STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ESTATE OF ABRAHAM MARGOLIS	:	DECISION DTA No. 811920
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner Estate of Abraham Margolis, c/o Jay Waxenberg, 1585 Broadway, New York, New York 10036, filed an exception to the determination of the Administrative Law Judge issued on July 27, 1995.[1] Petitioner appeared by Elliot S. Gross, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel).

Petitioner filed a brief in support of its exception and in reply to the Division of Taxation's brief in opposition. Petitioner's reply brief was received on January 18, 1996, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied pursuant to 20 NYCRR 3000.17(d)(1) as being untimely filed.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

When the interests of two tenants in common in a single property are separately transferred to two unrelated transferees, must the consideration received be aggregated for purposes of applying the real property transfer gains tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

[1]This determination also included Matter of the Petition of Rose Roiter, DTA No. 811214. Petitioner Rose Roiter did not take an exception to the determination of the Administrative Law Judge.

On July 1, 1969, Sol Roiter and Abraham Margolis acquired as tenants in common real property located at 48-50-52 Orchard Street, New York, New York ("the subject property"). This property consisted of four retail stores and was held by Roiter and Margolis for the purpose of renting as commercial space.

At some point subsequent to their purchase of the property, Roiter and Margolis formed a partnership called A & S Management Co., the purpose of which was to collect rents and pay expenses on the subject property.

Sol Roiter was a watchmaker by trade and was a passive investor in the subject property. Upon his death in 1985, his interest in the property passed to his wife, petitioner Rose Roiter.

Abraham Margolis' business was real estate and he managed the property (i.e., collected the rents and paid the expenses) until his death in or about February 1987. Following Mr. Margolis' death, his interest in the property passed to his estate and the management of the property was undertaken by Meyer Kimmel, Esq. Mr. Kimmel had represented Mr. Margolis in various matters over the course of 20 years prior to Mr. Margolis' death. The co-executrices of the Margolis estate, Nili Cohen and Rachel Ostrowitz, requested that Mr. Kimmel manage the property and he did so until approximately May of 1989.

A Federal income tax return (Form 1065) was filed on behalf of the partnership, A & S Management Co., for the year 1986.

By contract of sale dated April 5, 1988, the Estate of Abraham Margolis agreed to sell its one-half undivided interest in the subject property to Abraham Friedman for $999,000.00. Mr. Friedman was and had been a tenant on the subject property for several years. He was the principal of Pan Am Menswear Company, Inc. which operated a men's clothing store on the subject premises. Gains tax questionnaires filed in connection with this proposed transfer listed an anticipated closing date of May 7, 1988.

The above-mentioned sale was never completed and, pursuant to a contract of sale dated October 20, 1988 and a deed dated November 9, 1988, the Estate of Abraham Margolis

transferred its undivided one-half interest in the subject property to Wolf Landau for a purchase price of $950,000.00. Mr. Landau took title to his interest in the property subject to a lis pendens filed by Abraham Friedman on November 4, 1988. Mr. Landau had been a tenant on the subject premises since September 1, 1986. He was principal of Imperial Sportswear, Inc. which operated a retail store on the subject premises. Mr. Landau's lease agreement required annual rental payments of $76,800.00.

The October 20, 1988 contract of sale stated that the sale of the Estate of Margolis' interest was being made "without the consent of the co-tenant", i.e., Rose Roiter. The contract further indicated that, to the best of the seller's knowledge, there were no agreements between the co-tenants with respect to the premises. The contract also provided, at paragraph 51 thereof:

> "The parties acknowledge that neither Seller nor Purchaser has any control over the Co-Tenant and recognizes that depending on when and to whom Co-Tenant disposes of its half of the premises, the Seller may be retroactively subject to the New York State Transfer Gains Tax."

By contract of sale dated February 5, 1989 and deed dated April 7, 1989, Rose Roiter transferred her one-half undivided interest in the subject property to Abraham Friedman for a purchase price of $990,000.00.

Also on February 5, 1989, Rose Roiter and Abraham Friedman executed an "Assignment of Claims" under the terms of which Ms. Roiter assertedly assigned to Mr. Friedman her interest in certain claims for a purchase price of $210,000.00. The assignment stated that the claims assigned therein resulted from damages caused by "numerous defaults" under the lease by which Landau occupied space in the subject premises and by an unlawful occupancy by Landau of certain other space in the premises. The Assignment of Claims further provided that the purchase price was payable at the time and place of the closing on the contract of sale of the interest in real property.

As previously noted, Sol Roiter was a passive investor in the subject premises. He had little, if any, involvement in the management of the property, which was handled by Abraham Margolis. Their common interest in the subject premises appears to have been the extent of their

business and personal relationship. The two did have a familial relationship. Specifically, Sol Roiter's father-in-law's sister was married to Abraham Margolis. (Stated differently, Rose Roiter was the niece of Rose Margolis, Abraham Margolis' wife.) This familial relationship notwithstanding, the two did not have much in the way of a close personal relationship, nor were the Roiter and Margolis families close. The familial relationship between the Roiter and Margolis families terminated with the death of Rose Margolis in 1985.

While the record shows that Sol Roiter and Abraham Margolis were not close, the record does not reveal the existence of any mistrust or animosity between these two individuals. Following Sol Roiter's death, however, a level of mistrust did develop as Fay Fortgang, Sol and Rose Roiter's daughter, who had begun to act on her mother's behalf with respect to the property, believed that Abraham Margolis had improperly taken a management fee without disclosure to Rose Roiter. Additionally, Ms. Fortgang believed that Abraham Margolis had improperly failed to share with Rose Roiter insurance proceeds received by Margolis in 1986 as a result of a fire at the premises. Further, in a matter unrelated to the subject premises, Rose Roiter and her siblings commenced a lawsuit against the Estate of Rose Margolis. This action involved the existence and validity of a will which the Roiters believed had been executed by Rose Margolis and under which the Roiters were beneficiaries. Apparently, the Roiters were not beneficiaries under the will offered for probate. This litigation was ongoing at the time of the transfers at issue herein.

Sol Roiter did not provide for any member of the Margolis family in his will. Similarly, Abraham Margolis did not provide for any of the Roiters in his will.

In response to the failure of the April 5, 1988 contract of sale, Abraham Friedman filed suit against the Estate of Abraham Margolis on November 4, 1988 seeking specific performance of said contract. As noted previously, a lis pendens was also filed on November 4, 1988. The record herein does not indicate the reason for the failure of the April 5, 1988 contract. The complaint filed in connection with Abraham Friedman's suit indicates that the estate sought to declare Friedman in default under the April 5, 1988 contract on July 11, 1988, but does not indicate a reason for such a declaration.

The parties to the above-mentioned action subsequently executed a stipulation of discontinuance dated June 15, 1990. As may be observed, the stipulation of discontinuance was entered into subsequent to Mr. Friedman's purchase of an interest in the subject property from Rose Roiter.

At hearing, the Estate of Abraham Margolis introduced into the record an affidavit of Nili Cohen, co-executor of the Estate of Abraham Margolis, which stated, in part, as follows:

> "3. At the time of the sale by the Estate to WOLF LANDAU, I had no knowledge (and I know that my co-Executrix had no knowledge) as to the intentions of ROSE ROITER, Executrix of the Estate of SOL ROITER, to sell the one-half interest of the Roiter Estate in the same property.
>
> "4. I was subsequently informed that ROSE ROITER, acting in behalf of herself and the Roiter Estate sold the remaining one-half interest in the same property to ABRAHAM FRIEDMAN and that the transaction was consummated in April, 1989.
>
> "5. The two transactions were completely unrelated, and were not consummated pursuant to an agreement or plan to effectuate by partial or successive transfers, a transfer which would otherwise have been taxable under Article 31-B of the Tax Law.
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> "6. After the Gains Tax authorities made a determination to aggregate the sales prices of the two transactions entered into by the Roiter Estate and Margolis Estate, I was not afforded an opportunity to furnish the sworn statement referred to in Section 1440(7) of Article 31-B of the Tax Law."

Also introduced in the record herein was an affidavit of Rose Roiter dated June 7, 1994 which stated, in part:

> "4. The transfer of the Margolis Property was not made pursuant to any plan, agreement or arrangement with me or with my children. In fact, Paragraph 25 of the Contract of Sale for the Margolis Property specifically states that my consent was not obtained in connection with the sale of the Margolis Property.
>
> "5. No part of the consideration received from the transfer of the Margolis Property was shared with me or with my children.
>
> "6. On April 7, 1989, I transferred to Abraham Friedman all of my undivided one-half tenancy-in-common interest in the Property (the 'Roiter Property'). The Contract of Sale for the Roiter Property was executed on February 5, 1989.
>
> "7. The transfer of the Roiter Property was not made pursuant to any plan, agreement or arrangement with the Estate of

> Abraham Margolis or with the children of Abraham and Rose Margolis.
>
> "8. No part of the consideration received from the transfer of the Roiter Property was shared with the Estate of Abraham Margolis or with the children of Abraham and Rose Margolis.
>
> * * *
>
> "13. I had no knowledge of the sale of the Margolis Property to the transferee -- Wolf Landau -- until after the consummation of that sale.
>
> * * *
>
> "16. The transfer of the Roiter Property was not made pursuant to any plan or agreement to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of Article 31-B of the Tax Law of the State of New York."

Neither Rose Roiter nor Fay Fortgang had any knowledge of the estate's sale of its interest to Landau until after such sale was completed. Roiter and Fortgang became aware of such sale following a telephone call from Abraham Spector, Mr. Landau's attorney, in January 1989.

After learning of Landau's purchase of the one-half interest in the property, Roiter was approached by Friedman seeking to purchase Roiter's interest in the property and decided to enter into negotiations with Friedman to sell her interest. Ms. Fortgang's low regard for Mr. Landau was a significant factor in Roiter's decision to sell her interest.

In the fall of 1987, the Estate of Abraham Margolis, through its attorney, Meyer Kimmel, Esq., communicated with prospective purchasers of the estate's interest in the subject property. By letter dated September 15, 1987, Mr. Kimmel inquired as to Rose Roiter's interest in acquiring the estate's interest in the property.

By letters dated October 30, 1987 and November 5, 1987 to the attorneys of Mr. Landau and Mr. Friedman, respectively, Mr. Kimmel inquired as to whether Landau or Friedman was interested in acquiring the estate's interest in the subject property.

In the letters to Landau's and Friedman's attorneys, Mr. Kimmel stated that the owner of the other half of the subject property, i.e., Rose Roiter, had a first refusal option to purchase the property at the price that any third party would offer. Based on the testimony of Fay Fortgang, it

appears that Rose Roiter believed that she had such a right. However, no such option was offered to Rose Roiter either at the time of the estate's contract with Friedman or at the time of the estate's sale to Landau, and no document purporting to confer such an option was entered into evidence herein.

Pursuant to a Notice of Petition Hold Over, dated June 8, 1988, petitioners Estate of Margolis and Rose Roiter, as landlords of the subject premises, commenced an action against Imperial Sportswear, Inc. in New York City Civil Court. As noted previously, Wolf Landau was the principal of Imperial Sportswear, Inc. The petition filed in connection with this civil action alleged that the tenant, Imperial Sportswear, Inc., had "squatted upon or intruded into [the subject property] without permission."

Following the two transfers at issue herein, Landau and Friedman hired Abraham Spector, Mr. Landau's attorney, to manage the property. This move was necessary because Landau and Friedman were not on good terms.

The record is unclear as to the disposition of the claim or claims which were the subject of the Assignment of Claims following the transfer of such claims. Mr. Landau testified that he did not recall whether Mr. Friedman had sued him in connection with such claims. Mr. Friedman was not present at the hearing and did not testify.

On September 16, 1991, the Division of Taxation ("Division") issued to petitioner Estate of Abraham Margolis a Notice of Determination which assessed $93,887.00 in real property transfer gains tax due, plus interest, in respect of the transfer of real property located at 48-52 Orchard Street, New York, New York.

On February 21, 1991, the Division issued to petitioner Rose Roiter a Statement of Proposed Audit Adjustment which asserted $90,888.06 in real property gains tax due, plus interest, in respect of the transfer of real property located at 48-52 Orchard Street, New York, New York. In response to this statement, petitioner Roiter paid under protest the asserted gains tax due plus accrued interest by check dated March 20, 1991.

The Notice of Determination and Statement of Proposed Audit Adjustment each had an "Attachment" which set forth the Division's rationale behind the issuance of such documents. Specifically, the attachments noted that the Division had received gains tax questionnaires and supporting documentation in respect of the transfers from Estate of Margolis to Landau and from Rose Roiter to Friedman. The attachments further noted that these transfers were properly aggregated under Tax Law § 1440(7) and that pursuant to this section the transfers were subject to gains tax.

At no point prior to the issuance of the Notice of Determination and the Statement of Proposed Audit Adjustment did the Division inform either petitioner herein of their right to furnish an affidavit or sworn statement to the effect that the subject transfer "was not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article" (see, Tax Law § 1440[former (7)]).

In its amended answer filed in respect of the petition of Rose Roiter, the Division asserted a greater deficiency than that set forth in the Statement of Proposed Audit Adjustment. Specifically, pursuant to Tax Law § 1444(3)(a)(2), the Division asserted that the $210,000.00 in consideration paid to petitioner Rose Roiter by Abraham Friedman pursuant to the Assignment of Claims constituted additional consideration for the transfer of Roiter's interest in the subject premises. The Division thus asserted a greater deficiency in the amount of $21,000.00, plus interest.

All parties retained and were represented by separate and independent counsel in the transfers at issue herein. Moreover, neither Rose Roiter nor the Estate of Abraham Margolis shared any part of the consideration each received in respect of the subject transfers.

OPINION

In the determination below, the Administrative Law Judge dealt with several discrete issues concerning the subject transfers. First, the Administrative Law Judge held that Tax Law former § 1440(7) required that consideration received on transfers made by tenants in common must be aggregated regardless of whether there was a single transferee or multiple transferees.

The Administrative Law Judge distinguished between the conditional aggregation rules applicable to partial or successive transfers and the absence of such language to limit aggregation in the context of transfers made by tenants in common. The Administrative Law Judge also held that the 1994 amendment to Tax Law § 1440(7) (which provides that transfers by co-tenants to one or more transferees effectuated within a three year period are to be aggregated) was a mere change in phraseology and not a substantive change in the law.

Second, the Administrative Law Judge rejected the Division's assertions that aggregation was warranted because petitioner and Rose Roiter should be treated as a single transferor and Landau and Friedman should be treated as a single transferee. Here, the Administrative Law Judge stated that the record was void of any evidence that Landau and Friedman were acting in concert when each obtained their respective co-tenancy interest.

Third, the Administrative Law Judge rejected the Division's assertion that petitioner's and Rose Roiter's transfers would be subject to gains tax on the theory that each transferred a controlling interest in an entity that held an interest in real property because title to the property was held individually by petitioner and Rose Roiter.

The Administrative Law Judge sustained the imposition of additional tax against Rose Roiter holding that she failed to prove that the $210,000.00 consideration received for the assignment of claims was an independent bona fide transaction.

The Administrative Law Judge rejected petitioner's claim that the assessment should be cancelled because the Division did not inform it that it could submit a sworn statement that its transfer was not pursuant to a plan to avoid tax. The Administrative Law Judge held that the responsibility to submit such a statement is on the transferor and that there is no requirement in the law or regulations which support petitioner's assertion.

Finally, the Administrative Law Judge held that the failure of the conciliation conferee to submit a reasoned analysis along with factual determinations to support the conciliation order is of no consequence.

As noted, Rose Roiter did not take an exception to the determination of the Administrative Law Judge. On exception, petitioner Estate of Abraham Margolis has only excepted to one portion of the Administrative Law Judge's determination. The sole issue before this Tribunal is whether Tax Law § 1440 (former [7]) requires aggregation of consideration received by tenants in common who separately and independently transfer their interests to separate transferees.

Article 31-B of the Tax Law imposes a tax of ten percent on the gain derived from the transfer of real property in New York (Tax Law § 1441). Tax Law § 1443(1) exempts from tax transfers where the consideration is less than $1 million. Tax Law § 1440 (former [7]) provided, in part, that:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale . . . . Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article, and the transfer of real property by tenants in common, joint tenants or tenants by the entirety . . ." (emphasis added).

Petitioner asserts that the underlined portion of former subdivision seven "explicitly addresses the transfer of real property by tenants in common, it does not address . . . transfers of real property by tenants in common" (Petitioner's brief, p. 3). Petitioner contends that the statute contemplates that this clause requires aggregation when a single unified transfer is effectuated by tenants in common, i.e., a transfer to a single transferee, but does not require aggregation when the transfer is to multiple transferees. Petitioner states that "[t]his interpretation of the statute is consistent with any rational theory of the aggregation rules: only transfers that have some nexus to each other, that are related, are to be aggregated" (Petitioner's brief, p. 4). Petitioner contends that in the present situation aggregation is not warranted or appropriate because the requisite nexus is lacking. Petitioner also points to the regulation which specifically states that a transfer by tenants in common to one transferee is aggregated but does not address the situation where there are transfers to multiple transferees as support for its proposition. Petitioner also contends that the 1994 amendment to Tax Law § 1440(7) which aggregates consideration received by

tenants in common on transfers made within three years of each other and without regard to the number of transferees also supports its position that former subdivision seven did not require aggregation in all instances in which tenants in common transfer their respective interests to multiple transferees.

In response the Division disagrees with this position, arguing that the first sentence of Tax Law § 1440 (former[7]) defines the phrase "transfer of real property" as "the transfer or transfers of any interest . . . ." Therefore, argues the Division, the reasoning employed by the Administrative Law Judge in the determination below was proper.

We reverse the determination of the Administrative Law Judge for the reasons set forth below.

In the determination below, the Administrative Law Judge stated:

> "As with all matters of statutory construction, analysis must begin with a literal reading of the statute (see, McKinney's Cons Laws of NY, Book 1, Statutes § 94). In this case, the focus is on the third sentence of section 1440(former [7]) . . . . The second clause of this sentence sets forth conditions under which partial or successive transfers will not be aggregated ('unless . . . article') and clearly refers to the clause which preceded it, i.e., 'transfer of real property shall also include partial or successive transfers.' In other words, partial or successive transfers are conditionally subject to aggregation. Following this second clause, the list of various kinds of transfers included within the meaning of 'transfer of real property' continues: 'and the transfer of real property by tenants in common, joint tenants or tenants by the entirety.' The second clause, i.e., 'unless . . . article,' does not refer to or modify the list of the three tenancy interests which follow. The tenancy interests listed are thus distinguished from other 'partial or successive transfers' and are thus not subject to the conditional aggregation rules which are applicable to such other 'partial or successive transfers'" (Determination, conclusion of law ""G").

We disagree with the Administrative Law Judge's analysis that all partial or successive transfers by co-tenants are in every instance required to be aggregated. We agree with petitioner that the language of the statute requires that a unitary transfer by tenants in common must be aggregated, but does not necessarily require aggregation when there are separate and unrelated transfers by tenants in common. While the last clause provides that "the transfer of real property by tenants in common, joint tenants or tenants by the entirety" is subject to aggregation,

conspicuously absent from the clause is the term "transfers." The absence of the term "transfers" indicates that where co-tenants divest themselves of their co-tenancy interests in what is in reality a single transfer, i.e., a joint transfer to a single transferee, the consideration is automatically aggregated. However, where there are multiple transfers by tenants in common, joint tenants or tenants by the entirety, they are subject to the conditional aggregation rules that are applicable to other partial and successive transfers. The 1994 amendment to Tax Law § 1440(7) supports this conclusion.

Tax Law § 1440(7) now reads, in pertinent part, as follows:

> "(b) 'Transfer of real property' shall include:
>
> * * *
>
> "(ii) partial or successive transfers of interests in real property by tenants in common, joint tenants or tenants by the entirety of such real property to one or more transferees, if such transfers occur within a three year period, without regard to the use of such real property or whether such transfers were pursuant to a plan or agreement."

The plain language of this amendment specifically requires aggregation of tranfers by co-tenants regardless of the number of transferees without need for the last clause of subparagraph (ii). Although the legislative history concerning this amendment is scant, it is our contention that the Legislature's intent in including the last clause of such subparagraph was to make it clear that multiple transfers by co-tenants (occurring within a three year period) were now automatically aggregated and not subject to the conditional aggregation rules as was the case under prior law.

Further, the Division's own regulation does not suggest the contrary. 20 NYCRR former 590.43(d) provides in part:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:
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> * * *
>
> "(d) Several transferors, owning one parcel of land either as joint tenants, tenants in common, or as tenants by the entirety, one transferee?
>
> "Answer: The statute specifically requires that the consideration paid to each such transferor be aggregated with the

> consideration paid to the other transferors in determining whether the consideration is $1 million or more. Once the million-dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives, less his original purchase price for the property" (emphasis added).

This regulation supports our conclusion that the multiple transfers by co-tenants are subject to the conditional aggregation rules applicable to partial or successive transfers. The regulation limits the application to "one transferee." While we acknowledge that the regulation does not attempt to portray a comprehensive list of all the circumstances under which transfers are to be aggregated, we agree with petitioner that "requiring aggregation in all cases . . . renders the example's specifically stated condition of a single transferee irrelevant" (Petitioner's brief, p. 5).

Having concluded that multiple transfers by co-tenants are subject to the conditional aggregation rules applicable to other partial or successive transfers, the facts and circumstances surrounding the transfers at issue lead us to conclude that aggregation was not warranted in this case. The purpose of the aggregation clause of the gains tax is to treat transfers that have some connection to each other as a single transfer and to tax accordingly (Matter of Cove Hollow Farm v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127, 129). Here, that connection is lacking. The record indicates that the relationship between the Estate of Abraham Margolis and Rose Roiter was less than harmonious. Both parties did not agree, either expressly or tacitly, to sever all ties by divesting themselves of their interests in the subject property. In fact, each was oblivious of the other's intentions with respect to their individual tenancy in common interest. Roiter did not find out about the Estate of Margolis' transfer of its tenancy in common interest to Landau until after the sale was consummated. Likewise, the Estate of Margolis did not find out about Roiter's transfer to Friedman until after that sale was consummated. Secondly, the Administrative Law Judge found, and the Division has not excepted to such finding, that the transferees, Friedman and Landau, were not acting in concert when each purchased their tenancy in common interest so as to treat them as a single transferee. In sum, the requisite connection between the transfers at issue which would support aggregation is missing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Estate of Abraham Margolis is granted;

2. The determination of the Administrative Law Judged is reversed;

3. The petition of the Estate of Abraham Margolis is granted; and

4. The Notice of Determination dated September 16, 1991 is cancelled.

DATED: Troy, New York
July 18, 1996

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner