STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **PAUL D. JAFFE** 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.	:	DECISION DTA Nos. 811953 and 811987
In the Matter of the Petition of **LEON J. GREENSPAN** 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.	:	

Petitioners Paul D. Jaffe, 180 East Post Road, White Plains, New York 10601 and Leon J. Greenspan, 34 South Broadway, White Plains, New York 10601, each filed an exception to the determination of the Administrative Law Judge issued on February 2, 1995. Petitioners appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation relied on the brief filed before the Administrative Law Judge. Oral argument, at petitioner Leon J. Greenspan's request, was heard on October 12, 1995, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether a holder of a tenancy in common interest receives consideration for purposes of the real property transfer gains tax when he/she transfers that interest to a partnership in exchange for a partnership interest.

II. Whether consideration received on the transfer of a tenancy in common interest in real property should be aggregated with that received by co-tenants each contributing their respective tenancy in common interest to a partnership in exchange for a partnership interest.

FINDINGS OF FACT

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

Petitioners, Paul D. Jaffe and Leon J. Greenspan, were limited partners in a partnership known as Gadlex Associates ("Gadlex"). Gadlex's sole asset was fee ownership of an office building located at 180 East Post Road, White Plains, New York ("the property").

Relevant to this matter, the Gadlex partners and their interests in the partnership's property were as follows:

Partner	Percentage of Interest in Gadlex
Paul D. Jaffe	27½%
Leon J. Greenspan	27½%
Herbert K. Kanarek	30 %
Joel Martin Aurnou	15 %

As a result of litigation involving Gadlex and its four partners, an interlocutory judgment dated October 26, 1990 was rendered in Supreme Court of the State of New York, Westchester County, ordering the assets of the partnership to be sold and liquidated at a partition sale by auction on or before March 6, 1991. A receiver was appointed for the purpose of administering the assets of Gadlex and to conduct the auction. The proceeds from the sale of assets were to be used to discharge the obligations of Gadlex and the remaining proceeds were to be distributed to the limited partners. The judgment by its terms set forth the partnership interests of each partner and was structured such that if any partner were the successful bidder, the effect thereof

was to set a value on that building for the purpose of the successful partner or partners buying out the remaining persons. A public auction was held on March 12, 1991 and, as a result, partners Mr. Kanarek (with an interest of 30%) and Mr. Aurnou (with an interest of 15%) were the successful purchasers buying out Mr. Greenspan and Mr. Jaffe (with a collective interest of 55%) at a bid value of $1,250,000.00. Mr. Greenspan and Mr. Jaffe were to receive, in the aggregate, 55% of that value, or $687,500.00 less certain adjustments for partnership obligations. The judgment also provided that if any of the partners were successful bidders, they could apply their partnership interest against the bid price and needed only to pay over directly to the remaining partners their partnership interest based on such price. The successful purchasing partners, Mr. Kanarek and Mr. Aurnou (with a combined partnership interest of 45%) were originally going to assign their bid to a newly-formed partnership known as Post 180 Associates. They intended that their capital contribution to the partnership would be their 45% Gadlex partnership interest credit plus a prorated share of additional working capital to be advanced by all the partners in the new partnership. In return they would own a collective 45% interest in Post 180 Associates.

Transferor and transferee questionnaires were filed dated July 22, 1991 and July 17, 1991, respectively, reporting an anticipated transfer of the property by Gadlex to Post 180 Associates (Exhibit "Y"). The transferee questionnaire identified Gadlex as the transferor and Post 180 Associates, Mr. Aurnou and Mr. Kanarek as the transferees. The date of anticipated transfer was August 1, 1991 and on the questionnaire the "consideration to be paid to transferor by transferee" was equal to $687,500.00. Based on such information, the Division of Taxation ("Division") issued a tentative assessment to Gadlex on October 31, 1991 computing tax of $40,325.03 owed with respect to the transfer of the property (Exhibit "X"). The explanation and calculation of anticipated tax due provided by the Division stated the following:

> "Section 590.50(c) of the Gains Tax Regulations provides that in cases where a transfer consists of a partial mere change of identity or form of ownership or organization 'the million-dollar exemption is applied to consideration first and then the mere change exemption is applied. A transfer in which the consideration is greater than $1 million will remain taxable; the mere change exemption only defers payment of tax on the portion of gain determined to be attributed to a mere change

in form of ownership.'

"Since the consideration for the transfer before applying the 45% mere change exemption is over $1 million, the exemption claimed under Section 1443.1 of the Tax Law for a transfer where the consideration is less than $1 million has been denied.

"The anticipated tax due was computed as follows:

Consideration	$1,250,000.00
Original purchase price	(516,817.65)
Gain	$733,182.35
% Change of owenrship [sic]	x 55%
Gain subject to tax (net adjustments)	$403,250.29
Tax @10%	$40,325.03"

After additional conflict among the partners, the transaction was restructured. Upon the dissolution of Gadlex, the partnership property was distributed in kind to the limited partners according to their respective percentages, with the former limited partners then owning the property as tenants-in-common. On or about January 23, 1992, petitioners and Post 180 Associates entered into an agreement which provided Post 180 Associates an option to buy the undivided tenancies-in-common from each of the petitioners. Such options were required to be exercised on or before February 17, 1992.

A final judgment arising out of the litigation concerning the Gadlex dissolution was entered on March 16, 1992. In pertinent part, it declared that the interlocutory judgment dated October 26, 1990 be vacated and set aside and that the directive in such decision, i.e., the order for the auction sale, also be vacated. In addition, the final judgment stated that the auction sale conducted pursuant to the authority of the interlocutory judgment be declared to be a nullity. It was further decreed that the limited partnership of Gadlex terminated effective February 27, 1990 and that partnership interests of the limited partners of Gadlex were distributed in kind to them such that each of the limited partners would hold his individual distributed share as a tenant-in-common according to the percentages described above. In proportion to their partnership interests, each of the limited partners was also required to pay certain of the partnership obligations.

Essentially, the restructured deal would convey the subject property to the new limited

partnership known as Post 180 Associates in three transactions. The first transaction resulted from the eventual dissolution of Gadlex and an in-kind distribution of the subject property to the limited partners in their respective interests. The Division determined that this transaction was a mere change of identity and issued a tentative assessment providing for no gains tax due.

The second transaction reflected the conveyances by Mr. Kanarek and Mr. Aurnou of their collective 45% interest as tenants-in-common to Post 180 Associates in return for their respective 30% and 15% partnership interests in Post 180 Associates. The Division again determined this transaction to be a mere change of identity and, as to Mr. Kanarek and Mr. Aurnou, waived any gains tax liability.

The third transaction reflected the purchase of petitioners' collective 55% interest as tenants-in-common of the property by Post 180 Associates for a combined consideration of $687,500.00. The Division aggregated this transaction with the consideration from the second transaction above to determine the $1,000,000.00 threshold. It did so on the basis that the original bid price on the property was $1,250,000.00. Since the transaction then exceeded the $1,000,000.00 threshold, the Division determined a portion of the transaction was subject to gains tax and assessed petitioners collectively $40,325.03.

On February 3, 1992, the Division received entirely revised sets of transferor and transferee questionnaires from petitioners and the other limited partners. The transferee questionnaires filed with respect to the transfer from Mr. Kanarek and Mr. Aurnou to Post 180 Associates indicated that the "consideration to be paid to transferor by transferee" was equal to zero. As to the transferee questionnaires filed with respect to the transfer by Mr. Greenspan and Mr. Jaffe to Post 180 Associates, the "consideration to be paid to transferor by transferees" was $687,500.00.

A schedule of adjustments dated February 18, 1992 and completed in conjunction with the tentative assessment and return provided the following explanation:

> "In applying the $1 million exemption, Tax Law Section 1440.7 provides for the aggregation of consideration received on the transfer of real property by tenants in common, joint tenants or tenants by the entirety. Since the consideration ($687,500.00) for the transfer of L.J. Greenspan's [and] P.D. Jaffe's combined 55%

tenant in common interest in the property plus the consideration ($562,500.00**) for the transfer of the remaining 45% tenant in common interests exceeds $1 million, the exemption claimed under Tax Law Section 1443.1 is denied. The anticipated tax due was computed as follows:

Consideration for combined 55% tenant in common interests of L.J. Greenspan and P.D. Jaffe.	$687,500.00	
Original purchase price attributable to combined 55% tenant in common interests ($516,817.65 x 55%)		(284,249.71)
Gain subject to tax (Net Adjustments)	403,250.29	
Tax @10%		40,325.03

"** Although not subject to tax by virtue of the mere change exemption applied, the consideration for the transfer of the 45% tenant in common interest was determined by the value of the partnership interest in Post 180 Associates received for the transfer."

Petitioners paid the tax due and filed claims for refund of their respective shares. The basis for the refund claim was that the consideration received was less than $1,000,000.00.

On July 30 and 31, 1992, petitioners were issued correspondence from the Division denying the refund claim of each petitioner. The reasoning is identical and the content, in pertinent part, is provided below:

"Claimant contends that the subject transfer should be exempt from gains tax because the consideration received does not meet the $1 million threshold.

"A review of our files shows that Gadlex Associates a limited partnership was fee owner of the subject property. In February 1992 the partnership dissolved and ownership of the property transferred to the four limited partners as tenants in common based on their percentage of ownership.

"Two of the tenants in common, Kanarek and Aurnou, then conveyed their interests to a new limited partnership, Post 180 Associates. At that time the partners of Post 180 Associates bought out the remaining two tenant in common interests of Paul Jaffe and Leon Greenspan.

"Section 590.43(d) of the Gains Tax Regulations provides that when several transferors, owning one parcel of land as tenants in common transfer their interests to one transferee 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 of the property.

"Also, Regulation Section 590.50(c) states that the million dollar exemption is applied to consideration first and then the mere change exemption is applied. A transfer in which the consideration is greater than $1 million will remain taxable,

> the mere change exemption only defers payment of tax on the portion of gain attributed to a mere change in form of ownership.
>
> "Therefore, it is our position that the consideration received by claimant for the transfer of his interest in the subject property to Post 180 Associates must be aggregated with the consideration received by the remaining three tenants in common for the transfer of their interests in Post 180 Associates.
>
> "Since the aggregate consideration exceeds $1 million the consideration received by claimant is subject to tax less his original purchase price of the property.
>
> "Accordingly, the refund claim of [petitioners] is hereby denied in its entirety." (Exhibits "B" and "H".)

The Bureau of Conciliation and Mediation Services received timely requests for conciliation conference from both petitioners on August 24, 1992. A conciliation conference was conducted on January 7, 1993 and conciliation orders were issued to each petitioner, dated April 16, 1993, denying their refund claims. Timely petitions were filed with the Division of Tax Appeals by Mr. Jaffe and Mr. Greenspan on June 9, 1993 and June 17, 1993, respectively.

The question in this matter concerns what, if any, consideration was received by Mr. Kanarek and Mr. Aurnou on their transfer of their 45% collective interest as tenants-in-common of the property to Post 180 Associates, and whether the Division appropriately aggregated such transfers with those of petitioners.

OPINION

In the determination below, the Administrative Law Judge held that the individuals who contributed their tenancy in common interests in exchange for partnership interests in Post 180 Associates received value to the extent of their interest in the partnership. The Administrative Law Judge held that the aggregate value of Mr. Kanarek's and Mr. Aurnou's interest in the partnership was $562,500.00. The Administrative Law Judge then held that since the total consideration received on the transfers of the four tenancy in common interests was more than $1,000,000.00, the Division properly denied petitioners' refund claims. Additionally, the Administrative Law Judge rejected the Division's claim that petitioners would also be liable for tax under Tax Law § 1448(1) because the restructuring of the transfer was premised on avoidance of the gains tax rather than for legitimate business purposes.

On exception, petitioners assert that the Administrative Law Judge erred in holding: (1) the consideration received by Aurnou and Kanarek to Post 180 Associates was for a consideration of $562,500.00; (2) the parties had agreed that the value of the real property was $1,250,000.00; and (3) the value of the property was $1,250,000.00 as of February 1992 when the subject transfers actually occurred. Petitioners contend that Aurnou and Kanarek received nothing of value on their transfer of their tenancy in common interests to Post 180 Associates and, therefore, there is no gains tax due because the aggregate consideration received on all transfers is less than $1,000,000.00. In the alternative, petitioners assert that the aggregate consideration should be the cost basis of Aurnou's and Kanarek's interests plus the consideration actually received by petitioners.

In response, the Division asserts that the consideration received by Aurnou and Kanarek was their respective partnership interest in Post 180 Associates and that the aggregate value of such amounted to $562,500.00. The Division then asserts that under the regulations, the total consideration for the transfers must be determined before the mere change of identity exemption is applied.

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

New York imposes a tax equal to ten percent of the gain received on the transfer of real property (Tax Law § 1441). Gain is measured by subtracting the original purchase price of the property from the consideration received on the transfer (Tax Law § 1440[3]). If the consideration received on the transfer is less than one million dollars, the transfer is exempt from gains tax (Tax Law § 1443[1]). Likewise, a transfer which "consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest" is an exempt transfer (Tax Law § 1443[5]). Under the Division's regulations, the total consideration on a transfer is first determined before applying the mere change of identity exemption (20 NYCRR 590.51[a]). Consideration received by tenants in common on each individual co-tenant's transfer is aggregated for purposes of applying the million dollar

exemption because such transfers are treated as a single transfer for purposes of applying the gains tax (Tax Law § 1440[7]; Matter of Ader, Tax Appeals Tribunal, September 15, 1994; Matter of Tomback, Tax Appeals Tribunal, September 1, 1994).

Petitioners do not dispute that the consideration received on the subject transfers to Post 180 Associates is subject to aggregation, but claim that Aurnou and Kanarek received no consideration on the transfer of their interests in the property to Post 180 Associates. Petitioners assert that the only consideration paid on the transfer of the property to Post 180 Associates was the cash that they received from the partnership. We disagree.

> "'Consideration' means the price paid or required to be paid for real property or any interest therein . . . Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value . . ." (Tax Law § 1440[1][a], emphasis added).

A partnership results from a contract between the parties (Rizika v. Potter, 72 NYS2d 372, 375). As with any contract, the agreement or agreements underlying the partnership must be supported by consideration (15 NY Jur 2d, Business Relationships, § 1305). Here, Kanarek and Aurnou agreed to transfer their respective tenancy in common interests to Post 180 Associates in exchange for the partnership's promise to transfer a partnership interest to Kanarek and Aurnou. Thus, contrary to petitioners' assertion, Kanarek and Aurnou each received consideration on the transfer (see, Levinsky v. Kraut, 121 AD2d 723, 504 NYS2d 150, 151).

We also reject petitioner's contention that the partnership interests had no value at the time of the transfer. Clearly, the transfer of the partnership interests was inextricably tied to the transfer of the real property to the partnership and the value of the former reflects the value of the real property. Finally, petitioners have not offered any evidence as to what the value of the property was at the time of transfer and, thus, have not established that it was less than the $1,250,000.00 relied on by the Division. There is simply no legal support, in the section 1440(1)(a) definition of consideration, for petitioners' position that the consideration for the partnership interests at the time of their transfer was equal to the historical cost basis of Kanarek

and Aurnou in the partnership interests. Therefore, the $562,500.00 value placed upon Kanarek and Aurnou's collective interests was reasonable.[1]

Having found that Kanarek and Aurnou received consideration on the transfer, we likewise reject petitioners' argument that implicit in a mere change identity is a lack of consideration. If, as petitioners assert, a transfer which results in a mere change in identity is a transfer that lacks consideration, there would be no need to exempt from taxation that portion of the transaction which results in the mere change because that transfer would not be subject to taxation.

Accordingly, it is ORDERED, ADJUDGED, and DECREED:

1. The exception of Paul D. Jaffe, is denied;
2. The exception of Leon J. Greenspan, is denied;
3. The determination of the Administrative Law Judge is affirmed;
4. The petition of Paul D. Jaffe is denied;
5. The petition of Leon J. Greenspan is denied; and

[1]The Division placed a value of $1,250,000.00 on the property by dividing the amount received by petitioners ($687,500.00) by their collective tenancy in common interest (55%). The Division then determined the value of Kanarek and Aurnou's collective tenancy in common interest by multiplying their combined percentage interest (45%) by the $1,250,000.00 previously determined.

6. The Division of Taxation's denial of the refund claims is sustained.

DATED: Troy, New York
March 28, 1996

/s/John P. Dugan
John P. Dugan
President

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner