

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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|--|---|----------------|
| In the Matter of the Petition                            | : |                |
| of   | : |                |
| <b>WILLIAM ISER</b>                                      | : | DECISION       |
|  | : | DTA No. 812176 |
| 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 for the Year 1987.           | : |                |

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Petitioner William Iser, 7200 Radice Court, Lauderhill, Florida 33319 filed an exception to the determination of the Administrative Law Judge issued on May 9, 1996. Petitioner appeared by Olshan, Grundman, Frome & Rosenzweig, LLP (Thomas D. Kearns, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief in support of his exception and a reply brief. The Division of Taxation filed a brief in opposition. Petitioner's request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Jenkins concurs. Commissioner Pinto took no part in the consideration of this decision.

***ISSUE***

Whether William Iser's withdrawal from Timberline Associates, L.P. constituted an acquisition of a controlling interest by Stephen Iser which was subject to the real property transfer gains tax.<sup>1</sup>

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<sup>1</sup>The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

***FINDINGS OF FACT***

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

Each petitioner<sup>2</sup> entered into a stipulation of facts with the Division, both of which have been incorporated into the Findings of Fact below.

On or about January 10, 1985, Timberline, a New York corporation, purchased real property located in Town of Clarkstown, County of Rockland, New York. The property was acquired from Kingsgate Company, a New York partnership, having an office in New City, New York. The property purchased was described as "Lot E-1 on a certain map entitled 'Plan of Kingsgate, Town of Clarkstown, County of Rockland, State of New York'."

Also on January 10, 1985, Timberline purchased a second parcel of real property from Rusten Enterprises, Inc., a New York corporation, having an office at 71 Smith Hill Road, Monsey, New York, which was described in the deed as "Lot E-2 on a certain map entitled 'Plan of Kingsgate, Town of Clarkstown, County of Rockland, State of New York'." These two parcels comprised the property in issue (the "property").

At the time of the acquisition of the property, Timberline was owned by two individuals, Stephen Iser, who owned 60% of the corporation, and William Iser, who owned 40% of the corporation.

On or about February 24, 1987, the corporation was liquidated and the property was transferred to Timberline, a Delaware limited partnership (the "Partnership"), which was organized to, among other objects and purposes, hold title to the property. Upon the transfer, the interests in the Partnership were held as follows:

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<sup>2</sup>The parties in the proceeding at the Division of Tax Appeals were petitioner as well as Timberline Associates, L.P. (hereinafter "Timberline"). The Administrative Law Judge granted the petition of Timberline and the Division of Taxation (hereinafter the "Division") did not file an exception. Accordingly, William Iser is the sole petitioner in this proceeding before the Tax Appeals Tribunal.

|                  |       |
|------------------|-------|
| Stephen Iser     | 59.5% |
| William Iser     | 39.5% |
| T.A. Group, Inc. | 1.0%  |

The Partnership had one general partner, T.A. Group, Inc., 71 Smith Hill Road, Monsey, New York, and two limited partners, William Iser and Stephen Iser. Stephen Iser signed the Agreement of Limited Partnership of Timberline as president of T.A. Group, Inc.

The Partnership agreement stated in Paragraph "7. Term." that it would dissolve, and its affairs wind up, at such time as the partners unanimously determined, or earlier if the partnership disposed of its interest in all or substantially all of its property or if dissolution occurred under Delaware law or if the general partner was removed, withdrew or dissolved.

The capital contributions of the partners at the inception of the Agreement of Limited Partnership were as follows:

|                  |              |
|------------------|--------------|
| T.A. Group, Inc. | \$ 500.00    |
| Stephen Iser     | 3,000,000.00 |
| William Iser     | 2,000,000.00 |

T.A. Group, Inc. contributed in cash, while the limited partners, Stephen and William Iser contributed their 60% and 40% interest in the property described above, from the corporation. T.A. Group, Inc. was general partner, with a percentage of ownership generously described as 1% given its insignificant capital contribution. Important to note, however, is the fact that the First Amended and Restated Agreement of Limited Partnership, paragraph "13.4" provided that T.A. Group, Inc. was designated the "tax matters partner".

The partners to the Agreement of Limited Partnership of Timberline agreed that the fair market value of the property was \$5,000,000.00.

The Agreement of Limited Partnership also provided for the withdrawal of limited partners from the partnership. In paragraph "14" of the agreement, it stated:

"Any limited partner who wishes to withdraw from the Partnership is entitled to receive an amount equal to his capital account balance on such terms as the General Partner and the withdrawing Limited Partner agree, and the Partnership shall be bound by the terms of any such agreement."

Petitioners and the Division stipulated that the transfer of the property to the Partnership constituted a mere change in the form of ownership of the Property.

On or about February 26, 1987, William Iser withdrew from the Partnership and thereafter, on March 6, 1987, Axel Graf, an unrelated third-party, purchased a 29% interest in the Partnership. William Iser's withdrawal from the Partnership was a transfer by William Iser of a 40% interest in the Partnership.

An agreement, dated February 26, 1987, was executed by Stephen Iser on behalf of T.A. Group, Inc. for Timberline, and William Iser, which provided that William Iser would withdraw from the partnership and receive his capital account balance in the amount of two million dollars (\$2,000,000.00). The terms specified that Iser would receive \$100,000.00 from Timberline and the balance within five years. However, the principal balance was to be reduced by payments to William Iser upon the sale of each condominium unit in accordance with the following schedule:

| <u>Amount per Unit</u> | <u>Number of Units</u> |
|------------------------|------------------------|
| \$7,000.00             | First 10               |
| \$7,500.00             | Next 10                |
| \$8,000.00             | Next 10                |
| \$8,500.00             | Next 10                |
| \$9,000.00             | Next 10                |
| \$9,500.00             | Next 10                |
| \$7,805.00             | Next 179               |
| \$7,905.00             | Last 1                 |

The payments to William Iser were to be made in the above-stated amounts on the date of the closing of the sale of a unit and regardless of the amount Timberline received on any sale.

Petitioners did not submit gains tax transfer questionnaires for the withdrawal from the Partnership or the acquisition of a controlling interest to the New York State Department of Taxation and Finance.

On March 6, 1987, the approximate interests in the Partnership were then held as follows:

|                  |       |
|------------------|-------|
| Stephen Iser     | 70.5% |
| Axel Graf        | 28.5% |
| T.A. Group, Inc. | 1.0%  |

By letter, dated October 21, 1987, the firm of Dreyer and Traub, issued an opinion to T.A.

Group, Inc., the general partner, with regard to the gains tax ramifications of the transactions set forth above. Specifically with regard to the liquidation of William Iser's interest in the partnership and the subsequent acquisition by Mr. Graf of an interest in the Partnership from the Partnership. The letter stated that it did not believe that the gains tax was applicable, saying that since at all times Stephen Iser owned 60% or more of the total interest in the Partnership, both directly and indirectly, there had not been a transfer of a controlling interest in the Partnership.

Sometime subsequent to 1987, the Partnership filed a gains tax return with the Division in connection with the sale of condominium units at the property which recited an original purchase price ("OPP") and a stepped-up OPP to reflect the consideration paid to William Iser upon the liquidation of his interest in the Partnership. The Division determined that the Partnership was not allowed the step-up on the basis that its acquisition of William Iser's interest was not of a "controlling interest".

The Division issued a Notice of Determination to Timberline, dated September 1, 1991, assessment number L-002662595-8, which assessed additional real property gains tax in the sum of \$99,573.08 plus penalty and interest, for the tax periods ended January 28, 1988 and July 18, 1988. In addition, the Division issued another Notice of Determination to Timberline, assessment number L-008352394-4, which assessed additional real property gains tax for the tax period ended October 2, 1992 in the sum of \$17,928.02, plus interest. The second assessment was issued following an analysis of the 100% update figures provided by Timberline. These two assessments were sustained in full in two separate conciliation orders, dated October 14, 1994.

As a result of the adjustments made with regard to Timberline, the Division issued an assessment to William Iser, dated July 29, 1991, which set forth additional real property gains tax due of \$180,200.00, plus penalty and interest, for the period ended February 26, 1987. Based on evidence provided by William Iser, this assessment was revised to \$160,400.00, plus penalty and interest after the conciliation conference, by order dated May 21, 1993.

**OPINION**

Tax Law former § 1440(7) defined "transfer of real property" to include an "acquisition of a controlling interest in any entity with an interest in real property." Further, a transfer of real property included "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" (Tax Law former § 1440[7]). A "controlling interest" was defined in Tax Law former § 1440(2) to mean, in the case of a partnership, "fifty percent or more of the capital, profits or beneficial interest in such partnership." Tax Law former § 1443(5) exempted a transfer of real property which involved "a mere change of identity or form of ownership or organization, where there is no change in beneficial interest" from gains tax.

Former section 590.45(d) of the Commissioner's regulations (20 NYCRR part 590) considered the aggregation of interests acquired in an entity with an interest in real property:

"(d) Question: If a shareholder acquires a 50 percent interest in a corporation and gains tax is paid on that transfer, and one year later the same shareholder acquires an additional 20 percent, is there a second acquisition of a controlling interest?

"Answer: Yes. The interests acquired after March 28, 1983 are added together in determining whether an acquisition of a controlling interest has occurred. No acquisition of stock will be added to another acquisition of stock if they occur more than three years apart, unless the acquisitions were so timed as part of a plan to avoid the gains tax. An example of this would be if T acquired 80 percent of the stock and simultaneously contracted for the purchase of the remaining 20 percent in three years and one day."

In his determination, the Administrative Law Judge concluded that William and Stephen Iser transferred their interests in the property to the partnership in exchange for proportionate interests in the partnership as limited partners. The agreed market value of the property transferred was \$5,000,000.00. Relying on the decision of this Tribunal in Matter of Jaffe (Tax Appeals Tribunal, March 28, 1996), the Administrative Law Judge concluded that the value of the partnership interests was dictated by the value of the real property. The Administrative Law Judge found that these transfers were supported by consideration in that Stephen and William

Iser transferred their respective interests to the partnership in exchange for the partnership's transfer of partnership interests to them. But for the exemption provided for in Tax Law § 1443(5), the Administrative Law Judge concluded that Stephen Iser's acquisition of a controlling interest in the Partnership would have been subject to tax. When he acquired William Iser's additional 40% interest in the Partnership, it was aggregable with his prior acquisition, regardless of whether tax actually was imposed, and taxable.

The Administrative Law Judge further concluded that even though the example given in 20 NYCRR former 590.45 showed gains tax paid on the acquisition of the controlling interest, the importance of section 590.45(d) vis-a-vis aggregation is that there can be more than one acquisition of a controlling interest subject to the real property gains tax. The mere change exemption only defers payment of tax and was not intended to prevent aggregation with subsequent acquisitions of controlling interests.

The Administrative Law Judge found that Matter of Whiteface Ltd. Partnership (Tax Appeals Tribunal, November 3, 1994) was not applicable to the facts of this proceeding. Here, while Stephen Iser's transfer of his 60% interest in the real property to the Partnership in exchange for a 60% interest in the Partnership was eligible for exemption as a mere change in identity, the subsequent withdrawal from the Partnership by William Iser was clearly subject to aggregation pursuant to 20 NYCRR former 590.45(d).

Based on his conclusion that the second acquisition of a controlling interest upon the withdrawal of William Iser from the partnership was a taxable event, the Administrative Law Judge concluded that the partnership was entitled to a step-up in its basis.

In his exception, petitioner argues that Stephen Iser beneficially owned a 60% interest and petitioner owned a 40% interest in the property at issue from the moment that Timberline acquired it. The restructuring of the realty owner from a corporation to a partnership did not involve a change in beneficial ownership of the realty owner but was, rather, a mere change of identity. Petitioner argues that the Administrative Law Judge incorrectly determined that on this restructuring, Stephen Iser acquired a controlling interest in the partnership. Likewise,

petitioner argues that a controlling interest was never transferred or acquired when William Iser withdrew from the partnership because Stephen Iser already had a controlling interest.

Petitioner argues that the surrender of petitioner's 40% partnership interest was not aggregable with the interest held by Stephen Iser pursuant to Tax Law former § 1440(7) or 20 NYCRR former 590.45(d), because for transfers to be aggregated, the first of such transfers must be taxable. In this case, the acquisition of the partnership interest was not taxable but was exempt as a mere change in identity. Petitioner argues that because petitioner's transactions are excluded from the statutory scheme of taxation, the statute must be construed in favor of petitioner and against the Division. Petitioner argues that the Division's assessment of Timberline demonstrates the ambiguity in the statute and regulation because the partnership assessment was based on a conclusion by the Division that the acquisition of the partnership interest of petitioner was not of a controlling interest. Finally, petitioner, relying on the decision of this Tribunal in Matter of Whiteface Ltd. Partnership (*supra*), argues that where two transactions occur simultaneously, economic reality takes precedence over the form of the transaction in determining whether a taxable event has occurred. The economic reality here, argues petitioner, is that only a 40% interest changed hands, and that is well below the threshold required for taxation as an acquisition of a controlling interest.

The Division, in opposition, argues that the Administrative Law Judge correctly sustained the Notice of Determination issued to petitioner. The Division argues that this Tribunal should give no weight to either the determination of an Administrative Law Judge cited by petitioner or the advisory opinion relied on by petitioner. Further, the Division argues that it was appropriate to pursue alternative theories of liability against petitioner herein and Timberline, noting that this was responsive to the inconsistent positions taken by petitioner and Timberline in failing to report the acquisition of a controlling interest by Stephen Iser yet claiming a proportionate part of the purchase price of petitioner's interest as part of the partnership's original purchase price.

Each of the arguments presented on exception was considered by the Administrative Law Judge. Certain of the arguments presented by petitioner on exception rely on a determination by



an Administrative Law Judge in an unrelated matter and an advisory opinion issued to an individual not a party to the instant matter. We note that neither has precedential value in a proceeding before us (see, Tax Law § 2010[5]). Further, we do not find the reasoning underlying either of them to have a persuasive effect on the matter at hand. After a thorough review of the record, we find that the Administrative Law Judge fully addressed each of the issues raised and we find no reason to alter his findings of fact or conclusions of law. As a result, we affirm the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William Iser is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of William Iser is granted to the extent set forth in conclusion of law "B" of the Administrative Law Judge's determination, but is otherwise denied; and
4. The Notice of Determination dated July 29, 1991, as modified by the conciliation order dated May 21, 1993 and in accordance with paragraph "3" above, is sustained.

DATED: Troy, New York  
May 8, 1997

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

/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner