STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANTHONY MARTINEZ	:	DECISION DTA No. 813568
for Revision of Determinations or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law and Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner Anthony Martinez, P.O. Box 133, Adirondack, New York 12808, filed an exception to the determination of the Administrative Law Judge issued on November 27, 1996. Petitioner appeared by Jessel Rothman, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Susan Hutchison, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Jenkins took no part in the consideration of this decision.

ISSUE

Whether the Division of Taxation properly imposed real property transfer gains tax and real estate transfer tax on petitioner's transfer of his one-sixth interest in a partnership as an acquisition of a controlling interest in an entity with an interest in real property.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "10" and "11" which have been modified. TheAdministrative Law Judge's findings of fact and the modified findings of fact are set forth below.

On December 30, 1987, Anthony Martinez ("petitioner"), entered into an agreement with Eugene and Marcia Leogrande (the "Leograndes"), Edward T. and Linda S. Moore (the

"Moores"), and Vincent Reinhardt to form the partnership known as L & M Investment Associates. The business of the partnership was to consist of the ownership and management of certain real property located in the Town of Queensbury, Warren County, New York; the construction of certain buildings on such lands; the acquisition of additional lands and the operation, leasing and management of such properties. The purpose of the partnership was the building of a shopping center.

The partnership interest of each partner was represented in the agreement as follows:

Eugene and Marcia Leogrande	33 1/3%
Edward T. and Linda S. Moore	33 1/3%
Vincent Reinhardt	16 2/3%
Anthony Martinez	16 2/3%

On or about October 12, 1989, pursuant to a provision of the partnership agreement, petitioner served a Notice of Intention to Arbitrate and Demand for Arbitration upon the Leograndes, the Moores and Vincent Reinhardt, alleging misuse and misappropriation of partnership funds. Petitioner sought the return of misappropriated funds, an adjustment to the stated partnership interests, and a restatement of petitioner's capital contributions.

Arbitration proceedings were held in May and June 1990, with a continuation scheduled for July 17, 1990. Before it was continued, the Leograndes, the Moores and Mr. Reinhardt issued a letter of intent dated June 14, 1990 to purchase petitioner's interest in L & M Investment Associates and the real estate known as French Mountain Commons in Lake George, New York. Such purchase was for the sum of $250,000.00 and was scheduled to be completed by July 12, 1990. One by one, the proposed purchasers subsequently made it clear that they did not desire to purchase petitioner's interest. Although petitioner offered to purchase the interests of the other parties, each refused to sell. As a result, petitioner commenced an action in Supreme Court, Warren County, New York seeking specific performance of the letter of intent.

Between July 19 and July 27, 1990, desiring to avoid further arbitration and litigation, Mr. Moore approached petitioner regarding the sale of petitioner's interest to him. On July 27, 1990, petitioner contracted to sell his 1/6th partnership interest to Mr. and Mrs. Moore for

$230,000.00. The agreement specifically stated that the Moores desired to settle all litigation related to petitioner's interest by purchasing petitioner's interest in the partnership. Accordingly, a deed representing a 1/6th interest in the real estate and a Real Property Gains Tax Affidavit were submitted as evidence of the conveyance from petitioner to the Moores on July 27, 1990. Simultaneously, petitioner executed stipulations of discontinuance for the various actions against the L & M partners. A Certificate of Amendment of the Partnership of L & M was executed reflecting the removal of petitioner as a general partner of the partnership. Likewise, an Amended Business Certificate by L & M Investment Associates was executed by the remaining partners, reflecting the revised partnership interests as follows:

Eugene and Marcia Leogrande	33 1/3%
Edward and Linda Moore	50%
Vincent Reinhardt	16 2/3%

A Real Property Gains Tax Transferor Questionnaire was filed by Vincent Reinhardt, and received by the Division of Taxation ("Division") on April 2, 1991, reporting a transfer of a 1/6th partnership interest in L & M Investment Associates to the Moores. The real property interest is a shopping center located on Route 9, Queensbury, New York. The date of transfer was reported to be February 28, 1991, and stated consideration was $500,000.00.

Also during April 1991, the Division received transferee questionnaires indicating transfers of partnership interests in L & M by Eugene Leogrande (33 1/3%) and Anthony Martinez (16.67%). The reported dates of transfer were August 10, 1990 and July 27, 1990, respectively. The purchasers were the Moores.

The Division issued correspondence to petitioner dated April 23, 1991 indicating that a review of the Division's records revealed that there was a transfer of a controlling interest in a partnership, which has an interest in real property in New York State. The correspondence further set forth information and documents which the Division requested petitioner to submit.

Petitioner's representative responded by correspondence dated May 20, 1991, in which he stated that petitioner had sold his 1/6th partnership interest and did not transfer, nor did the Moores acquire, a controlling interest in any entity with real property.

Based upon information supplied by the Moores and Mr. Reinhardt, the original purchase price ("OPP") for the real property was reported to be $2,702,525.00. The Division multiplied the OPP by 16.67% (petitioner's partnership interest) to arrive at an original purchase of $450,000.00. The amount of OPP is not in dispute.

The parties herein agree that consideration for the transfer of petitioner's partnership interest to Edward Moore, which occurred on July 27, 1990, was comprised of $230,000.00 cash and $450,000.00 of mortgage debt assumed by Moore upon the transfer of the interest and related real estate. The $450,000.00 mortgage amount represents 1/6th of the principal outstanding on the mortgage loan of $2,700,000.00, verified by documentation as of August 29, 1990.

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

> The Division computed the gains tax at 10% of the difference between consideration of $680,000.00 and OPP of $450,000.00, or $23,000.00, and accordingly issued a notice of determination dated January 7, 1993 in that amount plus penalty and interest. The Division also issued to petitioner a Notice of Determination, dated January 7, 1993, asserting real estate transfer tax due of $2,720.00, plus penalty and interest, based upon petitioner's transfer of a controlling interest, pursuant to Tax Law §§ 1401(e) and 1402.[1]

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> On or about March 31, 1993, petitioner filed a Request for Conciliation Conference. A conference was held on July 14, 1994, and an Order sustaining the statutory notices was issued dated November 10, 1994. On or about February 8, 1995, a petition contesting the conciliation order was filed with the Division of Tax Appeals. Petitioner specifically challenged the imposition of real estate transfer tax, although he never addressed this issue again before the Administrative Law Judge with the exception of a comment in the transcript (tr., p. 38) that petitioner disputed the Division's position underlying its preparation of a "dummy return" (Form TP-584, Combined Real Property Gains Tax Affidavit [and] Real Estate Transfer Tax

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[1] We modified finding of fact "10" of the Administrative Law Judge's determination to reflect the correct date of issuance of the notice of determination and to more accurately reflect the record.

Return.) The Division of Taxation filed its answer on March 22, 1995.[2]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the acquisition by the Moores of the partnership interests of petitioner (16.67%), the Leograndes (33.33%) and Mr. Reinhardt (16.67%) amounted to an acquisition of a controlling interest pursuant to Tax Law §§ 1440(2) and 1440(7) and the regulations at 20 NYCRR former 590.44(a) and 590.45(d). The Administrative Law Judge relied on our case in ***Matter of Harris*** (Tax Appeals Tribunal, December 30, 1993) for the proposition that, in entity transactions, the use of the word "acquisition" rather than "transfer" reflects a legislative decision to impose tax on the acts of transferees rather than on the acts of transferors.

The Administrative Law Judge rejected petitioner's attempt to apply the regulation at 20 NYCRR 590.44, which deals with the aggregation of partial or successive transfers of real property on the basis that it deals with transfers of real property, and not the transfers of an interest in an entity that owns real property. The Administrative Law Judge noted that the regulation is derived from a different provision of Tax Law § 1440(7) and that the provisions of that regulation regarding the aggregation of partial or successive transfers of real property requires the finding of a plan which is dependent on the intent of the transferor at the time of the transfer.

ARGUMENTS ON EXCEPTION

Petitioner argues that the current regulation at 20 NYCRR 590.44 dealing with the aggregation of partial or successive transfers of real property, effective as of November 1994, is controlling in the instant matter and should be applied retroactively. Petitioner also contends that the transfer of his interest to the Moores was not the transfer of a controlling interest and that the consideration received for his transfer was less than $1,000,000.00.

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[2] We modified finding of fact "11" of the Administrative Law Judge's determination to more accurately reflect the record.

Central to petitioner's arguments is the belief that the Legislature never intended that the intent of the transferee would govern the payment of taxes, as evidenced by the change in the regulations. Petitioner argues that the intent of the transferor controls and that said intent must reflect a plan to acquire a controlling interest in an entity having an interest in real property and the consideration must be in excess of $1,000,000.00.

Petitioner also contends that the Tribunal's decision in ***Matter of Harris*** (***supra***) was legislatively overruled and should not be relied upon in support of the proposition that it is the intent of the transferee which must be examined to determine if there was a plan to acquire a controlling interest. Petitioner apparently argues that the Legislature's addition of the word "transfer" to Tax Law § 1440(7) and the renumbering of 20 NYCRR 590.44 support this conclusion. Petitioner then construes the new language in the statute to require an analysis of his intent in the instant circumstances as transferor. Petitioner contends that he had no intent to condition his sale to the Moores on their purchase of the Leograndes' or Mr. Reinhardt's interests.

The Division argues that petitioner was correct in his belief that the transfer of his one-sixth interest in the partnership was not the transfer or acquisition of a controlling interest, but that the gains tax was triggered by the subsequent transfers to the Moores by the Leograndes and Reinhardt within a three-year time frame. The Division contends that the law and regulations in effect at the time of the instant transactions called for the aggregation of the interests acquired by the Moores, specifically citing ***Matter of Harris*** (***supra***) wherein we rejected the taxpayer's argument that the aggregation clause was applicable to determine whether a taxable acquisition had occurred. The Division points out that the 1994 amendments to Tax Law § 1440 only dealt with the "aggregation clause" of the gains tax, not the taxable acquisition of a controlling interest.

The Division also argued the merits of its assessment of real estate transfer tax even though not specifically excepted to by petitioner.

OPINION

The Division assessed both real property transfer gains tax (hereinafter "gains tax") and real estate transfer tax. We deal first with the issue of the gains tax. Former Article 31-B[3] of the Tax Law imposed a tax on gains derived from the transfer of real property if the consideration was $1,000,000.00 or more (Tax Law former §§ 1441 and 1443). The transfer of real property was defined to include the transfer of real property by any method including, but not limited to, the transfer or acquisition of a controlling interest in any entity with an interest in real property (Tax Law former § 1440[7]). A controlling interest in a partnership was defined to be 50% or more of the capital, profits or beneficial interest (Tax Law former § 1440[2]). For purposes of determining whether a controlling interest had been acquired, only acquisitions of interests occurring after March 28, 1983 were added together (20 NYCRR former 590.45[c]). Further, all interests acquired after March 28, 1983 were added together unless the acquisitions were more than three years apart (20 NYCRR 590.45[d]).

Petitioner argues that his transfer of a one-sixth interest in the partnership was not the transfer of a controlling interest and that the consideration received was less than $1 million. Petitioner's argument would be valid if there had not been an acquisition of a controlling interest by the Moores. Given the definition of controlling interest in Tax Law former § 1440(2), petitioner's transfer of his 16 2/3% interest to the Moores resulted in the Moores owning a 50% interest in the partnership or a controlling interest (Tax Law former § 1440[2]; ***Matter of Iser***, Tax Appeals Tribunal, May 8, 1997). However, the consideration did not exceed the $1 million threshold provided for in Tax Law former § 1443(1). It was upon the additional transfers to the Moores by the Leograndes and Reinhardt, and the aggregation of those transfers pursuant to 20 NYCRR former 590.45(d), that the consideration exceeded the $1 million exemption threshold. The facts demonstrate that between July 27, 1990 and February 28, 1991 (within three years), the Moores acquired a 100% interest in the partnership. Pursuant to the law and regulations, in effect at the time of these transactions, cited above, the interests acquired by the Moores were properly added together to determine the acquisition of a

[3]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).

controlling interest and the total consideration paid therefor. Then, in accordance with Tax Law former § 1441, tax was assessed on each of the individual transfers.

We have consistently upheld the imposition of tax where there has been an acquisition of a controlling interest (***see, Matter of Estate of Goldman***, Tax Appeals Tribunal, August 14, 1997; ***Matter of Drizin***, Tax Appeals Tribunal, May 15, 1997; ***Matter of Iser, supra***; ***Matter of Harris, supra***). Further, the fact that an exemption acted to defer imposition of the tax in this matter is similar to the facts in ***Iser***, where the exemption set forth in Tax Law former § 1443(5) for a mere change of identity deferred the imposition of tax until a later transfer of a second controlling interest. In the instant matter, the subsequent transfers to the Moores triggered the gains tax and subjected petitioner's one-sixth interest to tax.

The 1989 amendment to the Tax Law adding transfers of controlling interests to Tax Law former § 1440(7) was added to increase the scope of the definition, not to narrow it. By adding transfers to the statute, the Legislature enabled the tax to reach the syndication of partnership interests. This is evident from the change in the regulation at 20 NYCRR former 590.45(a) to current 590.46(a). The prior regulation provided that the syndication of a partnership interest was not subject to aggregation unless a person or persons acting in concert acquired a controlling interest. The current regulation provides that the syndication of a partnership interest is subject to aggregation and that the transfers of partnership interests pursuant to a plan of syndication will be aggregated to determine if a controlling interest has been transferred. In contrast, in the instant matter, the focus is the acquisition of a controlling interest by the Moores, not a syndication which would entail an analysis of whether the transferors were acting in concert. Further, petitioner's argument that the current regulation at 20 NYCRR 590.44 supports the position that his intent to convey his interest must have been in concert with the Leograndes and Reinhardt is without merit. That regulation is an interpretation of the aggregation clause portion of Tax Law former § 1440(7), upon which petitioner's reliance is misplaced. We have rejected similar contentions in ***Matter of Estate of Goldman*** (***supra***) and ***Matter of Harris*** (***supra***), where petitioners argued that the aggregation clause was

applicable in determining whether an acquisition of a controlling interest had occurred. In ***Harris***, we stated:

> "[w]ith respect to petitioner's contention that the aggregation clause must be applied to determine whether a taxable acquisition has occurred, we agree with the Division that the so-called aggregation clause is not applicable. The aggregation clause is a separate sentence in the section 1440(7) definition of transfer of real property which expands upon the basic definition included in the first sentence of section 1440(7) by stating that the '[t]ransfer of real property shall also include partial or successive transfers' [citation omitted]. Petitioner's construction would turn the statutory scheme on its head by applying the aggregation clause as a limitation on the basic definition of transfer of real property."

The aggregation clause is not applicable to the facts in this case and the intent of the transferors, i.e., petitioner, the Leograndes and Reinhardt, is not relevant to the primary inquiry of whether there was an acquisition of a controlling interest. The relevant factor is whether the Moores acquired 50% or more of the partnership within a three year period. In fact, the Moores acquired a 100% interest in the partnership by three transfers which occurred within seven months. Those transfers were properly added together pursuant to 20 NYCRR former 590.45(d) and would be added together under current 20 NYCRR 590.46(f) to determine whether there has been an acquisition of a controlling interest.

For the reasons stated above, we affirm the determination of the Administrative Law Judge with respect to the gains tax assessment.

Although raised in the petition and disputed at the hearing, but not stated as an issue or argued in petitioner's brief, the determination did not deal with the imposition of real estate transfer tax. It is determined however, that petitioner was not prejudiced by this oversight since the Administrative Law Judge discussed in detail the relevant theory of acquisition of a controlling interest, which is identical in both the transfer tax in Article 31 and in the gains tax in Article 31-B. Further, even though raised by the Division in both the brief to the

Administrative Law Judge and to the Tribunal, petitioner chose not to respond to the Article 31 arguments at either level of review.[4]

The real estate transfer tax defined conveyance of real property in the same manner as the gains tax, i.e., its definition included the acquisition of a controlling interest (Tax Law § 1401[e]) which is also defined as 50% or more of the capital, profits or beneficial interest in such partnership (Tax Law § 1401[b]). The regulations mirror the gains tax as well. They provide that an acquisition of a controlling interest occurs when a person acquires 50% or more of the capital, profits or beneficial interest in the partnership (20 NYCRR 575.6[a]). Further, the transfer tax regulations provide:

> "[w]here there is a transfer or acquisition of an interest in an entity that has an interest in real property, on and after July 1, 1989, and subsequently there is a transfer or acquisition of an additional interest or interests in the same entity, the transfers or acquisitions will be added together to determine if a transfer or acquisition of a controlling interest has occurred" (20 NYCRR 575.6[d]).

The same analysis employed in the gains tax discussion above applies to the real estate transfer tax. Petitioner's transfer of his 16 2/3% interest in the partnership was properly added to the transfers by the Leograndes and Reinhardt to determine whether there had been an acquisition of a controlling interest by the Moores. Since there was such an acquisition of a controlling interest, there was a conveyance of real property subject to the transfer tax, and petitioner was properly assessed his proportionate share of the tax on his transfer.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Anthony Martinez is denied;

2. The determination of the Administrative Law Judge is affirmed;

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[4]It should be noted that we do not condone the Administrative Law Judge's failure to address the transfer tax issue. In the past, we have remanded cases to fully develop issues through our two-stage tax appeals process (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, September 12, 1991). However, to do so in the instant matter would be of no benefit to this forum or the parties since (1) the Administrative Law Judge dealt with the theory behind the acquisition of controlling interests, which is applicable to both Article 31 and Article 31-B taxes, thereby effectively dealing with the issue below and (2) petitioner, after objecting to the imposition of real estate transfer tax in his petition and once at the hearing (tr., p. 38), did not specifically address the issue again, even though the Division thoroughly briefed the issue in its briefs before the Administrative Law Judge and the Tribunal. Petitioner had the opportunity to respond in a reply brief before the Tribunal but declined. Therefore, petitioner will not be prejudiced by our disposition of this issue.

3. The petition of Anthony Martinez is denied; and

4. The two notices of determination, dated January 7, 1993, asserting real estate transfer tax and real property gains tax, respectively, are sustained.

DATED: Troy, New York
October 16, 1997

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Donald C. DeWitt
President

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Joseph W. Pinto, Jr.
Commissioner