

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>244 BRONXVILLE ASSOCIATES</b>	:	<b>ORDER AND OPINION</b>
for Revision of a Determination or for Refund of Tax on	:	DTA NOS. 814542
Gains Derived from Certain Real Property Transfers under	:	AND 815566
Article 31-B of the Tax Law.	:	

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On May 22, 1998, Infinity Corporation, by its representative, Isidor D. Friedenberg, Esq., filed a motion for leave to file a brief as amicus curiae and for permission to be heard at oral argument on the exception. The motion was supported by the affirmation of Isidor D. Friedenberg, Esq., dated May 21, 1998. The Division of Taxation, by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel), filed a letter in response, dated June 19, 1998, in which it opposed both the motion to file a brief and the motion for leave to be heard at oral argument on the exception. Petitioner, 244 Bronxville Associates, did not respond to the motion. Infinity Corporation replied to the Division's response by letter, dated July 1, 1998.

**ORDER**

Upon reading and filing the motion, the proposed amicus brief, the response of the Division of Taxation thereto and the reply of Infinity Corporation, and due deliberation having been had thereon,

Now, on the motion of Infinity Corporation, it is

ORDERED that so much of said motion by Infinity Corporation as requests leave to file a brief as amicus curiae be and the same is hereby granted; and

ORDERED that so much of said motion by Infinity Corporation as requests permission to be heard at oral argument on the exception be and the same is hereby denied.

***FINDINGS OF FACT***

On January 29, 1998, the Administrative Law Judge issued a determination that held that the Division of Taxation properly used a per share method to allocate petitioner's original purchase price to units subject to real property gains tax, rather than a relative fair market value method, for purposes of determining petitioner's final gains tax liability as a result of the repeal of the gains tax law. On February 9, 1998, petitioner filed an exception to the determination of the Administrative Law Judge. Briefs were filed by the parties as specified above.

On May 22, 1998, Infinity Corporation filed a Notice of Motion for leave to file an amicus curiae brief and appear and be heard at oral argument on the exception. The movant filed an affidavit in support as well as the amicus curiae brief. The Division of Taxation opposed the submission of the brief and Infinity's request to be heard at oral argument on the exception. Petitioner did not respond to the motion.

***OPINION***

Acceptance of an amicus curiae brief remains in the discretion of this Tribunal. We established our standards for acceptance of such briefs in *Matter of Standard Mfg. Co.* (Tax Appeals Tribunal, July 11, 1991) wherein we adopted the standard of the New York State Court of Appeals set forth in their Rules of Practice, Rule 500.11(e):

(e) Amicus Curiae Relief. (For appeals selected for sua sponte examination of the merits see section 500.4 of this Part). A brief may be filed only by leave of court granted on motion, or upon the court's own request.

Motions for amicus curiae relief, when appropriately made on notice to all of the parties and sufficiently in advance of the argument of the appeal to allow adequate court review of the motion and the proposed brief, must include consideration of and satisfaction of the court of at least one of the following criteria:

(1) a showing that the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency;

(2) that movants would invite the court's attention to law or arguments which might otherwise escape its consideration; or

(3) that amicus curiae briefs would otherwise be of special assistance to the court.

As in *Standard*, we find that the proposed amicus brief meets the criteria set forth in the second and third subparagraphs and will accept the brief on those grounds. In addition, we note that Infinity Corporation is directly involved in multiple matters which involve the same issue being decided in *244 Bronxville Associates* and, as such, its standing to file an amicus is further justified. As succinctly stated by the United States Court of Appeals in *Ryan v. Commodity Futures Trading Commn.* (125 F3d 1062):

An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, *when the amicus has an interest in some other case that may be affected by the decision in the present case . . .* or when the amicus has unique information or perspective . . . (*Id.* at 1062-1063, emphasis added).

However, we deny Infinity's request to be heard at oral argument on the exception on the same basis we denied such a motion in *Standard*, i.e., Infinity has not offered any evidence of

“extraordinary reasons” for participating in the oral argument, if any, which is our standard for granting such requests.<sup>1</sup>

Accordingly, we grant so much of the motion by Infinity Corporation as seeks leave to submit a brief amicus curiae and deny so much of the motion as requests permission to be heard at oral argument on the exception. Petitioner, 244 Bronxville Associates, and the Division of Taxation are granted sixty (60) days from the date of this order to respond to the brief amicus curiae filed by Infinity Corporation.

DATED: Troy, New York  
October 1, 1998

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner

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<sup>1</sup>We relied upon the Federal Rules of Appellate Procedure, Rule 29, for guidance, and continue to do so.