STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TAFT PARTNERS DEVELOPMENT GROUP	:	DECISION DTA NO. 817465
for Revision of a Determination or for Refund of Tax on Gains Derived from Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner Taft Partners Development Group, c/o Jacques Catafago, The Catafago Law Firm, PC, 350 Fifth Avenue, Suite 4810, New York, New York 10118, filed an exception to the determination of the Administrative Law Judge issued on November 8, 2001. Petitioner appeared by Phillips, Lytle, Hitchcock, Blaine & Huber, LLP (Gary J. Gleba, Esq. and Edward M. Griffith, Jr., Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on July 10, 2002 in Troy, New York.

On January 23, 2003, the Tax Appeals Tribunal ("Tribunal") issued a decision remanding this matter to the Administrative Law Judge for a determination on the issue of whether or not petitioner was the transferee in the transaction which is the subject of this proceeding. In that decision, the Tribunal ordered that upon issuance of the determination on remand, the full record shall be returned to the Tribunal for a decision on the issues raised on the initial exception and

on any exception that may be taken by either of the parties to the determination of the Administrative Law Judge on remand. The Administrative Law Judge issued a determination on remand on July 24, 2003. Petitioner, c/o Jacques Catafago, The Catafago Law Firm, PC, 350 Fifth Avenue, Suite 4810, New York, New York 10118, filed an exception to the remanded determination of the Administrative Law Judge on August 18, 2003.

Petitioner filed a brief in support of its exception to the remanded determination. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tribunal renders the following decision.

ISSUES

I. Whether petitioner is liable for real property transfer gains tax as a transferee of the 35% partnership interest in petitioner transferred by Sholom Drizin in 1984.

II. Whether the stipulation of settlement entered into by the representatives of Sholom Drizin and the Attorney General's Office included the Notice of Determination issued to Taft Partners Development Group relating to the same transfer.

III. Whether the Division of Taxation had authority to apply a refund of real property transfer gains tax due to petitioner to the balance of tax remaining due after the settlement of Sholom Drizin's tax liability on the transfer.

III. Whether the General Obligations Law is applicable to the stipulation of settlement such that it disposes of the Notice of Determination issued to Taft Partners Development Group.

FINDINGS OF FACT

On May 15, 1997, the Tribunal issued a decision which found Sholom Drizin, a partner in petitioner, liable for real property transfer gains tax due as the result of his transfer of a controlling interest in petitioner, which was an entity with an interest in real property (***Matter of Drizin***, Tax Appeals Tribunal, May 15, 1997). There is no dispute between the parties that the transfer which gave rise to Sholom Drizin's tax liability therein is the same transfer of a controlling interest in an entity with an interest in real property for which the Division of Taxation (hereinafter the "Division") has asserted real property transfer gains tax liability against petitioner in the present proceeding. In order to fully establish the events preceding the transfer at issue herein, we take judicial notice of the findings of fact and conclusions of law contained in the ***Drizin*** decision, as did the Administrative Law Judge in his determination on remand, and incorporate certain of those facts herein.

We find the facts as determined by the Administrative Law Judge in his determination on remand, except for findings of fact "5," "7," "11," and "14" which we have modified to more accurately reflect the record herein and in ***Matter of Drizin*** (***supra***). The modified facts as well as the remaining facts as found by the Administrative Law Judge in his determination on remand are set forth below.

The Division issued a Notice of Determination, dated April 30, 1992, to Sholom Drizin asserting real property transfer gains tax due of $643,309.00, plus interest of $804,228.86 and penalties of $225,158.00, for a total amount due of $1,672,695.86. The "Computation Section" of the notice contained the following explanation:

> Section 1447.3 of Article 31B of the tax law states in part ". . .in a case where no tentative assessment has been issued because the transferee did not file the required

> questionnaire. . . the transferee shall be personally liable for the taxes stated to be due in a Notice of Determination . . . and such liability may be assessed and enforced in the same manner as the liability for the tax under this Article. . . . "

The notice went on to state that a search of the Division's files failed to find a filing on the transfer of a controlling interest of Taft Partners Development Group from Mr. Drizin to petitioner and that as such filing was required, the tax had been computed as shown.

On January 5, 1984, Royale Towers Associates ("seller") and Sholom Drizin ("purchaser") entered into an Amended and Restated Agreement For Sale and Purchase of the Taft Hotel. According to this purchase and sale agreement, the purchase price was to be $32,505,280.00. The terms also provided that contemporaneously with the execution and delivery of the contract the purchaser was to deposit $3,200,000.00 with the seller. The property known as the Taft Hotel is located at 761-779 Seventh Avenue, New York, New York.

On March 1, 1984, Sholom Drizin entered into an Agreement of Assignment, as assignor, with Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher collectively listed as the assignee, "having a place of business c/o Goodstein Management, Inc. . . ." whereby Sholom Drizin, owner of a 100% interest, agreed to assign to the assignees a 50% interest in an agreement for sale and purchase of premises located at 761-779 Seventh Avenue, New York, New York (Taft Hotel), dated January 5, 1984, which he had with Royale Towers Associates. In addition, Sholom Drizin and the assignees were to enter into a limited partnership agreement and the partnership was to acquire title to the premises.

On March 7, 1984, Drizin and the assignees entered into an Agreement of Limited Partnership of Taft Partners Development Group ("Taft Partners").

Pursuant to the agreement: (a) Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were, collectively, the managing general partners; (b) Mr. Drizin, Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were general partners; and (c) Andrew Goodstein, Martin Goodstein, Patricia Kay Goodstein and Mitchell Siegel, as trustees for the benefit of ("f/b/o") Michele A. Goodstein under trust agreement ("u/t/a") dated July 7, 1967, f/b/o Geoffrey A. Goodstein u/t/a dated July 7, 1967, and f/b/o Shari L. Goodstein u/t/a dated July 7, 1967, and Samuel Lewis were limited partners. Trustees Martin Goodstein, Patricia Kay Goodstein and Mitchell Siegel were listed in the agreement "with an address c/o Goodstein Management, Inc., 211 East 46th Street, New York, New York."

The general partners held the following percentage interests in the partnership: Sholom Drizin - 50%; Arthur Cohen - 20%; Steven Goodstein - 8.5%; Martin Goodstein - 2%; and Jacob Sopher - 10%. The remaining 9.5% interest was held by the limited partners.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> On March 7, 1984, Sholom Drizin ("seller") and Steven Goodstein ("purchaser") entered into a Partnership Interest Acquisition Agreement ("acquisition agreement") whereby Mr. Drizin agreed to sell to Steven Goodstein an additional 35% interest in petitioner for $8,320,000.00. This sale was consummated on September 24, 1984. On consummation of the sale, Drizin retained a 15% interest in the partnership and became a limited partner.[1]

According to the terms of the acquisition agreement, Mr. Drizin, simultaneously with the receipt of a $1,600,000.00 down payment and a Letter of Credit in the amount of $6,720,000.00,

---

[1]We modified finding of fact "5" to more accurately reflect the record.

was to execute and deliver to Steven Goodstein an instrument "for the purpose of assigning the Interest to Purchaser or his assignee(s) or designee(s)." In addition, Mr. Drizin was to execute any documents or certificates required "in connection with the transfer of the Interest and the conversion of Seller's remaining interest in the Partnership to a limited partner's interest." Pursuant to paragraph 6, the agreement was:

> conditioned upon Purchaser obtaining and delivering to Seller the Letter of Credit, prior to or simultaneously with the downpayment on a date not later than the date the Partnership acquires title to the Premises.

This paragraph also provided that, in the event that the Letter of Credit was not obtained and delivered to the seller or if he did not comply with the requirements contained in paragraph 5, the transaction would be null and void and "neither party shall have any claim against the other." Paragraph 7 of the acquisition agreement contained the "Conditions Precedent" to the consummation of the sale of the interest, which included, *inter alia*, that the March 1, 1984 assignment between petitioner, Steven Goodstein, Martin Goodstein, Arthur Cohen and Jacob Sopher "shall not have been rescinded."

The agreement also specifically provided that Mr. Drizin was responsible for making the requisite real property transfer gains tax (hereinafter "gains tax") filings and paying the tax which "*may*" be due, regardless of whether the State made a claim for said taxes at closing or at any future time.

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> On or about May 21, 1984, Mr. Drizin executed, as a partner of petitioner, a Real Property Transfer Gains Tax Questionnaire -Transferee, Form TP-581 ("transferee questionnaire"). According to the questionnaire, petitioner was the

> transferee which was acquiring a 100% fee interest in 761-779 Seventh Avenue, New York, New York, Section 4, Block 1003, Lot 1 on May 15, 1984 for $32,280,000.00 from transferor, Royale Tower Associates.[2]

On June 11, 1984, Chase Manhattan Bank ("Chase") sent a loan commitment letter for the purchase and renovation of the fee premises located at 777 Seventh Avenue, New York, New York to the Goodstein Construction Company. The loan commitment letter was addressed to "The Goodstein Construction Company, 211 East 46th Street, New York, New York, Attention: Mr. Martin Goodstein."

Included as part of the terms in Chase's loan commitment letter were the following:

> We agree to lend $102,000,000 to a partnership comprised of Martin and Steven Goodstein, Arthur Cohen and Henry Sopher (hereinafter and in the General Conditions attached hereto termed the 'Borrower') of which up to $41,000,000 shall be advanced for acquisition of the Premises (the 'Acquisition Allocation'), with the balance (the 'Construction Allocation') to be advanced for the renovation of the existing building located on the Premises into a multi-use condominium building containing 20,470 square feet of professional space, 23,493 square feet of retail space, 24,470 square feet below grade, including a 4,996 square foot health club and residential space containing 720 condominium apartments aggregating 343,207 saleable square feet of space, all of which shall be completed within 24 months from the date of the loan closing.

Additionally, Chase required that a guaranty of payment of the note be executed by Martin and Steven Goodstein, Arthur G. Cohen and Henry Sopher.

Taft Partners acquired a 100% fee interest and developed the property identified as the Taft Hotel and converted it to condominium status. In connection with this development, petitioner filed transferor questionnaires, reporting its gain in connection with the disposition of condominium units in accordance with the regulations established by the Division requiring periodic updates of estimates of consideration and of costs. In these tax returns, petitioner

---

[2]We modified finding of fact "7" to more accurately reflect the record.

sought to claim the cost of the acquisition of the 35% partnership interest transferred by Sholom Drizin to Steven Goodstein as part of its original purchase price. During the audit of these returns, the Division discovered that the transfer of this 35% interest had never been reported for gains tax purposes and issued a notice of determination to Mr. Drizin for the gains tax on such transfer.

Sholom Drizin petitioned the notice of determination and was found liable for gains tax in the amount of $623,541.00, plus penalty and interest by decision of the Tax Appeals Tribunal dated May 15, 1997.

Mr. Drizin then commenced an Article 78 proceeding in the Appellate Division, Third Department. As Mr. Drizin had failed to pay the amount due or file a bond, Assistant Attorney General Julie Mereson made a motion to dismiss the proceeding which was granted.

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

> Following the dismissal of the Article 78 proceeding, settlement discussions began between Ms. Mereson and representatives of Mr. Drizin: Jeremy Heisler, David Eisig, Judge Fusco and David Jaroslawicz regarding the assessment issued to Mr. Drizin, assessment number L-005583137. The representatives of Mr. Drizin drafted a stipulation of settlement which Ms. Mereson reviewed, made some changes to and then executed along with David Jaroslawicz. The stipulation provides as follows:
>
> > RE: MATTER OF SHOLOM DRIZIN DTA NO. 811808
> >
> > IT IS HEREBY STIPULATED BY AND AGREED, by and between the taxpayer, Sholom Drizin, and the State of New York Department of Taxation and Finance, that the above matter and claim of the Department of Taxation and Finance for taxes, penalties and interest under assessment number L-005583137 is settled against Sholom Drizin for the amount of Eight Hundred Fifty Thousand

> ($850,000.00) Dollars, to be paid by check drawn on a New York bank on or before July 31, 1998.
>
> IT IS FURTHER AGREED, that all appeals and proceedings will be withdrawn as part of the settlement.

The stipulation is dated July 7, 1998.[3]

During 1991 petitioner filed a Claim for Refund of Real Property Transfer Gains Tax in the amount of $533,273.51. The refund claim is based upon gains tax paid as part of the Taft Hotel project. Following an audit by the Division, the amount of the refund was reduced to $529,873.00.

On July 31, 1995, the Division issued to petitioner a Notice of Determination under Gains Tax Law, number GT-95073101, which indicated that petitioner was liable as a transferee for its purchase of the 35% partnership interest from Sholom Drizin. The notice provided that petitioner was being assessed tax due of $623,541.00, plus penalty and interest, and also indicated that overpayment relating to the condominium development in the amount of $529,873.00 had been applied to the amount due.

We modified finding of fact "14" of the Administrative Law Judge's determination to read as follows:

> Petitioner filed the Real Property Transfer Gains Tax Questionnaire on September 8, 1988 in which it sought to claim the cost of the acquisition of the 35% partnership interest transferred by Sholom Drizin as part of its original purchase price.[4]

Following the remand of this matter by the Tax Appeals Tribunal, the Administrative Law Judge provided the parties with four options as to the procedure that was to be used to

---

[3]We modified finding of fact "11" to more accurately reflect the record.

[4]We modified finding of fact "14" to more accurately reflect the record.

address the issue presented. The options included a scheduled hearing, the presentation of additional evidence and briefs through submission, the filing of additional briefs or a determination based on the record as it then stood. The Division opted to introduce additional evidence and briefs through the submission process. The taxpayer's representative advised the Administrative Law Judge that "[t]he petitioner does not believe that there is any reason to reopen the case for the presentation of additional evidence or to file briefs. Nevertheless, the petitioner is willing to submit an additional brief if you believe that such a brief would assist you in resolving the issue."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge rejected petitioner's argument that the stipulation of settlement between Sholom Drizin and the Attorney General's Office also resolved the dispute between petitioner and the Division. The stipulation of settlement was between Mr. Drizin and the Division and stated that the assessment issued to Mr. Drizin was settled. The Administrative Law Judge stated that it mentioned no other parties, DTA numbers or assessments.

The Administrative Law Judge found that the Drizin stipulation was unambiguous, and since there was no allegation of fraud, accident or mistake, the parol evidence rule prohibited resort to extrinsic evidence to alter or explain the meaning of a contract when the language of the contract was clear on its face. Thus, the Administrative Law Judge concluded that it was proper to exclude the oral testimony presented by petitioner which was at variance with the language contained in the stipulation.

The Administrative Law Judge noted provisions of Tax Law former Article 31-B which imposed personal liability for the gains tax on a transferee when the transferee failed to file the required transferee questionnaire. The Administrative Law Judge concluded that upon petitioner's failure to file the required transferee questionnaire, petitioner became personally liable for the tax due as a result of the partnership transfer, and, thus, petitioner's liability was joint and several with that of the transferor.

Noting that the Division may collect any amount due from either the transferor or transferee up to the total amount due, the Administrative Law Judge determined that the Division initially collected from petitioner the refund due on the Taft Hotel condominium project. It then settled the remaining amount due with the transferor, properly reducing the amount owed by the transferor with the amount of petitioner's refund, so as not to collect the amount of tax due twice. The Administrative Law Judge held that if the State were to refund the amount claimed by petitioner, the Division would be denied full payment of the tax to which it is entitled under former Article 31-B.

In his determination on remand, the Administrative Law Judge concluded that petitioner was the transferee in the transaction at issue. The Administrative Law Judge found that the Notice of Determination issued to Taft Partners was, in effect, a notice issued to the five partners, four of whom were the transferees in the transaction at issue and one of whom, Sholom Drizin, was the transferor. The Administrative Law Judge found that the partners were properly apprised of the basis of the assessment and the specific transaction which gave rise to the assessment.

The Administrative Law Judge also believed that petitioner had represented itself as the transferee to the Division in several documents it filed regarding the development and conversion to condominium status of the real property as well as when it claimed a step-up in its original purchase price of the real property in which it held an interest.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge erred in finding that petitioner was the transferee in the transaction at issue. Petitioner asserts that unless it was a party to the transaction, the Division lacks statutory authority to assess it for tax due as a result of the transfer.

Petitioner maintains that the stipulation of settlement entered into by Sholom Drizin and the New York State Attorney General disposed of the notice of determination issued to petitioner as a result of that same transfer. Petitioner asserts that the Administrative Law Judge incorrectly concluded that petitioner was jointly and severally liable for the gains tax arising from that transfer. As a result, petitioner believes that the Division should be estopped from applying the gains tax refund due to petitioner against the liability arising out of the 1984 transfer at issue, which liability was fully satisfied and settled by the stipulation of settlement.

In opposition, the Division argues that petitioner was the transferee in this matter. Based on the "look-through" doctrine, the Division maintains that the economic reality of the transaction dictates that the partners are the alter egos of petitioner. This, maintains the Division, is what allows petitioner, the partnership, to claim a step-up in its original purchase price of the real property to reflect the amount paid to acquire the 35% interest.

The Division believes that petitioner is jointly and severally liable, as a transferee, with Sholom Drizin for the gains tax due as a result of the transfer of Drizin's 35% interest in petitioner. By petitioner's failure to timely file the required transferee questionnaire, the Division maintains that petitioner became primarily liable for the tax due on the transfer. The Division argues that despite the Division's settlement with Drizin, petitioner remains liable for the balance owing on the assessment arising from the transfer.

OPINION

Pursuant to Tax Law former § 1441, a tax was imposed at a rate of ten percent on gains derived from the transfer of real property within New York ("gains tax"). 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." 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."

Pursuant to Tax Law former § 1447(1), the Commissioner of Taxation and Finance was authorized to prescribe forms that both the transferor and the transferee were to complete and file concerning each transfer of real property. Former § 1447(3)(a) of Article 31-B of the Tax Law stated in part "in a case where no tentative assessment has been issued because the transferee did not file the required questionnaire . . . the transferee shall be personally liable for the taxes stated to be due in a notice of determination . . . and such liability may be assessed and enforced in the same manner as the liability for tax under this article."

The Division asserted transferee liability against petitioner as the result of the 1984 transfer by Sholom Drizin of the 35% interest he held in Taft Partners Development Group

(petitioner). Additionally, the Division offset petitioner's alleged liability by applying a refund which petitioner had claimed as the result of a step-up in its original purchase price. The basis for the step-up in original purchase price was the acquisition of a controlling interest in petitioner by Steven Goodstein.

In our remand of this matter to the Administrative Law Judge, we concluded that the issue of whether or not petitioner was actually the transferee in the transaction between Sholom Drizin and Steven Goodstein was clearly raised at the hearing by petitioner and needed to be addressed. If petitioner was not a party to the transfer as either a transferor or transferee, petitioner bears no liability for the real property transfer gains tax due as a result of that transfer.

The Administrative Law Judge, in his determination on remand, determined that Sholom Drizin, one of the general partners in petitioner, transferred a 35% interest in petitioner ***to*** petitioner. We find that his determination is in direct conflict with our previous decision in ***Matter of Drizin*** (***supra***).

It is important to remember that what is at interest herein is not the transfer of an interest in realty, per se, but the transfer of a controlling interest in an *entity* with an interest in real property. At all times relevant to our inquiry, both before and after the Drizin transfer, petitioner owned 100% interest in the real property known as the Taft Hotel. The only interest which was transferred was a partnership interest in petitioner, transferred from one partner to another partner. As we found in ***Drizin***, the Partnership Interest Acquisition Agreement readily discloses that Sholom Drizin and Steven Goodstein entered into an agreement whereby Sholom Drizin agreed to sell ***to Steven Goodstein*** a 35% interest in Taft Partners Development Group owned by

Drizin for $8,320,000.00. Thus, the transferee of the 35% interest in petitioner was Steven Goodstein and not petitioner.

In ***Drizin***, we affirmed the conclusion of the Administrative Law Judge that individuals identified as "the investors," Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher, acted "as a single entity when they initially acquired the 50 percent interest in the contract to purchase the real property and also when Steven Goodstein acquired the 35% interest in the partnership." For purposes of our analysis herein, it is important to note that while each of the "investors" was also a general partner in Taft Partners Development Group, there is no evidence on which to conclude that these investors were acting other than in concert with each other and not as partners in Taft Partners Development Group or on behalf of Taft Partners Development Group when Steven Goodstein acquired Drizin's 35% interest. Further, it is important to note that these "investors" did not include all of the partners of petitioner. Thus, our conclusion herein is consistent with our decision in ***Matter of Drizin*** (***supra***) that the transferee in the transaction at issue was Steven Goodstein, acting in concert with the "investors" identified as such in ***Drizin***, and petitioner was not a transferee in that transaction.

We note that even the Administrative Law Judge, despite his conclusion to the contrary, stated that: "thus, the notice of determination issued to Taft Partners was, in effect, a notice issued to the five partners. *Four partners were the transferees in the transaction at issue*, and the fifth partner, Sholom Drizin, was the transferor and was also liable and assessed for the unpaid real property gains tax" (Determination on remand, conclusion of law "A," emphasis added).

The only basis for the Division's position that petitioner was the transferee in that transaction seems to be its statement in the Notice of Determination issued to Sholom Drizin that Drizin transferred his 35% interest in petitioner ***to*** petitioner. If the Division's position were to be upheld, we would have to conclude that the partnership share of the remaining partners of petitioner had been enriched by the acquisition of Drizin's interest. However, after the acquisition of the Drizin interest by the "investors," there is no evidence that the share of the limited partners increased proportionately. Further, to hold petitioner liable for the tax due on this transfer would unfairly penalize these remaining partners by reducing their share of the partnership assets.

We find no other situation that has been brought before us in which the Division treated an acquisition of a partnership interest by one or more partners or a redemption of partnership interest by a partnership as an acquisition of a controlling interest by the partnership itself so that the partnership is held liable as a transferee. In contrast to the Division's position, we note that in ***Matter of Iser*** (Tax Appeals Tribunal, May 8, 1997, ***confirmed Matter of Iser v. New York State Commr. of Taxation & Fin.*** 256 AD2d 820, 681 NYS2d 866) we held that a partnership's redemption of a 40% partnership interest of a withdrawing partner was a taxable acquisition of a controlling interest by one of the remaining partners.

Additionally, the Division has already assessed Sholom Drizin, the transferor, and collected the tax due. The Division argues that it collected less than the full amount due and is therefore entitled to apply the refund claimed by petitioner to satisfy the balance of the Division's claim. However, petitioner was never a party to the settlement discussions with Drizin. We must remember that Drizin, on consummation of the transfer, became a limited

partner in petitioner. There is no evidence that he either sought to bind petitioner to liability for this tax nor that he had the authority to do so.

The Division's regulation at 20 NYCRR former 590.49, stated in applicable part:

> (b) *Question*: Is the original purchase price of the real property as held by the entity stepped-up upon the acquisition of a controlling interest?
>
> *Answer*: Yes. In the case of the acquisition of a controlling interest, where the mere change exemption was not applied, the original purchase price in the real property as held by the entity may be stepped-up to reflect the consideration recognized on the transfer of the ownership interest.

In this case, the consideration given to Sholom Drizin on the transfer of his 35% interest was recognized and Drizin's gains tax liability was paid. As a result, petitioner appropriately claimed a step-up in its original purchase price of the Taft Hotel property (***see, Matter of Iser, supra***). Further, in ***Matter of SKS Assocs.*** (Tax Appeals Tribunal, September 12, 1991), we held that the "language of 20 NYCRR [former] 590.49(c) explicitly conditions the step-up in basis upon the resale of *partnership interests*, rather than a sale of the real property by the partnership" (emphasis supplied).

In short, the Division has already taxed the appropriate party to this transaction and cannot now assert any liability it believes it suffered as the result of a settlement with that party against a non-party who was not liable for the tax in the first instance.

Based on this conclusion, petitioner has no liability for the gains tax due as a result of the transfer. Despite the fact that the Division applied the amount of refund due and owing to petitioner as a credit against the individual liability of Sholom Drizin, there was no authority for it to do so. Petitioner, having no liability for the tax at issue, cannot be required to bear the tax burden incurred by one or more of its limited partners acting on his own behalf.

As a result of our decision on the issue of petitioner's relationship to the transfer at issue, we need not analyze the remaining issues raised by the parties on exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Taft Partners Development Group is granted;

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

3. The petition of Taft Partners Development Group is granted; and

4. Petitioner's claim for refund of overpaid real property transfer gains tax of $529,873.00 is granted.

DATED: Troy, New York
May 6, 2004

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

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