STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AMERICAN EXPRESS COMPANY AND AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION	:	DETERMINATION
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.	:	

Petitioner, American Express Company and American Express International Banking Corporation, c/o Stroock & Stroock & Lavan, Esqs., 7 Hanover Square, New York, New York 10004-2594, filed a petition 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 (File No. 803265).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 24, 1989 at 9:30 A.M., with all briefs to be filed by June 16, 1989. On June 16, 1989, the Division of Taxation brought a motion seeking to reopen the hearing and to vacate a stipulation entered into in connection therewith. Argument on this motion was heard September 7, 1989; the transcript thereof was settled by parties' stipulation on or about November 3, 1989. On December 20, 1989, an Order was issued granting the Division's motion to the extent that the hearing record was to be reopened and the stipulation was vacated in part. On February 14, 1990, the hearing was reconvened and was continued to conclusion before the same Administrative Law Judge with all briefs to be filed by March 28, 1990. Petitioner appeared at all times by Stroock &Stroock & Lavan, Esqs. (Kevin L. Smith, Esq., of counsel). The Division of Taxation appeared at all times by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether the March 18, 1983 claimed date of execution of certain documents, alleged by petitioner to constitute a "written contract" for purposes of Tax Law § 1443(6), has been confirmed by independent evidence.

II. Whether, if so, petitioner's June 15, 1983 transfer of its former headquarters located at 125 Broad Street, New York, New York pursuant to such documents was entitled to exemption from gains tax under Tax Law § 1443(6) as a transfer made via "a written contract entered into on or before March 28, 1983".

FINDINGS OF FACT

Prior to commencement of the proceedings herein, the duly authorized representatives for the parties entered into a stipulation of facts. This stipulation, modified only insofar as to omit specific references to the various exhibits included with the stipulation, is set forth hereinafter.

Stipulated Facts

Background

American Express Company and American Express International Banking Corporation (hereinafter jointly called "AMEX") was, from 1974 to 1983, formerly the owner and major occupant of the building at 125 Broad Street, New York, New York (the "Broad Street Property").

AMEX was the owner, by assignment, of the rights of the lessee in the ground lease for the Broad Street Property, together with certain franchise and lease agreements relating to the use and operation of the building.

AMEX had maintained its principal headquarters at the Broad Street Property since 1974.

In 1982 AMEX had outgrown its space at the Broad Street Property and required more space for its expanding world-wide operations.

In November 1981, Olympia & York Battery Park Company ("O&Y") entered into a sublease with the Battery Park City Authority ("BPCA") dated as of September 1, 1981 (the "Battery Park Master Sublease"), which provided for O&Y to develop the commercial center at

Battery Park City, and obligated O&Y to construct four towers for use as commercial office space.

The Broad Street Transaction (described hereinafter) was structured in the form of a sale-leaseback.

As part of the proposed sale transaction, AMEX was to obtain the right to occupy a 51-story office building tower which was to be constructed on Parcel C of the commercial center of Battery Park City (the "Battery Park Transaction").

O&Y was to purchase the Broad Street Property and then lease the premises back to AMEX for a limited time so that AMEX's business operations could continue to function from the Broad Street Property until AMEX could move into the office building tower which was to be built on Parcel C at Battery Park City.

The negotiations for the sale of the Broad Street Property by AMEX to O&Y were contingent upon AMEX obtaining, inter alia: (a) a separate leasehold interest in Parcel C; and (b) the requisite government approvals by the Public Authorities Control Board ("PACB") for its proposed new headquarters site and office building tower at Battery Park City.

The authorized representatives of AMEX and O&Y engaged in arms-length negotiations beginning in or around March 1982 for the Broad Street Transaction.

Negotiations for the Broad Street Transaction involved, among other terms and documents, the following:

(a) the sale by AMEX of its rights in the ground lease on the Property and of its interests in the building at the Property and the assignment by AMEX to O&Y of the franchise and lease agreements relating to the use and operation of the building on the Property;

(b) the sublease by O&Y to AMEX of all of the space within the building located at the Property;

(c) the management by O&Y or its affiliate of the Broad Street Property during the period in which AMEX remained in occupancy at the Building;

(d) such other collateral documents as were necessary to carry out the agreements set forth herein in subsections (a), (b) and (c) of this paragraph.

The principal documents with respect to the Broad Street Transactions were (a) the

Agreement of Sale and (b) the Assignment of Ground Lease and Assumption (hereinafter collectively referred to as the "Operative Agreements"). In addition, the assignment of Chilled Water Agreement, which provided chilled water to the 125 Broad Street Property, the sublease by O&Y to AMEX of all of the space within the building located at the Broad Street Property and the Management Agreement of O&Y or its affiliate of the Broad Street Property were also principal documents in the Broad Street Transaction.

In April 1982, a draft of the Agreement of Sale for the Broad Street Property was circulated among the parties.

Additional drafts of the Agreement of Sale were circulated after April 1982 up to and including March 1983.

Concurrently with the negotiations for the Broad Street Transaction, the authorized representatives of AMEX, O&Y and BPCA engaged in arms-length negotiations, beginning in or around April 1982, on major aspects of the Battery Park Transaction.

Under the terms of the Battery Park Master Sublease, between O&Y and BPCA, O&Y had the right to require BPCA to sever each of the Parcels and obtain a separate, independent lease (a "Severance Lease") therefor.

At the same time that O&Y was negotiating the Agreement of Sale of the Broad Street Property, O&Y was also negotiating its Severance Lease for the Battery Park City transaction.

The Severance Lease was executed by O&Y and BPCA on June 15, 1983.

O&Y, as assignor, on June 15, 1983, contemporaneously with its execution of the severance lease, assigned its leasehold interest in Parcel C to AMEX and two related corporations, as assignees, thereby making these entities the direct tenants of BPCA.

March 15, 1983 was designated as the day for the execution of the Operative Agreements of the Broad Street Transaction and the principal documents of the Battery Park Transaction. Subsequently, a three-day adjournment was agreed upon, and the execution of the documents was scheduled for March 18, 1983.

On March 18, 1983, the documents relating to the transfer of the Broad Street Property,

including the Operative Agreements, and certain documents relating to the Battery Park Transaction were signed and notarized. On the same date as the execution of the Operative Agreements, the parties and BPCA entered into and executed an agreement referred to therein by the parties and BPCA as the Escrow Agreement (the "Escrow Agreement"), dated March 18, 1983. The parties delivered the Operative Agreements to the escrow agent designated in said Escrow Agreement, Kaye, Scholer, Fierman, Hayes & Handler (the "Escrow Agent") on March 18, 1983.

The Operative Agreements were signed by the authorized representatives of the parties, and notarized by Messrs. John Noonan and Stephen P. Norman on March 18, 1983.[1]

The notaries were not parties to the transaction. Mr. John Noonan was a paralegal at the law firm of Olnick, Boxer, Blumberg, Lane & Troy and Mr. Stephen P. Norman was the Secretary of the American Express Company.

On March 18, 1983, pursuant to the Escrow Agreement of the same date, O&Y and AMEX delivered the following documents relating to the Broad Street Transaction to the Escrow Agent:

(a) four copies of the Agreement of Sale;

(b) four copies of the Assignment of Ground Lease with Assumption;

(c) four copies of the Assignment of Chilled Water Agreement;

(d) four copies of the Sublease;

(e) two copies of the Memorandum of Sublease; and

(f) four copies of the Management Agreement.

AMEX and O&Y delivered to the Escrow Agent the Agreement of Sale, the Assignment of Ground Lease and Assumption, and the Chilled Water Agreement to be held by the Escrow Agent pending the approvals of the PACB and the Board of Estimate.

In addition to delivering to the Escrow Agent the documents related to the Broad Street

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[1]By Order dated December 20, 1989, the stipulation was vacated insofar as it concludes that the operative agreements were fully signed on March 18, 1983 (see Finding of Fact "64", infra).

Transaction, AMEX and O&Y also delivered certain

documents central to the Battery Park Transaction. Included among these documents were:

(a) the Construction Agreement, which bound O&Y to construct the office building tower on Parcel C of Battery Park City which would serve as AMEX's new headquarters;

(b) four executed copies of the Letter Agreement with respect to Kiosks, or stalls to be located within the Winter Garden Atrium structure on Parcel B of Battery Park City (the "Kiosk Letter Agreement");

(c) four executed copies of the Letter Agreement from AMEX to O&Y with respect to broker's commission and other broker compensation (the "Broker Letter Agreement"); and

(d) four executed copies of the Letter Agreement from O&Y to AMEX with respect to the central plant constructed on Parcel D of Battery Park City (the "Central Plant Letter Agreement").

The release of the documents by the Escrow Agent and the closing of the Broad Street Transaction were contingent on the fulfillment of the conditions set forth in the Escrow Agreement of March 18, 1983.

On June 15, 1983 the documents were released by the Escrow Agent and the Broad Street and Battery Park Transactions formally closed.

On June 15, 1983, AMEX delivered to O&Y the Assignment to the Leasehold interest in the Broad Street Property, and AMEX and O&Y executed, delivered and exchanged all other documents collateral thereto for the Broad Street Transaction, as required by the Agreement of Sale, as well as documents for the Battery Park Transaction including the Severance Lease.

Board of Estimate Approval

In order to close the Broad Street Transaction, AMEX needed to obtain approval from the Board of Estimate of the City of New York (the "Board of Estimate") of the transfer of a certain Chilled Water Agreement dated June 28, 1974 (the "Franchise").

The Franchise permitted AMEX to maintain and use two pipes and a conduit under Broad Street.

On March 10, 1983, the law firm of Tufo & Zuccotti, AMEX's counsel with regard to

the Board of Estimate approval of the transfer of the Franchise, sent a letter to the Bureau of Franchises of the City of New York, concerning the Board of Estimate's approval of the transfer of the Franchise.

The Assignment of the Franchise was signed by AMEX and O&Y on March 9, 1983 (the "Assignment of the Franchise").

After the signing of the Assignment of the Franchise, AMEX submitted it to the Board of Estimate for approval.

Prior to granting approval of the Assignment of the Franchise, the Board of Estimate, through its Director of Franchises, requested by letter dated March 11, 1983 that the parties submit a copy of the Assignment of the Ground Lease and Assumption.

The Board of Estimate would not approve the Assignment of the Franchise until it was in receipt of a signed copy of the Assignment of Ground Lease and Assumption.

Pursuant to the request of the Board of Estimate, AMEX delivered a copy of the Assignment of Ground Lease and Assumption, signed on March 18, 1983. The document was transmitted with a cover letter to the Board of Estimate on March 22, 1983. AMEX's March 22, 1983 letter to the Board of Estimate, which was annexed to the aforementioned document, was clocked in as received by the Bureau of Franchises on the same day.

In the letter of March 22, 1983, Tufo & Zuccotti advised the Board of Estimate that AMEX sought to have the Assignment of the Franchise considered by the Board of Estimate at the Board's first meeting in April 1983.

The request for approval of the Assignment of the Franchise came before the Board of Estimate on April 14, 1983 and consent was granted on that date.

The Mayor's approval of the Assignment of the Franchise was obtained on April 26, 1983.

PACB Approval

Completion of the Battery Park Transaction required the approval of the PACB.

O&Y, BPCA and AMEX were ready, prior to April 1983, to submit the Battery Park

Transaction to the PACB for approval at the April 1983 meeting of the PACB.

The Broad Street Transaction, as well as the Battery Park Transaction, was dependent upon PACB approval of the Battery Park Transaction.

The minutes of the meeting of the Members of the Board of BPCA reflect that a resolution was passed on March 15, 1983 which granted approval and authority to the officers of BPCA to enter into documents necessary to complete the Battery Park Transaction.

The BPCA made timely submission of documents concerning the Battery Park Transaction which it deemed necessary for the meeting of the PACB, originally scheduled for April 13, 1983.

The PACB meeting scheduled for April 13, 1983 was postponed by the PACB to April 22, 1983, at which time the PACB granted approval of the proposed Battery Park Transaction.

Commencement of Litigation

The New York Tax Law, Article 31-B, §§ 1440-1441-C providing for a tax on gains derived from certain real property transfers (the "Gains Tax") was first introduced in the New York State Legislature on February 28, 1983 as part of the Omnibus Budget Bill.

The introduction of the Gains Tax took place nearly a year after the commencement of negotiations on the Broad Street and Battery Park Transactions.

AMEX executed and delivered to O&Y the Tentative Assessment and Return, as completed by the Department of Taxation and Finance, dated "6-3-83" and designated Assessment No. A0009, together with a certified check payable to the order of the New York State Department of Taxation and Finance in the amount of $9,172,460.90, representing payment in full of the Gains Tax set forth on the Tentative Assessment and Return.

AMEX paid the tax under protest.

The New York State Department of Taxation and Finance adjusted the amount of the Gains Tax owed by AMEX to allow for certain deductions, resulting in a tax reduction of $2,342,070.80, thereby leaving the sum of $6,829,390.10 in dispute.

On April 4, 1985, AMEX filed a written claim for Refund of Real Property Transfer Gains Tax (New York State Department of Taxation and Finance Form TP-165.8) requesting a refund in the amount of $6,829,390.10, plus interest.

The claim was received by the Department of Taxation and Finance on April 9, 1985.

The New York State Department of Taxation and Finance acting through its Audit Division, advised AMEX, by letter dated February 3, 1986, that the refund claim was denied in its entirety.

AMEX filed a petition to the State Tax Commission,[2] Tax Appeals Bureau in April 1986.

The Audit Division answered AMEX's petition on September 17, 1986.

The Issue Before The Commission

AMEX has applied for a hearing before the New York State Tax Commission to determine whether AMEX is entitled to a refund or a revision of a determination of taxes paid, pursuant to the exemption provided by section 1443(6) of Article 31-B of the New York Tax Law.

Authenticity of Documents

The documents submitted with the stipulation are authentic originals, or, where originals were unavailable for submission, authentic and true copies of originals of the documents referred to as Exhibits throughout the stipulation of facts and the parties agree to their admission into evidence at the hearing held in this matter.

Supplemental Stipulation

On June 16, 1983, O&Y delivered to AMEX the "Purchase Price" of One Hundred Sixty Million Dollars ($160,000,000) under Section 4 of the Agreement of Sale by wire transfer of Federal funds which amount constituted the consideration for the Broad Street Transaction.

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[2]Effective September 1, 1987, the adjudicatory functions of the (former) State Tax Commission were assumed by the newly created Division of Tax Appeals (see generally Tax Law Article 40). All references hereinafter to the State Tax Commission shall be deemed references to the Division of Tax Appeals.

The Purchase Price was transferred into the following designated account and its receipt was confirmed by Morgan Guaranty Trust Company on June 16, 1983:

American Express Company General Funds
Account No. 001-53-311
Morgan Guaranty Trust Company
23 Wall Street
New York, New York

Additional Facts

The January 24, 1989 Hearing

At the January 24, 1989 hearing, petitioner provided the testimony of one David Hershberg, Esq. Mr. Hershberg was AMEX's general counsel as well as its chief in-house representative with respect to the Broad Street and Battery Park transactions.

Mr. Hershberg testified to the complexity of the transactions and attendant negotiations which were commenced in March of 1982 and continued thereafter for nearly a year. He testified that the "deal was done" (negotiations had been completed) before March 15, 1983 and that the parties were bound to the deals with no further negotiation of terms of any consequence contemplated or necessary as of such date. The March 15, 1983 date was set for signing the operative agreements, other "ancillary" documents, and also the escrow agreement whereby the documents could be held "in limbo" pending requisite approvals of third parties as described hereinabove. Mr. Hershberg testified that the March 15, 1983 date was mutually extended to March 18, 1983, on which date the operative agreements as well as the escrow agreement were fully executed (i.e. signed by all parties). Mr. Hershberg described the strong desire of all parties to complete the proposed transactions, and noted that the documents had to be "in place" in order to get on the PACB's April calendar.

Motion and Order

On June 16, 1989, the Division of Taxation brought a motion seeking to reopen the hearing in this matter for the purpose of vacating the stipulation set forth above insofar as paragraphs 21 and 22 of the stipulation conclude that the Franchise as well as the operative agreements (the "Agreement of Sale" and the "Assignment of Ground Lease and Assumption")

were executed on (or before) March 18, 1983. More specifically, the Division questioned the absence of Sanford Weill's (AMEX's president) signature from copies of such documents as submitted to the Division with petitioner's Claim for Refund. By order dated December 20, 1989 the Division's motion was granted, with the parties' stipulation vacated to the extent that it concluded the operative agreements were fully signed on March 18, 1983. Pursuant to this Order, the hearing was reopened on February 14, 1990 for the purpose of presenting evidence and argument on the date of actual complete execution of the operative agreements.

The February 14, 1990 Hearing

On the February 14, 1990 hearing date, petitioner provided in evidence ink-signed originals of the operative agreements and of the Franchise. Each of these documents bears all signatures required thereon, including specifically that of Sanford Weill, as well as notarizations where required.

In addition to the originals of the noted documents, petitioner provided the testimony of one Steven Norman, Esq. Mr. Norman is, and was on March 18, 1983, AMEX's corporate secretary.

Mr. Norman was present at the March 18, 1983 meeting, held in AMEX's Boardroom, and testified to what transpired there. He was present only to serve as a notary witnessing the signatures and/or taking the acknowledgements of Sanford Weill and George Carmany. Mr. Norman was not himself a "party" to the transaction or a signatory on behalf of any of the parties thereto (see Finding of Fact "23", supra). Mr. Norman testified that several duplicate originals of the operative agreements were signed, that each was signed in his presence on March 18, 1983 in the same place (i.e., the Boardroom), that several persons were present (e.g., representatives of the parties, their attorneys, the notaries) and that he was fully familiar with Mr. Weill's signature. Mr. Norman testified specifically that he saw Mr. Weill present in the Boardroom on March 18, 1983, and that he saw Mr. Weill sign the operative agreements (8 or 10 of each such document) on such date. In turn, Mr. Norman testified he affixed his notarial stamp and signature immediately thereafter in witness. At hearing, Mr. Norman confirmed the

signature of Mr. Weill as appearing on the inked copies of the operative agreements as well as on the Franchise.

Sanford Weill did not appear in these proceedings. However, he submitted an affidavit stating that he signed the described documents on March 18, 1983.

Included with the Division of Taxation's motion papers and in evidence in these proceedings is petitioner's original Claim for Refund, attached to which is a photostatic copy of the Agreement of Sale (as filed with the Claim for Refund). Also included with the motion papers were copies of the Assignment of Ground Lease with Assumption and the Franchise. These copies (the "Division's copies") are identical in substantive content to the ink-signed originals as submitted on February 14, 1990 by petitioner. They differ only in that the signature of Sanford Weill does not appear on the Division's copies of the documents. The March 18, 1983 notarization for Mr. Weill's signature on the Division's copies, however, is by the same notary (Mr. Norman) and appears on both sets of documents, notwithstanding the absence of Mr. Weill's signature. On the Division's copies, as well as on petitioner's originals, all other signatures appear where called for, together with notarizations, dated March 18, 1983, where called for. Careful comparison of the Division's copies with the petitioner's inked originals reveals slight differences as to the physical placement of the various signatures. Such small differences in placement are inconsequential and are apparently attributable either to photocopying placement and/or to individual executions of multiple original copies of the documents.

Petitioner noted that the key documents for both transfers were placed in escrow to "give finality to the transactions' terms and to preserve the agreements pending approvals." In addition, the escrow agreement referenced the documents deposited therein to be "executed", and in turn defined "executed" to mean signed by an authorized officer of each party in question, and notarized, where provided for in the document.

Paragraph 18 of the Escrow Agreement relates, inter alia, to the potential enactment of a gains tax and provides, in pertinent part, as follows:

"In the event that as of the date of the fulfillment of the conditions of this escrow, there shall have been (x) enacted by the State of New York any legislation which shall have increased the Real Property Transfer Tax payable in connection with the conveyance of any interest in real estate or (y) the enactment of any legislation by the State of New York which shall impose a gains tax on the transfer of real property or any interest in real property or a tax of similar nature or import, whether similar or dissimilar to the gains tax heretofore enacted as Article 31-A of the Tax Law on July 11, 1981 ('Gains Tax') or (z) proposed for enactment by the State of New York any legislation or program which would increase the Real Property Transfer Tax or impose a gains tax either of which taxes would (i) be retroactive from the date of enactment to the date on which the escrow conditions are satisfied, or (ii) would effect any of the within transactions, then either Amex or O&Y, by notice to the other parties, may conclusively determine that the escrow conditions have not been satisfied. Within 10 days after such notice is given, any other party may elect to pay such increases by notice to the other parties, in which event such determination shall be of no force or effect."

CONCLUSIONS OF LAW

A. Article 31-B of the Tax Law, which became effective March 28, 1983, imposes (via Tax Law § 1441) a tax at the rate of ten percent on gains derived from the transfer of real property within New York State. Subdivision (n) of section 184 of chapter 15 of the Laws of 1983 provides that the tax imposed by Tax Law § 1441 "shall not apply to any transfer made on or before the effective date of [the act imposing the tax]."

B. Tax Law § 1443(6) provides the following exemption from the tax imposed by Tax Law § 1441:

"Where a transfer of real property occurring after the effective date of this article is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts and circumstances as determined by the tax commission. A written agreement to purchase shares in a cooperative corporation shall be deemed a written contract for the transfer of real property for the purposes of this subdivision."

It is this language, commonly referred to as the "grandfather provision", under which petitioner seeks exemption. In simplest terms, exemption is allowed if petitioner can prove the Broad Street transfer occurred pursuant to a written contract actually entered into on or prior to the March 28, 1983 effective date of the gains tax, with the actual date of contract execution confirmed by independent evidence.

C. Preliminarily, it should be noted that Tax Law § 1443(6) authorizes an exemption

from the gains tax. As such, this statute should be strictly construed against the petitioner, since an exemption is not a matter of right but is allowed only as a matter of legislative grace (Matter of Old Nut Co. v. New York State Tax Commn., 126 AD2d 869, 871, lv denied 69 NY2d 609, 516 NYS20 1025; Matter of Saratoga Harness Racing v. New York State Tax Commn., 119 AD2d 919, lv denied 68 NY2d 610).

D. In this case, petitioner alleges the operative agreements, and most specifically the Agreement of Sale, suffice to constitute a written contract for purposes of the exemption sought, maintaining further that the record contains sufficient independent evidence to confirm that such documents were executed on March 18, 1983. It is appropriate to treat first the issue of when the operative agreements were executed, for if the date of execution is not established as occurring on or before March 28, 1983, grandfather exemption could not be allowed notwithstanding that the documents themselves might form a written contract.

E. Tax Law § 1443(6) offers two examples of what would constitute independent evidence confirming the date of contract execution, to wit, recording of the contract or payment of a contract deposit. Neither of these acts occurred in this case. However, based upon review of all of the evidence, it is concluded that the record herein contains "other facts and circumstances" (Tax Law § 1443[6]) constituting "objectively verifiable corroboration" of the execution date of the documents as required under the statute (see Matter of Old Nut Co. v. State Tax Commn., 126 AD2d 869, 511 NYS2d 161, 162, lv denied 69 NY2d 609, 516 NYS2d 1025). In particular, what was challenged by the Division of Taxation was whether Sanford Weill signed the documents on or before March 18, 1983. None of the other signatures or their notarizations on such documents are challenged. In response to this challenge, petitioner furnished the ink-signed originals of the operative agreements (and of the Franchise), each of which includes Mr. Weill's signature. In addition, petitioner provided as a witness Steven Norman, the person who served as notary with regard to Mr. Weill's signature. Mr. Norman testified to such signing and notarization in particular, as well as to the process during which the documents in question were signed. Although employed by AMEX, Mr. Norman's only role in

the subject transfer was to serve as notary. He was neither a signatory to the subject documents nor a party to the transaction (see, Finding of Fact "23"). The duties and obligations of a notary are independent actions, with the fraudulent exercise thereof subject to criminal sanctions (see Penal Law § 175.35). It would be naive to suggest, much less conclude, that improper notarizations never occur. However, to support such a conclusion there must be some evidence of impropriety and here none is apparent.

In addition to the notarization evidence, the balance of the evidence conveys "a sense of binding action by the parties" sufficient to fulfill the independent evidence requirement (see 20 NYCRR 590.20). Perhaps most persuasive, in fact, is that it makes no sense to believe O&Y executed the operative agreements on March 18, 1983 (an uncontested fact), becoming bound thereon, but failed to assure that AMEX, by its president (Mr. Weill), also executed the documents on such date. His failure to sign on any of the multiple originals of the documents would have been a glaring omission which surely would have been noted by O&Y (or its attorneys) with rectification required. At worst, this supports a conclusion that the absence of Mr. Weill's signature on the Division's copies is most likely attributable to a missed signature on one of multiple sets of executed originals of the operative agreements.

Further, in connection with AMEX's request for approval to transfer the Franchise, AMEX filed a signed copy of the Assignment of Ground Lease with Assumption with the Bureau of Franchises. This filing was made at the request of the Bureau of Franchises, and the cover letter accompanying such filing bears a Bureau indate stamp of March 22, 1983 (a date prior to the effective date of the gains tax). In addition, the various documents were placed in escrow as described. A deposit of documents in escrow presupposes their existence. Noteworthy in this regard is the fact that the escrow agreement called for executed copies of, inter alia, the operative agreements, with executed defined to mean signed by all parties and notarized (see, Finding of Fact "69"). Hence, without more evidence to impugn the validity of any signatures, or their date of affixation, it is concluded that the operative agreements were signed by all parties on March 18, 1983.

F. Having concluded the operative documents were fully signed by March 18, 1983 leaves only the issue of whether such documents constituted a contract between the parties. As to the issue of whether the subject documents formed a contract, the Appellate Division has interpreted the grandfathered contract exemption language of Tax Law § 1443(6). In Estate of Lever v. New York State Tax Commn. (144 AD2d 751, 535 NYS2d 158) the Appellate Division concluded that the existence of a binding contract for purposes of Tax Law § 1443(6) is to be determined by "the objective intent of the parties as gathered from their expressed words and deeds (Wright v. Ford Motor Co., 111 AD2d 810, 811, 490 NYS2d 556)." (Estate of Lever v. New York State Tax Commn., supra, 535 NYS2d at 160.) This standard is controlling herein. The objective intent test articulated by the Appellate Division in Lever has long been the standard employed by the courts in New York to determine the existence of a binding contract (see, e.g., Mencher v. Weiss, 306 NY 1, 7; Homan v. Earle, 53 NY 267, 272). In determining the objective intent of the parties:

> "[D]isproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain (see Arnold v. Gramercy Co., 15 A.D.2d 762, 224 N.Y.S.2d 613, affd. 12 N.Y.2d 687, 233 N.Y.S.2d 687, Aker v. Fredella & Co., 227 App. Div. 226, 237 N.Y.S. 442; cf. Jemzura v. Jemzura, 36 N.Y.2d 496, 503-504, 369 N.Y.S.2d 400, 408-409)." (Brown Bros. Electrical Contractors, Inc. v. Beam Construction Corp., 41 NY2d 397, 400, 393 NYS2d 350, 352.) (Emphasis supplied.)

G. The subject transaction was clearly not a "garden variety" real estate closing. While the Broad Street transfer is the one at issue, it cannot be divorced from the related Parcel C transaction at Battery Park City. Only by viewing the entire picture, as opposed to focusing on the Broad Street transfer in isolation, can the objective intent of the parties be ascertained. The Division of Taxation argues, in essence, that the parties did not intend to be bound when they signed the operative agreements. More specifically, the Division argues that AMEX did not intend to be bound to transfer 125 Broad Street unless and until the Parcel C transaction at Battery Park City was also a binding commitment. In turn, since the Parcel C transaction required PACB approval, the Division argues that AMEX could not be bound until such approval was granted. However, the evidence (and the law) supports a contrary result -- namely

that AMEX agreed to sell 125 Broad Street and was bound to do so unless third-party action beyond AMEX's control made the Battery Park transaction fail, in which case the 125 Broad Street transfer would fail. The evidence strongly supports both parties' intent to be bound to the overall transaction as negotiated (i.e., AMEX to sell 125 Broad Street to O&Y, then lease it back while and until O&Y built and transferred to AMEX a new building at Parcel C).

In the instant matter, negotiations were ongoing between petitioner and O&Y, and between these parties and BPCA, over the course of a year. These negotiations resulted in an agreement with respect to the two transactions described. The parties in turn executed the operative agreements, plus other documents, on March 18, 1983 and placed the same in escrow as a means of preserving their agreement pending receipt of requisite third-party approvals. The parties then undertook to effectuate the transactions pursuant to the terms of the operative documents and, in mid-June of 1983, (after receiving the required approvals) did so.

A review of the various agreements, together with the conduct of the parties in respect of said agreements, compels the conclusion that the parties came to a meeting of the minds and mutually assented to the terms and conditions of the transactions. It is apparent that the parties' assent to the essential terms of the transactions, which are necessarily viewed as a whole, was final and that no further negotiations affecting the transaction in significant detail were contemplated (see Brause v. Goldman, 10 AD2d 328, 199 NYS2d 606, 611, affd 9 NY2d 620; cf. Estate of Lever v. New York State Tax Commn., supra). The parties' intent to be bound by the terms of the agreements is manifested by their conduct both preceding and following execution thereof (see Reprosystem, B.V. v. SCM Corp., 522 F Supp 1257, 1275 [SD NY 1981], affd in part, revd in part 727 F2d757, cert denied 469 US 828). In sum, at the time of execution of the agreements, the parties had committed themselves to the terms of the transfers, subject only to third-party activity beyond the parties' control. At that point neither party could unilaterally walk away without incurring liability for breach of contract. Moreover, both parties were bound by implied covenants of good faith and fair dealing to use their best efforts to complete the transactions (Norgate Homes, Inc. v. Central State Bank, 82 AD2d 849, 440

NYS2d 51, 53; see also, 22 NY Jur 2d, Contracts, § 201). More specifically, such covenants bound the parties to use their best efforts to gain the required third-party approvals.[3] Accordingly, pursuant to the objective intent standard articulated in Lever (supra) it is concluded that the operative documents formed a binding contract for purposes of Tax Law § 1443(6) at the time of execution on March 18, 1983.

H. In the context of the objective intent test, the pending third-party approvals may speak to some extent against the existence of a binding contract and in support of the Division's position (see Matter of Bredero Vast Goed, N.V. v. New York State Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105). However, the balance of the relevant facts herein, discussed above, strongly supports petitioner's position. With respect to such approvals, it seems apparent that the Board of Estimate (re: transfer of the Franchise) and PACB (re: Parcel C) approvals were, at the very least, highly probable at the time the agreements were executed. In reliance upon this expectation, both parties reached an agreement in principle, executed the agreements, proceeded to fulfill their respective obligations under the agreements vis-a-vis obtaining such approvals, and subsequently consummated the transfers pursuant to the agreements. The parties thus clearly intended to

be bound by the agreements, and, as has been concluded herein, were bound by the agreements upon execution on March 18, 1983. The sense is that all parties (including the third parties) wanted the transfers to occur, particularly O&Y as the developer under time constraints and in need of a cornerstone tenant at Battery Park City (see, Finding of Fact "5"). Even the potential

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[3]The third-party approvals herein are not unlike the "mortgage contingency" commonly encountered in residential real estate transactions, whereunder the purchasing party must perform its obligation to purchase the property as contracted for only if able to obtain a mortgage loan, the granting of which is an action beyond the purchaser's control (typically involving approval of a loan by a financial institution). There, as here, there is no question that the parties (purchaser and seller) are under contract; rather, the question is whether performance under such contract will be excused due to inability to secure third-party approval (i.e., a mortgage loan) (see, Cone v. Daus, 120 AD2d 788).

enactment of a gains tax was a third-party event beyond the control of both parties. The gains tax contingency language in the escrow agreement, obviously drafted in anticipation of enactment, did not serve to allow either party to unilaterally void the agreements. Even if (as happened) a gains tax was enacted, the escrow agreement provided that either party could give notice that such legislative enactment (a third-party event) defeated the contract. However, any other party could then elect to pay the tax thus rendering such notice of no force and effect and the transaction would proceed. Under the gains tax (Tax Law Article 31-B), the liability therefor is placed (at least initially) upon the transferor. Here, AMEX, as transferor, paid the tax (albeit under protest) and did not try to "escape" the transaction via the escrow terms. Even if AMEX had done so, O&Y could have paid the tax and the transaction would have proceeded. Hence, only if a third-party event occurred (a gains tax was enacted by the Legislature), and if neither side would pay such tax, would the contract be terminated. Simply put, the possible enactment of a gains tax was a planned-for contingency, the occurrence of which could serve to excuse fulfillment of the parties' existing contract. Here, the tax was enacted and it was paid according to its terms (pending resolution of the claim for exemption herein). In sum, the contract remained in effect and the subject transfer was effected pursuant thereto.

I. The Division also alleges the parties' failure to close the transactions contemporaneously with the signing of the operative agreements, as called for in the Agreement of Sale, means there was never a contract in that such failure shows the parties had no intent to follow the terms of the agreement they signed. Such argument places undue and disproportionate emphasis on a single act far beyond its contextual significance (Brown Bros. v. Beam, supra), and thus is rejected. In fact, contemporaneous closing would not have been possible given that closing could not occur prior to obtaining the noted third-party approvals.

J. In summary, as of March 18, 1983, the parties had reached agreement, reduced it to writing (the operative agreements), and executed such writings (on March 18, 1983). No further negotiations were contemplated or necessary. Only by third-party actions (i.e., PACB rejecting the Battery Park Transaction, Board of Estimate rejecting transfer of the Franchise or

enactment of a gains tax), each of which actions was entirely beyond the control of the parties, could the parties' obligation to perform (i.e., close the deal) under their agreement be defeated. This does not say that a contract did not exist; rather, this indicates that there existed a contract between the parties with performance thereunder subject to third-party controlled events. Once bound, as here, neither party could unilaterally withdraw. The proposed transactions fulfilled several needs, including AMEX's need for additional space. The structure of the transactions (the sale and leaseback of 125 Broad Street) served to provide AMEX with a continuing place of business until its new headquarters at Parcel C was completed. On the other hand, O&Y gained a needed "cornerstone tenant" for its development of Battery Park City as planned (and obligated). A sense of commitment to the transactions can be seen by AMEX's (as well, undoubtedly, by O&Y's) expenditure of substantial sums of money on the projects in the feasibility and negotiation stages (fees for attorneys, architects, engineers, etc.). In this, as well as in many cases, the escrow agreement serves as a useful (and commonly used) vehicle to hold documents (or other items) pending the happening of some specific future event(s). The creation and deposit of the noted documents into escrow not only confirms the existence of such documents, but also is indicative of the fact that the parties had reached agreement and were only awaiting outside approval.

In light of all of the foregoing, the transfer of real property at issue was made pursuant to a written contract the date of execution of which has been established as occurring before March 28, 1983. Hence, the transfer was exempt from gains tax pursuant to Tax Law § 1443(6).

K. The petition of American Express Company and American Express International Banking Corporation is granted, and the Division of Taxation is hereby directed to grant in full that portion of petitioner's April 4, 1985 refund claim denied by the Division, together with such

interest as is lawfully due and owing.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE