STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RUBIN BROTHERS HOLDING CO. & OTHERS	:	DETERMINATION DTA NO. 810562
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.	:	

Petitioners, Rubin Brothers Holding Co. & Others, 301 East 48th Street, New York, New York 10017, 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.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 12, 1993 at 1:15 P.M., with all briefs submitted by November 18, 1993. Petitioners appeared by Edwin R. Eisen, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly aggregated certain transfers of interests in real property owned by petitioners at 53 East 57th Street, New York City.

II. Whether the Division of Taxation properly calculated original purchase price with regard to the transfer in issue of real property known as 53 East 57th Street, New York City.

III. Whether petitioners have demonstrated that their failure to pay the proper amount of tax due was attributable to reasonable cause and not willful neglect.

FINDINGS OF FACT

On May 21, 1990, the Division of Taxation ("Division") issued to Rubin Brothers Holding Co. & Others ("Rubin Brothers") a Notice of Determination of Real Property Gains Tax Due, assessment identification number L-001679951-1, setting forth tax due of $68,137.20,

penalty of $23,847.97 and interest of $17,279.51, for a total amount due of $109,264.68.

An explanation of the assessment was included on an attachment to said notice and set forth the following:

> "The following computation of tax is in regards to the transfer of development rights associated with real property at 53 East 57th Street, as applied in accordance with Section 1440.7 of Article 31-B of the Tax Law and 590.43 of Gains Tax regulations.
>
> "The Department has examined the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers of the development rights, fee above the plane and leasehold with option, and has determined that the transfers are to be aggregated.
>
> "The $1 million threshold has been reached when all the transfers were aggregated, as follows:
>
> | | |
> |---|---|
> | Consideration | |
> | Development rights | $681,372.00 |
> | Fee above the plane | 22,916.66 |
> | Present value of leasehold with option to purchase | 2,379,924.30 |
> | Total Consideration | $3,084,212.96 |
>
> "Tax on the development rights as follows:
>
> | | | |
> |---|---|---|
> | Consideration | $681,372.00 | |
> | Less: Original Purchase Price | 0 | |
> | Gain | | $681,372.00 |
> | Tax on the above at 10% | | $68,137.20 |
>
> "Penalties and interest are due in accordance with Section 1446 of the Tax Law, from February 1, 1988."

In a related transaction which was the subject of a separate assessment not before this forum, the Division assessed Rubin Brothers, by assessment identification number L-001679952-9, dated May 21, 1990, for tax in the amount of $266,982.32, penalty of $93,443.73 and interest of $62,452.22, for a total amount due of $169,070.68, after payment of $253,807.59.

In an attachment to said assessment, the Division set forth the following explanation:

"The following computation of tax is in regards to two of three transfers associated with real property located at 53 East 57th Street, New York, NY, and is in accordance with Article 31-B of the Tax Law.

"Tax is computed as follows:

Fee above the plane	$22,916.66
Present value of leasehold with option to purchase	2,379,924.30
Consideration	$2,402,840.96
Less: Original Purchase Price (OPP)	0
Gain	$2,402,840.96

"Computation of additional consideration as provided by 590.9 of Gains Tax regulations:

.10 (Selling price - OPP) = .9X

.10 (2,402,840.96 - 0) = .9X

240,284.09 = .9X

240,284.09 / .9 = X

266,982.32 = X

"X in the equation equals the amount of tax due when the transferee pays the gains tax on behalf of the transferor.

"Interest and penalties are also due in accordance with Section 1446 of the Tax Law, from February 1, 1988.

"Payment made by transferee, 57-57th Associates, in the amount of $253,807.57 received March 15, 1990, is shown."

On January 26, 1993 and January 29, 1993, Rubin Brothers and the Division, respectively, entered into a stipulation for discontinuance of the proceeding with regard to assessment identification number L-001679952-9 in which petitioner agreed to pay additional real property gains tax of $13,174.73, plus interest and penalty.

From Findings of Fact "1" and "2" above, it is apparent that the transactions underlying the two assessments are inextricably intertwined, since the aggregation of the development rights subjected to real property gains tax in this matter was with the two transfers which were the subject of the matter described in Finding of Fact "2". Therefore, where necessary and

relevant, facts from the matter not in issue and previously settled, concerning assessment number L-001679952-9, will be referred to in this determination.

On August 14, 1987, Rubin Brothers entered into an agreement with WZ 58th Street Associates ("WZ 58th"), a New York general partnership with a principal place of business in care of Zeckendorf Company, 55 East 59th Street, New York, New York, whereby Rubin Brothers transferred to WZ 58th the excess transferable development rights ("TDR") associated with its property at 53 East 57th Street, permitting WZ 58th to construct a building containing more floor area than is available to it under the New York City Zoning Regulations. The difference between total floor area available at the Rubin Brothers' property at 53 East 57th Street as determined by the New York City Zoning Regulations and the actual existing floor area is referred to as "unused floor area". The unused floor area and all development rights available at the Rubin Brothers' property as of August 4, 1987 pursuant to the New York City Zoning Regulations but not exercised as of that date were referred to as the "excess development rights". It was these rights which were transferred to WZ 58th for the sum of $450,000.00 and the lesser of $275,000.00 or the aggregate of payments of $22,916.66, payable monthly between September 1, 1987 and August 31, 1988. In fact, the additional amount paid totalled $231,372.00 for a total consideration paid by WZ 58th for the development rights of $681,372.00.

By way of background, WZ 58th contained a general partner known as Z 57th Street Limited Partnership ("Z 57th"), which in turn contained a general partner known as Z 57th Street, Inc. Petitioner never explained the identities of these entities.

The development rights were ultimately transferred to 57-57th Associates on November 18, 1987. 57-57th Associates was a development partnership of which WZ 58th was one of the general partners, the other being Bermuda Shops Limited. 57-57th Associates had the same address as WZ 58th, i.e., in care of Zeckendorf Company, 55 East 59th Street, New York, New York.

According to testimony of Abraham Kaplan, vice-president of Z 57th Street, Inc., WZ

58th was obligated to transfer whatever rights it had in adjoining properties to 57-57th Associates.

Rubin Brothers filed a transferor questionnaire which indicated that the transfer of the TDR to WZ 58th was anticipated to take place on November 18, 1987 for a consideration of $681,372.00. A transferee questionnaire was filed by WZ 58th which also indicated the transfer of TDR on the same anticipated date and for the same consideration. The transferee questionnaire was signed by Abraham Kaplan, vice-president of Z 57th Street, Inc. The transferor questionnaire was dated September 19, 1989, while the transferee questionnaire was dated October 30, 1989. A real property transfer gains tax affidavit was filed by Rubin Brothers on or about November 18, 1987 which indicated the transfer of real property (the TDR) to 57-57th Associates, the real property being located at 53 East 57th Street, New York, New York, and that the consideration therefor was $4,522.05. The affidavit also claimed that the transfer was exempt from tax because the consideration was less than $500,000.00 and was not a partial or successive transfer pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of Article 31-B of the Tax Law.

The agreement for the sale of the TDR indicated that two real estate brokers were to earn commissions on the sale, namely, Mr. Albert Bialek, president of Bialek Associates, Inc., and Mr. Arnold Gumowitz, representing Arnold Gumowitz Real Estate. Additionally, a handwritten notation on the agreement indicates that Rubin Brothers also dealt with one Steven Riker of Abrams, Benesch and Riker. However, it is not known if any additional commissions were due to Mr. Riker.

By letter dated November 2, 1989, Rubin Brothers requested a tentative assessment indicating no tax due on the transaction with WZ 58th and the sale of the TDR.

Mr. Kaplan, vice-president of Z 57th Street, Inc., testified that, prior to the transfer of the TDR on November 18, 1987, the Zeckendorf organization, through one of the realtors named in the TDR agreement, Albert Bialek, sought to purchase the entire fee interest in the

Rubin Brothers' property at 53 East 57th Street on two separate occasions.

By letter dated October 27, 1987, Mr. Bialek, acting on behalf of his "customer", William Zeckendorf, Jr., indicated that Mr. Zeckendorf was prepared to purchase the fee ownership in 53 East 57th Street for $9,000,000.00 in addition to the $2,000,000.00 "that he has already agreed to pay for the unused development rights." The October 27, 1987 letter also indicated that Mr. Zeckendorf had agreed to assume Rubin Brothers' obligation to pay Mr. Bialek his brokerage commission.

In a letter, dated November 4, 1987, Mr. Bialek made a second offer on behalf of "our customer", William Zeckendorf, Jr., indicating that Mr. Zeckendorf was prepared to purchase the fee ownership in 53 East 57th Street for $10,000,000.00 in addition to the $2,000,000.00 "that he has already agreed to pay for the unused development rights." Once again, Mr. Bialek indicated that Mr. Zeckendorf had agreed to assume any obligation on behalf of Rubin Brothers to pay Mr. Bialek his real estate commission. Both of these offers were rejected.

During the same period, the fall of 1987, Rubin Brothers was negotiating to lease its property with Siegel Consultants, Ltd. By letter dated June 14, 1991, from Joan Siegel, president of Siegel Consultants, Ltd., written at the request of Mr. Cyrus Rubin, Ms. Siegel confirmed the negotiations that had transpired between the two companies concerning a proposed lease of 53 East 57th Street to one Bonni Keller, who intended to open a Geoffrey Beene retail shop during the late summer and fall of 1987. The offer at that time was for a 15-year lease commencing at $450,000.00 per year, increasing to $550,000.00 by the end of the 10th year, with adjustments thereafter. Ms. Siegel indicated that her company was an active real estate brokerage company, specializing in leasing Madison Avenue, Fifth Avenue and East 57th Street properties to high-end fashion tenants, representing such clients as Burberry's, Calvin Klein, Fortunoff and Bonni Keller. Rubin Brothers rejected the lease offer because it considered Bonni Keller a risk.

Rubin Brothers is a family partnership which was formed by three brothers in 1940. The original brothers purchased 53 East 57th Street on January 29, 1948. The property remained in

the family until the transactions in issue. The current owners of Rubin Brothers are the second and third generation of the brothers.

Although the development rights had been sold, Rubin Brothers continued to try to lease its property. In addition to the negotiations with Siegel Consultants, Ltd. noted in Finding of Fact "10", Rubin Brothers also negotiated with one Helen Wall of Judson Realty in December of 1987, but no offer materialized.

On February 1, 1988, Rubin Brothers entered into an agreement with 57-57th Associates whereby Rubin Brothers agreed to sell and convey to 57-57th Associates that portion of its property at 53 East 57th Street lying above a horizontal plane drawn at elevation 81.14 feet above the datum used by the Topographical Bureau, Borough of Manhattan ("fee above the plane"), in consideration of $22,916.66. Pursuant to the real property transfer gains tax affidavit filed in this matter, the transfer took place on May 5, 1988.

Also on February 1, 1988, Rubin Brothers entered into an indenture of lease with 57-57th Associates, the term of which was 10 years beginning on February 1, 1988 and expiring on the 10th anniversary but subject to extension. The rent payable under the lease varied in accordance with a schedule set forth therein.

Finally, on February 1, 1988, Rubin Brothers entered into a purchase agreement with 57-57th Associates for certain land, buildings and improvements erected on premises located at 53 East 57th Street, New York City, excluding excess development rights and the fee above the plane, both of which had been transferred previously. Consideration for the transfer was either $5,000,000.00 in cash or certain property of equivalent value (a condominium unit in the building to be built on or near the site of the property being transferred pursuant to the purchase agreement). The purchase agreement provided that Rubin Brothers would deliver to an escrow agent the executed, acknowledged deed for the subject premises along with the return required for payment of the New York City real property transfer tax, an affidavit pursuant to section 1445 of the Internal Revenue Code, and a transferor questionnaire for purposes of the New York State real property transfer gains tax. Purchaser placed in escrow $500,000.00 of the

purchase price and agreed to pay an additional $4,500,000.00 at the closing of the premises if the cash option was exercised on the 5th anniversary date of the purchase agreement.

In case the seller decided to exercise the exchange option, the purchase agreement provided that the purchaser would transfer to Rubin Brothers title and fee simple to a conforming condominium unit constructed upon the real property located at Block 1293 on the tax map of the City of New York, Borough of Manhattan (adjacent to petitioner's property). That transfer was to take place on or after the 45th day from the date the purchaser delivered to the seller notice that the purchaser or its affiliate (acting as sponsor of the plan for the conforming condominium unit) had proceeded to amend the plan filed with the New York State Department of Law to declare said plan effective and certifying that the conforming condominium unit was substantially complete and that purchaser was prepared to close title under the exchange option.

In a transferor questionnaire filed by Rubin Brothers on March 6, 1990, it disclosed the transfer of the leasehold grant on February 1, 1988 for a gross consideration of $2,402,840.66 and an original purchase price of $95,499.00. It declared a gain subject to tax of $2,307,341.66 and tax due of $256,371.00. The consideration included consideration of $22,916.66 for the transfer of the fee above the plane, also transferred on May 5, 1988. By letter dated March 14, 1990, the law firm of Whitman & Ransom remitted $253,807.59 of the tax reported due on the transferor questionnaire, stating therein that the balance would be paid within the week.

Rubin Brothers filed two real property gains tax affidavits for the transfers of the fee above the plane and the leasehold interest on May 5, 1988. It indicated on the affidavit concerning the transfer of the fee above the plane that the transfer was exempt from gains tax based upon the exemption for transfers where consideration is less than $500,000.00. In the affidavit regarding the transfer of the leasehold interest, Rubin Brothers claimed an exemption from gains tax on the basis that it was not a transfer of real property within the meaning of Tax Law § 1440.7. However, as noted above, Rubin Brothers ultimately acquiesced in the aggregation of the transfer of the fee above the plane and the leasehold interest coupled with the

purchase agreement and paid the gains tax due thereon.

Although the allocated original purchase price set forth on the transferor questionnaire with regard to both the fee above the plane and the leasehold interest was stated to be $95,499.00, Rubin Brothers' purchase price of the property was also stated to be $246,000.00. The amount set forth on the transferor questionnaire allegedly represented the amount of the original purchase price allocable to the lease, the fee above the plane and the development rights contract pursuant to the provisions of the regulations at 20 NYCRR 590.19 and 590.28.

Mr. Cyrus Rubin, a partner in Rubin Brothers who testified at hearing, indicated that he had worked for Arnold Gumowitz Real Estate, the same company owed a commission as set forth in the sale of the TDR contract. Mr. Rubin was not a broker, but a licensed real estate salesman. Mr. Rubin and Mr. Gumowitz had a "blow off" when Mr. Gumowitz failed to pay Mr. Rubin commissions owed to him.

Mr. Rubin's memory of the chronology of the transactions in issue was clouded. He claimed not to have been interested in any adjoining or contiguous properties, whether they were the subject of any plan by his neighbor, William Zeckendorf, or his affiliated companies and partnerships, although he stopped short of actually denying knowledge of such a plan or development.

Mr. Rubin testified that, despite his background in real estate and substantial holdings, he did not understand what development rights were when Mr. Bialek offered to purchase them on behalf of Mr. Zeckendorf and testified that the term was very unfamiliar to him. However, he stated that after the term was explained to him, he discussed it with his partners and they decided, since they had no intention of expanding their building, to sell those rights and retain the building.

Mr. Rubin acted as a real estate salesperson for Rubin Brothers in addition to his other responsibilities as a partner for petitioner, but he did not recall ever negotiating the purchase agreement for the property entered into with 57-57th Street Associates.

Petitioner submitted the 1992 U.S. Partnership Return, Form 1065, which it said

indicated that the value of the property located at 53 East 57th Street, New York, New York, was included in the balance sheet under "building and other depreciable assets" of $64,706.00. The value of the land was stated to be $106,294.00. The total cost listed for both items was $171,000.00.

As set forth earlier in Finding of Fact "5" above, WZ 58th was obligated to contribute any rights it acquired in adjoining properties to 57-57th Street Associates.

Around the time the Zeckendorf affiliates were bargaining for the purchase of properties in the 57th Street and 58th Street area, they were simultaneously entering into negotiations with a company known as EIE International ("EIE"), a Japanese firm which held a substantial interest in Regent Hotels, for EIE's participation in this joint venture.

Originally, 57-57th Street Associates only held an interest in a hotel on 58th Street through a sister company. Then it purchased (through 58 Associates) the development rights from Rubin Brothers in November 1987. After that, 57-57th Street Associates acquired two brownstones in the area from The Bermuda Shops, a joint venture. At that time, the plan was to acquire properties in the area to build a mixed-use building, a combination of a hotel and residential condominiums. The development plan evolved from a small boutique hotel to the development of a 500-room hotel. The arrival on the scene of EIE played a large part in the change in plans.

57-57th Street Associates negotiated with EIE from January to June 9, 1988. An agreement was allegedly signed on June 13, 1988. That agreement called for WZ 58th to sell its partnership interests in 57-57th Street Associates to EIE or a company under its control.

Following the gains tax filings made by Rubin Brothers in connection with the sale of the fee above the plane and the 10-year lease coupled with the purchase agreement, by letter dated March 22, 1990, the Division informed attorneys for Rubin Brothers that further documentation was needed to establish the claimed $246,000.00 purchase price. No response to this request appeared in the record.

In response to the Notice of Determination issued by the Division on May 21, 1990 to

Rubin Brothers, assessment number L-001679951-1, Rubin Brothers Holding filed a request for conciliation conference on July 18, 1990. The Notice of Determination was sustained by Conciliation Order dated December 13, 1991 and petitioners timely petitioned said order before the Division of Tax Appeals on March 2, 1992. The Division filed its answer to said petition on June 26, 1992.

By letter dated February 27, 1990, the Division notified representatives for Rubin Brothers that it was awaiting the required questionnaires and supporting documentation regarding the aggregation of development rights and leasehold for property located at 53 East 57th Street.

By letter dated May 16, 1990, in a letter to the Division from Edwin R. Eisen, Esq., attorney for Rubin Brothers, petitioners took issue with the aggregation of the sale of the development rights and the subsequent agreement for lease of the premises at 53 East 57th Street and the sale of the fee above the plane as well as the purchase agreement. Mr. Eisen ended the letter by concluding that the facts supported his contention that no gains tax is due because the sales should not be aggregated.

The purchase agreement entered into between Rubin Brothers and 57-57th Street Associates, dated February 1, 1988, indicated that the parties chose the same broker involved in the development rights purchase agreement, i.e., Albert Bialek Associates, Inc., by Mr. Albert Bialek.

In addition, Paragraph 17 of the same agreement concerning the brokers in the sale transaction provided that the parties to the agreement would indemnify and defend each other and hold each other harmless against any claim by any other broker or person including A. Gumowitz Real Estate, by Arnold S. Gumowitz, "with whom seller has advised purchaser that a dispute exists" for any commissions in connection with this specific transaction. Mr. Gumowitz was also involved in the TDR transaction and employed Mr. Rubin.

CONCLUSIONS OF LAW

A. Tax Law § 1441, effective March 28, 1983, imposed a tax on gains derived from the

transfer of real property within the State of New York. The tax is applied at the rate of 10% of the gain. Tax Law § 1443.1 provides that a total or partial exemption is allowed if the consideration is less than $1,000,000.00. Petitioners contend that their transfer of development rights in property they owned at 53 East 57th Street in New York City should not have been aggregated with their subsequent transfer of the fee above the plane and a leasehold interest in the same property coupled with a purchase agreement exercisable on the fifth anniversary of the lease. If the transfer of the development rights is not aggregated with the subsequent transfers, the consideration would be less than $1,000,000.00 and not subject to gains tax pursuant to Tax Law § 1443.1. Of course, once a transaction has been determined to be subject to tax, the party claiming the exemption must clearly demonstrate its entitlement thereto (Matter of Sanjaylyn Co. v. State Tax Commn., 141 AD2d 916, 919, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55).

It is noted from the outset that the term "interest", when used in connection with real property, includes the transfer of development rights (see, Tax Law § 1440.4; 20 NYCRR 590.3, 590.63).

The phrase "transfer of real property" is defined in Tax Law § 1440.7 as the transfer or transfers of any interest in real property by any method, including but not limited to a sale. The third sentence of Tax Law § 1440.7 states, in part, as follows:

> "Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article . . . ."

The unique aspect of this case is that the Division seeks to aggregate several transfers of interests in the same real property, to wit, the excess development rights, the fee above the plane and the leasehold interest coupled with the purchase agreement. Petitioners conceded the propriety of aggregating the latter two interests, but contend that the excess development rights should not be aggregated with those other two interests.

The Division's determination that the transactions in issue should be aggregated and subjected to the real property gains tax was based upon several theories. The first is that the

transfers in question were properly aggregated as a single transfer of real property by one transferor to one transferee, citing the regulation at 20 NYCRR 590.42 and the first sentence of Tax Law § 1440.7, which provide that certain transfers of real property shall be treated as a single transfer and aggregated for gains tax purposes. Essentially, the Division analogized the instant matter to the transfer of contiguous or adjacent parcels of property to one transferee.

Alternatively, the Division argued that the manner in which the transfers in issue were effected was more in the nature of subdividing, where transfers of subdivided interests in real property are subject to aggregation (see, 20 NYCRR 590.43[g]).

A third theory under which the Division believed the transfers of the three interests in 53 East 57th Street should be aggregated was pursuant to Tax Law § 1440.7 and 20 NYCRR 590.43, where one transferor transfers contiguous or adjacent parcels of land to more than one transferee pursuant to a plan or agreement. It is determined that under any one of these three theories the Division properly aggregated the three transactions or transfers and assessed additional real property gains tax on the transfer of the excess development rights.

In Matter of General Builders Corp. (Tax Appeals Tribunal, December 24, 1992), the Tribunal set forth the following analysis with regard to a situation where two transactions must be treated as a single transfer and the proceeds aggregated:

> "In determining whether petitioner's transactions are subject to the gains tax, the focus of the analysis is on the economic reality of the transactions (Matter of Bredero Vast Goed, N.V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105 [where the court sustained looking through two tiers of entities to find a transfer of real property]). This requires examining the circumstances surrounding the entire transaction including, of course, events which may have occurred many months before the actual closing of title to the property (Matter of Bredero Vast Goed, N.V. v. Tax Commn., supra). In order to analyze whether a taxable transaction has occurred, previous cases have looked at the entire transaction to determine such things as the identity of the transferors or transferees (Matter of Howes, Tax Appeals Tribunal, September 22, 1988, affd 159 AD2d 813, 522 NYS2d 972; Matter of Brooks, Tax Appeals Tribunal, September 24, 1992; Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988) or whether adjacent or contiguous parcels are related (Matter of Albany Pub. Markets, Tax Appeals Tribunal, August 27, 1992; Matter of Armel, Tax Appeals Tribunal, July 23, 1992; Matter of Eff & Zee Co., Tax Appeals Tribunal, April 16, 1992)."

The regulation at 20 NYCRR 590.42 provides, in part, as follows:

"Question: Is the consideration received by a transferor for the transfer of contiguous or adjacent parcels of property to one transferee added together for purposes of applying the $1 million exemption?

"Answer: Generally, yes. A transfer of real property is defined in section 1440(7) of the Tax Law to mean 'the transfer or transfers of any interest in real property.' Thus, the separate deed transfers of contiguous or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property. It is the consideration for the interest in a single transfer, regardless of the number of deeds used to transfer the property, that is used to determine the application of the $1 million exemption.

"However, if the transferor establishes that the only correlation between the properties is the contiguity or adjacency itself, and that the properties were not used for a common or related purpose, the consideration will not be aggregated."

The true economic realty of the transactions in issue indicates that Rubin Brothers made three transfers of interests in real property, to wit, development rights (Tax Law § 1440.4; 20 NYCRR 590.63), a leasehold interest and a contract to purchase real property (Tax Law § 1440.4), and a transfer of the fee above the plane or air rights (20 NYCRR 590.64). Uncontradicted circumstantial and documentary evidence demonstrated that the transfers were made to entities controlled by William Zeckendorf, i.e., WZ 58th and 57-57th Street Associates. The purchase and leasehold agreements were executed by 57-57th Street Associates, as purchaser and tenant, respectively, and also by WZ 58th Street Associates, a general partner; Z 57th Street Limited Partnership, a general partner; Z 57th Street, Inc., a general partner, by Abraham Kaplan, vice president. The purchaser of the excess development rights was listed and subscribed as WZ 58th Street Associates, a New York general partnership, and also Z 57th Street, Inc., a New York corporation, as general partner, by Abraham Kaplan, vice president. At hearing, Mr. Kaplan identified himself as being associated with WZ 58th Street Associates in his capacity as vice-president of 57th Street, Inc., a general partner in 57th Street Limited Partnership, which was in turn a general partner of WZ 58 Associates. He also referred to his employer as "actually Zeckendorf Realty Corporation" (tr., p. 106).

Although the Division urges the application of the look-through principle in order to determine the true beneficial owner involved in a particular transaction, citing Matter of 307 McKibbon St. Realty Corp. (Tax Appeals Tribunal, October 14, 1988), petitioners have not

seriously challenged the common beneficial ownership interest in the transferees herein. The record establishes that William Zeckendorf, a noted New York real estate developer, through various entities controlled by him, pursued various owners of real property in the 57th and 58th Street area between Madison and Park Avenues for the purpose of an assemblage which would be converted into one of several uses planned by him. Although petitioners faintly raise the argument that, in fact, the ultimate transfer of the 57-57th Street Associates partnership interest to EIE International altered the ultimate transferee herein, the documentation does not support such a conclusion. Further, petitioners had a duty to prove that the transfers were made to multiple rather than single transferees where such a strong inference of affiliation exists, such as who executed the documents for purchasers in issue and the titles of each of the partnerships and corporations involved (see, Matter of Swan, Tax Appeals Tribunal, January 14, 1993).

In order for the transactions in issue to fall within the purview of 20 NYCRR 590.42, it is necessary to consider the three transactions one transfer of real property for purposes of the gains tax.

In Matter of Eff & Zee Co. (Tax Appeals Tribunal, April 16, 1992), the Tribunal elaborated on the meaning of 20 NYCRR 590.42 as follows:

> "Regulation 20 NYCRR 590.42 addresses a scenario where a taxpayer transfers contiguous or adjacent parcels of land to a single transferee. This regulation states that multiple transfers under this scenario will be treated as a single transfer for purposes of applying the $1 million exemption, unless the taxpayer can show that 'the only correlation between the properties is the contiguity or adjacency itself' and that 'the properties were not used for a common or related purpose.' This regulation has been held to require two distinct showings by the taxpayer in order to prevent aggregation (Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988 [first requirement]; Matter of Sanjaylyn Co. v. State Tax Commn., 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55 [second requirement]; Matter of Bombart v. Tax Commn. of State of New York, 132 AD2d 745, 516 NYS2d 989 [second requirement]; Matter of Von-Mar Realty Co., Tax Appeals Tribunal, December 19, 1991 [recognizing two distinct requirements]). Thus, it is only where a taxpayer meets the dual requirements of 20 NYCRR 590.42 -- both of which ignore subjective intent and look only to the properties themselves -- is the Division precluded from aggregating the consideration from such sales."

A strong analogy can be drawn between contiguous or adjacent properties and the various interests in one parcel of real property, i.e., the development rights, fee above the plane and

leasehold interest coupled with a purchase agreement. The more important test, and the second requirement of the regulation, necessary for the taxpayer to demonstrate that the interests or transfers should not be aggregated is that the properties were not used for a common or related purpose. However, the parcel in issue was presumably purchased by petitioners' forefathers from one transferor (no facts in the record indicate anything to the contrary) in the late 1940's (tr., p. 52) and held as investment property by the partnership for over 40 years. The partnership return in evidence as petitioners' Exhibit "2" indicated that the primary activity of the partnership was real estate and the description of its property in said return listed one commercial building at 53 East 57th Street in New York City.

Cyrus Rubin, a general partner in Rubin Brothers, testified that his primary business was as a shoe manufacturer, having also served as a real estate salesman with Mr. Gumowitz. Mr. Rubin stated that the family did not want to sell the property because it was the holding company's most precious piece of property. Instead, the property was leased, providing a steady stream of income to the partners. The concept of a steady stream of income was very important to Rubin Brothers as further indicated by the terms of the sale of the development rights which included a lump-sum payment of $450,000.00 and 12 monthly payments of approximately of $23,000.00 per month.

In any event, it is clear that the property was held as a real estate investment providing a steady stream of income to the partners. This investment purpose applied to all of the interests in 53 East 57th Street, including the development rights, air rights or fee above the plane, and leasehold interest coupled with a purchase agreement. The whole and each of its component parts were held for investment purposes, thus establishing that there was a correlation between each of the interests transferred above and beyond contiguity or adjacency and, in addition, that the interests were used for a common or related purpose, i.e., investment purposes. In Matter of Iveli v. Tax Appeals Tribunal (145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003), the court found that there was a common or related purpose where the "buildings on each parcel were held for investment purposes" and, therefore, the parcels were properly

aggregated. In Matter of Bombart v. Tax Commn. (132 AD2d 745, 516 NYS2d 989), the court found that the parcels therein were used for a common or related purpose where "petitioner operated them through a single management company for the same income-producing purpose, i.e., rental of residential apartment units" and were properly aggregated.

Petitioners argue that the Division did not have the right to raise the issue of whether the transfers should be aggregated based upon 20 NYCRR 590.42. However, this regulation specifically deals with aggregation in circumstances very similar to those occurring herein. The Division raised no additional facts, only applied the law and regulation to the facts adduced at hearing and, as such, is within its right to raise this issue. Further, petitioners have not been prejudiced by the raising of this issue since they had a full opportunity to rebut the Division's arguments in their reply, an opportunity of which they availed themselves fully.

Petitioners claim that case law prohibits a memorandum of law from raising a new theory for the Division's determination to aggregate the sales herein. However, there is no basis for this assertion. The cases cited by petitioners are inapposite. In Matter of Mattone v. State of New York Dept. of Taxation & Fin. (144 AD2d 150, 534 NYS2d 478), the court did not consider the issue of whether the Division's determination (that sales of buildings should be aggregated pursuant to Tax Law § 1440[7]) was or was not supported by substantial evidence because the issue had not been preserved for judicial review. However, in that case, the issue of aggregation had not been raised by the petitioner at the administrative level as in the instant matter. In Matter of Koren-DiResta Construction Co. v. State Tax Commn. (138 AD2d 909, 526 NYS2d 654), the court stated that, as a general rule, objections not raised at the hearing or board level may not be raised for the first time in the application for judicial review, specifically referring to alleged errors committed by the auditor in his treatment of several transactions. The court stated that objections are required to be stated in the petitions for redetermination with sufficient detail to identify exactly what action of the audit bureau the petitioner is protesting. That was clearly not the case here when the legal theory of aggregation had been raised. It is noteworthy that both of these cases involve situations where the petitioners were raising issues

and objections for the first time on judicial review, not review before an Administrative Law Judge. Finally, the Tax Appeals Tribunal has a long-standing policy of entertaining issues based upon the record before it and by this same rule it is determined that the same policy applies at the Administrative Law Judge level (see, Matter of Rizzo, Tax Appeals Tribunal, May 13, 1993; Matter of Jericho Delicatessen, Tax Appeals Tribunal, July 23, 1992).

B. The Division has also asserted that the transfers in issue were properly aggregated pursuant to 20 NYCRR 590.43(g) which states as follows:

> "Question: Will the subdividing of real property be subject to aggregation pursuant to section 1440(7) of the Tax Law?
>
> "Answer: Yes. Section 1440(7) of the Tax Law specifically provides that all subdividing of real property is subject to the aggregation rule, except in the case where the subdivided property is improved with residences and is used for residential purposes, other than those pursuant to cooperative or condominium plans."

Although not the typical subdivision of real property, the transfers in issue added up to a transfer of the entire parcel owned by petitioners. More succinctly put, the whole is equal to the sum of all its parts.

In Bombart v. Tax Commn. (supra), the court found substantial evidence to support the Division's finding that the sale of three contiguous parcels to one transferee was originally intended to be perfected as a single transaction for a single unapportioned purchase price. In Bombart, the petitioner had originally contemplated transferring the parcels under one contract to a single purchaser and then changed the structure of the sales by selling each of the three parcels individually. The parcels were contiguous, acquired by a single deed from a common grantor, and the petitioner operated them through a single management company for the same income-producing purpose. The court in Bombart noted the following legislative purpose behind Tax Law § 1440(7):

> "The expansive definition of real property, the legislative purpose of maximizing revenues from the tax and the inclusion of only two narrow exceptions to the broad reach of the statute as to apportionment of consideration or separate treatment of subdivided parcels, all support the conclusion that the originally planned sale to Infinity Corporation under one contract would properly have been deemed a single sale exceeding the $1 million exemption."

Many of the same ingredients appear in the instant matter where the interests were more than contiguous, being component parts of the whole. They were presumably acquired by a single deed from a common grantor, they were operated and managed by Rubin Brothers for the same income-producing purpose, and the structure of the sales, although not as definitive as the facts in Bombart, are still compelling. The contracts in issue were executed within a very short period of time. The contract for the sale of the development rights was executed on August 14, 1987 and closed on November 18, 1987. The contract for the fee above the plane was executed on February 1, 1988, as were the lease and purchase agreements. The lease agreement took effect immediately and it cannot be determined from the record when a closing took place on the other contracts since no documentation was provided by petitioners to substantiate same. Although Abraham Kaplan, of Zeckendorf Realty Corporation, testified that the closing took place on June 16, 1988, nothing in the record supports that assertion and, without more, it is not found to be credible.

Although purposefully left unexplained by petitioners, there were common brokers in at least two of the transactions. The contract for the sale of the development rights indicated that one of the co-brokers was Mr. Arnold Gumowitz, the same broker with whom Mr. Cyrus Rubin had been affiliated prior to the sale and who was specifically mentioned in the purchase agreement (although only to hold purchaser harmless from his claims). Both WZ 58th and 57-57th Street Associates employed Albert Bialek, who appeared as a co-broker on the sale of the development rights and the purchase agreement. In addition, Mr. Bialek was the author of the October 27, 1987 and November 4, 1987 letters to Mr. Rubin which indicated Mr. Zeckendorf's interest in the property at 53 East 57th Street.

Although Mr. Cyrus Rubin had difficulty remembering the specifics of the transactions in issue, given the magnitude of the transactions which occurred and the importance of these transactions to Rubin Brothers' sole investment property, it seems inconceivable that Mr. Rubin could have been so uninformed about Mr. Zeckendorf's plan for a tract of land which included the parcel in issue. Mr. Rubin's testimony that he was not interested in anyone's property other

than his own is not credible in light of the other facts and circumstances in the record. Also without credibility was Mr. Rubin's testimony that the transferable development rights held little value to the partnership and therefore it sold them because it had no intention of developing its property any further, ignoring the fact that the right to develop is an inherent component of the ownership of real property. The right to develop has been put more poetically as follows:

> "There is nothing which so generally strikes the imagination, and engages the affection of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (Blackstone, Book 2, ch 1, p. 2 [15th ed 1809]).

By selling the development rights to 53 East 57th Street, Rubin Brothers was permanently encumbering that real property, diminishing its value and making it a less attractive product on the real estate market -- that is, less attractive to all except William Zeckendorf or one of his controlled affiliates. For only Mr. Zeckendorf could purchase the other component parts of the property and regain the whole.

It is determined that the subdivision of 53 East 57th Street by its component parts, the interests which were sold herein, constituted a subdivision of property within the meaning and intent of the regulation at 20 NYCRR 590.43(g) and the Division properly aggregated pursuant to this regulation.

C. The Division also asserted that the transfers in issue should be aggregated under 20 NYCRR 590.43(a) which applies the aggregation clause of Tax Law § 1440.7 to the case of one transferor, more than one transferee and the transfer of contiguous or adjacent parcels of land. The regulation also requires that the sales be pursuant to a plan or agreement and that a transferor may furnish a sworn statement to the effect that there was no plan or agreement to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of the gains tax. However, whether the sales are pursuant to a plan or agreement also depends on the intent of the transferor at the time of each transfer and that the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers, will also be examined to determine if the transfers should be aggregated. In the

instant matter, after an examination of the circumstances, the Division determined that the facts and circumstances dictated that the transfers be aggregated.

The Division's argument is in the alternative to its determinations under the prior two regulations wherein there was no requirement that there be more than one transferee or an intent. For purposes of arguing the applicability of 20 NYCRR 590.43(a), it is assumed that there was more than one transferee, i.e., WZ 58th and 57-57th Street Associates. It has already been determined that there was one transferor and that the interests which were transferred were, by analogy, contiguous or adjacent. The key element in this regulation is whether or not the transfers were pursuant to an agreement or plan. The facts set forth above with regard to 20 NYCRR 590.43(g) more than amply demonstrate that petitioners' plan was to transfer all the interests in their real property, albeit by partial or successive transfers.

Although Mr. Rubin denied the existence of a plan or agreement to transfer the property by partial or successive transfers, he did not address himself to each of the facts in the record which indicate otherwise, seemingly more interested in denying any interest in or knowledge of the Zeckendorf schemes which were occurring all around him during the period in issue. The courts and the Tribunal have determined that a simple declaration denying the existence of a plan or agreement, in and of itself, is not sufficient to prove qualification for an exemption (see, Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692). As the Executive Land Corp. court held:

> "The plantiff's interpretation of [Tax Law § 1440(7)] is incorrect as it would allow any transferor to claim exclusion from the gains tax simply by stating that he is not acting pursuant to a plan to avoid the tax. That is not a rational interpretation of the statute, nor of its clear underlying legislative purpose" (Executive Land Corp. v. Chu, supra, 545 NYS2d at 354, 357).

Based upon the evidence, there was sufficient basis to conclude that the transfers were pursuant to a plan as contemplated by Tax Law § 1440.7, despite petitioners' statements to the contrary. Since the regulations of the Tribunal clearly place the burden of proof on the taxpayer (see, 20 NYCRR 3000.10[d][4]), it is determined that petitioners have not met their burden of refuting the inferences of a plan or agreement as evidenced by the circumstances herein.

D. Petitioners place much weight and reliance upon the case of Matter of General Builders Corp. (supra) where a single transfer was not found, even though the petitioner transferred adjacent properties to related transferees, because from the petitioner's perspective the transfers were to two unrelated transferees and the petitioner had no control over the subsequent assignment of the contracts of sale. That has not been found to be the case herein. There was no evidence of an assignment other than the bald assertion of Mr. Kaplan, whose testimony contradicted documents in evidence. Further, the facts and circumstances of the instant matter are far more convincing than those which existed in General Builders and it is the cumulative effect of all of those facts and circumstances which lead to the conclusion that the transfers were pursuant to a plan or agreement. It is also not the situation that the Division is attempting to "squeeze" the facts into 20 NYCRR 590.42 or 590.43(a) or (g). The facts in this instant matter fall squarely within the purview of each of those sections. It is also curious that, although petitioners raised the issue of an assignment, they never squarely addressed the issue for the simple reason that no assignment exists in the record.

For all of the reasons set forth above, the Division properly aggregated the transfers in issue and properly assessed additional real property gains tax.

E. Tax Law § 1446.2(a) provides, in pertinent part, as follows:

> "Any transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount . . . . If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

The regulation at 20 NYCRR 590.71(b) restates this provision. Petitioners contend that Tax Law § 1446(2)(a) was never intended to penalize taxpayers who legitimately protest determinations made by the Division. However, such a rule would effectively prohibit the Division from ever imposing penalty where the taxpayer had a different interpretation of the Tax Law or regulations promulgated thereunder.

It has been held:

"The failure to pay a tax due to a different legal interpretation of a statute need not

> be considered 'reasonable cause'. In fact, if it were so considered, [the Commissioner] would rarely if ever be entitled to levy such penalties" (Matter of Auerbach v. State Tax Commn., Sup Ct, Albany County, March 27, 1987, Williams, J., affd 147 AD2d 390, 536 NYS2d 557).

Petitioners contend that their research had not determined another decision involving transferable development rights. However, transferable development rights are found within the definition of "interest" in Tax Law § 1440.4 and also in the regulations at 20 NYCRR 590.3 and 590.63. When read in conjunction with Tax Law § 1440.7, it is apparent that there is a logical basis for the position that transferable development rights could be aggregated with other transfers of interest in real property. Therefore, regardless of which theory the Division ultimately used to aggregate the transfers made herein, the Division's assertion of penalties herein was justified. Petitioners claim that they did not pay the additional tax essentially because they did not interpret the laws and regulations in a manner consistent with the Division. However, as stated above, this is not reasonable cause for the abatement of penalty. Therefore, the Division's imposition of penalty in this matter is determined to have been proper.

F. The final issue to be disposed of is whether a portion of the original purchase price should have been allocated to the sale of the transferable development rights. The initial problem which was encountered on audit were the numerous unsubstantiated figures provided by various representatives of Rubin Brothers of original purchase price. The March 14, 1990 letter from Whitman & Ransom to the Division indicated an original purchase price of $246,000.00. This figure was used to calculate allocated original purchase price on the transfer of the leasehold grant and the fee above the plane. By letter dated March 22, 1990 to Whitman & Ransom, the Division requested substantiation of this figure. However, it does not appear that any substantiation was ever submitted, a fact attested to by the notices of determination which, in their computation sheets, indicated that petitioners were given no credit for original purchase price in any of the transactions.

In an affidavit sworn to by Cyrus Rubin on March 6, 1990, in support of the request for conciliation conference by Rubin Brothers, Mr. Rubin stated that the original purchase price of $95,499.00 set forth in the transferor questionnaire, allocable to the lease/contract and the fee

above the plane, was based upon the $246,000.00 original purchase price and that this amount was based upon the books and records of Neil Blumstein, C.P.A., an accountant for Rubin Brothers on March 6, 1990.

However, at hearing, the affidavit of Melvin Spielman was introduced for the purpose of establishing that the actual original purchase price was $171,000.00, as gleaned from the balance sheets included on the U.S. Partnership Return of Income for the year 1992. That figure is composed of $64,706.00 in "building and other depreciable assets" and a land value of $106,294.00. However, as pointed out by the Division in its brief, these figures have also been submitted without substantiation or underlying testimony. It is not known how the values were reached and therefore petitioners have not borne their burden of proving an original purchase price. Therefore, the Division's calculation of real property gains tax on the transfer of the excess transferable development rights is sustained.

G. The petition of Rubin Brothers Holding Co. & Others is denied and the Notice of Determination dated May 21, 1990, assessment number L-001679951-1, is sustained.

DATED: Troy, New York
May 16, 1994

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE