STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
SHOLOM DRIZIN	:DETERMINATION DTA NO. 811808
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, Sholom Drizin, 441 Crown Street, Brooklyn, New York 11225, 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 Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 27, 1994 at 1:45 P.M., with all briefs to be submitted by May 31, 1995, which date commenced the six-month period to issue a determination in this matter.[1] Petitioner, appearing by Martin Kurlander, Esq., submitted a brief on March 6, 1995. The Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel), submitted a brief on April 20, 1995. Petitioner submitted his reply brief on June 1, 1995.

[1]The record remained open until August 26, 1994 to allow petitioner the opportunity to submit documents contemporaneous with the transaction which took place in 1984 (tr., pp. 89-90).

ISSUES

I. Whether petitioner is liable for gains tax on his transfer of a 35% interest in Taft Partners Development Group, a partnership having an interest in real property.

II. Whether the penalty imposed pursuant to Tax Law § 1446(2)(a) should be abated.

FINDINGS OF FACT

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

> "Section 1447.3 of Article 31B of the tax law states in part '...in a case where no tentative assessment has been issued because the transferee did not file the required questionnaire... the transferee shall be personally liable for the taxes stated to be due in a Notice of Determination... and such liability may be assessed and enforced in the same manner as the liability for the tax under this Article...'
>
> "A search of our files failed to find a filing on the transfer of CONTROLLING INTEREST OF TAFT PARTNERS DEVELOP
> from MENT GROUP YOU TAFT PARTNERS DEVELOPMENT GROU
> to P [sic].
>
> "Such filing is required by section 1447.3 of the tax law. Therefore, taxes have been computed as shown."

On January 5, 1984, Royale Towers Associates ("seller") and Sholom Drizin ("purchaser") entered into an Amended and Restated Agreement For Sale and Purchase (Division's Exhibit "F") of the Taft Hotel. According to this purchase and sale

agreement, the purchase price was to be $32,505,280.00 "subject to credit adjustments, prorations and reimbursements, provided for herein and to the terms of Section 2, 10 and 20." The terms also provided that contemporaneously with the execution and delivery of the contract the purchaser was to deposit $3,200,000.00 with the seller.

The property known as the Taft Hotel is located at 761-779 Seventh Avenue, New York, New York.

It is noted that petitioner is not a native-born American and, at times during the hearing, had some difficulty expressing himself in English.

During the hearing, petitioner testified that he gave the $3,200,000.00 deposit to a Mr. Halloran (tr., pp. 15-16).

Petitioner testified that the Taft Hotel needed to be refurbished. He estimated that an additional "$40-, $50,000,000" was needed "to rebuild the hotel" (tr., p. 18). He stated that he did not have the ability to obtain a mortgage of the magnitude required to both purchase and renovate the property (tr., p. 16). Petitioner asked Philip Winograd to find a partner who would provide the financing.

Philip Winograd is the real estate broker who found the Taft Hotel for petitioner. During the hearing, Mr. Winograd described the Taft Hotel as "a big property" located "on the west side" (tr., p. 69). He further stated that at that time it was becoming fashionable "to move west from east" (tr., p. 69).

Mr. Winograd averred that petitioner asked him to "procure a person who could provide financing for a 50% interest" (tr.,

p. 63). When asked how he went about finding that person, Mr. Winograd responded, in pertinent part:

> "We prepared a brochure, and I went around to all the developers that I knew that could get this kind of money, and were interested in this project. And I introduced him to several others that didn't work out, and these people were amenable, agreeable.
>
> "You know, sometimes you can talk to a Mr. Cohen two months earlier, and 'No, no, no. I'm not interested.' And you have to understand, in the 80's, it was a violent time in New York with real estate. I mean trading, real estate property, it was like a monopoly. And two months later they were happy to get a chance to buy the property, or, go in partners in the property" (tr., pp. 72-73).

According to Mr. Winograd, he introduced Steve Goodstein, Martin Goodstein, Arthur G. Cohen and Jacob I. Sopher to petitioner as prospective investors.[2]

Petitioner stated that he did not know Messrs. Goodstein, Cohen and Sopher prior to being introduced to them by Mr. Winograd.

On March 1, 1984, petitioner entered into an Agreement of Assignment ("assignment") (Division's Exhibit "G"), wherein petitioner was the assignor and Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were collectively listed as the assignee, "having a place of business c/o Goodstein Management, Inc., 211 East 46th Street, New York, New York."

According to the terms of this assignment, petitioner assigned a 50% interest in the agreement for sale and purchase of the premises located at 761-779 Seventh Avenue, New York, New York, dated January 5, 1984, which he had with Royale Towers

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[2]Martin Goodstein is Steven Goodstein's brother.

Associates to the assignee in return for assignee's payment to petitioner of $1,600,000.00. In addition, pursuant to paragraph 4(a) of this assignment, petitioner and the assignee were to enter into a limited partnership agreement and the partnership was to acquire title to the premises.

On March 7, 1984, petitioner entered into an Agreement of Limited Partnership of Taft Partners Development Group ("agreement") (Division's Exhibit "H").

Pursuant to the agreement: (a) Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were, collectively, the managing general partners; (b) petitioner, Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were general partners; and (c) Andrew Goodstein, Martin Goodstein, Patricia Kay Goodstein and Mitchell Siegel, as trustees f/b/o Michele A. Goodstein u/t/a dated July 7, 1967, f/b/o Geoffrey A. Goodstein u/t/a dated July 7, 1967, and f/b/o Shari L. Goodstein u/t/a dated July 7, 1967, and Samuel Lewis were limited partners.[3]

The general partners held the following percentage interests in the partnership: petitioner - 50%; Arthur Cohen - 20%; Steven Goodstein - 8.5%; Martin Goodstein - 2%; and Jacob Sopher - 10%. The remaining 9.5% interest was held by the limited partners (tr., pp 43-47).

Petitioner testified that, after a month's negotiation, he

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[3]Trustees Martin Goodstein, Patricia Kay Goodstein and Mitchell Siegel were listed in the agreement "with an address c/o Goodstein Management, Inc., 211 East 46th Street, New York, New York."

and the others entered into a written assignment agreement (see, Finding of Fact "11"). He further stated that there was no other written agreement to protect him (tr., pp. 38-39).

Petitioner averred that even though he did not make any money, he was very pleased with the deal because the other partners were providing the financing for both the purchase and the construction. In addition, he stated that he was very pleased with his 50% interest and his position as a general partner because he had control (tr., p. 40).

According to petitioner, on March 2, 1984, a discussion was held between him and Steven Goodstein. He testified that he intended to make a

big hotel, while Mr. Goodstein wanted to develop condominiums.[4] At that time, petitioner also requested access to the books.

Petitioner averred that, within hours of that discussion, he received a telephone call from someone who said "You better come up" (tr., p. 19).[5]

Petitioner proferred the following testimony about what subsequently transpired:

> "I actually came up with my friend Joshua Sopher, and he start to this and they start -- They don't want me to be a general partner. And here it comes the worse fight, and we was [sic] fighting for the whole

[4]Petitioner explained that he had been involved in construction and wanted to be involved in the construction along with Steven Goodstein, who was the principal in the Goodstein Construction Company.

[5]Petitioner could not recall exactly who called him.

week, till the end of the week.

"We agreed that they would pay me, and I sold them additional -- It was actually not a sale. They put me like on an option that they were able to buy additional 35%. And I have 15%, and I should be 15%, I should be limited partner. I did not like it, but --" (tr., pp. 19-20).

When asked by his representative to indicate with whom he had the conversation concerning the sale of the 35%, petitioner responded "[w]ith Steve Goodstein was behind the whole thing" (tr., p. 20). He further stated:

"Steve Goodstein forced me, forced me to sell, to become a limited partner. And he forced on all the partners, and I don't know if they all agree with him at this time on March 7th, but he wants me out of the books. He doesn't want me there" (tr., p. 21).

Petitioner testified that he sold the 35% interest to Steven Goodstein under duress and threat. He proferred the following explanation as to the manner in which he was forced to sell the 35% interest to Steven Goodstein:

"Because you see I sign already with him a contract. And I could not provide the financing by myself, but I could take other people, other people who had the strength to get the money. But when I signed already the first contract with Steven Goodstein, the 50%, so I can not go and take out the money. I was already tied up to him.

"And he says he's going -- For him to lose a million six is nothing for them in their position. For Arthur Cohen and them, a million six, and he says he's going to lose all the money. And apparently, I found out later that they was [sic] negotiating behind my back, if I'm going to be stubborn and not to give them the 35%, actually Steve Goodstein said they're going direct to Halloran and buy from him without me, with me the hotel.

"So they forced me, and I did not have the choice to take another partner, and I could not -- and I could not -- I could not go with -- and I did not want to go with them. I know what Goodstein's going to do to the

> hotel. Actually, he did, and I felt it already" (tr., pp. 23-24).

On March 7, 1984, petitioner ("seller") and Steven Goodstein ("purchaser") entered into a Partnership Interest Acquisition Agreement ("acquisition agreement") whereby petitioner sold to Steven Goodstein the 35% interest in Taft Partners Development Group ("Taft") for $8,320,000.00. Upon consummation of the sale of petitioner's 35% interest, his remaining 15% interest in Taft automatically converted to a limited partner's interest.

According to the terms of the acquisition agreement, petitioner, simultaneously with the receipt of the $1,600,000.00 downpayment and the Letter of Credit in the amount of $6,720,000.00, was to execute and deliver to Steven Goodstein an instrument "for the purpose of assigning the Interest to Purchaser or his assignee(s) or designee(s)." In addition, petitioner was to execute any documents or certificates required "in connection with the transfer of the Interest and the conversion of Seller's remaining interest in the Partnership to a limited partner's interest."

Pursuant to paragraph 6, the agreement was:

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

This paragraph also provided that, in the event that the Letter of Credit was not obtained and delivered to the seller or if it did not comply with the requirements contained in paragraph 5, the transaction would be null and void and "neither party shall

have any claim against the other." Paragraph 7 of the acquisition agreement contained the "Conditions Precedent" to the consummation of the sale of the interest, which included inter alia: that the March 1, 1984 assignment between petitioner, Steven Goodstein, Martin Goodstein, Arthur Cohen and Jacob Sopher "shall not have been rescinded".

According to paragraph 11 of the acquisition agreement, Steven Goldstein, as purchaser, could freely assign his rights thereunder "provided the assignee(s) shall assume in writing all duties and obligations of Purchaser."

Petitioner's Exhibit "3" is the Real Property Transfer Gains Tax Questionnaire - Transferee, Form TP-581 ("transferee questionnaire") which petitioner executed as a partner of Taft. According to the transferee questionnaire, Taft was the transferee which was acquiring a 100% fee interest in 761-779 Seventh Avenue, New York, New York, Section 4, Block 1003, Lot 1 on May 15, 1984 for $32,280,000.00 from transferor, Royale Tower Associates.

Attached to the transferee questionnaire was petitioner's affidavit, sworn to on May 21, 1984. In his affidavit, petitioner stated:

> "1. I am making this affidavit to set forth the details regarding my purchase of premises known as 761-779 Seventh Avenue, which property is known as the 'Hotel Taft'.
>
> "2. The Contract of Purchase was entered into by me as of January 5, 1984 for a purchase price of $32,505,280.00. Simultaneously with the execution of the Contract of Purchase a downpayment of $3,200,000.00 was deposited thereunder.
>
> "3. Thereafter on March 1, 1984 an understanding

was arrived at between myself and Messrs. Arthur G. Cohen, Steven Goodstein, Martin Goodstein and Jacob I. Sopher under the provisions of which I assigned to said four individuals a 50% interest in the Contract of purchase in consideration for the payment of $1,600,000.00, representing one-half of the downpayment deposited under the Contract of Purchase. A copy of the instrument of assignment dated March 1, 1984 is attached hereto as Exhibit 'A'.

"4. Thereafter the five holders of interests in the Contract of Purchase assigned the respective interests of the purchaser in and to the Contract of Purchase to Taft Partners Development Group, a limited partnership, comprised of the same individuals, as General Partners and children and related parties of said individuals as Limited Partners. A copy of the assignment to the limited partnership is annexed hereto as Exhibit 'B'.

"5. The Limited Partnership Agreement provides for all profits to be shared among the General Partners and Limited Partners in accordance with the respective capital contributions of each. A copy of Exhibit A to said Limited Partnership Agreement is annexed hereto as Exhibit 'C' which shows, for example, that my capital percentage remains at 50%.

"6. No Gains Tax is due with reference to the two assignments herein referred to by reason of the fact that no profit or consideration was realized by the assignors as a result thereof."[6]

On June 11, 1984, Chase Manhattan Bank ("Chase") sent a loan commitment letter for the purchase and renovation of the fee premises located at 777 Seventh Avenue, New York, New York to the Goodstein Construction Company.[7]

Included as part of the terms in Chase's loan commitment

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[6] None of the exhibits referenced in petitioner's affidavit were annexed to the transferee questionnaire submitted into the record.

[7] The loan commitment letter was addressed to "The Goodstein Construction Company, 211 East 46th Street, New York, New York, Attention: Mr. Martin Goodstein."

letter were the following:

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

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

Petitioner submitted five letters, addressed to himself and the other members of Taft, dated March 2, 1984, June 19, 1984, June 21, 1984, July 12, 1984 and July 27, 1984, respectively, from Sidney Hoffman, Controller of Goodstein Construction Corp. Each of these letters requested money, to fund Taft's working capital or to pay Taft's various obligations, based upon each member's partnership percentage. [8]

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[8]Each letter stated the total amount of money required at that time and the amount due from each member of the partnership. The total amount of money requested in each letter was:

March 2, 1984	$100,000.00
June 19, 1984	$ 30,000.00
June 21, 1984	$ 40,000.00
July 12, 1984	$ 50,000.00
July 27, 1984	$150,000.00

The ownership interests in Taft, as reflected in each of these letters, follows:

	Percentage
Steven Goodstein	8.5
Martin Goodstein	8.5
Andrew Goodstein	3.0
Arthur Cohen	20.0
Jacob Sopher	10.0
Sholom Drizin	50.0

In response to the Division's questions concerning the relationship between the four gentlemen who had been assigned 50% of petitioner's right to buy the property, and why they were all listed to one address, petitioner testified as follows:

> "They were fighting. You know, business interest, and they separate individuals. Arthur Cohen was in the banking. Hank Sopher is selling condominiums. And Martin Goodstein is a separate story. They are separate individuals, separate business. They are separate people.
>
> "I don't know why. Maybe it is easier for the lawyers to write. I really don't know. I really don't know.
>
> "Because they have, everybody is separate ideas, separate offices. And they are separate individuals, very separate. I don't know. I don't know" (tr., pp. 35-36).

The Division's representative asked petitioner a series of questions concerning his removal from control by Steven Goodstein, in particular whether the other partners agreed with Steven Goodstein's actions. Petitioner testified that he really

did not know where Arthur Cohen stood on the issue. According to petitioner, when Mr. Cohen spoke to him, Mr. Cohen was on his side. However, petitioner did not know what Mr. Cohen said to Steven Goodstein when those two spoke. As for Martin Goodstein, petitioner stated that he was unsure of what Martin's position was because Martin and his brother, Steven, were fighting and were not talking to each other. He averred that he felt Mr. Sopher was the only one on his side and that Mr. Sopher wanted him to remain at 50%.

Petitioner testified that Steven Goodstein never stated that he was acting on behalf of Messrs. Cohen and Sopher. Petitioner could not remember whether or not Steven Goodstein ever stated that he was acting on behalf of his brother, Martin. As for limited partner Andrew Goodstein, petitioner testified that he did not know that Steven had a son (tr., pp. 49-51, 53-55).

On September 24, 1984, petitioner transferred his 35% interest in Taft to Steven Goodstein.

Petitioner's Exhibit "1" is a document, dated September 24, 1984, addressed to petitioner, written by Steven Goodstein, c/o Goodstein Management, Inc., which referenced "Taft Partners Development Group (the 'Partnership')" (emphasis in original). This document set forth, in pertinent part, the following:

> "Reference is made to that certain Partnership Interest Acquisition Agreement, entered into as of the 7th day of March, 1984 between Sholom Drizin, as seller and Steven Goodstein, as purchaser, modified by that certain Modification of Partnership Interest Acquisition Agreement, entered into as of the 18th day of June, 1984, between Sholom Drizin, as seller and Steven Goodstein, as purchaser (the 'Agreement').

> "Capitalized terms not defined herein shall be given the same meaning ascribed to them in the Agreement.
>
> "1. Pursuant to the Agreement, the undersigned hereby delivers to you the sum of $1,600,000 as payment in full of the Downpayment, as provided as paragraph 2 of the Agreement. Pursuant to our agreement of even date and notwithstanding any provision of the Agreement to the contrary, it is hereby understood and agreed that the Letter of Credit* shall be delivered to you on or before ninety (90) days from the date hereof or on such earlier date as the construction loan closing with Chase shall take place. **[9] The letter of credit may
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> be drawn upon on or after 12/24/85 in accordance with the provisions thereof. It is further understood and agreed that, in the event you have not timely received the Letter of Credit as aforesaid, at your option the Interest conveyed by you to the undersigned on this date shall be reconveyed to you, or in the alternative you shall have the right to demand immediate payment from the partnership for the amount secured by the Letter of Credit. (SEE RIDER TO PARAGRAPH '1')"

Petitioner's signature appears at the bottom on the second page of the document directly beneath "ACCEPTED AND AGREED".

It is noted that the copy of this document submitted into the record consisted of two pages only; the referenced Exhibits "A" and "B" and the rider to paragraph "1" were not included.

A copy of the Modification of Partnership Interest Acquisition Agreement, entered into as of June 18, 1984, referenced in the document, dated September 24, 1984, discussed in the preceding Finding of Fact is not part of the record.

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[9] The following appeared at the bottom of the page:

> "* THE FORM OF WHICH IS ANNEXED HERETO AS EXHIBIT 'A'."
>
> "** THE AMOUNT OF THE LETTER OF CREDIT HAS BEEN DETERMINED IN ACCORDANCE WITH EXHIBIT 'B' ANNEXED HERETO."

At some point in the fall of 1984, Taft purchased the property from Royale Towers Associates. The record is silent as to the exact date. Petitioner testified that he thought that they closed in October of 1984 (tr., p. 49).

As noted in Finding of Fact "1", the Division issued a Notice of Determination, dated April 30, 1992, to petitioner which asserted real property transfer gains tax due of $643,309.00, plus interest of $804,228.86 and penalties of $225,158.00, for a total amount due of $1,672,695.86.

Petitioner's request for a conciliation conference was deemed timely.

After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 125289), dated March 26, 1993, sustaining the statutory notice.

Petitioner timely filed a petition, on April 15, 1993, which challenged the assessment of real property transfer gains tax. Petitioner alleges that the Division: (a) "erroneously determined that Petitioner transferred a controlling interest in real property within New York State, subjecting the transfer to gains tax under Tax Law § 1440"; and (b) "erroneously determined that Petitioner transferred a portion of his interest in real property to a group of individuals who were acting in concert and therefore this was the transfer of a controlling interest subject to gains tax." The petition also asserts that the transfer in issue should not be aggregated with any earlier transfers because each transfer was completely independent of

each other and each of the transfers involved different parties; "the various transferees of the various transfers were not part of a group", nor did a relationship exist amongst the various transferees "wherein one transferee influenced or controlled the actions of any others"; the transfer in issue "was made solely between two individuals; there were no other parties or groups involved"; and the transfer in issue was not a transfer of a controlling interest and, therefore, it would not be subject to the gains tax.

The Division served an answer, dated May 24, 1993, on petitioner.

Petitioner was asked by his representative whether, at the time he sold the first 50% interest, he intended to sell any further interest in Taft; he responded, "Definitely, no" (tr., p. 24).

As further support to his position, petitioner submitted his personal affidavit which he executed on July 26, 1994. In his affidavit, petitioner alleges:

> "I, Sholom Drizin am attesting to the fact that on March 1, 1984, when I included the Taft Partnership in the purchasing of the Taft Hotel, and made them 50% partners for providing the financing, I did not have the slightest idea or intention that ultimately I would be forced to relinquish an additional 35% to Steven Goodstein, and become a limited partner on the remaining 15%.
>
> "The transfer of the 35% interest to Steven Goodstein was made under duress and against my will. It was not part of any agreement or plan with the previous transfer."

Petitioner stated that he thought his lawyer told him that he did not have to file any transfer tax return as a result of

his transfer of the 35% interest to Steven Goodstein. Petitioner gave the following response to his representative's query concerning the advice given to him "at the time about filing Capital Gains tax" for the transfer in issue:

> "No filing. I understood that I don't owe, I don't have to pay -- I don't have -- The lawyer's advice is that I don't have to pay gains tax. That's what they advised me. I don't know if they filed or they did not file, this I don't know. But I don't -- Well, I'm just, already it's a long time ago. But I definitely -- If it was supposed to be filed, I was always to my lawyer to obey whatever the law is. And if I would have to pay, I would pay" (tr., pp. 28-29).

After petitioner had rested, the Division's representative attempted to submit only one more document which he had requested from the audit group. His explanation as to the source of the document and the reason for his submission of this document follows:

> "Basically different files. As far as audit goes, there's a file for Taft Partnership, there's a file for Mr. Drizin. And I needed access to the Taft Partnership file. Rather than sending the whole file, they were able to send me the documents I required. And I believe a note, handwritten by Nancy Boise [phonetic], pretty much reads for itself.
>
> "And the sole purpose I'm offering these documents is, I was seeking to find out how Taft Partnership treated the acquisition of this 35% for gains tax purposes, at some point in time in their dealings with the Department.
>
> "Several documents -- The pertinent point, she says in her note that she highlighted information. The highlighting didn't show up on the copies, but I'll show petitioner's representative. It deals with the last page of the group of documents" (tr., pp. 76-77).

According to the Division's representative, the last page of this document was directly relevant because it showed how Taft treated the acquisition for gains tax purposes.

Petitioner's representative was given the opportunity to review the documents and, upon review, he objected to the Division's offer of the documents into evidence. The documents, consisting of some audit workpapers of Taft Partners Development Group, including Ms. Boise's cover note and a Real Property Gains Tax Questionnaire - Transferor, were admitted as the Division's Exhibit "J" (tr., pp. 78-84).

At that point in the proceedings, petitioner's representative asked for a continuance "for the possibility of bringing in other witnesses to negate any inference brought in by this very last document put in by the State of New York through their Audit Division" (tr., pp. 84-85).

After listening to the arguments made by both petitioner's and the Division's representative on the issue of whether a continued hearing should be granted, Administrative Law Judge Maloney granted petitioner's request for a continued hearing. However, in case, after investigation, petitioner decided not to proceed with the continued hearing, a briefing schedule was to be set.

Prior to the close of the hearing, the Division withdrew its offering of Exhibit "J" and petitioner withdrew his request for a continued hearing. A briefing schedule was set at that time.

The record in the instant matter remained open until August 26, 1994 to afford petitioner the opportunity to submit documents contemporaneous with the 1984 transaction.

Petitioner did not submit any additional documents into

the record.

The Division, in its brief, concedes that, based on additional information submitted to it by petitioner, the tax assessment should be reduced from $643,309.00 to $623,541.00; interest and penalty are to be adjusted accordingly based upon this reduction in the amount of tax due. According to the Division's brief, the total amount due (i.e., tax, interest and penalty) as of April 1, 1995 was $1,872,317.00.

The Division's representative brought a motion, on notice to petitioner, for reopening the record, dated June 2, 1995, pursuant to 20 NYCRR 3000.5.[10] The Division submitted the affidavit of David Gannon, Esq., sworn to on June 2, 1995, together with an exhibit annexed thereto in support of that motion. The return date of the motion was July 4, 1995.

In his affidavit in support of the motion for reopening the record, Mr. Gannon made the following assertions:

> "4. At the hearing in this matter, Administrative Law Judge Maloney left the record open until August 26, 1994 to provide petitioner with the opportunity to 'submit further documents concerning the transaction that took place in 1984. This will be limited to documents contemporaneous with the 1984 transaction' (Tr., p. 89).
>
> "5. Petitioner did not submit any documentation during this time period.
>
> "6. Prior to, during, and subsequent to the hearing in this matter, petitioner and the Division of Taxation have been and

[10]Although not stated in the notice of motion, it appears that the ground for this motion is newly-discovered evidence.

continue to be involved in settlement negotiations.

"7. Subsequent to the hearing in this matter, petitioner retained an additional representative, David Eisig of KPMG Peat Marwick. Mr. Eisig has been petitioner's primary contact person concerning settlement negotiations.

"8. During the course of settlement negotiations, Mr. Eisig repeatedly informed me that he was unable to gain access to relevant, material documentation concerning the transfer at issue because petitioner and the Taft Partnership were engaged in substantial litigation which involved, inter alia, the transaction at issue.

"9. In conjunction with the settlement negotiations, on May 31, 1995 it became necessary for me to review for the first time a Division of Taxation file which, although concerning a taxpayer other than petitioner, i.e., Taft Partnership, was directly relevant to the ongoing settlement negotiations to the extent it contained material information relevant to the settlement discussions.

"10. During the review of the file I located the Report of Closing attached as Exhibit 'A'.

"11. This document clearly fits within the category of 'documents contemporaneous with the 1984 transaction' (Tr., p. 89).

"12. Based on the representations made to me by David Eisig (¶ 8 supra), it seems apparent that the reason petitioner did not provide additional contemporaneous documentation by the August, 1994 deadline was that, due to pending litigation between petitioner and the Taft Partnership, petitioner was unable to have access to contemporaneous documents in the possession of the Taft Partnership which related to the transfer at issue, such as Exhibit 'A'.

"13. In light of this access problem, pursuant to this motion the Division of

Taxation both requests and consents to the opening of the record in this matter for the sole purpose of allowing the Division of Taxation, on behalf of petitioner, to submit a copy of the Report of Closing.

"14. In the opinion of the Division of Taxation, this offering will not disrupt the current proceedings. The Division of Taxation has no desire to submit any brief or memorandum concerning this document, as the document speaks for itself. Further, while a return date of July 4, 1995 has been selected pursuant to 20 NYCRR 3000.5, this was done solely (i) to comply with regulation 20 NYCRR 3000.5 and (ii) to fix a point in time for petitioner's reply, if any.

"15. This motion is in no way intended to delay or prolong this proceeding. Consistent with this desire to avoid delay, the Division of Taxation concedes to having the Administrative Law Judge address this motion in her determination.

"16. I realize that the timing and nature of this motion are unique, but given: (i) the unique circumstances surrounding this matter, (ii) the Division of Taxation's efforts on behalf of petitioner, (iii) the Division of Taxation's express desire to avoid further delay, (iv) the Division of Taxation's consent to the opening of the record, and (v) the Division of Taxation's efforts to prepare and file this motion within 48 hours of the discovery of the Report of Closing, I believe that this motion is both appropriate and proper."

Attached to Mr. Gannon's affidavit as Exhibit "A" is the 16-page Report of Closing for the acquisition of the Taft Hotel by Taft Partners Development Group.

Petitioner's representative requested and received a two-week extension of time in which to submit papers in opposition

to the Division's motion for reopening the record. The revised return date for this motion was July 20, 1995.

Petitioner's representative brought a cross-motion, on notice to the Division, for reopening of the record, dated July 6, 1995.[11] The return date of this cross-motion was July 27, 1995. The affirmation of Martin Kurlander, Esq., affirmed on July 6, 1995, was submitted in opposition to the Division's motion and in support of petitioner's cross-motion made in the alternative.

Mr. Kurlander, in his affirmation in opposition to the Division's motion for reopening the record and in support of petitioner's cross-motion to reopen the record, made the following assertions, in pertinent part:

> "(2) At the Administrative Hearing of this matter, Your Honor gave petitioner Mr. Drizin until August 26, 1994, to submit additional documents relevant to The Taft Hotel transaction. The State did not request, not [sic] did Your Honor provide it, with the option to offer an [sic] additional evidence.
>
> "(3) Now, nearly one year after the August, 1994 deadline, the Division, in the guise of acting on Mr. Drizin's behalf, moves to reopen the hearing and offer the 'Report of Closing' as a favor to Mr. Drizin. That attempt must be rejected on many grounds.
>
> "(4) The State has no standing to offer a document in evidence on behalf of an adversary.
>
> "(5) The Division hasn't made even a pretense of showing that 'special circumstances' exist which would warrant reopening the record at this late date, more

[11]Review of the papers submitted in support of petitioner's cross-motion reveals that petitioner is requesting that the record be reopened and a continued hearing be granted to give petitioner the opportunity to present additional witnesses and submit further documentary evidence, if available.

than one year after close of the hearing, and after the parties have finished briefing the case.

* * *

"(7) In the instant matter case the Division of Taxation provides only the conclusory statement of its attorney, David Gannon, Esq., that on May 31, 1995, during review of the Taft Hotel file, 'I (Mr. Gannon) located the report of closing.' (Gannon Aff., ¶ 10) Mr. Gannon fails to demonstrate why, with due diligence, the State could not have obtained the Taft Partners' own closing statement in time for the hearing or before the briefs were submitted.

"(8) From Mr. Gannon's affidavit it is plain that long before the State's motion to reopen, the Division of Taxation had in its possession the Taft Partnership file containing the Report of Closing. (See Gannon Aff., ¶ 9.) The evidence was there; it was just not discovered by Mr. Gannon until he decided to peruse the file in May, 1995. Affirmant respecfully [sic] submits that this lack of investigative zeal does not qualify as the due diligence which is a prerequisite to re-opening of a hearing.

"(9) Obviously, the Division of Taxation believes that the Report of Closing aids its case in a way the testimony and documents already admitted during the Administrative Hearing did not. The State must think so, otherwise it would not apply for the Taft closing statement's admission. It is, therefore, disingenuous for Mr. Gannon to suggest that (1) the document will not disrupt the current proceedings and (2) the State has no desire to submit a brief or a memorandum concerning the document. (Gannon Aff. ¶ 14)

"(10) Nothing could be more procedurally unfair to petitioner Drizin than to allow the Division of Taxation to hide behind Mr. Drizin and slip in new evidence lying long dormant in the Division's files.

"(11) Alternatively, if Your Honor does decide to admit the Report of Closing, then Mr. Drizin's cross-motion should be granted and the hearing should be reopened to give Mr. Drizin the chance to call more witnesses and submit further documentary evidence, if available. Reopening should not be a one-sided affair with the Division of Taxation having the right to pick and chose [sic] what evidence may come in. Mr. Drizin should have an equal opportunity to explore issues pertinent to resolution of this case and to do so in the form of live witnesses and written evidence."

The Division submitted a letter, dated July 19, 1995, as both its reply to petitioner's comments concerning the Division's motion and its response to petitioner's cross-motion.

In its letter, the Division stated that it considered the July 27, 1995 return date of petitioner's cross-motion to be in error and that the correct return date is dictated by 20 NYCRR 3000.5, i.e., August 7, 1995.[12]

The Division asserted that petitioner's challenges to the Division's motion and his cross-motion are without merit. It argues that it was simply seeking "to provide the court with one relevant contemporaneous document which the taxpayer had stated he would have provided but for the fact that pending litigation prevented him from accessing the documentation" (Division's letter, p. 4). The Division also contended that petitioner's cross-motion should be denied. It avers that petitioner has had his opportunity to present witnesses and submit written evidence.

"Unfortunately, petitioner chose to squander this opportunity by exploring the wrong issues at the hearing" (Division's letter, p. 4).

The Division submitted eight proposed findings of fact. In accordance with State Administrative Procedure Act § 307(1), all the proposed findings of fact have been incorporated into the Findings of Fact herein except number 8, which was modified

[12]Thirty days from July 6, 1995 is August 5, 1995. Since August 5, 1995 falls on a Saturday, the return date would move to the next business day, or August 7, 1995.

to more accurately reflect the record.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts that the Division erroneously subjected his transfer of a 35% interest in Taft to tax. He argues that his sale of his 35% interest in Taft was an isolated transaction between Steven Goodstein and him. Petitioner contends that Mr. Goodstein's purchase of the 35% interest was not the acquisition of a controlling interest in real property. Furthermore, he maintains that he has submitted overwhelming evidence "that Steven Goodstein did not collude with the other non-Drizin Taft partners when Mr. Goodstein bought his 35 percent stake" in Taft (Petitioner's reply brief, p. 3).

Petitioner also argues that the Division's regulations, in effect during March-September 1984, the time of the Drizin-Goodstein sale of the 35% interest in Taft, "excluded Steven Goodstein's 35% purchase from the definition of 'the acquisition of a controlling interest in real property'" (Petitioner's reply brief, p. 9). Petitioner asserts that no partner individually acquired 50% or more of Taft when he sold his 35% interest to Steven Goodstein. Petitioner maintains that Steven Goodstein had an 8.5% share of Taft prior to his purchase of the 35% interest in issue. He argues that because Steven Goodstein's share in Taft did not reach 50% even after he acquired the subject 35% interest, there was no transfer subject to the gains tax.

Lastly, petitioner argues that even if the transfer is subject to tax, there must be an abatement of penalties and

interest pursuant to Tax Law § 1446(2)(a). He maintains that his failure to file a return was due to reasonable cause and not willful neglect. Petitioner asserts that he had a strong basis for believing that Steven Goodstein had not acquired a controlling interest which was subject to gains tax. He argues that he had first-hand knowledge that Steven Goodstein was acting alone in acquiring his 35% interest in Taft, and therefore it was entirely reasonable for him to conclude that there was no need to file since the transaction was exempt from any gains tax.

The Division asserts that petitioner was properly assessed gains tax on his transfer of the 35% interest in Taft. It contends that the facts in the instant matter clearly show:

> "that Messrs. Cohen, Goodstein, Goodstein and Sopher was a 'group of persons acting in concert' pursuant to 20 NYCRR 590.44 and 590.45. Therefore, petitioner's transfer of 35% of his partnership interest to Steven Goodstein constitutes the transfer of a controlling interest in an entity with an interest in real property" (Division's brief, p. 8).

The Division also contends that the imposition of penalties was appropriate and that petitioner has failed to demonstrate that penalty abatement is warranted in this matter. Citing relevant case law, it asserts that "neither ignorance of the law nor reliance on the advice of a professional constitutes reasonable cause" (Division's brief, p. 10).

The Division requests that the petition be denied and that the Notice of Determination, as modified by its "concession of a $19,768.00 reduction in tax amount due, be sustained in full, together with interest and penalty" (Division's brief, p. 11).

CONCLUSIONS OF LAW

A. The Division has brought a motion for reopening the record for the sole purpose of allowing it, on behalf of petitioner, to submit into evidence the Report of Closing for the acquisition of the Taft Hotel by Taft Partners Development Group. In support of this motion, the Division has submitted the affidavit of its representative, David Gannon, Esq. Mr. Gannon asserts that while reviewing the Division's file on Taft Partners he discovered the Report of Closing, a document which he believes fits within the category of documents contemporaneous with the 1984 transactions. He contends that this motion is proper and should be granted. Petitioner's response to the Division's motion is contained in Martin Kurlander's affirmation. Mr. Kurlander asserts that the Division's motion should be denied. He argues that the Division has not shown that any "special circumstances" exist which would warrant reopening the record so late in the proceedings. He further contends that the Division has failed to demonstrate why, with due diligence, it could not have obtained the Report of Closing from the Taft file in time for the hearing or before the briefs were due.

As an alternative to his response to the Division's motion for reopening the record, petitioner has brought a cross-motion for reopening the record. Petitioner, in his cross-motion, requests that if the record is to be reopened, it should be reopened not only for the submission of the Report of Closing, but also so that a hearing may be held which would give him the

opportunity to present additional witnesses and submit further documentary evidence, if available. The Division's arguments in opposition to petitioner's cross-motion were contained in a letter.

B. I have reviewed the entire record in this matter, including the motion papers submitted by both sides. I find the Division's assertions in favor of reopening the record to be meritless. Petitioner is correct that the Division has failed to demonstrate why, with due diligence, it could not have discovered the Report of Closing in time for the hearing held in this matter.

The hearing in the instant matter was held on July 27, 1994; however, the record remained open until August 26, 1994 to afford petitioner the opportunity to submit documents contemporaneous with the 1984 transaction. Petitioner did not submit any additional documents into the record (see, Findings of Fact "44" and "45"). Review of the record indicates that the Division's representative had access to the Taft audit file prior to the July 27, 1994 hearing; however, rather than requesting the entire file at that time, he only requested and received certain documents (see, Finding of Fact "40"). The Division submitted and then withdrew its Exhibit "J" -- audit workpapers from the Division's audit file for Taft, which included a page which showed how Taft treated the acquisition for gains tax purposes -- from the record (see, Finding of Fact "43"). The Division's motion seeks the admittance of the Report of Closing for Taft Partners Development Group's acquisition of

the Taft Hotel, a document which may have been the source of the information contained in the documents making up the Division's withdrawn Exhibit "J". There is nothing in Mr. Gannon's affidavit which indicates that the Report of Closing was not in the Taft audit file all along. It is clear from the record before me that the Division failed to adequately review the Taft audit file prior to the hearing in the instant matter. The Report of Closing is not new evidence which was unavailable to the Division prior to the closure of the record in this matter.

In Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991), the Tribunal explained that the consideration of evidence after the record has been closed is improper because:

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record."

Therefore, I see no reason to reopen the record in this matter. The Division's motion for reopening the record is denied.

Petitioner's cross-motion for reopening the record requested that if the Division's motion was granted and the record was reopened, it be reopened so that a hearing may be held which would afford petitioner the opportunity to present additional witnesses and submit further documentary evidence, if available. Since the Division's motion for reopening the record is being denied and the record is remaining closed, petitioner's cross-motion for reopening the record must be denied as it is rendered moot.

Petitioner's cross-motion for reopening the record is denied.

C. Tax Law § 1441, which became effective March 28, 1983, imposes a 10% tax upon gains derived from the transfer of real property located within New York State. Tax Law § 1443(1)(a) provides for an exemption from gains tax when the consideration is less than the $1,000,000.00 threshold.

D. Tax Law § 1440(7) defines "transfer of real property" in pertinent part, as follows:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, . . . or acquisition of a controlling interest in any entity with an interest in real property."

E. Tax Law § 1440(4) defines "interest" as follows:

> "'Interest" when used in connection with real property includes, but is not limited to, title in fee, a leasehold interest, a beneficial interest, an encumbrance, a transfer of development rights or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. Interest shall also include an option or contract to purchase real property."

The same provision is found in the regulations at 20 NYCRR 590.3.

F. 20 NYCRR former 590.55 was promulgated pursuant to Tax Law § 1440(4) and (7). 20 NYCRR former 590.55 provides, in pertinent part, that:

> "Question: Is the assignment of a contract to buy real property by the contract vendee a transfer of an interest in real

property subject to the gains tax?

"Answer: Yes. The assignment is taxable to the assignor if the consideration is $1 million or more. For purposes of determining if the $1 million threshold is met and for purposes of filing requirements, the consideration for the assignment is the sum of the amount paid by the transferee/assignee for the contract right plus the contract's purchase price for the real property. If this amount is $1 million or more, it is taxable. Then for purposes of determining gain, consideration is the amount the assignor receives for the assignment. Thus, the gain would be calculated by subtracting any original purchase price for the assignment (legal fees incurred to acquire the contract right or an amount paid to obtain the contract through a previous assignment) from the amount paid for the assignment to the assignor."

G. The term "controlling interest" is defined in Tax Law § 1440(2), in pertinent part, to mean:

"(ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity."

The same provision is found in the regulations at 20 NYCRR former 590.44. This regulation further provides that:

"In the case of a partnership, association, trust or other entity, the acquisition occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the capital, profits or beneficial interest in such entity. Because the statute looks to the acquisition of the controlling interest, it is the act of the transferee which triggers the tax."

H. 20 NYCRR former 590.45 was also promulgated pursuant to Tax Law § 1440(2). 20 NYCRR former 590.45 provides, in pertinent part, that:

"(a) Question: Is the syndication of partnership interest subject to any aggregation?

"Answer: No. As long as no person or group of persons acting in concert acquires a controlling interest (50 percent), the limited partners' (investors) purchases are not taxable.

"(b) Question: When is a group of persons acting in concert?

"Answer: When the various purchasers have a relationship such that one purchaser influences or controls the action of another. . . .

Where the individuals or entities are not commonly controlled or owned, persons will be treated as acting in concert only when the unity with which the purchasers have negotiated and will consummate the transfer of ownership interests supports a finding that they are acting as a single entity. If the acquisitions are completely independent, each purchaser buying without regard to the identity of other purchasers, then the acquisition will be treated as separate acquisitions. The transferees must provide affidavits swearing that their acquisitions are independent of each other. Factors that will indicate whether persons are acting in concert include the following:

(1) The acquisitions are closely related in time.

(2) There are few purchasers.

(3) The contracts to purchase contain mutual terms.

(4) The purchasers have entered into an agreement in addition to the purchase contract binding themselves to a course of action with respect to the acquisition."

I. Although the regulations cited above were not effective until September 24, 1985 and the transaction at issue took place in March through September 1984, such regulations are nonetheless applicable in the instant matter.

> "Although a taxing body does not have unfettered authority to make regulations retroactive (Central Illinois Public Service Co. v. United States, 435 US 21, 33, 98 SCt 917, 923, 55 L Ed 2d 82 [Brennan, J., concurring]), and may not give retroactive effect to regulations that change settled law, particularly where it leads to harsh results for the taxpayer (Redhouse v. Commissioner of Internal Revenue, 728 F2d 1249, 1251, 1252, cert denied, 469 US 1034, 105 SCt 506, 83 L Ed 2d 397), nevertheless, a taxing authority's retroactive application of the regulation will be upheld where the choice is a rational one supported by relevant considerations (Chock Full O'Nuts Corp. v. United States, 453 F.2d 300, 302)." (Matter of Varrington Corp. v. City of New York Dept. of Finance, 201 AD2d 282, 607 NYS2d 630, affd 85 NY2d 28, 623 NYS2d 534.)

In the instant matter, retroactive application of the relevant regulations is appropriate because regulations interpreting tax statutes are generally retroactive to the effective date of the statute to which they relate unless the taxing authority limits such retroactive application (see, Internal Revenue Code § 7805[b]; Matter of Varrington Corp.v. City of New York Dept. of Finance, supra). In addition, the acquisition of a controlling interest in an entity with an interest in real property was included in the definition of a "transfer of real property" subject to tax when the gains tax, article 31-B, was first enacted, on March 28, 1983.

J. The Division contends that the record establishes that Messrs. Steven and Martin Goodstein, Cohen and Sopher were clearly acting in concert when petitioner first assigned a 50 percent interest in the contract to purchase the Taft Hotel to

them, as well as when petitioner subsequently transferred his 35 percent interest in Taft to Steven Goodstein. It asserts that petitioner's transfer of his 35 percent interest to Steven Goodstein constitutes the transfer of a controlling interest in an entity with an interest in real property which is subject to the gains tax.

K. Petitioner asserts that his transfer of 35 percent of Taft to Steven Goodstein was not a transfer of a controlling interest subject to the gains tax. He contends that Steven Goodstein's purchase of 35 percent of petitioner's interest in Taft increased his partnership interest to 43.5 percent, well below the 50 percent threshold for acquisition of a controlling interest. He asserts that the Division's concerted action theory is without merit. Petitioner argues that there is no evidence that Steven Goodstein and Messrs. Martin Goodstein, Sopher and Cohen acted in concert to buy 35 percent of petitioner's interest in Taft to add to their previous holdings of approximately 50 percent of Taft. He argues that he offered powerful testimony that the two transfers were not related. Futhermore, petitioner maintains that he offered credible testimony that there was dissension amongst the four investors and that at least one investor, Jacob Sopher, was on his side. Petitioner also contends that his "contract to sell the 35 percent to Mr. Goodstein was made with Mr. Goodstein alone, as an individual, not with the four non-Drizinites as a unit" (Petitioner's brief, p. 21).

Petitioner avers that the original acquisition of 50 percent

by Messrs. Martin and Steven Goodstein, Cohen and Sopher differed sharply from the second acquisition of 35 percent by Steven Goodstein. He maintains that the price per share of Taft was much lower in the first deal than it was in the second one, i.e., in the first deal, the four partners paid $1,600,000.00 for 50 percent of the partnership, while in the later transaction "Steven Goodstein paid approximately $6.4 million (or $5.9 million on a present value, discounted calculation)" (Petitioner's brief, p.21). Petitioner argues that when Steven Goodstein "shook" him "down", Steven Goodstein was acting on his own and was not acting "'as a single entity' with Mr. Cohen, Mr. Sopher and Martin Goodstein" (Petitioner's brief, p. 22).

L. The record in this matter clearly indicates that the investors, Messrs. Steven Goodstein, Martin Goodstein, Cohen and Sopher were acting as a single entity when they initially acquired the 50 percent interest in the contract to purchase the Taft Hotel from petitioner and when Steven Goodstein acquired petitioner's 35 percent interest in Taft. However, the Division's argument that petitioner's transfer of his 35 percent interest in Taft to Steven Goodstein is a taxable event is without merit. It is clear from the record before me that, prior to petitoner's transfer of his 35 percent interest in Taft to Steven Goodstein, Messrs. Steven and Martin Goodstein, Sopher and Cohen already held a controlling interest in Taft.

Petitioner had a contract to purchase the Taft Hotel from Royale Towers Associates for $32,505,280.00. Unfortunately, petitioner did not have the ability to obtain the financing

necessary to either purchase or to renovate the hotel. Petitioner asked Philip Winograd, the real estate broker who had found the hotel for him, to find a partner who could provide financing for a 50 percent interest. Mr. Winograd introduced petitioner to a group of four investors, Steven and Martin Goodstein, Arthur Cohen and Jacob Sopher. These four investors had the ability to obtain the necessary financing. Petitioner testified that after a month's negotiation he and the four investors entered into a written assignment agreement. On March 1, 1984, pursuant to the assignment, petitioner: (a) assigned a 50 percent interest in the contract for sale and purchase of the Taft Hotel to Messrs. Steven Goodstein, Martin Goodstein, Cohen and Sopher, collectively known as "assignee", (b) agreed to enter into a limited partnership agreement with the assignee, and (c) agreed that the partnership was to acquire title to the premises. As of March 1, 1984, an informal partnership agreement was in effect which was subsequently formalized six days later, on March 7, 1987, when petitioner and Messrs. Steven Goodstein, Martin Goodstein, Cohen and Sopher entered into the limited partnership agreement which created Taft (see, Finding of Fact "12"). According to the terms of the limited partnership agreement, the four managing general partners were Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher (see, Finding of Fact "13").

In the instant case, Messrs. Steven Goodstein, Martin Goodstein, Cohen and Sopher's acquisition of a controlling interest was a two-step process begun on March 1, 1984 and

completed on March 7, 1984. The contract to purchase the Taft Hotel is an interest in real estate (see, Conclusion of Law "E"). As noted in Conclusion of Law "G", a "controlling interest" is defined as 50 percent or more of the capital, profits or beneficial interest in a partnership, association, trust or other entity. When petitioner and the four investors assigned their respective interests in the contract of purchase to Taft, the investors held a 50 percent interest in Taft. At that time, the investors acquired a controlling interest in Taft, a partnership which held an interest in New York real property.

It is noted that petitioner's assignment of the 50 percent interest in the contract to purchase the Taft Hotel was disclosed in the transferee questionnaire which petitioner executed on May 21, 1984. Petitioner's affidavit which accompanied the transferee questionnaire also disclosed the subsequent assignment by petitioner and the four investors of their respective interests in the contract to Taft. It is the acquisition of a controlling interest in a partnership having an interest in New York real property which would be subject to the gains tax. Since Steven and Martin Goodstein and Messrs. Cohen and Sopher acquired a controlling interest in Taft in March 1984, petitioner's subsequent transfer of his 35 percent interest in Taft to Steven Goodstein would not be subject to the gains tax. The acquisition of the additional 35 percent interest only increased the investors' ownership interest in Taft. Therefore, the Division improperly subjected petitioner's

transfer of his 35 percent interest in Taft to Steven Goodstein to the gains tax.

M. Tax Law § 1446 (former [1]) provided in part:

"If the tax commission determines that there has been an overpayment of tax, interest shall be paid by the comptroller to the transferor, on any refund paid pursuant to the provisions of section fourteen hundred forty-five of this article. If it determines that there has been an underpayment of tax, the transferor shall pay interest to the commission on the amount of any tax not paid. The commission, by regulation, shall set the rate of interest to be paid on underpayment. . . of the taxes imposed by this article at the rate of interest prescribed in subsection (e) of section one thousand ninety-six of this chapter."

N. With respect to penalties, Tax Law § 1446 (former[2][a]) provided, in part, that:

"[a]ny 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 of each month of delay or fraction thereof after the expiration of the first month after such return was required to be filed or such tax became due, such interest penalty shall not exceed twenty-five per centum in the aggregate. 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."

O. Assuming arguendo that the transfer of petitioner's 35 percent interest in Taft was a taxable event, the issue of whether the penalties should be abated must be addressed. Petitoner has asserted that reasonable cause exists pursuant to

Tax Law § 1446(2)(a) to waive and abate penalties and interest in this matter. Tax Law § 1446(former [2][a]) allows abatement of penalty and interest penalty only where it is established that the failure to file or pay the tax is due to reasonable cause and is not due to willful neglect. With respect to interest it is irrelevant whether or not petitioner's failure or delay in remitting the tax was due to reasonable cause and not willful neglect since there is no statutory authority for the abatement of interest assessed.

P. Petitioner has requested an abatement of the penalties assessed in this matter. Based on my review of the record, an abatement of penalties would be warranted in this matter.

It was reasonable for petitioner to believe that Steven Goodstein acted alone when he acquired petitioner's 35 percent interest. Petitioner had first-hand knowledge of the original transaction in which the 50 percent interest was transferred to Messrs. Cohen, Sopher, Steven Goodstein and Martin Goodstein and the subsequent transfer which is the subject of these proceedings. Petitioner offered credible testimony that there was dissension among Messrs. Cohen, Sopher, Steven Goodstein and Martin Goodstein. He further testified that the terms for the transfer of the 35 percent interest were negotiated only with Steven Goodstein. In addition, only Steven Goodstein's name appears as purchaser in the acquisition agreement. A reasonably prudent person would have believed, as petitioner did, that Steven Goodstein had not acquired a controlling interest in real property when he acquired petitioner's 35 percent interest in

Taft, inasmuch as Steven Goodstein held only an 8.5 percent interest in Taft prior to his acquisition of petitioner's interest.

It is also noted that petitioner had complied with the statute when he filed a transferee questionnaire disclosing his transfer of 50 percent of his interest in the contract to purchase the Taft Hotel (see, Finding of Fact "23"). Taking into account petitioner's background and his personal knowledge of the events leading up to the transfer of the 35 percent interest in Taft, it was reasonable for petitioner to believe that there was no need to file a return, or to pay the tax.

Assuming arguendo that the transfer of petitioner's 35 percent interest in Taft was a taxable event, an abatement of penalties would be warranted in this matter.

Q. The petition of Sholom Drizin is granted and the Notice of Determination, dated April 30, 1992 is hereby cancelled. The Division's motion is denied and petitioner's cross-motion is denied.

DATED: Troy, New York
November 30, 1995

/s/ Winifred M. Maloney

ADMINISTRATIVE LAW JUDGE