NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition	:	**DETERMINATION**
of	:	
Jonis Realty/E. 29th Street, LLC.	:	**TAT(H)09-9R(RP)**

Bunning, A.L.J.:

The Petition in this matter was filed with the Administrative Law Judge (ALJ) Division of the New York City (City) Tax Appeals Tribunal (Tribunal) on February 19, 2009. It protested a Conciliation Decision issued by City Department of Finance (Respondent) Conciliation Bureau dated November 25, 2008 upholding a May 21, 2008 Notice of Disallowance of a claim for refund (Notice of Disallowance) in the amount of $674,996, consisting of $511,720 in Real Property Transfer Tax (RPTT), $32,787 in interest, and $130,489 in penalties. The Conciliation Decision sustained the Notice of Disallowance and discontinued the conciliation proceeding.

A hearing was held before the undersigned at One Centre Street, New York, New York, on December 11 and 16, 2014, where testimony was taken and exhibits were submitted. Petitioner and Respondent filed briefs after the hearing, the last of which was filed on July 1, 2015. Petitioner was represented by Matthew Hearle, Esq. of Goldberg Weprin Finkel Goldstein LLP. Respondent was represented by Amy Bassett, Esq., Assistant Corporation Counsel with the City's Law Department.

ISSUES

1. Whether the Tribunal has jurisdiction to consider this matter, which depends on whether Steven Halegua had the authority to file the Claim for Refund, the request for conciliation conference, and the Petition.

2. Whether the transfer of an economic interest in real property should be aggregated with two earlier transfers to determine whether a controlling interest was transferred.

FINDINGS OF FACT

Steven Halegua (Steven) and Nathan Halegua (Nathan) are brothers. At all relevant times, Steven was a chiropractor who resided in Florida, and Nathan was a real estate investor and developer in New York. In August, 2005, they each held a 46.5% interest in Petitioner, Jonis Realty/E 29th Street, LLC (Jonis). The other 7% interest was held by Nathan's son, Joshua Halegua. Jonis owned a 96% interest in 39 East 29th Street, LLC, which owned the parcels of real property located at 39-43 East 29th Street (collectively, with the acquisition of the adjacent lot, 45 East 29th Street (see below), the Property). 39-43 East 29th Street was managed by Nathan and had been in their family for some time. The remaining 4% interest in 39 East 29th Street, LLC was held by an unrelated party.

Nathan planned to develop the Property from four-story walk-ups to a multi-story condominium, but needed additional funding and construction expertise for this purpose. On or about August 5, 2005, Jonis made a transfer of a 30% interest in 39 East 29th Street, LLC to 39 East 29th Street LP (the Transferee). 39 East 29th

Street, LLC used the proceeds to purchase the adjacent lot, 45 E. 29th Street. This was followed by a transfer some months later[1] of an additional 18% interest in 39 East 29th Street, LLC by Jonis to the Transferee.[2] At that point the Property was beneficially owned 48% by Jonis, 48% by the Transferee, and 4% by the unrelated party. Nathan testified that there was never an intention to transfer more than this 48% (Tr 109:7-9).

Steven testified that he became uncomfortable with the investment after the Transferee's entry because he could not get answers to his questions about the status of the development, and although it was an income-generating property, he received no income. He was also concerned that if additional funding were needed, there would be capital calls, which he could not meet, which would result in the dilution of his interest or his being "squeezed out of the deal completely and I'd rather get something than nothing." (Tr 57:4-10.) He testified that he had initially offered to sell his interest in Jonis to the architect on the development project.

Steven testified that in a telephone conversation with Nathan and the Transferee, he offered to sell his interest in Jonis, and the offer was accepted by the Transferee. Nathan did not have

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[1]The date of the second transfer was not specified. Section 3.1.1(b) of the Amended and Restated Limited Liability Company Operating Agreement of 39 East 29th Street, LLC, dated August 5, 2005, required that this second transfer take place on or before October 1, 2005. The witnesses' testimony referred to this document.

[2]The figures of 30% and 18% are derived from the Amended and Restated Limited Liability Company Operating Agreement of 39 East 29th Street, LLC, dated August 5, 2005, and the testimony at the hearing, which relied on this document. The First Amendment to the Operating Agreement of that entity, dated March 14, 2006, refers to transfers to the Transferee of 25.41% and 22.59%. The parties did not refer to or explain this discrepancy. Because the total of the interests transferred under both documents is the same (48%), this discrepancy does not appear to be relevant.

sufficient funds to purchase Steven's interest and repeatedly asked Steven not to sell. On March 14, 2006,[3] Steven transferred his entire beneficial interest in the Property to the Transferee. He testified that he "sold under duress" and was "forced to sell." His testimony was corroborated by Nathan.

Although Steven's testimony and written submissions in this case have characterized the third transfer as a sale of his interest in Jonis, the Transferee did not in fact become a member of Jonis. Instead, Jonis transferred a 22.32% interest in 39 East 29th Street, LLC to the Transferee, and distributed the sales proceeds of $9,846,000 to Steven.[4]

The testimony was undisputed that after the first two transfers, no further transfers were contemplated. After that, because of his apprehension with his investment, Steven wanted to sell his interest to whomever he could. There was no plan for him to transfer to the Transferee or to anyone else. Indeed, he testified that his brother was bitter and angry about the transfer. Furthermore, there are no facts to indicate that the Transferee in any way solicited the offer to transfer or took any action to cause Steven to sell his interest to the Transferee.

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[3]There was a factual issue as to whether the transfer occurred on March 14, 2006, as stated on the cover page of the Petition and on the RPTT return (Form NYC RPT) filed in connection with this transaction, or on May 15, 2006, the date alleged in statement annexed to the Petition. At the hearing, the parties stipulated that the transfer took place on March 14, 2006 (Tr 147:10-15).

[4]Second Amended and Restated Limited Liability Operating Agreement Dated March 14, 2006 at section 3.1.1(c). Petitioner did not explain why this structure was adopted. It appears that it was done because it had the same economic effect as a sale of Steven's interest in Jonis, because Steven owned 46.5% of Jonis, which in turn owned 48% of the entity that held the Property. However, it kept investors who were not Halegua family members in 39 East 29th Street, LLC, rather than admit them into Jonis.

After these three transfers, the Property was beneficially owned 70.32% by the Transferee, 25.68% by Jonis, and 4% by the unrelated third party. The Transferee had obtained its entire interest within a three-year period.

Jonis determined RPTT was due on the third transfer, apparently concluding that it should be aggregated with the previous two transfers. It was also determined that Steven would pay the tax because the sale of his interest in Jonis would provide him with the necessary funds.

A Form NYC-RPT ("Real Property Transfer Tax Return") was filed for the transaction,[5] reporting that a 70.32% interest had been transferred. The grantor was listed as Jonis and Nathan signed the return on behalf of Jonis. According to the return, tax of $511,719.78 was due, together with $6,518.24 in interest, and penalty of $133,047.14, for a total of $651,285.16. According to the ACRIS cover sheet filed with the return, payment of $651,285.16 plus a filing fee of $165 was made to the City. The Halegua brothers testified that they believed Jonis made the payment to the City, but Steven testified that, ". . . I paid it out of my money. He [Nathan] wanted nothing to do with it. I mean, I think his feeling was you got the money, pay the tax, you know." (Tr 71:15-18.)

[5]Two different RPTT returns were introduced into evidence. One was attached to the Petition and Claim for Refund. It leaves the amounts of interest and penalty blank, and attaches a schedule entitled "NYC RPT Worksheet" which shows RPTT of $511,720, interest of $32,787, and penalty of $130,489, for a total of $674,996. The other RPTT return was included in Respondent's audit file (which contains both versions of the RPTT return), to which the ACRIS cover sheet was attached, and indicates a total payment of $651,285.16. The Department's records state that this amount was paid on October 25, 2006. Petitioner did not explain why the RPTT return attached to the Petition and Claim for Refund was not the one actually filed. Regardless, the document that was filed is controlling, and is discussed above.

Although the testimony was not completely clear as to the mechanics of the payment – whether Steven wrote a check or the amount of RPTT, interest, and penalty was withheld from his share of the proceeds of the sale – the testimony was undisputed that he paid the tax at issue.

According to a letter dated October 11, 2006 from Steven's attorney to David L. Smith at Goldberg, Weprin & Ustin LLP[6] (Goldberg Weprin), the amounts of RPTT, interest, and penalty, and New York State transfer tax, interest, and penalty, were withheld from Steven's proceeds from the sale. Attached to the letter was a schedule apparently prepared by Goldberg Weprin showing the amount of State and City transfer tax, penalty, and interest,[7] and a page entitled "Steven Halegua Redemption Payments" indicating that he received three installments totalling $9,846,000 from which $773,344 was listed as "Amt withheld for transfer taxes." Below that it states, "New York State $98,349" and "New York City $674,995."[8]

It is found as a fact that the amount paid for RPTT, interest, and penalty was withheld from Steven's proceeds and paid by Jonis to the City. However, the amount of tax, penalty, and interest that was paid was $651,285.16, reflected on the ACRIS cover sheet and the filed RPTT return, rather than the $674,996 sought as a refund, and the Claim for Refund is limited to the amount paid,

[6]The law firm later changed its name to Goldberg Weprin Finkel Goldstein, LLP.

[7]The schedule of City tax, entitled "NYC RPT Worksheet," was attached to the unfiled RPTT return referenced in note 5, above.

[8]$674,995 is $1 less than the amount of the refund claimed by Petitioner, a difference due to rounding.

$651,285.16. Jonis thus acted as a withholding agent and Steven, not Jonis, paid the RPTT, interest, and penalty at issue.

An Application to Claim a Refund dated September 15, 2007 (Claim for Refund) was filed with Respondent.[9] The amount of the claim was $674,996, which consisted of RPTT of $511,720, interest of $32,787, and penalties of $130,489. The claimant was listed as Jonis, and it was signed by Steven as a member, despite the fact that he had ceased to be a member 18 months earlier when he sold his interest in Jonis. No power of attorney or evidence of payment of the RPTT accompanied the Claim for Refund. Attached to the Claim for Refund was a lengthy recitation of facts stating that Steven was the grantor of the third interest transferred, and that this transfer was unrelated to the prior two transfers. It also attached the same schedule attached to the October 11, 2006 letter showing the amounts of RPTT, interest, and penalty. The Claim for Refund requested that the refund be paid to Steven at his address in South Miami, Florida, rather than at the Great Neck, New York address of Jonis shown on the RPTT return and other documents.

Steven testified that Nathan was aware that he was pursuing the Claim for Refund (Tr 67:15-18) and Nathan testified that Jonis approved of Steven's pursuing it (Tr 126:24 - 127:7.)

Respondent issued a Notice of Disallowance dated May 21, 2008 addressed to Jonis, in care of Steven at his address. The Notice of Disallowance did not address the claimant's failure to attach a

[9]Respondent's audit file contains two versions of the Claim for Refund. The first is dated on the cover page and attaches the version of the RPTT return which does not have interest and penalty filled in on page 3. The other is undated on the cover page and attaches the version of the RPTT return which has interest and penalty listed on page 3 and was apparently filed. The audit file was introduced without testimony, and neither party explained why there are two versions of the Claim for Refund. There is no dispute that the Claim for Refund was timely.

power of attorney or evidence of payment. Instead, it stated that the "three transfers of economic interest in Real Property within a three year period must be aggregated. The aggregation of the conveyance resulted in a controlling economic interest in the Real Property, which is subject to the Real Property Transfer Tax. You have failed to verify that the tax was overpaid."

A request for conciliation conference was timely filed on August 12, 2008. Attached to the request was a power of attorney, dated July 20, 2008, signed by Steven, authorizing Matthew Hearle and Andrew W. Albstein of Goldberg Weprin to represent Jonis. The power of attorney listed the taxpayer's name and address as "Jonis Realty/E 29th Street LLC, c/o Dr. Steve Halegua," with his Florida address.

Respondent's Conciliation Bureau issued a decision discontinuing the conciliation proceeding on November 25, 2008 because Petitioner disagreed with the Conciliation Bureau's proposed resolution. Jonis timely filed the Petition in this matter dated February 18, 2009, accompanied by a copy of the same power of attorney. Attorney Hearle, acting under the power of attorney signed by Steven, signed both the request for conciliation conference and the Petition. Both the request for conciliation conference and the Petition listed Jonis's address, rather than Steven's.

Respondent filed a motion for summary determination on October 5, 2009, arguing that because Steven had divested himself of his entire interest in Jonis by the transfer at issue, he lacked the authority to grant a power of attorney on behalf of Jonis, and to file the Claim for Refund, the request for conciliation conference, and the Petition. Respondent's motion was granted by a

Determination dated July 21, 2010, which concluded that Steven was no longer a member of Jonis after the transfer of his interest, and thus had no authority to execute the power of attorney in July, 2008, and that the Petition was therefore invalid.

Petitioner filed an exception dated August 19, 2010 with the Appeals Division of the Tribunal. As part of that appeal, Petitioner submitted a power of attorney, dated October 15, 2010, signed by Nathan on behalf of Jonis, authorizing attorneys Hearle and Albstein to represent Jonis in this matter. The taxpayer's name and address in this second power of attorney are shown as Jonis (not in care of Steven) at the New York address used by Jonis. There is no dispute that Nathan was authorized to execute this power of attorney on behalf of Jonis.

The Appeals Division remanded the case to the ALJ Division of the Tribunal, stating that among the issues to be determined were whether Steven was the grantor of an interest in Jonis, paid the RPTT, and is thus the true party in interest, and whether Jonis could ratify Steven's acts in pursuing the Claim for Refund. At the suggestion of the undersigned, Jonis filed a motion to amend the Petition to name Steven as the petitioner. The motion was denied by order dated December 30, 2013 because Petitioner was unable to prove whether Jonis or Steven had paid the tax to the City and thus did not establish that Steven was the proper party to file the Claim for Refund.

DISCUSSION

I. Jurisdiction

City Administrative Code (Code) § 11-2108.a provides that a claim for refund of RPTT "may be made by the grantor, the grantee

or other person who has actually paid the tax." The regulation (19 RCNY § 23-14 [a][1]-[3]) mirrors this language, but adds that the payment to be considered is the payment of tax "to the Commissioner of Finance." It provides that an application for refund or credit may be made "by any of the following persons, as the case may be: (1) [t]he grantor, if he has paid the tax to the Commissioner of Finance; (2) [t]he grantee, if he has paid the tax to the Commissioner of Finance; (3) [a]ny other person who has actually paid the tax to the Commissioner of Finance." This regulation also requires that the application be accompanied by a power of attorney if signed by an agent, and by a cancelled check or other evidence of payment of the tax by the applicant to the Commissioner (19 RCNY § 23-14[b] and [b][2][i]).

As Respondent points out, the purpose of the statute and regulation is to ensure that any refund of tax is paid to the proper person and in the proper amount. In this case, that party is Steven Halegua. The testimony and evidence presented at the hearing establish that Jonis withheld the RPTT, interest, and penalty from him on the sale of his interest and paid it to the City. Nathan's testimony establishes that Steven, rather than Jonis, paid the tax and that Jonis makes no claim for refund. Steven "actually paid the tax" and thus is the proper party to maintain the Claim for Refund.

The arrangement to pay the RPTT, interest, and penalty from the proceeds of the sale of Steven's interest may be analogized to the withholding of income tax from an employee's wages by an employer. The employer withholds the tax and pays it to the tax authority on behalf of the employee, but the employee is the taxpayer and is the appropriate party to seek a refund of any overpayment of tax because amounts withheld are credited to the tax

paid by the taxpayer (Internal Revenue Code [26 USC] § 1462; Tax Law § 673). Accordingly, Jonis's withholding of the RPTT, interest, and penalty from Steven makes Steven – not Jonis – the taxpayer. He is thus the proper party to make a claim for refund of the tax.

As far as the Claim for Refund is concerned, there is no jurisdictional issue. Steven signed and filed the Claim for Refund, which explained that two transfers of beneficial interests in the Property were made by Jonis and a third by him. The Claim for Refund sought a refund nominally for Jonis, but in care of Steven, requested that it be sent to his address, and directed that the refund be paid to him rather than Jonis. All of the facts were disclosed and Respondent processed the Claim for Refund on the merits, ignoring the failure to attach a power of attorney or evidence of payment. Furthermore, it sent the Notice of Disallowance addressed to Jonis at Steven's address in Florida. Respondent plainly acknowledged that it was dealing with Steven Halegua in addressing the Claim for Refund, and correctly treated him as the taxpayer.

An agency may waive a regulation where it does not affect substantial rights and is not prejudicial. (*Bivins v Helsby*, 55 AD2d 230 [3d Dept 1976]; *Matter of Meyer and N.H. Meyer Drug, Inc. v State Tax Commn.*, 1981 WL 141855 [Sup Ct, Albany County, 1981]; *Matter of Ilter Sener d/b/a Jimmy's Gas Station*, DTA No. 800498, TSB-D-88(7)S [NYS Tax Appeals Tribunal, 1988].) "A procedural as opposed to a jurisdictional defect may be waived and by receiving and hearing the protest on the merits without objection the appellants waived the alleged defect of which they now complain." (*Matter of Delaware, Lackawanna & W.R.R. Co. v Assessors of City of Binghamton*, 12 AD2d 852 [3d Dept 1961].)

Respondent did not request a power of attorney or evidence of payment when it was considering the Claim for Refund, and instead reached the merits. By doing so, it waived these requirements, which are not jurisdictional.

When the Claim for Refund was disallowed, Steven signed a power of attorney authorizing his attorneys to file the request for conciliation conference and the Petition. That power of attorney was nominally in the name of Jonis, but as with the Claim for Refund, the address was in care of Steven at his Florida address. Again, Respondent addressed the merits of the refund claim in the conciliation proceeding.

The Petition was brought in the name of Jonis. A petition may be amended to state the proper party, even after the 90 days for filing the petition have run. (*Matter of TD Rowe Corp. fka the Rowe Corp.*, TAT (E) 93-202 (UT) [NYC Tax Appeals Tribunal, 1996]; *Fletcher Plastics, Inc. v Commr.*, 64 T.C. 35 [1975]). A complaint or petition may be amended if the plaintiff or petitioner is not the real party in interest where "the right party plaintiff is in court but under a defective name or title as party plaintiff." (*Covino v Alside Aluminum Supply Co.*, 42 AD2d 77, 80 [4th Dept 1973]; *Orthopaedic Specialists of Greater N.Y., P.C. v Kemper Independence Ins. Co.*, 45 Misc3d 133(A) [1st Dept 2014]; *Unique Laundry Corp. v Hudson Park N.Y. LLC*, 55 AD3d 382 [1st Dept 2008]).

Here, the Petition was brought in the wrong name by the proper party. *Covino* presents a somewhat similar set of facts. In that case, the complaint was brought in the name of an individual doing business as a corporation. The complaint alleged that the property in question was owned by the corporation, and thus the corporation was the proper plaintiff. Amendment of the complaint was permitted

in part because the defendant "is not prejudiced and should have been well aware from the outset that a misdescription was involved." (42 AD2d 77, 79.) This is the case here. The Claim for Refund, request for conciliation conference, and Petition all allege that Steven's transfer should not be aggregated with Jonis's transfers. The Claim for Refund and first power of attorney listed the taxpayer as Jonis in care of Steven. Respondent sent the Notice of Disallowance to Steven. There is no prejudice to the City in treating Steven as the party maintaining the Claim for Refund. Indeed, Respondent in fact treated Steven as the claimant until it filed its motion to dismiss the Petition, which was premised on the argument that Steven lacked the authority to bring a claim for refund on behalf of Jonis.

However, even if Jonis were viewed as the party that paid the tax, the Tribunal has jurisdiction. Nathan testified that his brother was authorized to pursue the Claim for Refund on behalf of Jonis, and Nathan ultimately signed a power of attorney dated October 15, 2010 authorizing this proceeding.[10] There is nothing in the power of attorney he signed to indicate that it was intended to be prospective only; indeed, providing such a power of attorney would have been pointless because the only purpose of this second power of attorney was to ratify the actions of Steven and the attorneys in pursuing the Claim for Refund.

> The purpose of any written power of attorney is not to define the authority of the agent, as between himself and his principal, but to evidence the authority of the agent to third parties with whom the agent deals. (*Keyes*

[10]Steven testified that Nathan signed this power of attorney only after Steven agreed to pay Nathan 50% of the refund. Respondent argues from this that Steven's actions before then were not authorized. However, because Steven paid the tax and is the real party in interest, he did not need Nathan's approval to pursue the Claim for Refund. This testimony further illustrates the acrimony between the brothers resulting from Steven's sale of his interest in Jonis.

> *v Metropolitan Trust Co. of City of New York*, 220 NY 237, 115 NE 455, 456). Thus, in the absence of a statute requiring a written power of attorney (see, for example, General Obligations Law § 5-703[1][relating to powers over real property]), the lack of the written power does not mean that the representative is not authorized to act, but only means that the clear objective proof of the authority provided by a written power of attorney is not available.

(Matter of Jenkins Covington, N.Y., Inc., DTA Nos. 800310 and 800311, TSB-D-91(91)S, *confirmed*, 195 AD2d 625 [3d Dept 1993], *lv den*, 82 NY2d 664 [1994]; *see also*, 2A NY Jur.2d, Agency § 62; *cf. Matter of Sulzberger v Tax Commn. of City of N.Y.,* 33 AD2d 543 [1st Dept 1969] and *Matter of Jankolovits v Tax Commn. of City of N.Y.*, 274 AD2d 395 [2nd Dept, 2000], where the City Charter required a power of attorney). As is the case with the State Tax Appeals Tribunal discussed in *Jenkins Covington*, no statute requires a power of attorney in this Tribunal or in dealing with Respondent. Instead, this is provided in regulations: Tribunal Rules of Practice and Procedure (20 RCNY) §§ 1-03 and 1-04 and Respondent's regulations (19 RCNY) §§ 23-14 (discussed above, concerning refunds of RPTT) and 27-01 (governing representation of taxpayers.) Thus, as stated in *Jenkins Covington*, a power of attorney is not the exclusive means by which the agent's authority may be demonstrated.

Numerous cases have held that a deficient power of attorney may be ratified by subsequent acts, such as the representation of the petitioners "at every stage of these proceedings" (*Jenkins Covington*), the filing of petitions and appearances at a conciliation conference and the first day of hearing (*Matter of DeFilippis Crane Service, Inc.,* DTA No. 807042, TSB-D-94(19)S [NYS Tax Appeals Tribunal, 1994]), or submission of a second power of attorney (*Matter of Top Shelf Deli, Inc. t/a Burns Park Deli*, DTA No. 807115, TSB-D-92(14)S [NYS Tax Appeals Tribunal, 1992]). An

agent's unauthorized acts may be authorized after the fact by the principal's ratification, which "relates back and supplies original authority to do the act." (2A NY Jur.2d, Agency § 181.)

To the extent Jonis was or is a party to this proceeding (which it does not appear to be because it did not pay the tax, but instead withheld it from payment to Steven), the October 15, 2010 power of attorney signed by Nathan authorized these same attorneys to act on its behalf, and that authority related back to the inception of this matter. That authority was also demonstrated by the attorney's actions in pursuing this claim and action, ostensibly in the name of Jonis.

For these reasons, the Tribunal has jurisdiction in this matter. The Claim for Refund, request for conciliation conference, and Petition were properly and timely filed. The real party in interest is Steven, not Jonis.

II. Aggregation

The remaining issue is whether the third transfer is to be aggregated with the two prior transfers of interests in 39 East 29th Street, LLC in determining whether a controlling interest was transferred.

Code § 2102 imposes a tax on the transfer of a controlling interest in entities that own real estate in the City. A controlling interest is defined as 50% or more the stock of a corporation or of the capital, profits or beneficial ownership of a partnership. Code § 11-2101.8.

Code § 11-2101.7 defines a "transfer" to include transfers of interests in entities "whether made by one or several persons, or in one or several related transactions, which shares of stock or interest or interests constitute a controlling interest in such corporation, partnership, association, trust, or other entity."

Real Property Transfer Tax Rules and Regulations [19 RCNY] section 23-02, defining "controlling interest," provides that related transfers "are aggregated in determining whether a controlling economic interest has been transferred." It also provides that "Related transfers include transfers made pursuant to a plan to either transfer or acquire a controlling interest in real property."

This section also contains a presumption: "Transfers made within a three year period are presumed to be related and are aggregated, unless the grantor(s) or grantee(s) can rebut this presumption by proving that the transfers are unrelated."

The three transfers at issue took place within a three-year period, so they are presumed to be related. Petitioner has the burden to rebut this presumption (19 RCNY § 23-02).

Neither the statute nor the regulation define a "related transaction" or explain what showing must be made to rebut the presumption. The regulation contains 15 illustrations which provide some guidance.

In Illustration (ii) to Regulation 23-02, A, B, and C each own 1/3 of a corporation. A sells his 1/3 interest to D, and within 3 years, B sells his 1/3 interest to D. The illustration concludes: "The transfers made by A and B are presumed to be related because

they were made within a three year period" and tax will apply. Curiously, however, the illustration does not mention the rebuttable nature of the presumption. Nor does it state that transfers to the same transferee are necessarily related and not subject to the rebuttable presumption.

Illustration (x) contains a similar scenario from which a similar conclusion may be drawn. There, A and B each own 50% of a corporation. A sells 20% to C and within 2 years B sells 30% to C. The illustration concludes, "Since these transfers occur within a three year period, they are presumed to be related, and thus, subject to the transfer tax." Again, the rebuttable nature of the presumption is not referred to, but here, too, the parties could show that the transactions are unrelated.

Illustration (xi) provides an example of unrelated transactions. A, B, and C each own 1/3 of a corporation. In 1987, A loses a lawsuit related to her business and transfers her 1/3 interest to satisfy a judgment. In 1989, B transfers his 1/3 interest to his spouse pursuant to a separation agreement. The illustration concludes: "The transfers by A and B will not be aggregated because the transfers are not related. Thus no tax is due." This illustration presents a scenario of two transferors making transfers to two unrelated transferees for independent reasons. It concludes that they are unrelated apparently because the non-identity of the transferors and transferees, and the reasons for the transfers, establish the independence of the transactions and rebut the presumption that they be aggregated because they occurred within three years of each other. Illustration (xi) suggests that transfers which are unplanned and independent of each other are not related, and that facts demonstrating this can rebut the presumption.

Respondent issued a Finance Letter Ruling[11] holding that transfers by the same person were not related. FLR-(129)-RP-10/88 considered the following situation. The grantor (Y) held 50.7% of an entity and his son held the remaining 49.3%. Y made gifts of 0.2% of his interest to each of his two daughters in December, 1986, and again in January, 1987, reducing his ownership to 49.9%. At the time of the transfers he was in good health. Within three years, he unexpectedly died, triggering a redemption provision which caused the transfer of his entire remaining 49.9% interest for cash. After the redemption the son would own 98.5% of the entity and the daughters would own the remaining 1.5%. The ruling concludes that the transfers are unrelated, despite the fact that a controlling interest (50.7%) was transferred within a three year period. "Provided that the December, 1986, and January, 1987, transfers by Y totaling .8% were made while he was in good health and not in contemplation of death, then these transactions will not be deemed related to the redemption and, therefore, will not be aggregated."

The ruling does not articulate a rule, but the basis of the holding appears to be that at the time of the gifts to the daughters, there was no reason to expect that the final transfer by redemption would occur in the near future.[12] These facts rebut the presumption that the transactions are related. The regulations and

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[11]19 RCNY § 16-05(a) provides that "A ruling shall be binding upon the Department of Finance only with respect to the person to whom the ruling is rendered, provided that the facts are as stated in the ruling request. A taxpayer may not rely on a ruling issued to another taxpayer. All bureaus of the Department of Finance must follow the conclusions stated in the ruling where the factual situations are the same." Although not binding in this proceeding, such a ruling elucidates Respondent's analysis of the issue presented.

[12]The age of the grantor is not stated, but regardless, a redemption of his interest upon death was foreseeable at the time of the gifts. Yet the ruling considers only the near-term chances of his death: it relates that he was in good health and it assumes that the transfer was "not in contemplation of death."

this ruling indicate that transfers are unrelated if they are unplanned, unexpected, or occur for independent reasons (as in illustration xi). They also indicate that the rebuttable presumption applies even where the transfers are between the same transferor or transferee.

In this case, the evidence is uncontradicted that at the time of Steven's transfer, the Transferee owned 48% of the entity, there was no plan to make any further transfers and that the third transfer was for reasons unrelated to the initial transfers. The first two transfers were made to gain the funding and expertise of the Transferee, and were limited to a 48% interest. The third transfer was prompted by Steven's desire to exit the investment. It led to bitterness and acrimony between Steven and Nathan, who lost control of 39 East 29th Street, LLC. The third transfer was unplanned, unexpected, and occurred for reasons unrelated to the first two transfers.

Respondent argues that the three transfers are related because they are all transfers of interests in the same entity that resulted in the transfer of a controlling interest. The regulation could have been drafted to provide such a rule, but it was not. There is nothing in the regulation to indicate that transfers of interests in the same entity are by definition related and that the presumption may not be rebutted in such a case. Indeed, illustration (xi) is directly contrary to such an interpretation. To interpret the regulation as Respondent argues would eliminate both the requirement that transactions be related to be aggregated, and the ability to rebut the presumption. A regulation may not be selectively read in such a manner. A regulation, like a statute, must be interpreted so that all of its provisions are read and

construed together (*Matter of Tocqueville Asset Management L.P.*, TAT (E) 10-37 (UB) [City Tax Appeals Tribunal, 2015]).

For these reasons, and based upon these authorities, it is concluded that the third transfer is not related to the earlier transfers and thus may not be aggregated with them in determining if a controlling interest was transferred. Accordingly, the transfers are not subject to RPTT, the Claim for Refund to Steven Halegua is allowed, and the Petition is granted.

However, both the RPTT return which was filed and the ACRIS cover sheet indicate that the amount paid was $651,285.16, rather than the $674,996 sought by the Claim for Refund. Claims for refund of RPTT do not bear interest. Code § 11-2108.a. Therefore, the refund payable to Steven Halegua must be limited to $651,285.16.

IT IS SO ORDERED.

Dated: New York, New York
September 9, 2015

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David Bunning
Administrative Law Judge