STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
BERKELEY GROUP ASSOCIATES, AARON ZIEGELMAN AND WILLIAM K. LANGFAN for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	DECISION DTA Nos. 806126 808574, 808575 808576, 810096 and 810097

Petitioners Berkeley Group Associates, Aaron Ziegelman and William K. Langfan, c/o Joel Schneider, 152 West 57th Street, New York, New York 10019, filed an exception to the determination of the Administrative Law Judge issued on July 30, 1993. Petitioners appeared by Ziegler, Sagal & Winters, P.C. (Stephen S. Ziegler, Esq., Lanny Sagal, Esq. and Alan Winters, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief in support of their exception, the Division of Taxation filed a brief in response and petitioners filed a reply brief. The reply brief was received by the Secretary to the Tribunal on December 23, 1993 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Division of Taxation erred in failing to treat the transfer of real property by a sponsor to a cooperative housing corporation as a transfer subject to gains tax, thereby precluding petitioners from excluding the mortgage received on that transfer from consideration on subsequent sales of shares of stock, since the transfer occurred prior to the effective date of the gains tax law.

II. Whether the original purchase price should be stepped up to include a portion of the cooperative housing corporation's cost of the property.

III. Whether "negative carry" and "estimated negative carry" incurred by the sponsor on each of the cooperative conversions should be included in the original purchase price of each property as a cost of conversion.

IV. Whether petitioners' taxable gain should be reduced by the "adjustment payments" they made, or, in the alternative, whether suchpayments should be considered part of the sales price not for real property and therefore not subject to gains tax.

V. Whether petitioners Ziegelman and Langfan made a timely election to pay gains tax on an installment basis with regard to the conversion of 102-12 and 102-32 65th Avenue, Forest Hills, New York.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "11" and "13" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

On July 28, 1992, the parties entered into a "Stipulation Admitting Certain Facts" which has been incorporated into the following Findings of Fact. In addition, petitioners submitted 18 proposed findings of fact which also have been incorporated in the following findings, except that paragraph "5" will be addressed in a different manner because it assumes the validity of the valuation ascribed to unsold shares established through expert testimony at hearing and only becomes relevant if the "value" of the negative carry is determined a proper factor in calculating original purchase price ("OPP"); paragraph "13" will be addressed in a different manner, but the facts will be presented; paragraphs "16(a)", "16(b)", "16(c)" and "16(d)" are in the nature of legal arguments and will not be included in the Findings of Fact.

PREAMBLE

These matters involve four separate cooperative conversions of real property commonly known as 35-25 77th Street, 35-24 78th Street and 77-12 35th Avenue, Queens, New York (the "BGA Property"); 34-20 78th Street, Queens, New York (the "78 Property"); 61-41 Saunders Avenue, Queens, New York (the "Saunders Property"); and 102-12 and 102-32 65th Avenue, Forest Hills, New York (the "65th Avenue Property"). Petitioners, as sponsor of each cooperative conversion, transferred the subject real property to individual cooperative housing corporations prior to the effective date of the real property transfer gains tax ("gains tax") imposed by Tax Law Article 31-B. A portion of shares transferred to individual unit purchasers was conveyed pursuant to written contracts entered into prior to the effective date of the gains tax and thereby qualified for an exemption from the gains tax pursuant to Tax Law § 1443(6).

For each of the subject cooperative conversions, the Division of Taxation ("Division") determined that shares conveyed were subject to the gains tax. The Division, after determining the consideration received on taxable shares and the OPP allocated to such taxable shares, concluded that gains tax was required to be paid upon the transfer of units for each cooperative conversion. Notices of determination were issued by the Division that assessed gains tax on the transfer of shares for individual cooperative units of the 65th Avenue Property, the BGA Property, the 78 Property and the Saunders Property. It is notable that the Division recomputed the original gains tax determinations issued with respect to the BGA Property, the 78 Property and the Saunders Property.

1. Berkeley Group Associates ("BGA") was the sponsor of a cooperative conversion of the property known as the BGA Property (see, Preamble).

2. 34-20 78th Associates was the sponsor of a cooperative conversion of the property known as the 78 Property (see, Preamble).

3. 461-41 Saunders Associates was the sponsor of the property known as the Saunders Property (see, Preamble).

4. The conversions of the BGA Property, the 78 Property and the Saunders Property (collectively, the "Properties") were accomplished by the sponsor transferring the real property to the cooperative housing corporation ("CHC") in exchange for:

(a) the stock of the CHC not sold to unrelated parties at the time of conversion (the "unsold shares");

(b) the proceeds from the sale of stock of the CHC to unrelated parties at the time of conversion (net of certain expenses); and

(c) the assumption and/or the granting of a mortgage on the real property.

5. At hearing, petitioners' expert witness, Mr. James Levy, placed a value on the unsold shares in the BGA Property transfer from the sponsor to the cooperative housing corporation of $3,260,800.00. The closing statement valued the unsold shares at $5,100,626.30. The discount of the market value used by Mr. Levy was calculated by capitalizing the negative carry at 10% and deducting that amount from the discounted price of the unsold shares.

Using the same methodology for the 78 Property, Mr. Levy calculated a value for the unsold shares of $1,935,000.00, compared to the $2,323,320.36 set forth on the original closing statement. Finally, Mr. Levy calculated the value of the unsold shares for the Saunders Property to be $1,200,000.00, compared with the value ascribed to the property on the closing statement of $1,779,296.66.

6. The effective date of each of the BGA, 78 and Saunders conversions was prior to March 28, 1983, the effective date of the gains tax. In each case, there were sales of cooperative apartments which were exempt from the gains tax because the sales occurred on or before the effective date of the tax or were made pursuant to contracts entered into on or before the effective date of the tax (the "grandfathered sales"). The grandfathered sales in each of the foregoing conversions may be summarized as follows:

Property	Total Number of Shares [1]	% Grandfathered	Shares Allocable to Grandfathered Sales	Shares Allocable to Taxable Sales [1]
BGA	111,765	38.53	43,065	68,700
78	57,864	19.72	11,411	46,453
Saunders	20,564	19.00	3,906	16,658

7. Each of the conversions was pursuant to a noneviction plan. Accordingly, the sponsor was required to make sales of apartments to at least 15% of the existing tenants of the Properties in order to have the plan effective. In each case, the sponsor offered discounts to the existing tenants (the "insider discounts"). The sales to insiders were made at a discount in order to:

(a) achieve the level of insider sales necessary to have an effective plan; and

(b) achieve the lowest possible level of apartments occupied by protected tenants (as that term is defined below).

8. Under State and local laws, tenants of the Properties who did not wish to purchase their apartments (the "protected tenants") were entitled to remain as tenants as long as said tenants paid the rent increases permitted under the rent stabilization and rent control laws (which laws remained applicable to a protected tenant after the conversion) and did not breach their lease or statutory tenancy. Under these rent stabilization and rent control laws the sponsor, which becomes the owner of the apartments occupied by the protected tenants, is limited in its ability to raise the rents of protected tenants and may terminate their tenancies in only very limited circumstances.

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[1] Includes all the shares in the conversion. The total number of shares covered in these conversions are as follows:

Property	Total Number of Shares	Number of Taxable Shares Sold
BGA	110,340	67,275
78	57,541	46,130
Saunders	20,288	16,385

9. From the effective date of the cooperative conversion until an apartment occupied by a protected tenant was sold, the sponsor was liable to the CHC for the maintenance payable with respect to such apartment and the sponsor was liable under the offering plan, the proprietary lease and applicable law for other expenses related to the tenancy of the protected tenant (e.g., interior repairs, appliance repairs, painting as required by rent stabilization laws). The sponsor was also entitled to the rent paid by the protected tenant occupying such apartment. (The excess of the maintenance payments and other expenses incurred as owners of the apartments occupied by protected tenants [i.e., insurance, repairs, management fees] over the rent paid by the protected tenants is hereinafter referred to as the "negative carry".)

It is usual for a sponsor of a cooperative conversion to pay negative carry with respect to the unsold shares received by the sponsor in the conversion.

The failure of petitioners to pay the maintenance on the apartments represented by the unsold shares would have resulted in petitioners losing the ownership of such apartments (such maintenance charges constituting a first lien on the unsold shares).

10. The total negative carry for the BGA, 78 and Saunders conversions is as follows:

Property	Negative Carry
BGA	$536,133
78	121,869
Saunders	59,079
Total	$717,081

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

> 11. In each case, the sponsor sold to unrelated investors apartments occupied by protected tenants (the "investor sales"). The sales contract provided that the sponsor would pay the excess of the maintenance payments and other expenses incurred by the investors as owners of these apartments (e.g., insurance, repairs, management fees) over the rent paid by the protected tenants from the date the investor purchased the apartment until the date the protected tenant terminated its tenancy (such payment by the sponsor is hereinafter referred to as the "adjustment payment").
>
> The adjustment payment provision first appeared in the contract of sale in paragraph "13" and is immediately preceded by the purchaser's promise to pay a fee of 6% of the monthly rents from the units of the protected tenants. Also, there was no allocation of the

purchase price to this obligation or an explanation of a reduction in the consideration because of the adjustment payment incentive.

Paragraph "13" of the contract of sale reads as follows:

"13. (a) Purchaser hereby designates Seller as its agent and Seller agrees to manage or retain a management company therefore and cause such manager to enter into a management agreement with the Corporation's managing agent to manage the Apartments in accordance with law, including General Business Law 352-eeee. Such agreement will be substantially on the same terms and conditions as contained in the managing agent's agreement with the Corporation. Purchaser shall pay Seller a management fee equal to six (6%) percent of the monthly rents of the apartments to be conveyed hereunder and Seller shall be responsible for bearing the cost of the management fee charged by the managing agent of the Corporation. The provisions of this paragraph shall survive the Closing hereunder.

"(b) The term 'Operating Expenses' as used in this paragraph shall be deemed to mean:

"(i) all maintenance charges, utility charges, and any assessments payable by the Lessee to the Corporation under the terms of the Leases, except for assessments for capital improvements payable to the Corporation, (hereinafter 'Capital Improvement Assessments');

"(ii) the managing agent's fee as provided in paragraph 13(a) of this Agreement;

"(iii) the cost of liability insurance;

"(iv) the cost of repairs required to be made by the shareholder of the apartment under the By-Laws of the Corporation and the Lease and the cost of making repairs and furnishing services required under the provisions of the non-purchasing tenant's lease and as required by law, but in no event shall such costs be less than $30.00 per month per apartment; and

"(v) any other expenses which are ordinarily considered to be operating expenses in a cooperative building of a similar type.

"(c) In the event that any time during this Agreement there shall be insufficient monies on deposit with the managing agent to pay Operating Expenses as they become due, the Seller agrees to make prompt payment of same when due. Such payments, (hereinafter 'Operating Deficit Payments'), shall be reimbursed to Seller only as set forth in the following paragraph (d).

"(d) If in any calendar year the rental income from the Apartments shall exceed the Operating Expenses for such Apartments, such amount, (hereinafter the 'Surplus'), shall be paid to the Purchaser

within thirty (30) days after the end of the calendar year; except that Seller shall be reimbursed from such Surplus to the extent that Seller has, during the term of this Agreement, made Operating Deficit Payments which have not been reimbursed. Such reimbursement shall be made annually on a cumulative basis within thirty (30) days from the end of each calendar year. For example, if Operating Deficit Payments for 1985 and 1986 are $1,000.00 and $2,000.00 respectively, then, if there shall be a Surplus in 1987 the Seller shall be reimbursed the sum of $3,000.00 out of such Surplus. Any amounts not so paid to Seller will be carried over and paid out of the next available Surplus. Proceeds from the sale of any Apartment shall not be included in rental income for the purposes hereof and there shall be no obligation to pay such advances from net sale proceeds. In addition thereto, any rent increase received due to capital improvements made by and paid for by the Seller shall inure to the benefit of the Seller and shall not be included in computing rental income.

"(e) Seller agrees to pay, when due, any Capital Improvement Assessments for an Apartment, but will be reimbursed by Purchaser from Purchaser's net profit from the sale of such Apartment.

"(f) Seller's obligation to make payments for Operating Deficit Payments and Capital Improvement Assessments for any Apartment shall cease (and Purchaser will be required to make such payments thereafter) upon the concurrence of any of the following events:

"(i) if a non-purchasing tenant in occupancy shall surrender possession of such Apartment, voluntarily or otherwise; or

"(ii) if that portion of Principal allocated to such Apartment, as evidenced by the Promissory Note and Pledge Agreement, is paid in full; or

"(iii) the expiration of fifteen (15) years from the date of the Closing."

It was highly unusual for a sponsor to assume the obligation to make adjustment payments after selling apartments occupied by protected tenants.[2]

12. The actual amount of adjustment payments made by petitioners during the periods indicated below (prepared years after the transfers) is as follows:

Amount of Adjustment Payments	Period

[2] We modified the Administrative Law Judge's finding of fact "11" by setting forth paragraph "13" of the contract provisions.

BGA	$ 814,536	1984-1990
78	23,678	1984-1990
Saunders	66,085	1984-1990
65	136,910	1983-1989
	$1,041,209	

We modify the Administrative Law Judge's finding of fact "13" to read as follows:

> 13. Petitioners' expert, Mr. James Levy, calculated a fair market value of petitioners' obligation (within a month of the hearing) to make adjustment payments to the investors who purchased the unsold shares as follows:
>
> | | FMV of Adjustment Payment Obligation |
> |---|---|
> | BGA | $ 900,000 |
> | 78 | 135,000 |
> | Saunders | 23,000 |
> | 65 | 265,000 |
> | | $1,323,000 |
>
> Mr. Levy testified that these values were based on the actual adjustment payment made between 1983-1990 but did not explain the methodology or rationale for his calculation.[3]

14. The Division computed the tax on the BGA, 78 and Saunders conversions as follows:

	BGA	78	Saunders
Consideration:			
Sales Price of Shares	$ 6,957,307	$ 2,821,640	$ 1,815,822
Mortgage	2,227,538	1,187,683	814,420
Less: Brokerage Fees	(347,865)	(141,082)	(90,791)
Less: Reserve Fund	(135,720)	(39,852)	(51,332)
Total Consideration	$ 8,701,260	$ 3,828,389	$ 2,488,119
Original Purchase Price:			
Sponsor's Purchase Price to Acquire	$(1,926,357)	$(1,594,083)	$(1,314,448)
CHC Purchase Price to Acquire	-0-	-0-	-0-
Acquisition Costs	(35,943)	(55,549)	(42,296)
Capital Improvements	(706,768)	(490,494)	(312,220)
Conversion Costs	(218,105)	(89,940)	(70,327)
Selling Expenses	(39,960)	(48,053)	(4,021)

[3] We modified the Administrative Law Judge's finding of fact "13" by adding the last sentence to reflect the record in more detail.

Negative Carry	-0-	-0-	-0-
Total Original Purchase Price	$(2,927,133)	$(2,278,119)	$(1,743,312)
Gain Subject to Tax	5,774,127	1,550,270	744,807
Tax (10%)	$ 577,412	$ 155,027	$ 74,481

These computations were made on the basis of the entire conversion. The Division also imposed penalties for late filing of returns, and penalties and interest for late payment of tax.

15. In March 1984, petitioners Ziegelman and Langfan timely filed a return TP-580 for the investor sales, the subject of DTA No. 806126.

In May 1988, petitioners filed an amended TP-580 electing to pay the tax in installments.

Petitioners converted property located at 102-12 65th Avenue and 102-32 65th Avenue, Forest Hills, New York on July 1, 1983, at which time petitioners filed the proper returns and paid tax of $40,142.00.

On January 5, 1984, petitioners sold shares and leases to a group of investors for an aggregate price of $3,994,038.00. The 134 apartments covered by these shares were occupied by protected tenants.

Petitioners received no cash consideration on the closing. Instead, petitioners received a promissory note secured by a pledge of the shares allocated to the cooperative apartment transferred and an assignment of the proprietary lease for said apartment.

At the time of this sale, petitioners filed a TP-580 reporting a gains tax liability of $147,612.00. The Division ultimately issued a Notice of Determination setting forth tax due of $131,723.00, plus penalty, interest penalty and interest.

Petitioners made no payment of tax under the incorrect assumption that a supplemental return had been filed and a deferred payment plan requested.

In May 1988, after they had protested the Statement of Proposed Audit Adjustment, petitioners filed an amended return in which they elected to pay the gains tax in installments.

16. To the extent that the tax determined to be owing by petitioners is less than the tax set forth in Finding of Fact "14" above, there will be a corresponding reduction of interest and penalties owed to the Division.

17. The notices of determination issued in these cases are valid and petitioners timely filed petitions in these cases.

18. The Notice of Determination issued by the Division with regard to case number ("DTA#") 808574 concerned the cooperative conversion of buildings located at 35-25 77th Street, 35-24 78th Street and 77-12 35th Avenue in Queens, New York (the "Berkeley Conversion"). This Notice of Determination (Notice Number L-000749584-2), dated July 18, 1989, issued to Berkeley Group Associates, indicated a balance due of $1,059,573.87, representing $475,679.00 in tax, $417,407.22 in interest and $166,487.65 in penalty for the period ended March 29, 1983. A year later, on June 4, 1990, a redetermination occurred which increased the tax liability to $577,412.70. The Division issued two additional notices to cover this additional $101,731.70 liability, Notice Numbers L-001717155-7 for $51,532.19 (1985 and 1986) and L-001717224-9 for $50,193.93 (1983 and 1984).[4] These latter two notices were petitioned separately and are referenced as DTA# 810096. Finally, with regard to the cooperative conversions of the same properties listed above, the Division issued Notice Number L-001717166-6, for shares sold in 1987 and 1986, dated June 4, 1990, setting forth additional tax due in the sum of $6,503.19, plus penalty and interest. At conference, this amount was reduced to $4,664.83 and remains the amount in controversy. This matter was referenced as DTA# 810097 and, for unexplained reasons, was petitioned by Aaron Ziegelman, not Berkeley Associates. These cases dealt with the basis/mortgage issue, the negative carry issue and the adjustment payment issue.

19. DTA# 806126 concerned a Notice of Determination issued to Aaron Ziegelman and William K. Langfan, Notice Number 814-FA, dated July 13, 1988, which set forth additional tax due of $131,723.00, plus penalty and interest. The sole issue in this matter concerned the timeliness of petitioners' request to pay tax in installments.

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[4] There is a small unexplained discrepancy in the Division's amounts of tax, to wit: $51,532.19 + 50,193.93 = $101,726.12, not $101,731.70.

20. DTA# 808575 concerned a Notice of Determination, Notice Number L-000749696-1, issued to Aaron Ziegelman on July 18, 1989, which set forth tax due of $581,400.00, plus penalty and interest, for the period ended March 29, 1983. The cooperative conversion in issue concerned premises at 61-40 Saunders Street, Rego Park, New York and involved the same issues set forth in Finding of Fact "18" above for DTA# 808574. Subsequently, on May 23, 1990, the Division redetermined the tax to be $74,435.70, plus penalty and interest.

21. Finally, DTA# 808576 concerned a Notice of Determination, Notice Number L-000749695-2, issued to Aaron Ziegelman on July 18, 1989, which set forth tax due of $1,177,000.00, plus penalty and interest, for the period ended March 29, 1983. The cooperative conversion in issue in DTA# 808576 concerned premises at 34-20 78th Street, 34-30 78th Street and 34-40 78th Street in Queens, New York and involved the same issues set forth in Finding of Fact "18" above for DTA# 808574.

Subsequently, on May 30, 1990, after further documentation was submitted, the Division redetermined tax due of $155,027.80, plus penalty and interest.

OPINION

The Administrative Law Judge rejected petitioners' contention that the initial realty transfer should be recognized as a separate taxable event, noting that this issue had already been resolved against petitioners' position in Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin. (170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455) and in Matter of 61 East 86th St. Equities Group (Tax Appeals Tribunal, January 21, 1993). The Administrative Law Judge stated:

> "[i]nterestingly, in 61 East 86th Street Equities Group, the Tribunal addressed and dismissed all of the instant petitioners' arguments with regard to the issue of taxable transfers in a cooperative conversion, to wit: that the Tribunal's and subsequent appellate courts' decisions in 1230 Park Assocs. are inconsistent with the Tribunal's decisions in Matter of Perry Thompson Third Co. (Tax Appeals Tribunal, December 5, 1991) and Matter of Cheltoncort Co. (Tax Appeals Tribunal, December 5, 1991); that the statutory and regulatory definitions of "transfer" do not permit the Division's interpretation herein; that the Legislature did not act on a 1984 proposed amendment to the gains tax concerning the treatment of CHC's, as proposed by the Division; that the real estate transfer tax supports petitioners' position

> herein because the transfer tax was amended to conform substantially to the structure of the gains tax; that special weight should be accorded the amendments made to the New York City transfer tax; and that there are substantial economic and factual differences between condominium and cooperative conversions which require different treatment. The Tribunal carefully considered and then rejected all of said arguments. In the opinion of this Administrative Law Judge, no meritorious reasons have been offered which would provide a basis for not following the Tribunal's conclusions" (Determination, conclusion of law "A").

Petitioner has raised the same arguments on exception with respect to the taxation of the initial realty transfer as were raised before the Administrative Law Judge. As the Administrative Law Judge noted, these same issues were raised and addressed by us in 61 East 86th St. Equities Group. Petitioners have not acknowledged this decision, much less addressed our analysis. Therefore, we affirm the determination of the Administrative Law Judge on this issue for the reasons stated in his determination.

With respect to the negative carry issue, the Administrative Law Judge stated that:

> "[o]nce again, the Tribunal has exhaustively considered and rejected each of petitioners' arguments herein in Matter of 61 East 86th Street Equities Group (supra), i.e., that negative carry should be included in petitioners' original purchase price as "customary", "necessary" and "reasonable" costs of conversion; that petitioners' position is supported by the legislative history of Tax Law § 1440.5(a); that negative carry is actually an acquisition cost; that negative carry is a cost of capital improvement; and that the Appellate Division erred in deferring to the Tribunal's interpretation. Given this disposition by the Tribunal, a precedent-setting body for an Administrative Law Judge within the Division of Tax Appeals, I must follow the conclusions rendered in 61 East 86th Street Equities Group. Since it is the Tribunal which reviews Administrative Law Judge determinations (Tax Law § 2006.7) and not vice versa, I decline to comment on petitioners' criticism of the Tribunal's prior analysis of these issues" (Determination, conclusion of law "B").

Again, petitioners have raised the same arguments on exception with respect to the negative carry issue as were raised before the Administrative Law Judge and as held by the Administrative Law Judge we addressed these same arguments in 61 East 86 St. Equities Group. Therefore, we affirm the determination of the Administrative Law Judge on this issue for the reasons stated in the determination.

The next issue before the Administrative Law Judge was whether the value of the adjustment payment incentive should be subtracted from the consideration received by petitioners on the cooperative conversion. The Administrative Law Judge held that the adjustment payment made by petitioners was similar to the discount, credit or rebate described by the Division's regulation at 20 NYCRR 590.37, but that "[t]he trouble with petitioners' adjustment payment incentive is that it cannot be valued" (Determination, conclusion of law "C"). The Administrative Law Judge also stated that:

> "[p]etitioners did not value the adjustment payment incentive at the time of transfer or intend to allocate any part of their consideration for the incentive. It is determined herein that they have not established that the adjustment payments were incentives discounted to present value and subtracted from the consideration received at the time of the transfer (as specified in the regulation at 20 NYCRR 590.37)" (Determination, Conclusion of law "C").

On exception, petitioners argue that their obligation to make the adjustment payment constitutes personal property which is not subject to gains tax. Therefore, the consideration received by petitioners must be allocated between the real property transferred (the cooperative apartments) and the obligation to make the adjustment payment so that only the former is subject to tax.

Section 1440(1)(c) of the Tax Law provides, in part, that:

> "[i]n the case of a transfer which includes other assets which are in addition to real property or an interest therein and for which there is no reasonable apportionment of the consideration for such real property or interest, consideration means that portion of the total consideration which represents the fair market value of such real property or interest."

The Division argues that petitioners are not entitled to any allocation because Exhibit "B" to the stipulation, specifically the Pledge Agreement, makes it clear that the purchase price of the contract of sale was only allocated to the shares of capital stock of the apartment corporation and no other assets are mentioned. We find this argument unpersuasive because the quoted section of Tax Law § 1440(1)(c) clearly contemplates a situation where the parties have failed to make a reasonable allocation of consideration among assets and provides, in that case, that the fair market value of the real property determines the real property's consideration.

The Division has not controverted petitioners' claim that the obligation to make the adjustment payment was an item of intangible personal property (see, General Construction Law § 39). Therefore, we accept petitioners' contention on this point and agree that if petitioners had proved the portion of the consideration attributable to this interest, petitioners would have been entitled, under section 1440(1)(c), to a reduction of the consideration utilized to calculate the gains tax. We conclude that petitioners have failed to prove this point for two reasons.

First, the burden on petitioner was to prove the fair market value of the adjustment payment at the time of the transfer because the consideration is determined at the time of the transfer and is not affected by subsequent events (Matter of Cheltoncort Co. v. Tax Appeals Tribunal, 185 AD2d 49, 592 NYS2d 121; see also, Matter of River Terrace Assocs., Tax Appeals Tribunal, October 22, 1992 [where we discussed this principal as it applied to cooperative conversion] and Matter of V & V Properties., Tax Appeals Tribunal, July 16, 1992 [where we rejected the Division's attempt to reduce a transferor's original purchase price based on events occurring after the transfer]). As the Administrative Law Judge noted, petitioners' valuation of the adjustment payment was based on events that occurred after the transfer. Petitioners' valuation evidence consisted of the testimony of their expert, Mr. James Levy. Mr. Levy testified that the fair market value he determined for the adjustment payment was based on the actual adjustment payments that had been made with respect to the properties from the time of the conversions to shortly before the hearing (Tr., pp. 51-59), but he did not explain how he used this information to arrive at his conclusion. Specifically, Mr. Levy did not explain how the post-transfer history of adjustment payments could have been anticipated and, thus, could have been a factor in determining the value of the adjustment payments at the time of the transfer. Neither did Mr. Levy explain how the adjustment payments that were made over the period 1983-1990 were utilized to value the payments that would be required to be paid in the future. The only information on this point in the record is the following exchange between petitioners' representative and Mr. Levy:

"Q. One last question I want to ask: In valuating Mr. Ziegelman's obligation to make adjustment payments going forward, what discount rate or--

A. I used a thirteen percent capitalization rate.

Q. How did you arrive at that rate?

A. I recognized that this obligation is not one that will necessarily remain constant, for instance, during over a period of years, all things being equal, there will be turnover of apartments and his obligation ceases once the tenant moves out and then at that point the investor has the opportunity of renting that at market or selling the apartment. That income flow for instance where I used a ten percent on the negative cash flow, normally assume the negative cash flow would probably increase in the long run but that the higher cap rate which results in a lower number would be applicable to the income flow which probably will be decreased in the long run" (Tr., p. 58).

This explanation is inadequate to allow us to understand Mr. Levy's methodology in valuing the adjustment payments; therefore, we decline to accept Mr. Levy's opinion as to the value of these payments at the time of the transfer (see, Matter of Bernstein v. Commissioner of Taxation & Fin., ___ AD2d ___, 606 NYS2d 445; Matter of Medtronic, Inc., Tax Appeals Tribunal, September 23, 1993) and find that petitioners have failed to prove the value of the payments. On this basis alone, we would conclude that petitioners were not entitled to allocate any portion of the consideration received to the obligation to make the adjustment payments.

A second independent reason why we would deny petitioners an allocation of consideration from the cooperative conversion to the adjustment payment obligation is that it appears that the obligation was, at least in part, paid for by the purchaser's promise to pay a fee of 6% of the monthly rents to petitioners. Petitioners have not addressed this point and, therefore, have not established 1) the value of the promise to pay 6% of the rents nor 2) what portion of this payment was for petitioners' promise to make the adjustment payments as opposed to other aspects of petitioners' management services. Because petitioners have not established to what extent the promise to pay 6% of rents was consideration for the adjustment payments, we would conclude that petitioners were not entitled to allocate consideration from

the cooperative conversion, even if petitioners had established the value of the obligation to make the adjustment payments.

Petitioners next argue that even if the adjustment payment obligation is a discount, credit or rebate within the meaning of 20 NYCRR 590.37, the consideration should be reduced by the present value of the obligation because, although contingent in amount, the obligation is an absolute obligation of petitioners. The pertinent portion of 20 NYCRR 590.37 provides as follows:

> "[t]he treatment of a discount, credit or rebate which does not provide the transferee with an economic benefit realized immediately upon the transfer depends on whether the transferee's right to receive the future credit, discount or rebate is absolute or contingent. If the transferee's right to the future credit, discount or rebate is absolute, as provided for in the offering plan or agreement to purchase the shares, the present value of the discount, credit or rebate is a reduction of consideration at the time of the transfer. It will be presumed that a discount factor of 10 percent will be appropriate for calculating the present value of a credit, discount or rebate to which the transferee has an absolute right. If the transferee's right to receive the credit, discount or rebate is contingent upon any condition, the credit, discount or rebate is a reduction of consideration only to the extent that the transferor and transferee have attributed a reasonable value to the credit, discount or rebate in the offering plan or in the agreement to purchase the shares.
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> Example 3: Shares relating to a unit are sold for $150,000. The realty transferor agrees to rebate to the transferee $200 each month for five years. The transferee's right to the rebate is absolute. The consideration received by the transferor is reduced by the present value, using a discount factor of 10 percent, of the right to receive the discount, credit or rebate.
>
> Example 4: The agreement to purchase the shares provides for a credit of $60 per month towards the transferee's monthly maintenance charges for a two-year period. The credit terminates if the transferee sells the shares. The contract states that the value of this credit is $1,198.53. This calculation utilized a discount factor of 20 percent. Since this value is reasonable, this amount is a reduction of consideration at the time of the transfer."

The purchaser's right to receive the adjustment payment obligation was contingent upon 1) the continued occupancy of the apartment by the protected tenant and 2) a portion of the principal allocated to the apartment remaining due. Under the regulations, such a contingency

in the amount of the discount, credit or rebate means that the failure to have attributed a reasonable value to adjustment payment obligation in the offering plan or in the agreement to purchase the shares means no reduction to consideration is allowed.

Finally, petitioners' argue that:

> "[e]ven if it were found that the Adjustment Payment Obligation was not a separate asset, the gross consideration should still be reduced by the fair market value of the Adjustment payment obligation at the time of transfer because in substance the purchase price for the cooperative apartments transferred by the Petitioners to the Investors is an open transaction (i.e., determined by a formula -- a fixed amount reduced by the net loss incurred in carrying the apartments). It is analogous to buying a business and providing for an adjustment to the purchase price to reflect the performance of the business" (Petitioners' brief on exception, p. 66).

Petitioners further contend that: "[t]he Department has consistently held open transactions which had contingent consideration" and cites Matter of V & V Properties (supra) as an example of where the Division successfully asserted that the better solution would be to tax the contingent consideration when and if it was paid (Petitioners' brief on exception, p. 66). This same argument was presented to the Administrative Law Judge (Petitioners' hearing memorandum of law, p. 77). The Division did not respond to this argument before the Administrative Law Judge and the Administrative Law Judge did not address it in his determination. Further, the Division has not responded to this argument on exception. Because we believe it is important for us to receive the full benefit of our two-stage hearing and exception process which "gives the Tribunal, and ultimately the courts, the benefit of the Administrative Law Judge's research and analysis as well as the parties' research and analysis in response to the Administrative Law Judge's determination" (Matter of United States Life Ins. Co. in the City of New York, Tax Appeals Tribunal, March 24, 1994), we remand this matter to the Administrative Law Judge for the issuance of a supplemental determination dealing exclusively with the issue of whether the instant transaction should be held "open" by the Division to determine the actual amount of the adjustment payment obligation. Because the Division has never stated a position on this matter, we recommend that before issuing his supplemental determination, the Administrative Law Judge request the Division to file a brief

stating 1) whether it does have a policy of holding transactions open to determine consideration; 2) and, if so, the legal basis for this policy and how it is reconciled with Matter of Cheltoncort Co. v. Tax Appeals Tribunal (supra) and 3) why this transaction is not within this policy.

Lastly, the Administrative Law Judge dealt with whether petitioners were entitled to pay the gains tax on the conversion of 102-12 65th Avenue and 102-32 65th Avenue, Forest Hills in installment payments. The Administrative Law Judge held that the installment payment of gains tax was available for a term greater than three years only if a purchase money mortgage was included as part of the consideration for the transfer. The Administrative Law Judge concluded that there was no purchase money mortgage in the transfers at issue, therefore, at the most petitioners could qualify for installment payments over a term of three years. With respect to a three year term, the Administrative Law Judge stated that the issue was whether petitioners had timely elected to pay in installments even though the election was made 4 1/2 years after the transfer and no tax was paid during this period. The Administrative Law Judge held that the election was not timely because all of the installment payments were due under the three year term, pursuant to section 1442 of the Tax Law, before petitioners made an election. Relying on Matter of Posner (Tax Appeals Tribunal, June 21, 1990) and its reference to the Division's right under section 1442 to declare the entire unpaid balance of the tax due and owing if an installment payment was not timely paid, the Administrative Law Judge also held that the Division was well within its rights to declare the entire amount of tax due here because petitioners had failed to make any payment of tax for 4 1/2 years.

On exception, petitioners argue that obligations received from purchasers of cooperative units should be treated as if they were purchase money mortgages for purposes of the installment payment provisions. To hold otherwise, petitioners contend is inconsistent with the legislative intent, recognized by the Tribunal in Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin. (supra), to treat transfers pursuant to a cooperative plan like those pursuant to a condominium plan. Petitioners also argue that the installment payment provisions were intended to provide relief to taxpayers who did not receive a certain portion of consideration as

cash at the closing. Petitioners contend that a taxpayer is in no less need of such relief because their election was delayed.

The Division responds that it disallowed the election to make installment payments because, in the absence of a purchase money mortgage, petitioners did not qualify for the 15 year term and they did not qualify for the three year period because this period had already expired at the time of the election.

We believe that whether or not petitioners qualified for the 15 year period on installment payments,[5] the Division was justified in denying petitioners this benefit because petitioner delayed 4 1/2 years in making the election.

We agree with the Administrative Law Judge that the provision in section 1442 that provides that "[i]f the transferor shall fail to pay any such installment on the date on which it is due, the commissioner of taxation and finance may declare the entire unpaid balance of the tax due and owing" (Tax Law § 1442[e]) authorized the Commissioner to assess the tax at issue because petitioners failed to make payments when due, i.e., on the anniversary date of the transfer. This holding rejects petitioners' narrow reading of this provision which would allow the Division to assess the entire balance only where the taxpayer had made a valid election and then failed to make a required payment. Such a restrictive reading of the statute is nonsensical because it would give the Division less authority to deal with a taxpayer who had completely failed to comply with the statute (i.e., no election and no payments) than with a taxpayer who partially complied with the statute (election, but no payments). With regard to petitioners' taxpayer relief argument, we are of the opinion that petitioners provided their own relief by not paying the tax for 4 1/2 years and cannot now expect to receive the benefit of more relief.

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[5]We decline to address the issue of whether petitioners qualified for the 15 year term of installment payments because our research has disclosed that in another case pending before us the Division apparently took a different position on audit and allowed obligations arising from the sale of cooperative units to qualify the transferor for more than a three year term of installment payments. We have taken official notice of the record, specifically Exhibits "8" and "17," of this other case, Matter of Belhara Assocs. Ltd. Partnership, DTA 809542, under the authority of State Administrative Procedure Act § 306(4) (see, Matter of Blake, Tax Appeals Tribunal, April 23, 1992, Matter of Kolovinas, Tax Appeals Tribunal, December 28, 1990). Lacking an explanation of this apparent inconsistency, we will not address this issue which is not necessary to the resolution of this matter.

As explained above, we are remanding this case to the Administrative Law Judge for a supplemental determination on the issue of whether the transfers at issue should be held open by the Division to determine the actual adjustment payments made by petitioners. If either of the parties disagrees with the Administrative Law Judge's determination on remand, the party may obtain review of the determination by filing a timely exception to the determination on remand. If no exception is filed to the determination on remand, this decision shall be final for purposes of section 2016 of the Tax Law after the period for filing an exception to the determination on remand has expired.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Berkeley Group Associates, Aaron Ziegelman and William K. Langfan is denied except with respect to the issue of whether the Division of Taxation should hold the transfers open in order to determine the actual adjustment payments made, which issue shall be addressed by the Administrative Law Judge in his determination on remand;

2. The petitions of Berkeley Group Associates, Aaron Ziegelman and William K. Langfan are denied except to the extent indicated in paragraph "1" above;

3. The determination of the Administrative Law Judge is affirmed, except to the extent indicated in paragraph "1" above;

4. The notices of determination dated June 4, 1990, July 13, 1988 and July 18, 1988, as modified (see, Determination, conclusion of law "E"), are sustained except to the extent indicated in paragraph "1" above; and

5. This matter is remanded for the issuance of a supplemental determination consistent with this decision.

DATED: Troy, New York
June 2, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner