STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FISHER REALTY CO.	:	DECISION DTA NO. 807086
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 Fisher Realty Co., 71 Park Avenue, New York, New York 10011, filed an exception to the determination of the Administrative Law Judge issued on June 18, 1992. Petitioner appeared by Kostelanetz Ritholz Tigue & Fink (Kevin M. Flynn, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in response. Petitioner submitted a response letter to the Division of Taxation's letter brief. Oral argument was heard on December 10, 1992, and began the Tax Appeals Tribunal's six-month time period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether penalties based on the late payment of gains tax and on the late filing of certain gains tax returns should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "26" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Fisher Realty Co., is a New York general partnership. Its partners are Stephen Fisher and his wife, Renee Fisher.

On July 1, 1974, Stephen Fisher acquired the apartment buildings known as 425, 429 and 433 West 24th Street, New York City. The purchase prices ascribed to the three properties were as follows:

Street Address of Property	Price
425 West 24th Street	$ 690,000.00
429 West 24th Street	660,000.00
433 West 24th Street	650,000.00
Total	$2,000,000.00

The structures on the properties had been built in 1887, 1888 and 1889 as six 25-foot wide five-story tenements, two on each parcel. In 1968, 1970 and 1971, the buildings were renovated and converted into three 50-foot wide elevator apartment houses known as 425, 429 and 433 West 24th Street.

It appears that Stephen Fisher transferred title to petitioner on December 20, 1976.[1]

At some point, the partners decided to offer the property for sale under a cooperative conversion, and retained the law firm of Olnick, Boxer, Blumberg, Lane & Troy ("Olnick, Boxer") to handle the conversion. Petitioner was "Sponsor" of the offering.

By contract of sale dated July 15, 1981 and recorded in the office of the City Register of New York County on March 28, 1983, petitioner agreed to sell the subject premises to West 24th Owners Corp., a New York cooperative housing corporation. The property was to be sold subject to the following:

> "The lien of a purchase money 'wraparound' mortgage, maturing on June 30, 1989, to be taken back by Seller in the principal sum of $2,000,000.00 (the 'Wraparound Mortgage'), which will be subordinated to

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[1] The Offering Plan, a copy of which is included in Exhibit "1," states on page 81 that petitioner "acquired the Property on December 20, 1976." The statement "Purchase Price to Acquire," also included in Exhibit "1," states that petitioner acquired the premises on July 1, 1974 for $2,000,000.00 plus $109,489.85 in expenses. The latter statement would appear to refer to Mr. Fisher's original purchase (see above).

> and will consist of (i) an aggregate of the unpaid principal balances of the first and second mortgages on the Property (as more fully described in the Plan) (the 'Mortgage') and (ii) the difference between such balances and $2,000,000 as same may be reduced from time to time (as more fully described in the Plan);"[2]

The offering plan to convert the premises to cooperative ownership was dated June 15, 1982 and was amended four times, by amendments dated September 28, 1982, November 1, 1982, March 18, 1983 and October 5, 1983. The Fourth Amendment, dated October 5, 1983, declared the plan effective as a non-eviction plan, based upon the receipt of 23 subscription agreements as of October 4, 1983. Accordingly, the closing date was set as January 10, 1984. Paragraph 3 of said amendment provided as follows:

> "3. GAINS TAX COMPLIANCE
>
> The Sponsor shall pay out of the proceeds of this offering any New York State Real Property Transfer Gains Tax (the 'Gains Tax') which may be imposed pursuant to Article 31-B of the New York State Tax Law (the 'Gains Tax Law') as a result of the transaction contemplated by this offering. The Sponsor and each subscriber will be obligated to comply with any pre-audit procedures then pertaining to the Gains Tax and to sign and swear to such forms as are required under the Gains Tax Law. In addition, each subscriber, if requested by the Sponsor, agrees to appoint an individual designated by the Sponsor, as his true and lawful agent to: (a) execute on his behalf all required Gains Tax Law forms; (b) receive on his behalf a Statement of Tentative Assessment or Statement of No Tax due required under the Gains Tax Law; and (c) receive on his behalf the Release of Liability required under the Gains Tax Law.
>
> Annexed hereto as Exhibit 'B' is the form of Transferee Questionnaire (TP-581) required under the Gains Tax Law to be signed by each subscriber before a notary. Each subscriber must complete said form and deliver or mail it to the Selling Agent within five (5) days after receipt."

On December 19, 1983, Olnick, Boxer submitted to the Division of Taxation a letter requesting a "Statement of No Tax Due" with respect to the conveyance of the premises from petitioner to the apartment corporation, together with documentation in support of the request.[3]

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[2] Contract of Sale, paragraph 3(a)(1), as incorporated in Exhibit "2."

[3] Exhibit "2."

In essence, the basis for the requested exemption was that the contract had been entered into and, in fact, recorded, prior to the effective date of the real property gains tax.

Also on December 19, 1983, under separate cover from the documents referred to above, Olnick, Boxer submitted to the Division of Taxation a letter and documentation in connection with the transfer of shares from the apartment corporation to individual subscribers and the transfer of the remaining unsold shares to the sponsor.[4]

DOCUMENTATION UNDER OPTION B

The following was submitted as "documentation under 'OPTION B' for the original submission as requested pursuant to...TSB-M-83-(2)-R dated August 22, 1983":

(a) copies of the Offering Plan and the four amendments;

(b) statement of Gross Consideration executed by Stephen Fisher, as partner of petitioner stating that:

(i) 886 shares allocated to 11 apartments would close on January 10, 1984 for total cash consideration of $620,584.10;

(ii) 889 unsold shares allocated to 5 vacant apartments would be issued to petitioner for total cash consideration of $311,336.69;

(iii) 8,019 unsold shares allocated to 80 occupied apartments would be issued to petitioner for total cash consideration of $2,246,683.23; and

(iv) total anticipated gross consideration was $3,178,604.02.

(c) a letter of A. J. Clarke Management Corp. stating that said firm was to receive a brokerage commission of 6% on each apartment sold, upon closing; and

(d) statement of "Purchase Price to Acquire", stating that petitioner had acquired the premises on January 1, 1974. The purchase price was stated to be $2,109,489.85, consisting of

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[4]Exhibit "1."

$2,000,000.00 in consideration plus $109,489.85 in expenses. A schedule itemizing the claimed expenses was also attached. Copies of the closing statement and contract of sale with respect to Stephen Fisher's purchase of the premises on January 1, 1974 were also enclosed.

(e) schedule of "Capital Improvements".[5]

(f) statement of "Method of Apportionment" showing the number of shares of stock allocated to each apartment.

(g) "Summary Schedule".[6]

DOCUMENTATION UNDER PROCEDURE B

The following was submitted as "the requisite documentation under 'Procedure B' for the sale of certain Shares of the Apartment Corporation by the Sponsor to individual purchasers as required pursuant to your Department's Publication 587 dated June 1983, as amended by...TSB-M-83(2)-R dated August 22, 1983":

(a) for subscription agreements entered into prior to March 29, 1983:

(i) transferor questionnaire of the sponsor;

(ii) five transferee questionnaires for subscribers; and

(iii) five applicable subscription agreements.

(b) for subscription agreements entered into on or after March 29, 1983:

(i) transferor questionnaire of the sponsor;

(ii) six transferee questionnaires for subscribers;

(iii) six applicable subscription agreements; and

(iv) six schedules of apportionment applicable to each individual subscriber.

The aforementioned letter enclosing the above documents concluded, in part:

"Based upon the within documentation, your Department will have the necessary information to enable it to prepare a Tentative Assessment and Return or

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[5]Copy not included in Exhibit "1."

[6]Copy not included in Exhibit "1."

Statement of No Tax Due, as appropriate with respect to the conveyance of shares of the Apartment Corporation by the Sponsor to individual purchasers."

On February 17, 1984, Olnick, Boxer again wrote to the Division of Taxation advising that the closing took place on January 10, 1984 and that on said date petitioner conveyed fee title to the apartment corporation. The letter also advised that: 584 shares of stock were issued to purchasers who entered subscription agreements prior to March 29, 1983; 1,257 shares were issued to 15 purchasers who entered into subscription agreements on or after March 29, 1983; 7,953 unsold shares were issued to petitioner; and 87 shares allocated to one purchaser who entered into a subscription agreement on or after March 29, 1983 had not yet closed.

DOCUMENTATION UNDER OPTION B

Enclosed with the letter was the following "supplemental documentation under 'OPTION B'":

(a) "Exhibit 'A' Summary Schedule", a recalculation of the "Original Summary Schedule...[submitted December 19, 1983] revised in accordance with the information contained in Tentative Assessment No. C-794-(7-12) dated January 10, 1984". This schedule showed total anticipated gain subject to tax as $475,499.02; and

(b) "Exhibit 'B' Summary Schedule", a "New Summary Schedule", based on the recalculation of the data on the Exhibit 'A' Summary Schedule and on the 11 subscription agreements submitted therewith. This schedule showed the total anticipated gain subject to tax as $403,191.44.

DOCUMENTATION UNDER PROCEDURE B

Also submitted as the "requisite documentation under 'Procedure B'" was:

(a) for subscription agreements entered into prior to March 29, 1983:

(i) transferor questionnaire of petitioner;

(ii) two transferee questionnaires; and

(iii) two applicable subscription agreements.

(b) for subscription agreements entered into on or after March 29, 1983:

(i) transferor questionnaire of petitioner;

(ii) nine transferee questionnaires;

(iii) nine applicable subscription agreements; and

(iv) nine schedules of apportionment applicable to each individual subscriber.

The letter of February 17, 1984 concluded, in part:

> "Based upon the within documentation, your Department will have the necessary information to enable it to prepare a Tentative Assessment and Return and/or Statement of No Tax Due, as appropriate, with respect to the conveyance of Shares of the Apartment Corporation by the Sponsor to individual purchasers."

On September 5, 1985, Olnick, Boxer submitted supplemental documentation under "OPTION B" consisting of the following:[7]

(a) "Exhibit 'C' Summary Schedule" based on a recalculation of data previously submitted on Exhibit "B" (see above), and new data and correction of errors contained in Tentative Assessment No. C-794-(15-23);

(b) "Revised Schedule and Summary for Tentative Assessment No. C-794 (15-23)"; and

(c) certified check dated September 5, 1985 in the amount of $11,107.13 representing "tax due based upon the Revised Schedule and Summary for Tentative Assessment No. C-794-(15-23) prepared by our client".

As noted above, the first cooperative closings took place on January 10, 1984. In the course of approximately one year, 27 of the 96 apartments had been sold. Petitioner entered into a contract of sale, dated as of January 21, 1985, for the sale of the 7,502 remaining shares and petitioner's interest in the proprietary leases to the 69 apartments represented by said shares, to Armand Lasky for $4,100,000.00 ("the bulk sale").

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[7]The letter of September 15, 1985 is in the record as Exhibit "7." Copies of the enclosures are not included with said exhibit.

Petitioner retained the law firm of Schulte Roth & Zabel to handle the bulk sale, because Stephen Fisher's then son-in-law was a young attorney associated with that firm and Mr. Fisher wanted to help his then son-in-law's career. Olnick, Boxer, however, continued to represent petitioner in all other matters involving the cooperative, including gains tax.

The bulk sale to Mr. Lasky apparently closed on May 20, 1985.[8]

By letter dated February 11, 1986, Olnick, Boxer enclosed the following supplemental documentation under "OPTION B":

(a) A "Summary Schedule" dated December 23, 1985, covering the sale of all apartments except apartment 2E, which was subject to litigation and was not expected to close for several years;

(b) a "Schedule of Additional Capital Improvements and Conversion Expenses" dated December 23, 1985;

(c) transferor questionnaire of petitioner;

(d) transferee questionnaires, schedules of apportionment and contracts of sale regarding three separate apartments and the 69 apartments included in the bulk sale; and

(e) petitioner's check dated December 20, 1985 in the amount of $111,173.64, representing tax due based on the enclosed summary schedule, less prior payments made.

On March 6, 1986, the Division of Taxation responded to the submission of February 11, 1986, requesting additional breakdown and explanation as to various costs and expenses.

On April 16, 1986, Olnick, Boxer submitted the detailed information requested by the Division of Taxation and also conceded that nine renovation items totalling $122,050.00 were actually applicable to other buildings and that petitioner wished to correct the Schedule of Additional Capital Improvements and Conversion Expenses by deleting said amount.

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[8]Transferee Questionnaire of Armand Lasky sworn to February 4, 1986, copies of which are attached to Exhibits "8" and "9."

On May 5, 1986, a "Schedule of Adjustments" was issued to petitioner. The adjustments used petitioner's figures for consideration and brokerage, but disallowed certain components of the original purchase price claimed by petitioner, i.e., the original purchase price was adjusted from $2,648,388.52 to $2,356,568.90. The Schedule of Adjustments was as follows:

"Items and Explanation:	Adjusted Amounts
Option B Update Totals	
Consideration:	5,697,468.30
Less Broker	341,848.10
Net Consideration	$5,355,620.20
Original Purchase Price: (see Attached for Disallowances)[9]	2,356,568.90
Gain:	2,999,051.30
Less: Grandfathered Units	449,569.93
Taxable Gain	2,549,481.37
Estimated Tax (10% of Gain)	254,948.14
Less: Assessed	22,437.63
Estimated Tax Remaining:	232,510.51
Tax per Share (7,850 Shares Remaining)	$29.6192

Exp.: Unit 2C (433 West 24th St.)

Shares	X	Tax Per Share	=	Est. Tax on Unit
(87)	X	(29.6192)	=	(2,576.87)"

Also on May 5, 1986, the Division of Taxation issued tentative assessments and returns with respect to the sale of the three apartments and also with respect to the bulk sale of May 20, 1985. The tentative assessments for the three apartments were shown to be the amounts paid on February 14, 1986 with respect to said apartments, with no tax due. The tentative assessment for the bulk sale was shown to be $222,203.24, less $102,969.12 paid on February 14, 1986, for a total remaining due of $119,234.12. No penalty or interest was shown on any of the aforesaid tentative assessments and returns.

On June 2, 1986, Olnick, Boxer returned the tentative assessments and returns issued May 5, 1986, with the transferor affidavit portion thereof sworn to by petitioner on May 24, 1986 and enclosed a check for $119,234.12. The letter noted that there were discrepancies in certain allowances and that petitioner had been advised to apply for a refund.

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[9] The attachment consisted of 11 pages of disallowed expenditures and has not been reproduced here.

On December 22, 1986, Olnick, Boxer wrote to the Division of Taxation advising that it had completed the last transfer (apartment 2E at 433 West 24th Street) and enclosed the following:

(a) transferor questionnaire of petitioner;

(b) transferee questionnaire for apartment 2E;

(c) schedule of apportionment;

(d) closing statement for apartment 2E;

(e) A "Final Summary Schedule", dated November 3, 1986, showing original purchase price of $2,356,568.90 and taxable gain of $2,551,658.90; and

(f) check in the amount of $2,320.51 "representing the final amount of gains tax due with respect to this project".

On January 13, 1987, the Division of Taxation wrote to Olnick, Boxer stating, in part, as follows:

> "Before we issue on unit 2E, which you claim to be your last unit, we will need answers to the following: 1. We have unit 433/3E being sold to R. Fox listed as a grandfathered unit, we also show the same unit being sold to K. W. Karlson with a tax assessed of $3,050.18 please explain. 2. According to our records we have issued no Tentative Assessment for unit 425/5D."[10]

With respect to the question as to apartment 5D at 425 West 24th Street, the attorney who handed the matter at Olnick, Boxer submitted his affidavit dated February 24, 1987 stating, in essence, as follows:

(a) That the closing originally scheduled for January 10, 1984 had been adjourned at the request of the purchaser's attorney because the purchaser had not received a mortgage commitment.

(b) The apartment closed on February 16, 1984 for a purchase price of $59,316.60 and a transferee questionnaire was received by the law firm.

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[10] Exhibit "17."

(c) The transferee questionnaire was inadvertently placed in the building's closing file and was not discovered until receipt of the Division of Taxation's letter of January 13, 1987 (supra).

On March 6, 1987, the Division of Taxation issued tentative assessments and returns showing the following adjustments:

"Items and Explanation: ADJUSTED AMOUNTS

OPTION 'B' PROJECT TOTALS

ACTUAL CASH	$5,713,567.00
MORTGAGE	$2,000,000.00
GROSS CONSIDERATION	$7,713,567.00
BROKERAGE FEES - 6%	$342,814.02
ORIGINAL PURCHASE PRICE	$2,356,568.90
ANTICIPATED GAIN	$5,014,184.08
TAX @ 10%	$501,418.41
LESS TAX ATTRIBUTABLE TO GRANDFATHER SALES	$38,216.80
LESS TAX ASSESSED ON PREVIOUS UNITS	$252,845.33
REMAINING TAX TO BE APPLIED TO LAST 2 UNITS	$210,356.23
TAX PER UNIT	$105,178.11

PLEASE NOTE THAT THE ABOVE CALCULATIONS WERE USED TO COMPUTE THE TAX DUE ON ALL SUBMISSIONS."

Tax of $105,178.11 each was calculated with respect to units 433 West 24th Street Apartment 2E and 425 West 24th Street Apartment 5D. Penalty and interest were also computed. The sum of $2,320.51 previously paid with respect to 433 West 24th Street Apartment 2E was deducted from the total due on said apartment.

On April 28, 1987, the law firm of Stroock & Stroock & Lavan (the firm with which Olnick, Boxer had merged) wrote to the Division of Taxation enclosing petitioner's check for $210,356.22 representing the final tax due as shown on the schedule of adjustments of March 6, 1987. The letter protested the imposition of penalties on essentially two grounds:

(a) that the questionnaire for unit 5D had inadvertently been misfiled by a paralegal and thus had never been filed with the Division of Taxation; and

(b) that petitioner had "adopted the tax per share as calculated and reflected in the [Gains Tax] Bureau's worksheets".[11]

We modify finding of fact "26" of the Administrative Law Judge's determination to read as follows:

> On May 27, 1987, the Division of Taxation wrote to petitioner's attorneys acknowledging assessment of the penalty and interest and stating, in pertinent part, as follows:
>
> > "Before we can make any adjustments to the penalty and interest imposed, we will need the following information and documents.
> >
> > (1) A schedule listing all 96 apartments in the cooperative project, and the date each apartment was transferred [sic] to their [sic] individual purchaser.
> >
> > (2) Copies of the cancelled checks used in payment of the Gains Tax. Also, schedules of what apartments were covered by each tax payment.
> >
> > In reviewing our file for Fisher Realty Co., we found that an Option 'B' project update was filed in February 1986. In the summary schedule, dated December 23, 1985, the total anticipated gross consideration was reported at $5,697,468. Did this amount include the mortgage indebtedness of 2,000,000? [sic]"[12]

On June 23, 1987, petitioner's attorneys responded, submitting:

(a) A "Schedule of Units, Tentative Assessments and Returns and Gains Tax Payments";

(b) A "Schedule of Checks in Payment of Gains Tax"; and

(c) copies of original and cancelled checks.

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[11] Exhibit 20, page 3.

[12] The introductory sentence of finding of fact 26 was modified to show that the May 27, 1987 letter acknowledged the assessment of penalty and interest, rather than the payment.

The letter stated in part, as follows:

> "Also, regarding the mortgage indebtedness of $2,000,000, please note that this amount was included in the Gains Tax Bureau's worksheets and in our Summary Schedule on file with the Gains Tax Bureau as of August 13, 1985.[13] It appears that the $2,000,000 in mortgage indebtedness, however, was not included in the Summary Schedule dated December 23, 1985. We would appreciate your forwarding to us a copy of the December 23, 1985 Summary Schedule contained in your files so that we can confirm that we are referring to the same schedule."

On July 22, 1987, the Division of Taxation responded, enclosing a copy of the December 23, 1985 Summary Schedule and requesting additional information. The letter also stated as follows:

> "In reviewing the information and documents filed, we found that check #137 for $111,173.64 was returned to us by the bank as uncollected. Therefore, the $111,173.64 remains due."

On August 20, 1987, petitioner's attorneys submitted additional information, together with a replacement check for the $111,173.64.

On October 8, 1987, the Division of Taxation recomputed the tax, penalty and interest due from petitioner. A letter of said date transmitting the recomputation to petitioner's attorneys stated, in pertinent part, as follows:

> "Based on the information and schedules received by our office, we have reviewed the file of Fisher Realty Co. It was revealed that in February 1986, an option 'B' project update was filed. The reported gross consideration of $5,697,468, did not include the mortgage indebtedness of $2,000,000. This resulted in an understatement of both the
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> gain subject to tax and the tax due on assessments number 24 through 27, which were issued on May 5, 1986.
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> * * *
>
> The review of the information received, also revealed that the tax due on all apartment sales reported to our Office from February 14, 1986, was paid a year or more after the apartments were transferred from Fisher Realty Co. Therefore, we have computed penalty and interest for failure to pay the tax due on the date of transfer, pursuant to Section 1442 of the Tax Law."

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[13] It is unclear to which Summary Schedule this statement refers.

The recomputation was as follows:

Tax	$463,201.60
Penalty	160,341.43
Interest	90,642.48
Less: Payments made	(465,522.12)
Amount Due	$248,663.39

In response to a request by petitioner's attorneys, the Division of Taxation sent a copy of the returned check for $111,173.64 on October 29, 1987.

BACKGROUND OF THE UNCOLLECTED CHECK

Petitioner's check number 137 dated December 20, 1985 in the amount of $111,173.64 (see above) was drawn on Chemical Bank ("Chemical") account number 114-290741, which was a money market account.[14] Petitioner had instructed Chemical that said account was to be closed on December 31, 1985 and the check was to be charged against account number 114-273707. As noted above, the check was not sent to the Division of Taxation until February 11, 1986. The check was presented to Chemical on February 19, 1986 and was returned to the Division of Taxation on February 26, 1986, unpaid, as the account had been closed. The Division of Taxation's transmittal memorandum[15] for the returned check bears the notation "Refer to Maker", however, the Division of Taxation did not advise petitioner of the check's dishonor for 17 months (see above). Chemical has acknowledged that petitioner was not notified that the check had been returned, as the bank's computer system does not print an advice to notify a customer when a check is returned because an account has been closed. Chemical has confirmed that the balance in account number 114-273707 on February 19, 1986 was $722,875.69 and the check would have cleared if petitioner's instructions had been followed. It appears that Chemical's failure to follow the instructions may have been

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[14] Transcript, page 61.

[15] Attachment to Exhibit "26."

attributable to the sudden death, in late December 1985, of the officer handling petitioner's accounts.

NOTICE OF DETERMINATION OF TAX DUE

On March 3, 1988, the Division of Taxation issued a Notice of Determination of Tax Due under Gains Tax Law, stating that petitioner had not shown sufficient grounds for abating the penalty and interest. Accordingly, the notice asserted penalty of $159,351.94, interest of $89,311.45 and additional interest (interest on $89,311.45 from August 22, 1987 through March 31, 1988) of $4,259.77, for a total due of $252,923.16.

OPINION

The Administrative Law Judge determined that petitioner's failure to include the $2,000,000.00 wraparound mortgage as consideration received for the property was not reasonable. The Administrative Law Judge found that the failure to include the mortgage in the computation of gross consideration was not the result of confusion concerning a complex or arcane requirement; rather, it was a failure to adhere to the definition of consideration set forth in Tax Law § 1440. Further, the Administrative Law Judge concluded that even if the recently enacted Tax Law § 1446(5) (Laws of 1992 [ch 55, § 68]) was applicable to this matter, it would not be relevant because there was no authority for the $2,000,000.00 omission and the tax treatment of this omission was not properly disclosed.

Regarding the returned check, the Administrative Law Judge determined that the Division of Taxation (hereinafter the "Division") erred in failing to notify petitioner when the check had been returned. Accordingly, the Administrative Law Judge found that penalty and interest penalty should be cancelled as of the date petitioner could have made payment had it been notified. Upon review of the relevant dates, the Administrative Law Judge concluded that: (i) the payment was due upon the May 20, 1985 sale transfer of several apartments; (ii) the check making the payment was mailed to the Division on February 11, 1986; and (iii) the check was returned by the bank to the Division on February 26, 1986. The Administrative Law Judge

determined that, had the Division promptly notified petitioner, payment could have been made in ten days, or by March 8, 1986. Accordingly, the Administrative Law Judge cancelled the penalty and interest penalty imposed after March 8, 1986, but found that interest was to be computed without modification since petitioner had possession of the funds during the entire period.

Regarding the unreported transaction, the Administrative Law Judge concluded that a clerical error does not constitute reasonable cause, and that the newly enacted Tax Law § 1446(5) would not alter this result even if that section were applicable.

On exception, petitioner states that the gains tax and the attendant regulations do not define reasonable cause, and implies that it is proper to look to how the term is defined in the sales tax and personal income tax regulations. Petitioner also asserts that the recently enacted Tax Law § 1446(5) is applicable to this matter because the Laws of 1992 (ch 55, § 427[g]) provide that the new subdivision 5 is applicable to cases where penalty and interest penalty have not been irrevocably fixed before March 1, 1993.

Petitioner contends that the evidence in this case shows that petitioner reasonably relied on its tax advisor and attorney for the calculation of consideration received from the sale of the property. Further, petitioner asserts that confusion existed between the Division and petitioner, since petitioner provided information concerning the mortgage in several instances yet the Division did not consider the mortgage in several documents -- tentative assessments, worksheets, and a summary schedule. In its exception, petitioner contends that it reasonably relied on these documents received from the Division when petitioner calculated gains tax due.

Concerning the returned check, petitioner argues that it should not be held liable for interest, contending (i) that it is improper to assert interest for the seventeen-month period that the check sat in the Division's files, and (ii) that it is improper to impose interest when penalty and interest penalty have been cancelled.

Concerning the unreported transaction, petitioner asserts that the unintentional misfiling of the form, and prompt filing and payment of tax due upon discovery of the error, constitutes reasonable cause warranting the abatement of penalty, interest penalty, and interest, citing Matter of Auerbach v. State Tax Commn. (142 AD2d 390, 536 NYS2d 557).

In response, the Division relies on the determination of the Administrative Law Judge. In addition, the Division asserts that it is not proper to look to other areas of the tax law when making a reasonable cause determination under the gains tax, citing Matter of Aire Bon Assocs. (Tax Appeals Tribunal, April 18, 1991).

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

THE WRAPAROUND MORTGAGE

Tax Law § 1440 provides:

> "'Consideration' means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor, including payment for an option or contract to purchase or use real property. Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to. Consideration includes the cancellation or discharge of an indebtedness or obligation" (Tax Law § 1440[1][a], emphasis added).

Based on this definition, we conclude that the requirement that the wraparound mortgage be included in the calculation of consideration was readily apparent. Thus, our focus turns to whether petitioner has demonstrated reasonable cause for its failure to include the wraparound mortgage in its calculations despite this obvious statutory direction.

Former Tax Law § 1446(2)(a) provides 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 . . . . 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."

Petitioner contends that, because the gains tax and its accompanying regulations do not define reasonable cause, it is proper to look to how the term is defined in the sales tax and personal income tax. We disagree. As we stated in Matter of Aire Bon Assocs. (supra), "we conclude that it is not necessary to look at the other taxes for guidance on this issue and instead turn to the case law . . . ."

Petitioner asserts that the evidence presented shows that it reasonably relied on its attorney and tax advisor when determining the amount of consideration received from the sale of the property. Further, petitioner states that confusion existed between petitioner and the Division because the mortgage was revealed, yet was not included in several documents prepared by the Division.

Reliance on counsel, by itself, does not constitute reasonable cause (Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121). Rather, we consider all of the actions of a taxpayer to be relevant in a reasonable cause determination, including the reasonableness of its reliance on its counsel (Matter of LT & B Realty Corp. v. New York State Tax Commn., supra). Further, the review of these actions must be made in light of information available at that time (Matter of LT & B Realty Corp. v. New York State Tax Commn., supra; Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin. of the State of New York, 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455). Upon reviewing all of the facts and circumstances surrounding the present case, we conclude that petitioner has not demonstrated reasonable cause.

The point of controversy in this matter seems to involve the communications and the exchange of documents which occurred between petitioner and the Division during the course of this cooperative conversion. Specifically, petitioner alleges that it relied on tentative assessments issued by the Division which did not include the wraparound mortgage in the calculation of consideration. We find such reliance unreasonable.

Initially, we note that petitioner bears the burden of proving that the penalty was improperly assessed (Matter of LT & B Realty Corp. v. New York State Tax Commn., supra; see, 20 NYCRR 3000.10[d][4]).

On August 22, 1983, the Division issued TSB-M-82-(2)-R, "Computation of Consideration and Original Purchase Price for Condominium or Cooperative Projects." This document sets forth two alternative methods of computing the gains tax due upon the sale of a unit in a cooperative scenario. Petitioner was filing under the Option B method set forth in the TSB-M. The Option B method required the taxpayer to make an original submission of relevant information and various documents. One of the requirements of this method was that the original submission include a summary schedule which set forth, inter alia, the total anticipated gross consideration. The materials in the original submission made by petitioner were entered into evidence at the hearing (see, Exhibit "1"). However, these materials do not include the summary schedule prepared by petitioner. Thus, we are unable to determine the manner in which petitioner stated its total anticipated gross consideration in its original submission to the Division, i.e., we do not know if petitioner included the wraparound mortgage or in any way specifically called the Division's attention to this mortgage. This is not to say that the mortgage went unmentioned; we acknowledge that it was set forth in the offering plan submitted as part of the Option B original submission documentation (see, Exhibit "1"). However, we see nothing in the record that indicates that petitioner specifically raised as an issue the inclusion of the mortgage in consideration.

Moreover, petitioner has not offered a basis for its reliance on the tentative assessments issued by the Division (Petitioner's brief on exception, pp. 25-27). The tentative assessments do not set forth the transaction as a whole and do not contain information concerning the total anticipated gross consideration; rather, they simply address the individual units which were transferred as part of the conversion (see, Exhibits "13," "19," and "30"). Absent some evidence confirming a positive representation by the Division that the wraparound mortgage was not to

be included in the calculation of gross consideration, we find that it was unreasonable for petitioner to not include the mortgage in light of the language of Tax Law § 1440(1)(a).

In sum, we find that petitioner's failure to include the wraparound mortgage in the calculation of consideration was in direct conflict with Tax Law § 1440(1)(a), and that petitioner has failed to demonstrate reasonable cause for this omission.

Petitioner contends that a recent amendment (L 1992, ch 55, § 65) which added subdivision 5 to Tax Law § 1446 supports its position. We disagree. Language addressing the effective date for this amendment states that the amendment "shall not apply . . . where a determination has been issued by the division of tax appeals before March 1, 1993" (L 1992, ch 55, § 427[g]). The Administrative Law Judge's determination in this matter was issued on June 18, 1992. Thus, the 1992 amendment is not available to petitioner.

THE RETURNED CHECK

Petitioner asserts that interest relating to the returned check should be cancelled. We disagree. In contrast to the penalty and interest penalty imposed by section 1446(2) of the Tax Law, we do not have the authority to abate the interest imposed by Tax Law § 1446(1).

THE UNREPORTED TRANSACTION

Former Tax Law § 1442 provides:

> "[t]he tax imposed by this article shall be paid by the transferor to the tax commission, or to any agent of such commission appointed pursuant to section fourteen hundred forty-nine-b of this article, on the date of transfer. In the case of a transfer pursuant to a cooperative or condominium plan, the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred."

The unit at issue, designated as 425 West 24th Street, Apartment 5D, was sold on February 16, 1984 (Exhibit "18"). However, petitioner did not submit the gains tax documentation relevant to this sale to the Division until the Division informed petitioner of the oversight by a letter dated January 13, 1987 (Exhibit "17"). Petitioner asserts that it has demonstrated reasonable cause through its counsel's prompt response to the Division's January 13, 1987 letter, citing Matter of Auerbach v. State Tax Commn. (supra). We disagree.

As stated above, reliance on counsel, by itself, does not constitute reasonable cause (Matter of LT & B Realty Corp. v. New York State Tax Commn., supra). Further, petitioner has not established that it was reasonable for it to be unaware that information due, required to be filed with the Division upon the transfer of a unit, had not been filed until the Division notified petitioner some three years later (see generally, Matter of MGK Constr., Tax Appeals Tribunal, March 5, 1992 [where the lack of internal control procedures was a significant factor in the conclusion that the taxpayer's actions were unreasonable]). This conclusion is consistent with the principles set forth in Auerbach.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Fisher Realty Co. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Fisher Realty Co. is denied; and

4. The Notice of Determination dated March 3, 1988, as modified by conclusion of law "G" of the Administrative Law Judge's determination, is sustained.

DATED: Troy, New York
May 20, 1993

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner