STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BELVEDERE GARDEN ASSOCIATES	:	DECISION DTA No. 807808
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 Belvedere Garden Associates c/o Ronald S. Kahn, Esq., 37 West 39th Street, New York, New York 10018 filed an exception to the determination of the Administrative Law Judge issued on October 24, 1991 with respect to its petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law. Petitioner appeared by Ronald S. Kahn, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in response to the exception. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner is entitled to a refund of real property transfer gains tax paid on shares sold under a cooperative plan when such payment was not required under Option B but was calculated based on actual consideration received.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "3" and "5" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, Belvedere Gardens Associates, filed a non-eviction cooperative conversion plan with regard to property located at 35-15 84th Street and 35-16 85th Street in Jackson Heights, New York. The plan became effective August 25, 1986.

Pursuant to the real property gains tax filing procedures with respect to cooperative plans, petitioner filed a schedule of original purchase price and a transferor questionnaire, dated October 20, 1986, under Option B, which contained the following information:

	Column A Actual to Date	Column B Estimated Additional through Completion	Column C Total Anticipated (ActualplusEstimated)
Anticipated Gross Consideration	---	$6,557,640.64	$6,557,640.64
Brokerage Fees	---	341,142.72	341,142.72
Anticipated Consideration	---	6,216,497.92	6,216,497.92
Purchase Price to Acquire Property	$1,660,000.00	---	1,660,000.00
Other Acquisition Costs	48,468.50	---	48,468.50
Cost of Capital Improvements	188,788.00	130,000.00	318,778.00
Conversion Costs	52,695.00	311,028.00	363,723.00
Allowable Selling Expenses	---	---	---
Original Purchase Price	1,949,941.50	441,028.00	2,390,969.50
Gain Subject to Tax	(1,949,941.50)	5,775,469.92	3,825,528.42

We modify the Administrative Law Judge's finding of fact "3" to read as follows:

> Based upon the information contained in the filing, the amount of anticipated tax per share was calculated to be approximately $42.657. Therefore, under Option B, the transferor paid approximately $42.00 in gains tax per share as the shares sold. The plan included 8,968 shares.
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> Petitioner's calculation of the anticipated consideration to be received under the cooperative plan was based on the price specified in each purchase agreement for all sold units and at the insider price for all unsold units. This estimate of consideration was the safe harbor

estimate for consideration applicable to this type of cooperative plan as articulated by the Division in TSB-M-86(3).[1]

Under Option B, the transferor was required to update the filing information three times with the Division of Taxation -- when 50%, 75% and 100% of the shares were sold. Petitioner's 50% update filing, which was dated September 13, 1988, contained information with regard to the consideration actually received for shares sold as well as estimated consideration for shares to be sold in the future. The 50% update also contained new calculations with respect to the original purchase price as follows:

	Column A Actual to Date	Column B Estimated Additional through Completion	Column C Total Anticipated (Actual plus Estimated)
Anticipated Gross Consideration	$4,484,366.26	$2,951,863.38	$7,436,229.64
Brokerage Fees	238,021.00	152,121.74	390,142.74
Anticipated Consideration	4,246,345.26	2,799,741.64	7,046,086.90
Purchase Price to Acquire Property	1,660,000.00	---	1,660,000.00
Other Acquisition Costs	48,468.50	---	48,468.50
Cost of Capital Improvements	414,333.00	---	414,333.00
Conversion Costs	255,219.00	---	255,219.00
Allowable Selling Expenses	---	---	---
Original Purchase Price	2,378,020.50	---	2,378,020.50
Gain Subject to Tax	1,868,324.76	2,799,741.64	4,668,066.40

We modify the Administrative Law Judge's finding of fact "5" to read as follows:

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[1] We modified the Administrative Law Judge's finding of fact "3" by adding the second paragraph. This modification was made to reflect additional details of the record.

> Attached to the 50% update filing was a computer printout indicating the actual selling price for the units sold. Based on this information, petitioner recalculated the amount of gains tax due per share by dividing the anticipated gain to be received pursuant to the plan ($466,806.64) by the total number of shares (8,968). This calculation resulted in a new tax per share of approximately $52.05 which petitioner then multiplied by the number of shares sold to date (4,969) to arrive at a gains tax due of $258,648.77. Petitioner then subtracted from the amount of tax due the amount of gains tax paid as the shares were sold ($211,966.00)[2] to arrive at a gains tax due of $46,682.77. This amount was forwarded by check to the Division of Taxation along with petitioner's 50% update filing.[3]

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[2] Petitioner paid this amount based on the estimates contained in the original filing which anticipated that the tax per share would be $42.657. Option B permitted petitioner to pay tax in this amount as the units sold rather than requiring petitioner to recalculate the tax actually due on each share as each unit sold. The amount of tax due per share would be recomputed at the 50% and 75% plateaus based upon actual consideration and then at the 100% sell-out point any underpayments or overpayments would be computed (see generally, TSB-M-83-[2]-R, TSB-M-86-[2]-R and TSB-M-86-[3]-R).

[3] The Administrative Law Judge's finding of fact "5" read as follows:

> "5. Attached to the 50% update filing was a computer printout indicating the actual selling price for the units sold. Based on this information, petitioner recalculated the amount of gains tax due per share by dividing the actual gain received ($466,806.64) at the 50% update filing by the total number of shares (8,968). This calculation resulted in a new tax per share of approximately $52.05 which petitioner then multiplied by the number of shares sold to date (4,969) to arrive at a gains tax due of $258,648.77. Petitioner then subtracted from the amount of tax due the amount of gains tax paid as the shares were sold ($211,966.00)* to arrive at a gains tax due of $46,682.77. This amount was forwarded by check to the Division of Taxation along with petitioner's 50% update filing."
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> *Petitioner paid this amount based on the estimates contained in the original filing which anticipated that the tax per share would be $42.657. Option B permitted petitioner to pay tax in this amount as the units sold rather than requiring petitioner to recalculate the tax actually due on each share as each unit sold. The amount of tax due per share would be recomputed at the 50% and 75% plateaus based upon actual consideration and then at the 100% sell-out point any underpayments or overpayments would be computed (see generally, TSB-M-83-[2]-R, TSB-M-86-[2]-R and TSB-M-86-[3]-R).

We modified this finding of fact to reflect that petitioner's calculation at the 50% update was done to estimate the anticipated gain for the entire plan, not the actual gain received.

In response to petitioner's 50% update filing, the Division of Taxation wrote a letter, dated October 5, 1988, stating that it recalculated the amount of tax per share owing in the future as $63.7263 (tax remaining [$254,841.60] divided by shares remaining [3,999]). The Division noted that this new tax rate is to be used until petitioner submits a project update at which time a new tax rate will be established.

By letter dated October 11, 1988, the Division of Taxation acknowledged receipt of the $46,682.77 and stated that the amount would be used as a credit against future sales. The letter read as follows:

> "Please be advised that our update procedure establishes a new project tax which is reduced by tax previously assessed and the remaining tax is allocated over the remaining unsold units. Therefore, since no additional payment was required with the update a credit of $46,682.77 has been established for this case. . . ."

On November 7, 1988, petitioner filed a claim for refund of real property transfer gains tax in the amount of $46,482.77 attaching the Division's two letters dated October 5 and 11, 1988.

By letter dated December 8, 1988, the Division denied the refund claim noting that, although the additional payment of $46,682.77 was not required at that time under Option B, a credit would be established for that amount to offset the tax due on future sales. The Division explained the operation of the Option B method for calculating tax owed on cooperative sales as follows:

> "In accordance with the 'Option B' method of filing elected by the sponsor, the total consideration and total original purchase price for a condominium or cooperative conversion are to be anticipated and apportioned to each unit based on the units percentage of the total units, utilizing a fixed common denominator. This option in effect is an allocation of the total anticipated gain to each unit. Therefore, by a sponsor selecting 'Option B', the
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> apportioned amount of tax due is not affected if the actual consideration it receives for a particular unit is higher or lower than the apportioned amount. Pursuant to 'Option B', when the conversion reaches the 25%, 50%, 75% and 100% sellout points, the sponsor must furnish updated information to reflect the actual consideration received from each unit and the anticipated consideration for the unsold units in addition to updating the original purchase price for the project. The remaining tax due for the project is then apportioned to the unsold units rather than recalculating tax due on units already sold and assessed. In the event that the tax is

> overpaid based on actual figures at 100% sellout, then a refund may be applied for at that time. In the meantime, you may apply your credit towards the tax due on future sales."

On July 12, 1989, a conciliation conference was held. By Conciliation Order dated November 3, 1989, the conciliation conferee denied petitioner's request for a refund.

Petitioner filed a petition, dated February 1, 1990, arguing that the Division erred in refusing to grant the refund of "an erroneous overpayment of a tax that may never become due" and that the conciliation conferee made an untimely determination on September 25, 1989 which was more than 30 days after the conciliation conference on July 12, 1989.[4]

On July 16, 1990, the Division filed an answer to the petition affirmatively stating that the refund claim was properly denied and that because the petition to the Conciliation Order was received by the Division on February 2, 1990 it was not filed within 90 days after the Conciliation Order was issued.

At the hearing held on February 5, 1991, the Division withdrew its claim that the petition was untimely filed and submitted as Exhibit "K" the mailing envelope which contained the petition and was postmarked February 1, 1990.[5]

In his post-hearing brief, petitioner's counsel affirmed that only one apartment has been sold since September 1988. He also affirmed that this apartment (Apartment 2E) was sold on August 7, 1989 for the purchase price of $77,000.00 and that gains tax was paid in the amount of $5,416.73.[6]

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[4]Petitioner has not raised the issue of an untimely determination at hearing or in its post-hearing brief; therefore, it appears that this argument has been abandoned. In any event, this argument has no merit. There are no facts in the record upon which there can be a finding that the conciliation determination was untimely inasmuch as the conciliation conference proceeding is not deemed concluded until the taxpayer fails to agree with the conferee's proposed resolution (see, 20 NYCRR 4000.5[c][3][iii]). Moreover, even if the Conciliation Order was untimely, petitioner has not indicated what remedy it seeks.

[5]This envelope was in the possession of the Division of Tax Appeals and was made available, at the Division's request, to the Division's counsel at hearing.

[6]The computer printout attached to the 50% update filing indicated that Apartment 2E concerned 85 shares of the cooperative. Based upon the amount of tax allegedly paid ($5,416.73), the amount of tax per share equals $63.726.

OPINION

The Administrative Law Judge concluded that petitioner was not entitled to a refund of the $46,682.77 because this amount did not constitute an overpayment, but instead reflected an underpayment of tax. The Administrative Law Judge further concluded that the fact that the payment in question was not required under Option B did not mean that it was not owing at the time it was paid.

On exception, petitioner argues that the Administrative Law Judge erred in concluding that the payment of tax was both due and owing. Petitioner asserts that in the case of a cooperative conversion the actual amount owing cannot be determined until all of the units are sold, thus, estimated payments are made based upon a formula devised by the Division of Taxation (hereinafter the "Division") and the payment made by petitioner was not required.

In response, the Division asserts that Tax Law § 1442 requires the gains tax to be paid at the date of transfer of each cooperative unit and that the tax is to be calculated based upon an apportionment to each cooperative unit of the original purchase price and the total consideration anticipated under the plan. The Division contends that petitioner did not erroneously pay gains tax and that the payment of $46,682.77 "was the result of petitioner's own determination that the tax properly owed on its transfer of 4,969 cooperative units exceeded the tax that had been paid to the Division of Taxation" (Division's letter brief, p. 2). The Division argues that the Administrative Law Judge correctly determined that the payment did not constitute an overpayment but was, in fact, an underpayment based upon consideration actually received and that the Option B method of paying the tax does not affect the tax obligation itself, but only the timing of the underpayment.

We reverse the determination of the Administrative Law Judge.

Section 1445(1)(a) of the Tax Law, in setting forth the general rules for refunds of gains tax, states in part that "[a] person claiming to have erroneously paid the tax imposed by this

article may file an application for refund . . . ." This provision establishes as a principal element for a refund application that the tax was erroneously paid. In contrast to the assertion made by the Division, we conclude that whether the tax was paid "erroneously" does not depend on the knowledge or intent of the taxpayer, but instead on whether the tax was correctly paid under the provisions of Article 31-B of the Tax Law.

It is true, as the Division notes, that section 1442(b) of the Tax Law requires tax to be paid on a cooperative conversion as each unit is transferred; however, the only statement made in the Tax Law as to the calculation of the amount of tax required to be paid upon the sale of each unit, is the statement requiring "an apportionment of the original purchase price of the real property and total consideration anticipated" under the plan (Tax Law § 1442[b]).

The Division has elaborated on this statutory provision by establishing the Option B method of tax calculation for cooperative plans.[7] Under Option B, the transferor is required to make a filing for the cooperative plan 20 days before any units are sold. In this filing, the transferor is required to estimate the anticipated selling price of all the units in the plan and to provide a statement explaining the basis used to determine this estimate of consideration (see, Instructions for forms DTF-701 and DTF-702). This estimate of consideration is utilized to calculate the gain anticipated to be received under the entire cooperative plan. This anticipated gain is allocated to each unit, based on a means of apportionment selected in the pre-transfer filing (see, Instructions for forms DTF-701 and DTF-702). As each unit is sold, tax is required to be paid based on that unit's allocable share of the anticipated gain. At the 50% and 75% sell-out points, the transferor is required to update his filing and to recalculate the consideration, and thus the gain, anticipated under the plan. The anticipated consideration at each update point is the sum of the actual consideration received to date on sales and the total consideration anticipated on the remaining units (see, Form DTF-701 and Instructions). Any increase in the

[7]Option B has been the only method available for gains tax filings made for cooperatives after August 1, 1986 (TSB-M-86-[2]-R).

anticipated consideration caused by the actual consideration received on the sale of units, exceeding that which was anticipated for those units, results in an increase in anticipated consideration, which in turn results in an increase in the tax required to be paid on the sale of future units (see, Form DTF-701). Such an increase does not require an additional payment of tax at the 50% or 75% update points.

The obvious goal of the entire Option B method of filing is to estimate the consideration that will be received when the cooperative plan is sold out, as well as to allow for both the payment of tax based on this estimate and for the adjustment of the estimate as the sales pursuant to the plan proceed. This is consistent with the imposition of the gains tax, which is upon the overall cooperative plan (see, Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316). There is absolutely nothing in this procedure, prior to the complete sellout of the plan, which requires tax to be paid on a prior sale based on the actual consideration received for a unit. In fact, the Division eliminated the payment method based on actual consideration (Option A) in August, 1986 (TSB-M-86-[2]-R).

Evaluating petitioner's payment of $46,682.77 in terms of the statute and the procedure established by the Division pursuant to this statute, it is clear that the payment was erroneous. First, petitioner's filing and payments, with the exception of the instant payment, appear in all respects to be in accordance with the procedure established under Option B (Exhibit "A," completed gains tax submission). The Division has never asserted in these proceedings that these filings or payments were in any way incorrect. Further, the payment at issue, which related to prior sales and was calculated based on the fact that the actual consideration received exceeded the consideration anticipated for the sold units, was totally inconsistent with the Option B filing method. Upon receipt of the payment at issue, the Division itself stated petitioner was not required to pay the $46,682.77 (Exhibit "A," letter dated October 11, 1988). In our view, petitioner's complete compliance with the detailed calculation and payment process established by the Division in Option B, followed by a payment that is not only not required by,

but is totally at odds with, Option B, renders the payment erroneous. We stress that our conclusion here is not intended to suggest that a refund would be appropriate where the tax was paid in accordance with Option B (see, e.g., Matter of Albe Realty Co., Tax Appeals Tribunal, March 26, 1992) or where the taxpayer had not complied with the requirements of Option B.

Our conclusion that the instant payment was erroneous and should be refunded is also supported by the fact that the payment was not, under the scheme implemented by the Division, an underpayment of tax.

At the same time that the Division established Option B as the only authorized filing method for cooperative plans, the Division created safe harbor rules for estimating the consideration to be received pursuant to a cooperative plan (TSB-M-86-[3]-R). The use of these safe harbor estimates ensured that the transferor would not be subject to interest and penalty for any underpayment of gains tax throughout the conversion plan to the extent that the underpayment arose because the actual consideration received exceeded that which had been anticipated (TSB-M-86-[3]-R). Since the TSB-M excludes such an underpayment from the imposition of interest, such an underpayment cannot be an "underpayment" as that term is used in Article 31-B because section 1446(1) provides, in pertinent part, that "if the commissioner of taxation and finance determines that there has been an underpayment of tax, the person liable for the tax shall pay interest to the commissioner at the underpayment rate" (Tax Law § 1446[1]).

The Division does not dispute that petitioner's estimate of anticipated consideration was a safe harbor estimate (Division's letter on exception, p. 2). Therefore, the difference between this estimate and actual consideration received cannot, under the TSB-M-86-(3)-R, be subject to interest and cannot be determined by the Division to be an underpayment of tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Belvedere Garden Associates is granted;

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

3. The petition of Belvedere Garden Associates is granted; and

4. The Division of Taxation's denial of the refund claim is reversed.

DATED: Troy, New York
June 18, 1992

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

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