STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
44 WEST 62ND STREET ASSOCIATES	:	DECISION DTA No. 809545
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, 44 West 62nd Street Associates, c/o Living Earth Realty, 10 West 66th Street, New York, New York 10023, filed an exception to the determination of the Administrative Law Judge issued on September 9, 1993. Petitioner appeared by Margolin, Winer, and Evens (James L. Tenzer, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski., Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner's reply brief was received on February 18, 1994, which date began the sixth-month period to issue this decision. Neither party requested oral argument.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioner should be able to step-up its original purchase price of real property to fair market value on the date it was transferred to the cooperative housing corporation.

II. Whether the mortgage on the real property should be grandfathered when determining consideration to petitioner on the subsequent sale of shares in the cooperative housing corporation.

III. Whether the Division of Taxation's different gains tax treatment of cooperative corporations as compared to other entities and the different treatment accorded mortgages violates the equal protection clauses of the New York State and United States Constitutions.

IV. Whether the Division of Taxation properly computed petitioner's gains tax liability using actual consideration received on the sale of taxable units plus the portion of the mortgage allocated to such units minus the portion of original purchase price allocated to such units.

V. Whether petitioner's original purchase price in the real property should include conversion period interest and conversion period real property taxes.

VI. Whether petitioner has established that penalties asserted for failure to timely file certain returns and failure to remit tax due should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1,", "4," "6," "8" and "9" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> Petitioner, 44 West 62nd Street Associates, was a joint venture comprised of 62nd Venture Corp. and M.R. Associates Limited Partnership. On December 15, 1980, pursuant to a contract of sale dated January 21, 1980, petitioner acquired the leasehold interest in the property located at 44 West 62nd Street, New York, New York for $8,000,000.00. On May 6 and 7, 1982, pursuant to a contract of sale dated November 7, 1980, petitioner acquired by purchase the fee interest in the property for $2,200,000.00.[1]

Petitioner was the sponsor of an offering plan to convert 44 West 62nd Street, New York, New York, to cooperative ownership. The approximate date of the first offering under the plan was December 1, 1981.

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[1] Finding of fact "1" of the Administrative Law Judge's determination was modified to reflect the fact that 62nd Venture Corp. and M.R. Associates Limited Partnership were joint venturers in petitioner.

On October 15, 1981, petitioner entered into a contract of sale to sell the property located at 44 West 62nd Street to the Lincoln Plaza Tenants Corporation ("Lincoln Plaza"). On October 20, 1982, petitioner transferred title to the premises to Lincoln Plaza, the cooperative housing corporation ("CHC"), pursuant to the terms of the plan.

Petitioner received as consideration from Lincoln Plaza upon the sale of the premises the amount of $14,914,507.00, which was comprised of the following:

Proceeds of sale of apartments (cash)	$ 751,077.00
Mortgage to which 44 West was subject	5,000,000.00
Unsold shares	9,163,430.00
	$14,914,507.00

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> A total of 40,000 shares of capital stock of Lincoln Plaza was allocated to 158 residential apartment units issued by Lincoln Plaza. Prior to March 28, 1983, individual subscribers made capital contributions to the corporation, Lincoln Plaza, in exchange for 31,204 shares, representing 124 residential apartments. Subsequent to March 28, 1983, individual subscribers made capital contributions to Lincoln Plaza totalling $471,030.00 in exchange for 1,354 shares, representing five residential apartment units. Pursuant to an agreement dated June 26, 1984, petitioner redeemed 62nd Venture Corp.'s 50% interest in petitioner for consideration totalling $3,154,997.00. On June 26, 1984, petitioner transferred, in bulk, the remaining 7,442 shares for $3,640,000.00, representing 29 residential apartment units.[2]

On or about March 11, 1985, petitioner submitted a transferor questionnaire for the bulk transfer of the 29 apartment units. The questionnaire indicated that petitioner, as transferor, transferred 7,442 shares, representing 29 units, in Lincoln Plaza to five individuals taking as tenants-in-common, as transferees. The purchase money mortgage was apportioned to each unit transferred.

A transferor questionnaire was not filed for the five apartment units transferred on the following dates:

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[2] Finding of fact "4" of the Administrative Law Judge's determination was modified to reflect the fact that petitioner redeemed 62nd Venture Corp.'s 50% interest. We also modified finding of fact "4" to reflect that contributions for the five units totalled $471,030.00 not $472,030.00.

July 7, 1983
July 18, 1983
September 14, 1983
March 6, 1984
November 4, 1984

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> The Division of Taxation ("Division") determined petitioner's original purchase price ("OPP") using the price originally paid to acquire the property and the amount paid for capital improvements, co-oping expenses and other acquisition costs. The Division did not include in the category of capital improvements items entitled "conversion period interest" and "conversion period real property taxes." In addition, the Division did not compute petitioner's original purchase price using the fair market value of the premises on the date it was sold by petitioner to Lincoln Plaza (October 20, 1982). The original purchase price allocated to the 29 units sold on June 26, 1984 was adjusted upward by the Division to reflect the redemption of 62nd Venture Corp.'s 50% interest in petitioner.[3]

Petitioner incurred $3,387,332.00 in conversion period interest, which, according to petitioner, was the interest expense incurred "from inception in connection with all amounts borrowed to fund amounts paid to convert the property to cooperative ownership." Petitioner also incurred $579,816.00 in conversion period real property taxes, which were the real property taxes paid on vacant units during the conversion period.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> The conversion period interest that petitioner included in the capital improvements portion of OPP and which the Division disallowed was described by petitioner as follows:

Fee and Leasehold Loan	$3,310,192.00
Construction Advances	977,140.00
	$4,287,332.00

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[3] Finding of fact "6" of the Administrative Law Judge's determination was modified, at the request of petitioner, to reflect adjustments to the original purchase price of the 29 units with respect to the transaction between petitioner and 62nd Venture Corp.

> The Division, on audit, requested contract/construction loans to verify the construction advances.[4]

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> By Notice of Determination of Tax Due under Gains Tax Law, dated November 19, 1988, the Division assessed gains tax, relating to the 8,796 shares of stock sold by petitioner between March 28, 1983 and the date of the audit, in the amount of $30,948.00, plus interest of $16,655.00 and penalty of $10,832.00, for a total amount due of $58,435.00. On August 5, 1988, petitioner paid the total amount due in full.
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> The gains tax due was computed as follows:

Consideration	$4,111,030.00
Less: reserve fund	131,940.00
Add: mortgage indebtedness	1,099,500.00
Gross consideration	$5,078,590.00
Less: brokerage	77,284.00
	$5,001,306.00
Less: OPP[5]	4,691,829.00
Gain on shares - taxed per audit	$ 309,477.00
Tax due @ 10%	$ 30,948.00
Penalty ($30,948.00 x 35%)	10,832.00
Interest	16,655.00
Total	$ 58,435.00[6]

Petitioner submitted a series of interrogatories to the Division. The interrogatories and the responses of the Division are summarized as follow

(a) Individuals purchase real property and transfer the real property to a partnership, which thereafter transfers it to a corporation in exchange for its stock, all prior to March 28, 1983. The OPP for determining the gain on the sale of the stock so acquired by the partnership is the fair market value of the property on the date of the transfer to the corporation

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[4] Finding of fact "8" of the Administrative Law Judge's determination was modified to reflect that our review of the record reveals that the full $4,287,332.00 was disallowed and remains in controversy.

[5] Original purchase price ("OPP") was computed without the inclusion of "conversion period interest" and "conversion period real property taxes" that had been claimed by petitioner.

[6] Finding of fact "9" of the Administrative Law Judge's determination was modified to reflect that petitioner paid the tax on August 5, 1988 and not on July 20, 1988.

(b) The partnership in (a) above distributes the stock of the corporation to its partners before March 28, 1983. The OPP for determining the gain on the subsequent sale of the stock by the partners is the fair market value of the property on the date of the distribution. There is no distinction between shares of stock of a corporation that is qualified to sell its stock to tenant-shareholders and shares of other corporations.

(c) Property transferred by a partnership to a corporation (including a cooperative corporation), prior to March 28, 1983, is subject to the encumbrance of a bargain lease.[7] The value of the bargain lease is consideration received prior to the effective date of the gains tax law and, therefore, is not included in the consideration on the subsequent sale of the stock to the tenant-shareholders after March 28, 1983.

(d) Property, transferred by a partnership to a corporation (including a cooperative corporation), prior to March 28, 1983, is subject to the encumbrance of a mortgage. The value of the mortgage is not consideration received prior to March 28, 1983 and, therefore, is included in the consideration on the subsequent sale of the stock.

(e) Subsequent to March 28, 1983, property is transferred by a partnership to a corporation (including a cooperative corporation) which is subject to the encumbrance of both a bargain lease and a mortgage. The value of both is included on a pro-rata basis in the consideration on the subsequent sale of the stock.

OPINION

The Administrative Law Judge concluded petitioner was not entitled to step up its OPP to the fair market value at the time of transfer from the sponsor to the CHC because under Mayblum v. Chu (67 NY2d 1008, 503 NYS2d 316), Article 31-B of the Tax Law was designed to treat a cooperative conversion as a single transaction for purposes of applying the gains tax. Implicit in the Administrative Law Judge's analysis was the fact that a step-up in OPP would require that the conversion be viewed as two separate transactions.

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[7]A "bargain lease" is a lease providing for a rent below fair market rent. Such a lease is valued at the time that it is created at the present value of the difference between the rent payable under the lease and the fair market rent over the term of the lease.

Second, the Administrative Law Judge declined to treat a mortgage created prior to the effective date of the gains tax in the same way as a bargain lease created prior to the effective date of the gains tax in determining consideration for the sale of stock in the CHC. The Administrative Law Judge, relying on Matter of Birchwood Assocs. (Tax Appeals Tribunal, July 27, 1989), held that the Division properly treated a portion of a mortgage given by the CHC to petitioner in a transaction occurring prior to the enactment of the gains tax law as consideration to petitioner on the subsequent sale of stock to unit purchasers even though no portion of the value of a bargain lease created prior to the effective date of the gains tax would be treated as taxable consideration by the Division. The Administrative Law Judge held that the bargain lease and mortgage were distinguishable in that a mortgage is an encumbrance on all units while a bargain lease encumbers only a commercial unit or units.

Third, the Administrative Law Judge addressed the constitutionality of (i) treating transfers of property to a cooperative corporation different from transfers to non-cooperative corporations and (ii) the Division's refusal to "grandfather" mortgages placed on the real property before the effective date of the gains tax in determining petitioner's consideration. The Administrative Law Judge rejected petitioner's constitutional arguments stating the Court of Appeals already addressed these issues in Trump v. Chu (65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915), and held that the disparate treatment accorded cooperative corporations and non-cooperative corporations was constitutional.

Fourth, the Administrative Law Judge upheld the Division's calculation of gains tax due using the actual cash consideration and the mortgage portion of consideration less the pro-rata portion of the OPP. The Administrative Law Judge held that since the actual transfers had already occurred and petitioner had not reported the first five transfers that were subject to tax, nor elected any method of reporting when any of the transfers were made, petitioner lost its entitlement to choose between Option A or Option B (see, TSB-M-83[2]-R). Furthermore, the Administrative Law Judge concluded that the Division's calculation of tax due using actual

consideration on taxable units, without taking into account the consideration on grandfathered units, was reasonable.

Fifth, the Administrative Law Judge upheld the Division's disallowance of conversion period interest and conversion period real property taxes in the calculation of OPP. The Administrative Law Judge held that the conversion period interest appeared to be an expense incurred to acquire real property not an expense incurred to convert the property to cooperative ownership and, thus, was not properly included in OPP. Likewise, the Administrative Law Judge disallowed the conversion period real property taxes because they were a cost of carrying the ownership in cooperative form and not a cost of creating ownership in cooperative form.

Sixth, the Administrative Law Judge refused to abate penalties and penalty interest because petitioner failed to establish reasonable cause.

On exception, petitioner asserts that: (1) the Division must use the fair market value of the property on the date it was sold by petitioner to the CHC in computing the OPP for shares sold after March 28, 1983 because the Division would do so if the real property had been transferred to an entity other than a CHC prior to March 28, 1983; (2) the Division must treat mortgages created prior to March 28, 1983 the same way bargain leases created prior to March 28, 1983 are treated when determining consideration on the subsequent sale of stock in the CHC; (3) the Division's refusal to (i) step-up the OPP to fair market value on the date of the transfer to the CHC occurring prior to March 28, 1983, and (ii) treat mortgages the same as bargain leases in determining consideration, is violative of both the United States and New York State Constitutions; (4) since under Mayblum v. Chu (supra), the cooperative conversion is treated as a single transaction for gains tax purposes, the overall project gain should be allocated on a per-share basis for determining gain subject to tax under Option B; (5) conversion period interest and conversion period real property taxes are customary, reasonable and necessary expenses incurred to create ownership interests in cooperative form, and as such, are properly includable in OPP; and (6) penalties and penalty interest should be abated because it was reasonable to grandfather the mortgage in light of the Division's policy to grandfather bargain leases and any

underpayment of gains tax was due to the complicated nature of the gains tax law and not due to willful neglect.

In response, the Division contends: (1) the gains tax was designed to treat cooperative corporations differently than non-cooperative corporations; (2) the different treatment accorded cooperative corporations under the gain tax statute has already been deemed constitutional by the Court of Appeals in Trump v. Chu (supra) and, as such, petitioner's constitutional challenges are without merit; (3) the inconsistent treatment accorded mortgages and bargain leases that were created prior to March 28, 1983 is entirely reasonable in that a mortgage is an encumbrance on all units, whereas a bargain lease encumbers only a commercial unit or units; (4) the use of actual consideration received on the sale of units subject to tax in computing gains tax due was proper because the Option "B" method of filing is only utilized prior to the sell-out of the cooperative plan; (5) the case law and regulations concerning cooperative conversions make it clear that conversion period interest and conversion period real property taxes are not properly includible in the calculation of OPP; and (6) no reasonable basis exists for abatement of the penalties and penalty interest.

We affirm the determination of the Administrative Law Judge.

We first address the issue of whether the Division must step-up the OPP of the property to its fair market value at the time of its transfer to the CHC.

Petitioner argues that the Division must use the fair market value of the property on the date it was sold by petitioner to the CHC in computing the OPP for shares sold after March 28, 1983 because the Division would do so if the property had been transferred to an entity other than a CHC prior to March 28, 1983. We reject petitioner's contentions.

To begin with, it is well settled that a cooperative conversion is treated as a single transaction for purposes of applying the gains tax (Mayblum v. Chu, 109 AD2d 782, 486 NYS2d 89, mod 67 NY2d 1008, 503 NYS2d 316; Matter of 1230 Park Assocs. v. Commr. of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455). Allowing petitioner to step-up its original purchase price of the property to its fair market value

at the time of transfer would have the effect of treating the cooperative conversion as two transactions, i.e., the transfer to the CHC and the transfers of shares to individual unit purchasers, instead of one (Matter of 470 Newport Assocs., Tax Appeals Tribunal, September 2, 1993). Furthermore, it is of no significance whether the property was transferred to the CHC prior to March 28, 1983 (the effective date of the gains tax), or subsequent to such time for gains tax purposes (Matter of 470 Newport Assocs., supra), for it is the transfer of shares to unit purchasers which is the taxable event, and not the transfer to the CHC (Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316, 317).

We have already considered and rejected the argument that the Division is required to treat pre-gains tax transfers to CHCs in the same manner as transfers to other types of entities. In Matter of 61 East 86th St. Equities Group (Tax Appeals Tribunal, January 21, 1993) we stated:

> "[a]s we noted in 1230 Park, Article 31-B has a number of provisions that single out transfers pursuant to a cooperative or condominium plan for treatment different from that applied to other types of transfers. In our view, these provisions, contained in former sections 1440(7), 1442, and section 1443(6), provide ample support for the Division's decision to tax transfers pursuant to a cooperative plan like transfers pursuant to a condominium plan and, as a result, to treat cooperative corporations differently from non-cooperative corporations" (Matter of 61 East 86th St. Equities Group, supra; see also Matter of 470 Newport Assocs., supra).

Next, petitioner argues that the Division must treat mortgages created prior to March 28, 1983 the same way it treats bargain leases created prior to such date when determining consideration on the subsequent sale of the stock. Petitioner contends that since the mortgage was assumed by the CHC in a transfer occurring prior to March 28, 1983, the consideration attributable to such mortgage should be grandfathered. We disagree.

Whether the mortgage was created or assumed prior to the effective date of the gains tax is of no significance because under Mayblum v. Chu (67 NY2d 1008, 503 NYS2d 316, 317), the gains tax is imposed on the overall conversion plan, so it follows that the transfer of the mortgage to the CHC is not the taxable event (Matter of Birchwood Assocs., supra). The mortgage, whether created or assumed prior or subsequent to the effective date of the gains tax, is treated by the Division as consideration only on that portion of the mortgage allocated to

shares sold after the effective date of the gains tax, pursuant to contracts entered into after such date.

We find no merit to petitioner's contention that the Division must treat pre-gains tax mortgages the same as pre-gains tax bargain leases. The Division's decision to treat no portion of a pre-gains tax bargain lease as taxable consideration is not inconsistent with the Division's treatment of mortgages because they are two very different types of encumbrances (Matter of 470 Newport Assocs., supra), and the Division's treatment reflects these differences. Among the differences is the fact that a mortgage encumbers each individual unit while a bargain lease does not.

Furthermore, even if petitioner were to persuade us that bargain leases and mortgages were to be treated the same, i.e., allocated to all units, petitioner has not attempted to explain why the pre-gains tax mortgage should be treated like the pre-gains tax bargain lease, instead of vice versa.

Petitioners next argue that the Division's refusal to step-up OPP to fair market value on the date of transfer to the CHC occurring prior to March 28, 1983 and its different treatment of mortgages as compared to bargain leases violates the Equal Protection Clause of both the United States and New York State Constitutions. We disagree.

With respect to petitioner's constitutional challenges regarding cooperative corporations as compared to other entities, as we noted earlier, Article 31-B of the Tax Law was designed to treat CHCs differently than other entities (Matter 61 East 86th St. Equities Group, supra). The different tax treatment accorded CHCs "enjoys a presumption of constitutionality which 'can only be overcome by the most explicit demonstration that [the] classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it' [citations omitted]" (Trump v. Chu, supra, 489 NYS2d 455, 458-459). Petitioner has not carried its burden in light of the Court of Appeals' decision upholding the different gains tax

treatment of cooperative and condominium developments compared to subdivided realty in Trump v. Chu (supra).

Turning next to petitioner's equal protection argument concerning the Division's different treatment of mortgages and bargain leases, we find no merit to petitioner's assertion that the distinction drawn by the Division between mortgages and bargain leases violates the Equal Protection Clause of either the New York State or United States Constitution (see, Matter of National Elevator Indus. v. New York State Tax Commn., 49 NY2d 538, 427 NYS2d 586).

We next address whether the Division properly calculated gain and tax due on audit. On audit, the Division calculated gain and tax due using the actual consideration received on the units subject to tax plus the pro-rata portion of the mortgage allocated to such units minus the pro-rata portion of the OPP allocated to the taxable units. Petitioner argues that since the gains tax treats the cooperative conversion as a single transaction, the overall project gain should be allocated on a per-share basis for determining gain subject to tax under Option B. In essence, petitioner asserts that all unit transfers, including grandfathered transfers, be counted in calculating gain per share and the gain per share be multiplied by the number of shares subject to tax. We disagree.

Prior to August 1986, there were two methods of calculating gains tax liability upon transfers of cooperative apartment units, Option A and Option B (see, TSB-M-83[2]-R). Under Option A, gain was computed based on the actual consideration received less the pro-rata portion of OPP allocated to each unit. "Under Option B, petitioner could have elected, prior to the time it started making taxable sales, to estimate the consideration to be received on all future sales" (Matter of Normandy Associates, Tax Appeals Tribunal, March 23, 1989, emphasis added). Therefore, petitioner could have validly elected the Option B method of filing prior to the sale of the five residential units. Petitioner had not done so. In fact, no filings were made with respect to those five units. Furthermore, petitioner has not provided us with any support for the proposition that under Option B, gain per share is computed based on the total project gain (net of grandfathered and non-grandfathered shares) and then allocated to the non-

grandfathered shares to compute tax due. Finally, we agree with the Administrative Law Judge that:

> "the Division's computational method which deals specifically with consideration received only on taxable (non-grandfathered) units is reasonable. It is in harmony with determining whether the cooperative conversion itself is taxable in its own right based on whether consideration anticipated on taxable (non-grandfathered) units alone reaches $1,000,000.00. Hence, petitioner's argument to include grandfathered units is rejected" (Determination, conclusion of law "G").

Petitioner's next argument concerns whether conversion period real property taxes and conversion period interest are includible in OPP. Petitioner argues that both costs, pursuant to Tax Law § 1440(5)(a), are customary, reasonable, and necessary expenses incurred to create ownership interests in cooperative form. We disagree.

First of all, conversion period interest and conversion period real property taxes are not costs incurred to create ownership interests in cooperative form. These costs are merely expenses incurred to carry the property and not incurred to create ownership interests in the property (Matter of Mattone v. State Dept. of Taxation & Fin., 144 AD2d 150, 534 NYS2d 478). We direct petitioner's attention to our decision in Matter of 1230 Park Associates (Tax Appeals Tribunal, July 27, 1989, affd Matter of 1230 Park Associates v. Commr. of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957) where we stated the test was whether the cost "can be characterized as an expense incurred to create ownership in the cooperative form."

Petitioner attempts to distinguish Matter of Mattone v. State Dept. of Taxation & Fin. (supra) from the present situation in that the interest and taxes were incurred with the conversion of the property to cooperative ownership, while Mattone "is authority for the simple proposition that interest is not includible in OPP when a project is abandoned" (Petitioner's brief on exception, p. 31).

We find petitioner's argument without merit. Whether or not a project is completed or abandoned prior to completion, these expenses are still costs of carrying the property and not costs incurred creating ownership interests in property and, as such, are properly excluded from OPP.

Petitioner also excepts to the Administrative Law Judge's finding that documentation was provided for only $900,000.00 of the $4,287,332.00 conversion period interest that petitioner argues should be included in OPP. Petitioner argues that throughout the audit and conciliation process the only issue was whether this is an expense properly includible in OPP. Our review of the record reveals that the full $4,287,332.00 was disallowed and $900,000.00 was never allowed. Whether petitioner provided documentation substantiating the $4,287,332.00 is of no consequence to our decision because, as discussed, conversion period interest is not an expense properly includible in OPP for purposes of applying the gains tax.

Finally, we address whether petitioner has established reasonable cause for abatement of the penalties and penalty interest.

Tax Law § 1446(2)(a) authorizes imposition of a penalty and penalty interest for failure to pay over tax in a timely manner. These charges may be cancelled if the failure was due to reasonable cause, and not due to willful neglect (Tax Law § 1446[2][a]). All of the actions of a taxpayer are relevant when determining if reasonable cause exists (Matter of LT & B Realty Corp v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121). "Further, the review of these actions must be made in light of information available at that time" (Matter of 61 East 86th Street Equities Group, supra; see also Matter of LT & B Realty Corp. v. New York State Tax Commn., supra). Based on our review of the record in this case, we agree with the Administrative Law Judge that reasonable cause does not exist for abatement of the penalties and interest penalties.

Among the information the Administrative Law Judge noted that was available concerning the gains tax treatment of cooperative conversions at the time petitioner began making taxable transfers of units pursuant to the cooperative conversion plan included Publication 588, "Questions and Answers - Gains Tax on Real Property Transfers, TSB-M-83(2)-R, the Supreme Court decision in Mayblum v. Chu (Sup Ct, Queens County, May 11, 1984, Graci, J., affd 109 AD2d 782, 486 NYS2d 89, mod 67 NY2d 1008, 503 NYS2d 316), and the Revised Publication 588 which reiterated the proper treatment of cooperative conversions

under the gains tax law. The Administrative Law Judge stressed petitioner's delayed filing of the transferor questionnaire for the transfer of the 29 units, petitioner's failure to file transferor questionnaires with respect to the five taxable unit transfers, and petitioner's delayed payment of gains tax all contributed to a showing that reasonable cause did not exist.

Petitioner argues that penalties and penalty interest should be abated because reasonable cause existed. Petitioner states that since it knew of the Division's practice to grandfather pre-gains tax bargain leases it was reasonable to treat the mortgage the same way. However, in its gains tax questionnaire, petitioner allocated a portion of the mortgage to each of the 29 units in determining consideration. Therefore, we find that the argument petitioner advances had nothing to do with petitioner's failure to pay the gains tax when due. Moreover, the gains tax questionnaire was filed approximately nine months after the transfer had occurred, and no filings had been made with respect to the transfer of the five taxable units.

Petitioner further asserts that the complexity of the gains tax law and the fact that Mayblum v. Chu (67 NY2d 1008, 503 NYS2d 316) was not decided by the Court of Appeals until May 1986 led to its failure to timely pay the tax. While we agree the gains tax as it relates to cooperative corporations is complex, its complexity is no excuse for not filing with respect to the transfers of the five taxable units and its late filing with respect to the bulk transfer of the 29 units. Furthermore, the Supreme Court declaratory judgment in Mayblum v. Chu (Sup Ct, Queens County, May 11, 1984, Graci, J.) which sustained the gains tax treatment as applied to CHCs was issued May 11, 1984, well over a month prior to petitioner's bulk transfer of 29 units on June 26, 1984. Therefore, we find no basis to abate the penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 44 West 62nd Street Associates is denied;

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

3. The petition of 44 West 62nd Street Associates is denied; and

4. The Notice of Determination dated November 19, 1988 is sustained.

DATED: Troy, New York
August 11, 1994

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

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