STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AARON ZIEGELMAN[1]	:	DECISION DTA No. 809760
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 Aaron Ziegelman, c/o Joel Schneider, 152 West 57th Street, 21st Floor, New York, New York 10019, filed an exception to the supplemental determination of the Administrative Law Judge issued on November 10, 1994. Petitioner appeared by Ziegler, Sagal & Winters, P.C. (Lanny M. Sagal, Stephen S. Ziegler and Alan Winters, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. The final brief in the combined matter was received on May 2, 1995, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs. Commissioner Francis R. Koenig took no part in the consideration of this decision.

[1]By mutual agreement, this case was combined with Berkeley Groups Associates, Aaron Ziegelman and William K. Langfan (DTA Nos. 806126, 808574, 808575, 808576, 810096 and 810097). While the Tax Appeals Tribunal considered these cases on a combined basis, separate decisions are being issued in order to fully set forth the facts in each case.

ISSUE

Whether the transaction at issue herein should have been held open by the Division of Taxation in order to determine the actual amount of the adjustment payments made by petitioner.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "13" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

On December 16, 1992, the parties entered into a "Stipulation Admitting Certain Facts" which has been incorporated into the following Findings of Fact.[2] In addition, petitioner submitted 14 proposed findings of fact. Some of them (proposed findings of fact "1," "2," "4," "5," "6," "7," "8," the first paragraph of "10," and "13") are, for the most part, restatements of provisions of the aforesaid stipulation and, accordingly, have been incorporated, but not separately set forth, into the following Findings of Fact. The balance of the proposed findings of fact have been dealt with as follows:

(a) Proposed finding of fact "3," while incorporated into the following Findings of Fact, is relevant only if it is determined that the transfer by the sponsor (petitioner) to the cooperative housing corporation is a transfer subject to gains tax and, by virtue of such determination, permits a step-up of the original purchase price to include a portion of the cooperative housing corporation's cost of the property;[3]

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[2]Attached to the Stipulation Admitting Certain Facts were two exhibits (Exhibit "A" is a copy of the offering plan; Exhibit "B" is a copy of the closing statement). Several of the paragraphs of the stipulation contain references to the aforesaid exhibits which, for purposes of incorporation into the Findings of Fact, have been omitted.

[3]Reference to the transfer of the property by the sponsors to the cooperative housing corporation as the "Realty Transfer" has been omitted due to its implication that, by virtue thereof, a taxable event occurred. In addition, the value of unsold shares ($1,500,000.00) is accepted herein only for the limited purpose of valuing consideration paid by the cooperative housing corporation to the sponsor.

(b) Proposed findings of fact "9" and "11" are incorporated in the following Findings of Fact;

(c) The second paragraph of proposed finding of fact "10" and proposed finding of fact "12" are contentions of petitioner and, while based upon the testimony of a witness called to testify on petitioner's behalf, are rejected as conclusory in nature and not otherwise supported by evidence in the record; and

(d) Proposed finding of fact "14" is a statement of the issues and the parties' positions on each of these issues. Since the contents thereof are not facts, they will be addressed separately in paragraphs under the heading "Summary of the Parties' Positions" which immediately follow the Findings of Fact.

Aaron Ziegelman ("petitioner") and William K. Langfan were the sponsors of a cooperative conversion of the property located at 37-27 86th Street, Jackson Heights, New York (the "property"). Petitioner had a 50% tenant-in-common interest therein.

The conversion of the property was accomplished by the sponsors transferring the real property to the cooperative housing corporation ("CHC") in exchange for:

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

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

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

The consideration paid by the CHC to the sponsors for the transfer of each property was as follows:

Shares subscribed to prior to closing (5,335 shares)	$ 486,514.00
Shares not subscribed to prior to closing ("Unsold Shares")	1,500,000.00
First mortgage	669,197.00
Second mortgage	571,816.00
Gross Price	$3,227,527.00

Deduct:		
Capital Improvements	$322,000.00	
Working Capital Fund	45,000.00	
Brokerage	24,326.00	
Legal Fees	35,000.00	
Other	42,074.00	
		468,400.00
Net Purchase Price		$2,759,127.00

The effective date of the conversion was prior to March 28, 1983, the effective date of the gains tax. Accordingly, there were sales of cooperative apartments which were exempt from the gains tax because the sales occurred before the effective date of the tax or were made pursuant to contracts entered into before the effective date of the tax (the "grandfathered sales"). The grandfathered sales in the conversion may be summarized as follows:

Total Number of Shares	% Grand-fathered	Shares Allocable to Grandfathered Sales	Shares Allocable to Taxable Sales
42,425	16.1579%	6,855	35,570

The conversion was made pursuant to a noneviction plan. Accordingly, the sponsor was required to make sales of apartments to at least 15% of the existing tenants of the property in order to have the plan effective.

The sponsor offered discounts to the existing tenants. The sales to insiders were made at a discount in order to:

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

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

Under State and local laws, tenants of the property who did not wish to purchase their apartments (the "protected tenants") were entitled to remain as tenants as long as said tenants paid the rent increases permitted under the rent stabilization and rent control laws (which laws remained applicable to a protected tenant after the conversion) and did not breach their lease or statutory tenancy. Under these rent stabilization and rent control laws the sponsor, who becomes

the owner of the apartments occupied by the protected tenants, is limited in his ability to raise the rents of protected tenants and may terminate their tenancies in only very limited circumstances.

From the effective date of the cooperative conversion until an apartment occupied by a protected tenant was sold, the sponsor was liable to the CHC for the maintenance payable with respect to such apartment, and the sponsor was liable under the offering plan, the proprietary lease and applicable law for other expenses related to the tenancy of the protected tenant (e.g., interior repairs, appliance repairs, painting as required by rent stabilization laws). If the sponsor did not pay the maintenance on the units occupied by protected tenants, he would forfeit said units -- on which the maintenance charges are a first lien.

The sponsor was also entitled to the rent paid by the protected tenant occupying such apartment. The maintenance payments and other expenses incurred by petitioner as owner of the apartments occupied by protected tenants (i.e., insurance, repairs, management fees) exceeded the rent paid by the protected tenants. (Such excess is hereinafter referred to as the "negative carry"). It is usual for a sponsor of a cooperative conversion to pay negative carry with respect to the unsold shares received by the sponsor in the conversion.

The total negative carry incurred by petitioner was $72,392.00.

The sponsor sold to unrelated investors apartments occupied by protected tenants (the "investor sales"). The sales contract provided that the sponsor would pay any negative carry incurred by the investor from the date the investor purchased the apartment until the date the protected tenant terminated its tenancy (such payment by the sponsor is hereinafter referred to as the "adjustment payment").

We find an additional finding of fact to read as follows:

Paragraph 13(f) of the sales contract provided as follows:

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

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

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

(iii) the expiration of fifteen (15) years from date of the Closing.[4]

During the period 1983 through 1990, the actual amount of adjustment payments made by petitioner was $12,549.00.

The Division of Taxation ("Division") computed the tax on the conversion as follows:[5]

Consideration:	
Sales Price of Shares	$2,626,465.00
Mortgage	1,020,001.00[6]
Less: Brokerage Fees	(131,323.00)[7]
Less: Reserve Fund	(36,986.00)[8]
Less: Mortgage Amortization	(8,783.00)
Total Consideration	$3,469,374.00
Original Purchase Price:	
Sponsor's Purchase Price to Acquire	$1,550,000.00
CHC Purchase Price to Acquire	-0-
Acquisition Costs	26,769.00
Capital Improvements	320,500.00
Conversion Costs	84,338.00
Negative Carry	-0-
Subtotal	$1,981,607.00
x Non-Grandfathered %	x .82191
Total Original Purchase Price	$1,628,703.00
Gain Subject to Tax	$1,840,671.00
x Rate	x .10
	$ 184,067.00

[4]We made the additional finding of fact to more adequately reflect the record.

[5]Per 8/8/90 Audit Schedule which differs slightly from Notice of Determination.

[6]$1,241,013.00 x .82191 non-grandfathered percentage of units sold per audit.

[7]$2,626,465.00 cash consideration x 5%.

[8]$45,000.00 x .82191 non-grandfathered percentage of units sold per unit.

On August 21, 1989, the Division issued a Notice of Determination to petitioner in the amount of $354,560.52 ($187,411.00 additional gains tax; $101,555.67 interest; $65,593.85 penalty).

The Division's Bureau of Conciliation and Mediation Services, by a Conciliation Order dated May 17, 1991 (CMS No. 100720), recomputed the tax due from $187,411.00 to $181,307.00, plus penalty and interest computed at the applicable rate.

At the hearing (see, tr., pp. 15-17), the Division's representative stated that the actual amount of tax at issue was $180,445.00, which amount is the result of multiplying the number of shares taxed (34,870 shares) times the amount of tax per share ($5.1748).

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

> At the hearing, James L. Levy of Appraisers and Planners, Inc. in New York City testified as to the value of apartments occupied by protected tenants. Based upon his analysis of comparable sales, Mr. Levy stated that, for the years 1982 through 1984, sales of occupied cooperative apartments were generally made at a discount rate of 50 to 70%. Pursuant to his testimony (see also, Exhibit "3"), these apartments (containing 37,090 shares) were sold by petitioner at 50% of market value. Mr. Levy testified that, in reality, the percentage was lower because petitioner agreed to pay the negative carry after the ownership of the apartments was transferred to the investors and, in addition, because the investors did not have to put down any cash (petitioner provided 100% financing). Based upon the 50% discount and a negative cash flow of $19,258.00 (see, Exhibit "2") which was capitalized at 10%, the value of these shares was appraised by Mr. Levy at $1,495,015.00 which, when rounded off, became $1,500,000.00.[9]

In its decision issued on August 18, 1994, the Tax Appeals Tribunal stated, in pertinent part, as follows:

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[9]We modified this finding by inserting the correct amount, $1,495,015.00, for the appraised value of the unsold shares. Petitioner raised an issue on exception to which the Division did not respond. Petitioner states that in finding of fact "13" of the supplemental determination, the Administrative Law Judge determined that the appraised value of the unsold shares was $1,395,015.00 when the correct figure should be $1,495,015.00. From a review of the record, it appears that the correct amount is $1,495,015.00. While we now amend what appears to be a typographical error, we note that it is of no consequence to the outcome of this matter or to the amount of petitioner's liability.

"Finally, petitioner argues consideration should be reduced by the actual amount of adjustment payments petitioner actually makes. Petitioner asserts '[t]he Department has consistently held open transactions which had contingent consideration' (Petitioner's reply brief on exception, p. 7). Petitioner advanced this same argument before the Administrative Law Judge, but the Administrative Law Judge did not address it in his determination (Petitioner's post-hearing reply brief, p. 11). 'The Administrative Law Judge should, as a general rule, address every issue raised by the parties in the proceeding before them, so long as the issue has not been subsequently abandoned by the parties' (Matter of United States Life Ins. Co. in the City of New York, Tax Appeals Tribunal, March 24, 1994). Therefore, we remand this issue back to the Administrative Law Judge for a supplemental determination on whether this transaction should be held open by the Division to determine the actual amount of the adjustment payment obligation. If either of the parties disagrees with the Administrative Law Judge's determination on remand, the party may obtain review of the determination by filing a timely exception to the determination on remand. If no exception is filed to the determination on remand, this decision shall be final for purposes of Tax Law § 2016 after the period for filing an exception to the determination on remand has expired."

OPINION

In our prior decision in this matter (Matter of Ziegelman, Tax Appeals Tribunal, August 18, 1994), we considered whether the value of the adjustment payment obligation should have been subtracted from the consideration received by petitioner on the cooperative conversion. We accepted petitioner's argument that the obligation assumed by petitioner to make the adjustment payment was an item of intangible personal property. We concluded that consideration could have been allocated between the real property and the adjustment payment obligation "if petitioner had established the value of this interest at the time of transfer. However, petitioner has not proven what the fair market value of the obligation to make adjustment payments was at the time of transfer . . . . Therefore, petitioner is not entitled to reduce consideration by the obligation to make adjustment payments . . ." (Matter of Ziegelman, supra).

We further denied petitioner's relief on his claim that the adjustment payment obligation was a discount, credit or rebate which reduced consideration as provided in former 20 NYCRR 590.37. Our denial was based on the fact that the purchasers' right to receive the benefit of the adjustment payment was contingent on the continued occupancy of the apartments by protected

tenants and a portion of the principal allocated to the apartments remaining due. Therefore, pursuant to former 20 NYCRR 590.37, the obligation was allowed as a reduction to consideration "only to the extent that the transferor and transferee have attributed a reasonable value to the credit, discount or rebate in the offering plan or in the agreement to purchase the shares," which neither petitioner nor the purchasers did.

We remanded this matter to the Administrative Law Judge for consideration of one issue raised by petitioner and not specifically addressed by the Administrative Law Judge in his determination: Whether this transaction should have been held open by the Division to determine the actual value of the adjustment payment obligation.

On remand, the Administrative Law Judge, relying on our prior decision in this matter and our decisions in Matter of Cheltoncort Co. (Tax Appeals Tribunal, December 5, 1991, affd Matter of Cheltoncort Co. v. Tax Appeals Tribunal, 185 AD2d 49, 592 NYS2d 121) and Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992), concluded in a supplemental determination that "since it was petitioner's own failure to present the evidence necessary to prove the fair market value of the adjustment payments at the time of the transfer or to attribute a reasonable value to these payments in the offering plan or contracts of sale, the transaction should not be held open by the Division to determine the actual amount of petitioner's adjustment payment obligation" (Supplemental determination, conclusion of law "C").

Petitioner contended that the Division has "consistently held open transactions which had contingent consideration," relying on the position of the Division as stated in TSB-M-86(4)-R, issued on May 28, 1986. On remand, the Administrative Law Judge concluded that:

> "[a] literal reading of this memorandum (TSB-M-86(4)-R) and the Tribunal's footnote in Matter of V & V Properties (supra; see, Conclusion of Law "B") would seem to indicate that, where a transferor will receive an unvalued (as of the date of the contract) benefit or a contingent payment which will increase consideration and, therefore, result in greater tax due, there is a mechanism in place for holding open the transaction until such benefits or payments can be accurately valued. Apparently, the reverse is not true, i.e., where an obligation of the transferor or a discount, credit or rebate to the

> transferee will likely reduce consideration and, therefore, result in a lesser amount of tax due, the transaction will not be held open" (Supplemental determination, conclusion of law "D").

On exception, petitioner argues that the Administrative Law Judge's reliance on the Tribunal's holding in Matter of Cheltoncort Co. (supra) is misplaced. He argues that in Cheltoncort the taxpayer's consideration was not contingent and the value was determinable at the time of transfer. Here, however:

> "the consideration payable to Petitioner was the amount of the purchase money note paid by the Investor, reduced by the amount of Adjustment Payments Petitioner would have to make in the future. Thus, at the time Petitioner transferred the Apartments to the Investors, Petitioner's right to consideration was contingent on his future obligation to make Adjustment Payments and was not determinable at the time of the transfer. Rather, the consideration which Petitioner received from the Investors could be determined only after the date of transfer as a result of events subsequent to the date of transfer, which events were not in the control of either Petitioner or the Investors" (Petitioner's brief, p. 7).

Petitioner compares his situation to one where property is taken by eminent domain. There, the actual dollar amount of consideration is "dependent on future events beyond the control of the parties" (Petitioner's brief, p. 7). Petitioner also argues that the Division's position, as set forth in its memorandum of May 28, 1986 (TSB-M-86[4]-R), addressed the situation where:

> "at the time of transfer the minimum consideration is established and additional consideration is contingent on future events [footnote omitted]. In the instant case, the maximum consideration is established at the time of transfer and the actual consideration is contingent on future events" (Petitioners' brief, pp. 8-9).

While TSB-M-86(4)-R protects the Division, petitioner argues he is entitled to similar protection.

The Division, on the other hand, argues that prior to the amendment to section 1444(3)(b) on April 19, 1989, there was no provision in the Tax Law to extend the three-year statute of limitations for an assessment of tax where consideration could not be determined (see, Division's brief, p. 4). However, the Division had the ability to hold open a period of assessment where a

taxpayer executed an agreement extending the period of time for assessment, as explained in TSB-M-86(4)-R. The Division further argues that the relevant documents in these transactions:

> "explain only that the purchase price was allocated to the shares of capital stock of the corporation. The contingent nature of the operating deficit payments does not make the consideration for the sale of shares similarly contingent . . . . The operating provisions in the relevant agreements allow no right of 'set-off' against consideration due on the transfer of shares" (Division's brief, pp. 4-5).

We affirm the supplemental determination of the Administrative Law Judge, but for the reasons stated below.

In Matter of Cheltoncort Co. (supra), we concluded that in calculating the amount of tax due on a transfer for purposes of Article 31-B, "the value of the consideration has to be determined at the time of the transfer in order to finally fix the tax owed. Subsequent events do not alter the value that the consideration had at the time of the transfer" (Matter of Cheltoncort Co., supra).

In Matter of V & V Properties (supra), the petitioner sought to include in consideration (for purposes of calculating its original purchase price) certain liabilities it had assumed from the seller. We allowed these liabilities as part of the consideration even though it appeared that the petitioner may not have ultimately paid such liabilities because "the determinative factor is whether petitioner was required to pay this amount at the time the transfer occurred [footnote omitted]. Subsequent events do not affect the amount of liability assumed by petitioner at the time it acquired the property" (Matter of V & V Properties, supra).

In Matter of Starburst Develop. Co. (Tax Appeals Tribunal, May 5, 1994), we further explained the concept underlying our decision in Cheltoncort when we stated:

> "[p]etitioner contends that the Administrative Law Judge erred in holding that the statute [Article 31-B] required a contemporaneously existing and completed home on the homesite. Petitioner asserts that '[t]he statute itself, of course, imposes no temporal requirement, only requiring that "parcels improved with residences" be the subject of the transfer' (Petitioner's brief on exception, p. 5).

> "We disagree with petitioner that the statute does not impose a temporal restriction. The gains tax is imposed 'on gains derived from the transfer of real property within the state' (Tax Law § 1441, emphasis added). We conclude that the moment that the taxable event occurs, i.e., the transfer of the real property, is the temporal restriction underlying the entire gains tax. Consistent with this interpretation, we have held that the consideration for the transfer is fixed at this moment and is not reduced by subsequent events (Matter of Cheltoncort Co., supra; see also, Matter of V & V Properties, supra [where we held that consideration as an element of original purchase price was also fixed at the time of transfer and could not be reduced by the Division based on subsequent events]). To deviate from this theory, as petitioner suggests, and exclude transactions from the definition of transfer of real property based on subsequent events would, in our view, be contrary to the entire scheme of the tax" (Matter of Starburst Develop. Co., supra; see also, Matter of Shechter, Tax Appeals Tribunal, October 13, 1994).

The Tax Law defines "consideration" as the "price paid or required to be paid for real property" (Tax Law § 1440[1][a]). To analyze petitioner's claim, we must not look at the "consideration" from the perspective of petitioner; i.e., how much was actually received as a result of the transfers. Rather, we must calculate consideration by determining how much was paid or required to be paid by the purchasers for the interests in real property that were transferred.

In this case, it is clear that the amounts paid or required to be paid by the purchasers of the tenant-occupied cooperative apartments was set forth in the contracts of sale for the shares representing those cooperative units. Irrespective of the amounts that petitioner ultimately was required to expend to fulfill his adjustment payment obligations under the terms of these contracts, the purchasers were not required to give additional consideration nor would they receive a refund of the amount they paid or were required to pay under their contract based on the actual expenditures made by petitioner.

As we concluded in our earlier decision in this matter (Matter of Ziegelman, supra), had petitioner placed a reasonable value on his adjustment payment obligation in the offering plan or in the contract of sale for the cooperative shares, petitioner would have established a basis for his claim that he was entitled to a reduction in consideration pursuant to former 20 NYCRR 590.37.

Likewise, had petitioner provided evidence of the value of this obligation at the time of the transfer, petitioner would have established a basis for his claim that such value was paid for an item of intangible personal property and not for an interest in real property. No such value having been established, the Division was entitled to treat the entire consideration as having been given to acquire an interest in real property.

As to petitioner's claim that the Division should "hold open" the transaction because the value of the consideration was not determinable at the time of the transfer, we disagree. At the time of the transfers at issue herein, Tax Law § 1444(3) provided that "[n]o assessment of additional tax under this article shall be made after the expiration of three years from the date of transfer, or in the case of a transfer pursuant to a condominium or cooperative plan or an aggregated transfer, after the expiration of three years from the date of the last transfer made pursuant to such plan or aggregated transfer . . ."

The policy of the Division, as enunciated in TSB-M-86(4)-R, was to agree with the taxpayer to extend the statute of limitations in situations where a contract contains an unvalued benefit or provides for a contingent payment to provide that additional consideration received by the transferor at a later date would not escape taxation. TSB-M-86(4)-R provides the following:

> "[w]here a contract contains an unvalued benefit or provides for a contingent payment, the Department will issue either a statement of tentative assessment or statement of no tax due based on the known consideration. An agreement extending the statute of limitation of time for assessment will be required to be filed. If there is additional consideration received for the transfer at a later date, the transferor and transferee, are required to file updated questionnaires disclosing the actual consideration for the transfer of real property."

In 1989, subdivision (3)(b) was added to section 1444 to provide that:

> "[i]n the case of a transfer for which the total consideration is not determinable by the commissioner of taxation and finance at the time the questionnaires are submitted, no assessment of additional tax under this article shall be made after the expiration of three years from the date the taxpayer notifies the commissioner of taxation and finance of the amount of consideration finally determined."

Neither section 1444 nor TSB-M-86(4)-R requires that the Division "hold open the transfer" for the calculation of consideration (and computation of tax due) in the present case. Here, the total amount of consideration paid or to be paid by the purchasers is not in issue. The only issue is the allocation of consideration between the interest in real property and the intangible personal property by petitioner. There is no finding and there is no basis on which to find that the value of the consideration paid or to be paid on the transfers at issue was indeterminable or incapable of being determined at the time of transfer. Further, events transpiring subsequent to the transfer had no effect on the amount the purchasers paid or were required to pay for their interest in real property.

Petitioner analogizes his situation to that of the transferor of property in an eminent domain proceeding. The situation in an eminent domain proceeding is easily distinguishable from the present case. There, the amount to be paid by the transferee is not firmly established at the time of transfer. Even in such a situation, however, we did not accept the argument that consideration could never be calculated at the time of transfer. In Matter of E.L.C. Hotel Corp. (Tax Appeals Tribunal, April 6, 1995), we concluded that a transferor in an eminent domain proceeding was liable for interest on unpaid gains tax from the date of the transfer of title, even when the amount of consideration was not actually determined until long after the transfer. We stated that:

> "[t]he gains tax is imposed on the gain derived from the transfer of real property in the State (Tax Law § 1441). Section 1442(a) of the Tax Law provides that the tax is due no later than 15 days after the date of transfer. There is no special rule in Article 31-B that establishes a different date for payment of tax when the consideration is contingent, not determinable or not determined.
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> * * *
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> "We appreciate that petitioners could not precisely calculate the amount of tax due at the time of transfer. However, for the taking of their properties, petitioners were entitled to receive the market value of their properties at the time the properties were appropriated [citation omitted]. Given this standard, petitioners could have estimated the tax due on the

transfer and paid the tax within 15 days of the transfer" (Matter of E.L.C. Hotel Corp., supra).

Based on the foregoing, we conclude that there is no basis on which to hold the transfers by petitioner open for a determination of the actual value of the adjustment payment obligation in order to calculate the consideration paid or to be paid.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Aaron Ziegelman is denied;

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

3. The petition of Aaron Ziegelman is denied; and

4. The Notice of Determination dated August 21, 1989, as modified by conclusion of law "E" of the Administrative Law Judge's supplemental determination, is sustained.

DATED: Troy, New York
October 12, 1995

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner