STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EVELYN REYNOLDS, PAUL BOGONI, CHARLOTTE KELLY AND THOMAS URICH	:	DECISION DTA No. 810628
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.	:	

Petitioners Evelyn Reynolds, Paul Bogoni, Charlotte Kelly and Thomas Urich, 340 Riverside Drive, New York, New York 10025, filed an exception to the determination of the Administrative Law Judge issued on March 17, 1994. Petitioners appeared by Solomon P. Glushak, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Petitioners' reply brief was received on September 15, 1994, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the sales of shares pursuant to the cooperative conversion plan, prior to the 1984 amendments to Tax Law § 1442 and prior to the promulgation of regulations, are subject to gains tax.

II. Whether the sales of shares are subject to gains tax when petitioners furnished a sworn statement that the cooperative conversion plan was not conceived for the purpose of avoiding gains tax.

III. Whether the Division of Taxation erred in its calculation of "gain" by (a) failing to use the value, rather than the face amount, of a wraparound mortgage in computing consideration; (b) failing to follow its own guidelines in computing estimated consideration for unsold shares; (c) failing to include estimated brokers' fees of 6% on future sales in calculating estimated consideration; and (d) failing to include a flip tax paid by petitioners into the reserve fund.

IV. Whether penalties and interest should be abated because there were no regulations in effect at the time of transfer of certain shares.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

In 1975, the four petitioners purchased as tenants in common an apartment building containing 63 apartments at 340 Riverside Drive, New York, New York. The respective ownership interests of petitioners were as follows:

Paul Bogoni - 56%
Evelyn Reynolds - 26%
Thomas Urich - 9%
Charlotte Kelly - 9%

As a result of litigation brought on by Evelyn Reynolds against the three other tenants in common, the parties agreed to settle their differences by selling the apartment building.

On January 20, 1983, petitioners conveyed the building to a cooperative corporation pursuant to a cooperative conversion plan the first offering of which occurred on March 31, 1981. Under the cooperative Offering Plan, a total of 79,990 shares[1] was allocated to the 63 apartments.

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[1]In the answer to petitioners' petition, the Division of Taxation ("Division") admitted that the total number of shares was 79,990. However, the Division's attachment sheet to the Notice of Determination at issue calculated tax based on the total project shares at 79,910. The Offering Plan contained a pencilled line through the typed amount of 79,910 shares over which was written in pencil the amount of 79,990. In their brief, petitioners state that the correct number of 79,990 shares is not in dispute.

According to petitioners' petition, at the January 20, 1983 closing, 41 apartments and 51,110 shares were sold leaving 22 unsold apartments and 28,880 unsold shares. On or about August 1, 1983, petitioners entered into an agreement dividing their interests as sponsors of the cooperative plan in the unsold apartments and shares.

Petitioners sold apartments 2A and 12D on April 3, 1984 and March 20, 1984, respectively. Petitioners' respective interests in the two apartments at the time of the sales were as follows: Paul Bogoni, 56%; Evelyn Reynolds, 26%; Thomas Urich, 9%; and Charlotte Kelly, 9%. Petitioners Paul Bogoni and Thomas Urich sold apartment 6D on March 5, 1986. Paul Bogoni had an 86% interest and Thomas Urich had a 14% interest in that apartment. Apartments 13B, 11C, 14C and 10D, owned 100% by Evelyn Reynolds, were sold on January 1, 1985. Petitioners did not pay real property gains tax at the time of the sale of these seven apartments. According to petitioners' petition, the seven apartments represented a total of 9,230 shares.

By letters dated October 21, 1988 to petitioners c/o Sonnenschein, Sherman and Deutsch and to petitioners' attorney, Solomon Glushak, the Division informed petitioners that the records at the New York Department of Law indicated that aggregate consideration in excess of $1,000,000.00 would be received for a cooperative conversion plan with respect to 340 Riverside Drive and that it had no record of receiving the statutory filing for such transfers. The Division requested petitioners to file the appropriate questionnaires and to provide a copy of the offering plan along with all amendments. The Division requested a reply within 20 days.

By letter dated December 14, 1988, the law offices of Sonnenschein, Sherman and Deutsch informed the Division that because the premises were converted to cooperative ownership prior to the effective date of the gains tax law, no filings were made at that time. The letter also suggested that if the Division needed further information, it should contact Solomon Glushak, the attorney for the sponsor of the conversion.

By letter dated January 13, 1989, the Division advised Mr. Glushak that the transfer of shares pursuant to a cooperative plan triggers the payment of the gains tax rather than the transfer of the property to the cooperative corporation. The Division again requested that certain

documents, including a list of all units contracted for and sold after March 28, 1983, be submitted to it within 20 days.

By letter dated February 27, 1989, the Division informed Mr. Glushak that it had not received the information requested in its January 13 letter. The Division advised as follows:

> "This letter is to advise you that interest and penalty continues to accrue on any tax due and that section 1444 of Article 31-B provides in part that when a form required by Article 31-B is not filed, the amount of tax due shall be determined by the Commissioner of Taxation and Finance from any records or information obtainable.
>
> "Accordingly, failure to reply to our letter within 10 days from the date of this letter may result in the issuance of a Proposed Statement of Audit Changes for any Real Property Gains Tax that might be due, together with full penalties and interest as authorized by Sections 1444 and 1446 of Article 31-B of the Tax Law."

By letter dated March 1, 1989, Mr. Glushak indicated that he enclosed copies of the offering plan, all 11 amendments and closing statement. He also stated the following:

> "It is my understanding that because this plan was consummated and the property conveyed prior to the effective date of the statute providing for the gains tax, that no gains tax is due."

The Division sent a Statement of Proposed Audit Adjustment, dated July 14, 1989, to petitioners asserting tax due in the amount of $1,719,200.00, plus $1,522,114.00 in interest and $601,720.00 in penalty, for the total amount of $3,843,034.00. The Division provided the following explanation of the adjustment:

> "Since you have failed to respond to our requests for additional information of January 13, 1989 and February 27, 1989, your Real Property Gains Tax liability has been computed based on the best information available at this time. Tax period beginning date: 3/29/83."

By letter dated July 19, 1989, Mr. Glushak contacted the Division and stated the following:

> "This letter is in response to your 'statement of proposed audit adjustment', which I received today -- as quite a surprise.
>
> "Enclosed is a copy of my letter to your department of March 1, 1989, -- with which I mailed a copy of the offering plan, amendments and the closing statement prepared by the attorneys who handled the matter. My letter explained that the property concerned was sold on January 20, 1983 and, therefore, is not subject to the gains tax.

> "I am again enclosing copies of the offering plan, the amendments and the closing statement.
>
> "Please review the enclosures and get back to me so that this matter can be straightened out."

In response to the July 19 letter, the Division wrote a letter, dated August 3, 1989, to Mr. Glushak referring him to Tax Law § 1442 and section 590.33 of the tax regulations advising him as follows:

> "If the aggregate cash consideration paid by the tenant/purchasers for the units contracted for after March 28, 1983, plus the amount of unpaid mortgage indebtedness apportioned to such units is $1,000,000 or more, transfer gains tax may be due.
>
> "Based on these facts, if the consideration for the cooperative units within this project will equal $1,000,000 or more, the following information must be submitted:
>
> "1) Copy of offering plan and all amendments.
>
> "2) List of all units contracted for and sold after March 28, 1983, including closing dates and cash consideration.
>
> "3) Completed DTF 700 forms, including contract of sales and closing statement for sponsors original acquisition and brokers statement.
>
> "4) Transferors Employer Identification Number or Social Security Number."

The Division also stated that all referenced information must be submitted within 20 days of the date of the August 3 letter.

By letter dated November 1, 1989, the Division sent a copy of a Supreme Court decision, Matter of Mayblum v. Chu (Sup Ct, Queens County, May 11, 1984, Graci, J.), to Mr. Glushak. The Division noted that the case discussed the issue of when a taxable event occurred with respect to cooperative conversions. The letter also contained the following statement:

> "Also enclosed is a copy of my August 3, 1989 letter outlining the items that must be submitted to this office. A submission of the 700 forms and schedules of all shares sold since 3/29/83 and a schedule of unsold shares is requested by November 24, 1989."

The Division sent to petitioners a Notice of Determination, dated June 25, 1990, asserting tax due for the period ended April 1, 1983 in the amount of $879,257.91, plus $958,499.04 in

interest and $307,740.16 in penalties, for the total amount of $2,145,497.11; and tax due for the period ended March 5, 1986 in the amount of $34,951.49, plus $17,174.17 in interest and $12,232.89 in penalties, for the total amount of $64,358.55. Attached to the notice was the following explanation for the amount of tax due:

"The following figures have been used in calculating Gains Tax for the cooperative project located at 340 Riverside Drive, NYC.

Total project shares 79,910
22,150 - sold prior to 3/83
30,080 - sold post 3/83
27,680 - unsold

Consideration (28,930 shrs @ $116 p/s)	$3,355,880	
(1,150 shrs @ $300 p/s)	345,000	
Estimated consideration (27,680 shrs @ $6500 p/s)	13,840,000	
Mortgage ($1,350,000 allocated to 57,760 shrs)	975,798	
		$18,516,678
Less: Reserve fund ($125,478)		(90,697)
Less: Original Purchase Price (alloc. to 57,760 shrs)		
Purch. Price to Acquire ($671,500)	$485,369	
Capital Improvements ($533,780)	385,823	(871,192)
Gain		$17,554,789
Tax		$1,755,478.90
Tax per share $30.3926		
Tax on 30,080 shares		$914,209.40"

By letter dated November 27, 1990, the Division recalculated the amount of tax due after discussions with Mr. Glushak. With respect to the sale of units 12D and 2A, the Division set forth the following calculations of tax due:

"Paul Bogoni	Evelyn Reynolds	Thomas Urich	Charlotte Kelly
56%	26%	9%	9%
Units	Shares	Consideration	
12D	1,330	$230,000	
2A	1,260	255,000	
	2,590	$485,000	

Consideration	$485,000
Mortgage $1,350,000 allocated to 2,590 shrs[2]	43,712
	528,712
Brokerage	(29,100)
Reserve fund $150,000 allocated to 2,590 shrs	(4,857)

[2]The Division calculated the allocation based on the total number of shares in the cooperative building which totalled 79,990.

OPP $1,199,419 allocated to 2,590 shrs	(38,835)
Gain	$455,920
Tax due - 10%	$ 45,592
Tax per share $17.6030	

Paul Bogoni	- 56% interest =	$25,531.52
Evelyn Reynolds	- 26% interest =	$11,853.92
Thomas Urich	- 9% interest =	$ 4,103.28
Charlotte Kelly	- 9% interest =	$ 4,103.28
		$45,592.00"

With respect to the sale of units 10B[3] and 6D, the Division calculated the amount of tax due based on Paul Bogoni's and Thomas Urich's ownership interest in certain units as follows:

"Paul Bogoni 86%		Thomas Urich 14%
Units	Shares	Consideration
9A	1,470	
14A	1,620	
10B	1,440	$535,000
11B	1,470	
6C	1,000	
8C	1,040	
12C	1,330	
15C	1,420	
1D	1,000	
11D	1,300	
14D	1,390	
15D	1,420	
6D	1,150	308,000
	17,050	$843,000

Consideration (2,590 shrs)		$843,000
Estimated Consid - $843,000 / 2,590 x 50% x 14,460 shrs		2,353,239
Mortgage $1,350,000 allocated to 17,050 shrs		287,775
		3,483,994
Buyout		(15,000)
Brokerage		(18,000)
Reserve fund $150,000 allocated to 17,050 shrs		(31,973)
OPP $1,199,419 allocated to 17,050 shrs		(255,658)
Gain		$3,163,363
Tax		$316,336.30
Tax per share $18.5534		
Tax on 2,590 shares	$48,053.30	
Tax paid on Unit 10B	14,628.52	
Balance Due	33,424.78	

[3]Unit 10B was sold on November 18, 1990, subsequent to the issuance of the Notice of Determination. Therefore, the amount of tax calculated with respect to unit 10B ($18.5534 x 1,440 shares = $26,716.90) and the tax payment of $14,628.52 relates to a unit not covered by the notice challenged in this petition. However, the actual sale price of unit 10B does effect the tax per share due with respect to unit 6D.

Paul Bogoni - 86% interest =	$28,745.31
Thomas Urich - 14% interest =	4,679.47
	$33,424.78"

In the letter, the Division explained the method used for calculating estimated consideration in the above calculations as follows:

> "The method used to compute estimated consideration is pursuant to procedures established by this Department for valuing unsold shares. This is further explained in the attached memo (TSB-M-86-(3)-R), Safe Harbor Estimate for Transfers Pursuant to Condominium and Cooperative Plans. Basically, in this particular case, the Department allows an estimate of 50% of vacant market value or 100% of the latest offering plan price. (For Bogoni and Urich, vacant sales have occurred, so it is possible to estimate the unsold shares at 50% vacant market value. For Reynolds and Kelly, vacant sales have not occurred, so 100% of the latest offering plan price has been used. The latest offering plan price is $500 per share, as stated in the Eleventh Amendment).
>
> "The taxpayers may elect to not file pursuant to safe harbor, in which case they may value the unsold shares based on their reasonable estimate. However, if the shares should actually be sold at higher than estimated, the taxpayer will be subject to penalty and interest. If the taxpayer chooses to not file pursuant to safe harbor, a written statement to that effect is to be provided to this department."

With respect to the sale of units 13B, 11C, 14C and 10D, the Division recalculated the amount of tax due as follows:

"Evelyn Reynolds
100%

Units	Shares	Consideration
13B	1,530 }	
11C	1,300 }	$467,200
14C	1,390 }	
10D	1,270 }	
13D	1,360	
	6,850	$467,200

Consideration	$467,200
Estimated Consid - 1,360 shrs @ $500 per shr, per 11 Amend	$680,000
Mortgage $1,350,000 allocated to 6,850 shrs	115,608
	1,262,808
Brokerage	0.00
Reserve fund $150,000 allocated to 6,850 shrs	(12,845)
OPP $1,199,419 allocated to 6,850 shrs	(102,713)

Gain	$1,147,250
Tax	$114,725
Tax per share $16.7481	
Tax on 5,490 shares	$91,947.06"

Taking into account these recalculations, but excluding the tax on unit 10B ($26,716.90), which was not covered by the Notice of Determination, and excluding the tax paid on the sale of unit 10B ($14,628.52), the total amount of tax due for the units covered by the Notice of Determination was $158,875.47.

After a conciliation conference, the conferee issued a Conciliation Order, dated December 27, 1991, recomputing the tax deficiency to $138,564.00,[4] plus penalty and interest. In the order, it was noted that "[p]ayments totalling $116,745.00 have been applied to this assessment."

Petitioners filed a petition, dated March 22, 1992, arguing, inter alia, that (1) because the building was conveyed to the cooperative corporation prior to the effective date of Article 31-B, no gains tax was due on the sale of the units; that (2) no gains tax was due on units sold prior to September 24, 1985, which was the effective date of the regulations concerning the projected sales of unsold shares or their evaluation, because all sales prior to that date did not add up to $1,000,000.00; that (3) units sold prior to September 4, 1984, the date section 1440.7 was amended, are not subject to gains tax; that (4) the Division incorrectly determined the original purchase price to be $14.99 per share rather than $61.87 per share; and that (5) the Division failed to allow legal fees, closing fees and full contribution to reserve fund with respect to the sales of units 12D and 2A.

The Division filed an answer, dated June 16, 1992, affirmatively stating, inter alia, that the Division made available to the public Publication 588 which explained the treatment of transfers by a cooperative corporation; that the transactions in question were subject to gains tax; that the 1984 amendment merely amplified the Legislature's intent and did not change the taxability of

[4]This amount does not correspond to the Division's recalculation of tax due ($158,875.47) (see, above). The record contains no explanation as to how the conferee recomputed the tax due.

transfers of cooperative shares; and that petitioners bear the burden of proving error on the part of the Division.

At the hearing held on March 24, 1993, the parties agreed that the case primarily involved legal issues and that they would submit the case on the evidence, without testimony, and attempt to reach a stipulated agreement on the facts. Petitioners also moved to amend their petition to provide recalculations of the gains tax due and to claim that "gains tax is not owed because the co-op plan was not designed as a scheme to evade gains tax." In support of this claim, petitioners attached to the amended petition an affirmation by their attorney, Solomon P. Glushak, stating that he was personally familiar with the cooperative plan and that "the purpose of the Plan conversion to a co-op was in no way intended by the petitioners or any of them as a scheme to avoid the New York State Real Property Gains Tax." Petitioners also made an oral motion to amend further their petition to recalculate the tax to include potential broker's commissions of 6% for selling unsold units in the future.

At the hearing, the parties were given until April 28, 1993 to review petitioners' proposed calculations and to submit a stipulation of facts. In the event the parties did not stipulate to facts, the record was left open until April 28, 1993 to submit any further documentation in support of their respective positions. The April 28, 1993 date was extended until May 28, 1993.

On May 28, 1993, the Division submitted to the Division of Tax Appeals amendments to the Offering Plan, Transferor/Transferee Questionnaires and attachments, and an affidavit by Peter Van Buren explaining the audit adjustments in the case. The Division's counsel also stated in the cover letter to the Division of Tax Appeals that on May 20, 1993 he faxed a copy of Mr. Van Buren's affidavit to Mr. Glushak and requested that he send to the Division a proposed stipulation. The Division's counsel noted that as of May 28, 1993 he had not received a response to that request.

In his affidavit, Mr. Van Buren explained the Division's computation of consideration, estimated consideration, proportionate share of mortgage, reserve fund, and original purchase price as follows:

"(a) The consideration figure used was the actual consideration received [see DTF-700 series and transferor/transferee questionnaires].

"(b) Estimated consideration was computed by using the guidelines set forth in TSB-M-86-(3)-R.

"(c) The proportionate share of the mortgage encumbering the property was computed by dividing the principal balance of the wraparound mortgage, $1,350,000, by the total number of shares, 79,990, and multiplying the resulting number by the number of shares sold [see p. 5, Third Amendment].

"(d) The amount of the Reserve Fund apportioned to the unit sales, $150,000, was derived from the Seventh Amendment to the Offering Plan. The apportionment is computed by dividing the amount of the Reserve Fund, $150,000, by the total number of shares, 79,990, and multiplying the resulting number by the number of shares sold.

"(e) The original purchase price, $1,199,419.00, was computed by adding the following component costs:

- purchase price to acquire:	$ 902,900.
- acquisition:	$ 3,646.
- capital improvements:	$ 82,190.
- conversion:	$ 210,683.
Total OPP	$1,199,419.00"

With respect to units 12D and 2A, Mr. Van Buren set forth the same calculations contained in the Division's recalculations contained in the November 27 letter (see, above). Similarly, with respect to units 10B and 6D, owned by petitioners Bogoni and Urich, Mr. Van Buren explained the estimated consideration used to calculate the tax per share as follows:

> "Units 10B and 6D were transferred vacant. Accordingly, pursuant to TSB-M-86-(3)-R, the Safe Harbor estimate of consideration was computed at 50% of the vacant market value of the unsold units. The calculation is as follows:
>
> Actual consideration for sales of units 10B and 6D: $\frac{\$843,000.}{2,590} = 325.4826$
> Number of shares sold
>
> 325.4826 x 14,460 unsold shares x 50% = $2,353,239.00."

Mr. Van Buren's calculation of tax due by Evelyn Reynolds for the sale of units 13B, 11C, 14C and 10D differed from that contained in the Division's November 27, 1990 letter because he considered the actual sale price of unit 13D, which sold in March of 1992 for $325,000.00.

Mr. Van Buren set forth the calculation for the five units owned 100% by Evelyn Reynolds as follows:

"Units 13B, 11C, 14C, 13D and 10D - 6850 shares

Consideration:	$792,200.00	
Mortgage:	$115,608.00	
Working Capital/Reserve	($12,845.00)	[150,000 x $\frac{6,850}{79,990}$]
OPP	($127,875.06)[5]	
Gain	$767,087.94	
Gains Tax	$ 76,708.79"	

From these calculations, the tax per share should be $11.19836, as opposed to the calculation of the tax per share ($16.7481) contained in the November 27, 1990 letter for units 13B, 11C, 14C and 10D.

On August 3, 1993, the Division of Tax Appeals received an application by petitioners to further amend their petition, inter alia:

> "to incorporate their revised determinations of taxes which were made, they claim, pursuant to the Tax Commission guidelines identified in its answer as the basis for the Tax Commission's determinations, . . . to allege that Evelyn Reynolds was not liable for any taxes on the sale of Apts. 13B, 11C, 14C and 10D prior to their transfer in 1993, . . . [and] to deny any gains tax liability because the Plan and apartment sales were not pursuant to an agreement or plan to avoid the gains tax."

Petitioners also requested:

> "a hearing, if it is necessary, to put in testimony and further evidence to support petitioners' claim that the Plan and apartment sales were not pursuant to an agreement or plan to avoid the gains tax."

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[5]The OPP was calculated as follows:

$102,713.00	($1,199,419.00 x $\frac{6,850}{79,990}$)
$ 6,791.00	(legal fees incurred or 1st 4 units)
$ 8,230.00	(capital improvement to unit 13D)
$ 10,141.06	(additional legal fees)
$127,875.06	

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

> The fifth amendment to the Offering Plan provided, in pertinent part, that:
>
> "(ii) As further additions to the Reserve Fund, Sponsor shall pay to the Apartment Corporation 3% of the excess over $45 per share of the actual selling price (less commissions, costs involved in obtaining possession of the apartment, costs of capital improvements, legal fees and other ordinary closing costs). Such payments shall only be made on the first sale of each block of "Unsold Shares," as that term is defined in the Plan and Propriety Lease, and only if the sale is made to a bona fide purchaser for occupancy and only after twenty-three sales have closed."

OPINION

First, the Administrative Law Judge held that a cooperative conversion is treated as a single transfer for gains tax purposes and that all sales made after the effective date of the gains tax are subject to tax. Second, the Administrative Law Judge held that the 1984 amendments to section 1442 of the Tax Law were merely a clarification of the Legislature's intent to aggregate the transfer of shares pursuant to a cooperative conversion plan. Third, the Administrative Law Judge rejected petitioners' argument that no tax was due on transfers prior to the promulgation of regulations relating to the gains tax. Specifically, the Administrative Law Judge stated:

> "[p]etitioners' claims are meritless. Tax imposed under a statute may be enforced prior to the promulgation of the Division's regulations concerning that statute . . . . [T]he units in question were taxed in accordance with the statutory language concerning cooperative plans. In any event, regulations that merely codify or fill in the details of the statutory policy do not invoke a claim of impermissible retroactive application [citations omitted]" (Determination, conclusion of law "C").

Fourth, the Administrative Law Judge declined to allow petitioners to step-up their original purchase price in the property to fair market value at the time the property was conveyed to the cooperative housing corporation holding that where a transfer results in no beneficial change of ownership or interest, the transferee has a carryover basis in the property.

Fifth, the Administrative Law Judge, relying on our decisions in Matter of Normandy Assocs. (Tax Appeals Tribunal, March 23, 1989) and Matter of River Terrace Assocs. (Tax Appeals Tribunal, October 22, 1992), held that the Division properly calculated consideration

using the face amount of a wraparound mortgage rather than its value when determining gain per share.

Sixth, the Administrative Law Judge held that:

> "it was reasonable for the Division to base the estimated consideration for the two vacant units on 50% of the actual sales price of the sold units inasmuch as that method reflects the potential sales price of future units" (Determination, conclusion of law "G").

Additionally, the Administrative Law Judge rejected petitioners' assertion that the Division erred in determining estimated consideration by including the full face amount of the mortgage when determining estimated consideration rather than reducing it by 50%. With respect to this issue the Administrative Law Judge stated:

> "[t]his amount is a known entity and can be apportioned over the entire 79,990 shares of the cooperative as done in the Division's calculations. The purpose of taking 50% of the consideration already received as an estimate of future consideration recognizes the speculative nature of future sale prices. There is no speculation as to the amount of the mortgage obligation assumed by each share of the cooperative" (Determination, conclusion of law "G").

Seventh, the Administrative Law Judge declined to allow petitioners to reduce gain by anticipated flip tax. The Administrative Law Judge did, however, state that because the Division stated it would allow contributions to the reserve fund with respect to units 6D and 10B, these contributions should be utilized in recomputing the tax per share with respect to unit 6D.[6] The Administrative Law Judge held that until flip tax payments with respect to units 12D, 2A, 13B, 11C, 14C and 10B could be substantiated that they had, in fact, been paid, it was proper for the Division to disallow them. Likewise, the Administrative Law Judge held that although the Notice of Determination did not cover unit 13D, the payment into the reserve fund with respect to such unit should have been allowed in computing the tax per share for units 13B, 11C, 14C and 10D inasmuch as the Van Buren affidavit calculated tax per share on these units using the actual consideration received on the transfer of 13D.

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[6]The Administrative Law Judge limited the recomputation of tax per share to unit 6B because unit 10B was not covered in the determination.

Eighth, the Administrative Law Judge declined to allow a deduction for brokerage commissions on future sales in the absence of evidence that petitioners will actually incur these charges.

Ninth, the Administrative Law Judge also rejected petitioners' claim that no taxes were owed with respect to units 13B, 11C, 14C and 10D because the contract for sale did not provide for their transfers until 1993 because petitioners provided no evidence to support their claim.

Finally, the Administrative Law Judge held that petitioners did not establish reasonable cause for abatement of penalties and penalty interest.

On exception, petitioners assert that: (1) no tax is owed on transfers prior to the effective date of the 1984 amendment to Tax Law § 1442 because such amendment was a substantive change and not a mere clarification of existing law; (2) no gains tax is payable because petitioners have furnished a sworn statement that the plan was not designed to evade gains tax; (3) no tax is due because regulations concerning whether a plan was intended for the purpose of evading gains tax were not promulgated until September 24, 1985; (4) the portion of the mortgage allocated to unsold shares should be reduced by 50% when calculating estimated consideration on unsold shares; (5) consideration from the wraparound mortgage should be reduced by petitioners' obligation to pay the first mortgage; (6) it was an error to disallow flip tax payments because under the fifth amendment to the offering plan petitioners are obligated to make such payments to the reserve fund; (7) estimated brokerage commissions should have been utilized in calculating estimated consideration on unsold shares; (8) the Division has misapplied its own regulations in determining gain and tax per share; and (9) penalties and penalty interest should be abated because petitioners' failure to comply with the gains tax filing requirements is due to the ambiguity of gains tax law.

In response, the Division relies on the reasoning embodied in the determination of the Administrative Law Judge and urges that such determination be affirmed in all respects.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1441 imposes a tax of 10% on gains derived from the sale of real property. It is well settled that a cooperative conversion is treated as a single transaction for purposes of applying the gains tax (Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455; Mayblum v. Chu, 109 AD2d 782, 486 NYS2d 89, mod 67 NY2d 1008, 503 NYS2d 316; Matter of 44 West 62nd Street Assocs., Tax Appeals Tribunal, August 11, 1994).

Petitioners argue that prior to September 4, 1984, the effective date of amendments to Tax Law § 1442, section 1442 did not provide for aggregating transfers pursuant to a cooperative plan for purposes of determining entitlement to the $1,000,000.00 exemption. In support of their contention, petitioners argue that the amendment to section 1442 was not a clarification of existing law, but a substantive change. We disagree.

In the original 1983 enactment, Tax Law § former 1440(7) provided, in pertinent part, that:

> "'[t]ransfer of real property' means the transfer or transfers of any interest in real property by any method . . . . Transfer of real property shall also include partial or successive transfers pursuant to an agreement or plan to effectuate by partial or successive transfers pursuant to an agreement or plan to effectuate a transfer which would otherwise be included in the coverage of this article, provided that the subdividing of real property and the sale of such subdivided parcels improved with residences or transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property (emphasis added)."

The inclusion of the term "transfers" in the definition of "transfer of real property" indicates that multiple transfers of interests in real property are to be treated as a single transfer for purposes of applying the gains tax (Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, 235, lv denied 73 NY2d 708, 540 NYS2d 1003). Additionally, as the Administrative Law Judge noted, the Legislature's intent of aggregating transfers pursuant to a cooperative conversion plan is evinced by explicitly excluding such transfers from the residential exemption from aggregation.

Furthermore, the court in Trump v. Chu (65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915) made it clear that the original enactment taxed sales pursuant to a cooperative or condominium plan based on aggregate consideration. In Trump, the court rejected the taxpayers' assertion that Article 31-B (L 1983, ch 15, § 181) impermissibly discriminated against sales pursuant to a cooperative or condominium plan by requiring consideration received on the sale of units in such a plan be aggregated for purposes of applying the one million dollar exemption in Tax Law § 1443(1) while not requiring aggregation of consideration received on the sale of individual residences in a subdivision, holding that the distinction violated neither the State nor Federal Constitution (Trump v. Chu, supra).

The amendment to section 1442 of the Tax Law made by Chapter 900 of the Laws of 1984 did not, as petitioners contend, require aggregation of sales pursuant to a cooperative plan. Instead, this amendment required that tax on aggregated transfers, other than sales pursuant to a cooperative or condominium plan, be paid only after the aggregated consideration received by the transferor equalled $1 million (20 NYCRR 590.68). Both before and after the amendment, tax on sales pursuant to a cooperative plan was due on the first sale made if the consideration to be received under the entire plan would equal $1 million.[7]

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[7]The pertinent amendments to section 1442 were as follows (the underlined language was added):

> "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. In the case of partial or successive transfers which are treated in the aggregate pursuant to subdivision seven of section fourteen hundred forty of this article, the date of transfer shall be deemed to be the date on which each partial or successive transfer of the aggregated transfer is transferred. For purposes of calculating the amount of tax due in each such partial or successive transfer or transfer pursuant to a cooperative or condominium plan, an apportionment of the original purchase price of the real property and total consideration anticipated under such cooperative or condominium plan or such aggregated transfer shall be made for each such cooperative or condominium unit or partial or successive transfer. Provided, however, in the case of partial or successive transfers, other than transfers pursuant to a cooperative or condominium plan, no tax is due until the consideration paid or required to be paid for the real property transferred equals or exceeds one million dollars."

Petitioners next argue that gains tax is neither due nor owing because petitioners have furnished a sworn statement which states that the subject transfers were not designed so as to avoid the gains tax. We disagree.

Tax Law § 1440(7) includes in the definition of a "transfer of real property" not only a single transfer, but also

> "partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article."

Thus, the ultimate issue is whether there is a plan or agreement to effectuate by partial or successive transfers a transfer "which would have been subject to the real property gains tax, but for the structuring of the disposal of the property into partial or successive transfers" (Matter of Cove Hollow Farm v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127, 129). Accordingly, whether or not petitioners' transfers were pursuant to a plan or agreement to effectuate by partial or successive transfers a transfer which would otherwise be subject to the gains tax is of no significance because, as discussed above, the consideration received on the transfer of shares pursuant to a cooperative conversion is aggregated for purposes of applying the gains tax.

Next, we address whether regulations concerning when there was a plan or agreement to evade the gains tax were required before the Division could impose tax on the subject transfers. Petitioners argue that the Division erred by not exempting the plan from gains tax in the absence of any regulations which set forth a standard for determining when there was a plan or agreement to evade the gains tax. We disagree.

We agree with the Administrative Law Judge that "the units in question were taxed in accordance with the statutory language concerning statutory plans" (Determination, conclusion of law "C"). Although the regulations concerning the gains tax did not become effective until September 24, 1985, the regulations merely codified the Department's policy of how the gains tax

was to be applied with respect to cooperative conversions (Matter of Iveli v. Tax Appeals Tribunal, supra, 535 NYS2d 234, 235; Matter of Sanjaylyn Co. v. State Tax Commn., 141 AD2d 916, 528 NYS2d 948, 950, appeal dismissed 72 NY2d 950, 533 NYS2d 55).

Further, as the Administrative Law Judge noted, in Publication 588, at question and answer 21.F, issued in August of 1983, the Division stated that transfers pursuant to a cooperative plan are aggregated under section 1440.7 of the Tax Law. We believe that Publication 588 was an adequate vehicle to state this explanation of the law and that the explanation was not required to be stated in a regulation in order to be effective (see, Matter of Friesch-Groningsche Hypotheek Bank Realty Credit Corp. v. Tax Appeals Tribunal, 185 AD2d 466, 585 NYS2d 867, lv denied 80 NY2d 761, 592 NYS2d 670).

Next, petitioners argue that the Division erred in calculating estimated consideration on unsold units by including the full portion of the wraparound mortgage allocated to each unsold unit rather than reducing the mortgage portion by 50% as is done with the cash portion. With regard to this issue the Administrative Law Judge stated:

> "[t]his argument has no merit. All shares of the cooperative are pledged as security for repayment of the mortgage under the terms of the Offering Plan. This amount is a known entity and can be apportioned over the entire 79,990 shares of the cooperative as done in the Division's calculations. The purpose of taking 50% of the consideration already received as an estimate of future consideration recognizes the speculative nature of future sale prices. There is no speculation as to the amount of the mortgage obligation assumed by each share of the cooperative. Thus, petitioners' argument is rejected" (Determination, conclusion of law " G").

The Administrative Law Judge completely and adequately addressed this issue and we affirm for the reasons stated therein.

Petitioners also argue that the Division erred in calculating consideration by including the full face amount of the wraparound mortgage rather than reducing it by petitioners' obligation to pay the underlying first mortgage. We disagree.

In Matter of Normandy Assocs. (supra), we stated:

> "the Division's position that the face amount of the mortgage, rather than its value, is correct under the law. Tax Law section

> 1440(1)(a) provides that consideration includes 'the amount of any mortgage, purchase money mortgage, lien or other encumbrance' (emphasis added). In contrast, in the same section of the law the 'consideration' for a lease is defined to include 'the value of the rental . . .' (emphasis added). Since the Division's interpretation is in accord with, and gives significance to, the different terms used by the Legislature in defining consideration, we agree . . . that it is a correct interpretation."

Therefore, this argument is also rejected.

We next address whether the Division erred by refusing to allow estimated flip tax payments of $7,411.50 with respect to units 13B, 11C, 14C and 10D in computing gain.

Under the provision of the fifth amendment to the Offering Plan upon which petitioners rely, petitioners were required to pay "3% of the excess over $45 per share of the actual selling price (less commissions, costs involved in obtaining possession of the apartment, costs of capital improvements, legal fees and other ordinary closing costs)," but such payments were only required with respect to the sale of certain shares. Pursuant to the Division's regulations, "payments to a reserve fund . . . held by the cooperative corporation do not constitute consideration paid by the purchasers, if such payments are required pursuant to the offering plan" (20 NYCRR 590.38). Petitioners have not established that flip tax payments to the reserve fund would be required under the fifth amendment to the offering for units 13B, 11C, 14C and 10D; therefore, we affirm the Administrative Law Judge's disallowance of $7,411.50 in anticipated payments with respect to these units.

Petitioners also assert that the Administrative Law Judge erred by not allowing flip tax payments to the reserve fund on units 12D and 2A. We disagree.

As the Administrative Law Judge noted, petitioners provided no documentation to substantiate that the additional payments to the reserve fund in accordance with the fifth

amendment to the Offering Plan had, in fact, been made.[8] Therefore, because such payments cannot be substantiated, they were properly disallowed.

Next, petitioners assert that the determinations should be recalculated to include estimated brokers' commissions of 6% on unsold units. In support of their position, petitioners cite to Matter of Normandy Assocs. (supra). We disagree.

In Normandy Assocs., we allowed estimated brokerage fees of 6% in calculating estimated consideration. We noted that the Division did not challenge the Administrative Law Judge's conclusion that a 6% brokerage fee was allowable in reducing estimated consideration. We stated that this "adjustment was in accord with the Option B filing method set forth in TSB-M-82(2)-R as well as the Division's current cooperative filing forms, DTF-701" (Matter of Normandy Assocs., supra). The Division's forms, however, require "a copy of the brokerage agreement setting forth the total brokerage fee anticipated under the plan." Here, however, there is no evidence concerning the amount, if any, of brokerage fees that will be incurred. Therefore, it was proper to disallow anticipated brokerage fees.

Next, petitioners argue that the Division has misapplied its guidelines in calculating safe harbor estimates on unsold shares. Petitioners assert that it was an error to use actual consideration received rather than 50% of estimated consideration pursuant to TSB-M-83(2)-R. 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[s] could have elected, prior to the time they started making taxable sales, to estimate the consideration to be received on all future

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[8]Petitioners submitted their brief in support of their petition to the Administrative Law Judge on August 3, 1993 along with twelve exhibits. Included in such exhibits were two letters from Mr. Glushak to an attorney (presumably the purchasers' attorney) indicating that the petitioners would make the additional payments to the reserve fund with respect to units 12D and 2A in accordance with the fifth amendment to the Offering Plan. The administrative Law Judge had extended the time to submit additional evidence to May 28, 1993. Accordingly, the exhibits submitted on August 3, 1993 have no bearing on the outcome as the record was closed (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

sales" (Matter of Normandy Assocs., supra). Therefore, petitioners could have validly elected the Option B method prior to making taxable sales. Petitioners had not done so. As the Administrative Law Judge stated:

> "it was reasonable for the Division to base the estimated consideration for the two vacant units on 50% of the actual sale price of the sold units inasmuch as that method reflects the potential sale price of future units" (Determination, conclusion of law "G").

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

With regard to this issue, the Administrative Law Judge stated:

> "Tax Law § 1446.2(a) permits abatement or waiver of penalty if it can be determined that a taxpayer's failure to timely file and pay the gains tax was due to reasonable cause and not due to willful neglect. The reasonableness of a taxpayer's failure to pay the tax must be evaluated in light of the Division's articulated policy (see, Matter of Benacquista, Polsinelli & Serafini Mgt. Corp. v. Commr. of Taxation & Fin. of the State of NY, 191 AD2d 80, 598 NYS2d 829, 832) and "the extent of the taxpayer's efforts to ascertain its tax liability" (Matter of KAL Associates, Tax Appeals Tribunal, October 17, 1991). Here, petitioners have offered no evidence that they made any efforts to determine their tax liability.
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> "Petitioners' contention that they should not be held liable because the regulations were not issued until 1984 has no merit. The Division had issued in August of 1983 Publication 588, which was subsequently adopted as regulations. Moreover, the statutory language itself should have induced petitioners to make inquiries concerning their tax liability. Furthermore, the record reflects that even after the Division contacted petitioners in 1988 and informed them of their potential tax liability, the documents requested were not timely provided. Considering the total circumstances, petitioners have not demonstrated reasonable cause to waive penalties or interest penalties for failure to comply with the filing and payment provisions of the gains tax law (see, Matter of Benacquista, Polsinelli & Serafini Mgt. Corp. v. Commr. of Taxation & Fin. of the State of NY, supra; Matter of Brounstein, Tax Appeals Tribunal, January 30, 1992)" (Determination, conclusion of law "K").

The Administrative Law Judge completely and adequately addressed this issue and we affirm for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Evelyn Reynolds, Paul Bogoni, Charlotte Kelly and Thomas Urich is denied;

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

3. The petition of Evelyn Reynolds, Paul Bogoni, Charlotte Kelly and Thomas Urich is granted to the extent indicated in conclusions of law "H," "L" and "M" of the determination of the Administrative Law Judge, but is otherwise denied; and

4. The Division of Taxation is directed to modify the Notice of Determination dated June 25, 1990 in accordance with paragraph '3" above, but such Notice, as modified by the Conciliation Order, is otherwise sustained.

DATED: Troy, New York
March 9, 1995

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

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