STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ENDERS FARM ASSOCIATES	:	DECISION DTA No. 810774
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 Enders Farm Associates, 8311 Creekcrest Circle, Manlius, New York 13104, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on December 16, 1993. Petitioner appeared by Slotnick, Arno, Bertrand & Welch (Daniel J. Arno, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief in support of its exception and a letter in opposition to the Division of Taxation's exception. The Division of Taxation filed a letter brief in support of its exception and a letter in opposition to petitioner's exception and in reply to petitioner's letter in opposition. Petitioner filed a letter in reply to the Division of Taxation's brief in opposition. Oral argument, at both parties' request, was heard on June 15, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether management fees paid to petitioner's general partner may be included in the original purchase price for the purpose of the real property transfer gains tax.

II. Whether finance charges paid to petitioner's limited partners based on a percentage of the selling price of real property may be included in the original purchase price as interest on a construction loan.

III. Whether petitioner proved entitlement to the residential exemption for subdivided parcels under Tax Law § 1440.7.

IV. Whether petitioner demonstrated reasonable cause to abate the penalties imposed under Tax Law § 1446.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Enders Farm Associates, is a limited partnership whose business, according to the Limited Partnership Agreement ("partnership agreement"), was "the construction, development and sale of lots, houses and other structures together with related facilities, all of which are located in the County of Onondaga and Surrounding areas in the State of New York."

According to the partnership agreement signed on August 7, 1984, the general partners were (1) Express Development Corporation located in Washington D.C. and (2) Abdo Contractors, Inc. located in Manlius, New York, and the limited partners were (1) Newgate Corporation located in Athens, Greece and (2) Oakland Investments, Ltd. located in Beirut, Lebanon. The partnership agreement provided that the limited partners each contributed $50,000.00 and that additional contributions "shall be made by the Limited Partners."

Paragraph 9 of the partnership agreement provided as follows:

> "Each partner shall be given credit for his financial contribution, management and sales ability in accordance with the following charges against income:

	Percentage of Sales
Management Efforts -	
Express Development Corp.	
10%	
Selling Efforts -	
Abdo Contractors, Inc.	
10%	
Financial Charge -	
Newgate Corporation	
15%	
Financial Charge -	
Oakland Investments Ltd.	15%

"Thereafter, profits/losses shall be shared in accordance with the following formula:

	Percent of Profit	Percent of Loss
Express Development	16.67%	50.00%
Abdo Contractors Inc.	16.67%	50.00%
Newgate Corporation	33.33%	0
Oakland Investments Ltd.	33.33%	0"

By letter dated September 5, 1990, an auditor with the Division of Taxation ("Division") informed petitioner that in her review of the records of the Clerk of Onondaga County she discovered that petitioner sold several unimproved subdivided parcels of real property for a consideration that aggregated more than $1,000,000.00. The auditor further noted that the Division's records indicated that petitioner had not filed transferor questionnaires in accordance with the Tax Law.

Thereafter, the auditor conducted a field audit of petitioner's sales of real property to determine the amount of transfer gains tax owed.

Petitioner filed two transferor questionnaires dated November 1, 1990. On the questionnaires, petitioner reported gross consideration of $3,675,000.00 for the sale of the subdivided lots. From this amount, petitioner made the following deductions as the original purchase price in calculating the gain subject to tax:

purchase price to acquire property		$ 365,000.00
other acquisition costs		110,250.00
cost of capital improvement		2,832,250.00
allowable selling price		367,500.00
	Total	$3,675,000.00

At the conclusion of the audit, the auditor disallowed $368,180.00 claimed by petitioner to be management fees includable in the original purchase price. The auditor characterized the alleged management fees as payments to a related party for services that are general and administrative rather than construction supervision. The auditor also disallowed as part of the original purchase price operating costs of $38,286.00[1] and $1,104,541.00 in claimed finance charges on a loan by limited partners to petitioner. The auditor determined that the finance charges constituted returns on partners' investment and profit sharing not in connection with a construction loan. After these adjustments, the auditor determined taxable gain in the amount of $1,578,236.00.

The Division issued to petitioner a Notice of Determination dated February 14, 1992 for gains tax due in the amount of $157,824.00, plus $55,226.00 in penalty and $74,059.02 in interest, for the total amount due of $287,109.02.

Petitioner filed a petition, dated April 20, 1992 and received by the Division of Tax Appeals on May 1, 1992, challenging the entire amount assessed by the Notice of Determination. In the petition, petitioner alleged that the "Commissioner's determination is barred, in whole or in part, by the statute of limitations, having occurred more than 3 years from the Notice of Assessment";[2] that the Division erred in not allowing it to increase its original purchase price by the interest that was paid to the limited partners on a loan related to construction and/or financing of the project, and other related costs; that the Division erred in "not allowing an exemption of $1,000,000.00 per sale, since the Taxpayer is selling real estate improved by one-family residences"; and that the penalty and interest penalty should be

[1]According to petitioner's brief, it is not disputing this disallowance (Petitioner's brief, p. 4, ftn. 2).

[2]At hearing, petitioner withdrew its statute of limitations claim (Tr., p. 9).

cancelled.

The Division filed an answer, dated June 1, 1992, affirmatively stating, inter alia, that petitioner sold unimproved lots in a subdivision and not lots improved by single-family residences; that the Division properly disallowed certain costs claimed by petitioner as the original purchase price under the statute; and that the penalties were properly imposed pursuant to Tax Law § 1446 because petitioner failed to comply with the filing and payment provisions of Tax Law §§ 1447 and 1442.

At the hearing held on March 25, 1993, Richard Seikaly, president of Express Development Corporation, testified concerning the nature of the management fees and financial charges that petitioner claimed as part of the original purchase price in calculating gain under Article 31-B of the Tax Law. Mr. Seikaly testified that he was a mechanical engineer with 20 years experience in the development and construction of real estate projects and that the Enders Farms project was developed in a series of stages, with which he was directly involved, beginning with site selection, feasibility studies, and the financing and acquisition of the real property. When questioned as to his involvement in the engineering stage, Mr. Seikaly responded that he obtained the services of an engineering firm to do the design work concerning the roads, sewers and "everything that goes into a development of this kind" (Tr., p. 44) and that he obtained the services of a land surveyor to do the layout and surveying.

According to his testimony, Mr. Seikaly was in Syracuse at least once every two weeks in 1983 during the beginning stages of the project and thereafter was in Syracuse less frequently. He described his presence and involvement in the project as follows:

> "Even though at various stages my presence here was not necessary, simply because of the activity that required my presence, but out of Washington we were administering a lot of the things that were going on. And it was almost daily contact with Bob Abdo, who was the contractor.[3] And whenever the need became necessary he either traveled to Washington or I came here."

---

[3] Bob Abdo was the president of Abdo Contractors, Inc., the other general partner of petitioner.

Q. "Is it your testimony then, did you work for this project while in Washington, D.C.?"

A. "Yes, of course."

Q. "A lot of work?"

A. "Yes. Yes. Especially dealing with financial matters, relations with the limited partners, engineering matters. Because this project was not done at one shot, it was done in six stages. So, you really had six different projects going on the same piece of land."

Q. "What were those stages?"

A. "Construction stages and sales stages, financial stages. Each one had to be properly financed before it even started. And this is where the relationship with the market and the project and the limited partners were necessary to keep the thing going."

Q. "Why did you do that and not Mr. Abdo?"

A. "Well, Mr. Abdo and I go a long way back, and we're like a team. He is proficient in many areas and so am I, so we split responsibilities. And I normally have responsibility for general business outlook, for financial matters, engineering matters and construction from an engineering point of view. And Mr. Abdo has responsibility, and does a good job of actual supervision of construction and sales because he knows all the builders in this area and he knows the market very well." (Tr., pp. 45-46.)

* * *

Q. "The services you rendered were, then, general administrative?"

A. "I might add -- I don't know if everybody knows this -- a general partner is really responsible for everything that goes on in the project. If the project went haywire it would be our responsibility, not the limited partner. So by necessity we have to remain involved, if not by anything else."

Q. "You kept your fingers on this project all the time, is that your testimony?"

A. "Yes." (Tr., pp. 56-57.)

Mr. Seikaly described his management role in the project as more than just construction management. In accordance with the partnership agreement, he was paid 10% of all sales which over a nine-year period amounted to the $368,180.00 that was disallowed by the auditor. Mr. Seikaly claimed that the amount paid to him from 1983 through 1987 or 1988 was his sole source of income for those years. He justified the amount paid to him as follows:

Q. "Based on your experience, what is the normal compensation, say, for a general construction manager?"

A. "Well, you've been calling it construction management in these proceedings, I would like to call it management, not just construction, because construction management is just a piece of what management really does on a project like this. So, if I may, I will answer your question construction management on a contractual basis in an arms length situation is normally anywhere between 8 and 12 percent of construction cost. This is when the activity is limited to the supervision of an actual construction job. Doesn't include engineering and design."

Q. "Which you did?"

A. "That led to do or the creation of the project or any other activity, except the actual supervision of the contract. Which doesn't include financial responsibility, except in auditing what the contractor wants to be paid. So, it really doesn't describe the full scope of what we have done."

Q. "You did more than construction management, is that your testimony?"

A. "The construction management has two phases, one relates to engineering and objectives of the construction, the other is actually in-ground construction. The actual in-ground construction was done to the tune of 80 percent by Mr. Abdo. I might add, the first phase of this was let out on bid. In other words, we had the general contractor, who we got through bid. Following that, through local independent subcontractors, we were the general contractor."

Q. "You were the general contractor?"

A. "Yes. The partnership, through the management agreement that it had with both Mr. Abdo and myself, we decided to do it ourself and there was no added compensation for it; it was just the ten percent."

Q. "Ten percent of?"

A. "Sales."

Q. "Based on your experience, is this a common charge?"

A. "It is common. Actually, it's lower than common. Normally, a general partner in a partnership like this gets 40 percent. Since we were both equity as well as general partners we figured that the whole thing was fair on the basis of the way it was done." (Tr., pp. 46-48.)

Mr. Seikaly testified that the reason the limited partners financed the project was to avoid

the risk, high interest rates and points associated with bank financing in the early 1980's.[4] He noted that by basing the finance charges on a percentage of sales, rather than on a fixed interest rate, the project eliminated the risk of foreclosure or bankruptcy that characterized the real estate market at that time.[5] According to his testimony, the limited partners

> "reinvested their equity of three hundred thousand, following which all profits following the sales were reinvested in lieu of obtaining revolving credit from a bank." (Tr., pp. 52-53.)

In his testimony at the March 25, 1993 hearing, Mr. Abdo testified that he had been in the construction business for 40 years and in the real estate business for 20 years. He confirmed Mr. Seikaly's testimony concerning Mr. Seikaly's involvement in the project. Specifically, he noted that Mr. Seikaly negotiated the sale price of the property, did all the financial arrangements, feasibility studies, correspondence with the bank and scheduling. Mr. Abdo responded as follows to questions concerning the management fees paid to Mr. Seikaly's corporation and the finance charges paid to the limited partners:

Q. "Based on your 40 years of experience in construction is [the $368,000.00 management fee] a lot of money?"

A. "No."

Q. "Why is that?"

A. "Well, for the time spent and responsibility, it just isn't a lot of money."

Q. "Do you know what the normal construction compensation would be for someone in a similar position as his corporation?"

A. "Well, that's hard to say. I know we've hired engineers and they didn't contribute as much to a project as Mr. Seikaly did, and they were paid twice as much."

Q. "Based on your experience, does it occur that managers are paid a percentage of sales?"

---

[4]Mr. Hall, petitioner's accountant, testified that the start up costs of construction involved a $300,000.00 loan from the limited partners and a $300,000.00 loan from a bank.

[5]In his testimony, Bob Abdo noted that many contractors in real estate projects were folding because of the interest rates and that, in fact, petitioner obtained one piece of real property for the project after a foreclosure on a mortgage with an 18% interest rate (Tr., p. 89).

A. "Yes."

Q. "How about limited partners being paid a percentage of sales for financing charges, is that an occurrence you've seen?"

A. "Yes, it is."

* * *

Q. "Could this project have been completed without his corporate help?"

A. "I doubt it."

Q. "Why is that?"

A. "I couldn't have done it myself. I couldn't have obtained the financing to put the project together." (Tr. pp. 88-89.)

With respect to Mr. Abdo's and Mr. Seikaly's separate responsibilities, Mr. Abdo testified as follows:

Q. ". . . You did not perform the same function as Mr. Seikaly's corporation?"

A. "No."

Q. "Your functions were different?"

A. "Yes. I was on a day to day supervision management type of a job. I would supervise the actual construction of the sewers and the installation of the water and --"

Q. "You didn't do any of the actual negotiations or financing?"

A. "I didn't do any of the financing. I did, jointly with Mr. Seikaly, some of the negotiations with contractors. We did work very close together on that. And with the engineers and the surveyors."

Q. "But there were things Mr. Seikaly's corporation did that you couldn't do?"

A. "That's correct." (Tr., p. 92.)

At the hearing, petitioner submitted into evidence a document listing each lot number, builder, the date construction commenced on each lot, the date each lot closed and the date the house on each lot closed. Mr. Abdo testified that this document was prepared from courthouse records. He claimed that these were the same records used by the Division's auditor of the 115 subdivided lots that were sold by petitioner between 1985 and 1992. Mr. Abdo testified that

between 20 and 25 lots contained completed houses when the lots were sold to the builders who then sold them to the homeowner,[6] and that between 50% and 60% of the lots had homes substantially completed. Mr. Abdo stated that the type of single-family residence that was built on the subdivided lots took a minimum of five months from the time of excavation until completion. Therefore, concluded Mr. Abdo, in the document listing the various lot numbers and their respective closing dates, it can be assumed that a house was substantially completed when the difference between the lot closing and house closing was two months or less. Similarly, Mr. Abdo asserted that when there was a simultaneous closing of the lot and house, the home was fully completed.

On the document listing the closing dates, the following lots had a lot closing and house closing on the same date:

Section B, lot no. 24
lot no. 33
Section C, lot no. 113
lot no. 121
Section E, lot no. 86
Section F, lot no. 99
Section G, lot no. 60

In the following instances the document indicated that the house closing preceded the lot closing:[7]

[6]Mr. Abdo also testified that between 20 and 25 times petitioner executed a deed to the real property directly to the homeowner.

[7] Mr. Abdo testified that the house closing preceded the lot closing because in those instances the builder did not have the money to pay petitioner for the lot until the builder sold the home to the ultimate homeowner.

	Lot Closed	House Closed
Section B, lot no. 19	8/10/87	7/1/87
lot no. 23	7/25/86	2/2/86
lot no. 44	3/21/87	3/20/87
lot no. 46	10/8/86	4/3/86
Section C, lot no. 123	8/11/87	8/21/86
Section F, lot no. 55	2/15/90	10/26/89
lot no. 98	1/23/91	1/13/91

In all instances, the partnership sold only the lot to the builder and the builder sold the home and lot to the ultimate homeowner.

Mr. Robert D. Hall, who worked as petitioner's public accountant since 1983, testified that the project construction was managed by Mr. Abdo and Mr. Seikaly through their respective corporations; that Mr. Seikaly was directly involved in the construction on the job site or by way of telephone calls from Washington D.C.; and that basing Mr. Seikaly's management fee on a percentage of sales was common and that the amount he received over the nine-year period was not a lot based on the services rendered. Mr. Hall also testified that he added the management fees to the original purchase price based on the terms of the partnership agreement.

With respect to the finance charges paid to the limited partners, Mr. Hall testified that he considered the amount paid to the limited partners, which was based on a percentage of sales, to be finance charges or interest on a loan. He testified concerning the reasons for his conclusions as follows:

Q. "And why were they not partnership distributions, why were they interest payments?"

A. "Well, again, the partnership agreement dictates the terms of how you're doing the accounting. The income tax laws dictate another way of how to do it. The Gains Tax has a third way of calculating income. So, you've got three or four different ways to account for and you account for to be in accordance with the partnership agreement."

Q. "As interest charges?"

A. "As interest charges."

Q. "Is that your understanding of the Gains Law, also?"

A. "Well, the Gains Law deviates from both the general accepted accounting principles and it deviates from income tax purposes. So, the Gains Tax itself is a third method of accounting, if you would."

Q. "Do you stand by your accounting as being accurate under the Gains Law?"

A. "Yes."

Q. "I mean that, what I'm saying, that in fact these were interest charges?"

A. "My belief is that in accordance with the partnership agreement that's what they were."

Q. "Is it based on your experience? Is it common to have interest pegged to sales in these types of situations?"

A. "Is it common?"

Q. "Does it happen?"

A. "I've seen other cases that it's done. Again, I haven't seen a lot of them done on sales, but generally it has been done before." (Tr., pp. 68-69.)

When questioned as to what provisions under the gains tax law he relied on in claiming both the management fees and interest as part of the original purchase price, Mr. Hall responded as follows:

> "Well, again, the gains tax law says that cost of construction is, basically, the only cost you get in regards to the gains tax. And you go to the -- what's confusing about it, general accepted accounting principles as well as the income tax law provide for interest, real estate taxes, management fees and so forth and so on, should be capitalized and become part of the construction cost. So, you have the income tax law, which is different than the gains tax law. But, underneath general accepted accounting principles and under income tax laws all initial start up cost and so forth and so on are capitalized and then amortized over the number of lots you get, if you will." (Tr., p. 80.)

Mr. Hall also testified that he attended various seminars on the gains tax law and requested clarification from the Division concerning the residential exemption. Petitioner submitted a letter dated November 30, 1988, on the Division's letterhead signed by a tax technician responding to an inquiry about the gains tax law as it effected homebuilders. In the letter, relevant sections of the Tax Law and regulations were quoted (e.g., Tax Law §§ 1440.7 and 1443.5 and 20 NYCRR 590.43[g]). In addition, the letter contained the following paragraph:

"Concerning the lots sold improved with residences to transferee's [sic] to be used as their residences, it is our opinion that the consideration received from such sales is not to be aggregated with the consideration received from the sale of vacant lots. The sale of the individual residences, however, would be separately subject to the gains tax if the consideration received for a single residence is $1 million or more."

OPINION

The Administrative Law Judge determined that, based upon the testimony of petitioner's witnesses, the fees paid for Mr. Seikaly's contributions to the project were includible in the original purchase price. The Administrative Law Judge reasoned that the fees for Mr. Seikaly's services were specifically associated with the project's acquisition of property and capital improvements and that these costs were allowable additions to the original purchase price pursuant to 20 NYCRR 590.15 and 590.16, respectively. The Administrative Law Judge found that Mr. Seikaly performed the following relevant services: 1) negotiation of the purchase price; 2) marketing and feasibility studies; 3) engineering matters; 4) acting as the general contractor negotiating with contractors; and 5) handling general administration and coordination of the construction and financing of capital improvements. The Administrative Law Judge further determined that such costs would undoubtedly be included in the original purchase price had they been paid to a third party.

The Administrative Law Judge also concluded that the fees paid justly and fairly represented the worth of Mr. Seikaly's services. Testimony by petitioner's witnesses regarding the calculation of fees based on the percentage of sales as standard in the industry was accepted by the Administrative Law Judge as credible. Further testimony by petitioner's witnesses to the effect that the fees paid for Mr. Seikaly's efforts were not overinflated, but rather low, was also accepted by the Administrative Law Judge.

The Administrative Law Judge also rejected the Division's contention that the subject fees were general and administrative costs. The Administrative Law Judge found the fact that Mr. Seikaly's general partner and construction manager responsibilities may have overlapped is not controlling in this case. Given that the sole business of the partnership was the one real

estate project and that the services performed were otherwise within the parameters of the regulations as capital improvement costs, not general or administrative expenses, the Administrative Law Judge concluded that the fees are includable in the original purchase price.

The Administrative Law Judge also found relevant that the fees for Mr. Seikaly's services of development and construction of the real estate project were specifically prescribed for in the partnership agreement.

The Administrative Law Judge also found that petitioner could not include the $1,104,000.00 paid to the limited partners in the original purchase price. The Administrative Law Judge determined that a plain reading of the partnership agreement would lead one to conclude that the payments constituted a return on the limited partners' capital investment. The Administrative Law Judge also found support for her conclusion in the fact that the $1,104,000.00 payment to the limited partners appeared to be the only return on their contributions.

The Administrative Law Judge further determined that 20 NYCRR 590.16(d) does not require that interest paid during the construction period on loans be included in the original purchase price. The Administrative Law Judge reasoned that the regulation merely states that interest on loans is the type of cost that may be included. Citing Matter of MCI Telecommunications (Tax Appeals Tribunal, January 16, 1992, affd 193 AD2d 978, 598 NYS2d 360), the Administrative Law Judge determined that to construe the regulation as requested by petitioner would be inconsistent with the statutory framework or purpose of taxing the gain of investors in real property. The Administrative Law Judge went on to note that notwithstanding whether investors characterize the return on their investment in real property as interest on a loan or a return on their capital investment, the end result is the same -- investors received payments based on the gain in real property. As a result, the Administrative Law Judge concluded the payment to the limited partners does not qualify as part of the original purchase price.

The Administrative Law Judge determined that the sales of subdivided lots by petitioner

to the builders, who in turn sold the lots with residences to homeowners, did not come within the residence exception to the aggregation clause.

The Administrative Law Judge found that the builders, not petitioner, sold lots improved with residences to transferees for use as their residences. Petitioner merely sold subdivided lots to the builders. The Administrative Law Judge noted that the fact that builders commenced or completed lots prior to the actual transfer of lots from petitioner to builders does not entitle petitioner to the residential exemption.

The Administrative Law Judge further rejected petitioner's contention that because some of petitioner's sales of lots to builders were completed at the same time as the builders' sale of the lots and residences to the homeowners, these transfers were, in effect, "part and parcel" of the ultimate transaction to the homeowner. As a result, the Administrative Law Judge concluded that petitioner had not met its burden to establish that the subject transfers qualified for the residential exemption under section 1440(7) of the Tax Law.

The Administrative Law Judge also determined that petitioner did not present reasonable cause to justify the abatement of penalty. The Administrative Law Judge determined that petitioner's reliance on the advice of its tax advisor was insufficient to meet petitioner's burden. The tax advisor testified that he recognized that the gains tax law deviated from the income tax law and generally accepted accounting principles, but failed to make further inquiries after learning of these differences. Further, the Administrative Law Judge found petitioner's accountant's incorrect reliance on a November 30, 1988 letter from the Division also did not establish reasonable cause.

On exception, the Division makes the same assertions as addressed by the Administrative Law Judge, in addition to several new arguments.

We will first address those arguments not raised below.

The Division, citing Matter of Calandra (Tax Appeals Tribunal, September 29, 1988) for the proposition that words in a statute are to be construed where possible in their ordinary

everyday sense, relies on definitions in Black's Law Dictionary for the terms "general" and "administrative" to support its position that the subject management fees are not includible in the original purchase price because administrative means management and the services at issue were management services.

We disagree.

It is clear from 20 NYCRR 590.16 that the terms "general" and "administrative" were not meant to exclude all management services. This point is evidenced by the language of the second to last paragraph of 20 NYCRR 590.16 subsection (d), which provides for the inclusion of certain indirect project costs into the original purchase price. Specifically, this paragraph states:

> "[i]ndirect project costs may also be included in original purchase price if they are specifically identified with a project. Indirect project costs are indirect costs incurred after the acquisition of the property, such as construction administration costs, legal fees, and various office costs (cost accounting expenses, design costs, and other expenses of departments providing services to projects), that clearly relate to projects under construction. The full amount of indirect project costs that clearly relate to a specific project, such as costs associated with a field office at a project site and the administrative personnel that staff the office, may be added to the cost of the capital improvement. However, indirect project costs which relate to numerous projects must be allocated in a rational manner to the projects to which the costs relate based on the nature of activity that gave rise to the costs" (20 NYCRR 590.16[d], emphasis added).

To accept the Division's Dictionary definition of "general" and "administrative" would render meaningless the provisions cited above which include several administrative costs as includible in the original purchase price.

Further, as correctly noted by the Administrative Law Judge:

> "[f]rom the language and total context of the regulation, the excluded 'general and administrative costs' relate to the cost of running a corporation or partnership generally as opposed to the costs specifically associated with a projects capital improvements" (Determination, conclusion of law "A").

This point is emphasized upon a review of expenses considered indirect project costs includible in the original purchase price and those considered excluded as general and administrative. For example, includible indirect costs are office costs, legal fees and accounting expenses

specifically identified with a project. General and administrative costs not considered includible are general legal fees, general accounting expenses and corporate office expenses. From the above provisions one must surmise that "general" and "administrative" cannot be taken literally, but rather, as referring to those expenses relating only to the operation of the business entity and not those related to a particular project.

Consequently, we reject the Division's interpretation of the language.

The Division also argues that petitioner failed to substantiate the amount of management fees claimed. Citing Tax Law § 1448(3), which provides that records of the costs for acquisition of interests in real property must be kept by transferors, the Division argues that petitioner has failed to offer any substantiation documenting the payment of the claimed management fees. As a result, argues the Division, the Administrative Law Judge should not have sustained the inclusion of fees paid to Mr. Seikaly in the original purchase price.

We disagree.

Section 1448(3) is a record-keeping provision which requires a taxpayer to maintain records for audit purposes. The statue does not address what records are necessary to substantiate a claim at a Division of Tax Appeals proceeding. Where the Legislature intends to require corroborating evidence, it is explicit in doing so (Matter of Avildsen, Tax Appeals Tribunal, May 19, 1994; see also, Tax Law § 1443[6] [in order to qualify for the "grandfather" exemption under Article 31-B, the Legislature required independent evidence such as recording of the contract or payment of a deposit]).

Absent a specific directive from the Legislature requiring corroborative evidence, testimony, if found to be credible is sufficient to meet the taxpayer's burden of proof (Matter of Mobley v. Tax Appeals Tribunal, 177 AD2d 797, 576 NYS2d 412, 413, appeal dismissed 79 NY2d 978, 583 NYS2d 195; Matter of Pay TV of Greater New York, Tax Appeals Tribunal, July 14, 1994; Matter of Avildsen, supra).

The Administrative Law Judge found petitioner established, through credible testimony,

that the fees paid to Mr. Seikaly were specifically related to the acquisition of the subject property and capital improvements and, accordingly, the fees paid were includible in the original purchase price as per 20 NYCRR 590.15 and 590.16, respectively. While this Tribunal is not absolutely bound by an Administrative Law Judge's assessment of credibility, we find nothing in the record to justify deciding to the contrary (Matter of Spallina, Tax Appeals Tribunal, February 27, 1992).

As a result, we reject the Division' argument that petitioner failed to substantiate the management fees included in the original purchase price.

The Division also argued that petitioner failed to establish what portion of the management fee was incurred during the construction period as required in the "Question:" portion of 20 NYCRR 590.16(d). Further, the Division contends: "[n]either did the Petitioner prove how much of the management fee was 'incurred after the acquisition of the property' as provided in the body of the regulation" (Division's brief on exception, p. 5).

We find it was unnecessary for petitioner to so allocate Mr. Seikaly's services. It is apparent from the Administrative Law Judge's determination that she found all the services performed were includible in the original purchase price pursuant to 20 NYCRR 590.15 as acquisition and prerequisition costs and pursuant to 20 NYCRR 590.16 as costs of capital improvements.

Given the fact that the entirety of fees paid Mr. Seikaly were includible in the original purchase price, the Division's argument must be rejected.

The remainder of the Division's arguments are reiterations of those made below. Given that the Administrative Law Judge dealt fully and correctly with these arguments, we affirm the Administrative Law Judge's finding with regard to including management fees in petitioner's original purchase price.

On exception, petitioner also makes the same arguments that were raised below.

We first address petitioner's claim that the subject parcels are exempt from aggregation pursuant to the residential exemption found in section 1440(7).

Petitioner argues that since lots were transferred to the builder with residences either substantially or completely ready for occupancy, it is irrelevant that the lots were not transferred by petitioner directly to the homeowner given these lots with homes were simultaneously transferred by the builder to the homeowner.

We agree with the Administrative Law Judge that the subject transfers are not excepted from the gains tax.

As we found in Matter of Starburst Development Co. (Tax Appeals Tribunal, May 5, 1994), in order to come within the residential exemption of section 1440(7) the transferor must transfer both the lot and completed residence to the homeowner for use as his residence. Petitioner in no instance transferred lots improved with residences to homeowners. It is irrelevant to our decision that certain lots were transferred improved with residences to homeowners by the builders. In the present matter, the only transfers that are relevant for petitioner's tax liability were the sale of unimproved lots to builders.

Turning to the issue of whether the payments of $1,104,000.00 to the limited partners may be characterized as interest includible in petitioner's original purchase price, we find petitioner makes the same assertions on exception as it did below. We agree with the Administrative Law Judge that the only evidence in the record indicates that the payments were a return on the limited partners' capital investment and were not interest payments on a loan. We affirm the determination of the Administrative Law Judge on this issue for this reason. We do not agree with the Administrative Law Judge's suggestion that a limited partner could never prove that advances to the partnership were loans. Instead, we simply hold that petitioner did not prove this here.

We also conclude that the arguments raised by petitioner on exception regarding the abatement of penalties have also been fully and competently treated by the Administrative Law

Judge in her determination and we need not address them again.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Enders Farm Associates is denied;

2. The exception of the Division of Taxation is denied;

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

4. The petition of Enders Farms Associates is granted to the extent indicated in conclusion of law "A" of the Administrative Law Judge's determination, but is, in all other respects, denied; and

5. The Division of Taxation is directed to modify the Notice of Determination dated February 14, 1992 as indicated in paragraph "4" above, but such Notice is otherwise sustained.

DATED: Troy, New York
December 1, 1994

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

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