STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
IVANCREST ASSOCIATES	:	DECISION DTA No. 810980
for Revision of a Determination or for Refund of Taxes on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner Ivancrest Associates, 1161 Meadowbrook Road, North Merrick, New York 11566, filed an exception to the determination of the Administrative Law Judge issued on April 7, 1994. Petitioner appeared by Margolin, Winer and Evens (James L. Tenzer, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation resubmitted its hearing brief in opposition. Petitioner resubmitted its hearing reply brief on July 27, 1994, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the original purchase price for residential apartments acquired by petitioner and which were later transferred to a cooperative housing corporation as part of a conversion to cooperative use, should be based on petitioner's original cost for the property or the cooperative housing corporation's cost for such property.

II. Whether the cooperative housing corporation's mortgage indebtedness on the property should be allocated to and included in consideration received by petitioner upon its sale of cooperative housing corporation shares.

III. Whether the Division of Taxation's different treatment of cooperative corporations and non-cooperative corporations with regard to the determination of original purchase price and the treatment of mortgages in determining consideration violates the Equal Protection clauses of the New York State and Federal constitutions.

IV. Whether petitioner is entitled to compute its gains tax liability with respect to the cooperative conversion it sponsored by utilizing the "Option B" calculation method as opposed to the method employed by the Division of Taxation on audit.

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

VI. Whether petitioner has demonstrated that the Division has improperly computed interest on the assessment.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "7," "9," "11," "13," "15," "16" and "17 which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

The parties do not appear to disagree on the facts. Petitioner, Ivancrest Associates, 1161 Meadowbrook Road, North Merrick, New York 11566 (referred to herein variously as "petitioner," "sponsor" or "transferor") is the sponsor of a plan to convert to cooperative ownership, real property known as Rivercrest Apartments, 103 Gedney Street, Nyack, New York ("the property").

Petitioner acquired the property consisting of 94 apartment units for the sum of $1,715,562.00 in June 1966.

On March 12, 1980, petitioner, as sponsor, caused 103 Gedney Owners, Inc., a cooperative housing corporation ("CHC"), to be incorporated in the State of New York. In May 1980, petitioner caused the CHC to submit for approval to the Attorney General of the State of New York, a plan for the sale of the CHC's shares to persons intending to purchase the

cooperative's apartment units ("Units"). The plan was approved and declared effective April 24, 1981.

On March 4, 1980, petitioner entered into an agreement to convey the property to the CHC. On September 16, 1981, pursuant to the March 4, 1980 agreement, petitioner conveyed the property to the CHC in exchange for: a) the total proceeds from the sale of shares; b) the remaining unsold shares; c) a purchase money mortgage note; and d) the CHC taking the property subject to the first mortgage. The amount paid to petitioner by the CHC upon the transfer of the property was $4,936,276.00, computed as follows:

Cash	$1,550,961.00
Value of 14,917 unsold shares	924,400.00
Rome Savings Bank Mortgage Assumed by the CHC	1,260,915.00
Mortgage note from the CHC to petitioner	1,200,000.00
TOTAL:	$4,936,276.00

The gains tax became effective March 28, 1983. After the effective date of the gains tax petitioner sold shares representing interests in eight of the cooperative's residential apartments, but did not file gains tax forms or pay applicable tax to the Division of Taxation ("Division"). The Division wrote petitioner's attorney on December 1, 1988 advising him that petitioner, as sponsor of a cooperative housing plan, the shares of which have an aggregate value exceeding $1 million, was required by Article 31-B (§ 1447) of the Tax Law to file questionnaires, infra, with the Division at least 20 days prior to the date of each transfer. The letter went on to request that petitioner comply with these filing requirements.

On or about February 7, 1989, petitioner filed the required transferor's Real Property Transfer Gains Tax Schedule of Original Purchase Price (DTF-700[9/85]). On the schedule of original purchase price, petitioner reported its price to acquire the property as $4,936,276.00 as computed above. It is noted that petitioner did not report the price it paid in 1966 ($1,715,562.00) as the cost of acquiring the property, but rather, the amount contracted for by the CHC upon petitioner's transfer of the property to the CHC.

We modify the Administrative Law Judge's finding of fact "7" to read as follows:

On February 7, 1989 and February 16, 1989, petitioner filed Unit Submission Questionnaires for Cooperatives and Condominiums (DTF-702[9/85]). These unit submission questionnaires together reflect that the subject property contains 94 apartment units, which constituted 54,685 shares in the CHC. The unit submission questionnaire dated February 7, 1989 reported that 79 units (46,321 shares) had been sold for $2,152,564.00. Of the 79 units reported as sold, 78 units (45,749 shares) were shown as exempt from gains tax by virtue of having been sold prior to the effective date of the gains tax statute (March 28, 1983). The 79th unit (Unit 5A representing 572 shares) was sold subsequent to March 28, 1983 and was, thus, a taxable unit, however, said unit submission questionnaire reported that no tax was due on the sale of this unit. The unit submission questionnaire dated February 16, 1989 reported the transfer of seven taxable units (3,506 shares). Once again, petitioner reported that no tax was due on the transfer of these seven units. The remaining eight units, representing 4,858 shares, were reported as unsold. The cover letter from petitioner's representative, included with the questionnaire filed on February 7, 1989 stated, in pertinent part: "[W]e are enclosing the properly executed and notarized . . . forms in connection with the above-captioned matter reporting the transfer of 78 'grandfathered' units and one 'taxable' unit (i.e., a sale after March 28, 1983 which was not subject to a binding contract entered into prior to March 29, 1983).

"Please note that since the transferor believed that 78 of the units previously sold were 'grandfathered' . . . that the 'total anticipated selling price,' as computed under 'safe harbor,' of the 16 'taxable' units was $473,778 (i.e., the $2,632,378 amount reported on Form DTF-701(6/85). . . less the consideration includible therein attributable to the 'grandfathered' units in

the amount of $2,158,600), which amount is less than one million dollars, and that the 'gain subject to tax' for any sales subsequent to March 28, 1983 was a loss, the Transferor, in good faith, did not previously file for such transfers and intended to file for the first transfer, if any, for which tax would become due" (emphasis in original).[1]

In a March 15, 1989 letter from petitioner's representative, James L. Tenzer, to the Division, Mr. Tenzer urged that since petitioner's transfer of the property to the CHC occurred on September 16, 1981 and prior to the effective date of the gains tax, the original purchase price ("OPP") of the property must be "stepped-up" to the $4,936,276.00 contract amount set

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[1] The Administrative Law Judge's finding of fact "7" read as follows:

> "On February 7, 1989 and February 16, 1989, petitioner filed Unit Submission Questionnaires for Cooperatives and Condominiums (DTF-702[9/85]). These questionnaires together reflect that the subject property contains 94 apartment units, which constituted 54,685 shares in the CHC. At the time of filing these questionnaires, petitioner reported 79 units (46,321 shares) had been sold for $2,152,564.00 prior to the effective date of the gains tax statute (March 28, 1983), with 15 units (8,364 shares)* remaining unsold. These forms reported that no gains tax was due, since the sale of all of these units' shares were "exempt", except for one. The one exception was Apartment 5A. Although that unit was sold after March 28, 1983, petitioner reported no gains tax was due. The cover letter from petitioner's representative, included with these filed questionnaires stated, in pertinent part:
>
> "[W]e are enclosing the properly executed and notarized . . . forms in connection with the above-captioned matter reporting the transfer of 78 'grandfathered' units and one 'taxable' unit (i.e., a sale after March 28, 1983 which was not subject to a binding contract entered into prior to March 29, 1983).
>
> "Please note that since the transferor believed that 78 of the units previously sold were 'grandfathered' . . , that the 'total anticipated selling price,' as computed under 'safe harbor,' of the 16 'taxable' units was $473,778 (i.e., the $2,632,378 amount reported on Form DTF-701(6/85) . . . less the consideration includible therein attributable to the 'grandfathered' units in the amount of $2,158,600), which amount is less than one million dollars, and that the 'gain subject to tax' for any sales subsequent to March 28, 1983 was a loss, the Transferor, in good faith, did not previously file for such transfers and intended to file for the first transfer, if any, for which tax would become due. (Emphasis in original.)"
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> *This figure was subsequently increased to 8,936 shares. This increase was due to adding the 572 shares attributable to Unit 5-A, which petitioner reported as having no tax due (see Finding of Fact "10").

We have modified the Administrative Law Judge's finding of fact "7" to more accurately reflect the record.

forth in petitioner's contract with the CHC. Further, petitioner urged that since the amounts represented by the Rome Savings Bank Mortgage ($1,260,914.00) and the mortgage issued by the CHC to petitioner ($1,200,000.00) were received by petitioner on September 16, 1981, prior to the March 28, 1983 effective date of the Tax Law's gains tax provisions, such mortgage amounts are "grandfathered" and cannot be included in computing total consideration for gains tax purposes.

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

> The Real Property Gains Tax Questionnaire (DTF-701[9/85]) filed by petitioner on February 7, 1989 reported actual gross consideration (up to that time) of $2,152,564.00, estimated additional gross consideration upon the sale of remaining shares of $216,778.00, and total anticipated (actual plus estimated) gross consideration of $2,369,342.00 once all shares have been sold. This form indicates that total anticipated consideration under the Plan was computed using the actual selling price for the 79 units reported as sold on the unit submission questionnaire dated February 7, 1989 ($2,152,564.00) and "safe harbor" estimates for the 15 unsold units (15 units representing 8,364 shares multiplied by "safe harbor" estimate of $49.83 per share equals $416,778.00 less $200,000.00 for working capital fund produces the estimated consideration figure of $216,778.00). Exhibit "C" attached to this questionnaire stated, in relevant part:
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> "The Transferor respectfully asserts that the entire amount of $2,460,914.00 in mortgage indebtedness (the 'Mortgage Amount') is 'exempt' and, therefore, should be excluded from 'gross consideration' . . . . The sale of the Property and the 'receipt' by the Transferor of the Mortgage Amount . . . occurred on September 16, 1981, which was before the effective date (i.e., March 19,[sic] 1983) of the 'gains' tax . . . . The Transferor respectfully asserts that the entire Mortgage Amount is 'grandfathered.' Accordingly, the

Mortgage Amount should be excluded from 'gross consideration,' which is consistent with the treatment of 'grandfathered' transfers of interests in real property prior to March 29, 1983."[2]

The Division conducted an audit of petitioner's sales of cooperative units under the offering plan. The full list of actual post-March 28, 1983 sales by petitioner determined upon audit and upon which tax has been asserted in this case, are as follows:

Unit	Shares	Sale Price	Closing Date
5A	572	$ 57,000.00	July 22, 1983
6B	600	132,000.00	March 15, 1987
1E	467	105,000.00	August 4, 1986
1G	387	30,960.00	August 29,1985
4G	490	80,000.00	May 9, 1986
LJ	400	40,000.00	August 29,1985
LK	590	67,500.00	January 14,1986
5P	572	93,500.00	January 14,1986

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[2] The Administrative Law Judge's finding of fact "9" read as follows:

> "The Real Property Gains Tax Questionnaire (DTF-701[9/85]) filed by petitioner on February 7, 1989 reported actual gross consideration (up to that time) of $2,152,564.00,* estimated additional gross consideration upon the sale of remaining shares of $216,778.00, and total anticipated (actual plus estimated) gross consideration of $2,369,342.00 once all shares have been sold. This form indicates that total anticipated consideration under the Plan was computed using the actual selling price for all units sold or then under contract and "safe harbor" estimates for the seven unsold units. Exhibit "C" attached to this questionnaire stated, in relevant part:
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> 'The Transferor respectfully asserts that the entire amount of $2,460,914.00 in mortgage indebtedness (the "Mortgage Amount") is "exempt" and, therefore, should be excluded from "gross consideration". . . . The sale of the Property and the "receipt" by the Transferor of the Mortgage Amount . . . occurred on September 16, 1981, which was before the effective date (i.e., March 19,[sic] 1983) of the "gains" tax . . . . The Transferor respectfully asserts that the entire Mortgage Amount is "grandfathered." Accordingly, the Mortgage Amount should be excluded from "gross consideration," which is consistent with the treatment of "grandfathered" transfers of interests in real property prior to March 29, 1983.'"
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> * This amount includes petitioner's sales occurring prior to March 28, 1983.

We modify finding of fact "9" of the Administrative Law Judge's determination by deleting the footnote which indicated that the $2,152,564.00 of actual gross consideration "includes petitioner's sales occurring prior to March 28, 1983." The footnote was deleted since the $2,152,564.00 figure includes consideration from the 78 units sold prior to March 28, 1983 and consideration from unit 5-A which was sold subsequent to March 28, 1983. We also modified the second sentence of finding of fact "9." We have modified this finding of fact to more accurately reflect the record.

TOTALS: 4,078 $ 605,960.00

We modify the Administrative Law Judge's finding of fact "11" to read as follows:

The Division determined that the total anticipated gross consideration to be received by petitioner for the 16 taxable units was $1,217,488.00. This amount was computed as follows:

Actual consideration for eight units sold after March 28, 1983	$ 605,960.00
Estimated consideration for eight unsold units (4,858 shares x $49.83 "safe harbor" estimate)	242,074.00
Portion of mortgage indebtedness attributable to taxable units and, as such, includable in consideration (8,936 taxable shares x $2,460,914.00 mortgages) (54,685 total shares	402,134.00
Less portion of working capital fund attributable to taxable units (8,936 x $200,000.00) 54,685	(32,680.00)
Anticipated gross consideration	$1,217,488.00[3]

The Division determined petitioner's original purchase price ("OPP") based on the price it paid to acquire the property in 1966 ($1,715,562.00), rather than the reported fair market value

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[3] The Administrative Law Judge's finding of fact "11" read as follows:

> "The Division determined that the total anticipated gross consideration to be received by petitioner for the eight cooperative units actually sold after March 28, 1983, plus the seven units not yet sold at the time of audit, was $1,217,488.00."

We have modified this finding of fact to reflect the record in greater detail.

(i.e., the so called, "stepped-up basis") of the premises ($4,936,276.00) on the date it was sold by petitioner to the CHC on September 16, 1981.

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

> The Division's audit determined that the portion of total original purchase price attributable to the 8 units sold, plus the 8 units yet to be sold, after the March 28, 1983 effective date of the gains tax was $336,558.00.[4]

The Division's audit disallowed petitioner's brokerage fees for lack of substantiation.

We modify the Administrative Law Judge's finding of fact "15" to read as follows:

> As a result of the Division's audit, a Statement of Proposed Audit Changes was issued to petitioner on May 4, 1989, asserting real property gains tax in the amount of $40,201.74 plus penalty and interest. A Notice of Determination asserting this real property gains tax, plus penalties and interest, was issued to petitioner on September 25, 1989. Petitioner disagreed with the tax asserted and timely filed a request for a Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS").[5]

We modify the Administrative Law Judge's finding of fact "16" to read as follows:

> At the BCMS conference, petitioner produced additional documentation to substantiate actual and anticipated brokerage fees in the amount of $53,213.00. In addition, the conferee allowed additional amounts for capital improvements. As a result, Conciliation Order No. 101444 was issued April 10, 1992 reducing the tax asserted to $36,672.63 plus penalty

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[4] We modify the Administrative Law Judge's finding of fact "13" to reflect that there were eight unsold units and not seven as stated by the Administrative Law Judge and that the Division's audit determined the portion of total original purchase price attributable to the 16 taxable units to be $336,558.00 and not $360,678.00 as stated by the Administrative Law Judge. These modifications were made to more accurately reflect the record.

[5] We modify finding of fact "15" of the Administrative Law Judge's determination by changing the date of the Statement of Proposed Audit Changes from May 14, 1989 to May 4, 1989 and the date of the Notice of Determination from October 5, 1989 to September 25, 1989 to more accurately reflect the record.

and interest.[6]

We modify the Administrative Law Judge's finding of fact "17" to read as follows:

The Gains Tax remaining in dispute in this proceeding is based solely upon sales occurring after the March 28, 1983 effective date of the gains tax, and is computed as follows:

Actual Consideration	
(8 units=4,078 shares)	$ 605,690.00
Estimated Consideration	
(8 unsold units = 4,858	
shares x $49.83)	242,074.00
Mortgage Indebtedness	
(8,936/54,685 x $2,460,914.00)	402,134.00
Less Wording Capital Fund	
(8,936/54,685 x $200,000.00)	(32,680.00)
TOTAL ANTICIPATED GROSS CONSIDERATION:	$1,217,218.00
Less actual brokerage fees:	(26,489.00)
Less estimated brokerage fees:	(26,724.00)
Less capital improvements allowed:	(24,120.00)
Less Original Purchase price	
allocated to 8,936 shares:	$ (336,558.00)
TOTAL ANTICIPATED GAIN	
(on 16 Units equalling 8,936 shares):	$ 803,717.00

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[6] We modify the Administrative Law Judge's finding of fact "16" by changing the date of the Conciliation Order from March 19, 1992 to April 10, 1992 to more accurately reflect the record.

Gains Tax at 10%: $ 80,359.70

Taxable shares = 8,936

Tax Per Share = 8.9928

Unit No.	Shares	Closing Date	Tax/Share	Tax Due
5A	572	July 22, 1983	8.9928	$5,143.88
6B	600	March 15, 1987	8.9928	$5,395.68
1E	467	August 4, 1986	8.9928	$4,199.64
1G	387	August 29, 1985	8.9928	$3,480.21
4G	490	May 9, 1986	8.9928	$4,406.47
LJ	400	August 29, 1985	8.9928	$3,597.12
LK	590	January 14, 1986	8.9928	$5,305.75
5P	572	January 14, 1986	8.9928	$5,143.88

4,078 Shares Gains Tax Asserted $36,672.63[7]

Petitioner submitted a series of interrogatories to the Division. The interrogatories and the responses of the Division were submitted as part of the Stipulation in this matter and are summarized as follows:

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

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

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[7] We modify the Administrative Law Judge's finding of fact "17" by deleting from the table the lines that provide "Estimated Consideration for unsold units (7 units = 4,858 shares): $611,528.00." We deleted these lines from the table since the $611,528.00 figure actually includes estimated consideration for the eight unsold units plus a portion of mortgage indebtedness less a portion of the working capital fund. The finding of fact was also modified to reflect that the total anticipated gain of $803,717.00 was applicable to 16 units and not 15 units. These changes were made to more accurately reflect the record.

shareholders and shares of other corporations.

(c) Property transferred by a partnership to a corporation (including a cooperative corporation), prior to March 28, 1983, is subject to the encumbrance of a bargain lease.[8] The value of the bargain lease is consideration received prior to the effective date of the gains tax law and, therefore, is not included in the consideration on the subsequent sale of the stock to the tenant-shareholders after March 28, 1983.

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

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

OPINION

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

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

transactions and that this construction is contrary to the existing case law.

Second, the Administrative Law Judge declined to treat mortgages created pursuant to binding written agreements executed prior to the effective date of the gains tax in the same way as a bargain lease created prior to the effective date of the gains tax in determining consideration for the sale of stock in the cooperative housing corporation. The Administrative Law Judge, relying on Matter of Birchwood Assocs. (Tax Appeals Tribunal, July 27, 1989), held that the Division properly treated a portion of the mortgages created pursuant to binding written agreements executed prior to the enactment of the gains tax law as consideration to petitioner on the subsequent sale of stock to unit purchasers even though no portion of the value of a bargain lease created prior to the effective date of the gains tax would be treated as taxable consideration by the Division. The Administrative Law Judge held that the bargain lease and mortgages were distinguishable in that the consideration from a bargain lease is received by the sponsor at the time the lease is executed, while consideration from the mortgages is recognized when units (shares) are sold to individual unit purchasers.

Third, the Administrative Law Judge addressed the constitutionality of (i) treating transfers of property to a cooperative corporation different from transfers to non-cooperative corporations and (ii) the Division's refusal to "grandfather" mortgages placed on the real property pursuant to binding written agreements executed before the effective date of the gains tax in determining petitioner's consideration. The Administrative Law Judge rejected petitioner's constitutional arguments stating the Court of Appeals already addressed these issues in Trump v. Chu (65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915), and held that the disparate treatment accorded cooperative corporations and non-cooperative corporations was constitutional. The Administrative Law Judge also concluded that the gains tax was not unconstitutional "as applied" to petitioner since petitioner failed to adduce any evidence to show that it was treated differently from other similarly situated cooperative housing corporations.

Fourth, the Administrative Law Judge concluded that the Division properly calculated the gains tax due; that it properly apportioned the gain to each unit; that its computational method was reasonable and that petitioner lost its right to choose between Option A or Option B by its failure to file a gains tax questionnaire electing either Option A or Option B.

Fifth, the Administrative Law Judge refused to abate penalties and penalty interest which were imposed because petitioner failed to establish reasonable cause.

Finally, the Administrative Law Judge held that interest was due since the Division properly determined the tax and penalties due. The Administrative Law Judge rejected petitioner's claim that no tax was due and, therefore, no interest was due.

On exception, petitioner asserts that: (1) the Division must use the fair market value of the property on the date it was sold by petitioner to the cooperative housing corporation in computing the original purchase price because the Division would do so if the real property had been transferred to an entity other than a cooperative housing corporation prior to March 28, 1983; (2) the Division must treat mortgages created pursuant to a binding written agreement executed prior to March 28, 1983 the same way bargain leases created prior to March 28, 1983 are treated when determining consideration on the subsequent sale of stock in the cooperative housing corporation; (3) the Division's refusal to (i) step-up the original purchase price to fair market value on the date of the transfer to the cooperative housing corporation and (ii) treat mortgages the same as bargain leases in determining consideration, is violative of both the United States and New York State Constitutions; (4) since under Mayblum v. Chu (supra), the cooperative conversion is treated as a single transaction for gains tax purposes, the overall project gain should be allocated on a per-share basis for determining gain subject to tax under Option B; (5) if any tax is due, it has established reasonable cause for the abatements of penalties and penalty interest; (6) the Division incorrectly assessed interest in that no tax was due and, therefore, no interest can be due; (7) alternatively, if a portion of the mortgage indebtedness is properly included in consideration that said indebtedness must be reduced to

reflect the actual amortization to date and anticipated future amortization until the sale of the remaining unsold shares; and (8) no tax is due since total anticipated consideration at the time of the initial taxable sale did exceed the $1,000,000.00 threshold and that no update is required because it has not yet reached the 50% sellout plateau.

We affirm the Administrative Law Judge with respect to that portion of his determination which (1) denied a step-up of original purchase price; (2) held that a portion of the mortgage indebtedness was includable in consideration (3) found that petitioner's constitutional rights were not violated; and (4) concluded that the Division's method of computing consideration, gain and the allocation of gain to each unit was proper.

We first address the issue of whether the Division must step-up the original purchase price of the property to its fair market value at the time of its transfer to the cooperative housing corporation.

Petitioner argues that the Division must use the fair market value of the property on the date it was sold by petitioner to the cooperative housing corporation in computing the original purchase price because the Division would do so if the property had been transferred to an entity other that a cooperative housing corporation prior to March 28, 1983. We reject petitioner's contentions.

To begin with, it is well settled that a cooperative conversion is treated as a single transaction for purposes of applying the gains tax (Mayblum v. Chu, 109 AD2d 782, 486 NYS2d 89, mod 67 NY2d 1008, 503 NYS2d 316; Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455). Allowing petitioner to step-up its original purchase price of the property to its fair market value at the time of transfer would have the effect of treating the cooperative conversion as two transactions, i.e., the transfer to the cooperative housing corporation and the transfers of shares to individual unit purchasers, instead of one (Matter of 470 Newport Assocs., Tax Appeals Tribunal, September 2, 1993). Furthermore, it is of no significance that the property was transferred to the cooperative housing corporation prior to March 28, 1983 (the

effective date of the gains tax), for it is the transfer of shares to unit purchasers which is the taxable event, and not the transfer to the cooperative housing corporation (Mayblum v. Chu, supra, 503 NYS2d 316, 317).

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

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

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

A mortgage, whether created prior or subsequent to the effective date of the gains tax, is treated by the Division as consideration only on that portion of the mortgage allocated to shares sold after the effective date of the gains tax, pursuant to contracts entered into after such date. This treatment of a mortgage as consideration was sustained by the Court in Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin. (supra).

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

the differences is the fact that a mortgage encumbers each individual unit while a bargain lease does not.

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

Petitioner next argues that the Division's refusal to step-up original purchase price to fair market value on the date of transfer to the cooperative housing corporations and its different treatment of mortgages as compared to bargain leases violates the Equal Protection Clause of both the United States and New York State Constitutions. We disagree.

With respect to petitioner's constitutional challenges regarding cooperative corporations as compared to other entities, as we noted earlier, Article 31-B of the Tax Law was designed to treat cooperative housing corporations differently than other entities (Matter of 61 East 86th St. Equities Group, supra). The different tax treatment accorded cooperative housing corporations:

> "enjoys a presumption of constitutionality which 'can only be overcome by the most explicit demonstration that [the] classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it' [citations omitted]" (Trump v. Chu, supra, 489 NYS2d 455, 458-459).

Petitioner has not carried its burden in light of the Court of Appeals' decision upholding the different gains tax treatment of cooperative and condominium developments compared to subdivided realty in Trump v. Chu (supra).

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

We next address whether the Division's method of calculating gain and tax due on audit was proper. On audit, the Division calculated gain and tax due using the actual consideration

received on the eight sold units plus estimated consideration for the eight unsold units plus the pro-rata portion of the mortgages allocated to the 16 taxable units minus pro-rata portions of the working capital fund and the original purchase price allocated to the taxable units. Petitioner argues that since the gains tax treats the cooperative conversion as a single transaction, the overall project gain should be allocated on a per-share basis for determining gain subject to tax under Option B. In essence, petitioner asserts that all unit transfers, including grandfathered transfers, be counted in calculating gain per share and the gain per share be multiplied by the number of shares subject to tax. We disagree.

Prior to August 1986, there were two methods of calculating gains tax liability upon transfers of cooperative apartment units, Option A and Option B (see, TSB-M-83-[2]-R). Under Option A, gain was computed based on the actual consideration received less the pro-rata portion of original purchase price allocated to each unit. Under Option B, a taxpayer can elect to estimate the consideration to be received on all future sales. Here, petitioner did not elect any method until it filed its questionnaire (electing Option B) on February 7, 1989, some 5 1/2 years after its first taxable sale on July 22, 1983. Under these circumstances, we conclude that the Division's computational method which includes consideration from the eight sold units and estimated consideration for the eight unsold units is reasonable. Such method is in harmony with determining whether the cooperative conversion is taxable based on whether consideration anticipated on taxable units alone reaches the $1,000,000.00 threshold. Furthermore, petitioner has not provided us with any support for the proposition that under Option B, gain per share is computed based on the total project gain (net of grandfathered and non-grandfathered shares) and then allocated to the non-grandfathered shares to compute tax due.

We reserve decision with respect to the issues concerning waiver of penalties and the assessment of interest since any conclusions regarding these issues could be affected by additional issues to be addressed on remand.

Finally, we remand this matter to the Administrative Law Judge for a determination on the issues of whether the mortgage indebtedness to be allocated to the taxable units must be

reduced to reflect actual and anticipated future amortization of the mortgages and to address petitioner's argument that no tax is due because its initial calculation of anticipated total consideration at the time of its first taxable sale did not exceed $1,000,000.00 and that said initial determination of anticipated total consideration does not, as yet, have to be recalculated since it has not reached the 50% sellout plateau. These arguments were made before the Administrative Law Judge but were not addressed in his determination. We make this remand because petitioner has a right to an administrative determination on the issues raised before the Administrative Law Judge (Matter of Riehm v. Tax Appeals Tribunal, 179 AD2d 970, 579 NYS2d 228, lv denied 79 NY2d 759, 584 NYS2d 447) and we believe that this determination should be rendered first by the Administrative Law Judge (Matter of United States Life Ins. Co. in the City of New York, Tax Appeals Tribunal, March 24, 1994). We direct the Administrative Law Judge to issue his determination as expeditiously as possible without further briefs or hearings.

We will retain jurisdiction over this case based on the exception already timely filed by petitioner. After the Administrative Law Judge issues his supplemental determination, petitioner will be allowed to add to its existing exception and brief to respond to the issue addressed in the supplemental determination so long as it does so within 30 days of the issuance of the supplemental determination, or requests an extension of time to do so within the 30-day period. The Division will be given an opportunity to respond to any additional material submitted by petitioner. If the Division wishes to except to any portion of the Administrative Law Judge's supplemental determination, the Division will be required to submit a timely exception to the supplemental determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Administrative Law Judge for the issuance of a supplemental determination in accordance with the foregoing decision.

DATED: Troy, New York
January 19, 1995

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

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