STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MORDECHAI HALBERSTAM	:	DECISION DTA No. 812255
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 Mordechai Halberstam, c/o Carl Caller, 4311 13th Avenue, Brooklyn, New York 11219-1337, filed an exception to the determination of the Administrative Law Judge issued on March 16, 1995. Petitioner appeared by Carl Caller, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's reply brief was received on July 3, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and DeWitt concur.

ISSUES

I. Whether the Division of Taxation properly determined that certain transactions entered into by petitioner were options or assignments of contracts to purchase real property.

II. Whether the Division correctly calculated the original purchase price for petitioner's acquisition.

III. Whether petitioner should have been allowed to place documentary evidence in the record after the time period for doing so had elapsed.

IV. Whether those portions of petitioner's reply brief addressing issues not raised in the Division of Taxation's first brief should be stricken.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to petitioner, Mordechai Halberstam, a Notice of Determination dated January 19, 1993 asserting real property gains tax due under Article 31-B of the Tax Law in the amount of $61,600.00, plus penalty and interest.

The notice was issued as a result of an investigation of certain real property transfers connected with a plan to convert the premises of 600 Shore Road, Long Beach, New York to cooperative ownership. The offering plan for that project describes the property as a building known as Riviera Towers. Under the plan, the cooperative corporation offered for sale a total of 36,978 shares of capital stock allocated to 93 residential apartments. The date of the first offering of the plan was August 7, 1987. During the course of an audit involving unrelated third parties, the Division learned that in connection with this cooperative conversion plan petitioner had made transfers of certain interests in the real property but had never notified the Division.

In May 1991, the Division obtained information from the ultimate sponsor of the 600 Shore Road cooperative conversion plan, Martin Katz, relating to the nature of petitioner's interest in the premises and the price paid for the acquisition of that interest. As relevant here, the narrative account provides as follows:

> "On January 22, 1986 a contract of sale was entered into by and between Jay J. Raddock, as Seller, and Brothers Forever Company, a partnership . . . for the sale to Brothers Forever Company of premises known as 600 Shore Road, in Long Beach, New York. The contract called for a sales price of $3,850,000.00, and, pursuant to the terms of a contract of assignment dated the same day, Brothers Forever Company agreed to assign its right, title and interest in and to the contract and the property to Chaim Gross in consideration of a total purchase price of $5,350,000.00 (the 'Contract'). The original contract by and between Jay J. Raddock, as Seller, and Brothers Forever Company, as Purchaser, was, in fact, negotiated by and on behalf of Chaim Gross.
>
> "The Contract was different from the standard apartment house contracts in various respects. The Contract not only contained the regular representations by the Seller with respect to the premises . . . and the information required by a prospective cooperative

converter, but, indeed, required the Purchaser, during the pendency of the Contract, to convert the premises to cooperative ownership at the Purchaser's own cost and expense. The Contract required the Seller to cooperate with the Purchaser and provide such information and execute such documentation as may reasonably be necessary and required but contemplated a closing on the cooperative shares simultaneously with the closing of title to the premises.

"Pursuant to the terms of the Contract, in addition to the original deposit, the Purchaser was required to make additional deposits on account of the purchase price, during every six (6) months between the contract date and the closing date, in the amount of $50,000.00.

* * *

"On or about April 1, 1988, Chaim Gross entered into an Agreement of Assignment whereby in consideration of the payment of $615,000.00, Mr. Gross relinquished his right, title and interest in and to the property, the Contract, and the sponsorship of the project to an entity formed by Martin Katz, named Oros Holding. Pursuant to the terms of the Agreement of Assignment, Mr. Gross was reimbursed for the $600,000.00 in deposits he had theretofore paid to Brothers Forever Company and/or Jay J. Raddock and $200,000.00 in conversion expenses and capital improvements at the premises undertaken by Mr. Gross . . . .

"In addition to the obligation undertaken by Martin Katz d/b/a Oros Holding, vis-a-vis Chaim Gross, Mr. Gross effectuated an agreement with Mordechai Halberstam with reference to certain claims that Mr. Halberstam had as against the premises and Chaim Gross. Pursuant to the terms of that agreement between Mr. Katz and Mr. Halberstam, Mr. Halberstam released Mr. Gross from any claims whatsoever in connection with 600 Shore Road and was granted an option by Mr. Katz to acquire, within thirty (30) days after the date of closing of title to the premises or September 30, 1988, whichever is later, certain unsold shares which would exist at the premises subsequent to the closing of title. Mr. Halberstam, in turn, entered into agreements with various investors to assign to them units of apartments. The option price to be paid by Mr. Halberstam was the sum of $500,000.00 over and above all pro-rata charges, costs and expenses incurred or accrued in connection with the remainder of the conversion process.

"Thereafter, the conversion process progressed and in connection therewith the Contract to acquire the premises was assigned by Martin Katz d/b/a Oros Holding to Long Beach Owners Corp., the corporation which ultimately took title.

"Naturally, the transfer of title to the co-op corporation was simultaneous with the transfer to various tenant purchasers of the shares to their cooperative units.

"On or about July 10, 1988, all of the above transactions closed simultaneously. Also closing at that time were the transfers to over twenty (20) individual cooperative purchasers, many of whom received conventional mortgage financing from various lending institutions at the time of closing.

> "The closings, which were attended by literally well over 100 people, involved the transfer of rights from Jay J. Raddock to Brothers Forever Company to Chaim Gross to Oros Holding to Long Beach Owners Corp., and simultaneously with the acquisition of title by Long Beach Owners Corp. and also of the transfer of partnership shares to the individual unit holders and the block unit holders." (Emphasis added.)

Mr. Katz also provided the Division with a copy of a letter dated August 9, 1988 from Mr. Katz to petitioner which states, in pertinent part:

> "Reference is made to that Agreement of Assignment between Chaim Gross, the contract vendee for premises 600 Shore Road, Long Beach, New York, and ourselves.
>
> "Pursuant to the terms of that agreement, the sum of $500,000.00 was to be paid in connection with your assignment to me of any rights you may have had in and to the proposed contract.
>
> "Please be advised that the remaining balance, after receiving credit in connection with the sale of the apartments and making all computations in connection with the apartments on which title has been transferred, is $336,226.00. Please make arrangements for the payment of the foregoing sum as soon as possible."

In a letter to the auditor dated August 22, 1991, Mr. Katz's accountant provided "a summary of the computation used by Messrs. Katz and Halberstam to compute the balance of the amount due from Halberstam to katz [sic]" as follows:

"Gain per DTF701 (update)			$621,121
less amt from Halberstam			(336,226)
Sub			284,895
additional costs to Katz			
extension fee to Raddock		94,000	
interest to East River Sav			
June 88	23,572		
Jul	2,548		
total		26,120	
total other costs to Katz		(120,120)	
net amounts available to Katz		$164,775	
amounts from Halberstam		336,226	
Total amount to Katz			$500,000."

At the Division's request, transferor and transferee questionnaires were filed by petitioner

and the individuals to whom he transferred his interest in the real property. Petitioner submitted a Transferor Questionnaire for Cooperatives and Condominiums (Form DTF-701) showing that a total of 36 apartment units were transferred for a total anticipated consideration of $952,269.00. The purchase price to acquire the property was reported as $500,000.00. Allowable selling expenses were added to this amount to calculate an original purchase price of $501,000.00 and a gain of $451,269.00. Petitioner also submitted six individual submission questionnaires (Form DTF-702), one for each transferee. The six transferees submitted transferee questionnaires. These questionnaires show that a total of 37 apartment units were transferred by petitioner as follows:

Transferee	Apartment Units	Consideration
Glick	2R, 2S, 4S	$ 82,605.00
Horowitz	1B, 1M, 2C, 3D, 4E, 6B, 6C, 6H	228,698.00
Vorhand	1H, 1P, 4F, 4H, 5E, 5F, 5G, 6J	255,885.00
Fasten	1S, 2A	56,138.00
Teitlebaum	1A, 5A, 6A, 2K, 3K, 4K, 6K, 4L, 5L, 3M, 1N, 5N, 3P, 4P, 5P	314,918.00
Ostreicher	4R	14,025.00
Totals	37 apartments	$952,269.00

The transferee questionnaires indicate that the transfers in question were transfers of shares of stock in the cooperative housing corporation, Long Beach Owners Corporation. Each transferee questionnaire was dated and signed in December 1991. The date of transfer for all units was reported as September 1988. Petitioner provided no information to substantiate the information supplied on the questionnaires.

As indicated above, the questionnaires did not reveal the price paid per share or per apartment unit. The only prices given were totals for all units allegedly purchased by each transferee. The consideration shown on the questionnaires bears no relationship to the prices shown in the offering plan. For example, unit 4R, sold to transferee Ostreicher for $14,025.00, is shown in the offering plan as a 3.5 room apartment unit to which 374 shares were allocated. The insider price (the price at which the unit was offered to the existing tenant) was $84,150.00.

The offering price to other potential purchasers was $121,550.00. The following table shows the offering plan selling prices for each unit allegedly transferred by petitioner:

Transferee	Apt. No.	Insider Price	Price to Others
Glick	2R	$ 80,100.00	$ 115,700.00
	2S	53,775.00	77,675.00
	4S	57,375.00	82,875.00
Horowitz	1B	84,375.00	121,875.00
	6B	91,125.00	131,625.00
	2C	88,200.00	127,400.00
	6C	94,050.00	135,850.00
	3D	91,350.00	131,950.00
	4E	143,325.00	207,025.00
	6H	101,700.00	146,900.00
	1M	60,750.00	87,750.00
Vorhand	5E	144,450.00	208,650.00
	4F	143,325.00	207,025.00
	5F	144,450.00	208,650.00
	5G	102,150.00	147,550.00
	1H	93,825.00	135,525.00
	4H	99,450.00	143,650.00
	6J	100,125.00	144,625.00
	1P	73,125.00	105,625.00
Fasten	2A	83,025.00	119,925.00
	1S	52,875.00	76,375.00
Teitlebaum	1A	82,125.00	118,625.00
	5A	87,975.00	127,075.00
	6A	88,875.00	128,375.00
	2K	88,650.00	128,050.00
	3K	92,025.00	132,925.00
	4K	93,150.00	134,550.00
	6K	95,400.00	137,800.00
	4L	81,450.00	117,650.00
	5L	82,350.00	118,950.00
	3M	64,350.00	92,950.00
	1N	60,750.00	87,750.00
	5N	66,150.00	95,550.00
	3P	77,175.00	111,475.00
	4P	78,075.00	112,775.00
	5P	78,975.00	114,075.00
Ostreicher	4R	84,150.00	121,550.00
Totals		$3,369,500.00	$4,744,350.00

The Division was uncertain of whether petitioner had actually sold shares of stock in the cooperative corporation to the transferees or contract rights to purchase the apartments. The auditor made several inquiries in an attempt to resolve this issue.

By letter to petitioner dated December 20, 1991, the Division requested the following information: (1) copies of executed sales contracts, closing statements related to each sale, bank records substantiating receipt of payments, and (2) a copy of the contract by which petitioner acquired his interest in the real property and a related closing statement and cancelled checks showing the amount paid. Petitioner did not respond to this letter.

A second letter dated March 10, 1992 sought a reply to the Division's original request for information. Again, no response was received.

To ascertain the nature of the transfers, the auditor contacted the managing agent of the cooperative corporation and requested access to the cooperative's stock certificate record book and the maintenance billing rolls for the year of the transfer, 1988. The auditor was furnished with two computer-generated listings. The first listing shows the names of all unit owners, apparently at or around the time of the audit, the date of purchase by that owner, the previous owner of the same unit and the date of that owner's purchase of the unit. The second listing identifies each apartment unit in the cooperative and its owner allegedly as reported on Forms 1098.[1] Petitioner's name does not appear on either listing. The listings show that, with two exceptions, the six individuals identified as transferees in this proceeding acquired their shares on July 7, 1988, but the persons or entities from which the shares were acquired are not revealed. The two exceptions are these: Unit 1P was reportedly sold to transferee Vorhand, but the listing shows that it was purchased on July 7, 1988 by Katz; Unit 1S was purchased by transferee Fasten on November 9, 1988.

Based on the fact that petitioner's name does not appear in the cooperative's listings as an owner of any of the apartments, the Division concluded that petitioner never took title to any cooperative shares and that the transfers in question were assignments of rights to purchase the cooperative shares. The audit summary describes the method used to determine gains tax due

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[1]The Division does not use a Form 1098. The Internal Revenue Service Form 1098 is a report of mortgage interest paid. The record does not identify the purpose or nature of the "Form 1098" referred to in the audit report.

as follows:

> "Pursuant to gains tax regulation 20 NYCRR 590.55, when determining if the $1 million threshold is met the consideration for the assignment is the sum of the amount paid by the assignees for the contract right plus the contract's purchase price for the real property. Therefore, adding the offering plan prices to the assignment consideration of $952,269.00 would subject the transfers to gain [sic] tax.
>
> "Allowing for acquisition cost of $336,266, which was verified by related case[s] . . ., the gain subject to tax was $616,003."

Apparently, the Division issued a preliminary statement of audit changes to petitioner. That statement was not placed in the record; however, a letter from the Division to petitioner's representative, Mr. Caller, indicates that he received such a statement. The letter states:

> "In my capacity as Mr. Keith Brown's supervisor, I am responding to your protest letter of April 28, 1992 regarding the department's Statement of Proposed Audit Adjustments.
>
> "After reviewing the file, it is quite clear that Mr. Brown has made several written and telephone requests for records and/or documentation he needs to conduct the department's standard audit. Unfortunately, his efforts have been to no avail.
>
> "I am sure you will agree with me that the scope of information Mr. Brown has requested is neither onerous or voluminous. A copy of Mr. Brown's letter to Mr. Halberstam, dated December 20, 1992, requesting the records needed for the audit is enclosed for your reference.
>
> "Please be advised that if the information requested is not received by this office within ten days from the date of this letter the department will issue a Notice of Determination. Also, the maximum penalty and interest will be imposed on the assessment pursuant to Section 1444 of the Tax Law."

The Division later issued to petitioner a Statement of Proposed Audit Adjustment dated September 4, 1992, asserting gains tax due of $61,600.00, plus penalty and interest. An incomplete copy of this statement was attached to petitioner's request for a conciliation conference indicating that the statement was received by petitioner. The request for conference was signed by Mr. Caller and received by the Division on December 7, 1991. It states:

> "(1) Mr. Halberstam sold all of his shares in Long Beach Owners Corp. which is the owner of 600 Shore Road, Brooklyn, N.Y., for less

> than one million dollars. The sale is exempt under Section 1443(1) of the Tax Law.
>
> "(2) The cost basis of the shares was in excess of the $336,266.00 shown in the audit report."

The Division scheduled a conciliation conference for September 21, 1993 at 9:00 A.M. In a letter to Steven Saskin, Conciliation Conferee, dated August 24, 1993, Mr. Caller requested that the conference be cancelled, stating: "As the issues are clear cut it has been decided that a petition should be filed instead." The Division informed petitioner by letter that proceedings in the Bureau of Conciliation and Mediation Services had been discontinued at his request.

Petitioner filed a timely petition in the Division of Tax Appeals where the statements made in the request for conference were repeated. In addition, petitioner stated: "The Audit Report states that the total consideration is $952,269.00."

The Division served an answer in response to the petition on or about November 15, 1993. Paragraph 2 of the answer states:

> "Affirmatively states that, when determining whether an assignment is taxable, the consideration for the assignment is the sum of the amount paid by the assignee for the contract right plus the contract's purchase price for the real property."

Petitioner and the Division waived a hearing and agreed to resolve this matter through submission of documents and briefs. By letter dated April 25, 1994, the Administrative Law Judge to whom the matter was assigned established the following submission schedule:

> "Filing of documents by the Law Bureau: June 1, 1994
> "Filing of petitioner's documents and brief: July 6, 1994
> "Filing of Law Bureau's brief: August 15, 1994
> "Filing of petitioner's reply brief: September 9, 1994"
>
> The letter also stated:
>
> "It is your responsibility to meet the above schedule. The record will be closed to the submission of evidence as of July 6, 1992. Briefs and documentary evidence not filed in accordance with this schedule will be returned to the filing party. Copies of any documents submitted to me should be sent to your opposing party. Each party is responsible for meeting its own due dates regardless of whether anything is received from the other party. If you need an extension of time for filing, you must make a request to me in writing within the

time limits prescribed for filing your brief." (Emphasis in original.)

In accordance with the schedule, the Division filed documents on June 1, 1994. At the same time, it requested two additional weeks for the submission of documents relating to acquisition costs, stating that materials concerning the original purchase price of $336,266.00 were in a related file and unavailable at the time of the initial submission. The Division's request was granted in a letter dated June 7, 1994. No other change in the submission schedule was mentioned in that letter. A copy of the letter was sent to Mr. Caller.

The Division filed additional documents on June 8, 1994. Copies of those documents and the documents submitted on June 1, 1994 were sent to Mr. Caller.

Petitioner's time to file his documents and a brief passed and nothing was submitted. No one contacted the Administrative Law Judge on behalf of petitioner to request an extension of the filing schedule.

On July 22, 1994 the Division filed with the Administrative Law Judge what it describes as "a letter in lieu of a formal brief." The letter was received on July 25, 1994. The Division did not address any of the substantive issues raised in the petition and answer. Rather, the Division requested that the Notice of Determination issued to petitioner be sustained on the ground that petitioner had surrendered to the presumption of correctness of the notice by failing to file documents or a brief. Furthermore, the Division stated that petitioner should not be allowed to present legal arguments addressing the merits of the assessment in a reply brief since this would deny the Division an opportunity to respond to petitioner's position. The Division's position is explained as follows:

> "The traditional method of briefing a matter, when utilized properly, allows the parties to full [sic] develop the issues presented: (i) the petitioner would prepare a brief setting forth his or her argument, (ii) the Division would then have the opportunity to state its position as well as respond to the petitioner's arguments, and (iii) the petitioner would then have the last word, via the reply brief, whereby he or she could address the arguments raised by the Division as well as attempt to bolster his or her initial brief in light of any comments made by the Division in their brief.

> "In the present matter, petitioner's failure to file any brief turns this time-honored method on its ear. Based on the presumption of correctness, the Division is not obligated to initiate the development of arguments in light of petitioner's failure to file either evidence or a brief. Further, any attempt by petitioner to address the merits of the case at this point in the proceedings (i.e., in the reply brief) would be substantially detrimental to the interests of the Division, as the Division has no opportunity to respond.
>
> "At most, petitioner's reply brief is limited to the subject matter of this letter brief and cannot extend to other aspects of the case. Any such arguments should be withdrawn from the court's consideration (Ardolino v. Reinhardt, 128 AD 339, 112 NYS 641; see also, State Farm Fire and Casualty Co. v. LiMauro, 103 AD2d 514, 481 NYS2d 90, affd 65 NY2d 369, 492 NYS2d 534; Garlasco v. Smith, 250 AD 534, 294 NYS 772, affd 276 NY 666)."

By letter dated July 25, 1994, received by the Division of Tax Appeals on July 26, 1994, Mr. Caller requested an extension of time for the filing of petitioner's papers. As his letter indicates, he first made such a request in a telephone conversation with the Administrative Law Judge on July 22, 1994 and was instructed to put his request in writing. He gave several reasons for failing to file documents in accordance with the submission schedule. He states in his letter that he "was under the mistaken impression that the Department of Taxation and Finance would file an opening statement setting forth the basis for the Notice of Deficiency, as is usually done when the hearing is held in person." Concerning the opening statement, he also stated "I was at a total loss to understand why the transactions were not exempt, since they did not total $1,000,000.00." He also stated that his law assistant was absent from the office and that he (Mr. Caller) "did not follow the progress of the file." Finally he stated:

> "The Department of Taxation and Finance received an extension of 15 days until June 15, 1994. I was not informed of any reciprocal extension given to the petitioner for filing his papers. On July 22, 1994, when I realized my error and I contacted you and I attempted to reach David Gannon, Esq., attorney for the Department of Taxation and Finance to try to get an extension."

By letter to Mr. Caller dated August 2, 1994, the Administrative Law Judge denied petitioner's request for an extension of time in which to file documents and a brief. The reasons for the denial were set forth in that letter as follows:

> "Your written request for an extension was received by my office on July 26, 1994, more than two weeks after petitioner's time for filing documents and a brief expired. In your letter, you provide no acceptable excuse for failing to file petitioner's papers in accordance with the established schedule. Certainly, there is nothing in my letter of April 25th that could have given you the impression that the Department would file an 'opening statement' before petitioner was required to file its documents and brief. The schedule set forth in the letter is clear and precise, and it makes no provision for such a statement.
>
> "The Division of Taxation timely filed the bulk of its documentary evidence on June 1, 1994. At the same time, Mr. Gannon requested, and later was granted, two weeks to file additional documentation. You were not 'informed of any reciprocal extension given to the petitioner for filing his papers' because you did not ask for such an extension; therefore, an extension was not given. In light of the unambiguous language of my letter of April 25th and the explicit instruction contained in it, there is no basis for granting petitioner additional time to file documents and a brief in this matter."

In accordance with the original schedule, petitioner was given until September 9, 1994 to file a reply brief in which he was allowed to respond to all issues implicitly or explicitly raised by the documentary evidence submitted by the Division. In a letter to the Division's representative, David C. Gannon, also dated August 2, 1994, the Administrative Law Judge explained the basis for denying the Division's request that petitioner be precluded from addressing the merits of the case in a reply brief as follows:

> "While new legal issues may not be raised in a reply brief by a litigant in a civil proceeding, the same is not true in administrative proceedings in the Division of Tax Appeals where disputes are to be resolved with less formality than would be appropriate in a court of law. The Tax Appeals Tribunal has held that the Division of Taxation may raise new legal issues in a post-hearing brief, as long as the petitioner has an opportunity to respond (see, Matter of Chuckrow, Tax Appeals Tribunal, July 1, 1993). Fairness requires that the same legal principle be applied where the petitioner raises new legal issues in a post-submission brief."

In response to the Division's complaint that allowing petitioner to file a reply brief would deny it the opportunity to respond to petitioner's arguments, the Administrative Law Judge gave the Division until October 17, 1994 to file a response to petitioner's brief.

OPINION

In the determination below, the Administrative Law Judge reviewed various sections of Article 31-B -- Tax On Gains Derived From Certain Real Property Transfers, pointing out that under Tax Law § 1444, if the required forms are not filed or are insufficient, the Division is authorized to determine the tax due based on such records or information as may be obtainable. The Administrative Law Judge then held that petitioner failed to file the required forms and failed to respond to three written inquiries from the Division requesting information about the transfers that occurred.

The Administrative Law Judge further held that in light of the information available at the time of the audit as well as the Division's unsuccessful attempt to confirm petitioner's claim that he was ever an owner of the shares in question, "it was reasonable for the Division to conclude that petitioner had an option to purchase shares of cooperative stock and transferred those options at the time of the closing" (Determination, conclusion of law "B").

The Administrative Law Judge then held that since the Division was unable to determine the amount to be paid for the real property pursuant to the option agreement: 1) "it estimated the amount to be paid by using the insider prices shown in the offering plan"; 2) "[t]he sum of the amounts paid by the transferees for the assignment of the option plus the aggregate insider prices for the shares purchased exceeded $1,000,000.00, subjecting the consideration for the tranfers to the gains tax"; and 3) "its use of the insider prices to estimate consideration and its conclusion that the transfers were subject to gains tax was reasonable" (Determination, conclusion of law "B").

The Administrative Law Judge rejected petitioner's allegation that he did not transfer the option to purchase shares, but rather transferred the shares themselves for a price under $1,000,000.00, holding that petitioner failed to: 1) present evidence to support such a claim even though he had several opportunities to do so and 2) offer an explanation of what exactly transpired between himself and Mr. Katz as well as himself and the shareholders as transferees.

The Administrative Law Judge also rejected petitioner's allegation that he failed to file

additional documents because he was waiting for the Department's opening statement, holding that "the petition and Mr. Caller's brief demonstrate that he was well aware of the Division's legal position on this matter" (Determination, conclusion of law "B").

The Administrative Law Judge also held that petitioner's original purchase price was $500,000.00 as the Division failed to explain its determination that the original purchase price was $336,266.00.

The Administrative Law Judge's determination referred to her letters dated August 2, 1994, recited in the findings of fact, to explain her denial of petitioner's request for an extension of time in which to file documents and an initial brief as well as the Division's request to preclude petitioner from filing a reply brief. After addressing in quite some detail the Division's motion to strike those portions of petitioner's reply brief that exceeded the issues raised in the Division's first brief, the Administrative Law Judge denied said motion.

On exception, petitioner re-submitted his brief submitted below to the Administrative Law Judge continuing to argue that no gains tax is due as the transactions were not assignments of contract or options to purchase but were sales of shares, the total consideration paid being $961,419.00.

Petitioner further argues that he should have been given an opportunity to submit evidence to substantiate his position.

In reply, the Division argues that petitioner: 1) has failed to cite any part of the record which supports his allegation that the transactions were sales and not assignments; 2) was granted ample time to submit evidence in support of his position; and 3) was given a means to secure a reasonable extension of time for submitting evidence, if required.

Petitioner in reply argues the Division proposes to subject the transaction to gains tax by theorizing that the transaction is an assignment of contract instead of a sale of apartments; however, such a theory makes no sense as the total price paid to the sponsor would have been $3,961,419.00, an amount the fact pattern does not support.

We affirm the determination of the Administrative Law Judge.

Petitioner has not raised any issues on exception that were not raised before the Administrative Law Judge. The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the relevant issues. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mordechai Halberstam is denied;

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

3. The petition of Mordechai Halberstam is denied; and

4. The Notice of Determination dated January 19, 1993, as modified by the Administrative Law Judge, is sustained.

DATED: Troy, New York
November 30, 1995

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

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

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