STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
244 BRONXVILLE ASSOCIATES	:	DECISION DTA NOS. 814542 AND 815566
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 244 Bronxville Associates, c/o Houlihan Parnes Realtors, 455 Central Park Avenue, Scarsdale, New York 10583-1034, filed an exception to the determination of the Administrative Law Judge issued on January 29, 1998. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Paul Lefebvre, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on December 10, 1998 in Troy, New York.

Pursuant to orders issued on October 1, 1998, the Tax Appeals Tribunal granted motions for leave to file amicus curiae briefs by the Real Estate Board of New York, Inc. and Infinity Corporation.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Jenkins took no part in the consideration of this decision.

ISSUE

Whether the Division of Taxation properly allocated petitioner's original purchase price to certain cooperative units in determining petitioner's real property gains tax liability upon repeal of Article 31-B of the Tax Law.

FINDINGS OF FACT

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

1. Petitioner, 244 Bronxville Associates, is a partnership which was the sponsor of a plan for the conversion to cooperative ownership of a garden apartment complex consisting of two buildings with 54 apartments located in Yonkers, Westchester County at 240-246 Bronxville Road and 931-935 Palmer Road, an area of Yonkers with a Bronxville mailing address.

2. The offering plan, which was accepted for filing by the New York State Attorney General's Office on or about November 20, 1987, was a noneviction plan so that no tenant of the Yonkers property could be evicted by reason of the conversion to cooperative ownership. In addition, the tenants were entitled to continued occupancy in their rent-controlled or rent-stabilized apartments under New York rent protection laws and regulations.

3. The offering plan provided for the organization of a cooperative housing corporation known as Bronxville Palmer Owners, Inc., which subsequently changed its name to Bronxville Court, Inc. Pursuant to the offering plan, the cooperative housing corporation offered for sale 28,520[1] shares of its capital stock that were allocated to 54 residential apartments. The purchaser

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[1]Subsequent to the filing of the plan, there was a change in the allocation of shares for three apartments which resulted in a decrease to 28,470 as the total number of shares for sale.

of the shares allocated to an apartment was entitled to a proprietary lease for the apartment from the cooperative housing corporation.

4. On or about June 7, 1988, 244 Bronxville Associates converted the Yonkers property to cooperative ownership by conveying fee title to the property to the cooperative housing corporation. In accordance with the provisions of the offering plan, all shares of the capital stock of the cooperative housing corporation that were not sold to purchasers prior to the date of the conversion were issued by the cooperative housing corporation to 244 Bronxville Associates ("unsold shares").

Gains Tax Filings

5. A couple of months earlier, on or about April 11, 1988, petitioner made its initial gains tax filing. As of the initial filing, petitioner reported the sale of 34 of the 54 apartment units. It elected to calculate the gains tax due based upon a per share method of apportionment, with the common denominator of all units being 28,470. A complete copy of petitioner's initial gains tax filing[2] was not made a part of the record so the specific computation of tax due is not known. For example, the specific numerator representing the shares allocated to the 34 apartment units, which had been sold, is not known. However, a fraction based upon a numerator representing the

[2] Only the first pages of various multiple-page forms were made a part of the record by the parties.

shares allocated to the 34[3] apartment units sold and a denominator of 28,470 representing the shares allocated to all 54 apartment units making up the Yonkers property at issue was applied to the anticipated gain on the conversion project to determine gains tax due as of the initial filing. In computing the anticipated gain, petitioner also elected to utilize the "safe harbor" guidelines. It calculated the safe harbor price for the unsold shares at $112.50 per share so that the total anticipated gross consideration to be received for the unsold units was $989,438.00 based upon 8,795 shares allocated to the unsold units according to the parties' stipulation.

6. Since the conversion project was over 50% sold-out at the time of petitioner's initial filing, it did not file a 50% update with the State. When the project reached 75% sold-out in October of 1992 with 21,240 out of the total 28,470 shares having been sold, petitioner did not file the required 75% update with the State.

7. On June 1, 1993, the Division of Taxation ("Division") sent a letter to petitioner requesting that petitioner file a 75% update within 20 days. On July 9, 1993, the Division sent a second letter to petitioner again requesting a 75% update and certain information regarding the conversion project. Petitioner's agent, Houlihan-Parnes Realtors, subsequently informed the Division that its previous letters had been transmitted to the wrong address and had listed the incorrect first name for petitioner's principal partner, James J. Houlihan. On September 14,

[3] It is observed that the parties' stipulation noted that there were only 18 unsold units as of the date of petitioner's initial filing while the letter of petitioner's then attorney, dated April 11, 1988, which transmitted the documents pertaining to the initial gains tax filing to the State, noted that 34 units had been sold which would have left 20 unsold units. This inconsistency cannot be explained by the documents in the record, and it may be that the numerator used above represented the number of shares allocated to 36 units. Since this matter involves basically a legal issue, this factual variance is not critical.

1993, the Division sent a letter to petitioner's corrected address again requesting that petitioner file a 75% project update within 20 days.

8. On or about November 15, 1993, the Division received petitioner's 75% update. At the time of this submission, the conversion project was at approximately 78% sell-out (i.e., 42 units sold with 12 remaining unsold units). In its 75% update, petitioner used the per share apportionment methodology originally selected by it in its initial filing as noted in Finding of Fact "5". The 75% update indicated that 12 units representing 6,005 shares remained unsold and that the total anticipated gross consideration to be received for these units pursuant to safe harbor estimates was $675,563.00 ($112.50 per share X 6,005 shares). It is observed that the 42 units sold for prices ranging from $37,500.00, for a unit to which 125 shares had been allocated, to $135,000.00, for a unit to which 675 shares had been allocated.

9. Petitioner's attorney in his letter transmitting the 75% update to the State indicated that petitioner had requested an appraisal of the unsold shares and that such appraisal would be provided to the Division in lieu of the safe harbor estimates.

Audit and Adjustments

10. The Division conducted a field audit of petitioner's records to verify the costs claimed on its 75% update which resulted in the issuance of a Statement of Proposed Audit Adjustment dated March 28, 1994 against petitioner. The Division's adjustments consisted of the following disallowances:

(1) $51,833.00 in unsubstantiated brokerage fees;

(2) $16,000.00 in overstated mortgage commitment fees;

(3) $52,092.00 in unsubstantiated county real estate taxes;

(4) $71,010.00 in unsupported estimated capital improvement costs;

(5) $6,000.00 in erroneously claimed conversion costs;

(6) $3,679.00 in legal and accounting fees for preparation of petitioner's 1989 tax returns;

(7) $1,051.00 in nonallowable photocopying, postage and other miscellaneous administrative costs; and

(8) $15,600.00 in overstated additional selling expenses.

The Statement of Proposed Audit Adjustment dated March 28, 1994 was not introduced into the record. However, the parties stipulated that this statement asserted a total amount due on the previously sold units of $10,231.44 consisting of gains tax, penalty, and interest.

11. The amount of total anticipated gross consideration of $5,923,248.00 reported by petitioner on the 75% update was not adjusted by the Division which accepted petitioner's use of the safe harbor estimates for the 6,005 unsold shares.

12. A little over a month later, the Division issued a Revised Statement of Proposed Audit Adjustment dated May 5, 1994 asserting a total amount due of $53,075.91 consisting of tax, penalty, and interest. The revised statement was also not made part of the record, and it is unknown what portion of the total amount asserted due of $53,075.91 constituted gains tax asserted due. The parties stipulated that in the previous statement dated March 28, 1994, the auditor had mistakenly used an unapproved method to calculate the amount of tax due, and that the revised statement was issued to set forth the amount of tax due using the tax per share method.

13. The Division issued a third revised Statement of Proposed Audit Adjustments dated June 16, 1994 following the receipt of additional information from petitioner. This statement allowed an additional:

(1) $43,132.00 in substantiated brokerage fees;

(2) $52,092.00 in substantiated construction period real property taxes;

(3) $12,002.00 in estimated capital improvement costs; and

(4) $9,600.00 in selling expenses.

This third revised statement was also not introduced into the record, but the parties stipulated that the total amount of tax, penalty, and interest asserted due on the previously sold units was reduced to $36,867.84.

14. The Division then issued a Notice of Determination dated August 12, 1994 against petitioner asserting additional gains tax due of $20,035.18, plus substantial understatement penalties of $2,003.51 and interest of $15,134.05, for a total amount asserted due of $37,172.74.

15. The real property transfer gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996. (***see***, L 1996, ch 309, §§ 171-180.) The repeal applies to transfers of real property that occur on or after June 15, 1996. For partial or successive transfers that were treated as a single transfer of real property in accordance with Tax Law former § 1440(7), such as transfers pursuant to a cooperative plan like the matter at issue, the repeal provisions provide that no tax is due on any units remaining unsold on June 15, 1996, and that all taxpayers, such as petitioner, must file a final computation of tax with the Division by May 31, 1997.

16. As noted in Finding of Fact "14", the Division issued a Notice of Determination of gains tax due dated August 12, 1994 of $20,035.18 plus penalty and interest against petitioner. Nonetheless, the parties have stipulated that a larger amount is at issue in this matter:

> As a result of the repeal of Article 31-B, and the fact that no additional units were sold by the Petitioner after the 75% update was filed and the Notice of Determination was issued, the Audit Division was able to compute the final calculation of tax due by the Petitioner based upon the records available. The aforementioned calculation, which computed a total additional gains tax due of $42,075.00, was provided to the Petitioner on August 15, 1996.

17. As noted above, the record does not disclose any specific details concerning the Division's calculation of gains tax due of $20,035.18, the amount asserted due in the Notice of Determination dated August 12, 1994, which is the statutory notice at issue in this matter. In contrast, the record details the calculation of gains tax due of $42,075.00, which was, in the terminology of the stipulation, "provided" to petitioner.[4] An Exhibit "3" to the stipulation shows the following calculation of gains tax due of $42,074.63:

Project shares	28,470	
Actual sold	22,465	
Actual consideration (42 units/22465 shares)		$3,228,885.00
Allocated:		
Mtg. Indebtedness		1,688,623.00
Reserve fund		(62,337.00)
W/C fund		(11,836.00)
Discounts, credits		(21,462.00)
Gross consideration		$4,821,873.00
Less: actual brokerage fees		(86,487.00)
Less: original purchase price		
Allocated purchase price	($2,564,497.00)	
Allocated other acquisition	(118,963.00)	

[4]It does not appear that a notice of determination was issued against petitioner asserting such amount as due.

Allocated capital improvements	(407,967.00)	
Allocated conversion	(289,050.00)	
Actual selling expenses	(1,822.00)	
Total original purchase price		$(3,382,299.00)
Gain		$ 1,353,077.00
Tax at 10%		$ 135,307.70
Tax paid		$ 93,233.07
Tax due		$ 42,074.63

18. In response to the Division's assertion that gains tax of $42,074.00 was due, petitioner contended that it was due a refund of gains tax in the amount of $43,680.00 as shown in its own computation dated November 1, 1996, which the Division treated as a claim for credit or refund. Petitioner claimed a refund of gains tax due of $43,680.00 calculated as follows:

Project shares 28,470		
Actual sold 22,465		
Actual consideration (42 units/22463 shares)		$3,204,685.00[5]
Mortgage indebtedness		1,688,623.00[6]
Reserve fund-paid sold units		(42,000.00)
Reserve fund-allocated		(24,361.00)
Working capital fund-allocated		(14,617.00)
Discounts and credits		(20,450.00)
Total consideration		$4,791,880.00
Actual brokerage paid		(86,497.00)
Allocated purchase price	($3,166,988)	
Allocated other acquisition	(178,938)	
Allocated capital improvements	(505,241)	
Allocated conversion	(356,959)	
Actual selling expenses	(1,822)	

[5]As noted in Finding of Fact "17," the Division used an amount of $3,228,885.00 for actual consideration for the 42 units sold. The Division has agreed that petitioner may use a lower selling price of $57,500.00 instead of the $81,700.00 which it used for one unit. This $24,200.00 difference in selling prices explains the lesser amount of $3,204,685.00 used by petitioner for actual consideration in its calculation.

[6]Petitioner, like the Division, allocated mortgage indebtedness to the 42 sold units by use of a per share methodology.

Total original purchase price	(4,209,948.00)[7]
Gain	$495,435.00
Gains tax on sold units final update	49,543.00
Gains tax paid	(93,223.00)
Gains tax refund	$43,680.00

19. The Division by a letter dated November 21, 1996 denied petitioner's claim for refund of gains tax in the amount of $43,680.00. In response, petitioner filed a second petition dated December 12, 1996 with the Division of Tax Appeals. Pursuant to a stipulation of the parties, petitioner waived the Division's answer to its second petition and agreed that its claim for refund of gains tax would be consolidated with its earlier petition contesting the Notice of Determination dated August 12, 1994 described in Finding of Fact "14".

20. The parties have stipulated that two issues which arose as a result of petitioner's refund claim have been resolved. As noted in footnote "5", the Division has agreed to the reduction of the consideration paid for one of the sold units from $81,700.00 to $57,500.00. In addition, the Division has agreed that petitioner may use an amount "approximately $7,000.00" greater than it used for working capital and reserve funds, which were subtracted from actual consideration received by petitioner for the 42 units sold. Accordingly, the Division has conceded that if it "ultimately prevail[s] on the merits in this matter, the amount of tax determined to be due . . . will be appropriately adjusted." Furthermore, the parties stipulated that:

> Any additional discrepancies that may exist between the figures used in the Petitioner's final computation and the figures

[7] The photocopy included in the record which shows petitioner's calculation of its original purchase price is of poor quality. The amount shown for total original purchase price of $4,209,948.00 has been discerned by calculating back from the gain shown by petitioner of $495,435.00. The amounts shown above for the various components of the original purchase price used by petitioner are best guesses based upon the poor quality of the photocopy. Since the matter at hand involves a legal issue, this inability to be sure of the exact amounts is not critical.

> used in the Division's final computation will be decided in favor of the Division.

21. The parties have stipulated that the only issue remaining involves:

> [T]he proper method of allocating the original purchase price (e.g. purchase price, acquisition costs, capital improvements and conversion costs) for purposes of computing a final calculation of tax/refund due for the cooperative conversion project.

22. In calculating gains tax due of $42,074.63, as noted in Finding of Fact "17", the Division allocated original purchase price to the sold units based upon a per share method. Under this method, the purchase price to acquire the property of $3,250,000.00, for example, is divided by the total project shares of 28,470, and the resulting price per share of 114.1553 is then multiplied by the number of shares sold of 22,465 (allocable to the 42 sold units) to arrive at the allocated original purchase price of $2,564,497.00 or 78.9% of the total original purchase price. The same methodology was used by the Division to allocate amounts for (i) acquisition costs, (ii) capital improvements, and (iii) conversion costs, which are the other components of petitioner's original purchase price to the 22,465 shares representing the 42 sold units subject to gains tax.

23. In contrast, in calculating a refund of gains tax claimed by petitioner of $43,680.00, as noted in Finding of Fact "18", petitioner allocated 97.45% of its original purchase price to the 22,465 shares representing the 42 units sold. Petitioner calculated this allocation percentage of 97.45% by dividing the actual consideration for the 42 sold units of $3,228,885.00 by the total of such actual consideration for the 42 sold units plus the fair market value of the 12 unsold units, which according to an appraisal requested by petitioner had an estimated value as of April 2, 1997 of $82,000.00. Accordingly, $3,228,885.00 divided by $3,310,885.00 ($3,228,885.00 plus $82,000.00) equals .9745, expressed in percentage form as 97.45%

24. The appraised value for the 12 unsold units of $82,000.00 as of April 2, 1997 was prepared by Alan Offenberg, a certified real estate appraiser who "[o]ver the past 10 years . . . has valued over 7,500 properties including commercial, industrial, and residential properties throughout the New York Metropolitan area." Mr. Offenberg based his valuation on comparable sales and listings within the subject cooperative project and neighboring cooperative projects:

> Although there have been very few block sales or auctions of occupied apartments in and around the immediate subject area, the few that did occur resulted in occupied units being purchased (as a block) for between 10% and 15% of their actual value if they were vacant . . . . In summary, there is an extremely limited if nonexistent market for occupied, rent controlled Coop apartments in the subject area, and if a buyer can be found for occupied units, the price per unit is a very small fraction of the units['] actual value if they were vacant.

He concluded in his appraisal the following:

> [I]t is our considered opinion that the value (as a block sale) of the 12 unsold apartments is estimated to total $82,000 for all of the occupied apartments, which is 15% of the 'vacant' market value.

The Division did not offer an appraisal or any other evidence to contradict Mr. Offenberg's appraisal.

25. Petitioner also offered the opinion of various accounting professionals as follows:

(1) Estela Lorenzo, a certified public accountant, who stated in an affidavit that:

> The allocation of cost basis using the relative sales value accounting method matches income and expense and, therefore, clearly reflects income. On the other hand, a pro-rata or per share allocation would distort income.

According to Ms. Lorenzo, generally accepted accounting principles require such allocation method.

(2) Philip H. Levine, a certified public accountant and an expert in cooperative conversions, who is in agreement with Ms. Lorenzo's allocation methodology, noted the changing values of cooperative units depending on the stage of the cooperative conversion project:

> The three distinct segments of the project are as follows:
>
> (i) Sales at the initial closing of an effective cooperative . . . offering plan. This is normally a 90 to 180 day period beginning with approval date of the offering plan.
>
> (ii) The periodic sales during the intended holding period of the building. This period is based on the owners['] plan or financial conditions at the time. Many properties have been sold in bulk shortly after the initial sales period is complete.
>
> (iii) Bulk sale of the residual units, which are primarily occupied rent stabilized apartments.
>
> The sales value of individual apartments varies dramatically at each of these individual stages. At the initial closing, the sales are predominantly at original insiders['] price (approximately 60% of outside market prices[)].
>
> Sales at the second stage are primarily at outsiders['] market prices, which can vary based on market conditions. The prices at this stage usually average at a higher price than the initial closing since the apartments sold are almost exclusively destabilized (free market) sales.
>
> Sales at the third stage are primarily rent stabilized apartments and worth only a small fraction of the other prices per unit.

(3) Robert Frank, an attorney and expert in cooperative conversions, who stated in an affidavit that:

> The sponsor of a cooperative conversion in the New York City area (including Westchester County) will always be left with a significant number of occupied units that have no substantial value.

(4) Richard B. Portney, a certified public accountant, who agreed with Ms. Lorenzo's methodology for apportioning original purchase price, stated in an affidavit:

> Where, as here, there are two types of property as opposed to homogenous properties, in order to clearly reflect income and match income and expenses, you must allocate acquisition costs, etc. in accordance with the relative fair market values of the two different types of units (i.e. sold vs. unsold). On the other hand, a per share approach distorts income and economic reality as it does not match costs properly with income.

26. Included in the offering plan for the project at issue was an "Opinion of Reasonable Relationship" prepared by Barhite and Holzinger, Inc., a licensed real estate broker and management company. This opinion set forth the relative values of each unit based upon an allocation of shares. A similar document was also prepared by the law firm of Snow, Becker, Kraus, P.C. The share allocation set forth in these documents is based upon the relative apartment size, number of rooms, number of baths, location within the building and other "facets of comparable value". In the opinion of Stephen Godfrey, an experienced auditor within the Division's Real Property Transfer Gains Tax Unit, a per share method of allocation of petitioner's original purchase price to the 42 sold units:

> is the most logical method to use when comparing the relative value of each apartment, as opposed to comparing them with units in another project (per an appraisal).

27. Philip H. Levine, petitioner's expert, disagrees with Mr. Godfrey's opinion noting that the offering plan's Opinion of Reasonable Relationship is relevant to the apportioning of operating costs such as maintenance fees and not relevant to the apportioning of acquisition costs:

> In making such allocation, only the physical attributes (e.g., size, location) are taken into account. Other factors which bear on the fair market value of the units (e.g., whether the unit(s) is occupied under rent stabilization) are not considered. . . . [T]he

> opinion of reasonable value (and the related allocation) has nothing to do with the sponsor's apportionment of his acquisition costs.

28. Relevant portions of the parties' stipulation, dated February 21, 1997 by petitioner's representative and February 27, 1997 by the Division's representative, have been incorporated into this determination.

29. The Division has proposed 36 findings of fact. All of these proposed findings of fact are accepted except for proposed finding of fact "29". Proposed finding of fact "29" is accepted except for the last sentence which states that:

> [t]he increase in the deficiency from the 75% update arose due to the exclusion of estimated consideration and OPP attributable to the unsold shares.

As noted in Finding of Fact" 17", the record does not disclose any specific details concerning the Division's calculation of gains tax due of $20,035.18, which was the amount asserted due in the Notice of Determination dated August 12, 1994. Consequently, it cannot be specifically found why the amount of gains tax asserted due by the Division at a subsequent date of $42,075.00 was in an amount $22,039.82 greater than in the original Notice of Determination, although, in general, the Division's proposed finding that its subsequent calculation involved the exclusion of estimated consideration and original purchase price attributable to the unsold shares appears correct.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that neither the law which repealed the gains tax nor the former statutes specified a methodology for apportioning original purchase price (“OPP”) in the case of successive transfers pursuant to a cooperative plan of conversion. He noted the methodologies were specified in the Division of Taxation's Technical Services Bureau Memoranda (TSB-M-83-[2]-R and TSB-M-86-[3]-R). The former memorandum provided two options: the first computed gain based on actual consideration less a pro rata portion of the OPP, determined by some relationship between the unit sold and total units, and the second option allowed the taxpayer to estimate the consideration to be received on all future sales, which, when added to anticipated OPP and brokerage fees, was allocated to each unit based upon the unit's percentage to total units. The acceptable methods of apportionment were the same for both options, i.e., they were based on a percentage of common interest, square footage or shares of stock. Once an allocation method was chosen, it was irrevocable, unless the Division granted permission to change.

Since the second option was based on estimates, the taxpayer was required to file updates when it reached certain sell-out points, i.e., when it had sold 25%, 50%, and 75% of the units under its plan, whereupon the tax rate per share was adjusted to reflect actual consideration received plus estimated consideration for the remaining unsold shares. Upon sellout of the remaining shares, an adjustment was made to conform the estimates to actual consideration received.

In 1986, the Division eliminated Option A and adopted a modified Option B (TSB-M-86-[2]-R), which calculated tax on the basis of estimated consideration, an apportionment of OPP based on the unit's percentage to total units and an anticipated gain allocated to each unit. The method of apportionment adopted in 1986 permitted a percentage of the unit's common interest, square footage or shares of stock of all units. As in the earlier memorandum, the method of apportionment was irrevocable without prior approval of the

Division. Under the new memorandum, taxpayers still were permitted to file on a unit by unit basis using the actual consideration received, making periodic updates. The 1986 memorandum provided that the anticipated consideration for the unsold shares in noneviction conversion plans like the one in issue was the lower of 100% of the total of the offering plan prices established for insiders for the unsold units or 50% of the total of the vacant market value for the unsold units (***see***, TSB-M-86-[3]-R).

The Administrative Law Judge, finding no other authority for apportioning the OPP, found the Division's methods reasonable and proper. In light of the fact that petitioner used the per share method of allocating OPP for its initial filing in April of 1988 and in its 75% update of November 1993, the Administrative Law Judge found its choice irrevocable in accordance with the memoranda.

Although petitioner argued that using a relative fair market value methodology for allocation of OPP in its final gains tax filing would more fairly reflect income, the Administrative Law Judge held that income tax principles are not relevant for purposes of the gains tax (***Matter of V & V Properties,*** Tax Appeals Tribunal, July 16, 1992) and that gains tax has been imposed in situations where there was no economic gain (***Matter of Brockman,*** Tax Appeals Tribunal, April 4, 1996, ***confirmed Matter of Brockman v. Tax Appeals Tribunal***, 238 AD2d 693, 656 NYS2d 429).

The Administrative Law Judge also rejected petitioner's argument that 20 NYCRR former 590.19[8] was applicable herein, stating that said regulation was not applicable to cooperative

[8]The regulation at 20 NYCRR former 590.19 was subsequently renumbered 20 NYCRR 590.20 and is referred to in this decision as 20 NYCRR 590.20.

conversions, but to allocation of OPP where less than the transferor's complete interest had been transferred (as in the case of an easement, transfer of development rights or subdivision of a parcel of real property).

Finally, the Administrative Law Judge, in reliance on TSB-M-96-(4)-R, which provided that the calculation of OPP attributable to the transfer of cooperative units subject to tax would vary depending on the facts and circumstances of each case, held that petitioner was bound by its irrevocable election to apportion OPP on a per share basis.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the TSB memoranda and its election to utilize the per share method of apportionment of OPP for previous filings are irrelevant, since it believes neither have any bearing on final computations after the repeal of the gains tax.

Petitioner argues that ***Matter of Empire Realty Group 62nd St. Corp.*** (Tax Appeals Tribunal, March 17, 1994) and the regulation at 20 NYCRR 590.20 support its position that the fair market rule of allocation applies to the instant situation because, like the authorities cited, it involves the allocation of OPP between taxable and nontaxable real property.

The Division maintains the Administrative Law Judge reached the correct conclusion based on his determination that the Division's method of allocation was reasonable and proper. The Division relies on the repeal legislation and TSB-M-96-(3)-R and TSB-M-96-(4)-R as its authority for this position. Therefore, in order for petitioner to prevail, it is incumbent upon petitioner to prove that its interpretation of the law is not only plausible but the only reasonable construction available (***Matter of Custom Shop 5th Ave. Corp. v. Tax Appeals Tribunal***, 195 AD2d 702, 600 NYS2d 295).

The Division points out that petitioner's argument is flawed because it ignores the repeal legislation's focus on the actual shares sold prior to repeal, thus making reliance on the anticipated consideration from the unsold units irrelevant for purposes of the final computation. Further, the Division contends that petitioner's reliance on ***Matter of Empire Realty Group 62nd St. Corp***. (***supra***) was in error, since therein the Tribunal refused to apply TSB-M-83-(2)-R because it did not involve the transfer of any unit pursuant to the condominium plan, rather the retention of an interest (a commercial unit). It found that the regulation at 20 NYCRR 590.20 was applicable and permitted the petitioner therein to allocate OPP based on fair market value. However, the Division noted that the Tribunal in ***Empire Realty*** indicated that had the transfer of units been pursuant to the condominium plan, it would have found the memorandum applicable. Therefore, the Division argues that since there was no such reservation of an interest herein, the fair market value method of allocation is not available to petitioner.

Finally, the Division noted that petitioner allocated its mortgage on the project based upon a per share method and contends that utilizing two different methodologies for allocation of OPP and the project mortgage was irrational and inconsistent with the provisions of the Tax Law.

Petitioner believes that the two methodologies are consistent since purchasers of interests in a cooperative corporation are required to pay their proportionate share of the underlying mortgage.

An argument raised by the amicus briefs was that, after the repeal of the gains tax, the issue was no longer *when* all of the costs and consideration would be taken into account, rather *whether* they would be taken into account. This contention also challenges the Division's authority to bind a taxpayer to an election made under a law which has been repealed. The alternative is to follow the guidance of 20 NYCRR 590.20, which spoke to allocation of OPP between taxable and nontaxable interests.

Further, the amici argue that if a per share method of apportionment was utilized for OPP, then the same must be utilized for apportioning gain between sold and unsold units to arrive at a fair result.

OPINION

Article 31-B of the Tax Law was repealed by the Legislature on July 13, 1996 (***see***, L 1996, ch 309, §§ 171-180) and applied to transfers of real property occurring on or after June 15, 1996. The repeal had the effect of deeming all cooperative conversion plans completed, in light of the law's provision that "a final computation of tax shall be filed with the commissioner of taxation and finance by May 31, 1997" and that "the determination of gain or loss . . . shall be based only on the actual units [or] shares . . . sold prior to June 15, 1996."

Lamentably, the Legislature did not provide any guidance on how to apportion OPP, either directly or indirectly attributable to the taxable units or shares in cooperative plans transferred prior to June 15, 1996. In determining the apportionment of OPP, the Division has chosen to apply an extrapolation of Option B, as set forth in TSB-M-86-(3)-R, which was based on a safe harbor theory and assumed the ultimate sale of all units in a conversion plan. We do not believe that the Division's reliance was correct.

First, the repeal legislation created a "straddle" situation where unsold units as of June 15, 1996 were not taxable, while those sold before that date were. Thus, the situation created by the legislation for purposes of this matter left the cooperative corporation with sold, taxable units and unsold, retained units which were not taxable (L 1996, ch 309, §§ 171-180.)

Second, we believe that the Division has misinterpreted the language of the repeal legislation. The Division correctly noted that the focus of the repeal legislation centered on the intent to determine the tax due only on those units *sold* prior to June 15, 1996 and that the determination of gain or loss would be based only on those units. Further, the statute specifically states that, for determining tax due on those units, the OPP was to be calculated using only those amounts allowable pursuant to Tax Law §1440(5) (L 1996, ch 309, § 180[b][i]).

However, the Division would have us end our inquiry here and use the per share method it utilized to determine OPP. We do not believe that the straddle situation created by the legislation is best served by such an interpretation. Although the Division argues that the regulation at 20 NYCRR 590.20 was never intended to apply to circumstances like the ones in the present matter, we disagree.

The regulation at 20 NYCRR 590.20 was promulgated pursuant to Tax Law § 1440(5), the definition of OPP, and we believe its vitality and validity as applicable to this matter is unquestionable. The regulation addresses the apportionment of OPP in situations where only a part of an interest in real property is being transferred and part is being retained and dictates a fair market value ratio, as follows:

$$\frac{\text{fmv of interest transferred}}{\text{fmv of the real property, including interest}}$$

The analogy between the circumstances described in the regulation and those of the instant matter is strong, where the final determination of tax is based on the sale of part of the units in a cooperative plan and, by legislative action, the nontaxability of other units.

We find that the allocation of OPP should be resolved by the application of the regulation at 20 NYCRR 590.20. The circumstances described in the regulation are directly on point; i.e., the issue of allocating OPP between a taxable sale and a nontaxable retained interest, and the allocation based on relative fair market value should have been used by the Division herein (***see, Matter of Empire Realty Group 62nd St. Corp., supra***).

The Division's argument that the apportionment formula should not be based on the fair market value ratio relies, in part, on its belief that the ratio is not true to the legislative language that gain be determined solely on the basis of the units sold. Such an argument seems a bit disingenuous since the Division utilized an apportionment ratio which uses the unsold, retained units to establish its own per share ratio. By its own reasoning, the use of the unsold units in its ratio would be prohibited by the repeal legislation.

The Division's reliance on the Option B formula as set forth in a Technical Services Bureau memorandum, TSB-M-86-(2)-R and the instructions referred to therein, was inappropriate. That option required a taxpayer to estimate total consideration, subtract total OPP and brokerage fees, and then allocate the *gain* among all the units based on a methodology chosen by the taxpayer (e.g., common elements, square footage, shares or number of units). The resultant gain and tax due would then be assigned in accordance with the percentage of interest for the unit. It is arguable whether the Division even applied the Option B formula correctly, since it applied the formula to the OPP only and not to the gain.

After the repeal of the gains tax and the straddle situation which ensued, the value of the guidance offered by this methodology is not clear. Should the Division have valued the retained units to arrive at estimated consideration in its calculation of gain attributable to each unit, as called for by the memorandum? Should the Division have ignored the unsold units in accordance with its literal reading of the repeal legislation? In fact, if the Division wanted to hold petitioner to its election under Option B, it should have followed the other requirements of the memorandum. The Division chose to disregard the anticipated consideration for the unsold units and apply the allocation ratio to only one aspect of the gain, the OPP. This extrapolation from the original methodology of the memorandum due to the repeal was a convenient way for the Division to solve its problem, but there is no authority for sustaining it. In light of the fact that we find the regulation to be on point, we reject the Division's methodology. Further, we note that we are not bound by Technical Service Bureau memoranda. In ***Matter of Garden Way*** (Tax Appeals Tribunal, February 24, 1994), we stated:

> Technical Services Bureau memoranda are statements issued by the Division which are informational in nature, designed to disseminate the Division's current interpretation of the Tax Law in response to similar requests from a broad class of taxpayers; however, these statements are not promulgated pursuant to specific statutory authorization or direction and, thus, are not legally binding.

For the reasons set forth, we find that, as a result of the repeal of the real property transfer gains tax, the Division should have relied on its own relevant regulation, 20 NYCRR 590.20, for guidance in apportioning OPP to the units subject to tax based upon the stated relative fair market value methodology. Pursuant to this finding, petitioner's interpretation is both plausible and the only reasonable one under these unique circumstances (***Matter of Custom Shop 5th Ave. Corp. v. Tax Appeals Tribunal, supra***).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 244 Bronxville Associates is granted;

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

3. The Notice of Determination, dated August 12, 1994, is canceled; and

4. The claim for refund of 244 Bronxville Associates is granted to the extent that the Division of Taxation is directed to recompute the final tax due based upon application of the regulation at 20 NYCRR 590.20.

DATED: Troy, New York
June 10, 1999

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner