STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
475 ASSOCIATES AND ANDREW CLARKE, HARVEY CLARKE, MICHAEL GARBOW AND EDWIN MICKENBERG	:	DECISION DTA NO. 819618
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioners 475 Associates, Andrew Clarke, Harvey Clarke, Michael Garbow and Edwin Mickenberg, c/o Goldberg, Weprin & Ustin, LLP, 1501 Broadway, 22nd Floor, New York, New York 10036, filed an exception to the determination of the Administrative Law Judge issued on April 11, 2005. Petitioners appeared by Goldberg, Weprin & Ustin, LLP (Matthew E. Hearle, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition and petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on November 9, 2005 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether mortgage indebtedness incurred by a cooperative housing corporation from refinancings undertaken subsequent to the date of conversion to cooperative ownership should be allocated to the cooperative apartment units (shares) and included in consideration received by petitioners upon the sale of cooperative housing corporation shares.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "15" and "16" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Petitioner 475 Associates was a partnership with offices c/o Gelbwaks & Pollack, 299 Broadway, New York, New York during all relevant periods. Petitioners Andrew Clarke, Harvey Clarke, Michael Garbow and Edwin Mickenberg (the "partners") were principals of the 475 Associates partnership during all relevant periods.

On October 1, 1982, 475 Associates converted premises located at 475 Bronx River Road, Yonkers, New York (the "premises") to cooperative ownership. The mortgage indebtedness at the time of conversion to cooperative ownership (i.e., at the time of the transfer from the sponsor to the cooperative housing corporation ["CHC"]) was $288,829.67, consisting of a first mortgage to the Long Island Savings Bank in the amount of $232,395.00 and a second mortgage to Marion Norton Guidin in the amount of $50,312.50.

On March 28, 1983, the Tax on Gains Derived From Certain Real Property Transfers (the "Gains Tax") imposed pursuant to Tax Law Article 31-B became effective. The Gains Tax remained in existence until its repeal effective July 13, 1996.

Between April 5, 1983 and July 17, 1986, 475 Associates sold 602 shares of stock in the cooperative for consideration including total cash of $215,820.00. The shares sold were those relating to the following apartment units:

APARTMENT UNIT	DATE OF SALE
Unit 4E	April 5, 1983
Unit 6C	August 15, 1983
Unit 1D	March 29, 1984
Unit 3H	July 5, 1984
Unit 6H	August 22, 1984
Unit2G	May 10, 1985
Unit 2D	September 5, 1985
Unit 2K	July 17, 1986

On January 30, 1986, the first and second mortgages were refinanced into a consolidated first mortgage with National Cooperative Bank in the amount of $360,000.00.

Unit 2K, as set forth above, was sold subsequent to the January 30, 1986 mortgage refinancing. Petitioners included only a portion of the outstanding mortgage allocable to Unit 2K as consideration received upon sale. In this regard, petitioners calculated that the remaining amount of the original mortgages on the January 30, 1986 refinancing date ($263,363.95) represented 73.157 percent of the amount of the new mortgage ($360,000.00) in favor of National Cooperative Bank ("NCB Mortgage"). Accordingly, petitioners calculated the amount

of mortgage allocable to Unit 2K based on 73.157 percent of the outstanding balance of the NCB Mortgage on the date of the transfer of Unit 2K (i.e., 73.157 percent of the NCB Mortgage as amortized to the date of the unit transfer).[1]

On October 1, 1986, 475 Associates transferred 2,700 unsold cooperative shares to the four partners, Andrew Clarke, Harvey Clarke, Michael Garbow and Edwin Mickenberg, as tenants in common.

Between February 6, 1987 and December 15, 1987, the partners sold 218 shares of stock in the cooperative as follows:

APARTMENT UNIT	DATE OF SALE
Unit 3E	February 6, 1987
Unit 1G	June 24, 1987
Unit 6B	December 15, 1987

On January 14, 1988, the cooperative obtained a second mortgage from Clark Financial Services in the amount of $375,000.00.

Subsequent to the January 14, 1988 second mortgage, the partners sold an additional 330 shares of stock in the cooperative as follows:

APARTMENT UNIT	DATE OF SALE
Unit 6E	December 15, 1988
Unit 4J	April 18, 1990

[1] It is noted that petitioners' Exhibit "1" reflects $34,783.00 as consideration based on allocated mortgage indebtedness applicable to the 602 shares sold by 475 Associates between April 5, 1983 and July 17, 1996. In contrast, the Final Gains Tax Return filed by 475 Associates reflects $41,631.00 as consideration based on allocated mortgage indebtedness applicable to such shares. The difference in amount is not explained in the record.

Unit 1A	November 8, 1990
Unit 5E	February 28,1991

On March 29, 1991, the cooperative again refinanced the mortgages with a new mortgage in the amount of $805,000.00.

Subsequent to the March 29, 1991 refinancing, the partners sold an additional 591 shares of stock in the cooperative as follows:

APARTMENT UNIT	DATE OF SALE
Unit 1C	June 28, 1991
Unit 3J	February 3, 1992
Unit 6F	April 30, 1992
Unit 4H	September 23, 1992
Unit 5K	July 15, 1995
Unit 5J	July 19, 1995
Unit 2B	January 5, 1996

The Gains Tax was repealed effective July 13, 1996. On May 7, 1997, the partners filed a Gains Tax Final Computation, reporting their sale of a total of 1,139 shares pertaining to units transferred prior to June 15, 1996, for cash consideration in the amount of $706,500.00 plus allocated mortgage indebtedness consideration in the amount of $78,793.00 thus resulting in gross consideration in the amount of $785,293.00. The partners reduced such amount by $12,026.00 (reserve fund), to arrive at allocated aggregate consideration in the amount of

$773,267.00. In turn, such amount was reduced by $42,390.00 (brokerage fees), to arrive at consideration in the amount of $730,877.00.[2]

On May 7, 1997, 475 Associates also filed a Gains Tax Final Computation, reporting its sale of a total of 602 shares pertaining to units transferred prior to June 15, 1996, for cash consideration in the amount of $215,820.00 plus allocated mortgage indebtedness consideration in the amount of $41,631.00 thus resulting in gross consideration in the amount of $257,451.00. 475 Associates reduced such amount by $6,382.00 (reserve fund), to arrive at allocated aggregate consideration in the amount of $251,069.00. In turn, 475 Associates reduced such amount by $8,201.00 (brokerage fees), to arrive at consideration in the amount of $242,868.00.[3]

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

> Petitioners' two returns (Final Computations) as filed thus reported consideration in the aggregate amount of $973,745.00 ($242,868.00 for 475 Associates plus $730,877.00 for the partners). Under petitioners' calculations, the project thus did not reach the one million dollar gains tax threshold, and petitioners have requested a refund of gains tax paid in the aggregate amount of $36,195.29 ($16,392.70 to 475 Associates and $19,803.59 to the partners).[4] The sole basis raised for the refunds claimed by

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[2]It is noted that on petitioner's Exhibit "1", the amount of mortgage debt allocated is the lesser amount of $62,127.00, and that there is a reduction for allocated mortgage amortization in the amount of $3,232.00, such that (after the same reductions for reserve fund and brokerage), Exhibit "1" reports consideration in the amount of $710,979.00. The distinction between petitioners' Gains Tax Final Computation versus Exhibit "1" is that the latter is based on allocation of the remaining amount of amortized mortgage on the date of each share sale coupled with a claimed expense for allocated amortization.

[3]As before, petitioner's Exhibit "1" differs from the Final Computation in that, on Exhibit "1", the mortgage amount is the lesser amount of $34,743.00 and there is a reduction for allocated mortgage amortization in the amount of $12,280.00, such that after the same reductions for reserve fund and brokerage fees, Exhibit "1" reflects reported consideration in the (lesser) amount of $223,700.00.

[4]The total consideration under both of petitioners' calculations falls below one million dollars, to wit, totaling $973,745.00 on petitioners' Final Returns and $934,679.00 on Exhibit "1", thus in each instance resulting in

(continued...)

> petitioners in their two Final Computations is the amount of mortgage debt that is properly to be included as part of consideration. Petitioners' claim was that since total consideration was less than the $1 million threshold for the gains tax, they were entitled to a refund.[5]

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

> The Division of Taxation ("Division") audited petitioners' Gains Tax Final Computations and, by letters dated August 13, 1997 and April 30, 2002, denied petitioners' claims for refund. On July 29, 2002, petitioners filed a request for conciliation conference in the Division's Bureau of Conciliation and Mediation Services ("BCMS"). BCMS sustained the denial of refund by order dated May 23, 2003. Petitioners then filed a petition with the Division of Tax Appeals dated August 20, 2003. Based on the record, this petition appears to be the taxpayers' first mention, as an alternative argument, that they are entitled to a refund based upon a fair market value allocation of original purchase price pursuant to the decision in ***Matter of 244 Bronxville Assocs.*** (Tax Appeals Tribunal, June 10, 1999) (hereinafter, sometimes, "the ***Bronxville*** issue").[6]

We make the following additional finding of fact.

> At the commencement of the hearing before the Administrative Law Judge, the parties were asked to state the issue(s) in dispute. Neither party raised the ***Bronxville*** issue as a matter remaining in dispute. The record here is silent on the issue of fair market value allocation.

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[4](...continued)
a claim that the cooperative conversion was not subject to the gains tax.

[5]We modified finding of fact "15" to more fully reflect the record.

[6]We modified finding of fact "16" to clarify the issue upon which petitioners first claimed they were entitled to a refund of gains tax based on our decision in ***Bronxville***.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Former Article 31-B of the Tax Law imposed a tax at the rate of ten percent on gains derived from the transfer of real property or certain interests therein, as defined, where the consideration for the transfer met the one million dollar gains tax threshold (Tax Law former § 1441). "Gain" was defined as the difference between the "Consideration" for the transfer of the real property or interest therein and the "Original Purchase Price" ("OPP") of such property or interest therein where the consideration exceeded the OPP (Tax Law former § 1440[3]).

The statute defined "Consideration," in relevant part, as follows:

> the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor . . . . Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of *any* mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to. Consideration includes the cancellation or discharge of an indebtedness or obligation (Tax Law former § 1440[1][a], emphasis added).

OPP was defined as the consideration paid or required to be paid by the transferor to acquire the interest in the real property, plus the amount paid for any capital improvements made or required to be made to the real property (***see***, Tax Law former § 1440[5][a][i]; 20 NYCRR 590.8).

The Administrative Law Judge observed that regulations of the Commissioner of Taxation addressed the methodologies to be utilized in determining consideration and original purchase price. For purposes of computing the gains tax, cooperative and condominium conversions were treated as a single transfer, with the date of such transfer deemed to be the date on which each

cooperative or condominium unit was transferred. Tax due upon such transfers to individual cooperative apartment unit purchasers was to be based upon an apportionment, among the shares, of the original purchase price for the real property and the total consideration anticipated under the cooperative plan (***see***, Tax Law former § 1442[b]; ***see also***, ***Mayblum v. Chu***, 67 NY2d 1008, 503 NYS2d 316). The gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996. The repeal applied to transfers of real property that occur on or after June 15, 1996 (***see***, L 1996, ch 309, §§ 171-180). Pursuant to the repeal legislation, final returns were to be filed reflecting and accounting for taxable transfers.

The Administrative Law Judge noted that petitioners did not dispute the general proposition that upon sales of shares in a cooperative housing corporation, the discharge of the seller's pro rata share of mortgage repayment obligation allocated to the shares pertaining to the units sold (i.e., the portion of the mortgage obligation taken on by the purchaser/transferee) constitutes "relief from debt" and, thus, consideration for gains tax purposes. Rather, petitioners asserted that the amount of consideration arising from mortgage debt must be determined at the time of the sponsor-to-CHC transfer, and that subsequent events, including obtaining new mortgages or refinancings by which additional debt is undertaken, have no bearing on consideration. The Administrative Law Judge rejected this argument.

Petitioners' argument, the Administrative Law Judge noted, is based directly upon 20 NYCRR former 590.36 which, as in effect on the dates of the transfers in issue, provided as follows:

> Q. How does a mortgage on the real property transferred to the cooperative corporation affect the calculation of the gains tax?

> A. The amount of any mortgage to which the real property is subject when transferred by the realty transferor to the cooperative . . . is included as consideration to the realty transferor.

Petitioners read this regulation, which specifically includes in consideration mortgages extant at the time of the transfer from the sponsor to the CHC, as prescribing a limitation affirmatively excluding from such consideration any subsequent refinancings or new mortgage debt. The Administrative Law Judge found that petitioners' reading of the above regulation was too narrow and, moreover, was inconsistent with the nature of the gains tax as applied to cooperative conversions. First, the Administrative Law Judge pointed out, Tax Law former § 1440(1), broadly defined consideration to include *any* mortgage. Furthermore, the Administrative Law Judge noted, the regulation simply did not address the issue of subsequent refinancings or new mortgages, nor did it impose any limitation on including such debt as consideration. Instead, the regulation only stated, in answer to the question posed, that mortgage debt existing at the time of the transfer to the CHC was included in consideration. The Administrative Law Judge found, consistent with the nature of cooperative transfers, that the relevant statute, regulations and case law require that such later undertaken debt be included in computing consideration.

Tax Law former § 1442(b) provided, in pertinent part, that: "[i]n the case of a transfer pursuant to a cooperative or condominium plan, the date of such transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred." For purposes of calculating the amount of tax due in each such transfer, an apportionment of the original purchase price of the real property and total consideration anticipated under such plan shall be made for each such cooperative or condominium unit (***see***, Tax Law § 1442[b]).

The Administrative Law Judge noted that the regulations go on to explain that it is not the transfer of the real property to the cooperative corporation which is the event requiring payment of tax but, rather, it is the transfers of shares pursuant to the plan to the individual unit purchasers which are the events requiring the payment of the tax (***see,*** 20 NYCRR 590.33, renum 20 NYCRR 590.34). The Court of Appeals held that the gains tax is imposed by the statute upon the overall cooperative plan and that for purposes of computation of the tax, the cooperative conversion is treated as a single transfer (***see***, ***Mayblum v. Chu***, ***supra***). The taxable event is the transfer of the shares to the individual unit purchasers, and the consideration for each unit is determined *at the time each such unit is transferred*. The Administrative Law Judge pointed out in this regard our language in ***Matter of Birchwood Assocs.*** (Tax Appeals Tribunal, July 27, 1989):

> the tax treats the transfer of shares by the realty transferor to unit purchasers as the *only* taxable event. However, the gain on these transfers is measured by the difference between the consideration for the shares and the realty transferor's original purchase price in the real property prior to its transfer to the cooperative housing corporation. This scheme in effect ignores the realty transferor's transfer to the cooperative housing corporation and instead treats the realty transferor as if it were directly transferring its interest in the real property to the unit purchasers. Under this scheme the gains tax is imposed on the entire cooperative conversion plan, encompassing the real property prior to its transfer to the cooperative housing corporation and the sale of shares by the realty transferor subsequent to the property's conversion to cooperative ownership. The transfer to the cooperative corporation is then treated merely as a conduit which allows the transformation of the real property into shares allocated to units.

Thus, the Tribunal clearly rejected the concept of treating cooperative conversions as two-step processes whereunder the amount of mortgage debt would be consideration only on the transfer from the sponsor to the CHC.

Petitioners argued that consideration must be fixed at the time of the taxable transfer and that subsequent events do not alter the value of the consideration for the transfer. It is true, the Administrative Law Judge acknowledged, that the value of the consideration received must be fixed at the time of the taxable transfer, and that events occurring thereafter do not affect such value. However, the Administrative Law Judge pointed out, petitioners' argument overlooks the fact that the refinancings and new mortgages in this instance (or for that matter in any cooperative conversion), which occur after the sponsor-to-CHC transfer but prior to the transfers of unit shares, are not events *subsequent* to the taxable transfers (i.e., the unit share transfers) and, thus, are not excluded from consideration as events impacting the value of the consideration subsequent to the taxable transfers.[7]

In the case of cooperative conversions, the Administrative Law Judge noted, gain is measured by the difference between the consideration received *upon the sales of the shares* and the transferor's cost of acquiring the property prior to its transfer to the CHC (***Matter of Normandy Assocs.***, Tax Appeals Tribunal, March 23, 1989). Thus, the Administrative Law Judge found, consideration received upon the sales of the shares properly includes the portion of the mortgage debt existing at the time of such transfers of the shares, as such debt is allocated to the shares being transferred. Until the shares are sold, the mortgage debt repayment obligation rests with the share owners (here petitioners). Such obligation, the Administrative Law Judge

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[7]The Administrative Law Judge's footnote pointed out that all but two of the cases cited by petitioners did not involve transfers pursuant to a cooperative conversion. The two matters cited which did involve cooperative conversions dealt, respectively, with a post-closing settlement (a "subsequent event") which occurred *after* the transfer dates by which all of the units (shares) had been sold to the unit purchasers (***Matter of 93rd Street Assocs. v. Tax Appeals Tribunal,*** 259 AD2d 855, 686 NYS2d 210), and with the value of a leasehold interest as opposed to the value of the consideration for cooperative units (***Matter of Cheltoncort Co. v. Tax Appeals Tribunal***, 185 AD2d 49, 592 NYS2d 121).

determined, is not limited to the mortgage amount existing at the time of the transfer to the CHC, but rather to the entire outstanding mortgage debt obligation, including debt undertaken after the transfer of the property from the sponsor to the CHC. Upon sales of shares, the unit (share) transferee undertakes the mortgage repayment obligation, the share transferors (petitioners herein) are thus relieved of such obligation, and such relief from debt constitutes part of the consideration to the transferors.[8]

The Administrative Law Judge found the gains tax reporting requirements for cooperative conversions are consistent with this conclusion. Transferors were required to file returns and pay tax at the times of the taxable transactions, that is, as sales of shares to individual units occurred. In recognition that such sales would be ongoing over a period of time, the gain and the tax due on such sales were to be based upon an estimate of the anticipated consideration to be received for the entire property versus the OPP for the property, as each was allocated to the various shares and units (Tax Law former § 1442[b]). Periodic update filings were to be made with the Division as certain share sellout plateaus were reached, pursuant to which estimated (anticipated) consideration was to be updated to actual consideration such that, as sales progressed, the amount of initially estimated consideration drew closer to the amount of consideration actually received. Ultimately, upon sellout (or, as in this case, upon the repeal of the gains tax), a final return was to be filed under which estimated consideration was updated to actual consideration. Even though the initial estimate may have been that consideration would be less than one million dollars, if it ultimately turned out that actual consideration upon sales of

[8]This analysis applies even where the mortgagee would have no actual recourse against the selling shareholder for the amount of the debt incurred by the cooperative corporation.

units exceeded one million dollars (due, for example, to rising real estate prices), the gains tax would apply notwithstanding such initial estimate.

The Administrative Law Judge found that accepting petitioners' proposition that it is only the amount of debt existing at the time of the sponsor-to-CHC transfer which may be included in the calculation of consideration is inconsistent with the nature of the gains tax as applied to cooperative conversion. Ultimately, the Administrative Law Judge found that petitioners' position must fail since the financing activities (refinancings and additional mortgages) did not occur subsequent to the taxable transfers (the share sales) and, thus, were not barred from impacting the amount of consideration as subsequent events.

Next, petitioners argued that no tax was due because the unsold shares were not sold prior to the repeal of the gains tax and, thus, there was no relief from debt with respect thereto. While there were shares (units) unsold as of the date of the repeal of the gains tax, the Administrative Law Judge found the record established that the shares (and units) included in the Division's calculations were sold prior to the repeal of the gains tax. Accordingly, the Administrative Law Judge found that the pro rata share of mortgage debt allocated to such shares, including the mortgage debt taken on after the sponsor-to-CHC transfer, was properly included in consideration received by petitioners.

ARGUMENTS ON EXCEPTION

Petitioners take exception to the Administrative Law Judge's determination as a whole, and with one exception, their arguments are identical to those raised below. Specifically, petitioners rely upon 20 NYCRR former 590.36 to maintain that it is only the mortgage amounts encumbering the property at the time of the sponsor transfer to the cooperative corporation that

should be included in computing consideration. Any subsequent refinancings or mortgage indebtedness incurred subsequent to the sponsor-to-CHC transfer, petitioners argue, should not be included in the determination of consideration received for the sale of the real property or interest therein. Thus, petitioner would include only the portions of the Long Island Savings Bank mortgage and the Marion Norton Guidin mortgage allocated to the shares sold, and no portion of the subsequent (refinanced or new) debt incurred by the cooperative as constituting consideration received from individual unit purchasers. Using petitioners' method of calculation, such allocated mortgage amounts together with the cash received by petitioners for the units transferred would result, after relevant and undisputed reductions (***e.g.***, reserve fund, brokerage fees, etc.), in total consideration received of less than the one million dollar threshold for the imposition of the gains tax. Accordingly, petitioners assert that the gains tax does not properly apply and seek a refund of the gains tax they paid. Petitioners also claim the unsold shares in this case were not transferred until after the effective date of the repeal of the gains tax, thus, leaving no tax due in any event.[9]

Petitioners also raise a new and alternative argument in their brief, which was not raised in their exception. This alternative basis for relief posits that petitioners are entitled to allocate the

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[9]The primary issue presented for resolution by the Administrative Law Judge was whether or not mortgage debt incurred **after** the sponsor-to-CHC transfer should be allocated to and included in consideration upon share/unit transfers. While the Division included such debt in its calculations and petitioners did not, both parties nonetheless allocated mortgage debt to the shares based on the amortized actual balance of such debt on the date of each of the unit transfers. In addition, however, petitioners also reduced total consideration by some $15,512.00 ($12,280.00 for the Partnership plus $3,232.00 for the partners), based on the amount of the debt paid by petitioners while they owned their shares (***see***, footnotes "2" and "3"). At hearing, the parties disagreed over the propriety of this reduction. Such a reduction from consideration would be allowable where the initial total amount of the debt was simply allocated to the shares (and included in consideration upon their sale), with no provision to account for interim debt principal amortization during the period of petitioners' share ownership (***see***, 20 NYCRR 590.36, renum 20 NYCRR 590.37). However, where, as here, allocated consideration is based on the (lower) amortized amount of debt actually remaining due on each share transfer date, then the amount being included as consideration and subjected to tax would not include the portion of the debt already amortized. Thus, the additional reduction taken by petitioners for debt paid should properly be denied as duplicative.

original purchase price of the subject property based upon the fair market value of the remaining unsold units based on our decision in ***Matter of 244 Bronxville Assocs.*** (***supra***).

The Division argues that consideration received for transfers pursuant to a cooperative plan is determined on the date each cooperative unit is transferred to the unit purchaser and, most specifically, consideration includes the relief from indebtedness of the pro rata portion of the mortgage debt allocated to each such unit at the time of its sale. Thus, the Division notes that the additional mortgage indebtedness on the property (incurred through obtaining new mortgage financing and by refinancing existing mortgages) subsequent to the conversion to cooperative ownership, and not just the amount of mortgage debt existing at the time of conversion, should be allocated to the units and included in consideration received by petitioners upon their transfers of the units. Accordingly, the Division urges, by including in consideration the allocated share of the total amount of mortgage debt encumbering each unit on the date of each unit transfer, the total consideration for the cooperative conversion exceeds one million dollars and, thus, is subject to gains tax.

The Division urges that we reject petitioners' alternative argument based on the decision in ***244 Bronxville Assocs.*** The Division notes that after raising the issue in its petition, petitioners never offered any evidence to show the fair market value of the unsold units at the hearing nor argued the ***Bronxville*** issue in their brief before the Administrative Law Judge. As such, the Division argues that petitioner abandoned the issue.

Petitioners, in response, suggest that the reason they did not offer evidence and argument on this issue before the Administrative Law Judge was because "The proceedings [before the Administrative Law Judge] did not progress to the point where analysis of the benefits of the

Bronxville decision became relevant" (Petitioners' Reply Brief, p. 2). Petitioners request that we remand this matter to the Administrative Law Judge for a decision on this issue, should we find that gains tax is otherwise due.

OPINION

Treated first is petitioners' alternative argument that they are entitled to refunds based upon application of the fair market value original purchase price allocation methodology approved by us in ***Matter of 244 Bronxville Assocs.*** (***supra***). In that case, the petitioners provided evidence of the fair market value of the unsold units based on comparable sales prepared by a certified real estate appraiser. The record in ***Bronxville*** also included the testimony of accounting professionals and experts in cooperative conversions. The petitioners in ***Bronxville*** established a record that supported their valuation of the unsold units, and our decision in ***Bronxville*** was premised on that evidence.

Petitioners here, in contrast, after raising the issue in their petition, did nothing further. When, at hearing, petitioners were asked by the Administrative Law Judge to state the issue(s) in dispute, they never mentioned the ***Bronxville*** issue. In addition, petitioners did not argue the ***Bronxville*** issue in their brief to the Administrative Law Judge. Accordingly, petitioners are deemed to have abandoned the issue (***see***, ***Matter of Bello v. Tax Appeals Tribunal,*** 213 AD2d 754, 623 NYS2d 363; ***Gibeault v. Home Ins. Co.***, 221 AD2d 826, 633 NYS2d 678). Even if the issue had not been abandoned, petitioners have offered no evidence to support it.

Petitioners failed to provide any evidence of the fair market value allocation of OPP by an independent real estate appraiser based on comparable sales. Nor was any testimony of independent experts with knowledge of cooperative conversions offered in support of

petitioners' case. A presumption of correctness attaches to the Division's notices of determination, and the burden was on petitioners to show by clear and convincing evidence that the notice of determination and the method used to arrive at the assessment was erroneous (***see***, ***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398). Since petitioners failed to offer evidence on the issue of fair market value allocation of OPP, they would have failed to carry their burden of proof on this issue even had it not been abandoned.

Petitioners do not dispute that they failed to offer evidence on the ***Bronxville*** issue. Rather, petitioners claim that the proceeding below "did not progress to the point where analysis of the benefits of the ***Bronxville*** decision became relevant" (Petitioners' reply brief, p. 2). Petitioners urge that the Tax Appeals Tribunal now remand this matter to the Administrative Law Judge so that they can offer their evidence. Petitioners' argument is rejected for the same reasons as we set forth in ***Matter of Zeligfeld*** (Tax Appeals Tribunal, January 8, 2004). The hearing in this matter was petitioners opportunity to be heard.

To prevail, petitioners were required at that hearing to present whatever evidence and argument they could muster. Once the hearing record is closed, additional evidence may not be offered by either party (***see***, ***Matter of Abex Corp.,*** Tax Appeals Tribunal, October 8, 1992). The hearing process must be defined and final (***see***, ***Matter of Schoonover***, Tax Appeals Tribunal, April 15, 1991). Petitioners had the opportunity to present evidence concerning every element of their case, including the fair market value allocation of OPP. They failed to meet their evidentiary burden, failed to argue the issue in the brief below, and consequently it was abandoned. The fair market value allocation of original purchase price being a factual issue, it

may not be raised for the first time on exception[10] (***Matter of Otero***, Tax Appeals Tribunal, September 21, 2000; ***Matter of Howard Enters.***, Tax Appeals Tribunal, August 4, 1994).[11] For all of the above reasons, petitioners' alternative argument based on our decision in ***Matter of 244 Bronxville Assocs.*** (***supra***) is rejected.

With regard to petitioners' remaining arguments, we affirm the Administrative Law Judge's determination. We find that the Administrative Law Judge fully and correctly addressed each of the issues presented to him and petitioners have presented no evidence below or argument on exception which would justify our modifying the determination of the Administrative Law Judge in any respect. Thus, we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 475 Associates and Andrew Clarke, Harvey Clarke, Michael Garbow and Edwin Mickenberg is denied;

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

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[10]As a further basis for rejecting petitioners' ***Bronxville*** argument, they did not raise the issue in the exception filed with the Tribunal, but merely attempted to resurrect the issue in their briefs.

[11] Petitioners' refund claim based on the ***Bronxville*** issue would also appear to be untimely and barred by the applicable Statute of Limitations for requesting refunds based on our decision in ***Matter of Broadway-111th St. Assocs., LLC*** (Tax Appeals Tribunal, June 10, 2004, ***confirmed Matter of Broadway-111th St Assocs., LLC v. Commissioner***, ___ AD2d ___ [Mar. 23, 2006]). Pursuant to the Real Property Transfer Gains Tax repeal legislation, Final Return Forms computing taxable gains and gains tax due were to be filed by May 31, 1997 (***see***, ch 309, L 1996, § 180[b][1]). The period of limitations for claiming a refund of gains tax expired on May 31, 1999 (***see***, id., at § 180[c]). Petitioners timely filed their original Real Property Transfer Gains Tax computation on May 7, 1997, alleging that total consideration was less than $1 million and claiming a refund on that basis. Petitioners did not mention the ***Bronxville*** issue in that refund claim. The Division's brief states that petitioners mentioned the Bronxville issue in their request for conciliation to BCMS on July 29, 2002. While we do not have access to the record in BCMS, even if true that date is well past the last permissable date of May 31, 1999 for filing a refund claim for gains tax on a completely new issue. On similar facts, we held against petitioner in ***Matter of Broadway-111th St. Assocs., LLC*** (***supra***).

3. The petition of 475 Associates and Andrew Clarke, Harvey Clarke, Michael Garbow and Edwin Mickenberg is hereby denied; and

4. The Notices of Disallowance dated August 13, 1997 and April 30, 2002 are sustained.

DATED: Troy, New York
April 27, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner