STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALBE REALTY CO.	:	DETERMINATION
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, Albe Realty Co., c/o Carl Caller, Esq., 4311 13th Avenue, Brooklyn, New York 11219, filed a petition 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 (File No. 807449).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on November 1, 1990, at 3:45 P.M., with all briefs to be submitted by April 10, 1991. Petitioner appeared by N.C. Caller, P.C. (Carl Caller, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUES

I. Whether petitioner is entitled to a refund of all gains tax paid in connection with its transfers of cooperative apartment units as sponsor under a cooperative conversion plan on the basis that no additional units (though in existence) are being offered for sale, and that actual consideration received for those units transferred was less than $1,000,000.00.

II. Whether, if a complete refund is not granted, petitioner is nonetheless entitled to reduce its gain per share and thus its tax liabilitybased on allowance of certain expenses incurred in connection with its placement of a mortgage on the property which is the subject of the cooperative conversion.

III. Whether, again assuming a complete refund is not granted, petitioner is entitled to abatement of some or all of the late filing/late payment penalties assessed in connection with

certain of the unit transfers made to date.

FINDINGS OF FACT

Petitioner, Albe Realty Co. ("Albe"), a partnership, was the sponsor of a cooperative conversion involving certain premises located at 414 Albemarle Road, Brooklyn, New York. The premises consist of a building containing 46 apartment units plus a superintendent's apartment. Pursuant to the terms of the cooperative conversion plan, a total of 10,866 shares were allocated to the 46 apartment units offered for sale under the plan.

The cooperative conversion plan was filed with the Office of the Attorney General (Department of Law) on April 6, 1987, and was declared effective on June 30, 1988. The following statement appears, in bold-face type, on the cover page of the cooperative offering plan: "This Plan may not be used after 12 months from the (June 30, 1988) date of first offering unless extended by a duly filed amendment."

On September 5, 1988, petitioner, as sponsor, submitted requisite transferor and transferee questionnaires to the Division of Taxation in connection with the September 8, 1988 transfer of the premises to the cooperative housing corporation known as 414 Albemarle Owners Corp. (the realty transfer). These questionnaires set forth petitioners' anticipated consideration and expenses. Petitioner estimated the aggregate anticipated consideration it expected to receive on the conversion to be in excess of $2,000,000.00.

Petitioner sold and transferred shares together with the proprietary leases appurtenant to 12 out of the 46 apartment units offered for sale pursuant to the cooperative conversion plan. The last of such unit sales closed on January 3, 1989, leaving 34 units unsold. The total cash consideration actually received from sales of the units was $527,920.00. In addition, mortgage consideration allocated to the sold apartments was $285,547.00, leaving a total actual consideration received to date of $813,467.00.

No apartments have been sold since the January 3, 1989 closing. In fact, all of the unsold apartment units are rented and occupied and none are, at present, being offered for sale. On July 25, 1990, petitioner filed a seventh amendment to the cooperative offering plan which

stated that its primary purpose was "to set forth the financial disclosure requested in the Department of Law letter dated March 21, 1990".[1] This amendment also stated, at paragraph "E", the following:

> "The initial cooperative offering for apartments has expired and the Sponsor is not offering any apartments for sale. This amendment is not intended to set forth an offer to sell any apartments."

Included among the expenses claimed by petitioner as part of the conversion were certain costs incurred in the May 19, 1988 placement of a mortgage with First Nationwide Bank in the amount of $1,000,000.00. This mortgage replaced a then-existing $300,000.00 mortgage. The cooperative

closing (realty transfer) occurred thereafter, as noted, on September 8, 1988. At that time petitioner as sponsor took back a wrap-around mortgage of $1,050,000.00 from the cooperative housing corporation. The wrap-around mortgage encompassed the underlying First Nationwide mortgage herein described. This wrap-around mortgage was discussed in the offering plan, which provided, inter alia, for the sponsor to take back a wrap-around mortgage in the amount of $1,100,000.00 encompassing an anticipated preexisting mortgage in the amount of $800,000.00. The amounts noted above, to wit, the $1,050,000.00 wrap-around mortgage taken back and the $1,000,000.00 underlying institutional mortgage, represent amounts resulting from negotiations between petitioner and the tenants committee at the property. In sum, the $1,100,000.00 anticipated wrap-around mortgage was reduced in final amount by $50,000.00, and the $800,000.00 anticipated underlying institutional mortgage was increased in amount by $200,000.00.

The specific mortgage expenses claimed by petitioner but disallowed by the Division of Taxation include the following:

points	$27,500.00
mortgage tax	16,645.00

[1]The March 21, 1990 Department of Law letter was not introduced in evidence.

title insurance & recording tax	3,827.00
appraisal fee	3,000.00
bank's attorneys fee	3,000.00
credit report, messenger fee & tax service fee	400.00
~~Total~~	~~$54,372.00~~

Petitioner admits these expenses were incurred in connection with obtaining the First Nationwide mortgage, but maintains that such financing was a step in the cooperative conversion process. Thus, petitioner argues such expenses are properly deductible as costs incurred to create ownership interests in cooperative form (per Tax Law § 1440.5[a]). The Division of Taxation, by contrast, does not contest the dollar amounts of the costs or the fact that they were incurred in connection with the First Nationwide mortgage. However, the Division argues that such costs were not incurred to create ownership interests in cooperative form, but rather were incurred in connection with the refinancing by petitioner of an existing $300,000.00 mortgage on the property. The Division notes that such refinancing occurred in May 1988, some four months prior to the transfer of the property from petitioner, as sponsor, to the cooperative housing corporation. The Division argues that such refinancing by petitioner was undertaken to enable petitioner to convert some of its equity in the property to cash prior to cooperative conversion.

On July 18, 1989, the Division of Taxation issued to petitioner a Notice of Determination of Tax Due under Tax Law Article 31-B, assessing tax due in the amount of $1,188.72, plus penalty and interest per statute. The additional tax assessed is premised upon the Division's adjustments resulting in a higher per share gain (based on the Division's disallowance of the mortgage expenses described above), with the penalties based upon petitioner's late filing of certain returns, as well as its late payment and alleged underpayment of tax due on units transferred.

Petitioner protested this notice of determination, seeking a refund of all gains tax paid upon the argument that the offering of units has been terminated with the total actual consideration received for the offering being less than $1,000,000.00. In the alternative, petitioner seeks allowance of the mortgage expenses described above, as well as abatement of

the penalties and interest.

At hearing, the Division's representative indicated that pursuant to amendments to Tax Law Article 31-B (specifically Tax Law § 1442[a]), filing and payment was timely made (within 15 days of transfer) on at least some, if not all of the units transferred, and thus penalty would not be due on such units.[2]

CONCLUSIONS OF LAW

A. Petitioner seeks a refund of all gains tax paid to date upon the argument that sales of units have ended with total consideration received for those units sold being less than $1,000,000.00. Petitioner in fact seeks exemption under Tax Law § 1443(1) (consideration of less than $1,000,000.00), with refund to follow. Petitioner notes that Tax Law § 1442 requires payment of tax at the time of each unit transfer in a cooperative conversion if the anticipated consideration for the entire plan exceeds $1,000,000.00, versus the situation in other partial or successive transfers (i.e., aggregated transfers other than cooperative or condominium transfers) where payment of tax is not due until such transfers reach an aggregate consideration of $1,000,000.00. This distinction, according to petitioner, indicates only a timing difference as to when payment of tax is required, but has no bearing on the fact that if total consideration on all transfers as aggregated is less than $1,000,000.00, then no tax is due pursuant to Tax Law § 1443.1, and a refund of any tax paid (in the cooperative or condominium situation) should follow. The Division does not dispute this position, and agrees that the main question presented in this matter is whether the instant conversion plan has in fact ended.

B. Petitioner argues that the plan has been terminated because the time period within which sales could be made pursuant to the intitial offering has expired with no amendment extending such time period being filed by petitioner. In this regard, petitioner points to the

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[2]The Division provided no further specification, post hearing, as to which unit transfers were timely reported. However, reference to Exhibit "E-10", and its list of filing dates, appears to indicate that all filings were timely made.

seventh amendment to the plan (see, Finding of Fact "5") arguing that such amendment's primary purpose was to limit the offering, and hence the plan, to those units sold to date. Petitioner also notes that all 34 remaining unsold units held by petitioner are fully rented, occupied and not being offered for sale. Petitioner points out that if it were to offer any of the remaining units for sale, it would be required to file new amendments with the Attorney General giving full disclosure of all relevant factors to potential purchasers in order to obtain permission to "revive" the plan and make additional sales. Petitioner apparently equates such an act to the creation of a new plan.

C. Petitioner's arguments for a refund are rejected. The claim that sales of units have ceased and that no units are being offered for sale, while true at the present time, does not mean that the conversion plan has ended. First, there is no evidence or even any claim by petitioner that the original conversion plan has been formally abandoned. In fact, there is no evidence that any notice of abandonment has been filed with the Attorney General or that purchasers have been notified of such an abandonment as required (see 13 NYCRR 18.1[o]). Further, petitioner admits that simply by filing requisite amendments with the Attorney General giving full disclosure of all relevant material matters, sales of units could be started again (see generally, 13 NYCRR 18.5[a][2], [9]; 18.5[c]). As stated by petitioner's representative at hearing, "...at this point in time, [the Sponsor] has stopped selling. He has rented up all of his apartments and he does not intend to sell. He has stated, in any event, [that if] he decides to sell, he would file a new amendment." Petitioner has provided no authority for the proposition that filing such an amendment would constitute the creation of a new plan as opposed to a revival, update and continuation of the same (original) plan to convert the premises to cooperative ownership. The common use of the term "initial" offering (see, e.g., Finding of Fact "5") leads to a conclusion that subsequent offerings under the same plan would be made. Contrary to petitioner's argument, the primary purpose of the seventh amendment appears to have been to provide required financial disclosure and not to limit the plan to those units actually sold (see Finding of Fact "5").

D. Additional support for denying petitioner's claim is found in the language of Tax Law Article 31-B. All of the relevant provisions use the word plan as opposed to offer. For example, Tax Law § 1440.7 defines "transfers pursuant to a cooperative plan" to mean "all transfers of stock in a cooperative corporation which owns real property." So too, Tax Law § 1445(1)(c) provides for the filing of a claim for refund as follows:

> "Condominium or cooperative plan or aggregated transfer. Provided however, that in the case of a transfer pursuant to a condominium or cooperative plan, or aggregated transfer, an application for refund may be filed with respect to any such transfer within two years from the date of the last transfer made pursuant to such plan or aggregated transfer or from the date on which the tax was paid, whichever is later..." (emphasis added).[3]

To accept petitioner's argument requires limiting the term "cooperative plan" to mean "cooperative offering" (and here specifically "initial offering"), as opposed to meaning the overall, governmentally regulated, plan to convert ownership of real property to cooperative form. In short, petitioner reads "plan" and "offering" as synonymous, arguing here that both have ended. Such a restrictive definition of the term plan is rejected (see, Matter of Lion Brewery of New York City, Tax Appeals Tribunal, May 2, 1991; cf., Matter of 1230 Park Associates v. Commr of Tax and Fin., ___ AD2d ___, 566 NYS2d 957 [3d Dept, 1991] ["the gains tax is imposed by the statute upon the overall cooperative conversion plan"]).

E. Petitioner misplaces reliance upon the Division's "safe-harbor" memorandum (TSB-M-86-[3]R), and its language that a sell-out with respect to a cooperative conversion plan has occurred under circumstances where the transferor has transferred 85% of his interest in the cooperative and more than one year has passed since the transfer of an apartment unit. The memorandum provides, specifically, that such circumstances give rise to a rebuttable presumption that a sell-out has occurred. Here, however, petitioner does not even approach an 85% transfer level, having sold only 12 of 46 units, and thus a sell out under the terms of the

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[3] Similarly, the statute of limitations on assessments, per Tax Law § 1444(3)(a)(1), sets a time period of three years from the date of the last transfer made pursuant to a (cooperative conversion) plan.

memorandum cannot be presumed. Further, there is no language in the memorandum indicating that later sales of units (after such a presumed sell-out) would not be part of the original conversion plan and properly subject to aggregation with prior unit sales.[4] Finally, petitioner argues, citing 20 NYCRR 590.45,

that if no sales occur over a period of three years petitioner is entitled to a conclusive presumption that the original plan is terminated and no future sales can be aggregated. This alternative argument is not ripe for adjudication in that the three-year period noted by petitioner has not yet passed. Such argument calls for a ruling on an event which has not yet occurred; therefore, any such ruling would be premature and thus inappropriate.

F. Turning to the issue of mortgage cost inclusion, Tax Law § 1440.5(a) provides that original purchase price:

> "shall also include the amounts paid by the transferor for any customary, reasonable and necessary...fees incurred...to create ownership interests in property in cooperative or condominium form, as such fees and expenses are determined under rules and regulations prescribed by the [Commissioner of Taxation]."

G. Regulations of the Commissioner of Taxation, specifically 20 NYCRR 590.39, set forth certain costs includable in original purchase price as costs incurred to convert property to cooperative or condominium form. These costs include mortgage recording tax on mortgages created as a result of conveyance of title to a cooperative corporation, as well as attendant mortgage commitment fees, points paid to a lender, etc. Petitioner notes that the Division allowed inclusion of the mortgage costs incurred in

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[4]The "safe harbor" memorandum, in general, provides guidelines for a taxpayer to apply in estimating anticipated consideration in a conversion. Using such guidelines will insulate a taxpayer from penalties, even if such estimated consideration falls below actual consideration received. The memorandum also recognizes the possibility that using such guidelines could result in estimated consideration being well below the amount of actual consideration ultimately received (especially in periods of rising real estate values), hence tempting some taxpayers to refrain from selling the last unit(s) in a plan thereby evading tax due on actual consideration received (as calculated upon total sell-out or "close-up"). To counter such possible abuse, the presumed sell-out at 85% as described above is included in the memorandum.

placing the wrap-around mortgage on the property, upon the basis that the wrap-around mortgage was part of the cooperative conversion. In turn, petitioner argues for the same characterization of expenses incurred in placing the underlying institutional mortgage, arguing that it too was part of the cooperative conversion and that such costs on the underlying mortgage would have been incurred in connection with the wrap-around mortgage if the underlying mortgage had not been placed on the property prior to the conversion.

H. Petitioner's arguments on the mortgage expenses are rejected. It cannot be said that such costs were incurred as a necessary step to create ownership interests in cooperative form. Rather such costs on the underlying mortgage were incurred nearly four months prior to the transfer from the sponsor (petitioner) to the cooperative housing corporation, and were incurred in connection with refinancing an existing $300,000.00 mortgage. This refinanced institutional mortgage was continued as a lien on the property and a wrap-around mortgage was ultimately executed by the cooperative corporation to the sponsor at the time of the realty transfer. The fact that the lien of the institutional mortgage continued and was encompassed by the wrap-around mortgage does not mean the former was incurred to create ownership interests in cooperative form. In fact, petitioner's choice to remove its equity in the premises in the form of cash does not come within the ambit of costs incurred to create ownership interests in cooperative form; rather, the same reflects petitioner's business choice to maximize a "cash-out" of the property, an extra step taken by petitioner.

I. The petition of Albe Realty Co. is hereby denied, and the Notice of Determination dated July 18, 1989, modified only insofar as to remove penalties (see Finding of Fact "11", Footnote "2") is sustained.

DATED: Troy, New York
7/3/91

ADMINISTRATIVE LAW JUDGE