STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of BELHARA ASSOCIATES LIMITED PARTNERSHIP for Revisions of Determinations or for Refunds of Taxes on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	: : : : :	DETERMINATION DTA NOS. 807916, 807917, 807918, 807919, 809573, 809574, 809575, 809576, 809577 AND 809616

Petitioner, Belhara Associates Limited Partnership, c/o Margolin, Winer & Evens, CPA's, 600 Old Country Road, Garden City, New York 11530, filed ten petitions for revisions of determinations or for refunds of taxes on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On October 22, 1992 and October 29, 1992, respectively, petitioner by its representative, James L. Tenzer, Esq., and the Division of Taxation by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel), executed ten waivers of hearing and agreed to submit each of these cases for determination. All documents and briefs to be submitted were due by August 16, 1993. The Division of Taxation submitted documents on January 6, 1993. A stipulation was submitted on March 4, 1993. Petitioner submitted its initial briefs on April 6, 1993. The Division of Taxation's answering briefs were received on June 24, 1993, and petitioner's reply briefs were filed on August 16, 1993. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether, for eight of the ten cooperative apartment projects at issue, the Division of Taxation erroneously calculated "original purchaseprice" used to determine petitioner's gains tax liability on the sale of shares in cooperative apartment units by its refusal to step-up petitioner's acquisition price to the fair market value of the property on the date the property was transferred or sold to the respective cooperative housing corporation.

II. Whether, for each of the ten cooperative apartment projects at issue, the Division of Taxation erroneously included a wraparound mortgage note in its calculation of "consideration" received by petitioner.

III. Whether petitioner's rights under the equal protection clauses of the United States and New York State Constitutions would be violated if (i) the Division of Taxation does not step-up petitioner's "original purchase prices" to the fair market values of the properties on the dates the properties were transferred to the respective cooperative housing corporations, and/or (ii) the Division of Taxation includes wraparound mortgage notes in its calculations of "consideration" received by petitioner.

IV. Whether the Division of Taxation erroneously disallowed so-called "conversion period interest", "conversion period real property taxes", and "advertising and promotional fees" in calculating "original purchase price".

V. Whether, if gains tax is determined to be due, petitioner may pay such tax in installments.

VI. Whether the Division of Taxation incorrectly calculated interest due.

VII. Whether petitioner demonstrated reasonable cause to abate the penalties imposed under Tax Law § 1446 if it is determined that gains tax is owing.

VIII. Whether the Division of Taxation utilized a proper method for allocating gain between the transfer of units not subject to tax as "grandfathered" units and transfers of units subject to tax.

FINDINGS OF FACT

These matters involve the following ten cooperative apartment projects:

DTA #	Project	Approximate Date of First Offering as Noted in the Offering Plan	Number of Apartments
807916	Riverdale Park Apartments Riverdale, New York	October 1, 1982	265
807917	67-76 Booth Street	October 1, 1982	128

	Forest Hills, New York		
807918	625 Gramatan Avenue Mount Vernon, New York	February 25, 1983	96
807919	280-290 Collins Avenue Mount Vernon, New York	March 28, 1983	149
809573	110-150 Draper Lane Dobbs Ferry, New York	February 25, 1983	82
809574	63-33 98th Place Rego Park, New York	January 7, 1983	143
809575	Boulevard Apartments 18-35, 18-55, 18-75 Corporal Kennedy Street 209-39 23rd Avenue Bayside, New York	January 10, 1984	247
809576	23-25 and 23-35 Bell Boulevard Bayside, New York	June 29, 1984	126
809577	Bell Apartments 211-10, 211-40 18th Avenue 211-35, 211-65 23rd Avenue 18-65 211th Street Bayside, New York	January 10, 1984	309
807616	3616 Henry Hudson Parkway Riverdale, New York	September 13, 1982	119

Petitioner was described in the offering plan for 23-25 and 23-35 Bell Boulevard, Bayside, New York (which indicated the latest date of first offering of the ten projects at issue) as follows:

> "The Sponsor, Belhara Associates Limited Partnership, is a Connecticut limited partnership having an office at 425 East 61st Street, Suite 701, New York, New York 10021. Sponsor is currently the contract vendee of the Property. MR Gold Associates Limited Partnership ('MR Gold'), located at 425 East 61st Street, Suite 701, New York, New York, and Parkview Belhara Associates Limited Partnership ('Parkview') located at 425 East 61st Street, Suite 701, New York, New York, are the general partners of Sponsor.
>
> "The following persons are the principals ('Principals') of the Sponsor who have been actively involved in the planning and consummation of this Plan:
>
> (i) Martin J. Raynes, general partner of MR Gold;
>
> (ii) Robert B. Stang, limited partner of MR Gold;

(iii) William A. Wiener, limited partner of MR Gold;

(iv) Richard B. Adelman, limited partner of MR Gold;

(v) Frederic D. Heller, limited partner of MR Gold;

(vi) Henry J. Bunis, limited partner of MR Gold;

(vii) Phyllis Ostrofsky, limited partner of MR Gold;

(viii) Charles R. Hack, general partner of Parkview; and

(ix) James B. Mintzer, limited partner of Parkview.

"Each of the Principals has a business address at 425 East 61st Street, Suite 701, New York, New York 10021.

"The Principals, acting through Belhara Associates Limited Partnership and other entities, have been active in the New York City Metropolitan area in the acquisition, development and ownership of residential real estate and the conversion of non-residential properties to residential use. The following properties are the five (5) most recently offered for sale as cooperatives or condominiums in which some of the Principals have been actively involved:

Address	Year First Available for Occupancy
1. 280/290 Collins Avenue Mount Vernon, New York	anticipated - 1984
2. 625 Gramatan Avenue Mount Vernon, New York	anticipated - 1984
3. 110/150 Draper Lane Dobbs Ferry, New York	anticipated - 1984
4. 63-33 98th Place Rego Park, New York	anticipated - 1984
5. 3050 Fairfield Avenue Riverdale, New York"	anticipated - 1984

The Division of Taxation ("Division") issued the following ten notices of determination of tax due under the gains tax law against petitioner:

			Amount Asserted As Due:			
DTA #	Date of Notice	Project	(i) Tax	(ii) Penalty (and Penalty interest)	(iii) Interest	(iv) Total
807916	11/7/88	Riverdale Park Apts. Riverdale, NY	$ 49,039.00	$ 17,164.00	$ 18,317.00	$ 84,520.00
807917	11/7/88	67-76 Booth St.	36,084.00	12,944.00	17,679.00	67,707.00

		Forest Hills, NY				
807918	11/7/88	625 Gramatan Ave. Mount Vernon, NY	21,092.00	6,857.00	6,441.00	34,390.00
807919	11/29/88	280-290 Collins Ave. Mount Vernon, NY	35,072.00	12,275.00	11,530.00	58,877.00
809573	5/4/89	110-150 Draper Lane Mount Vernon, NY	33,914.00	16,087.43	11,869.75	61,871.18
809574	5/4/89	63-33 98th Place Rego Park, NY	69,914.00	31,994.59	24,469.90	126,378.49
809575	12/11/89	Boulevard Apartments Bayside, NY	256,580.15	89,803.01	111,673.87	458,057.03

809576	12/11/89	23-25 and 23-35 Bell Boulevard Bayside, NY	31,787.19	11,125.32	13,763.01	56,675.52
809577	3/3/89	Bell Apartments Bayside, NY	470,589.00	173,502.75	166,581.18	810,672.93
809616	9/25/89	3616 Henry Hudson Pkwy. Riverdale, NY	25,347.80	8,871.65	10,076.49	44,295.94

The four notices issued in November 1988 were on a Form AU-5.2 which showed the "Audit Division - Central Miscellaneous Tax Section" as the issuing entity. The notices pertaining to DTA Numbers 809573 and 809574 were on a Form DTF-963 showing the "Audit Division - New York D.O. - Gains Tax" as the issuing entity. The notice pertaining to DTA Number 809577 was on a Form DTF-963 showing the "Audit Division - New York D.O. - Misc Tax" as the issuing entity. Finally, the notices pertaining to DTA Numbers 809575, 809576 and 809616 were on forms DTF-963F showing the "Audit Division - Gains Tax Post Transfer" as the issuing entity. The four notices issued in November 1988 also asserted additional amounts of interest with no explanation except for the notice pertaining to DTA Number 807919, which indicated that additional interest of $1,278.35 was asserted for a period from August 20, 1988 to December 9, 1988. The use of various types of notices was unexplained; this reflects the fact that the record on submission contains hundreds of pages with little or no explanation.

<u>Riverdale Park Apartments</u>

Attached to petitioner's Request for Conciliation Conference, dated January 23, 1989, is a copy of a Statement of Proposed Audit Adjustment, dated August 8, 1988, which asserts tax plus penalty and interest in the amounts noted in Finding of Fact "3", but provides no explanation other than "[t]ax due per Audit." Several schedules, apparently prepared by the State's auditor, provide some detail concerning the calculation of the tax asserted as due. A so-called "WEC & Audit Schedule" dated August 17, 1988 (subsequent to the Statement of Proposed Audit Adjustment), which perhaps is an abbreviation for "<u>w</u>orksheet <u>e</u>stimated <u>c</u>onsideration", shows the following complex calculation of tax due of $49,039.00:

Cash consideration	$ 3,570,440.00
Bulk sale	6,035,213.00

Garage	67,390.00
Total consideration	$ 9,673,043.00
Add: Mortgage Indebtedness	3,500,000.00
Less: Mortgage Amortization	(8,750.00)
Total Estimated Consideration	$13,164,293.00
Less: Reserve Fund as per cooperative housing corporation closing	(33,695.00)
Working Fund	(1,000,000.00)
Actual Brokerage Commissions	(288,077.00)
Balance	$11,842,521.00
Less: Original Purchase Price	(11,278,108.00)
Anticipated Gain on Taxable Sale	$ 564,413.00
Tax at 10%	56,441.00
Total Taxable Shares	48,714
Anticipated tax per share	1.15862
Number of shares per audit	48,714
Total liability	$ 56,441.00
Less: Tax due on % change representing mere change of identity	(7,402.00)
Balance Due	$ 49,039.00
Interest	18,317.00
Penalty at 35%	17,164.00
Total due per audit	$ 84,520.00

Petitioner sold 184 of the 265 units in Riverside Park Apartments to Metropolitan Associates Limited Partnership ("MALP") in bulk in a transaction which qualified as a partial mere change of identity to the extent of 18.49% because certain partners in petitioner also had an interest in MALP. As a result, the Division reduced total liability shown in Finding of Fact "5" of $56,441.00 by $7,402.00 for a balance asserted due of $49,039.00.

Another schedule, a so-called "CACIC Sheet", dated June 11, 1987, which perhaps is an abbreviation for <u>c</u>omputation of <u>a</u>cquisition, <u>c</u>apital <u>i</u>mprovements and <u>c</u>onversion costs (apparently prepared by the State's auditor), detailed the calculation of the original purchase price of $11,278,108.00 which was used in Finding of Fact "5" to compute "anticipated gain on taxable sale". This "CACIC Sheet" shows the following computation for original purchase price:

Acquisition	
Original cost per contract	$ 9,818,000.00
Lost rents (as per acquisition contract)	138,814.00
Legal fees	32,578.00
Commitment fee - Citibank	17,143.00
	$10,006,535.00

Capital Improvements

Appliance Fund	$291,403.00	
Kitchens	209,194.00	
Bathrooms	170,284.00	
Plumbing	1,492.00	
Painting	107,892.00	
Elevator	2,700.00	
Flooring	4,235.00	
Electrical	1,305.00	
Glass	3,482.00	
Construction Period Interest	66,096.00	
		$ 858,083.00
Conversion Costs		
Printing	$ 10,912.00	
Filing Fees	7,275.00	
Inspection	539.00	
Title Insurance	29,380.00	
NYC Real Property Transfer Tax	246,825.00	
NYS Real Property Transfer Tax	10,800.00	
Mortgage Recording Tax	21,976.00	
Recording Fees	200.00	
Searches & Inspection	283.00	
Developers Fees (supervision and administration)	70,253.00	
Legal Fees	77,201.00	
Accounting Fees	3,942.00	
		$ 479,586.00
		$11,344,204.00
Disallowances: construction period interest		(66,096.00)
Total Original Purchase Price		$11,278,108.00

Another schedule, also apparently prepared by the State's auditor, detailed the computation of interest due to September 8, 1988 of $18,317.00 as follows:

	Tax	Interest
Bulk sale on 12/31/85 34,554 shares x 1.5862 [sic]	$40,035.00 (7,402.00) $32,633.00	$ 8,680.00
Apt. A13 7/7/86 to 9/8/88 140 shares x 1.15862	162.20	45.00
Apt. F57 3/5/86 to 9/8/88 251 shares x 1.15862	290.81	96.00
Apt. E35 4/15/85 to 9/8/88 183 shares x 1.15862	212.03	109.00
Composite Date (all others) 12/1/84 to 9/8/88 13,586 shares x 1.15862	15,741.00	9,387.00

	$49,039.04	$18,317.00

Although the auditor showed the use of 1.5862 per share in calculating the gain on the bulk sale of 34,554 shares, in fact he used the correct amount, 1.15862, to calculate $40,035.00 as the amount of tax due, before subtracting $7,402.00 which represented the mere change of identity (as noted in Finding of Fact "6"). The $7,402.00 was properly calculated by applying 18.49% (the percentage interest representing a mere change of identity) to 34,554 shares (the amount of shares transferred to MALP in the bulk sale) resulting in 6,389 taxable shares, which then multiplied by 1.15862 (the anticipated tax per share) equals $7,402.00.

Penalty of $17,164.00 was calculated as follows: $49,039.00 x .35 = $17,164.00.

Also attached to petitioner's Request for Conciliation Conference are photocopies of computer printouts showing the calculations for the amounts of interest shown above. For example, interest of $9,387.07 on tax due on the transfer of "all others" was calculated as follows:

Interest start date 12/1/84	
Interest end date 9/8/88	
Interest base $21,550.00 [sic]	
89 days at 11.0% from 12/1/84 to 2/28/85	$ 585.72
365 days at 11.8% from 2/28/85 to 2/28/86	2,771.82
365 days at 9.5% from 2/28/86 to 2/28/87	2,481.88
365 days at 7.5% from 2/28/87 to 2/28/88	2,132.87
192 days at 8.9% from 2/28/88 to 9/8/88	1,414.78
1,376 days total interest	$9,387.07

It is noted that the auditor utilized an incorrect interest base of $21,550.00 since 13,586 shares times 1.15862 (the correct anticipated tax per share, <u>not</u> 1.5862) equals $15,741.01. Similarly, the interest calculations for the transaction involving the sale of Apt. A13, Apt. F57 and Apt. E35 are incorrect because they too used an incorrect interest base.

The Division submitted into the record a document labeled "Closing Statement Cooperative Conversion of Riverdale Park Apartments, Riverdale, New York Prepared for Riverdale Park Corp." which was numbered "16".[1] Since this particular matter is representative

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[1]By a letter dated January 5, 1993, the Division submitted 173 documents which were numbered sequentially. Although described as "the jurisdiction documents for these cases", they are much more than that, and few other documents were submitted. Attached to the briefs

of all ten matters, the following description of "The Transaction" in this closing statement establishes the pattern followed by petitioner in these ten projects involving the conversion of apartments into cooperative housing units:

> "In connection with the conversion to cooperative ownership of the premises known as Riverdale Park Apartments, Riverdale, New York (the 'Premises'), Sponsor [petitioner], as contract vendee pursuant to a contract dated as of June 15, 1982 with Riverdale
>
> Park Associates, directed that fee title to the Premises be conveyed directly to the Apartment Corporation [Riverdale Park Corp.] by Riverdale Park Associates by bargain and sale deed . . . dated May 3, 1984.
>
> "The closing of title to the Premises with the Apartment Corporation ocurred [sic] concurrently with the closing of title with the Sponsor. Certain documents, as well as the deed, were delivered directly to the Apartment Corporation from Riverdale Park Associates.
>
> "The purchase price for the Premises paid to the Sponsor by the Apartment Corporation included the following:
>
> "(a) the aggregate cash proceeds obtained by the Apartment Corporation in connection with the sale of its shares to individual purchasers as of May 3, 1984 pursuant to individual subscription agreements (6,579 shares sold for a total of $1,069,504) less the working capital fund retained at the closing by the Apartment Corporation (the 'Working Capital Fund'), and less additional offering expenses incurred in connection with the sales and closing (including printing and advertising expenses, professional and legal fees, offering plan registration fees, broker's fees, gains tax and transfer tax expenses, marketing fees and title expenses), as provided for in the Contract of Exchange between Sponsor and Apartment Corporation dated as of June 15, 1982 and as amended by Supplemental Agreement dated as of May 3, 1984 (the 'Contract') and
>
> "(b) the Unsold Shares (42,135 shares valued at $8,138,119.25) and their appurtenant proprietary leases; and
>
> "(c) the Apartment Corporation taking subject to a purchase money mortgage on the closing date with Sponsor in the principal amount of $3,500,000.00 (the 'Mortgage').
>
> "As set forth in the letter of the Selling Agent [M. J. Raynes, Inc.] containing the calculations used to determine the total consideration received by Sponsor . . . but without taking any offering expenses into account, the aggregate value of the consideration received by Sponsor for items (a) and (b) above, was calculated to be $9,207,623.25. However, the total consideration received by Sponsor for the purposes of obtaining title insurance was calculated to be

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submitted by petitioner are mostly additional copies of various documents previously transmitted by the Division. In fact, it appears that, except for an occasional copy of a notice and demand, no additional documents were filed by petitioner.

$13,000,000 based on the gross cash proceeds obtained by the Apartment Corporation in connection with the sale of its shares, the value of the Unsold Shares and the principal amount of the Mortgage. The New York City Real Property Transfer Tax Return was calculated to be $246,825.07 based upon the price in the Riverdale Park Associates - Belhara Associates Limited Partnership contract.

"The transaction was closed in accordance with the provisions of the Offering Plan--A Plan To Convert to Cooperative Ownership Premises known as Riverdale Park Associates, Riverdale, New York, dated November 12, 1982, (the 'Plan') as amended by the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Amendments thereto."

It is observed that the closing took place at the offices of Robinson, Silverman, Pearce, Aronsohn & Berman, the law firm representing Riverdale Park Associates, and that Messrs. Arnold Goldstein, Sam Goldstein and John Bianco appeared on behalf of the partnership, Riverdale Park Associates.[2] It is noted that the same law firm, Robinson, Silverman, Pearce, Aronsohn & Berman, by attorney Matthew Klein, represented the cooperative housing corporation, Riverdale Park Corp.

Included in the record is a transferor questionnaire, Form TP-580, dated April 18, 1984, which was submitted by Riverdale Park Associates, c/o Samsom Management, 97-77 Queens Boulevard, Rego Park, New York, for the transfer of fee title to Riverdale Park Corp., the cooperative housing corporation. Riverdale Park Associates noted that consideration for the transfer was $1,000,000.00 or more, but claimed exemption from gains tax for two reasons: (1) under Tax Law § 1443.6 because the contract was entered into prior to March 29, 1983 (the effective date of the gains tax law) and (ii) "[i]nitial transfer-conversion to cooperative housing."

Also included in the record is a transferor questionnaire, Form TP-580, dated May 16, 1984, which was submitted by petitioner for the transfer of ownership of 57 of the 265 cooperative units included in the

[2]The sales agreement indicated that Sam Goldstein, Arnold Goldstein, SLA Realty Corp. by Arnold Goldstein, Lilarn Properties, Inc. by Arnold Goldstein and Sam Goldstein, as executor of the Estate of Lillian Goldstein were the "Sellers" (i.e., the partners of Riverdale Park Associates).

Riverdale Park Apartments conversion project. Petitioner reported no "anticipated tax due" on a loss of $2,202.00 calculated as follows:

Gross consideration to be paid for transfer by transferee[3]	$2,624,385.00
Brokerage fees to be paid by transferor	115,096.00
Consideration	2,509,289.00
Purchase price paid to acquire real property	2,062,584.00
Cost of capital improvements to real property	448,907.00
Original purchase price	2,511,491.00
Loss ($2,511,491.00 less $2,509,289.00)	$ 2,202.00

An Exhibit "A" attached to the questionnaire showed the following allocation between the 57 units reported as having been transferred by petitioner and the remaining 208 units:

	57 Transferred Units	208 Remaining Units	Grand Totals
Percentage	.201749 (taxable)	.798251 (nontaxable)	1.000000
Gross consideration	$2,624,385.00	$10,383,784.00	$13,008,169.00
(Less) Brokerage fees	115,096.00	455,394.00	570,490.00
Consideration	$2,509,289.00	$ 9,928,390.00	$12,437,679.00
Purchase price to acquire	2,062,584.00	8,160,932.00	10,223,516.00
(Plus) Cost of capital improvements	448,907.00	1,776,169.00	2,225,076.00
Original purchase price	$2,511,491.00	$ 9,937,101.00	$12,488,592.00

An Exhibit "B" attached to the questionnaire showed the following computation of "purchase price paid to acquire real property":

Acquistion	$ 9,818,000.00
Mortgage costs and fees	17,143.00
Attorney's fees	35,703.00
Title costs and fees	15,000.00

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3 This transferor questionnaire referenced "[a]ttached forms TP-581 (5/83)" which were not included in the document submitted. An Exhibit "A" attached to the questionnaire listed 57 transferees, the particular unit purchased, percentage interest, date of purchase agreement (ranging from March 20, 1983 to March 31, 1984), gross consideration (ranging from $26,703.00 to $80,376.00), brokerage fees and various items allocated to the particular units, including purchase price to acquire, cost of capital improvements, original purchase price and gain subject to tax.

Closing costs	337,670.00
Total purchase price paid to acquire real property	$10,223,516.00

Exhibit "B" referenced a so-called "Exhibit E, copy of June 15, 1982 'Agreement of Sale of Partnership Interest . . ." for the acquisition cost reported of $9,818,000.00. This document was submitted by the Division as "13". A complex document, it provided as follows with regard to petitioner's purchase price for Riverdale Park Apartments:

> "Sellers [Riverdale Park Associates] hereby agree to sell to Buyer [petitioner] and Buyer hereby agrees to purchase from Sellers all of the Partnership Interests on the Closing Date for an aggregate purchase price of $9,818,000.00, (the 'Initial Purchase Price') less title, transfer and recording fees, taxes and stamps, title charges, including without limitation title insurance premiums and survey costs, real property transfer taxes, mortgage and any other recording taxes and fees and the New York State Stamp Tax on Deeds and any other fees, charges or assessments necessary to consummate this transaction, other than legal fees, payable at the Closing, up to the amount of such charges based on a consideration of $9,818,000, and further adjusted as provided in Articles 11 [Closing Adjustments] and 15 [Further Actions Pending Closing] hereof (such price, as adjusted, to be referred to herein as the 'Purchase Price') and on the other terms and conditions set forth in this Agreement."

An Exhibit "C" attached to the questionnaire showed the following calculation of "total cost of capital improvements":

Conversion period interest	$ 423,534.00
Conversion period taxes	66,085.00
Reserve fund for capital improvements	1,000,000.00
Printing, etc. (Plan)	10,940.00
Professional fees	62,702.00
Selling expenses	19,422.00
Apartment renovations (construction)	665,684.00
Appliance fund	300,000.00
Filing fee	10,225.00
	$2,558,592.00
Less: conversion period income (excluding interest and taxes)	(333,516.00)
Total cost of capital improvements	$2,225,076.00

An Exhibit "F" attached to the questionnaire showed the following calculation of gross consideration of $13,008,169.00:

Total anticipated cash portion of purchase price for shares	$ 9,508,169.00
Amount of purchase money mortgage	3,500,000.00
	$13,008,169.00

The $9,508,169.00 was "[b]ased upon actual sales prices of units for which purchase agreements have been executed [presumably 57 units] and accepted and current prices for unsold units [presumably 208 units]."

An Exhibit "H" attached to the questionnaire showed the anticipated <u>cash</u> portion of purchase price for 265 units totalling $9,508,169.00. It is observed that this amount corresponds to the gross consideration shown on Exhibit "A" of $2,624,385.00 for the 57 transferred units and $10,383,784.00 for the 208 remaining units (totalling $13,008,169.00) because the cash portion of $9,508,169.00 plus the amount of the purchase money mortgage of $3,500,000.00 also totals $13,008,169.00. It is noted that the amounts used on Exhibit "H" for anticipated cash portion of purchase price are substantially lower than the amounts shown on the "Schedule of Purchase Prices and Share Allocations", included in the Cooperative Offering Plan for Riverdale Park Apartments introduced into the record on submission by the Division as "17". Furthermore, Exhibit "A" attached to the questionnaire shows a total gross consideration for the 57 units transferred at the closing of $2,624,385.00 with specific amounts shown for each of the 57 units transferred which are substantially higher than the amounts shown for such units on Exhibit "H". For example, unit A24 was sold to a transferee named Tocco for $57,145.00 according to Exhibit "A", while on Exhibit "H" petitioner showed $36,059.00 as the "anticipated cash portion of purchase price" for this unit.

As noted in Finding of Fact "10", the transaction involving the conversion of Riverdale Park Apartments, which has been described in detail, is representative of all ten matters. The other nine matters involved the similar pattern: petitioner directing that fee title to the respective premises be conveyed directly to the respective cooperative housing corporation pursuant to an earlier sales agreement with an entity that was the owner of the premises. As a result, the remaining nine transactions will be described in less detail. Initially, certain relevant facts may be summarized as follows:

Date of
Sales Agreement

DTA #	Project	Original[4] Property Owner	Between Petitioner and Original Property Owner	Purchase Price[5] Specified in Sales Agreement
807917	67-76 Booth St. Forest Hills, NY	67-76 Booth St. Associates consisting of Sam Goldstein, Arnold Goldstein and Arlene Goldstein	June 15, 1982	$3,100,000.00
807918	625 Gramatan Ave. Mount Vernon, NY	Mikeadam Realty Corp. by Sam Goldstein	June 15, 1982[6]	$3,484,581.00
807919	280-290 Collins Ave. Mount Vernon, NY	Mikeadam Realty Corp. by Sam Goldstein	June 15, 1982	$5,280,650.00

4

All of the original property owners were related in some fashion to Samson Management, a New York partnership, which may be a play on the name of Sam Goldstein.

5

All of the sales agreements in the record provided that the purchase price was to be decreased by the same expenses noted in Finding of Fact "12" for the Riverdale Park Apartments.

6

The same sales agreement applied to the properties involved in DTA Numbers 807918 and 807919. A third property located at 280 Bronxville Road, Yonkers, New York also covered by this agreement was not petitioned herein.

809573	110-150 Draper Lane Dobbs Ferry, NY	--[7]	June 15, 1982	$3,163,562.00
809574	63-33 98th Place Rego Park, NY	63-33 98th Place Associates	June 15, 1982[8]	$4,537,058.00
809575	Boulevard Apartments Bayside, NY	Boulevard Apartments Associates consisting of Arnold Goldstein, and Arnold Goldstein as trustee of eight different trusts and Scott David Goldstein	June 15, 1982	$9,970,000.00

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A sales agreement between petitioner and the original property owner was not included in the documents submitted. A document numbered "101", "Closing Statement Cooperative Conversion of 110-150 Draper Lane, Dobbs Ferry, New York", referencing a closing held on May 17, 1984, indicated that:

> "there were appearances by Brian B. Smith, Esq. of Robinson, Silverman, Pearce, Aronsohn & Berman, attorneys for Draper Lane Associates, Seller, a New York general partnership and by Arnold Goldstein and John Bianco of Samson Management, on behalf of said partnership . . . in connection with the transfer of the premises known as 110-150 Draper Lane, Dobbs Ferry, New York by Draper Lane Associates to the Apartment Corporation at the direction of the Sponsor."

Consequently, it is reasonable to find that the original property owner was also a Goldstein family entity of some sort. In addition, it is reasonable to assume that the purchase price specified in the sales agreement was used by the Division in calculating its audited original purchase price of $3,203,439.00 which on a document numbered "94" shows an audited acquisition cost of $3,163,562.00 based on $2,210,000.00 plus $914,581.00 (described as "liability") plus $38,981.00 (described as "lost rent"). Therefore, $3,163,562.00 was used above as the "purchase price specified in sales agreement."

8

As in DTA Number 809573, the sales agreement was not introduced. It is reasonable to assume that this sales agreement, like nearly all the others, was dated the same date since 63-33 98th Place Associates also appears to be a Goldstein family entity. The $4,537,058.00 was determined to be the "purchase price specified in sales agreement" in a similar fashion to the one described in footnote "7".

809576	23-25 and 23-35 Bell Bouleavard Bayside, NY	Mikeadam Realty Corp., a Goldstein family entity	October 28, 1982	--[9]
809577	Bell Apartments	Bell Apartments Associates, a Goldstein family entity	June 15, 1982	--[10]
809616	3616 Henry Hudson Pkwy. Riverdale, NY	3616 Henry Hudson Parkway Associates consisting of Sam Goldstein, Arnold Goldstein, Arnold Goldstein as trustee and Arlene Goldstein	June 15, 1982	$4,620,000.00

Bulk Sales of Unsold Units

Submitted into the record as a document numbered "36" is an "Amended and Restated Purchase Agreement", dated December 30, 1985, between petitioner and Metropolitan Associates Limited Partnership. It is observed that Martin J. Raynes and Charles Hack executed this document on behalf of petitioner, and Jerome I. Gellman, Charles Hack and James B. Mintzer executed the document on behalf of MALP. The purchase price for the sale of petitioner's unsold shares at seven of the ten projects at issue[11] was allocated as follows:

DTA #	Project	Allocation of Purchase Price
807916	Riverdale Park Apartments	$6,035,213.00 (34,554 shares at $174.66 per share)
807917	67-76 Booth Street	$2,474,348.00

[9] Petitioner did not raise the issue designated "I" with regard to this particular matter, which may explain why the "purchase price specified in sales agreement" is not clearly set forth in the record.

[10] Like the situation described in footnote "9", petitioner did not raise the issue designated "I".

[11] A project at 3050 Fairfield Avenue, Riverdale, New York was also covered by this bulk sale agreement but is not at issue herein.

		(14,639 shares at $169.02 per share)
809574	63-33 98th Place	$3,117,035.00 (26,900 shares at $115.87 per share)
809575	Boulevard Apartments	$3,149,170.00 (27,110 shares at $116.16 per share)
809576	23-25/35 Bell Boulevard	$1,194,320.00[12] (11,075 shares at $107.84 per share)
809577	Bell Apartments	$8,606,659.00 (74,435 shares at $115.63 per share)
809616	3616 Henry Hudson Parkway	$2,883,168.00 (29,378 shares at $98.14 per share)

The purchase price for the sale of petitioner's interest as lessee under certain parking leases was also allocated:

DTA #	Project	Allocation of Purchase Price for Parking Spaces
807916	Riverdale Park Apartments	$23,140.00 (52 spaces at $445.00 each)
807917	67-76 Booth Street	$3,560.00 (8 spaces at $445.00 each)
809574	63-33 98th Place	$27,145.00 (61 spaces at $445.00 each)
809575	Boulevard Apartments	$24,920.00 (56 spaces at $445.00 each)
809576	23-23 & 23-35 Bell Blvd.	$8,455.00 (19 spaces at $445.00 each)
809577	Bell Apartments	$88,110.00 (198 spaces at $445.00 each)

Apparently no parking spaces were sold at 3616 Henry Hudson Parkway (DTA Number 809616).

This "purchase agreement" provided that only $57,891.00 was "to be paid in cash . . . ." Petitioner allocated $11,972.00 of this cash amount to Riverdale Park Apartments. It is noted that the total purchase price for all of the units and parking spaces in issue sold under this agreement was $27,635,243.00 and the portion allocable to Riverdale Park Apartments is $6,058,353.00.

Submitted into the record as a document numbered "57" is a copy of a "Contract of Sale - Cooperative Apartment" dated September 26, 1985 between petitioner and Charles Hack, James B. Mintzer, Martin J. Raynes, Robert B. Stang, William A. Wiener, Frederic D. Heller, Richard B. Adelman, Henry Bunis and Phyllis Ostrofsky, as tenants-in-common, having an

[12]This amount also appears to include units located at 23-45/55 Bell Boulevard which was not included in the petition covering DTA Number 809576.

address as c/o MJR (perhaps an abbreviation for Martin J. Raynes) Development Corp. for the sale of petitioner's unsold shares at the other three projects at issue for an allocated purchase price as set forth in a Schedule "B" to the contract as follows:

DTA #	Project	Allocation of Purchase Price
807918	625 Gramatan Avenue	$1,982,976.00
807919	280-290 Collins Avenue	2,268,028.00
809573	110-150 Draper Lane	1,161,241.00

It appears that Martin J. Raynes and Charles Hack executed this contract on behalf of petitioner.

67-76 Booth Street, Forest Hills, New York

In DTA Number 807916, Riverdale Park Apartments, petitioner has raised each of the issues designated one through seven at the start of this determination. The facts have been detailed with reference to this project so as to resolve such issues by use of this representative matter. A review of the other nine matters reveals only one additional issue which was not raised in DTA Number 807916. DTA Number 807917, 67-76 Booth Street, Forest Hills, New York, will be used as a representative matter to resolve the issue designated as eight at the start of this determination. Facts necessary to resolve such issue are as follows.

The sale of three units representing 587 shares in Booth Street Owners Corp., the cooperative housing corporation, were "grandfathered" and not subject to the imposition of gains tax. 27,527 shares representing 125 units were, according to the Division, subject to tax. Expenses were apparently apportioned to the grandfathered units based upon a fraction where actual consideration paid for the grandfathered units was the numerator and total consideration to be received, including actual amounts and estimated amounts, was the denominator.

In a letter dated August 20, 1993 from Andrew J. Zalewski, the Division's representative, to the Administrative Law Judge, Mr. Zalewski, responding to certain allegations in petitioner's reply briefs, noted:

> "I am very concerned with the petitioner's various comments that suggest that our office was previously provided with a variety of documents to substantiate various items of expense . . . . After reviewing the Department's files I am fairly certain that none of the loan documents or documents for the amounts claimed to have been paid were ever forwarded to the Law Bureau by the taxpayer's representative for . . . matters submitted . . . . Furthermore, there has been no

stipulation of facts prepared that addresses any issue raised by the taxpayer."

It is observed that although the record on submission herein consists of hundreds of pages, there is no documentation for any items of expense claimed by petitioner on the projects at issue which were disallowed by the Division. In fact, without testimony or even the submission of affidavits, the complex transactions at issue have been very difficult to decipher. Furthermore, petitioner has greatly confused the record by submitting multiple copies of documents (e.g., a document numbered "57" is the same as an Exhibit "4" to petitioner's brief concerning DTA Number 807919 and Exhibit "4" to petitioner's brief concerning DTA Number 809573) and repetitious briefs that fail to clearly set forth how issues in one matter are the same or vary from other matters.

In the following six matters, the respective statutory notices at issue were sustained by the conciliation conferee: DTA Numbers 807916, 807917, 809573, 809575, 809576 and 809616. However, in the remaining four matters, the conciliation conferee reduced gains tax asserted as due as follows:

DTA #	Gains Tax Asserted Due in Notice of Determination	Tax, as Reduced by Conferee
807918	$ 19,592.00	$ 14,563.00
807919	35,072.00	30,177.00
809574	69,914.00	63,566.18
809577	470,589.00	463,293.79

In each matter where tax was reduced, petitioner substantiated additional capital improvement expenses (apparently certain model apartment expenses).

SUMMARY OF THE PARTIES' POSITIONS

In its brief submitted with reference to DTA Number 807916, Riverdale Park Apartments, petitioner argues the following points (which have been numbered to correspond with the numbering of the issues at the beginning of this determination):

(1) The "original purchase price" for shares sold by petitioner should be based upon the fair market value of the property on the date the partnership interests in Riverdale Park Associates were sold by petitioner to Riverdale Park Corp., the cooperative housing

corporation. In other words, petitioner contends it is entitled to a step-up in basis from the acquisition cost for its interest in the property under the June 15, 1982 sales agreement (described in Finding of Fact "12") to the fair market value of the property on May 3, 1984 when the fee title to the property was conveyed to the cooperative housing corporation. Consequently, petitioner seems to be arguing that its basis should be stepped-up to the purchase price for the property paid to it (as sponsor) by the cooperative housing corporation. Petitioner contends that the Division's practice in the situation where individuals buy property for $100.00, immediately transfer it to a partnership, which in turn "sells" the property to a newly-formed corporation in exchange for shares of stock at a time when the fair market value of the property is $10,000,000.00 is to treat the "original purchase price" on the subsequent sale of the shares of stock by the partnership as $10,000,000.00, not $100.00. Petitioner contends that the Division "admitted" this practice in other matters pending in the Division of Tax Appeals. According to petitioner, the situation at hand is similar and it is of no matter that the transfer to the cooperative housing corporation was after the effective date of the gains tax law because it was pursuant to a binding contract executed prior to such effective date;

(2) The wraparound mortgage note received by petitioner pursuant to a "contract of exchange" dated December 20, 1982, prior to the effective date of the gains tax law (which, in fact, was not made part of the record), should be treated as "grandfathered consideration". Petitioner analogizes to the Division's treatment of consideration attributable to "bargain leases". According to petitioner:

> "[I]f the 'bargain lease' was created in a sale to the corporation prior to March 29, 1983 [the effective date of gains tax law] the Respondent acknowledges . . . [its] 'practice' to consider the 'consideration' attributable to the 'bargain lease' to have been entirely received prior to March 29, 1983 and, accordingly, exempt ('grandfathered') and not to be included in determining the gain on shares of stock sold after March 29, 1983";

(3) The Division's denial of a "step-up" (as described in [1] above) and "grandfathering" of the mortgage (as described in [2] above) violates petitioner's rights under the equal protection clauses of the New York State and United States Constitutions;

(4) Interest incurred on amounts borrowed to fund the expenditures incurred to create

ownership interests in cooperative form and real estate property taxes incurred on vacant apartment units during the conversion period should be included in the calculation of "original purchase price". Petitioner argues that such expenses are "in theory and economic substance . . . not dissimilar to 'construction period interest' and 'construction period real property taxes'." Furthermore, according to petitioner, advertising and promotional fees should also be included in "original purchase price" as "costs to create ownership interest in cooperative form" under 20 NYCRR 590.39;

(5) Gains tax, if any, on the bulk sale of units and of parking spaces to Metropolitan Associates Limited Partnership should be payable in installments without interest;

(6) The Division incorrectly computed interest on the asserted deficiency because:

> "pursuant to 'Option B' [under TSB-M-83(2)R], no interest or penalty can be computed on the units sold prior to a required update filing based upon any difference between the actual 'consideration' received and the originally estimated 'consideration'";

(7) Penalty and interest penalty should be abated because petitioner's interpretation of the gains tax law and regulations was reasonable and it acted in "good faith". It "voluntarily, properly and timely notified the [Division] of the anticipated unit transfers" (petitioner's emphasis omitted), and it relied on its representative, who "was in contact with [the Division] at all times concerning these matters." Furthermore, interest and penalty should not be imposed based upon the Division's "safe harbor" guidelines.

A review of the other nine briefs submitted by petitioner in these matters reveals only one additional argument, not raised with reference to DTA Number 807916, Riverdale Park Apartments. In the same fashion that DTA Number 807916 is being used as the representative matter to resolve the seven issues designated at the beginning of this determination, this eighth argument raised in DTA Number 807917, 67-76 Booth Street project (which also corresponds to the eighth issue designated at the start), will be representative for other projects which also raised this issue:

(8) The Division incorrectly allocated gain between certain grandfathered units not subject to tax and units subject to tax. Petitioner contends that the Division incorrectly used "a

'two step' process which first allocates the actual 'cash consideration' and 'OPP' between the 'Grandfathered units' and the 'Taxable units' based on 'Option A' [set forth in TSB-M-83(2)R], and then computes the Gain for the 'Taxable units' . . . based on 'Option B'."

The Division counters that the gains tax law was designed to treat cooperative housing corporations differently. Relying on the decisions of the Tax Appeals Tribunal in Matter of Normandy Associates (March 23, 1989) and Matter of Birchwood Associates (July 27, 1989), the Division contends that the transfer to the cooperative housing corporation is ignored for purposes of calculating original purchase price. It dismisses petitioner's constitutional objections as meritless because "the Courts and the Tax Appeals Tribunal have already ruled that the Division of Taxation is properly administering the Gains Tax as it applies to cooperatives."

In addition, the Division argues that interest on realty acquisition financing and conversion period real property taxes are not allowable as part of original purchase price under the regulations. Moreover, petitioner failed to offer any evidence to "explain and document" expenses it claims should be included in original purchase price. The Division dismisses petitioner's claim that it qualified to make installment payments of gains tax on the transfer of units:

> "As the petitioner clearly failed to properly elect and make payments of gains tax as required by the applicable provisions of Tax Law former § 1442 there does not exist grounds for . . . payment of gains tax . . . pursuant to an installment payment plan."

The Division also rejects petitioner's claim that the Division used an improper "hybrid" method of determining gain:

> "What the petitioner describes as a distortion is the Department's method of acknowledging that certain units sold are not subject to tax pursuant to the exemption found at Tax Law § 1443(6)."

Finally, penalties were properly imposed, according to the Division, because given available information it was unreasonable for petitioner to conclude that two taxable transfers occur in a cooperative conversion scenario. Furthermore, petitioner misled by explaining in its filed transferor questionnaire that "its claimed acquisition cost for the subject property was the purchase price . . . paid pursuant to a contract dated June 15, 1982."

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a 10% tax upon gains derived from the transfer of real property located within New York State. The "gain" which is taxed is the difference between the "original purchase price" for the property and the "consideration" received for the property (Tax Law § 1440[3]).

B. Petitioner's argument that its original purchase price should be stepped-up to a so-called "fair market value" of the property on the date the partnership interests in Riverdale Park Associates were sold by petitioner to Riverdale Park Corp., the cooperative housing corporation (which it equated to the housing corporation's acquisition costs for the property), must be rejected. It is well established that a cooperative conversion does not involve two taxable transfers (Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316; 1230 Park Assoc. v. Commr. of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455; Matter of 61 East 86th Street Equities Group, Tax Appeals Tribunal, January 21, 1993; Matter of Birchwood Associates, Tax Appeals Tribunal, July 27, 1989).

C. The Tax Appeals Tribunal in Matter of Normandy Associates (March 23, 1989) rejected arguments like petitioner's:

> "[T]he [gains] tax . . . treats the transfer of shares by the realty transferor to unit purchasers as the taxable event . . . . [T]he 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 . . . . [T]he gains tax is imposed on the entire cooperative conversion plan . . . . The transfer to the cooperative corporation is . . . treated merely as a conduit which allows the transformation of the real property into shares allocated to units." (Emphasis added.)

Furthermore, petitioner's use of the term "fair market value" to describe the consideration it received from the cooperative housing corporation in exchange for the real property is questionable. As noted in Finding of Fact "10", the same law firm represented the partnership which originally owned the property and the cooperative housing corporation. As a result, it cannot be concluded that the cooperative housing corporation and petitioner negotiated at arm's length in establishing an acquisition price for the property. It would appear that both petitioner and the partnership, which originally owned the property, would be motivated to achieve the highest possible selling price to the cooperative housing corporation. Therefore, it is purely speculative and unproven by petitioner that the acquisition cost to the cooperative housing corporation represented the fair market value for the property (cf., Bernstein v. Commissioner of Taxation and Finance, ___ AD2d ___, ___ NYS2d ___ [3rd Dept., January 6, 1994] [wherein the court noted that a "compensation package" was not the product of arm's length negotiations]).

D. Tax Law § 1440(a) defines "consideration" as follows:

> "[T]he 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." (Emphasis added.)

The cooperative housing corporation assumed or took the real property at issue subject to a wraparound mortgage. Therefore, such mortgage was properly included by the Division in calculating consideration (cf., Matter of 61 East 86th Street Equities Group, supra).

E. Petitioner's argument that the denial of a "step-up" and "grandfathering" of the mortgage violated its rights under the equal protection clauses of the New York State and United States Constitutions is rejected.[13] As noted above, petitioner would be entitled to a "step-up" only if it were determined that there were two separate and distinct taxable transfers; this has been rejected. Furthermore, as noted above, the statute clearly includes a mortgage assumed or taken subject to in consideration. In short, petitioner has failed to sustain its heavy burden to establish palpably arbitrary or invidious discrimination in light of the very rational

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[13]An Administrative Law Judge has no authority to review the constitutionality of a tax statute on its face (Matter of Allied Grocers Cooperative, Tax Appeals Tribunal, November 30, 1989, confirmed 162 AD2d 791, 557 NYS2d 707). However, petitioner seems to be arguing that the gains tax statute was applied unfairly to it, and therefore this constitutional argument has been addressed in this determination.

basis described above for rejecting its arguments

(cf., Scobey v. New York State Tax Commn., 95 AD2d 905, 463 NYS2d 907; Matter of Balan Printing, Tax Appeals Tribunal, April 17, 1991).

F. Tax Law former § 1440 defined, in pertinent part, original purchase price as:

> "the consideration (i) paid by the transferor to acquire the interest in the real property or (ii) in the case of property acquired through gift or inheritance, the consideration paid by the last transferor who paid consideration to acquire the interest in the real property; plus in both cases the consideration by the transferor for any capital improvements made to such real property (including in the case of clause [ii] above, those by the last transferor who paid consideration) prior to the date of transfer" (Tax Law former § 1440[5]).

The above subdivision was repealed by the Laws of 1984 (ch 900, § 3, eff September 4, 1984) and was substituted with the following definition of original purchase price, in pertinent part, as:

> "(a) 'original purchase price' means the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property, including solely those costs which are customary, reasonable, and necessary, as determined under rules and regulations prescribed by the tax commission, incurred for the construction of such improvements. Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property and those customary, reasonable and necessary expenses incurred to create ownership interests in the property in cooperative or condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission" (Tax Law § 1440[5][a]).

In Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992), the Tribunal decided that the above change to the definition of "original purchase price" was a substantive change and not merely a clarification of the prior subdivision:

> "The Memorandum of the Governor's Program Bill, Gains Tax, 1984 (Bill Jacket, L 1984, ch 900) indicates that the new subdivision 5 added to section 1440 was a substantive change. In this memorandum under the headnote Substantive Proposals, it is stated, in pertinent part, that:
>
> > '[t]he proposal to allow customary, reasonable and necessary legal, architectural, and engineering costs, related to the sale of the property, and costs of creating cooperative and condominium ownership interests as an additional offset to taxable gain would impose the gains tax more accurately on the economic gain derived from a transfer.'"

Consequently, in V & V Properties (supra), the Tribunal decided that the taxpayer therein was "not entitled to include, as part of its original purchase price, the costs it incurred in the condominium conversion" because the transfer occurred prior to the effective date of the change.

As noted in Finding of Fact "1", the approximate dates of first offering as noted in the respective offering plans for each of the ten projects at issue predate the effective date of the change to the definition of "original purchase price" noted above. Moreover, the Division is correct in asserting that petitioner failed to offer any evidence to "explain and document" the expenses it claimed should be included in original purchase price.

G. Tax Law former § 1442 permitted a transferor to elect to pay gains tax on an installment basis as follows:

> "if the tax due exceeds fifty percent of the cash portion of the consideration received by the transferor on or before the date of transfer, the transferor may elect (i) to pay the entire tax, or (ii) where the cash portion of the consideration exceeds the tax due, to pay fifty percent of such cash portion, or (iii) where the cash portion of the consideration is equal to or less than the tax due, to pay the lesser or (a) fifty percent of the tax due or (b) such cash portion, and (iv) in the case of payments pursuant to clauses (ii) and (iii) hereof, to pay the balance over three years . . . in equal annual installments payable on the anniversary date of the transfer . . . ." (Emphasis added.)

If the transferor opts to pay in installments and fails to make an installment on the date that payment is due, former section 1442 further provided that "the tax commission[14] may declare the entire unpaid balance of the tax due and owing."

Petitioner failed to opt to pay installments in conformity with the above provisions. In fact, it appears that it was not until several years after the bulk transfers described in Finding of Fact "14" that petitioner raised the argument that it should be permitted to elect to pay tax in installments. As a result, the Division is correct that grounds do not exist for payment of gains tax pursuant to an installment payment plan. Furthermore, the record does not disclose when and how Metropolitan Limited Partnership and the tenants-in-common noted in Finding of Fact

[14] Pursuant to Tax Law § 2026, this reference to the tax commission is deemed to refer to the Division of Taxation.

"15" paid the remaining monies due on the bulk sale of units. In short, petitioner failed to carry its burden of proving entitlement to pay tax by installments (cf., Matter of K & D Development Corp., Tax Appeals Tribunal, June 18, 1992).

H. As noted in Finding of Fact "8", interest was computed by the Division from the date of transfer. Interest is imposable and due from the due date for the gains tax. As noted in Conclusion of Law "G", petitioner did not satisfy the statutory conditions for installment payment in a timely fashion and therefore failed to qualify for the installment payment election. As a result, interest was properly calculated by the Division back to the date of transfer (cf., Matter of Posner, Tax Appeals Tribunal, June 21, 1990).

In addition, petitioner has not established that it timely selected Option B as the method to calculate tax due. Therefore, the Division properly determined interest and penalty due on tax calculated by use of Option A (the actual consideration paid for each share less the amount of total original purchase price apportioned to each share), which was a valid method for the period at issue. It is observed that the Tax Appeals Tribunal, in footnote "12" of its decision in 61 East 86th Street Equities Group (supra), spelled out the nature of Option A and Option B filing methods for cooperatives and condominiums as described by the Division in TSB-M-83(2)-R (August 22, 1983). Since it was proper for the Division to use Option A, petitioner's argument that pursuant to 'Option B' . . . , no interest or penalty can be computed on the units sold prior to a required update filing based upon any difference between the actual 'consideration' received and the originally estimated 'consideration'" is rejected. In addition, it is noted that petitioner failed to set forth in a clear fashion its alternative interest calculations.

I. Pursuant to Tax Law § 1446.2(a):

> "Any person failing to file a tentative assessment and return or to pay any tax within the time required by [Article 31-B] shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount for each month of delay or fraction thereof . . . ."

The interest penalty may not exceed 25% in the aggregate. In addition, said section goes on to provide that if the Commissioner of Taxation:

> "determines that such failure or delay was due to reasonable cause and not due to willful neglect, [the commissioner] shall remit, abate or waive all of such penalty and such interest penalty."

Petitioner has the burden of proving that the failure to file and pay was due to reasonable cause and that it was not due to willful neglect. Petitioner has not shouldered this burden. In particular, the record does not support a conclusion that petitioner made a sufficient effort to ascertain its correct tax liability (see., Matter of Brounstein, Tax Appeals Tribunal, January 30, 1992; Matter of KAL Associates, October 17, 1991). In fact, the Division correctly pointed out that petitioner misled by explaining in its filed transferor questionnaire, detailed in Finding of Fact "12", that "its claimed acquisition cost for the subject property was the purchase price . . . paid pursuant to a contract dated June 15, 1982."

J. Petitioner has not established that the Division incorrectly allocated gain between certain grandfathered units not subject to tax and units subject to tax. Although not clearly articulated, it appears that petitioner contends that the Division's use of actual selling prices on those units already sold was improper. This contention is without merit. The Division upon audit simply used known amounts in calculating gain. Petitioner ignores the fact it did not elect any method (i.e., then available Option A or Option B) of reporting when the transfers were made, or pay tax. As a result, petitioner lost its entitlement to choose between Option A or Option B (Matter of Normandy Associates, supra; compare, Matter of Belvedere Garden Associates, Tax Appeals Tribunal, June 18, 1992). In light of this fact, the Division's use of actual (as opposed to theoretical anticipated) prices is entirely reasonable; actual consideration on units transferred but not reported was known and was used in calculating tax upon audit. Furthermore, under Option B, the Division is entitled to update to actual figures not only at certain selling plateaus, as noted, but more frequently if requested (see, TSB-M-86-[3]-R). Thus, the Division's audit computation is, in fact, an Option B approach updated to current amounts. In sum, petitioner's apparent position that gain should be recalculated by employing Option B from the outset thereby using estimated figures instead of known amounts is rejected (Matter of Normandy Associates, supra).

K. The ten petitions of Belhara Associates Limited Partnership are denied, and the ten notices of determination, except to the extent they were modified by conciliation orders and to the extent that interest should be recalculated due to the error noted in Finding of Fact "9", are sustained.

DATED: Troy, New York
February 17, 1994

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE