STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SIDNEY RAPOPORT	:	DETERMINATION DTA NO. 811824
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, Sidney Rapoport, Rapoport/Metropolitan Printing, 195 Hudson Street, New York, New York 10013, 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.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 7, 1993 at 1:15 P.M., with all briefs to be submitted by January 15, 1994. Petitioner appeared by Drake, Sommers, Loeb, Tarshis & Catania, P.C. (Steven L. Tarshis, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined that petitioner's conveyance of a leasehold interest which contained an option to purchase was a transfer of an interest in real property subject to the gains tax.

II. Whether the Division of Taxation properly determined that a termination of the aforesaid lease, prior to the exercise of the option to purchase, did not affect the taxability of the lease transaction, therebywarranting denial of petitioner's claim for refund of gains tax and interest previously paid.

III. Whether the Division of Taxation's determination that the aforesaid transaction was subject to gains tax was an unconstitutional application of the gains tax statutes.

FINDINGS OF FACT

On September 7, 1993, the representatives of Sidney Rapoport and the Division of Taxation entered into a written stipulation (including Exhibits "A" through "R"), the relevant portions of which have been incorporated into Findings of Fact "1" through "17".

On or about July 16, 1990, Sidney Rapoport ("petitioner"), as lessor, entered into a lease agreement with the Joseph Gardner Trust U/A/D December 30, 1987, as lessee, relative to real property located at 187-195 Hudson Street in New York City. The term of the lease was July 16, 1990 through May 31, 2039.[1]

On or about May 31, 1990, transferor and transferee questionnaires were filed with the Division of Taxation ("Division"). The transferor questionnaire set forth the following computation:

"1. Gross Consideration (Present value of lease using a 10% factor + Option + Brokerage to be paid by transferee to broker ($5,249,826 + $499,990 + $100,000)	$5,849,816
2. Brokerage	100,000
3. Consideration	$5,749,816

4. Original purchase price of Real Property x Value of Lease payments / Fair Market Value of Prop. = Adjusted OPP

$2,000,000 x $5,749,816 / $6,250,000 = $1,839,941 Adjusted OPP

Gross Consideration	$5,749,816
Less Adjusted OPP	(1,839,941)
Gain Subject to Tax	$3,909,875

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[1]The copy of the lease attached to the stipulation (Exhibit "A") was unsigned and undated. However, on the first page of the lease agreement, under the heading "TERM", the lease stated as follows:

"2. The term of this lease (the 'Demised Term') shall commence on June ___, 1990 (the 'Term Commencement Date'), and shall terminate on May 31, 2039 (the 'Expiration Date')."

Tax Due (10% of $3,909,875) $ 390,988"

Petitioner, on or about the same date, filed a supplemental gains tax return wherein he elected to pay the tax in 15 annual installments of $26,066.00. By check dated May 31, 1990, the first installment of gains tax due was paid.

By letter dated October 2, 1990, the Division notified petitioner that his election to pay the gains tax due in installments had been accepted as filed.

On or about July 7, 1991, petitioner paid the second installment of tax due in the amount of $26,066.00, plus interest in the amount of $41,846.29. Therefore, as of July 7, 1991, petitioner had paid a total of $93,978.29 which consisted of tax in the amount of $52,132.00, plus interest of $41,846.29.

On or about November 8, 1991, petitioner and the lessee agreed to terminate the lease and executed a Lease Termination Agreement. As part of the Lease Termination Agreement, the parties thereto agreed that the option to purchase the property was likewise terminated.

On or about February 15, 1992, a date which was within two years of the filing of the return and the payment of the first installment of tax due, petitioner filed a claim for refund of gains tax due in the amount of $52,132.00, plus interest of $41,846.29.

By letter dated March 31, 1992, the Division denied petitioner's refund claim in its entirety.

On June 30, 1992, a Request for Conciliation Conference was filed by petitioner requesting a refund in the amount of $93,978.20, representing tax and interest paid as of that date.

On October 30, 1992, after written notice to all parties by the conciliation conferee, a conciliation conference was held in Rye Brook, New York before Bruce M. Rauch, Conciliation Conferee. Glen L. Heller, Esq., appeared on behalf of petitioner; no personal appearance was made by any representative of the Division.

On November 9, 1992, petitioner's representative received a copy of the written position of the Division.

On November 16, 1992, a Notice and Demand for Payment of Tax Due was issued to petitioner in the amount of $60,423.14 ($26,066.00 representing the 1992 installment due and $34,357.14 in interest).

By letter dated November 27, 1992 (received by petitioner's representative on December 2, 1992), the conciliation conferee notified petitioner of his intention to sustain the position of the Division.

On December 8, 1992, the conciliation conferee issued a consent reflecting his decision to sustain the refund denial.

On December 21, 1992, petitioner paid the 1992 gains tax installment payment of $26,066.00, plus interest in the amount of $34,357.14. Attached thereto was a letter which advised the Division that these payments were being made under protest.

By Conciliation Order (CMS No. 123978) dated January 22, 1993, the Division's denial of petitioner's claim for refund was sustained.

By check dated July 6, 1993, petitioner paid the sum of $49,525.25 (tax of $26,066.00 and interest of $23,459.25).

On April 15, 1993, petitioner filed a petition with the Division of Tax Appeals. By letter dated April 21, 1993, the Division of Tax Appeals acknowledged receipt of the petition.

On August 4, 1993, petitioner's representative received the answer of the Division under letter dated August 2, 1993.

Petitioner owned the Hudson Street property since 1981. He conducted his printing business there since 1960. Because of his desire to downsize his business and to ultimately retire from it, petitioner consulted with Peter Hauspurg of Eastern Consolidated Properties, Inc., an attorney and real estate broker who represented the Joseph Gardner Trust, and ultimately entered into a Commission Agreement with him (see, Exhibit "1"). No commission was ever paid to Peter Hauspurg since the agreement was contingent upon the Joseph Gardner Trust ultimately acquiring the property.

In 1989, petitioner met with his attorney, John Flateau, with Peter Hauspurg and with

Joseph Gardner relative to the sale of the Hudson Street property. Despite the fact that petitioner initially desired to sell the property, Joseph Gardner preferred to lease it and petitioner was ultimately convinced that leasing it was a preferable alternative.

As part of the lease agreement, the Joseph Gardner Trust paid petitioner the sum of $499,990.00 for an option to purchase the property (see, paragraph 32 of lease agreement). Pursuant to the agreement, the lessee could not exercise the option until July 1, 1995. Petitioner had the option to accelerate this date to no earlier than January 1, 1994 upon giving proper notice to the lessee.

Pursuant to the terms of the lease, petitioner was to receive $490,000.00 per annum payable in equal monthly installments of $40,833.33 each (this was the annual rental from the term commencement date through May 31, 2000; from June 1, 2000 through May 31, 2039, the annual rent was to increase at five-year intervals). Petitioner testified that he received monthly rental payments from July 1990 until October or November 1991 at which time the Joseph Gardner Trust informed petitioner's attorney of its desire to terminate the lease.

After receipt of the $499,990.00, petitioner expended approximately $200,000.00 for back taxes, $33,000.00 to repave sidewalks and set aside $30,000.00 to cure fire code violations. Petitioner also put money in escrow for elevator insurance and for potential City code violations. The tenant demanded most of these expenditures and, as a result, petitioner netted only about $150,000.00 from the option fee received.

At the time of the execution of the lease, the building was fully rented. A short time thereafter, the tenant on the sixth floor filed for bankruptcy and, without rent from this tenant, the building was a losing proposition. As a result, the Joseph Gardner Trust informed petitioner's attorney of its intention to terminate the lease agreement.

As indicated in Finding of Fact "4", petitioner entered into a lease termination agreement on November 8, 1991 (the agreement was entered into with the co-trustees of the Joseph Gardner Trust). Pursuant to this agreement (paragraph 7 thereof), the purchase option was terminated and the option payment ($499,990.00) remained the sole property of petitioner.

Petitioner testified that at the time of entering into the lease, he did not understand the provisions of paragraph 31 of the lease, which provided as follows:

> "Landlord agrees to look solely to Tenant's estate and interest in this lease, and the Demised Premises, for the satisfaction of any right or remedy of Landlord for the collection of a judgment (or other judicial process) requiring the payment of money by Tenant, in the event of any liability by Tenant, and no other property or assets of Tenant shall be subject to levy, execution, attachment, or other enforcement procedure for the satisfaction of Landlord's remedies under or with respect to this lease, the relationship of Landlord and Tenant hereunder, or Tenant's use and occupancy of the Demised Premises, or any other liability of Tenant to Landlord."

SUMMARY OF THE PARTIES' POSITIONS

Petitioner's position may be summarized as follows:

(a) Pursuant to Tax Law § 1440(7), since the term of the lease did not exceed 49 years, the only basis upon which the Division held this to be a taxable transaction was the option to purchase. However, at the time the lease was terminated (November 8, 1991), the option right had not come into existence. At no time during the term of the lease (July 16, 1990 until November 8, 1991) did an actual right to exercise the option exist;

(b) Petitioner has attempted to distinguish the present matter from the facts of the two cases primarily relied on by the Division, i.e., Matter of Cheltoncort Co. (Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121) and Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992).

Petitioner contends that Cheltoncort involved an actual transfer of title to real property, and the subsequent events (store vacancies) were not permanent as was the lease termination herein. Moreover, the Cheltoncort facts did not affect the taxability of the transaction but merely referred to the amount of consideration.

V & V Properties can also be distinguished because the transaction was an actual sale and transfer of title and involved the amount of consideration received therein;

(c) Subsequent changes do affect the taxability of a transaction. In support of this contention, petitioner cites to an Advisory Opinion of the former State Tax Commission (TSB-A-87[8]-R). In addition, petitioner asserts that the three-year statute of limitations

(Tax Law § 1444[3]) permits the Division to assess tax based upon events occurring within three years of the transaction and 20 NYCRR 590.27 refers to rental payments after an option is no longer exercisable. Therefore, subsequent acts (such as the termination of the lease prior to the option to purchase coming into existence) are relevant;

(d) The statutory provision relating to claims for refund of gains tax (Tax Law § 1445[1]) states that a person claiming to have erroneously paid the tax may file a claim for refund within two years of the date of transfer or date of payment, whichever is later. Petitioner analogizes this provision to the income tax refund statute (Tax Law § 687) wherein taxpayers may file a claim for refund within three years. It is petitioner's position that both of these statutes contemplate the consideration of facts which were not available at the time of filing a tax return;

(e) It would be inequitable to impose gains tax upon a transaction where the transferor does not recognize a gain and where, as here, the consideration does not exceed $1,000,000.00; and

(f) Holding petitioner liable for gains tax on this transaction would be in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and/or Article 1, Section 11 of the New York State Constitution by imposing tax on consideration not received. In Trump v. Chu (65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915, 106 S Ct 285), the constitutionality of the gains tax was upheld on the basis that it was a tax on net gain and was not a tax on gross receipts. If this assessment is sustained, petitioner would be required to pay tax on anticipated rather than actual gain.

The position of the Division is as follows:

(a) Irrespective of the termination of the lease and the option to purchase in 1991, the gains tax remains due since the tax is computed as of the date of transfer and subsequent events do not affect the value of the consideration given for the transfer or the liability of

the transferor for the tax. In support of its position, the Division cites to Matter of Cheltoncort Co. (supra) and Matter of V & V Properties (supra). Contrary to petitioner's contention, the Division maintains that Cheltoncort relates to a leasehold interest and the non-effect of subsequent rental income on the value of the consideration at the time of the transfer;

(b) Although the option to purchase was not exercisable until a future date, it was granted at the time the lease was executed for a valuable consideration and was effective at that time; and

(c) Petitioner contends that since the calculation of the present value of a leasehold interest does not include rental payments for periods occurring after the option is no longer exercisable, subsequent acts must be considered because that information is available only at a later date and not at the execution of the lease. The Division maintains that, in this case, there was no time limit on the exercise of the option to purchase. The termination agreement was not anticipated or provided for at the time of the execution of the lease and, therefore, did not affect the computation of the consideration.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax on gains derived from the transfer of real property at the rate of 10% of the gain. Tax Law § 1440(3) defines "gain" as the difference between the consideration for the transfer of real property and the original purchase price.

B. Tax Law § 1440(7) defines "transfer of real property", in pertinent part, as follows:

> "the transfer or transfers of any interest in real property by any method, including but not limited to sale, . . . option, . . . [and] the creation of a leasehold or sublease only where (i) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years, (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for substantially all of the premises constituting the real property."

Tax Law § 1440(4) provides as follows:

> "'Interest' when used in connection with real property includes, but is not limited to, title in fee, a leasehold interest, a beneficial interest, an encumbrance, a transfer of development rights or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. Interest shall also include an option or contract to

purchase real property."

C. 20 NYCRR 590.27 provides as follows:

> "Question: Is the creation of a lease for a term less than 49 years which contains an option to purchase the real property subject to the gains tax?
>
> "Answer: Yes. Section 1440(4) of the Tax Law defines an interest in real property to include an option. The consideration for such a transfer is the present value of the net rental payments under the lease plus the consideration paid for the option to purchase (Tax Law, section 1440[1][b]). Rental payments for periods that occur after an option is no longer exercisable are not included in the calculation of the present value of the rental payments. If the sum of the present value of the net rental payments and the price paid for the option is $1 million or more, the transfer is subject to the tax (Tax Law, section 1440[1]). The present value of the net rental payments should be determined as set forth in section 590.26 of this Part" (emphasis in original).

Tax Law § 1440(1)(b) provides as follows:

> "In the case of (i) the granting of an option with use and occupancy of real property or (ii) the creation of a leasehold or sublease that is a transfer of real property, as defined in subdivision seven of this section, consideration shall also include the value of the rental and other payments attributable to the use and occupancy of the real property or interest therein, the value of any option to purchase or renew included in such transfer and the value of rental or other payments attributable to the exercise of any option to renew."

D. In the present matter, the term of the lease was 49 years. Clearly, absent the option to purchase, this lease would not be subject to tax since its term did not exceed 49 years (see, Tax Law § 1440[7]).

The primary contention of petitioner, however, is that during the term of the lease (July 16, 1990 to November 8, 1991), the option to purchase did not exist since it could not be exercised until January 1, 1994 at the earliest (see, Finding of Fact "19"). Therefore, petitioner asserts that the transaction should not be taxed because the lease was terminated before the option could be exercised.

In Matter of Cheltoncort Co. (supra), the Tribunal stated as follows:

> "In calculating the amount of tax due upon a taxable transaction, the value of the consideration has to be determined at the time of the transfer in order to finally fix the tax owed. Subsequent events do not alter the value that the consideration had at the time of the transfer" (emphasis added).

In a footnote in its decision in Matter of V & V Properties (supra), the Tribunal stated:

> "Our conclusion, which determines the amount incurred to acquire an interest

> in real property at the time of the subject acquisition for purposes of establishing original purchase price, is consistent with our conclusion that the amount of consideration received for the transfer of real property must be determined at the time that the transfer occurred, and that the consideration cannot be reduced based on subsequent events (Matter of Cheltoncort Co., Tax Appeals Tribunal, December 5, 1991; Matter of Perry Thompson Third Co., Tax Appeals Tribunal, December 5, 1991)."

In his brief, petitioner attempts to distinguish this matter from Cheltoncort and V & V Properties. Petitioner points out that Cheltoncort involved an actual transfer of real property and that the subsequent events (store vacancies) were not permanent events as was the termination of the lease agreement in the present matter. Petitioner further contends that the Cheltoncort matter did not involve a change of facts or circumstances which made the transaction not taxable under the gains tax statutes.

As to V & V Properties, petitioner accurately states that the case related to the determination of the amount of consideration paid and of the items allowable in calculating original purchase price. Also, V & V Properties involved an actual transfer of title with no lease or option to purchase at issue.

Certainly, as petitioner correctly states, there are facts which distinguish this matter from Cheltoncort and V & V Properties. There are also considerable differences in the facts as between Cheltoncort and V & V Properties. What is a constant, however, is the Tribunal's (and in the case of Cheltoncort, the Tribunal's and the Appellate Division's) holding that subsequent events do not alter the value of the consideration and, therefore, that the consideration must be determined at the time that the transfer occurs. The Tribunal's holding with respect to valuing consideration at the time of transfer is not confined to a particular set of facts or circumstances, but is, in the opinion of this Administrative Law Judge, applicable to the valuation of consideration in each and every taxable transaction.

At the time of the execution of the 49-year lease with the option to purchase, pursuant to Tax Law § 1440(4) and 20 NYCRR 590.27, a taxable transaction occurred. Petitioner received the sum of $499,990.00 (see, Finding of Fact "19") from the lessee for the option to purchase the property. It is irrelevant that the option could not be exercised until approximately six years

later (sooner if upon notice by petitioner/lessor). In Matter of Von Ford Associates (Tax Appeals Tribunal, May 26, 1994), the Tribunal affirmed that portion of a determination by an Administrative Law Judge that held that a lease with an option to purchase, while not exercisable until year 18 of the lease, is nevertheless a taxable transaction and that the consideration was the present value of the net rental payments under the lease plus the consideration paid for the option to purchase. The petitioner in Von Ford Associates had argued that because the option to purchase could not be exercised prior to the 18th year of the lease agreement, the option should be deemed nonexistent and the transaction not subject to tax or, at the very least, the value of the first 18 years of the rental payments should be deemed exempt from consideration. The Administrative Law Judge rejected this argument and, based upon Matter of Cheltoncort (supra), also found little merit to petitioner's argument that the transaction should be exempt from gains tax on the basis that the option could become nonexistent due to the transferee's default in rental payments or failure to exercise the option.

E. As set forth in paragraph 25(c), petitioner points to a statute, a regulation and an Advisory Opinion in support of his contention that subsequent changes do affect the taxability of a transaction.

Tax Law § 1444(3) provides for a three-year statute of limitations for the assessment of tax (unless a questionnaire or return was willfully false or fraudulent or was not filed, in which case tax may be assessed at any time). The purpose of this statutory provision, as is the purpose of assessment provisions under each article of the Tax Law, is to allow the Division adequate time to review filed returns and other documents and, if deemed necessary, to conduct an audit. The purpose of such a statute, in the case of gains tax, is to permit the Division to have sufficient time to determine whether a transferor's computation of tax due is correct, not to consider how events occurring subsequent to the transfer might impact upon such computation.

The regulation cited by petitioner (20 NYCRR 590.27), stating that "[r]ental payments for periods that occur after an option is no longer exercisable are not included in the present value of the rental payments", does not support petitioner's contention that this is evidence that

subsequent events are considered by the Division. In fact, the opposite is true. This regulation provides for the computation of consideration at the time of the creation of the lease (of less than 49 years with an option to purchase), rather than by waiting to see if, at some point in the future, the option is exercised.

The Advisory Opinion (TSB-A-87[8]-R), relating to an agreement to extend the term of an existing lease together with increasing rent, is also not supportive of petitioner's position. The petition for an Advisory Opinion contained the following facts:

> "Petitioner is the lessee on a long-term lease that was originally executed in the early nineteen fifties. The initial term of the lease was 75 years and the remaining balance of such term is approximately 37 years. The subject property is improved with a shopping center, which was constructed after it was leased.
>
> "Under the provisions of the extension agreement, approximately 30 years will be added to the initial term and there will be substantial rent increases during the remaining balance of such term. The extension agreement does not contain an option to purchase the underlying real property."

The Division's Technical Services Bureau found it to be a taxable transfer of an interest in real property for gains tax purposes because the modifications (in term and in rental payments) constituted a new agreement between the parties and, because the term was now 67 years (the remaining 37 plus 30 additional years) at a new rate, beginning as of the effective date of the modifications, a taxable lease was created. This is not a consideration of events occurring subsequent to a taxable transfer but is, instead, a determination that, as of the effective date of these modifications, a taxable transaction had now occurred.

As set forth in paragraph 25(d), petitioner claims that the refund provision of the gains tax law (Tax Law § 1445[1]), like its counterpart in income tax (Tax Law § 687), permits a taxpayer, upon ascertaining certain new facts, to make an application for a refund which, according to petitioner, is evidence that subsequent events are considered. While it is true that a taxpayer, within the two-year period prescribed by Tax Law § 1445(1), may file a claim for refund based upon the discovery of certain new facts (e.g., a previous computational error, failure to include an allowable expense in the determination of original purchase price, etc.), the law is clear, by virtue of the Tribunal's decisions in Cheltoncort and V & V Properties, that

events occurring subsequent to the transfer (such as a lease termination or mortgage default) which would alter the amount of consideration received will not be considered as a valid basis for a claim for refund. Therefore, in this regard, petitioner's contention is without merit.

F. Petitioner contends that, due to the fact that the lease was terminated after just over one year of existence, it would be inequitable to subject this transaction to the gains tax because he did not recognize a gain and, in any event, the consideration did not exceed $1,000,000.00. It is unclear from the record whether petitioner recognized a gain; however, it is undisputed that, by virtue of the lease termination agreement, he did not receive more than $1,000,000.00. However, it must also be noted that, at the time of the execution of the lease agreement in July 1990, this result could not have been anticipated. As previously noted (see, Conclusion of Law "D"), the value of the consideration must be determined at the time of the transfer and this consideration cannot be reduced as a result of subsequent events (in this case, the termination agreement). In Unimax Corp. v. Tax Appeals Tribunal (79 NY2d 139, 581 NYS2d 135, 138), the Court of Appeals, citing its decision in Matter of Long Is. Light Co. v. State Tax Commn. (45 NY2d 529, 535-536, 410 NYS2d 561), stated:

> "[I]t seldom suffices, and is often immaterial, in the resolution of tax controversies to demonstrate that in application a particular statute or regulation works even a flagrant unevenness. (Citation omitted.) That a 'fairer' taxing formula might have been adopted is of no moment. Indeed, in the application of tax statutes, unlike many other statutes, it cannot be assumed that when the Legislature designed the particular statute it had either a specific or even a general desire to achieve a fair or balanced formula. The objective may well have been the production or allocation of optimum revenue, and the particulars of the statute may have been responsive to that objective rather than to any other."

Based on the foregoing, petitioner's contention that the Division's treatment of him was inequitable must be rejected.

G. Finally, petitioner contends that holding him liable for gains tax on this transaction would be in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and/or Article 1, Section 11 of the New York State Constitution. Citing Trump v. Chu (65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915, 106 S Ct 285, 88 L Ed 2d 250), petitioner states that Trump upheld the constitutionality of the gains tax

because, although it is based upon gross consideration, the actual calculation of the tax due depends entirely upon the gain realized from the transfer. The tax is not imposed on the gross consideration received, but rather on the gain resulting when consideration received exceeds the original purchase price of the real property. Petitioner maintains that if his refund is not granted, he will be required to pay tax on an anticipated gain based upon a calculation made as of the date of the lease which is now erroneous because of the lease termination. This is violative of petitioner's rights under the Federal and State constitutions because, rather than being applied on a net gain as required by Trump, the tax is being imposed on a nonexistent anticipated gain on a transfer that never occurred.

In Executive Land Corp. v. Chu (150 AD2d 7, 545 NYS2d 354, 358), the court, citing Foss v. City of Rochester (65 NY2d 247, 491 NYS2d 128), stated that neither the Federal nor State constitutions require that all taxpayers be treated the same. They require only that those similarly situated be treated in a uniform manner. The court went on to say:

> "The scope of review is narrow and taxing statutes which neither classify on the basis of a suspect class, nor impair a fundamental right must be upheld if the classification is rationally related to the achievement of a legitimate State purpose (see, Trump v. Chu, 65 NY2d 20, 25, 489 NYS2d 455, 478 NE2d 971, appeal dismissed 474 US 915, 106 S Ct 285, 88 L Ed 2d 250). Such statutes enjoy a presumption of constitutionality which, in order to be overcome, requires 'the most explicit demonstration that [the] classification is a hostile and oppressive discrimination against particular persons and classes' (see, Trump v. Chu, supra, at 25, 489 NYS2d 455, 478 NE2d 971, citing Madden v. Kentucky, 309 U.S. 83, 88, 60 S Ct 406, 408, 84 L Ed 590)."

It is on this basis that petitioner's argument fails since it is clear that the Tribunal's holding (which was confirmed by the Appellate Division in Cheltoncort, supra) that the value of consideration must be determined at the time of transfer in order to finally fix the tax owed and that the value of the consideration cannot be altered by subsequent events is a statutory interpretation which applies to all transferors subject to the gains tax. While it is certainly true that subsequent events (such as the termination of the lease in the present matter) can and sometimes do affect the amount of consideration actually received and, as a result thereof, imposing tax on the gain as computed on the date of the transfer can result in a seemingly unjust treatment, such treatment cannot be found herein to be an unconstitutional one since petitioner

has not shown that he has been treated any differently than any other transferor subject to the gains tax.

H. The petition of Sidney Rapoport is denied.

DATED: Troy, New York
July 7, 1994

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE