STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

BRIARWOOD ASSOCIATES LIMITED PARTNERSHIP :

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.

DETERMINATION
:
DTA NOS. 811891
AND 811892

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Petitioner Briarwood Associates Limited Partnership, c/o I.M.S. Equities, 645 Park Avenue, New York, New York 10022, 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.

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On November 29, 1994 and December 7, 1994, respectively, petitioners, by their representative, Howard M. Koff, Esq., and the Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Andrew J. Zalewski, Esq., of counsel), consented to have the controversies determined on submission without hearing, with all briefs to be submitted by June 2, 1995, which datebegan the six-month period for the issuance of this determination. After due consideration of the record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

## ISSUES

I. Whether, based upon the Division of Taxation's failure to provide petitioners with copies of all documents submitted by it to the Division of Tax Appeals in furtherance of the parties' consent to have the controversies determined on submission, the notices of determination at issue herein must be cancelled by virtue of the Division of Taxation's default.

II. Whether, in computing taxable consideration on petitioners' sales of cooperative units, the Division of Taxation properly included actual consideration received on units sold subsequent to petitioners' last update filings pursuant to their safe harbor estimates of anticipated consideration.

III. Whether the Division of Taxation properly determined that the exchanges by Lawrence Goodman and Cynthia Levine of their interests in the subject properties in return for limited partnership interests (in the exact percentage of their original ownership) in the two partnerships was a mere change of identity or form of ownership or organization, thereby requiring that petitioners carry over the original purchase price of the properties.

IV. Whether penalties should be abated.

## FINDINGS OF FACT

The initial letter to the parties (after the waiver of hearing had been executed) from the Administrative Law Judge, dated October 31, 1994, advised that "[c]opies of any documents submitted to me should be sent to your opposing party."

By cover letter dated January 12, 1995, the Division of Taxation ("Division") sent 41 documents to the Administrative Law Judge. Of these documents, 19 related to Dunolloy Associates Limited Partnership ("Dunolloy") and 22 related to Briarwood Associates Limited Partnership ("Briarwood").[1] The letter set forth a list of each of these documents submitted and it indicated that a copy of the letter had been sent to Howard M. Koff, Esq.

A letter dated January 20, 1995 to the Division's representative, Andrew J. Zalewski, Esq., from petitioners' representative, Howard M. Koff, Esq., demanded that the Division furnish petitioners with copies of the documents submitted to the Administrative Law Judge.

A letter from Mr. Zalewski to Mr. Koff, dated January 23, 1995, indicated that, pursuant to 20 NYCRR 3000.8(b), the Division was required to provide the taxpayer only with a list of the documents submitted. The letter further advised that the

[1] Although the exhibits were numbered "1" through "42", the Division, by an apparently inadvertent omission, failed to include an Exhibit "39".

Division would provide petitioners with copies of any documents not already in the possession of petitioners.

By letter dated January 24, 1995 from Mr. Koff to the Administrative Law Judge, petitioners requested that, since the Division had defaulted on its obligation to file and serve its jurisdictional documents on or before January 13, 1995, the documents submitted should be returned to the Division and not be accepted into evidence. In addition, the letter sought to have the notices of determination cancelled for "lack of proof (i.e., failure to introduce into evidence the necessary jurisdictional documents)."

A letter to Mr. Koff from the Administrative Law Judge, dated January 25, 1995, advised that the remedy sought in Mr. Koff's letter of January 24, 1995 was not provided for by statute or regulation and further advised him to make a written request to the Division for any documents not currently in his possession.

By letter dated January 27, 1995 from Mr. Koff to Mr. Zalewski, petitioners renewed their request "for copies of all documents (other than the offering plans)."

Mr. Koff's letter to the Administrative Law Judge, dated February 13, 1995, advised that the Division had failed to furnish any documents and, therefore, requested a 30-day extension (from receipt thereof) to file and serve additional documents and objections to the Division's documents.

By letter to the parties dated February 22, 1995, the

Administrative Law Judge revised the schedule for submission of briefs and directed the Division to provide copies of all documents to petitioners by March 10, 1995.

A cover letter, dated February 28, 1995, to Mr. Koff from Mr. Zalewski advised that copies of documents (except the offering plans and the contract of sale dated August 2, 1984 which the Division stated were in the possession of the Division of Tax Appeals) were enclosed.

Briarwood

On February 1, 1985, a two-thirds interest in the premises known as Briarwood Gardens was sold to Stephen Shalom and Arthur Cohen for $2,933,387.96.  On the same date, Lawrence Goodman and Cynthia Levine conveyed their 33-1/3% interest in Briarwood Gardens to Briarwood, a New York limited partnership, in return for 33-1/3% of the limited partnership interest in Briarwood (see, Division's Exhibits "24" and "40").

On October 19, 1987, Briarwood, as sponsor, transferred the aforementioned property (Briarwood Gardens) to the cooperative housing corporation, Briarwood Owners' Corp.  A gains tax filing was made by Briarwood, as sponsor, with respect to initial sales and the gains tax rate was established by the Division on a per-share basis for a total of 73,460 shares for the project.  These initial filings are not part of this record.  Apparently, Briarwood indicated that this was a noneviction conversion plan.

On October 30, 1989, Briarwood filed a submission update (see, Division's Exhibits "32", "33" and "34").  At that time (see, ¶ 3 of Petition [Division's Exhibit "22"]), 33,958 shares

(46% of total sales) had been sold in anticipation of a sale of 34,138 additional shares to a single investor. Pursuant to the transferor questionnaire therein submitted, Briarwood indicated:

"SHARES

| | | | |
|---|---|---|---|
| 68,096 | Sold and Contracted | | $8,235,808 |
| 5,364 | Unsold Avg Fair Market ($112.71953 x 50%) | | 302,314 |
| 73,460 | Total Anticipated Selling Price | | 8,538,122 |
| | Mortgage Indebtedness (4th Amendment) | | 6,576,000 |
| | | | 15,114,122 |
| | Reserve Fund | ($198,105) | |
| | Supplemental Reserve Fund | ( 76,895) | (275,000) |
| | Working Capital Fund | | ( 75,000) |
| | Rebates | | ( 18,517) |
| | | | ~~$14,745,605~~ |
| | Sales Commission: 8,528,122 x 5% | | ~~$426,406~~ |

We have elected the safe harbor method of valuing unsold shares (50% of unsold outsider average price per share)."

This update was deemed to be a 75% update since 68,096 out of a total of 73,460 shares, or 92.7%, were sold or contracted to be sold as of this update.

In response thereto, the Division sent a letter to Briarwood's accountant, dated November 21, 1989 (see, Division's Exhibit "38"), which stated as follows:

> "Pursuant to your project update of 75% on the above referenced case, the tax has been established as:
>
> | | |
> |---|---|
> | Per Share | $1.6026 |
> | Per 1% of Common Element | $0.00 |
> | Per Unit | $0.00 |
> | Per Square Foot | $0.00 |
>
> "Please be advised that per your request this case has not been audited. The tax has been established by using the calculations submitted on the form DTF-701. As a result, your rights under the safe harbor provisions are forfeited. A subsequent review of the overall project may result in an adjustment to the

amount of tax, penalty and interest due.

"The tax rate, as set forth above, will be required to be used until such time as a project update is made and a new rate established. The procedure for project update filings is set forth in our form DTF-701-I (6-86)."

In November and December 1990, the Division conducted a field audit of Briarwood. At that time, 70,012, or 95.31%, of the shares had been sold; 3,448, or 4.69%, of the shares remained unsold.

As a result of the audit, a Statement of Proposed Audit Adjustment was issued to Briarwood on December 17, 1990 which asserted additional gains tax due of $113,670.00, plus penalty and interest.

On March 4, 1991, the Division issued a Notice of Determination to Briarwood in the amount of $113,670.00, plus penalty and interest, for a total amount due of $133,167.30.

One of the adjustments made as a result of the audit was the disallowance by the Division of a stepped-up basis used by Briarwood in computing the purchase price to acquire the property (utilized in Briarwood's original purchase price ["OPP"] computation). Out of a total of $4,400,095.00 which Briarwood claimed to have been the purchase price paid to acquire the property, $2,933,388.00 paid to acquire a two-thirds interest (see, Finding of Fact "11") was allowed in full. However, out of the balance claimed, $1,466,707.00, the Division disallowed $858,552.00. Therefore, total purchase price per audit was $3,541,543.00.[2] The rationale, per the audit comments (see, Division's Exhibit "24"), is that this represents the one-third interest conveyed by Goodman and Levine which the auditor treated as a mere change of identity thereby justifying use of a carryover basis rather than a stepped-up basis.

Also at issue herein was the auditor's utilization of actual consideration received in computing Briarwood's anticipated consideration for unsold shares. As was the case with the previous adjustment (see, Finding of Fact "17"), the source of some of the numbers used by the auditor is not clear. However, for purposes of clarity, reference to specific exhibits will, wherever possible, be made.

In its brief, the Division has attempted to compute that portion of the gains tax assessment which is attributable to its use of actual

consideration (as determined by audit) rather than the anticipated consideration determined by Briarwood in its last update on October 30, 1989 (see, Finding of Fact "12"). As of the audit in November and December 1990, 70,012 shares had been sold; as of Briarwood's update filing, 68,096 shares had been

[2]An examination of the relevant exhibits (Division's Exhibits "24", "29", "30" and "40") does not reveal the source of the $1,466,707.00 claimed. Apparently, from a review of the audit comments (see, Division's Exhibit "24"), it relates to the one-third interest conveyed to Briarwood in exchange for a one-third limited partnership interest in Briarwood. However, the pertinent audit workpaper, Schedule B-1(a) (see, Division's Exhibit "30"), does not explain the allowance of $608,155.00 out of the $1,466,707.00 claimed. Form DTF-700 (see, Division's Exhibit "32"), at Part I thereof, lists purchase price to acquire real property as $4,400,095.00 "per initial filing". Since these filings are not part of the record herein, the source of this figure cannot be ascertained.

sold. The difference was, therefore, 1,916 shares. The Division's computation, as set forth on pages 12 and 13 of its brief, are summarized below:

Actual Consideration

Audit - 70,012 shares with consideration of $8,450,877.00
(see, Division's Exhibit "26")

75% filing - 68,096 shares with consideration of $8,235,808.00
(see, Division's Exhibit "33", p. 3)

Actual consideration per share on shares sold between the update and the audit:

$8,450,877.00 - $8,235,808.00 = $215,069.00

$215,069.00 ÷ 1,916 shares = $112.25 per share

Briarwood (see, Division's Exhibit "33", p. 3) determined anticipated consideration using 50% of unsold outsider average price per share, which it determined to be $112.71953.

Utilizing the audit figure of $112.25 per share rather than 50% of Briarwood's $112.71953 resulted in an increase of $55.89 per share ($112.25 - [$112.71953 x 50%] = $55.89).

Therefore, according to the Division, using the actual consideration as calculated by the auditor results in an increase in consideration of $107,085.24 ($55.89 x 1,916 shares sold between update and audit). Gains tax, at 10% thereof, would be $10,708.52. Accordingly, the Division asserts that, out of the total assessment at issue, only $10,708.52 resulted from use of actual consideration, rather than Briarwood's anticipated consideration.

It must be pointed out, however, that in determining anticipated consideration, the auditor used a per-share figure of $122.16 (see, Division's Exhibit "27"). When applied to the balance of unsold shares after audit (3,448), anticipated consideration of $421,208.00 was calculated ( see, Division's Exhibit "26"). In arriving at the $122.16 figure, the Division analyzed the sale of 6,020 shares from which consideration of $1,470,866.00 was received ($1,470,866.00 ÷ 6,020 = $244.33 ÷ 2 = $122.16). Why the proceeds from the sale of 6,020 shares was used has not been explained. Since 50% of the $244.33 was used, it may be inferred that this was the Division's calculation of 50% of the vacant market value for the unsold units, although it begs clarification.

A Conciliation Order (CMS No. 114497) reduced the assessment from $113,670.00 to $105,012.00 ( see, Division's Exhibit "21"), plus applicable penalty and interest. The attached Report of Tax Conferences indicates that the recomputation was due to an increase in anticipated brokerage fees of 1½%.

The audit summary (see, Division's Exhibit "24") indicated that "penalty and interest was not assessed on additional tax due to additional consideration based on the Safe Harbor rule requirements." Penalty and interest was imposed for underpayment of tax using Briarwood's tax-per-share calculation (see, Division's Exhibit "28").

In paragraph 12 of its petition ( see, Division's Exhibit "22"), Briarwood alleged that $15,818.00 attributable to Special Additional Mortgage Recording Tax was improperly excluded from original purchase price as determined by the Division. However, Briarwood has failed to address this issue in its brief and has presented no evidence concerning this issue. Accordingly, it is deemed abandoned and shall not be addressed in this determination.

Dunolloy

On October 4, 1984, Sadie Blank, and others, as owners of a 70% interest in premises in Jackson Heights (Queens) known as Dunolloy Gardens, sold such interest in these premises to Stephen Shalom and Arthur Cohen for $6,895,000.00. On the same date, the remaining 30% interest in the premises, which was owned by Lawrence Goodman and Cynthia Levine, was conveyed to obtain a 30% limited partnership interest in Dunolloy ( see, Division's Exhibit "5" and Petitioners' Exhibit "7" attached to brief).

On September 22, 1987, Dunolloy, as sponsor, transferred the aforementioned property to Dunolloy Owners Corp., the cooperative housing corporation. A gains tax filing was made by Dunolloy, as sponsor, with respect to initial sales, and the gains tax rate was established by the Division on a per-share basis for a total of 141,062 shares for the project. These initial filings are not part of the record. Apparently, Dunolloy indicated that this was a noneviction conversion plan.

On October 30, 1989, Dunolloy filed a submission update (see, Division's Exhibits "12", "13" and "14"). At that time (see, ¶ 3 of Petition [Division's Exhibit "3"]), 56,521 shares were sold (40% of total shares) in anticipation of a sale of 75,426 additional shares to a single investor. Pursuant to the transferor questionnaire therein submitted, Dunolloy indicated:

"SHARES

| | | | | |
|---|---|---|---|---|
| 13,1947 | [sic] Sold and Contracted | | | $15,830,050 |
| 9,115 | Unsold avg. FMV $111.84723 - 50% | | | 509,744 |
| 14,1062 | | | | $16,339,794 |
| | MORTGAGE INDEBTEDNESS | | | 12,000,000 |
| | | | | $28,339,794 |
| | RESERVE FUND | | 600,924 | |
| | WORKING CAPITAL | | 299,076 | |
| | REBATES | | 106,450 | (1,006,450) |
| | | | | $27,333,344 |
| SALES COMMISSIONS | | | | |
| OUTSIDERS 5% | | | | |
| | | 11,541,404 | | |
| | | 509,744 | | |
| | | 12,051,148 | x 5% | 602,557 |
| INSIDERS 3% | | 4,288,646 | x 3% | 128,659 |
| | | | | 731,216 |

* We have elected the safe harbor method of valuing unsold shares."

Since approximately 93.5% of shares were sold and/or contracted for, this update was apparently considered to be a 75% update per safe harbor rules.

In response thereto, the Division sent a letter to Dunolloy's accountant, dated November 21, 1989 (see, Division's Exhibit "18"), which stated as follows:

> "Pursuant to your project update of 75% on the above referenced case, the tax has been established as:
>
> | | |
> |---|---|
> | Per Share | $0.9349 |
> | Per 1% of Common Element | $0.00 |
> | Per Unit | $0.00 |
> | Per Square Foot | $0.00 |
>
> "Please be advised that per your request this case has not been audited. The tax has been established by using the calculations submitted on the form DTF-701. As a result, your rights under the safe harbor provisions are forfeited. A subsequent review of the overall project may result in an adjustment to the amount of tax, penalty and interest due.

> "The tax rate, as set forth above, will be required to be used until such time as a project update is made and a new rate established. The procedure for project update filings is set forth in our form DTF-701-I (6-86)."

In October and November 1990, the Division conducted a field audit of Dunolloy. At that time, 137,640, or 97.57%, of the shares had been sold; 3,422, or 2.43%, of the shares remained unsold.

As a result of the audit, a Statement of Proposed Audit Adjustment was issued to Dunolloy on December 21, 1990 which asserted additional gains tax due of $419,302.00, plus penalty and interest.

On March 11, 1991, the Division issued a Notice of Determination to Dunolloy in the amount of $419,302.00, plus penalty and interest, for a total amount due of $577,826.91.

One of the adjustments made as a result of the audit was the disallowance by the Division of a stepped-up basis used by Dunolloy in computing the purchase price to acquire the property (utilized in Dunolloy's OPP computation).

Out of a total of $9,850,000.00 which Dunolloy claimed to have been the purchase price paid to acquire the property, $6,895,000.00 paid to acquire a 70% interest (see, Finding of Fact "21") was allowed in full. Of the balance of $2,955,000.00 claimed, the Division allowed $802,208.00 and disallowed $2,152,792.00 (see, Division's Exhibit "9"). Therefore, total purchase price per audit was $7,697,208.00. The rationale, per the audit comments (see, Division's Exhibit "5"), was that the 30% interest conveyed by Goodman and Levine was treated as a mere change of identity and carryover basis should be used. The stepped-up basis used by Dunolloy for this 30% interest was, therefore, disallowed.

Also at issue was the auditor's utilization of actual consideration received in computing Dunolloy's anticipated consideration for unsold shares. In its brief, the Division has attempted to compute that portion of the gains tax assessment which is attributable to its use of actual consideration (as determined by audit) rather than the anticipated consideration determined by Dunolloy in its last update on October 30, 1989 (see, Finding of Fact "22"). As of the audit in October and November 1990, 137,640 shares had been sold; as of Dunolloy's update filing, 131,947 shares had been sold. The difference was, therefore, 5,693 shares. The Division's computation, as set forth on pages 11 and 12 of its brief, is summarized below:

Actual Consideration

Audit - 137,640 shares with consideration of $17,027,762.00 (see, Division's Exhibit "7")

Dunolloy's Update - 131,947 shares with consideration of $15,830,050.00 (see, Division's Exhibit "13")

Actual consideration per share on shares sold between the update and the audit:

$17,027,762.00 - $15,830,050.00 = $1,197,712.00

$1,197,712.00 ÷ 5,693 shares = $210.39 per share

Dunolloy (see, Division's Exhibit "13", p. 3) determined anticipated consideration using 50% of unsold average fair market value, which it determined to be $111.84723.

Utilizing the audit figure of $210.39 per share rather than 50% of Dunolloy's $111.84723 resulted in an increase per share of $154.466385 ($210.39 - [$111.84723 x 50%] = $154.466385).

Therefore, according to the Division, using the actual consideration as calculated by the auditor results in an increase in consideration of $879,377.13 ($154.466385 x 5,693 shares sold between audit and update). Gains tax, at 10% thereof, would be $87,937.71. Accordingly the Division asserts that, out of the total assessment at issue, only $87,937.71 resulted from use of actual consideration, rather than Dunolloy's anticipated consideration.

It should be noted that on the WEC & Audit Schedule (Division's Exhibit "7"), on line 1 thereof, the auditor utilized a figure of $142.00 which supposedly is "100% insider". Just where this figure was derived from remains unclear. The auditor determined anticipated cash consideration of $485,924.00 ($142.00 x 3,422 unsold shares).

A Conciliation Order (CMS No. 114496) reduced the assessment from $419,302.00 to $397,019.00 (see, Division's Exhibit "2"), plus applicable penalty and interest. The attached Report of Tax Conferences indicates that the recomputation was due to an increase in anticipated brokerage fees of 1½%.

The audit summary (see, Division's Exhibit "5") indicated that "penalty and interest was not assessed on additional tax resulting from additional consideration based on the safe harbor rules requirement." Penalty and interest was imposed for additional tax due to underpayments of tax using Dunolloy's tax-per-share calculation (see, Division's Exhibit "8").

In paragraph 12 of its petition (see, Division's Exhibit "3"), Dunolloy alleged that $32,128.00 of other acquisition costs and $4,950.00 of capital improvements disallowed on audit attributable to the Special Additional Mortgage Recording Tax were improperly excluded from OPP as determined by the Division. However, Dunolloy has failed to address this issue in its brief nor has it presented any evidence concerning this issue. Accordingly, it is deemed abandoned and shall not be addressed in this determination.

Attached to Dunolloy's brief is the closing statement relating to the purchase by Dunolloy of a 70% interest in the premises from Sadie Blank, et al., and the exchange of a 30% interest in the premises by Cynthia Levine and Lawrence Goodman in return for a 30% limited partnership interest in Dunolloy. On page 9 of the closing statement is the basis upon which Dunolloy valued the 30% interest at $2,955,000.00. It stated that the fair market value of the premises was $9,850,000.00 based on a contract price of $6,895,000.00 for the purchase of the 70% interest; 30% is, therefore, equal to $2,955,000.00.

Also attached to Dunolloy's brief was an affidavit of Leora Willins, C.P.A., which set forth the basis upon which the auditor arrived at the actual consideration amount of $17,027,762.00 as set forth on the WEC & Audit Schedule (see, Division's Exhibit "7").

## CONCLUSIONS OF LAW

A. 20 NYCRR 3000.8, which sets forth the procedures relating to submissions without hearing, provides as follows:

> "(a) General. The parties may consent in writing to have the controversy determination on submission, without need for appearance at a hearing.
>
> "(b) Procedure. Within 30 days after the consent is executed, the Law Bureau shall submit to the administrative law judge or presiding officer assigned to the case all documentary evidence relevant to the issues, including any stipulation entered into by the parties, and shall provide a list enumerating all such documents to the petitioner or the petitioner's representative. Within 30 days after the Law Bureau provides such list, the petitioner may submit additional documents in support of the petition, and the parties may submit briefs within a reasonable period of time as agreed upon by them, subject to the power of the administrative law judge or presiding officer to fix the time as provided in section 3000.10(c)(3) of this Part. The parties may also submit proposed findings of fact and conclusions of law."

While the letter of the Administrative Law Judge (see, Finding of Fact "1") directed the parties to send copies of documents to the opposing party, such an instruction was merely advisory since the regulation requires only that the Division provide a list to petitioner or petitioner's representative of all documentary evidence which it submitted to the Administrative Law Judge (or Presiding Officer). The Division complied with this requirement (see, Finding of Fact "2").

Nowhere in the Tax Law or in the regulations promulgated thereunder is there any authority for granting the relief sought by petitioners, i.e., cancellation of the assessments based upon the Division's "default". As previously indicated, there was no default on the part of the Division since it complied with the provisions of 20 NYCRR 3000.8. Moreover, as indicated in Findings of Fact "9" and "10", petitioners were provided with copies of documents submitted to the Administrative Law Judge by the Division and the Administrative Law Judge revised the briefing schedule to ensure that petitioners had adequate time to prepare their brief and submit all documents which they deemed pertinent to these matters. Therefore, the notices of determination issued to these petitioners should not be cancelled for any alleged failure on the part of the Division to provide petitioners with copies of documents submitted to the Administrative Law Judge.

B. Tax Law § 1441 imposes a tax on gains derived from the transfer of real property at the rate of 10% of the gain. For purposes of computing the tax, a cooperative conversion is treated as a single transfer; however, the payment of tax is due upon the transfer of shares to individual purchasers pursuant to a cooperative plan (Tax Law § 1442[b]; see, Matter of Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316). In computing the amount of tax due as each share is sold, an apportionment of the original purchase price of the real property and total consideration anticipated under such cooperative plan shall be made for each share (Tax Law § 1442[b]).

C. On August 22, 1983, the Division set forth two options, A and B, to estimate gain on cooperative and condominium plans (TSB-M-83-[2]-R). Under Option A, the actual consideration paid for each share with an apportionment of the total original purchase price to each share determined the gain subject to tax as each share sold. Under Option B, the total anticipated consideration less the total anticipated original purchase price determined the gain subject to tax as each share sold. By selecting Option B, the taxpayer was permitted to pay the estimated tax rate, even though the actual consideration received may have been greater when the shares actually sold. Once the number of sales reached the 25%, 50% and 75% levels, a new tax rate per share was determined based on actual consideration received plus estimated consideration for the remaining unsold shares. At the 100% sell-out point, any underpayments or overpayments based on the actual consideration received for the total number of shares sold would be adjusted accordingly. Thus, in contrast to Option A, Option B was less cumbersome to administer to the extent that, as units were sold, it was not necessary to recalculate the amount of tax owed based on the actual consideration received, as well as other costs, for each unit.

In 1986, the Division eliminated Option A as a method of paying the tax and directed that the new method for paying the tax would be a modified Option B (TSB-M-86-[2]-R). Under the new Option B, updating was optional at the 25% plateau and guidelines were provided for determining "safe harbor estimates" of anticipated taxes such that, in the event of underpayments, there would be no imposition of penalty or interest on the underpayments (TSB-M-86-[3]-R). In effect, if the safe harbor estimates were lower than the actual selling price, then the taxpayer received the benefit of postponing the full amount of tax owed based on actual consideration. If the safe harbor estimates were greater than the actual selling price, then the taxpayer would be entitled to a lower tax rate for the remaining unsold shares when recalculated at the 50% and 75% plateaus or to a refund at the 100% sell-out point.

Petitioners contend that the Division erroneously included in consideration the actual cash proceeds generated by sales effectuated subsequent to the filing of the 75% project updates and prior to sellout. As a result, they assert that the Division violated the terms of Option B (TSB-M-86-[2]-R). In support of this position, petitioners rely upon Matter of Belvedere Garden Associates (Tax Appeals Tribunal, June 18, 1992).

In response, the Division maintains that these matters can properly be distinguished from Belvedere Garden Associates in the following ways:

(1) At the time of the audit, since petitioners had already filed 75% sellout filings, the only remaining filing which was required was a final sellout filing;

(2) In the present matter (in contrast to Belvedere Garden Associates), the Division is asserting that petitioners' payments of gains tax were incorrect. The Division disclaimed the filings which had reported a 75% sellout (see, Division's Exhibits "18" and "38") and, therefore never evaluated their filings which had reported estimated consideration; and

(3) Petitioners have offered no evidence to establish

that they properly filed estimates of consideration, for each of their particular projects, based upon a safe harbor filing rate of 50% of the total of the vacant market value as asserted in their transferor filings.

D. Pursuant to the Technical Services Bureau memorandum, Safe Harbor Estimate for Transfers Pursuant to Condominium and Cooperative Plans (TSB-M-86-[3]-R), for a noneviction conversion plan, the safe harbor estimate will be calculated by taking the lower of:

> "a) 100% of the total of the offering plan prices established for insiders for the Unsold Units, or
>
> "b) 50% of the total of the vacant market value for the Unsold Units. Vacant market value will be established based on the price of vacant units transferred at the initial closing. If there are insufficient contracts for vacant units to establish vacant market value, or if circumstances indicate that the vacant units are not being transferred at market value, then the transferor must use 100% of the insider offering plan price to calculate his Safe Harbor Estimate under (a) above.
>
> "The insider offering plan prices will be those established as of the date the initial Gains Tax submission is filed, or the date the submission is prepared, if within a reasonable time of the filing date. The vacant market value and the number of Unsold Units will be determined at the same date."

As previously indicated, the initial gains tax filings by these petitioners were not made a part of this record. On their 75% update filings (see, Division's Exhibits "13" and "33"), Briarwood and Dunolloy employed figures of $112.71953 and $111.84723, respectively, as unsold average fair market values. An examination of the cooperative offering plans (and amendments thereto) does not reveal the source of these figures. Neither petitioner, in the brief or the reply submitted, has made any attempt to substantiate that the number used was correct.

The estimated value of unsold shares is a figure used to determine the overall anticipated consideration for a cooperative conversion. The anticipated consideration is used to calculate the amount of gain per share and, ultimately, the amount of gains tax due as shares continue to be sold over the course of the conversion. The estimate of anticipated consideration is initially made at the outset of the conversion and is periodically reset for the purpose of trying to keep the estimated gain-per-share figure in proximity with the actual gain per share. The estimate of consideration and its resulting gain-per-share figure is redetermined when 25% (optional), 50% and 75% of the shares have been sold, i.e., at the update or final sellout points (the amount of actual gain is finally determined when 100% of the shares have been sold). At each of the update points, the total anticipated consideration and the gain-per-share figure are recomputed based upon the actual consideration received as of that date plus an estimate of the consideration to be received upon the sale of the shares which remain unsold.

E. Clearly, then, the Division correctly determined gains tax due based upon actual consideration received on shares sold between the filing of the 75% updates and the audits (1,916 shares in the case of Briarwood and 5,693 shares for Dunolloy). As of the date of audit, however, the Division calculated anticipated consideration for unsold shares using not each petitioner's figures, but its own.

The Division's audit brought petitioners' gain-per-share calculations current by its use of actual consideration on units sold to the date of the audit. This is, in all respects, proper. However the issue to be resolved herein is whether the Division, at the time of the audit, may also redetermine anticipated consideration by utilizing actual consideration amounts to date rather than permitting such anticipated consideration to be calculated based upon the taxpayer's safe harbor estimates.

It must be found that, in each of these matters, had Briarwood and/or Dunolloy proven that it complied with the safe harbor provisions, the Division would, pursuant to the terms thereof, be compelled to compute anticipated consideration based upon petitioners' estimates. While the source of the Division's figures ($122.16 per share for Briarwood and $142.00 per share for Dunolloy) remains unclear, it is petitioners which bear the burden of proof. The parties have chosen, in the instant matters, to have the controversies determined on submission without hearing. Upon reflection, perhaps the resolution of these matters would have been better accomplished through the hearing process, i.e., with clarifying testimony. In the alternative, documentary evidence such as petitioners' initial gains tax filings and calculations indicating the source of petitioners' vacant market value for unsold units may have aided petitioners in sustaining their burden of proof. Petitioners were certainly made aware that the source of these figures was in dispute, since this was a contention of the Division which was set forth in its brief. Absent such proof, however, the assessments cannot be cancelled or modified. This determination does not stand for the proposition that the Division may simply change a taxpayer's estimate of anticipated consideration on unsold shares where such taxpayer has validly elected safe harbor treatment; it merely holds that such action was proper in <u>these</u> cases because petitioners did not sustain their burden of proving that they validly elected and complied with the safe harbor guidelines.

F. Petitioners contend that, since the subject properties were acquired for consideration, pursuant to the provisions of Tax Law § 1440(5), "original purchase price" means the "consideration paid or required to be paid by the transferor" to acquire the interest in the property. It is petitioners' position that, despite this statutory language, the Tax Appeals Tribunal, in <u>Matter of Schrier</u> (Tax Appeals Tribunal, July 16, 1992, <u>affd</u> 194 AD2d 273, 606 NYS2d 384), upheld the validity of 20 NYCRR former 590.50(a)(3) which, petitioners maintain, "flies squarely in the face of section 1440(5)(a)."

Tax Law § 1443(5) provides for an exemption from gains tax:

> "[i]f a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest."

While 20 NYCRR former 590.50(a)(3), which relates to transfers of real property by a corporation to its shareholders who then hold the property as tenants-in-common in the same pro rata share as they own the corporation, is not at issue in the present matters, a closely-related regulation, i.e., 20 NYCRR former 590.50(a)(1), is applicable herein, providing as follows:

> "(a) Question: Section 1443(5) of the Tax Law exempts a transfer from the gains tax to the extent it 'consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest.' Does this exempt:
>
> > "(1) The transfer of real property by a person to a partnership in exchange for an interest in the partnership?
>
> "Answer: Yes. Partially. This is a mere change in the form of ownership and would be exempt to the extent of the person's interest in the partnership."

In the present matters, Lawrence Goodman and Cynthia Levine conveyed their 33-1/3% interest in the property to Briarwood in return for 33-1/3% of a limited partnership interest in Briarwood; as to Dunolloy, these same individuals conveyed their 30% interest in the property in exchange for a 30% limited partnership interest in Dunolloy.

Tax Law § 1440(5) states, in pertinent part, as follows:

> "(b) In the case of a transfer of real property by a gift, devise, bequest or inheritance, the original purchase price of the real property in the hands of the transferee immediately after the transfer shall be the same as the original purchase price of such property in the hands of the transferor immediately before the transfer.
>
> "(c) The transferee of every transfer of real property for which exemption is granted, pursuant to subdivision one of section fourteen hundred forty-three of this article on the basis that no consideration was paid for such transfer, shall be bound by a determination of original purchase price as determined under paragraph (b) of this subdivision, if such transferee participated in filing the forms upon which such exemption was granted."

In Matter of Schrier (supra), the Tribunal stated:

> "The cited portions of Tax Law § 1440(5) address situations where the carry-over original purchase price rule applies because a transfer of ownership was made but no consideration was paid for the transfer.

> Further, the carry-over purchase price rule is also applicable to situations where consideration is paid for a transfer of ownership, but the ownership is found to be a mere change, i.e., the form of ownership changed, but the holders of the ownership interest and their proportional interests remained the same (see, 20 NYCRR 590.50[a][3]).
>
> "Petitioners contend that because 20 NYCRR 590.50(a)(3) goes beyond Tax Law § 1440(5) by applying the carry-over purchase price rule to exchanges for consideration, the regulation is invalid. We disagree . . . .
>
> "We determine that the regulation represents a proper, practical method for implementing the gains tax and is not inconsistent with any statutory provision. To provide otherwise would undermine the imposition of the gains tax. Without 20 NYCRR 590.50(a)(3), a taxpayer intending to sell real property could raise the original purchase price of the real property through an intermediate transaction to a dummy corporation wholly owned by the taxpayer. This transaction would be exempt from tax pursuant to Tax Law § 1443(5) as a mere change in form. The corporation could then make a transfer of the real property to a third party. Although this transfer would be subject to the imposition of the gains tax, the amount of tax due would be greatly diminished since the intermediate transaction inflated the original purchase price through a transfer that was not taxed. The carry-over original purchase price rule, applied to the mere change in form transfer, acts to preserve the gain for taxation at the time of a subsequent taxable transfer. Therefore, we conclude that the regulation is a valid interpretation of the Tax Law."

As previously indicated, this position of the Tribunal was affirmed by the Appellate Division of the Supreme Court, Third Department (supra, 194 AD2d at 273).

Accordingly, it must be determined herein that the Division's determination that the exchanges by Lawrence Goodman and Cynthia Levine of their interests in the subject properties in exchange for limited partnership interests (in the exact percentage of their original ownership) in Briarwood and Dunolloy were mere changes of identity or form of ownership or organization was proper. Therefore, requiring that petitioners carry over the original purchase price of Mr. Goodman and Ms. Levine was also proper.

G. The issue of assessed penalties was not addressed by petitioners in evidence submitted or in their brief. Therefore, there is no reason for reduction or abatement thereof.

H. The petitions of Briarwood Associates Limited Partnership and Dunolloy Associates Limited Partnership are denied and the notices of determination issued to these petitioners on March 4, 1991 and March 11, 1991, respectively, as adjusted at the conciliation conference, are sustained.

DATED: Troy, New York
November 22, 1995

/s/ Brian L. Friedman

ADMINISTRATIVE LAW JUDGE