STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

ESTATE OF DANIEL D. BROCKMAN :

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. :

In the Matter of the Petition :

of :

RICHARD M. BROCKMAN :

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. :

In the Matter of the Petition :

of :

SUSAN BROCKMAN :

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. :

In the Matter of the Petition :

of :

JOLIE HAMMER :

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. 812111, 812112, 812113 AND 812114

Petitioner Estate of Daniel D. Brockman, c/o Richard M. Brockman, 28 West 89th Street,

New York, New York 10024, 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.

Petitioner Richard M. Brockman, 28 West 89th Street, New York, New York 10024, 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.

Petitioner Susan Brockman, 138 Duane 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.

Petitioner Jolie Hammer, 1200 Broadway, New York, New York 10001, 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.

On February 2, 1994, petitioners Jolie Hammer, Richard M. Brockman, and the Estate of Daniel D. Brockman (by its executor, Richard M. Brockman), on February 3, 1994, petitioner Susan Brockman, and on February 28, 1994, the Division of Taxation by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel) each signed a respective consent to have these matters determined on submission without a hearing, with all documents and briefs to be submitted by September 2, 1994. The Division of Taxation submitted documents on March 24, 1994. Petitioners, appearing by Jeffrey M. Diamond, Esq., filed their brief on July 1, 1994. The Division of Taxation filed its

brief on July 21, 1994, and petitioners' reply brief was received on August 17, 1994. Subsequently, petitioners obtained permission and submitted, on December 1, 1994, a copy of the decision of United States Bankruptcy Judge Dorothy Eisenberg in In Re Williams with a cover letter explaining its relevance to these matters. The Division of Taxation responded on December 22, 1994 with the filing of a letter in response, to which petitioners replied by a letter received December 30, 1994. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation in calculating consideration for the transfer of certain real property properly included a (proportionate share) of a purchase money mortgage of $8,500,000.00 held by the sellers (which included petitioners) despite the fact that the purchaser subsequently defaulted on such mortgage and the property was reacquired by the sellers through a foreclosure action.

II. Whether the Division of Taxation should be estopped from subjecting the transaction at issue to gains tax because petitioners had no actual income from the transaction but rather suffered a loss, and the Division of Taxation has asserted, in other forums, that the gains tax is an income tax.

FINDINGS OF FACT

The four petitioners, along with two others, each owned a certain percentage interest in a 378-acre parcel of unimproved land located in the Town of East Hampton, Suffolk County, New York at Sag Harbor Turnpike and Buckskill Road ("East Hampton parcel") as follows:

Name	Percentage Interest
Estate of Daniel D. Brockman	12.500
Richard M. Brockman	4.167
Jolie Hammer	4.167
Susan Brockman	4.166
Imre J. Rosenthal	50.0
National Investors Fund, Inc.	25.0
	100.0%

The four petitioners and the two other parties noted above in Finding of Fact "1", as

sellers, each executed a contract dated September 6, 1990 for the sale and purchase of the East Hampton parcel with a purchaser described as "Buckskill Estates, Inc., a New York corporation." This contract provided for a purchase price of $9,500,000.00 with a downpayment of $750,000.00 on the signing of the contract, $250,000.00 at closing and a purchase money note and mortgage from Buckskill Estates, Inc. to the sellers in the amount of $8,500,000.00. The contract noted that the downpayment of $750,000.00 "shall be paid to Seller in accordance with their respective interests in the premises" so that the downpayment was allocated as follows:

Seller	Percentage Interest	Amount
Imre J. Rosenthal	50.000	$375,000.00
National Investors Fund, Inc.	25.000	187,500.00
Estate of Daniel D. Brockman	12.500	93,750.00
Richard M. Brockman	4.167	31,252.50
Jolie Hammer	4.167	31,252.50
Susan Brockman	4.166	31,245.00
	100.000%	$750,000.00

The factual record on submission is limited. However, petitioners noted in their brief that the four petitioners consist of "three children

and the estate of their father" (Petitioners' brief, p. 1). The brief also sets forth the additional, albeit unsubstantiated, fact that the purchaser of the property, Buckskill Estates, Inc., was "an unrelated no-asset corporation which apparently planned to resell or develop the Property" (Petitioners' brief, p. 2). Documents in the record show that an individual named Paul Sweetman of Southington, Connecticut, executed documents on behalf of Buckskill Estates, Inc., as this New York corporation's president.

As noted in Finding of Fact "1", the four petitioners owned, in total, a 25% interest in the East Hampton property. The relationship between petitioners and Imre Rosenthal is unknown. The record also does not disclose many details concerning National Investors Fund, Inc., although it is observed that it is a Delaware corporation and that its corporate secretary, Robert M. Post, a New York attorney based in Hicksville, Long Island, executed documents on its behalf. It is further observed that the closing of the transaction at issue took place at the Hicksville office of Walter L. and Robert M. Post.

Petitioners each filed, as a transferor of an interest in real property, a Form TP-580, which is a real property transfer gains tax transferor questionnaire. The questionnaires of the Estate of Daniel D. Brockman, Richard M. Brockman and Jolie Hammer were each dated September 25, 1990, and the questionnaire of Susan Brockman was dated September 21, 1990. The questionnaires computed anticipated tax due as follows:

	Estate of Daniel D. Brockman	Richard M. Brockman	Jolie Hammer	Susan Brockman	Totals
Gross Consideration to be paid for transfer by Buckskill Estates	$1,187,500.00	$395,865.00	$395,865.00	$395,770.00	$2,375,000.00
(Less) Brokerage fees to be paid by transferor[1]	(118,750.00)	(39,587.00)	(39,587.00)	(39,577.00)	(237,501.00)

[1] Brokerage fees represented 10% of the gross consideration to be paid for the transfer. The questionnaires directed that the brokerage agreement should be attached to the questionnaire. However, the record does not include a copy of the brokerage agreement. It is unknown if petitioners were related in some fashion to the broker or if their relationship was at arm's length.

Consideration	$1,068,750.00	$356,278.00	$356,278.00	$356,193.00	$2,137,499.00
Purchase price paid to acquire real property	$ 90,644.00	$ 30,217.00	$ 30,217.00	$ 30,210.00	$ 181,288.00
Allowable selling expenses	25,000.00[2]	-0-	-0-	-0-	25,000.00
Original purchase price	$ 115,644.00	$ 30,217.00	$ 30,217.00	$ 30,210.00	$ 206,288.00
Gain subject to tax[3]	$ 953,106.00	$326,061.00	$326,061.00	$325,983.00	$1,931,211.00
Anticipated tax due	$ 95,311.00	$ 32,606.00	$ 32,606.00	$ 32,598.00	$ 193,121.00

The Division of Taxation ("Division") completed a tentative assessment and return dated October 15, 1990 for each petitioner based upon the transferor questionnaires. The tentative assessments and returns were "sworn to and subscribed to", respectively, by the Estate of Daniel D. Brockman and Richard M. Brockman on October 19, 1990 and by Jolie Hammer and Susan Brockman on October 22, 1990. These tentative assessments computed total gains tax due for the Estate of Daniel D. Brockman, Richard M. Brockman, Jolie Hammer and Susan Brockman of $95,310.60, $32,606.10, $32,606.10 and $32,598.30, respectively.

Subsequently, each petitioner filed a Form TP-583, which is a real property transfer gains tax supplemental return, all dated October 22, 1990, which deferred payment of a portion of the gains tax shown due on the tentative assessments and returns noted in Finding of Fact "5". Petitioners calculated amounts to be deferred as follows:

	Estate of Daniel D. Brockman	Richard M. Brockman	Jolie Hammer	Susan Brockman
(1) Gain subject to tax	$953,106.00	$326,061.00	$326,061.00	$325,983.00
(2) Tax due	95,310.60	32,606.10	32,606.10	32,598.30
(3) Cash received	125,000.00	41,670.00	41,670.00	41,660.00
(4) 50% of line 3	62,500.00	20,835.00	20,835.00	20,830.00

---

[2] The record does not disclose the specific nature of this expense and why only the estate incurred such expense.

[3] Consideration less original purchase price.

(5) Amount to be deferred[4]	32,810.60	11,771.10	11,771.10	11,768.30

Petitioners remitted the amounts shown on line (4) above. Photocopies of four checks in the respective amounts were included in the documents submitted by the Division as part of the claims for refund. Petitioners also made further installment payments in the following aggregate amounts as admitted by the Division in its answers to the petitions:

	Estate of Daniel D. Brockman	Richard M. Brockman	Jolie Hammer	Susan Brockman
Aggregate Amount of Additional Installment Payments	$22,237.40	$6,776.06	$7,975.93	$7,974.19

As noted in Finding of Fact "2", the property was sold to Buckskill Estates, Inc. for $9,500,000.00 which included a purchase money note and mortgage both in the corresponding amount of $8,500,000.00. This mortgage note, which was dated October 22, 1990, provided for the payment of the note in installments with the first payment of $297,500.00 due on April 1, 1991. Such payment was not made and, as a result, the sellers

accelerated and declared immediately due and payable the whole of the principal sum of the mortgage note. Because the default of Buckskill Estates, Inc. was not cured and no other satisfactory arrangements were agreed upon by the sellers and Buckskill Estates, Inc., the sellers commenced a foreclosure proceeding dated June 17, 1991 which sought the following relief:

> "Mr. Rosenthal[5] demands judgment that Buckskill, the People of the State of New York and all persons claiming under it or any of them, subsequent to the

---

[4] Line 2 less line 4.

[5] As noted in Finding of Fact "1", Imre J. Rosenthal owned a 50% interest in the 378-acre East Hampton parcel. He commenced the foreclosure action as "the mortgage servicing agent for the owners and holders of the mortgage herein foreclosed and of the Mortgage Note secured thereby" (paragraph "8" of the foreclosure complaint).

commencement of this action and the filing of a Notice of Pendency thereof, be barred and foreclosed of and from all estate, right, title, interest, claim, lien and equity of redemption of, in and to the Mortgaged Premises and each and every part or parcel thereof; that the Mortgaged Premises may be decreed to be sold, according to law . . .; that the monies arising from the sale thereof may be brought into the Court; that Mr. Rosenthal may be paid the amount due on the Mortgage Note and Mortgage as hereinbefore set forth, with interest and late charges to the time of such payment and the expenses of such sale, plus reasonable attorneys' fees, together with the costs, allowances and disbursements of this action, and together with any sums incurred by Mr. Rosenthal pursuant to any term or provision of the Mortgage Note and Mortgage set forth in this complaint, or to protect the lien of the Mortgage or the Mortgaged Premises, together with interest upon said sums from the dates of the respective payments and advances thereof, so far as the amount of such monies properly applicable thereto will pay the same; and that Buckskill may be adjudged to pay the whole residue, or so much thereof as the Court may determine to be just and equitable, of the debt remaining unsatisfied after a sale of the Mortgaged Premises and the application of the proceeds pursuant to the directions contained in such judgment, and that Mr. Rosenthal may have such other and further relief, as may be just and equitable."

As noted in Finding of Fact "3", few facts can be established from the record on submission. It is observed that petitioners pleaded the following allegations in their petitions, in response to which the Division, in its answer, pleaded that it "lacks knowledge or information sufficient to form a belief as to [such] allegation":

"6. Buckskill defaulted in making the first and each subsequent payment required under the Mortgage. Buckskill never made a single payment under the Mortgage.

"7. As a result of Buckskill's default, a foreclosure action was commenced.

"8. A judgment of foreclosure was entered and a foreclosure sale was held, at which Transferors' bid of $2,000,000.00 was successful.

"9. The Premises were thereafter reconveyed to Transferors by Referee's Deed.

"10. Petitioner incurred legal fees and disbursements with respect to the foreclosure action and the subsequent reconveyance of the Premises to Transferors, in an amount to be established at the hearing on this appeal." (Emphasis in original.)

Petitioners each filed a Form TP-165.8, which is a Claim For Refund Of Real Property Transfer Gains Tax, requesting refund of gains tax paid on the transaction at issue for the following reason:

"As a result of the [foreclosure action noted in Finding of Fact '7'], the

original transfer has become null and void. Therefore, since no 'transfer of real property' within the meaning of Section 1441 of Article 31-B of the Tax Law has taken place, Claimant has erroneously paid the tax imposed by said Article 31-B and is entitled to a refund of such tax."

By letters dated September 20, 1991, the Division denied petitioners' respective refund claims. The Division's letters provided the same explanation for such denials:

"The original sale involved the fee transfer of vacant land by tenants-in-common. The parties agreed that consideration of $9.5 million would be paid by the purchaser in the form of a $1,000,000 cash payment and a $8.5 million mortgage.

"Section 1440.1(a) of the Tax Law states that 'consideration' means the '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 the mortgage, purchase money mortgage . . . .'

"Section 1440.3 defines 'gain' as 'the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.'

"Since the amount of gain and tax due is computed at the time of transfer, the consideration used in this calculation takes whichever form the taxpayer elects. Because the mortgage is an amount required to be paid, and as the Department lacks the statutory authority to adjust gain based on future occurrence, we must conclude that claimants [sic] tax liability was properly determined at the time of transfer.

"In addition, we must disagree with claimant's contention that the aforementioned foreclosure action renders the transfer null and void.

"Section 1440.7 of the Tax Law provides that 'transfer of real property' means [']the transfer or transfers of any interest in real property by any method including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property'.

"There exists no statutory authority by which a transfer of real property within the meaning set forth above can be declared to be null and void . . . .

"Please be advised that should claimant reacquire the property, either through foreclosure proceedings or by accepting a deed in lieu of foreclosure, this action will constitute a second transfer of real property for gains tax purposes and must be reported to this office." (Emphasis in original.)

SUMMARY OF THE PARTIES' POSITIONS

Petitioners concede that purchase money mortgages constitute "consideration" for the purpose of determining "gain" subject to tax (Petitioners' brief, p. 4). However, they contend that because petitioners have suffered a loss, the imposition of gains tax here would not be

rationally related to a legitimate State interest and consequently violates the equal protection clause of the United States and New York State Constitutions (Petitioners' brief, p. 7). Petitioners distinguish the decision in Trump v. Chu (65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915, 106 S Ct 285) because the Court of Appeals agreed with the Division's argument that the gains tax "did not violate equal protection because the statute and regulations were constructed in such a manner that the tax was imposed only in the case of a net profit" (Petitioners' brief, p. 8).

Petitioners assert some alternative arguments. First, they suggest that petitioners did not sell their interests to Buckskill Estates but rather sold "an option for $1,000,000 (less expenses), which was completed", but the option and conveyance for an additional $8,500,000.00 was never "consummated" (Petitioners' brief, p. 9). In the alternative, they propose: (1) "the transaction could be viewed as a series of partial or successive transfers", and the only "completed" transfer "was for consideration . . . of less than $1,000,000" (Petitioners' brief, p. 11); or (2) "since title returned to Sellers . . ., the transaction collapsed" and there has been no "transfer of real property" (Petitioners' brief, pp. 11-12); or (3) "from the sale through the conclusion of the foreclosure action, this may be viewed as a single integrated transaction" and "the total consideration received by Petitioners from this integrated transaction was under $200,000 and there was no gain subject to the Gains Tax" (Petitioners' brief, pp. 12-13).

Undergirding all of petitioners' arguments is their complaint that the imposition of gains tax on a transaction that fell apart is "unreasonable and unjust" because they did not have an actual economic gain but rather suffered "a substantial out-of-pocket loss" (Petitioners' brief, p. 14).

The Division counters that events occurring subsequent to the sale of the property to Buckskill Estates, Inc. do not affect the real property transfer gains tax liability of petitioners. Citing decisions of the Tax Appeals Tribunal, including Matter of Old Farm Lake Company (April 2, 1992), the Division emphasizes that "in computing consideration, the 'amount' of a mortgage means the face amount of such mortgage, rather than its present value" (Division's

brief, p. 5; emphasis in original). The Division contends that even if petitioners suffered an economic loss on the transfer because of the buyer's failure to comply with its payment obligations, gains tax liability remains unaffected because the calculation of consideration remains unchanged. Citing the Court of Appeals decision in Unimax Corp. v. Tax Appeals Tribunal (79 NY2d 139, 581 NYS2d 135), the Division argues that petitioners' attempt to demonstrate that the application of the gains tax statute to the transfer at issue is flagrantly unfair is to no avail. The Division rejects petitioners' argument that their constitutional rights to equal protection have been violated because they "have not shown that they have been treated any differently than any other transferor subject to the gains tax" (Division's brief, p. 10). The Division also rejects petitioners' attempt to characterize their transfer to Buckskill Estates as something other than a transfer. According to the Division, such transfer was not invalidated by the subsequent foreclosure and sale back to petitioners.

Finally, the Division dismisses petitioners' argument that no gains tax should be due because the gains tax is an income tax and no income was earned. Rather, the Division, citing the Tribunal's decision in Matter of SKS Associates (September 12, 1991), maintains that the gains tax is a gains tax.

In their reply brief, petitioners contend that "the entire transaction -- from sale through foreclosure -- should be viewed as a single integrated transaction", and "[s]ince the total 'consideration' was less than $1 million and there was no 'gain', the transaction should not be subject to Gains Tax" (Petitioners' reply brief, p. 2). Petitioners contend that the definition of "transfer of real property" as set forth in Tax Law § 1440(7), applicable to the transaction at issue, included more than one transfer within the definition of "transfer of real property", i.e., "'[t]ransfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale, . . . mortgage foreclosure . . ." (emphasis added). The use of the language "or transfers", according to petitioners, supports their view that the entire transaction, from sale through foreclosure, should be viewed as a single integrated transaction. Petitioners point out that by chapter 170 of the Laws of 1994, the words "or transfers" were

deleted so that there is no basis for any concern that the "granting of this petition would open flood gates to further applications", since the words "or transfers" have been deleted (Petitioners' reply brief, p. 3).

Subsequent to the submission of briefs, petitioners requested permission to bring to the attention of the Administrative Law Judge the position taken by the Division in a bankruptcy case entitled In Re Williams in the United States Bankruptcy Court for the Eastern District of New York, which was reported as a front-page story in the New York Law Journal of November 8, 1994. In this bankruptcy matter, petitioners contend that the Division's attorney maintained that the gains tax was an "income tax" in order to obtain priority under Bankruptcy Code § 507(a)(7)(i) (as "a tax on or measured by income") for $3,000,000.00 in gains tax. Therefore, the Division, according to petitioners, should be estopped from denying that the gains tax is an income tax, and since petitioners received no income from the transaction at issue, no gains tax may be imposed.

The Division, in a letter dated December 20, 1994, countered that the Division may not be estopped "from asserting arguments of law in the present case whether or not they are contrary to its legal arguments in Williams." According to the Division's letter:

> "To agree that the tax is measured on income is not to agree with the petitioners that the tax must be calculated on the net gain actually received, as such receipts are affected by circumstances which occurred subsequent to the transfer."

Petitioners had final say in a letter dated December 27, 1994 where they emphasized that the Division should be estopped from taking a position inconsistent with a prior position.

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.

B. Tax Law § 1440(former [7]) defined "transfer of real property" to encompass an array of transactions as follows:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a

receiver or acquisition of a controlling interest in any entity with an interest in real property."[6]

C. Tax Law § 1440(3) defines "gain" as the:

"difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price."

Tax Law § 1440(5)(a)(i) defines "original purchase price" to mean:

"the consideration paid or required to be paid by the transferor (A) to acquire the interest in real property, and (B) for any capital improvements made or required to be made to such real property . . . ."

"Consideration", in turn, is defined by Tax Law § 1440(1)(a) to mean:

"the price paid or required to be paid, for real property or any interest therein . . . . 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 encumbrance, whether the underlying indebtedness is assumed or taken subject to" (emphasis added).

D. It is observed that petitioners are seeking a refund of gains tax paid. As noted in Finding of Fact "4", they filed transferor questionnaires which included their respective and proportionate shares of the face amount of the purchase money note and mortgage of $8,500,000.00 in their calculation of consideration. This was properly done, because it is well-established that consideration includes the face amount of a mortgage determined at the time of the transfer (Matter of Cheltoncort, Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121; Matter of South Suffolk Recreation Ventures, Tax Appeals Tribunal, November 3, 1994) and, as noted in paragraph "11", petitioners have conceded as much.

E. Petitioners are wrong that gains tax may be imposed only in the case of a net profit.

---

[6] The definition of "transfer of real property" noted above was applicable to the transaction at issue which took place in 1990. Subsequently, chapter 170 of the Laws of 1994 deleted the words "or transfers" from the definition of "transfer of real property" as noted in Conclusion of Law "G".

Instead, gains tax has been imposed in situations of speculative profit and in situations where real estate transactions have soured. In Matter of Howard Enterprises (Tax Appeals Tribunal, August 4, 1994), a conveyance in lieu of foreclosure which was the culmination of a soured project, also on the eastern end of Long Island, was held subject to gains tax because by the foreclosure a $3,000,000.00-plus mortgage was discharged. In short, there is no denying that the gains tax can be a rather harsh tax in a declining real estate market, but such harshness does not provide a way to avoid the tax. Nor does it provide a basis for concluding that petitioners' constitutional rights to equal protection are violated if the transaction at issue is held subject to tax. Certainly, petitioners have failed to shoulder the heavy burden to establish that the Division's imposition of gains tax resulted in palpably arbitrary or invidious discrimination (Scobey v. State Tax Commn., 95 AD2d 905, 463 NYS2d 907; see, Unimax Corp. v. Tax Appeals Tribunal, supra [wherein the court noted that there is no requirement that a taxing statute must be fair in application]).

In the matter at hand, as noted in Finding of Fact "8", petitioners stated that the sellers, which included petitioners, repossessed the East Hampton parcel with a successful bid at the foreclosure sale in the summer of 1991 of $2,000,000.00. This is a sum vastly smaller than the purchase price which Buckskill Estates agreed to pay of $9,500,000.00 by the contract dated September 6, 1990. Nonetheless, 25% of $2,000,000.00, or $500,000.00, which is the total percentage interest in the East Hampton parcel held by petitioners, is substantially greater than their total original purchase price of $206,288.00 as noted in Finding of Fact "4", and consequently their economic situation is somewhat better than the taxpayer in Howard Enterprises (supra). Of course, petitioners confront a total gains tax liability of $193,121.00 on a deal that soured. Unfortunately, the fact that petitioners did not profit as they anticipated on the transaction at issue is not relevant for purposes of calculating their gains tax liability (see, Matter of SKS Associates, supra).

F. Petitioners' attempt to categorize the transaction at issue as something other than a sale to Buckskill Estates is not supported by the record. As noted in Finding of Fact "2", the East

Hampton parcel was transferred by the sellers, which included petitioners, by a contract for the sale and purchase of such land. Petitioners' ability to challenge the form of this transaction as devoid of economic reality is limited (see, Matter of Lion Brewery of New York City, Tax Appeals Tribunal, December 9, 1993). Moreover, the facts are clear in the matter at hand that petitioners sold their respective interests in the East Hampton parcel to Buckskill Estates and petitioners have cited no authority for the proposition that the purchaser's subsequent default made the original sale null and void.

G. The Legislature has manifested no intent to ignore a transaction for purposes of gains tax due to subsequent events. Rather, the Legislature's definition of "transfer of real property", as noted in Conclusion of Law "B", is extremely broad. Such definition evidences no intent on the part of the Legislature to ignore the form of a transaction as a sale because the sale later turned sour, and the seller failed to profit as planned (cf., Matter of Shechter, Tax Appeals Tribunal, October 13, 1994 [wherein the Tribunal noted that the Legislature evidenced its intent to "look through" an entity to determine the beneficial owners of property by the way it defined "interest in property"]).

Petitioners have contended, as noted in paragraph "13", that the amendment of the definition of "transfer of real property" by chapter 170 of the Laws of 1994, which eliminated the words "or transfers", shows that the earlier definition which included such words supports their contention that "the entire transaction -- from sale through foreclosure -- should be viewed as a single integrated transaction." Such argument is without merit.

The Laws of 1994 (ch 170, § 94) amended Tax Law § 1440(7) to read as follows:

> "(a) 'Transfer of real property' means the transfer of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. Transfer of an interest in real property shall include 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.
>
> "(b) 'Transfer of real property' shall include:

"(i) partial or successive transfers of interests in contiguous or adjacent real property by a transferor or related transferors to one or more transferees, if such transfers occur within a three-year period, without regard to the use of such real property or whether such transfers were pursuant to a plan or agreement; provided, however, that consideration from a transfer of real property by a transferor shall not be aggregated with consideration from a transfer of real property by such transferor's estate and consideration from the following transfers of real property shall not be aggregated with consideration from any other transfer for purposes of this subparagraph: a transfer of real property pursuant to a mortgage foreclosure or any other action to enforce a lien or security interest; a transfer of real property upon liquidation or by a receiver; a transfer of real property pursuant to a taking by eminent domain; or a transfer of real property pursuant to a divorce proceeding;

"(ii) partial or successive transfers of interests in real property by tenants in common, joint tenants or tenants by the entirety of such real property to one or more transferees, if such transfers occur within a three-year period, without regard to the use of such real property or whether such transfers were pursuant to a plan or agreement;

"(iii) partial or successive transfers made pursuant to a cooperative or condominium plan. Transfers pursuant to a cooperative plan include all transfers of stock in a cooperative corporation which owns real property; and

"(iv) partial or successive transfers of interests in subdivided parcels of real property, without regard to the use of such real property or whether such transfers were pursuant to a plan or agreement; provided, however, that (A) the transfer of parcels located in a residential subdivision which have been substantially improved for residential use to a transferee who intends to construct residential dwellings on such parcels, or has constructed or is constructing residential dwellings on such parcels, and (B) the transfer of parcels located in a residential subdivision which have been improved or partially improved with a residential dwelling, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property. Such substantial improvement may include the construction of streets, sewers or utility lines. The fact that such subdivision is a residential subdivision may be demonstrated by zoning restrictions placed on such subdivided parcels or the existence of contracts entered into by the transferor to transfer developed parcels or by the transferee to build residences or other similar circumstances.

"(c) Notwithstanding the foregoing, transfer of real property shall not include a transfer pursuant to devise, bequest or inheritance; the creation, modification, extension, spreading, severance, consolidation, assignment, transfer, release or satisfaction of a mortgage; a mortgage subordination agreement, a mortgage severance agreement, an instrument given to perfect or correct a recorded mortgage; or a release of lien of tax pursuant to this chapter or the internal revenue code of nineteen hundred fifty-four, as amended."

It is observed that the Laws of 1994 (ch 170) represented enactment of a departmental bill of the Department of Taxation and Finance. A Memorandum In Support at page 19, Governor's Bill Jacket (L 1994, ch 170) shows that "the words 'or transfers' are deleted from the definition of 'transfer of real property' as surplusage." There is no support in a comparison of the current

definition to the earlier version or in the legislative history for petitioners' argument that the earlier version somehow supports its argument that the sale through foreclosure should be viewed as a single integrated transaction. Rather, petitioners have crafted a strained interpretation of the aggregation provisions included in both definitions.

H. Petitioners' argument that the Division should be estopped from taking a position in the matter at hand inconsistent with its prior position taken in the bankruptcy matter cited in paragraph "14" is also without merit. First, the extent of the Division's so-called "inconsistency" is reasonably disputed by the Division's representative, who argued persuasively as noted in paragraph "14" that "[t]o agree that the tax is measured on income is not to agree with the petitioners that the tax must be calculated on the net gain actually received . . . ." Furthermore, estoppel is an extraordinary remedy which is rarely applied (Matter of Maximilian Fur Co., Tax Appeals Tribunal, August 9, 1990). Petitioners have not established that they suffered a profound and unconscionable injury in reliance on actions of the Division sufficient to provide a basis to estop the Division from asserting the well-established legal principle that "consideration" includes the face amount of a mortgage determined at the time of the transfer as noted in Conclusion of Law "D" (see, Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

I. The respective petitions of the Estate of Daniel D. Brockman, Richard M. Brockman, Susan Brockman and Jolie Hammer are denied, and the refund denials dated September 20, 1991 are sustained.

DATED: Troy, New York
March 9, 1995

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE