STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MORDECHAI HALBERSTAM	:	DETERMINATION DTA NO. 812255
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, Mordechai Halberstam, c/o Carl Caller, 4311 13th Avenue, Brooklyn, New York 11219-1337, 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 and the Division of Taxation consented in writing to have the controversy determined on submission without hearing. Documents were submitted by the Division of Taxation, and briefs were submitted by both parties. The Division of Taxation submitted a brief on September 29, 1994 which commenced the six-month statutory period for issuance of a determination. Petitioner appeared by Carl Caller, Esq. The Division of Taxation appeared by William F. Collins, Esq. (David Gannon, Esq., of counsel). After due consideration of the documents and briefs submitted, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly determined that certain transactions entered into by petitioner were options or assignments of contracts to purchase real property.

II. Whether the Division correctly calculated the original purchase price for petitioner's acquisition.

III. Whether petitioner should have been allowed to place documentary evidence in the record after the time period for doing so had elapsed.

IV. Whether those portions of petitioner's reply brief addressing issues not raised in the

Division of Taxation's first brief should be stricken.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner, Mordechai Halberstam, a Notice of Determination dated January 19, 1993 asserting real property gains tax due under Article 31-B of the Tax Law in the amount of $61,600.00, plus penalty and interest.

The notice was issued as a result of an investigation of certain real property transfers connected with a plan to convert the premises of 600 Shore Road, Long Beach, New York to cooperative ownership. The offering plan for that project describes the property as a building known as Riviera Towers. Under the plan, the cooperative corporation offered for sale a total of 36,978 shares of capital stock allocated to 93 residential apartments. The date of the first offering of the plan was August 7, 1987. During the course of an audit involving unrelated third parties, the Division learned that in connection with this cooperative conversion plan petitioner had made transfers of certain interests in the real property but had never notified the Division.

In May 1991, the Division obtained information from the ultimate sponsor of the 600 Shore Road cooperative conversion plan, Martin Katz, relating to the nature of petitioner's interest in the premises and the price paid for the acquisition of that interest. As relevant here, the narrative account provides as follows:

> "On January 22, 1986 a contract of sale was entered into by and between Jay J. Raddock, as Seller, and Brothers Forever Company, a partnership . . . for the sale to Brothers Forever Company of premises known as 600 Shore Road, in Long Beach, New York. The contract called for a sales price of $3,850,000.00, and, pursuant to the terms of a contract of assignment dated the same day, Brothers Forever Company agreed to assign its right, title and interest in and to the contract and the property to Chaim Gross in consideration of a total purchase price of $5,350,000.00 (the 'Contract'). The original contract by and between Jay J. Raddock, as Seller, and Brothers Forever Company, as Purchaser, was, in fact, negotiated by and on behalf of Chaim Gross.
>
> "The Contract was different from the standard apartment house contracts in various respects. The Contract not only contained the regular representations by the Seller with respect to the premises . . . and the information required by a prospective cooperative converter, but, indeed, required the Purchaser, during the pendency of the Contract, to convert the premises to cooperative ownership at the Purchaser's own cost and expense. The Contract required the Seller to cooperate with the Purchaser and provide such information and execute such documentation as may reasonably be necessary and required but contemplated a closing on the cooperative shares simultaneously with the closing of title to the premises.

"Pursuant to the terms of the Contract, in addition to the original deposit, the Purchaser was required to make additional deposits on account of the purchase price, during every six (6) months between the contract date and the closing date, in the amount of $50,000.00.

* * *

"On or about April 1, 1988, Chaim Gross entered into an Agreement of Assignment whereby in consideration of the payment of $615,000.00, Mr. Gross relinquished his right, title and interest in and to the property, the Contract, and the sponsorship of the project to an entity formed by Martin Katz, named Oros Holding. Pursuant to the terms of the Agreement of Assignment, Mr. Gross was reimbursed for the $600,000.00 in deposits he had theretofore paid to Brothers Forever Company and/or Jay J. Raddock and $200,000.00 in conversion expenses and capital improvements at the premises undertaken by Mr. Gross . . . .

"In addition to the obligation undertaken by Martin Katz d/b/a Oros Holding, vis-a-vis Chaim Gross, Mr. Gross effectuated an agreement with Mordechai Halberstam with reference to certain claims that Mr. Halberstam had as against the premises and Chaim Gross. Pursuant to the terms of that agreement between Mr. Katz and Mr. Halberstam, Mr. Halberstam released Mr. Gross from any claims whatsoever in connection with 600 Shore Road and was granted an option by Mr. Katz to acquire, within thirty (30) days after the date of closing of title to the premises or September 30, 1988, whichever is later, certain unsold shares which would exist at the premises subsequent to the closing of title. Mr. Halberstam, in turn, entered into agreements with various investors to assign to them units of apartments. The option price to be paid by Mr. Halberstam was the sum of $500,000.00 over and above all pro-rata charges, costs and expenses incurred or accrued in connection with the remainder of the conversion process.

"Thereafter, the conversion process progressed and in connection therewith the Contract to acquire the premises was assigned by Martin Katz d/b/a Oros Holding to Long Beach Owners Corp., the corporation which ultimately took title.

"Naturally, the transfer of title to the co-op corporation was simultaneous with the transfer to various tenant purchasers of the shares to their cooperative units.

"On or about July 10, 1988, all of the above transactions closed simultaneously. Also closing at that time were the transfers to over twenty (20) individual cooperative purchasers, many of whom received conventional mortgage financing from various lending institutions at the time of closing.

"The closings, which were attended by literally well over 100 people, involved the transfer of rights from Jay J. Raddock to Brothers Forever Company to Chaim Gross to Oros Holding to Long Beach Owners Corp., and simultaneously with the acquisition of title by Long Beach Owners Corp. and also of the transfer of partnership shares to the individual unit holders and the block unit holders." (Emphasis added.)

Mr. Katz also provided the Division with a copy of a letter dated August 9, 1988 from Mr. Katz to petitioner which states, in pertinent part:

"Reference is made to that Agreement of Assignment between Chaim Gross, the contract vendee for premises 600 Shore Road, Long Beach, New York, and ourselves.

"Pursuant to the terms of that agreement, the sum of $500,000.00 was to be paid in connection with your assignment to me of any rights you may have had in and to the proposed contract.

"Please be advised that the remaining balance, after receiving credit in connection with the sale of the apartments and making all computations in connection with the apartments on which title has been transferred, is $336,226.00. Please make arrangements for the payment of the foregoing sum as soon as possible."

In a letter to the auditor dated August 22, 1991, Mr. Katz's accountant provided "a summary of the computation used by Messrs. Katz and Halberstam to compute the balance of the amount due from Halberstam to katz [sic]" as follows:

"Gain per DTF701 (update)			$621,121
less amt from Halberstam			(336,226)
Sub			284,895
additional costs to Katz			
extension fee to Raddock		94,000	
interest to East River Sav			
June 88	23,572		
Jul	2,548		
total		26,120	
total other costs to Katz		(120,120)	
net amounts available to Katz		$164,775	
amounts from Halberstam		336,226	
Total amount to Katz			$500,000."

At the Division's request, transferor and transferee questionnaires were filed by petitioner and the individuals to whom he transferred his interest in the real property. Petitioner submitted a Transferor Questionnaire for Cooperatives and Condominiums (Form DTF-701) showing that a total of 36 apartment units were transferred for a total anticipated consideration of $952,269.00. The purchase price to acquire the property was reported as $500,000.00. Allowable selling expenses were added to this amount to calculate an original purchase price of $501,000.00 and a gain of $451,269.00. Petitioner also submitted six individual submission questionnaires (Form DTF-702), one for each transferee. The six transferees submitted

transferee questionnaires. These questionnaires show that a total of 37 apartment units were transferred by petitioner as follows:

Transferee	Apartment Units	Consideration
Glick	2R, 2S, 4S	$ 82,605.00
Horowitz	1B, 1M, 2C, 3D, 4E, 6B, 6C, 6H	228,698.00
Vorhand	1H, 1P, 4F, 4H, 5E, 5F, 5G, 6J	255,885.00
Fasten	1S, 2A	56,138.00
Teitlebaum	1A, 5A, 6A, 2K, 3K, 4K, 6K, 4L, 5L, 3M, 1N, 5N, 3P, 4P, 5P	314,918.00
Ostreicher	4R	14,025.00
Totals	37 apartments	$952,269.00

The transferee questionnaires indicate that the transfers in question were transfers of shares of stock in the cooperative housing corporation, Long Beach Owners Corporation. Each transferee questionnaire was dated and signed in December 1991. The date of transfer for all units was reported as September 1988. Petitioner provided no information to substantiate the information supplied on the questionnaires.

As indicated above, the questionnaires did not reveal the price paid per share or per apartment unit. The only prices given were totals for all units allegedly purchased by each transferee. The consideration shown on the questionnaires bears no relationship to the prices shown in the offering plan. For example, unit 4R, sold to transferee Ostreicher for $14,025.00, is shown in the offering plan as a 3.5 room apartment unit to which 374 shares were allocated. The insider price (the price at which the unit was offered to the existing tenant) was $84,150.00. The offering price to other potential purchasers was $121,550.00. The following table shows the offering plan selling prices for each unit allegedly transferred by petitioner:

Transferee	Apt. No.	Insider Price	Price to Others
Glick	2R	$ 80,100.00	$ 115,700.00
	2S	53,775.00	77,675.00
	4S	57,375.00	82,875.00

Horowitz	1B	84,375.00	121,875.00
	6B	91,125.00	131,625.00
	2C	88,200.00	127,400.00
	6C	94,050.00	135,850.00
	3D	91,350.00	131,950.00
	4E	143,325.00	207,025.00
	6H	101,700.00	146,900.00
	1M	60,750.00	87,750.00
Vorhand	5E	144,450.00	208,650.00
	4F	143,325.00	207,025.00
	5F	144,450.00	208,650.00
	5G	102,150.00	147,550.00
	1H	93,825.00	135,525.00
	4H	99,450.00	143,650.00
	6J	100,125.00	144,625.00
	1P	73,125.00	105,625.00
Fasten	2A	83,025.00	119,925.00
	1S	52,875.00	76,375.00
Teitlebaum	1A	82,125.00	118,625.00
	5A	87,975.00	127,075.00
	6A	88,875.00	128,375.00
	2K	88,650.00	128,050.00
	3K	92,025.00	132,925.00
	4K	93,150.00	134,550.00
	6K	95,400.00	137,800.00
	4L	81,450.00	117,650.00
	5L	82,350.00	118,950.00
	3M	64,350.00	92,950.00
	1N	60,750.00	87,750.00
	5N	66,150.00	95,550.00
	3P	77,175.00	111,475.00
	4P	78,075.00	112,775.00
	5P	78,975.00	114,075.00
Ostreicher	4R	84,150.00	121,550.00
Totals		$3,369,500.00	$4,744,350.00

The Division was uncertain of whether petitioner had actually sold shares of stock in the cooperative corporation to the transferees or contract rights to purchase the apartments. The auditor made several inquiries in an attempt to resolve this issue.

By letter to petitioner dated December 20, 1991, the Division requested the following information: (1) copies of executed sales contracts, closing statements related to each sale, bank records substantiating receipt of payments, and (2) a copy of the contract by which petitioner acquired his interest in the real property and a related closing statement and cancelled checks showing the amount paid. Petitioner did not respond to this letter.

A second letter dated March 10, 1992 sought a reply to the Division's original request for

information. Again, no response was received.

To ascertain the nature of the transfers, the auditor contacted the managing agent of the cooperative corporation and requested access to the cooperative's stock certificate record book and the maintenance billing rolls for the year of the transfer, 1988. The auditor was furnished with two computer-generated listings. The first listing shows the names of all unit owners, apparently at or around the time of the audit, the date of purchase by that owner, the previous owner of the same unit and the date of that owner's purchase of the unit. The second listing identifies each apartment unit in the cooperative and its owner allegedly as reported on Forms 1098.[1] Petitioner's name does not appear on either listing. The listings show that, with two exceptions, the six individuals identified as transferees in this proceeding acquired their shares on July 7, 1988, but the persons or entities from which the shares were acquired are not revealed. The two exceptions are these: Unit 1P was reportedly sold to transferee Vorhand, but the listing shows that it was purchased on July 7, 1988 by Katz; Unit 1S was purchased by transferee Fasten on November 9, 1988.

Based on the fact that petitioner's name does not appear in the cooperative's listings as an owner of any of the apartments, the Division concluded that petitioner never took title to any cooperative shares and that the transfers in question were assignments of rights to purchase the cooperative shares. The audit summary describes the method used to determine gains tax due as follows:

> "Pursuant to gains tax regulation 20 NYCRR 590.55, when determining if the $1 million threshold is met the consideration for the assignment is the sum of the amount paid by the assignees for the contract right plus the contract's purchase price for the real property. Therefore, adding the offering plan prices to the assignment consideration of $952,269.00 would subject the transfers to gain [sic] tax.
>
> "Allowing for acquisition cost of $336,266, which was verified by related case[s] . . ., the gain subject to tax was $616,003."

Apparently, the Division issued a preliminary statement of audit changes to petitioner.

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[1]The Division does not use a Form 1098. The Internal Revenue Service Form 1098 is a report of mortgage interest paid. The record does not identify the purpose or nature of the "Form 1098" referred to in the audit report.

That statement was not placed in the record; however, a letter from the Division to petitioner's representative, Mr. Caller, indicates that he received such a statement. The letter states:

> "In my capacity as Mr. Keith Brown's supervisor, I am responding to your protest letter of April 28, 1992 regarding the department's Statement of Proposed Audit Adjustments.
>
> "After reviewing the file, it is quite clear that Mr. Brown has made several written and telephone requests for records and/or documentation he needs to conduct the department's standard audit. Unfortunately, his efforts have been to no avail.
>
> "I am sure you will agree with me that the scope of information Mr. Brown has requested is neither onerous or voluminous. A copy of Mr. Brown's letter to Mr. Halberstam, dated December 20, 1992, requesting the records needed for the audit is enclosed for your reference.
>
> "Please be advised that if the information requested is not received by this office within ten days from the date of this letter the department will issue a Notice of Determination. Also, the maximum penalty and interest will be imposed on the assessment pursuant to Section 1444 of the Tax Law."

The Division later issued to petitioner a Statement of Proposed Audit Adjustment dated September 4, 1992, asserting gains tax due of $61,600.00, plus penalty and interest. An incomplete copy of this statement was attached to petitioner's request for a conciliation conference indicating that the statement was received by petitioner. The request for conference was signed by Mr. Caller and received by the Division on December 7, 1991. It states:

> "(1) Mr. Halberstam sold all of his shares in Long Beach Owners Corp. which is the owner of 600 Shore Road, Brooklyn, N.Y., for less than one million dollars. The sale is exempt under Section 1443(1) of the Tax Law.
>
> "(2) The cost basis of the shares was in excess of the $336,266.00 shown in the audit report."

The Division scheduled a conciliation conference for September 21, 1993 at 9:00 A.M. In a letter to Steven Saskin, Conciliation Conferee, dated August 24, 1993, Mr. Caller requested that the conference be cancelled, stating: "As the issues are clear cut it has been decided that a petition should be filed instead." The Division informed petitioner by letter that proceedings in the Bureau of Conciliation and Mediation Services had been discontinued at his request.

Petitioner filed a timely petition in the Division of Tax Appeals where the statements made in the request for conference were repeated. In addition, petitioner stated: "The Audit Report states that the total consideration is $952,269.00."

The Division served an answer in response to the petition on or about November 15, 1993. Paragraph 2 of the answer states:

> "Affirmatively states that, when determining whether an assignment is taxable, the consideration for the assignment is the sum of the amount paid by the assignee for the contract right plus the contract's purchase price for the real property."

Petitioner and the Division waived a hearing and agreed to resolve this matter through submission of documents and briefs. By letter dated April 25, 1994, the Administrative Law Judge to whom the matter was assigned established the following submission schedule:

> "Filing of documents by the Law Bureau: June 1, 1994
> "Filing of petitioner's documents and brief: July 6, 1994
> "Filing of Law Bureau's brief: August 15, 1994
> "Filing of petitioner's reply brief: September 9, 1994"

The letter also stated:

> "It is your responsibility to meet the above schedule. The record will be closed to the submission of evidence as of July 6, 1992. Briefs and documentary evidence not filed in accordance with this schedule will be returned to the filing party. Copies of any documents submitted to me should be sent to your opposing party. Each party is responsible for meeting its own due dates regardless of whether anything is received from the other party. If you need an extension of time for filing, you must make a request to me in writing within the time limits prescribed for filing your brief." (Emphasis in original.)

In accordance with the schedule, the Division filed documents on June 1, 1994. At the same time, it requested two additional weeks for the submission of documents relating to acquisition costs, stating that materials concerning the original purchase price of $336,266.00 were in a related file and unavailable at the time of the initial submission. The Division's request was granted in a letter dated June 7, 1994. No other change in the submission schedule was mentioned in that letter. A copy of the letter was sent to Mr. Caller.

The Division filed additional documents on June 8, 1994. Copies of those documents and the documents submitted on June 1, 1994 were sent to Mr. Caller.

Petitioner's time to file his documents and a brief passed and nothing was submitted. No one contacted the Administrative Law Judge on behalf of petitioner to request an extension of the filing schedule.

On July 22, 1994 the Division filed with the Administrative Law Judge what it describes

as "a letter in lieu of a formal brief." The letter was received on July 25, 1994. The Division did not address any of the substantive issues raised in the petition and answer. Rather, the Division requested that the Notice of Determination issued to petitioner be sustained on the ground that petitioner had surrendered to the presumption of correctness of the notice by failing to file documents or a brief. Furthermore, the Division stated that petitioner should not be allowed to present legal arguments addressing the merits of the assessment in a reply brief since this would deny the Division an opportunity to respond to petitioner's position. The Division's position is explained as follows:

> "The traditional method of briefing a matter, when utilized properly, allows the parties to full [sic] develop the issues presented: (i) the petitioner would prepare a brief setting forth his or her argument, (ii) the Division would then have the opportunity to state its position as well as respond to the petitioner's arguments, and (iii) the petitioner would then have the last word, via the reply brief, whereby he or she could address the arguments raised by the Division as well as attempt to bolster his or her initial brief in light of any comments made by the Division in their brief.
>
> "In the present matter, petitioner's failure to file any brief turns this time-honored method on its ear. Based on the presumption of correctness, the Division is not obligated to initiate the development of arguments in light of petitioner's failure to file either evidence or a brief. Further, any attempt by petitioner to address the merits of the case at this point in the proceedings (i.e., in the reply brief) would be substantially detrimental to the interests of the Division, as the Division has no opportunity to respond.
>
> "At most, petitioner's reply brief is limited to the subject matter of this letter brief and cannot extend to other aspects of the case. Any such arguments should be withdrawn from the court's consideration (Ardolino v. Reinhardt, supra; see also, State Farm Fire and Casualty Co. v. LiMauro, 103 AD2d 514, 481 NYS2d 90, affd 65 NY2d 369, 492 NYS2d 534; Garlasco v. Smith, 250 AD 534, 294 NYS 772, affd 276 NY 666)."

By letter dated July 25, 1994, received by the Division of Tax Appeals on July 26, 1994, Mr. Caller requested an extension of time for the filing of petitioner's papers. As his letter indicates, he first made such a request in a telephone conversation with the Administrative Law Judge on July 22, 1994 and was instructed to put his request in writing. He gave several reasons for failing to file documents in accordance with the submission schedule. He states in his letter that he "was under the mistaken impression that the Department of Taxation and Finance would file an opening statement setting forth the basis for the Notice of Deficiency, as is usually done when the hearing is held in person." Concerning the opening statement, he also

stated "I was at a total loss to understand why the transactions were not exempt, since they did not total $1,000,000.00." He also stated that his law assistant was absent from the office and that he (Mr. Caller) "did not follow the progress of the file." Finally he stated:

> "The Department of Taxation and Finance received an extension of 15 days until June 15, 1994. I was not informed of any reciprocal extension given to the petitioner for filing his papers. On July 22, 1994, when I realized my error and I contacted you and I attempted to reach David Gannon, Esq., attorney for the Department of Taxation and Finance to try to get an extension."

By letter to Mr. Caller dated August 2, 1994, the Administrative Law Judge denied petitioner's request for an extension of time in which to file documents and a brief. The reasons for the denial were set forth in that letter as follows:

> "Your written request for an extension was received by my office on July 26, 1994, more than two weeks after petitioner's time for filing documents and a brief expired. In your letter, you provide no acceptable excuse for failing to file petitioner's papers in accordance with the established schedule. Certainly, there is nothing in my letter of April 25th that could have given you the impression that the Department would file an 'opening statement' before petitioner was required to file its documents and brief. The schedule set forth in the letter is clear and precise, and it makes no provision for such a statement.
>
> "The Division of Taxation timely filed the bulk of its documentary evidence on June 1, 1994. At the same time, Mr. Gannon requested, and later was granted, two weeks to file additional documentation. You were not 'informed of any reciprocal extension given to the petitioner for filing his papers' because you did not ask for such an extension; therefore, an extension was not given. In light of the unambiguous language of my letter of April 25th and the explicit instruction contained in it, there is no basis for granting petitioner additional time to file documents and a brief in this matter."

In accordance with the original schedule, petitioner was given until September 9, 1994 to file a reply brief in which he was allowed to respond to all issues implicitly or explicitly raised by the documentary evidence submitted by the Division. In a letter to the Division's representative, David C. Gannon, also dated August 2, 1994, the Administrative Law Judge explained the basis for denying the Division's request that petitioner be precluded from addressing the merits of the case in a reply brief as follows:

> "While new legal issues may not be raised in a reply brief by a litigant in a civil proceeding, the same is not true in administrative proceedings in the Division of Tax Appeals where disputes are to be resolved with less formality than would be appropriate in a court of law. The Tax Appeals Tribunal has held that the Division of Taxation may raise new legal issues in a post-hearing brief, as long as the petitioner has an opportunity to respond (see, Matter of Chuckrow, Tax Appeals

> Tribunal, July 1, 1993). Fairness requires that the same legal principle be applied where the petitioner raises new legal issues in a post-submission brief."

In response to the Division's complaint that allowing petitioner to file a reply brief would deny it the opportunity to respond to petitioner's arguments, the Administrative Law Judge gave the Division until October 17, 1994 to file a response to petitioner's brief.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner filed a brief on August 24, 1994 where he maintained that the transfers in issue were exempt from the imposition of the real property gains tax because the consideration for the transfers amounted to less than $1,000,000.00. Petitioner contends that he transferred the actual stock in the cooperative corporation and not a contract right to purchase stock or real property. Moreover, petitioner states that he "stood ready throughout, and continues to be ready" to offer evidence to refute the Division's assessment (Petitioner's brief, p. 8).

The Division responded to petitioner's brief in a letter dated September 28, 1994. The brief states that, based on the information provided on audit, the Division reasonably concluded that the transfers by petitioner were actually assignments of contract rights to purchase the stock of the cooperative corporation. It is the Division's position that it properly applied 20 NYCRR 590.55 and imposed the gains tax on the gain from these transactions.

The Division also reiterated its claim that petitioner should not have been allowed to file a reply brief and asked that its letter be considered:

> "both the Division's second brief in this matter as well as a motion to strike those portions of petitioner's reply brief (received by the Division on August 29, 1994 [Ex. '2']) which exceed the scope of petitioner's and the Division's main briefs, as those portions exceed the proper scope of a reply brief in matters before the Division of Tax Appeals" (Letter of David C. Gannon, September 28, 1994).

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a 10 percent tax on "gains derived from the transfer of real property within the state." Gain is defined in Tax Law § 1440.3 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." The "[t]ransfer of real property" includes the transfer or transfers of real property by any method including assignment of a

contract or an option to purchase real property (Tax Law § 1440[7]). Transferors and transferees of real property are required to file certain forms in accordance with the procedures set forth in Tax Law § 1447. Pursuant to Tax Law § 1444, if the required forms are not filed or are insufficient, the Division is authorized to determine the tax due based on such records or information as may be obtainable. Here, petitioner failed to file the required forms and failed to respond to three written inquiries from the Division requesting information about the transfers that occurred.

Based on the information available to it at the time of the audit, the Division determined that petitioner had acquired options to purchase certain unsold shares of the Long Beach cooperative housing corporation and then, in transfers subject to gains tax, assigned those options to six transferees for an option price of $952,269.00. Certain exemptions from the gains tax are provided for in Tax Law § 1443; among them is an exemption for transfers where the consideration is less than $1,000,000.00. For transfers occurring on or before April 19, 1989, Tax Law former § 1443 provides for an exemption:

> "1. If the consideration is less than one million dollars; provided, however, for the purpose of the application of this exemption only, consideration shall be deemed to also include:
>
> "(a) In the case of a transfer of an option, the amount to be paid for the real property pursuant to the option agreement being transferred.
>
> "(b) In the case of an assignment of a contract to purchase real property, the amount required to be paid for the real property pursuant to the terms of the contract being transferred."

The Division has issued regulations interpreting the provisions of the gains tax law. Former section 590.55 of the regulations provided as follows:

> "For purposes of determining if the $1 million threshold is met and for purposes of filing requirements, the consideration for the assignment is the sum of the amount paid by the transferee/ assignee for the contract right plus the contract's purchase price for the real property."

B. The Division's determination that the transfers in question were either options to purchase the shares of cooperative stock or assignments of contract rights was reasonable in light of the information available at the time of the audit. Mr. Katz's narrative account of the

transactions preceding the final closing and the August 9, 1988 letter to petitioner from Mr. Katz provide evidence that Mr. Halberstam paid Mr. Katz $500,000.00 for an option to purchase stock. Petitioner has never offered any explanation or evidence to counter Mr. Katz's statement. The Division attempted and was unable to confirm petitioner's claim that he was ever an owner of the shares in question. Based on this evidence, it was reasonable for the Division to conclude that petitioner had an option to purchase shares of cooperative stock and transferred those options at the time of the closing.

Pursuant to Tax Law § 1443(1), the amount of the consideration for the transfers is the sum of the amount paid for the option rights (determined to be the actual amount received by petitioner, $952,269.00) plus the option agreement's purchase price for the shares. Apparently, the Division was unable to determine the amount to be paid for the real property pursuant to the option agreement. Instead, it estimated the amount to be paid by using the insider prices shown in the offering plan. The sum of the amounts paid by the transferees for the assignment of the option plus the aggregate insider prices for the shares purchased exceeded $1,000,000.00, subjecting the consideration for the transfers to the gains tax. In view of the information available to the Division at the time of the audit, its use of the insider prices to estimate consideration and its conclusion that the transfers were subject to gains tax was reasonable.

It is well settled that statutes creating exemptions from tax are to be strictly and narrowly construed (see, Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715, lv denied 37 NY2d 708, 375 NYS2d 1027; Matter of Blue Spruce Farms v. New York State Tax Commn., 99 AD2d 867, 472 NYS2d 744, affd 64 NY2d 682, 485 NYS2d 526), and the taxpayer's argument must satisfy the burden of demonstrating clear and unambiguous entitlement to the exemption claimed (Matter of W. T. Wang, Inc. v. State Tax Commn., 113 AD2d 189, 495 NYS2d 792; Matter of Marriott Family Rests. v. Tax Appeals Tribunal, 170 AD2d 805, 570 NYS2d 741, lv denied 78 NY2d 863, 578 NYS2d 877). Accordingly, the burden was upon petitioner to show that he was entitled to claim the $1,000,000.00 exemption from the gains tax.

Petitioner's exemption claim rests upon his allegation that he did not transfer the option to purchase shares, but rather transferred the shares themselves for an aggregate price of $952,269.00. Petitioner has failed to present any evidence to support this claim. His representative states that the auditor's assumptions regarding the transfers are both erroneous and "tenuous" (Petitioner's brief, p. 6). He goes on to state:

> "Under [the Division's] scenario as what the auditor must have dreamt up, Mr. Halberstam would have assigned the right to purchase his contract rights with Mr. Katz for $952,269.00. Then the purchasers would have exercised the rights under the contract to purchase the apartments from Mr. Katz for the purchase price set forth in the offering plan, as this is the only way that the auditor could have assumed that the consideration was in excess of $1,000,000. If this were the case the purchasers would have paid $3,961,419 for the stock that Mr. Halberstam paid only $336,266 to Mr. Katz to obtain earlier in that same year" (Petitioner's Brief, p. 6).

Petitioner claims that if given the opportunity, he would have provided evidence to show that he actually owned and transferred the shares of cooperative stock. Petitioner had several opportunities to provide such evidence and failed to do so. Moreover, he has yet to provide his own coherent account of what transpired taking into account all of the evidence which is in the record.

Petitioner claims that his "purchase of the shares occurred at the very inception of the corporation" and that he "transferred his shares to purchasers within a very short time after obtaining them . . ." (Petitioner's brief, p. 7). The evidence shows that Mr. Katz granted petitioner an option to purchase unsold shares of stock (Mr. Katz's narrative, Finding of Fact "3"). Petitioner, as transferor, and the six transferees filed questionnaires which claim that petitioner transferred shares of stock in September 1988. But the cooperative corporation's records show the transferees as the shareholders of record as of July 7, 1988. Petitioner has never offered an explanation of the transactions between himself and Mr. Katz or himself and the transferees which takes into account these disparate facts.

Finally, the actions and statements of petitioner and his representative make me extremely skeptical of his claims. Petitioner provided none of the information requested of him on audit. He was sent three letters and at least one Statement of Proposed Audit Adjustment, but offered no explanation or documents to support his position. When petitioner withdrew from the

conciliation process, his representative stated that "the issues are clear cut" (Letter of Carl Caller to Steven Saskin, August 24, 1993, Finding of Fact "13"). However, as an explanation for his failure to file documents in accordance with the submission schedule, Mr. Caller stated that he "was awaiting an opening statement from the Department since I was at a loss to understand why the transactions were not exempt, since they did not total $1,000,000" (Letter of Carl Caller to Judge Corigliano, July 25, 1994, Finding of Fact "21"). The Division explained its position in its audit report and in its answer. Furthermore, the petition and Mr. Caller's brief demonstrate that he was well aware of the Division's legal position on this matter.

C. The Division calculated petitioner's original purchase price based upon Mr. Katz's letter of August 9, 1988 and the letter of August 22, 1991 from Mr. Katz's accountant. Both letters reference an acquisition cost of $336,266.00; however, both letters indicate that this sum is the balance due on a total cost of $500,000.00. Mr. Katz's narrative account also states that the acquisition cost for the option was $500,000.00. The Division provided no explanation at all for its determination that the original purchase price was $336,266.00; therefore, there is no basis in the record for that determination. In accordance with the documents presented, I conclude that the original purchase price was $500,000.00 and direct the Division to modify the assessment accordingly.[2]

D. Petitioner's request for an extension of time in which to file documents and an initial brief was denied as was the Division's request that petitioner be precluded from filing a reply brief. The reasons for the denial of those requests is set forth in the Administrative Law Judge's letters of August 2, 1994 (see, Finding of Fact "22"). Those reasons will not be repeated here. The facts and circumstances surrounding those orders are fully set forth in this determination to create a record in case either party chooses to except to those rulings. In addition to those requests, the Division made a motion, in its response to petitioner's reply brief, to strike those

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[2]In making this determination, I am well aware that petitioner's representative stated in his brief that "Mr. Halberstam paid only $336,266 to obtain Katz's shares." Since petitioner has consistently claimed that he paid $500,000.00 and the evidence supports that contention, I am giving little weight to Mr. Caller's statement.

portions of petitioner's reply brief that exceed the issues raised in the Division's first brief. This motion must be addressed, and, since the Division devoted approximately twice as much argument to the motion as it did to the merits of the case, I am forced to address it in some detail.

The Division contends that the original briefing schedule, whereby petitioner was to file an initial brief, the Division a brief in response, and petitioner a reply brief, "represents a fair and efficient way of allowing all parties the opportunity to present their case." The Division goes on to argue that:

> "[f]ailure to adhere to this schedule undermines the structure and need for finality in these matters, contradicts the Division of Tax Appeals statutory obligation to provide a just forum, and runs the risk of prejudicing a party who reasonably relied on the rules of the game as defined by the Division of Tax Appeals at the outset of the proceeding" (Division's letter, p. 4).

I will address each of these contentions separately, beginning with the Division's last assertion -- that allowing petitioner to address all issues in its reply brief runs the risk of prejudicing the Division. In support of this assertion, the Division cites to Matter of Chuckrow (Tax Appeals Tribunal, July 1, 1993). The Division's letter of September 28, 1994 states:

> "In Chuckrow, the Tax Appeals Tribunal ('Tribunal') concluded 'that any response petitioner had to the Division's assertion [raised for the first time in the Division's post-hearing brief] . . . would be in the nature of argument and could have been made in petitioner's reply to the Division's post-hearing brief, or in petitioner's brief on exception, and that petitioner was not prejudiced by the Division's failure to raise the additional ground while the record was still open' (Matter of Chuckrow, supra). Thus, the same briefing schedule which was utilized in the present matter provided the petitioner in Chuckrow with the opportunity to respond to the assertions made by the Division. This was possible because the briefing schedule allowed petitioner the opportunity to reply to the assertions raised by the Division." (Emphasis in original.)

In this proceeding, the Division was provided with an "opportunity to reply". The briefing schedule was modified to afford the Division such an opportunity. In fact, the Division was given the last word, effectively preventing petitioner from countering any legal arguments raised by the Division in its final brief. The Division has not explained how it was prejudiced by this procedure.

Next, I will address the Division's contention that allowing petitioner to address legal issues not raised in the Division's initial brief "contradicts the Division of Tax Appeals statutory obligation to provide a just forum." It supports this contention with the following passage from New York Jurisprudence:

> "The appellant's original brief should present all the points which he intends to urge upon the appellate court. The practice of omitting points of vital importance from such briefs, with the intention, after having received the respondent's answering brief, of setting them forth in so-called replying briefs, has been characterized as reprehensible (NY Jur 2d, Appellate Review, section 226, p.305)."

The situation described in the passage is different from the situation that exists in this case. There is not the least bit of evidence to suggest that petitioner's representative failed to file his brief with the intention of gaining some advantage over the Division. The reasons given for failing to comply with the schedule might best be described as law office failures. I would hardly describe that behavior as "reprehensible'. In addition, I do not believe that the principles expressed in the quoted passage are applicable to an Administrative Law Judge proceeding because of the significant differences in the nature of the two forums. For example, an appellate court engaged in an Article 78 review of administrative determinations is confined by the record created by the parties to the administrative proceeding. Thus, appellate courts routinely refuse to consider legal arguments not raised at the administrative level (e.g., Matter of Freer, 98 AD2d 834, 470 NYS2d 499, 500). In contrast, the Tax Appeals Tribunal has held that Administrative Law Judges have a duty to apply the correct law to the facts adduced at hearing, even if neither party accurately identifies the controlling legal theory and authority (see, Matter of Chamberlin, Tax Appeals Tribunal, January 30, 1992). In addition, the Tribunal has stated that because of the unique two-tier system of administrative review which exists in the Division of Tax Appeals, it is incumbent upon Administrative Law Judges to address every issue raised by the parties (Matter of United States Life Insurance Company in the City of New York (Tax Appeals Tribunal, March 24, 1994). In U.S. Life, the Tax Appeals Tribunal discussed this aspect of the Administrative Law Judge proceeding stating:

> "The fullest possible development of an issue occurs in our two-stage

> hearing/exception process when the Administrative Law Judge renders a determination on an issue stating a complete rationale for the conclusion and the litigants debate the correctness of the Administrative Law Judge's rationale and conclusion on exception. This two-stage process gives the Tribunal, and ultimately the courts, the benefit of the Administrative Law Judge's research and analysis as well as the parties' research and analysis in response to the Administrative Law Judge's determination."

These decisions of the Tax Appeals Tribunal strongly suggest that an Administrative Law Judge proceeding should not be governed by the rules applicable to appellate courts. Furthermore, they place an affirmative obligation on the Administrative Law Judge to aid the parties in creating the most complete record possible for review by the Tribunal.

The primary legal issue in this case is whether the Division reasonably determined that the consideration for the transfers amounted to more than $1,000,000.00. That issue was raised and addressed by the gains tax transferor and transferee questionnaires, the audit report, petitioner's request for a conciliation conference, and the pleadings. The Division chose not to address this issue in its first brief. Whether the Division intended by this action to eliminate the question from consideration by this Administrative Law Judge I cannot say. However, as that issue was raised by the documents placed in the record, it had to be addressed (Matter of United States Life Insurance Company in the City of New York, supra). If petitioner was precluded from making his arguments in a reply brief, he would have been allowed to make them on exception to the Tribunal. In these circumstances, it seemed preferable to allow both parties an opportunity to make their arguments at the Administrative Law Judge level so they could be addressed fully before review by the Tribunal on exception. I cannot see how this procedure "contradicts the Division of Tax Appeals statutory obligation to provide a just forum."

The Division also alleges that, in permitting petitioner to set forth the basis for his disagreement with the assessment in a reply brief, the Administrative Law Judge failed to follow the precedent of Matter of Burns (Tax Appeals Tribunal, April 28, 1994). In that case, the Division filed an exception to an Administrative Law Judge determination, received a two-day extension of time to file its brief, and then filed the brief approximately three weeks late. The petitioner moved to strike the brief. The Division's attorney withdrew its brief stating "it is

my intention to make petitioner's motion moot and thereby relieve the Tribunal from the need to waste any further resources on such a petty and distasteful matter." Petitioner filed a timely two-page letter in lieu of a brief. The Division then filed what was denominated a reply to the petitioner's letter. The Tribunal found that the 19-page "reply" was the same as the original brief with only minor changes and declined to consider its contents simply stating "we have not considered the Division's 'reply' brief because it is the brief withdrawn by the Division and we will not allow petitioner's motion to be circumvented in this manner" (Matter of Burns, supra).

The Division states in its letter:

> "[T]he Division is unable to reconcile the treatment it received in Matter of Burns with the treatment of petitioner's inaction in the present matter. While the Division agrees that full and complete discussion of the issues by the parties is invaluable, based on the Tribunal's actions in Burns precedent dictates that missed deadlines will be neither ignored nor re-structured to allow parties who have missed a deadline a second chance to advance their position."

In my opinion the precedential value of Burns is more limited than the Division believes. Section 3000.10 of the Rules of Practice and Procedure of the Tax Appeals Tribunal authorizes Administrative Law Judges to, among other things, "fix the time for filing of legal memoranda and other documents" (compare, State Administrative Procedure Act § 304[4] [which authorizes presiding officers in State administrative proceedings to "fix the time for filing of briefs and other documents"]). The regulations do not dictate the form that a briefing schedule must take; rather, the regulations leave the scheduling to the discretion of the Administrative Law Judge. There is no language in the Burns opinion which would limit that discretion. At most, the Burns opinion would lend weight to an argument that an Administrative Law Judge has the authority, in the exercise of his or her discretion, to return a late brief or to not consider its contents. Furthermore, the facts here are different from those in Burns. In Burns, the Tribunal considered the Division's actions to be an attempt to circumvent petitioner's motion. There is no circumvention involved in the matter before me.

Another consideration in weighing the precedential value of Burns is the difference between an Administrative Law Judge proceeding and a proceeding before the Tax Appeals Tribunal. In Burns, the Tribunal's rejection of the Division's reply brief effectively prevented

the Division from making any legal arguments on exception that it had not raised below. The Tribunal has "consistently held that new legal issues can be raised on exception" (Matter of Chuckrow, supra). Therefore, precluding petitioner from filing a so-called "reply" brief would not have precluded him from making any legal arguments he wished on exception. It would have prevented the Division and the Administrative Law Judge from addressing those arguments before the matter was brought to the Tribunal on exception and would have resulted in a less complete record for review by the Tribunal. I cannot see the advantage to either party or to the forum in such an outcome. In sum, I cannot find that either principles of fairness or binding legal precedent require the striking of any portion of petitioner's reply brief.

Finally, the Division has argued that allowing a party to ignore an established schedule "undermines the structure and need for finality in these matters." The necessity of finality in the administrative process has been invoked by the Tax Appeals Tribunal as a basis for not allowing new factual issues to be raised after a hearing (see, Matter of Sandrich, Inc., Tax Appeals Tribunal, April 15, 1993; Matter of Clark, Tax Appeals Tribunal, September 14, 1992; Matter of Consolidated Edison Co. of New York, Tax Appeals Tribunal, May 28, 1992). The Tribunal's policy on the raising of legal issues is different, and new legal issues may be raised on exception (Matter of Chuckrow, supra). I agree, however, that allowing a party to ignore the directions of an Administrative Law Judge without consequence has the potential to undermine the integrity of the hearing process itself. Here, petitioner was not allowed to ignore the submission schedule without consequence. By failing to submit his documents on time, petitioner forfeited his right to place evidence in the record in a matter that is primarily factual, and, as noted, he was unable to counter any legal arguments raised by the Division in its final brief. These sanctions should suffice to protect the integrity of the hearing process.

The Division's motion to strike those portions of petitioner's reply brief which exceed the scope of the Division's main brief is denied.

E. The petition of Mordechai Halberstam is granted to the extent indicated in Conclusion of Law "C"; the Notice of Determination issued on January 19, 1993 shall be modified

accordingly; and in all other respects the petition is denied.

DATED: Troy, New York
March 16, 1995

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE