STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
BERKELEY GROUP ASSOCIATES, AARON ZIEGELMAN AND WILLIAM K. LANGFAN[1]	:	D E C I S I O N DTA Nos. 806126, 808574, 808575, 808576, 810096 and 810097
for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	
	:	

Petitioners Berkeley Group Associates, Aaron Ziegelman and William K. Langfan, c/o Joel Schneider, 152 West 57th Street, New York, New York 10019, filed an exception to the supplemental determination of the Administrative Law Judge issued on February 2, 1995. Petitioners appeared by Ziegler, Sagal & Winters, P.C. (Alan Winters, Stephen S. Ziegler, and Lanny M. Sagal, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter stating it would rely on its brief filed in Matter of Aaron Ziegelman (DTA No. 809760) as its brief in opposition. The final brief in the combined matter was received on May 2, 1995, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

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[1] By mutual agreement, this case was combined with Aaron Ziegelman (DTA No. 809760). While the Tax Appeals Tribunal considered these cases on a combined basis, separate decisions are being issued in order to fully set forth the facts in each case.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs. Commissioner Francis R. Koenig took no part in the consideration of this decision.

ISSUE

Whether the transaction at issue herein should have been held open by the Division of Taxation in order to determine the actual amount of the adjustment payments made by petitioners.

FINDINGS OF FACT[2]

We find the facts as determined in the supplemental determination of the Administrative Law Judge except for finding of fact "15" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On July 28, 1992, the parties entered into a "Stipulation Admitting Certain Facts" which has been incorporated into the following Findings of Fact. In addition, petitioners submitted 18 proposed findings of fact which also have been incorporated in the following findings, except that paragraph "5" will be addressed in a different manner because it assumes the validity of the valuation ascribed to unsold shares established through expert testimony at hearing and only becomes relevant if the "value" of the negative carry is determined a proper factor in calculating original purchase price ("OPP"); paragraph "13" will be addressed in a different manner, but the facts will be presented; paragraphs "16(a)", "16(b)", "16(c)" and "16(d)" are in the nature of legal arguments and will not be included in the Findings of Fact.

PREAMBLE

These matters involve four separate cooperative conversions of real property commonly known as 35-25 77th Street, 35-24 78th Street and 77-12 35th Avenue, Queens, New York (the "BGA Property"); 34-20 78th Street, Queens, New York (the "78 Property"); 61-41 Saunders

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[2]These findings incorporate the modifications made by the Tax Appeals Tribunal in its June 2, 1994 decision.

Avenue, Queens, New York (the "Saunders Property"); and 102-12 and 102-32 65th Avenue, Forest Hills, New York (the "65th Avenue Property"). Petitioners, as sponsor of each cooperative conversion, transferred the subject real property to individual cooperative housing corporations prior to the effective date of the real property transfer gains tax ("gains tax") imposed by Tax Law Article 31-B. A portion of shares transferred to individual unit purchasers was conveyed pursuant to written contracts entered into prior to the effective date of the gains tax and thereby qualified for an exemption from the gains tax pursuant to Tax Law § 1443(6).

For each of the subject cooperative conversions, the Division of Taxation ("Division") determined that shares conveyed were subject to the gains tax. The Division, after determining the consideration received on taxable shares and the OPP allocated to such taxable shares, concluded that gains tax was required to be paid upon the transfer of units for each cooperative conversion. Notices of determination were issued by the Division that assessed gains tax on the transfer of shares for individual cooperative units of the 65th Avenue Property, the BGA Property, the 78 Property and the Saunders Property. It is notable that the Division recomputed the original gains tax determinations issued with respect to the BGA Property, the 78 Property and the Saunders Property.

Berkeley Group Associates ("BGA") was the sponsor of a cooperative conversion of the property known as the BGA Property (see, Preamble).

34-20 78th Associates was the sponsor of a cooperative conversion of the property known as the 78 Property (see, Preamble).

61-41 Saunders Associates was the sponsor of the property known as the Saunders Property (see, Preamble).

The conversions of the BGA Property, the 78 Property and the Saunders Property (collectively, the "Properties") were accomplished by the sponsor transferring the real property to the cooperative housing corporation ("CHC") in exchange for:

(a) the stock of the CHC not sold to unrelated parties at the time of conversion (the "unsold shares");

(b) the proceeds from the sale of stock of the CHC to unrelated parties at the time of conversion (net of certain expenses); and

(c) the assumption and/or the granting of a mortgage on the real property.

At hearing, petitioners' expert witness, Mr. James Levy, placed a value on the unsold shares in the BGA Property transfer from the sponsor to the cooperative housing corporation of $3,260,800.00. The closing statement valued the unsold shares at $5,100,626.30. The discount of the market value used by Mr. Levy was calculated by capitalizing the negative carry at 10% and deducting that amount from the discounted price of the unsold shares.

Using the same methodology for the 78 Property, Mr. Levy calculated a value for the unsold shares of $1,935,000.00, compared to the $2,323,320.36 set forth on the original closing statement. Finally, Mr. Levy calculated the value of the unsold shares for the Saunders Property to be $1,200,000.00, compared with the value ascribed to the property on the closing statement of $1,779,296.66.

The effective date of each of the BGA, 78 and Saunders conversions was prior to March 28, 1983, the effective date of the gains tax. In each case, there were sales of cooperative apartments which were exempt from the gains tax because the sales occurred on or before the effective date of the tax or were made pursuant to contracts entered into on or before the effective date of the tax (the "grandfathered sales"). The grandfathered sales in each of the foregoing conversions may be summarized as follows:

Property	Total Number of Shares[3]	% Grandfathered	Shares Allocable to Grandfathered Sales	Shares Allocable to Taxable Sales[3]
BGA	111,765	38.53	43,065	68,700
78	57,864	19.72	11,411	46,453
Saunders	20,564	19.00	3,906	16,658

Each of the conversions was pursuant to a noneviction plan. Accordingly, the sponsor was required to make sales of apartments to at least 15% of the existing tenants of the Properties in order to have the plan effective. In each case, the sponsor offered discounts to the existing tenants (the "insider discounts"). The sales to insiders were made at a discount in order to:

(a) achieve the level of insider sales necessary to have an effective plan; and

(b) achieve the lowest possible level of apartments occupied by protected tenants (as that term is defined below).

Under State and local laws, tenants of the Properties who did not wish to purchase their apartments (the "protected tenants") were entitled to remain as tenants as long as said tenants paid the rent increases permitted under the rent stabilization and rent control laws (which laws remained applicable to a protected tenant after the conversion) and did not breach their lease or statutory tenancy. Under these rent stabilization and rent control laws the sponsor, which becomes the owner of the apartments occupied by the protected tenants, is limited in its ability to raise the rents of protected tenants and may terminate their tenancies in only very limited circumstances.

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[3] Includes all the shares in the conversion. The total number of shares covered in these conversions are as follows:

Property	Total Number of Shares	Number of Taxable Shares Sold
BGA	110,340	67,275
78	57,541	46,130
Saunders	20,288	16,385

From the effective date of the cooperative conversion until an apartment occupied by a protected tenant was sold, the sponsor was liable to the CHC for the maintenance payable with respect to such apartment and the sponsor was liable under the offering plan, the proprietary lease and applicable law for other expenses related to the tenancy of the protected tenant (e.g., interior repairs, appliance repairs, painting as required by rent stabilization laws). The sponsor was also entitled to the rent paid by the protected tenant occupying such apartment. (The excess of the maintenance payments and other expenses incurred as owners of the apartments occupied by protected tenants [i.e., insurance, repairs, management fees] over the rent paid by the protected tenants is hereinafter referred to as the "negative carry".)

It is usual for a sponsor of a cooperative conversion to pay negative carry with respect to the unsold shares received by the sponsor in the conversion.

The failure of petitioners to pay the maintenance on the apartments represented by the unsold shares would have resulted in petitioners losing the ownership of such apartments (such maintenance charges constituting a first lien on the unsold shares).

The total negative carry for the BGA, 78 and Saunders conversions is as follows:

Property	Negative Carry
BGA	$536,133
78	121,869
Saunders	59,079
Total	$717,081

In each case, the sponsor sold to unrelated investors apartments occupied by protected tenants (the "investor sales"). The sales contract provided that the sponsor would pay the excess of the maintenance payments and other expenses incurred by the investors as owners of these apartments (e.g., insurance, repairs, management fees) over the rent paid by the protected tenants from the date the investor purchased the apartment until the date the protected tenant terminated its tenancy (such payment by the sponsor is hereinafter referred to as the "adjustment payment").

The adjustment payment provision first appeared in the contract of sale in paragraph "13" and is immediately preceded by the purchaser's promise to pay a fee of 6% of the monthly rents

from the units of the protected tenants. Also, there was no allocation of the purchase price to this obligation or an explanation of a reduction in the consideration because of the adjustment payment incentive.

Paragraph "13" of the contract of sale reads as follows:

> "13. (a) Purchaser hereby designates Seller as its agent and Seller agrees to manage or retain a management company therefore and cause such manager to enter into a management agreement with the Corporation's managing agent to manage the Apartments in accordance with law, including General Business Law 352-eeee. Such agreement will be substantially on the same terms and conditions as contained in the managing agent's agreement with the Corporation. Purchaser shall pay Seller a management fee equal to six (6%) percent of the monthly rents of the apartments to be conveyed hereunder and Seller shall be responsible for bearing the cost of the management fee charged by the managing agent of the Corporation. The provisions of this paragraph shall survive the Closing hereunder.
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> "(b) The term 'Operating Expenses' as used in this paragraph shall be deemed to mean:
>
> > "(i) all maintenance charges, utility charges, and any assessments payable by the Lessee to the Corporation under the terms of the Leases, except for assessments for capital improvements payable to the Corporation, (hereinafter 'Capital Improvement Assessments');
> >
> > "(ii) the managing agent's fee as provided in paragraph 13(a) of this Agreement;
> >
> > "(iii) the cost of liability insurance;
> >
> > "(iv) the cost of repairs required to be made by the shareholder of the apartment under the By-Laws of the Corporation and the Lease and the cost of making repairs and furnishing services required under the provisions of the non-purchasing tenant's lease and as required by law, but in no event shall such costs be less than $30.00 per month per apartment; and
> >
> > "(v) any other expenses which are ordinarily considered to be operating expenses in a cooperative building of a similar type.
>
> "(c) In the event that any time during this Agreement there shall be insufficient monies on deposit with the managing agent to pay Operating Expenses as they become due, the Seller agrees to make prompt payment of same when due. Such payments, (hereinafter 'Operating Deficit Payments'), shall be reimbursed to Seller only as set forth in the following paragraph (d).
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> "(d) If in any calendar year the rental income from the Apartments shall exceed the Operating Expenses for such Apartments, such amount, (hereinafter the 'Surplus'), shall be paid to the Purchaser within thirty (30) days after the end of the calendar year; except that Seller shall be reimbursed from such Surplus to the extent that Seller has, during the term of this Agreement, made Operating Deficit Payments which have not been reimbursed. Such reimbursement shall be made annually on a cumulative basis within thirty (30) days from the end of each

calendar year. For example, if Operating Deficit Payments for 1985 and 1986 are $1,000.00 and $2,000.00 respectively, then, if there shall be a Surplus in 1987 the Seller shall be reimbursed the sum of $3,000.00 out of such Surplus. Any amounts not so paid to Seller will be carried over and paid out of the next available Surplus. Proceeds from the sale of any Apartment shall not be included in rental income for the purposes hereof and there shall be no obligation to pay such advances from net sale proceeds. In addition thereto, any rent increase received due to capital improvements made by and paid for by the Seller shall inure to the benefit of the Seller and shall not be included in computing rental income.

"(e) Seller agrees to pay, when due, any Capital Improvement Assessments for an Apartment, but will be reimbursed by Purchaser from Purchaser's net profit from the sale of such Apartment.

"(f) Seller's obligation to make payments for Operating Deficit Payments and Capital Improvement Assessments for any Apartment shall cease (and Purchaser will be required to make such payments thereafter) upon the concurrence of any of the following events:

"(i) if a non-purchasing tenant in occupancy shall surrender possession of such Apartment, voluntarily or otherwise; or

"(ii) if that portion of Principal allocated to such Apartment, as evidenced by the Promissory Note and Pledge Agreement, is paid in full; or

"(iii) the expiration of fifteen (15) years from the date of the Closing."

It was highly unusual for a sponsor to assume the obligation to make adjustment payments after selling apartments occupied by protected tenants.

The actual amount of adjustment payments made by petitioners during the periods indicated below (prepared years after the transfers) is as follows:

	Amount of Adjustment Payments	Period
BGA	$ 814,536	1984-1990
78	23,678	1984-1990
Saunders	66,085	1984-1990
65	136,910	1983-1989
	$1,041,209	

Petitioners' expert, Mr. James Levy, calculated a fair market value of petitioners' obligation (within a month of the hearing) to make adjustment payments to the investors who purchased the unsold shares as follows:

	FMV of Adjustment Payment Obligation
BGA	$ 900,000
78	135,000
Saunders	23,000
65	265,000
	$1,323,000

Mr. Levy testified that these values were based on the actual adjustment payment made between 1983-1990 but did not explain the methodology or rationale for his calculation.

The Division computed the tax on the BGA, 78 and Saunders conversions as follows:

	BGA	78	Saunders
Consideration:			
Sales Price of Shares	$ 6,957,307	$ 2,821,640	$ 1,815,822
Mortgage	2,227,538	1,187,683	814,420
Less: Brokerage Fees	(347,865)	(141,082)	(90,791)
Less: Reserve Fund	(135,720)	(39,852)	(51,332)
Total Consideration	$ 8,701,260	$ 3,828,389	$ 2,488,119
Original Purchase Price:			
Sponsor's Purchase Price to Acquire	$(1,926,357)	$(1,594,083)	$(1,314,448)
CHC Purchase Price to Acquire	-0-	-0-	-0-
Acquisition Costs	(35,943)	(55,549)	(42,296)
Capital Improvements	(706,768)	(490,494)	(312,220)
Conversion Costs	(218,105)	(89,940)	(70,327)
Selling Expenses	(39,960)	(48,053)	(4,021)
Negative Carry	-0-	-0-	-0-
Total Original Purchase Price	$(2,927,133)	$(2,278,119)	$(1,743,312)
Gain Subject to Tax	5,774,127	1,550,270	744,807
Tax (10%)	$ 577,412	$ 155,027	$ 74,481

These computations were made on the basis of the entire conversion. The Division also imposed penalties for late filing of returns, and penalties and interest for late payment of tax.

We modify finding of fact "15" of the Administrative Law Judge's supplemental determination to read as follows:

> In March 1984, petitioners Ziegelman and Langfan timely filed a return TP-580 for the investor sales, the subject of DTA No. 806126.
>
> In May 1988, petitioners filed an amended TP-580 electing to pay the tax in installments.

Petitioners converted property located at 102-12 65th Avenue and 102-32 65th Avenue, Forest Hills, New York on July 1, 1983, at which time petitioners filed the proper returns and paid tax of $40,142.00.

On January 5, 1984, petitioners sold shares and leases to a group of investors for an aggregate price of $3,944,038.00. The 134 apartments covered by these shares were occupied by protected tenants.

Petitioners received no cash consideration on the closing. Instead, petitioners received a promissory note secured by a pledge of the shares allocated to the cooperative apartment transferred and an assignment of the proprietary lease for said apartment.

At the time of this sale, petitioners filed a TP-580 reporting a gains tax liability of $147,612.00. The Division ultimately issued a Notice of Determination setting forth tax due of $131,723.00, plus penalty, interest penalty and interest.

Petitioners made no payment of tax under the incorrect assumption that a supplemental return had been filed and a deferred payment plan requested.

In May 1988, after they had protested the Statement of Proposed Audit Adjustment, petitioners filed an amended return in which they elected to pay the gains tax in installments.[4]

To the extent that the tax determined to be owing by petitioners is less than the tax set forth in Finding of Fact "14" above, there will be a corresponding reduction of interest and penalties owed to the Division.

The notices of determination issued in these cases are valid and petitioners timely filed petitions in these cases.

The Notice of Determination issued by the Division with regard to case number ("DTA#") 808574 concerned the cooperative conversion of buildings located at 35-25 77th Street, 35-24 78th Street and 77-12 35th Avenue in Queens, New York (the "Berkeley Conversion"). This Notice of Determination (Notice Number L-000749584-2), dated July 18,

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[4] We modified the fourth paragraph of this finding by inserting the correct amount, $3,944,038.00, for the aggregate price of the 134 apartments. Petitioners raised an issue on exception to which the Division did not respond. Petitioners state that in finding of fact "15" of the supplemental determination, the Administrative Law Judge determined that the aggregate price for the 134 apartments was $3,994,038.00 when the correct figure should be $3,944,038.00. From a review of the record, it appears that the correct amount is $3,944,038.00. While we now amend what appears to be a typographical error, we note that it is of no consequence to the outcome of this matter or to the amount of petitioners' liability.

1989, issued to Berkeley Group Associates, indicated a balance due of $1,059,573.87, representing $475,679.00 in tax, $417,407.22 in interest and $166,487.65 in penalty for the period ended March 29, 1983. A year later, on June 4, 1990, a redetermination occurred which increased the tax liability to $577,412.70. The Division issued two additional notices to cover this additional $101,731.70 liability, Notice Numbers L-001717155-7 for $51,532.19 (1985 and 1986) and L-001717224-9 for $50,193.93 (1983 and 1984).[5] These latter two notices were petitioned separately and are referenced as DTA# 810096. Finally, with regard to the cooperative conversions of the same properties listed above, the Division issued Notice Number L-001717166-6, for shares sold in 1987 and 1986, dated June 4, 1990, setting forth additional tax due in the sum of $6,503.19, plus penalty and interest. At conference, this amount was reduced to $4,664.83 and remains the amount in controversy. This matter was referenced as DTA# 810097 and, for unexplained reasons, was petitioned by Aaron Ziegelman, not Berkeley Associates. These cases dealt with the basis/mortgage issue, the negative carry issue and the adjustment payment issue.

DTA# 806126 concerned a Notice of Determination issued to Aaron Ziegelman and William K. Langfan, Notice Number 814-FA, dated July 13, 1988, which set forth additional tax due of $131,723.00, plus penalty and interest. The sole issue in this matter concerned the timeliness of petitioners' request to pay tax in installments.

DTA# 808575 concerned a Notice of Determination, Notice Number L-000749696-1, issued to Aaron Ziegelman on July 18, 1989, which set forth tax due of $581,400.00, plus penalty and interest, for the period ended March 29, 1983. The cooperative conversion in issue concerned premises at 61-40 Saunders Street, Rego Park, New York and involved the same issues set forth in Finding of Fact "18" above for DTA# 808574. Subsequently, on May 23, 1990, the Division redetermined the tax to be $74,435.70, plus penalty and interest.

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[5]There is a small unexplained discrepancy in the Division's amounts of tax, to wit: $51,532.19 + $50,193.93 = $101,726.12, not $101,731.70.

Finally, DTA# 808576 concerned a Notice of Determination, Notice Number L-000749695-2, issued to Aaron Ziegelman on July 18, 1989, which set forth tax due of $1,177,000.00, plus penalty and interest, for the period ended March 29, 1983. The cooperative conversion in issue in DTA# 808576 concerned premises at 34-20 78th Street, 34-30 78th Street and 34-40 78th Street in Queens, New York and involved the same issues set forth in Finding of Fact "18" above for DTA# 808574.

Subsequently, on May 30, 1990, after further documentation was submitted, the Division redetermined tax due of $155,027.80, plus penalty and interest.

OPINION

In our prior decision in these matters (Matter of Berkeley Group Assocs., Tax Appeals Tribunal, June 2, 1994), we considered whether the value of the adjustment payment obligation should have been subtracted from the consideration received by petitioners on the cooperative conversion. We accepted petitioners' argument that the obligation assumed by petitioners to make the adjustment payment was an item of intangible personal property. We concluded that "if petitioners had proved the portion of the consideration attributable to this interest, petitioners would have been entitled, under section 1440(1)(c), to a reduction of the consideration utilized to calculate the gains tax. We conclude that petitioners have failed to prove this point for two reasons" (Matter of Berkeley Group Assocs., supra). These reasons can be summarized as follows: 1) petitioners failed to prove the value of the adjustment payment obligation as of the date of transfer and 2) petitioners failed to establish the value of the 6% of rents to be paid by the purchasers or to demonstrate how this affected the value of the adjustment payment obligation.

We further denied petitioners' relief on their claim that the adjustment payment obligation was a discount, credit or rebate which reduced consideration as provided in former 20 NYCRR 590.37. Our denial was based on the fact that the purchasers' right to receive the benefit of the adjustment payment was contingent on the continued occupancy of the apartments by protected tenants and a portion of the principal allocated to the apartments remaining due. Therefore,

pursuant to former 20 NYCRR 590.37, the obligation was allowed as a reduction to consideration "only to the extent that the transferor and transferee have attributed a reasonable value to the credit, discount or rebate in the offering plan or in the agreement to purchase the shares," which neither petitioners nor the purchasers did.

We remanded these matters to the Administrative Law Judge for consideration of one issue raised by petitioners and not specifically addressed by the Administrative Law Judge in his determination: Whether these transactions should have been held open by the Division to determine the actual value of the adjustment payment obligation.

On remand, the Administrative Law Judge, relying on our prior decision in these matters and our decisions in Matter of Cheltoncort Co. (Tax Appeals Tribunal, December 5, 1991, affd Matter of Cheltoncort Co. v. Tax Appeals Tribunal, 185 AD2d 49, 592 NYS2d 121) and Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992), concluded in a supplemental determination that since it was petitioners' own failure to present the evidence necessary to prove the fair market value of the adjustment payments at the time of the transfer or to attribute a reasonable value to these payments in the offering plan or contracts of sale, the transactions should not be held open by the Division to determine the actual amount of petitioners' adjustment payment obligation.

Petitioners contended that the Division has "consistently held open transactions which had contingent consideration," relying on the position of the Division as stated in TSB-M-86(4)-R, issued May 28, 1986. On remand, the Administrative Law Judge concluded that this contention of petitioners was not supported by the Division's position in TSB-M-86(4)-R and that, as argued by the Division, any debt the plan sponsor incurred because of the adjustment payment obligation arose after the transfer of shares was completed and the relevant agreements did not permit or imply any set-off against consideration due on the transfer of shares. "Therefore," he concluded, "it has not been demonstrated that it was ever intended that the adjustment payments diminish the consideration paid for the shares" (Supplemental determination, conclusion of law "A").

On exception, petitioners argue that the Administrative Law Judge's reliance on the Tribunal's holding in Matter of Cheltoncort Co. (supra) is misplaced. They argue that in Cheltoncort, the taxpayer's consideration was not contingent and the value was determinable at the time of transfer. Here, however:

> "the consideration payable to Petitioners was the amount of the purchase money note paid by the Investor, reduced by the amount of Adjustment Payments Petitioners would have to make in the future. Thus, at the time Petitioners transferred the Apartments to the Investors, Petitioners' right to consideration was contingent on their future obligation to make Adjustment Payments and was not determinable at the time of the transfer. Rather, the consideration which Petitioners received from the Investors could be determined only after the date of transfer as a result of events subsequent to the date of transfer, which events were not in the control of either Petitioners or the Investors" (Petitioners' brief, p. 7).

Petitioners compare their situation to one where property is taken by eminent domain. There, the actual dollar amount of consideration is "dependent on future events beyond the control of the parties" (Petitioners' brief, p. 8). Petitioners also argue that the Division's position, as set forth in its memorandum of May 28, 1986 (TSB-M-86[4]-R), addressed the situation where:

> "at the time of transfer the minimum consideration is established and additional consideration is contingent on future events. In the instant case, the maximum consideration is established at the time of transfer and the actual consideration is contingent on future events" (Petitioners' brief, p. 9).

While TSB-M-86(4)-R protects the Division, petitioners argue they are entitled to similar protection.

The Division, on the other hand, argues that prior to the amendment to section 1444(3)(b) on April 19, 1989, there was no provision in the Tax Law to extend the three-year statute of limitations for an assessment of tax where consideration could not be determined (see, Division's brief, p. 4). However, the Division had the ability to hold open a period of assessment where a taxpayer executed an agreement extending the period of time for assessment, as explained in TSB-M-86(4)-R. The Division further argues that the relevant documents in these transactions:

> "explain only that the purchase price was allocated to the shares of capital stock of the corporation. The contingent nature of the operating deficit

> payments does not make the consideration for the sale of shares similarly contingent . . . . The operating provisions in the relevant agreements allow no right of 'set-off' against consideration due on the transfer of shares" (Division's brief, pp. 4-5).

We affirm the supplemental determination of the Administrative Law Judge, but for the reasons stated below.

In Matter of Cheltoncort Co. (supra), we concluded that in calculating the amount of tax due on a transfer for purposes of Article 31-B, "the value of the consideration has to be determined at the time of the transfer in order to finally fix the tax owed. Subsequent events do not alter the value that the consideration had at the time of the transfer" (Matter of Cheltoncort Co., supra).

In Matter of V & V Properties (supra), the petitioner sought to include in consideration (for purposes of calculating its original purchase price) certain liabilities it had assumed from the seller. We allowed these liabilities as part of the consideration even though it appeared that the petitioner may not have ultimately paid such liabilities because "the determinative factor is whether petitioner was required to pay this amount at the time the transfer occurred [footnote omitted]. Subsequent events do not affect the amount of liability assumed by petitioner at the time it acquired the property" (Matter of V & V Properties, supra).

In Matter of Starburst Develop. Co. (Tax Appeals Tribunal, May 5, 1994), we further explained the concept underlying our decision in Cheltoncort when we stated:

> "[p]etitioner contends that the Administrative Law Judge erred in holding that the statute [Article 31-B] required a contemporaneously existing and completed home on the homesite. Petitioner asserts that '[t]he statute itself, of course, imposes no temporal requirement, only requiring that "parcels improved with residences" be the subject of the transfer' (Petitioner's brief on exception, p. 5).
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> "We disagree with petitioners that the statute does not impose a temporal restriction. The gains tax is imposed "on gains derived from the transfer of real property within the state" (Tax Law § 1441, emphasis added). We conclude that the moment that the taxable event occurs, i.e., the transfer of the real property, is the temporal restriction underlying the entire gains tax. Consistent with this interpretation, we have held that the consideration for the transfer is fixed at this moment and is not reduced by subsequent events (Matter of Cheltoncort Co., supra; see also, Matter of V & V Properties, supra [where we held that consideration as an element of original purchase price was also fixed at the time of transfer and could

> not be reduced by the Division based on subsequent events]). To deviate from this theory, as petitioners suggest, and exclude transactions from the definition of transfer of real property based on subsequent events would, in our view, be contrary to the entire scheme of the tax" (Matter of Starburst Develop. Co., supra; see also, Matter of Shechter, Tax Appeals Tribunal, October 13, 1994).

The Tax Law defines "consideration" as the "price paid or required to be paid for real property" (Tax Law § 1440[1][a]). To analyze petitioners' claim, we must not look at the "consideration" from the perspective of petitioners; i.e., how much was actually received as a result of the transfers. Rather, we must calculate consideration by determining how much was paid or required to be paid by the purchaser for the interest in real property that was transferred.

In this case, it is clear that the amount paid or required to be paid by the purchasers of the tenant-occupied cooperative apartments was set forth in the contracts of sale for the shares representing those cooperative units. Irrespective of the amounts that petitioners ultimately were required to expend to fulfill their adjustment payment obligations under the terms of these contracts, the purchasers were not required to give additional consideration nor would they receive a refund of the amount they paid or were required to pay under their contract based on the actual expenditures made by petitioners.[6]

As we concluded in our earlier decision in this matter (Matter of Berkeley Group Assocs., supra), had petitioners placed a reasonable value on their adjustment payment obligation in the offering plan or in the contract of sale for the cooperative shares, petitioners would have established a basis for their claim that they were entitled to a reduction in consideration pursuant to former 20 NYCRR 590.37. Likewise, had petitioners provided evidence of the value of this obligation at the time of the transfer, petitioners would have established a basis for their claim that such value was paid for an item of intangible personal property and not for an interest in real property. No such value having been established, the Division was entitled to treat the entire consideration as having been given to acquire an interest in real property.

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[6]Since neither party has raised the issue of whether all or a portion of the 6% of rentals payable by the purchasers should be included in consideration, we will not consider it herein.

As to petitioners' claim that the Division should "hold open" the transaction because the value of the consideration is not determinable at the time of the transfer, we disagree. At the time of the transfers at issue herein, Tax Law § 1444(3) provided that "[n]o assessment of additional tax under this article shall be made after the expiration of three years from the date of transfer, or in the case of a transfer pursuant to a condominium or cooperative plan or an aggregated transfer, after the expiration of three years from the date of the last transfer made pursuant to such plan or aggregated transfer . . . ."

The policy of the Division, as enunciated in TSB-M-86(4)-R, was to agree with the taxpayer to extend the statute of limitations in situations where a contract contains an unvalued benefit or provides for a contingent payment to provide that additional consideration received by the transferor at a later date would not escape taxation. TSB-M-86(4)-R provides the following:

> "[w]here a contract contains an unvalued benefit or provides for a contingent payment, the Department will issue either a statement of tentative assessment or statement of no tax due based on the known consideration. An agreement extending the statute of limitation of time for assessment will be required to be filed. If there is additional consideration received for the transfer at a later date, the transferor and transferee are required to file updated questionnaires disclosing the actual consideration for the transfer of real property."

In 1989, subdivision (3)(b) was added to section 1444 to provide that:

> "[i]n the case of a transfer for which the total consideration is not determinable by the commissioner of taxation and finance at the time the questionnaires are submitted, no assessment of additional tax under this article shall be made after the expiration of three years from the date the taxpayer notifies the commissioner of taxation and finance of the amount of consideration finally determined."

Neither section 1443 nor TSB-M-86(4)-R requires that the Division "hold open the transfer" for the calculation of consideration (and computation of tax due) in the present case. Here, the total amount of consideration paid or to be paid by the purchasers is not in issue. The only issue is the allocation of consideration between the interest in real property and the intangible personal property by petitioners. There is no finding and there is no basis on which to find that the value of the consideration paid or to be paid on the transfers at issue was

indeterminable or incapable of being determined at the time of transfer. Further, events transpiring subsequent to the transfer had no effect on the amount the purchasers paid or were required to pay for their interest in real property.

Petitioners analogize their situation to that of the transferor of property in an eminent domain proceeding. The situation in an eminent domain proceeding is easily distinguishable from the present case. There, the amount to be paid by the transferee is not firmly established at the time of transfer. Even in such a situation, however, we did not accept the argument that consideration could never be calculated at the time of transfer. In Matter of E.L.C. Hotel Corp. (Tax Appeals Tribunal, April 6, 1995), we concluded that a transferor in an eminent domain proceeding was liable for interest on unpaid gains tax from the date of the transfer of title, even when the amount of consideration was not actually determined until long after the transfer. We stated that:

> "[t]he gains tax is imposed on the gain derived from the transfer of real property in the State (Tax Law § 1441). Section 1442(a) of the Tax Law provides that the tax is due no later than 15 days after the date of transfer. There is no special rule in Article 31-B that establishes a different date for payment of tax when the consideration is contingent, not determinable or not determined.
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> "We appreciate that petitioners could not precisely calculate the amount of tax due at the time of transfer. However, for the taking of their properties, petitioners were entitled to receive the market value of their properties at the time the properties were appropriated [citation omitted]. Given this standard, petitioners could have estimated the tax due on the transfer and paid the tax within 15 days of the transfer" (Matter of E.L.C. Hotel Corp., supra).

Based on the foregoing, we conclude that there is no basis on which to hold the transfers by petitioners open for a determination of the actual value of the adjustment payment obligation in order to calculate the consideration paid or to be paid.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Berkeley Group Associates, Aaron Ziegelman and William K. Langfan is denied;

2. The supplemental determination of the Administrative Law Judge is affirmed;

3. The petitions of Berkeley Group Associates, Aaron Ziegelman and William K. Langfan are denied; and

4. The notices of determination dated June 4, 1990, July 13, 1988 and July 18, 1988, as modified, are sustained.

DATED: Troy, New York
October 12, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner