STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALBE REALTY CO.	:	DECISION DTA No. 807449
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law	:	
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Petitioner Albe Realty Co., 1499 Coney Island Avenue, Brooklyn, New York 11230 filed an exception to the determination of the Administrative Law Judge issued on July 3, 1991 with respect to its 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 appeared by N. C. Caller, P.C. (Carl Caller, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner is entitled to a refund of all gains tax paid in connection with its transfer of cooperative apartment units as a sponsor under a cooperative conversion plan on the basis that the cooperative conversion plan has ended, that no additional units are being offered for sale, and that the actual consideration received for the units transferred was less than $1 million.

II. Whether, if a complete refund is not granted, petitioner is entitled to reduce its gain per share and, thus, reduce its tax liability based on an allowance of certain expenses incurred in

connection with its placement of a mortgage on the property which is the subject of the cooperative conversion.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Albe Realty Co. ("Albe"), a partnership, was the sponsor of a cooperative conversion involving certain premises located at 414 Albemarle Road, Brooklyn, New York. The premises consist of a building containing 46 apartment units plus a superintendent's apartment. Pursuant to the terms of the cooperative conversion plan, a total of 10,866 shares were allocated to the 46 apartment units offered for sale under the plan.

The cooperative conversion plan was filed with the Office of the Attorney General (Department of Law) on April 6, 1987, and was declared effective on June 30, 1988. The following statement appears, in bold-face type, on the cover page of the cooperative offering plan: "This Plan may not be used after 12 months from the (June 30, 1988) date of first offering unless extended by a duly filed amendment."

On September 5, 1988, petitioner, as sponsor, submitted requisite transferor and transferee questionnaires to the Division of Taxation in connection with the September 8, 1988 transfer of the premises to the cooperative housing corporation known as 414 Albemarle Owners Corp. (the realty transfer). These questionnaires set forth petitioners' anticipated consideration and expenses. Petitioner estimated the aggregate anticipated consideration it expected to receive on the conversion to be in excess of $2,000,000.00.

Petitioner sold and transferred shares together with the proprietary leases appurtenant to 12 out of the 46 apartment units offered for sale pursuant to the cooperative conversion plan. The last of such unit sales closed on January 3, 1989, leaving 34 units unsold. The total cash consideration actually received from sales of the units was $527,920.00. In addition, mortgage

consideration allocated to the sold apartments was $285,547.00, leaving a total actual consideration received to date of $813,467.00.

No apartments have been sold since the January 3, 1989 closing. In fact, all of the unsold apartment units are rented and occupied and none are, at present, being offered for sale. On July 25, 1990, petitioner filed a seventh amendment to the cooperative offering plan which stated that its primary purpose was "to set forth the financial disclosure requested in the Department of Law letter dated March 21, 1990".[1] This amendment also stated, at paragraph "E", the following:

> "The initial cooperative offering for apartments has expired and the Sponsor is not offering any apartments for sale. This amendment is not intended to set forth an offer to sell any apartments."

Included among the expenses claimed by petitioner as part of the conversion were certain costs incurred in the May 19, 1988 placement of a mortgage with First Nationwide Bank in the amount of $1,000,000.00. This mortgage replaced a then-existing $300,000.00 mortgage. The cooperative closing (realty transfer) occurred thereafter, as noted, on September 8, 1988. At that time petitioner as sponsor took back a wrap-around mortgage of $1,050,000.00 from the cooperative housing corporation. The wrap-around mortgage encompassed the underlying First Nationwide mortgage herein described. This wrap-around mortgage was discussed in the offering plan, which provided, inter alia, for the sponsor to take back a wrap-around mortgage in the amount of $1,100,000.00 encompassing an anticipated preexisting mortgage in the amount of $800,000.00. The amounts noted above, to wit, the $1,050,000.00 wrap-around mortgage taken back and the $1,000,000.00 underlying institutional mortgage, represent amounts resulting from negotiations between petitioner and the tenants committee at the property. In sum, the $1,100,000.00 anticipated wrap-around mortgage was reduced in final amount by $50,000.00, and the $800,000.00 anticipated underlying institutional mortgage was increased in amount by $200,000.00.

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[1]The March 21, 1990 Department of Law letter was not introduced in evidence.

The specific mortgage expenses claimed by petitioner but disallowed by the Division of Taxation include the following:

points	$27,500.00
mortgage tax	16,645.00
title insurance & recording tax	3,827.00
appraisal fee	3,000.00
bank's attorneys fee	3,000.00
credit report, messenger fee & tax service fee	400.00
Total	$54,372.00

Petitioner admits these expenses were incurred in connection with obtaining the First Nationwide mortgage, but maintains that such financing was a step in the cooperative conversion process. Thus, petitioner argues such expenses are properly deductible as costs incurred to create ownership interests in cooperative form (per Tax Law § 1440.5[a]). The Division of Taxation (hereinafter the "Division"), by contrast, does not contest the dollar amounts of the costs or the fact that they were incurred in connection with the First Nationwide mortgage. However, the Division argues that such costs were not incurred to create ownership interests in cooperative form, but rather were incurred in connection with the refinancing by petitioner of an existing $300,000.00 mortgage on the property. The Division notes that such refinancing occurred in May 1988, some four months prior to the transfer of the property from petitioner, as sponsor, to the cooperative housing corporation. The Division argues that such refinancing by petitioner was undertaken to enable petitioner to convert some of its equity in the property to cash prior to cooperative conversion.

On July 18, 1989, the Division issued to petitioner a Notice of Determination of Tax Due under Tax Law Article 31-B, assessing tax due in the amount of $1,188.72, plus penalty and interest per statute. The additional tax assessed is premised upon the Division's adjustments resulting in a higher per share gain (based on the Division's disallowance of the mortgage expenses described above), with the penalties based upon petitioner's late filing of certain returns, as well as its late payment and alleged underpayment of tax due on units transferred.

Petitioner protested this notice of determination, seeking a refund of all gains tax paid upon the argument that the offering of units has been terminated with the total actual consideration received for the offering being less than $1,000,000.00. In the alternative, petitioner seeks allowance of the mortgage expenses described above, as well as abatement of the penalties and interest.

At hearing, the Division's representative indicated that pursuant to amendments to Tax Law Article 31-B (specifically Tax Law § 1442[a]), filing and payment was timely made (within 15 days of transfer) on at least some, if not all of the units transferred, and thus penalty would not be due on such units.[2]

OPINION

In his determination below, the Administrative Law Judge concluded that petitioner had failed to establish that its cooperative conversion plan has, in fact, ended. Therefore, he denied petitioner's claim for a refund of gains tax already paid. Moreover, the Administrative Law Judge rejected petitioner's contention that the expenses it incurred in connection with obtaining the First Nationwide mortgage were costs incurred in order to create ownership interests in cooperative form. Instead, the Administrative Law Judge determined that such costs on the underlying mortgage were incurred nearly four months prior to the transfer from petitioner to the cooperative housing corporation, and were incurred in connection with refinancing an existing $300,000.00 mortgage. Lastly, the Administrative Law Judge modified the notice of determination by removing the late filing penalty assessments. The Administrative Law Judge stated that based on the evidence presented by the Division, it appeared that all of petitioner's filings were timely.

On exception, petitioner disagrees with the Administrative Law Judge's interpretation of "cooperative plan." Petitioner contends that the phrase "cooperative plan" refers to its personal

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[2] The Division provided no further specification, post hearing, as to which unit transfers were timely reported. However, reference to Exhibit "E-10," and its list of filing dates, appears to indicate that all filings were timely made.

plan of selling apartments to purchasers which ended when there was no longer any intent to sell. Petitioner argues that the Administrative Law Judge's interpretation of "cooperative plan" to mean the last apartment which can be sold pursuant to the cooperative plan is unreasonable.

Petitioner also asserts that there should be no difference between the treatment of allowable expenses for a wraparound mortgage placed on the property in connection with the cooperative conversion, and the expenses incurred in first, placing an underlying mortgage on the property and, then, placing a wraparound mortgage on the property in connection with the cooperative conversion.

In response, the Division argues that petitioner's interpretation of "cooperative plan" is too narrow. The Division contends that "cooperative plan" refers to the entire plan to convert what was once one undivided parcel of improved real property into multiple interests in real property and the attendant conversion process. The Division argues that its interpretation is consistent with Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin. which recognized that "the gains tax is imposed by the statute upon the overall cooperative conversion plan" (Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, 959, lv denied 78 NY2d 859, 575 NYS2d 455). Therefore, the Division contends that the fact that the offering plan has expired is of little significance since such offering plan can be revived by refiling with the Attorney General.

The Division also argues that the costs associated with the mortgage which had been placed on the property prior to the cooperative conversion to refinance a smaller existing mortgage were costs properly disallowed by the Division. In citing 20 NYCRR 590.39, the Division contends that the mortgage tax was properly disallowed because the mortgage was not created as a result of a conveyance to the cooperative corporation as required. Moreover, the Division argues that the bank's attorney fee was properly disallowed since it was not incurred directly as a result of cooperative or condominium formation and transfer of title to the cooperative corporation. Lastly, the Division alleges that the remaining costs at issue were also properly

disallowed since they were not incurred directly in the process of transferring the property from the sponsor to the cooperative corporation.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

We will first address petitioner's argument that "cooperative plan" should be interpreted to mean petitioner's personal plan to sell apartments, as opposed to the entire cooperative conversion plan on file with the Attorney General.

We agree with the Administrative Law Judge that "cooperative plan" refers to the overall cooperative conversion plan that has been filed with the Attorney General. Tax Law § 1440(7) defines, in pertinent part, a "transfer of real property" to include: "transfers pursuant to a cooperative plan shall include all transfers of stock in a cooperative corporation which owns real property." We interpret the underscored phrase to encompass the overall cooperative conversion plan (see, Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316), and do not find that such phrase can be interpreted as narrowly as petitioner urges.

Additionally, petitioner contends that our interpretation of "cooperative plan" is unworkable since no plan would ever end, and no final determination of consideration could ever be made, until every apartment was, in fact, sold. This position is without merit.

A memorandum entitled Safe Harbor Estimate for Transfers Pursuant to Condominium and Cooperative Plans (TSB-M-86[3]R) specifically addresses the issue of when a particular cooperative plan has ended for purposes of the gains tax. For a non-eviction cooperative conversion plan, it is presumed, under the memorandum, that such plan has ended if: (1) the transferor has transferred 85% or more of his interest in the cooperative, and (2) more than 1 year has passed since such transferor transferred a unit in the cooperative. Therefore, contrary to petitioner's assertion, this is an example of a cooperative conversion plan that would be treated as having ended, although there still existed unsold apartments. In our particular case, petitioner has not transferred 85% or more of its interest in the cooperative, therefore, it is not

entitled to the presumption that its sell-out period has ended with respect to the criteria set forth in the Safe Harbor memorandum.

However, we do agree with petitioner that the question of when the plan has ended is a question of fact. We conclude that petitioner has failed to establish that its conversion plan has ended.

Petitioner repeatedly argues that its offering plan has expired and the sponsor may not make any more sales. It is clear that the offering plan has expired, but it is not clear that the cooperative conversion plan has ended. In order for the sponsor to restart selling apartments, it would be necessary for it to amend its offering plan which could apparently be done with a refiling with the Attorney General's office (see, 13 NYCRR 18.5[a]). Moreover, 13 NYCRR 18.1(o) provides, in pertinent part, that:

> "If the offering plan . . . is abandoned after filing, the sponsor shall execute and file form RS-3 promulgated by the Attorney General within five business days thereafter . . . . The sponsor shall concurrently send written notice as to the withdrawal, termination, or abandonment to all offerees as defined in these regulations."

Petitioner has presented no evidence that the above procedure was followed in order to prove that, in fact, the cooperative conversion plan has been abandoned. Therefore, although we agree that the offering plan on file with the Attorney General has expired, petitioner has not established that its conversion plan has ended within the meaning and intent of the gains tax law because petitioner has not established that it could not recommence making sales pursuant to the plan.

Petitioner argues that because its plan has ended, and it has received less than $1 million in consideration, it is entitled to a refund for the gains tax already paid. We disagree. As stated above, we do not find that petitioner's conversion plan has ended. Therefore, it is not possible to determine if petitioner has overpaid gains tax at this time. Thus, the refund claim is premature and is denied.

The next issue to address is whether the Division properly disallowed the costs incurred for a mortgage placed on the property prior to the cooperative conversion.

Tax Law § 1440(5)(a) defines "original purchase price," in pertinent part, to include:

> "those customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative or condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission."

Such allowable costs include: filing and recording fees, costs of printing the offering plan, title insurance, appraisal fees, mortgage recording tax on mortgages created as a result of conveyance of title to the cooperative corporation and mortgage commitment fees (20 NYCRR 590.39).

We agree with the Administrative Law Judge that the costs at issue were properly disallowed by the Division. The Tax Law states clearly that only costs incurred to create ownership interest in property in cooperative or condominium form are allowable. The mortgage in question, which was obtained four months prior to the conversion, was not a necessary expense incurred to create an ownership interest in the cooperative housing corporation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Albe Realty Co. is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Albe Realty Co. is denied; and

4. The Notice of Determination dated July 18, 1989, as modified by cancelling the late filing penalties assessed, is sustained.

DATED: Troy, New York
March 26, 1992

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

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner