

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JAMES N. CAHILL :
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. :

DECISION
DTA Nos. 809172
and 809173

In the Matter of the Petition :
of :
FRANK J. COSENTINO :
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 James N. Cahill, 145 Washington Avenue, Endicott, New York 13760, and petitioner Frank J. Cosentino, 70 Burdick Road, Ithaca, New York 14850, filed an exception to the determination of the Administrative Law Judge issued on December 24, 1992. Petitioners appeared by James N. Cahill, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a letter brief in response. This letter brief was received on May 25, 1993 and began the six-month period for the issuance of this decision. Oral argument, requested by petitioners, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the "original purchase price" of the real property sold by petitioners should be increased by the value of certain furniture, fixtures and equipment transferred with the real property.

II. Whether the "original purchase price" of the real property included \$500,000.00 paid for capital improvements which were funded by State and Federal grants.

FINDINGS OF FACTS

We find the facts as determined by the Administrative Law Judge except for finding of fact "23" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

In the early 1970's, the City of Binghamton, New York ("the City"), vacated the City Hall building located at 80 State Street in Binghamton, and moved into a new government plaza. The old structure, which had been built in 1894, was considered to be a landmark and was on the Federal and State historic registers. The building remained vacant for several years and local citizens formed a "Save City Hall Committee" in an attempt to preserve it.

The City obtained a \$250,000.00 New York State Department of Parks and Recreation grant for preservation and salvage of the old City Hall. It invited bidders to submit proposals to restore the building and to return it to the tax rolls by using it for an approved purpose. The City went through the bidding process twice, and each time the high bidder failed to obtain financing. The City then received a matching grant for an additional \$250,000.00 from a Federal community development program and reopened bidding.

Petitioners, James N. Cahill and Frank J. Cosentino, were each 50% shareholders in Southern Tier Management Company, Inc. ("Southern Tier"). Petitioners' plan was that Southern Tier renovate the building and create a hotel. When the bidding was opened for the third time, Southern Tier bid \$55,000.00 on its proposal, with a \$5,500.00 "good faith deposit" and the balance to be paid when financing was secured and the lease executed.

Southern Tier was the successful bidder and entered into a Development Agreement and Option to Lease dated February 27, 1979 with the City. The agreement set forth the timetable for the project, the obligations of the parties and other provisions. The lease was to be for a term of 30 years and the lessee was to have the right to purchase the property in the 30th year for the sum of \$1.00.¹

Section 5.01 of the agreement provided as follows:

"Section 5.01 The City of Binghamton though [sic] its Community Development Department shall have the obligation to administer a contract for the restoration and repair of the structure to the extent allowable under a grant from the State of New York Department of Parks and Recreation and matching funds from Community Development sources which shall not exceed Five Hundred Thousand Dollars (\$500,000.)."

Southern Tier was unable to obtain bank financing. Petitioners approached George K. Sarkisian and John Sarkisian, local contractors, who agreed to finance the project in return for a two-thirds interest.

Petitioners formed a limited partnership with the Sarkisian brothers, which partnership was known as Old City Hall Associates.

On September 25, 1981, Southern Tier agreed to assign all of its right, title and interest to the 30-year lease to Old City Hall Associates, simultaneously with the execution by Southern Tier of the lease and easement agreements. Old City Hall Associates agreed to lease the hotel back to Southern Tier for 50 years, on a triple net basis, at a rental amount to be agreed upon when the rate of interest of permanent financing and the cost of construction were determined.²

Because of the Sarkisians' involvement, Old City Hall Associates was able to obtain financing for the balance of the funds necessary and work on the hotel, which was to be known

¹A copy of the lease was apparently attached to the original agreement, but it is not attached to the copy in the record (Exhibit "K"). Mr. Cahill explained that the Federal grant required that the City not alienate ownership for 30 years and that petitioners (perhaps meaning Southern Tier) had immediately sent the City a check for \$1.00 exercising the option (Tr., p. 29).

²Tr., p. 25.

as the Hotel de Ville, started in October 1981. Financing included a \$500,000.00 mortgage loan from Lincoln First Bank and a \$325,000.00 mortgage loan from Sarkisian Brothers, Inc.³

Capital improvements for the project cost \$1,296,140.24, consisting of \$796,140.24 in improvements financed by the Sarkisians and \$500,000.00 paid for by the public funding.⁴ The grant monies were paid directly from the public sources to the contractors. The breakdown was as follows:⁵

"HOTEL deVILLE
(OLD CITY HALL RESTORATION PROJECT)
PUBLIC FUNDING BREAKDOWN

REVISED TO REFLECT CHANGE ORDERS AND AMENDMENTS 1 AND 2

<u>BID PACKAGE</u> <u>DS</u>	<u>SUBCONTRACTOR</u>	<u>STATE FUNDS</u>	<u>CDD FUN</u>
'C' Lightgage Metal Framing Structural Steel Metal Framing Miscellaneous Metals	Elsand Steel, Inc.	\$ -0-	\$ 83,300
'J' Wood Window Rehabilitation and Wood Doors New Wood Windows	Sarkisian Brothers, Inc.	\$ 57,000	\$ -0-
'E' Hollow Metal Frames/ Doors	Luster-Life, Inc.	\$ 23,279	\$ -0-
'F' Hardware	Luster-Life, Inc.	\$ -0-	\$ 12,859
'G' Elevator	Midstate Elevator Co., Inc.	\$ -0-	\$ 70,314
'M' Plumbing	J. & K. Plumbing & Heating Co., Inc.	\$ 107,731	\$ 83,527
'O' Electrical	Nelson's Lamp Lighters, Inc.	\$ 39,490	\$ -0-

³Exhibit "N," p. 2.

⁴These amounts are not in dispute. See Item 2 attachment sheets to statements of proposed audit changes (Exhibits "E" and "J").

⁵Exhibit "L."

Architectural Fees	Cummings & Pash, Architects	\$ 22,500	\$ -0-
TOTALS		\$ 250,000	\$ 250,000"

Southern Tier was to pay Old City Hall Associates the \$796,140.24 in capital improvements not paid for through the grants by rental payments which were calculated to amortize such costs. Terms were 17½% interest for 7 years.⁶

Old City Hall Associates supplied the basic shell of the hotel building. Southern Tier furnished it, providing all lighting, wall coverings, floor coverings, furniture and fixtures and trade fixtures. Southern Tier also added four rooms to the original design, increasing it from 58 to 62 rooms.⁷

The Hotel de Ville opened for business in May 1983.

While operating the hotel, petitioners determined that there was a need for a large banquet hall. The Sarkisian family owned a building at 85 State Street, directly across the street from the hotel, two-thirds of the downstairs floor of which was set up as a banquet hall. The remaining one-third was a bar which was leased out by the Sarkisians. By a lease dated October 29, 1985,⁸ Southern Tier rented the banquet facilities at 85 State Street and commenced to operate same.

In 1987, petitioners decided to buy out the Sarkisians. Pursuant to a Purchase and Sale Agreement dated April 20, 1987,⁹ Binghamton Hotel Corporation, 50% of the stock of which was owned by each of the petitioners, purchased the 67% interest of George K. Sarkisian, John Sarkisian and Sarkids, Ltd. for \$953,000.00. Petitioners had obtained a mortgage commitment

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Tr., p. 25.

7

While petitioner James N. Cahill testified that he and Mr. Cosentino furnished the hotel and added the four rooms (Tr., p. 26), it is presumed from the context of the testimony that he was referring to Southern Tier.

⁸Tr., p. 27; see also reference in Exhibit "N," p. 4.

⁹Exhibit "N."

for a mortgage loan from The Savings Bank of Utica to Old City Hall Associates. The mortgage loan was to close at the same time as the transfer of the two-thirds interest in Old City Hall Associates. The Lincoln First Bank, N.A. (Chase Lincoln First Bank, N.A.) mortgage with a balance of \$241,393.37, as well as the Sarkisian Brothers, Inc. mortgage, with a balance of \$285,976.15, were to be paid in full from the proceeds of the mortgage loan.

In compliance with a condition subsequent to the Purchase and Sale Agreement, Southern Tier purchased from Stephens Square Realty Associates all the furniture, fixtures, trade fixtures, equipment and supplies located in the banquet facilities at 85 State Street for \$123,340.00, pursuant to a bill of sale dated April 29, 1987.¹⁰ Southern Tier also purchased from George K. Sarkisian and John Sarkisian all the leasehold improvements on said premises for \$133,659.84, pursuant to a bill of sale also dated April 29, 1987.¹¹ The lease dated October 29, 1985 was terminated and a new 99-year lease was entered into between Stephens Square Associates as landlord and Southern Tier as tenant.

The mortgage loan of The Savings Bank of Utica to Old City Hall Associates was \$2,100,000.00 and the proceeds were disbursed as follows:¹²

<u>Payable to</u>	<u>Amount</u>
Chase Lincoln First Bank, N.A.	\$ 241,393.37
Sarkisian Brothers, Inc.	285,976.15
George K. Sarkisian and John Sarkisian	78,114.54
Sarbro Realty Corp.	47,150.00
Sarkids, Ltd.	261,736.00
George K. Sarkisian	14,315.05
John Sarkisian	14,315.05
Southern Tier Management Co., Inc. and	

¹⁰Exhibit "3." It is noted that the bill of sale recites the consideration as \$133,659.84, which is the amount ascribed to the leasehold improvements in the agreement. Petitioners' Exhibit "7" (accountant's worksheet) uses the \$123,340.00 figure. See also Administrative Law Judge's determination Finding of Fact "15" (disbursement schedule).

¹¹

Exhibit "2." This bill of sale recites the consideration to be \$124,340.00, which is the price ascribed to the furniture, fixtures, etc. by the agreement. Petitioners' Exhibit "7" uses the \$133,660.00 figure. See also Administrative Law Judge's determination Finding of Fact "15" (disbursement schedule).

¹²See Exhibit "1."

Stephens Square Associates	123,340.00
Southern Tier Management Co., Inc. and George K. Sarkisian and John Sarkisian	133,659.84
Old City Hall Associates	<u>900,000.00</u>
TOTAL	\$2,100,000.00

The furniture, fixtures and equipment located in the banquet facilities at 85 State Street were carried on the books of Old City Hall Associates¹³ and depreciated on Old City Hall Associates' Federal Form 4562 for 1987.¹⁴ (It is noted that the 1987 and 1988 partnership returns, as well as the ledger sheet, refer to Old City Hall Associates as "Old City Hall Associates II." The parties have not alluded to the difference in name and it will be assumed for purposes of this determination that Old City Hall Associates and Old City Hall Associates II were one and the same.) The cost claimed for the furniture, fixtures and equipment at issue is \$125,980.00, consisting of the \$123,340.00 purchase price and \$2,640.00 in refinancing charges.¹⁵

Petitioners' accountant testified that the furniture, fixtures and equipment and the leasehold improvements at 85 State Street had actually been purchased by Old City Hall Associates, because Old City Hall Associates provided the financing and that he accordingly carried them as assets on the books of said partnership.¹⁶

Pursuant to a Purchase and Sales Agreement dated August 3, 1988,¹⁷ Binghamton Hotel Corporation, as the general partner of Old City Hall Associates, petitioners, as limited partners in Old City Hall Associates, Southern Tier and Old City Hall Associates, agreed to sell their interests in the following to James R. McCoy and Nicholas G. Serafini, Jr.:

¹³

Exhibit "7."

¹⁴Exhibit "6."

¹⁵

Exhibits "5" and "8."

¹⁶Tr., p. 55.

¹⁷Exhibit "O."

- (a) lease between the City of Binghamton and Old City Hall Associates for the Hotel de Ville;
- (b) driveway, light and air easements;
- (c) all furniture, fixtures and equipment located in the Hotel de Ville (except television sets, telephones, switchboard and front desk computer system, which were leased);
- (d) 92 leased parking spaces;
- (e) leasehold interest in the lower floor of 85 State Street, together with leasehold improvements, furniture, fixtures, trade fixtures and equipment located therein; and
- (f) a limousine.

The purchase price was stated as follows:¹⁸

"The purchase price hereinafter will be the assumption of a Mortgage and Note presently held by The Savings Bank of Utica on the Hotel de Ville, with a current balance of approximately Two Million Forty-Seven Thousand Five Hundred Forty-one Dollars and Six-one [sic] cents (\$2,047,541.61), and the payment of Nine Hundred Forty-seven Thousand Five Hundred Forty-one Dollars and Sixty-one cents (\$947,541.61), said amount being allocated as follows:

- A. \$ 5,000.00 - Goodwill of Southern Tier Management Co.,
Inc.
- B. \$ 60,000.00 -Covenant Not to Compete of STM
- C. \$ 15,000.00 - 1983 Limousine
- D. \$147,000.00 - Sale by STM of all of its' [sic] interest in the furniture and fixtures.
- E. \$ 3,000.00 - STM supplies in the subject premises.
- F. \$170,000.00 - Sale by STM of all of its' [sic] leasehold improvements in the subject premises.

¹⁸Exhibit "O," pp. 4 and 5.

G. \$ 2,737.71 - The sale of fifty (50%) per cent of the stock in Binghamton Hotel Corporation by James N. Cahill.

H. \$ 2,737.70 - The sale of fifty (50%) per cent of the stock in Binghamton Hotel Corporation by Frank J. Cosentino.

I. \$271,033.10 - The sale by Frank J. Cosentino of his 49 1/2% per cent [sic] interest in Old City Hall Associates.

J. \$271,033.10 - The sale by James N. Cahill of his 49 1/2% per cent [sic] interest in Old City Hall Associates.

TOTAL \$947,541.61"

The closing was apparently held on November 8, 1988. The furniture, fixtures, trade fixtures, equipment and linens, including electric, plumbing, sewer and water systems and leasehold improvements in the leased premises at 85 State Street, and electrical, plumbing, water and sewer fixtures, ceilings, wall and floor coverings, interior partitions, doors and a 30-day supply of cleaning materials, all room keys and leasehold improvements at the Hotel de Ville, were transferred by Southern Tier to SAC Leisure, Inc. by a bill of sale dated November 8, 1988 for the sum of \$320,000.00.

Gains tax questionnaires showing a transfer date of November 8, 1988 stated that each petitioner sold his 50% interest in Binghamton Hotel Corporation and 49.5% limited partnership share in Old City Hall Associates (the other 1% share was owned by Binghamton Hotel Corporation, as general partner) to Nicholas G. Serafini, Jr. and James R. McCoy. The computation of anticipated tax due was the same for each petitioner:

"1. Gross consideration to be paid for transfer by Transferee.....	1,297,541.61
2. Brokerage fees to be paid by Transferor (attach brokerage agreement).....	7,500.00
3. Consideration (line 1 less line 2).....	1,290,041.61
4. Purchase price paid to acquire real property.....	27,500.00
5. Other acquisition costs (see instructions).....	611,221.45
6. Cost of capital improvements to real property.....	648,070.12
7. Allowable selling expenses (see instructions).....	
8. Original purchase price (add lines 4, 5, 6 and 7).....	1,286,791.57
9. Gain subject to tax (line 3 less line 8).....	3,250.00
10. Anticipated tax due (10% of line 9) (If exemption is claimed at Schedule A, line 3, leave blank).....	325.00"

Other gains tax questionnaires showing a transfer date of November 8, 1988 stated that Southern Tier transferred its sub-lease and leasehold improvements at 80 State Street and 85 State Street to SAC Leisure, Inc.¹⁹ The computation of tax due was as follows:

"1. Gross consideration to be paid for transfer by Transferee.....	170,000.00
2. Brokerage fees to be paid by Transferor (attach brokerage agreement).....	-0-
3. Consideration (line 1 less line 2).....	170,000.00
4. Purchase price paid to acquire real property.....	
5. Other acquisition costs (see instructions).....	
6. Cost of capital improvements to real property.....	161,698.93
7. Allowable selling expenses (see instructions).....	
8. Original purchase price (add lines 4, 5, 6 and 7).....	161,698.93
9. Gain subject to tax (line 3 less line 8).....	8,301.07
10. Anticipated tax due (10% of line 9) (If exemption is claimed at Schedule A, line 3, leave blank).....	830.11"

Additional questionnaires with a transfer date of November 8, 1988 stated that Southern Tier assigned its leasehold interest to the Hotel de Ville at 80 State Street to petitioners for \$498,000.00. The computation of tax due was as follows:

"1. Gross consideration to be paid for transfer by Transferee.....	498,000.00
2. Brokerage fees to be paid by Transferor (attach brokerage agreement).....	-0-
3. Consideration (line 1 less line 2).....	498,000.00
4. Purchase price paid to acquire real property.....	
5. Other acquisition costs (see instructions).....	
6. Cost of capital improvements to real property.....	254,184.07
7. Allowable selling expenses (see instructions).....	1,000.00
8. Original purchase price (add lines 4, 5, 6 and 7).....	255,184.07
9. Gain subject to tax (line 3 less line 8).....	242,815.93
10. Anticipated tax due (10% of line 9) (If exemption is claimed at Schedule A, line 3, leave blank).....	24,281.59"

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The questionnaire does not provide a breakdown. it is noted that the gross consideration of \$170,000.00 is the same amount as was attributed to Southern Tier's sale of leasehold improvements in the Purchase and Sales Agreement (Administrative Law Judge's determination, Finding of Fact "18").

The assignment agreement²⁰ provided that the \$498,000.00 was to be paid by reduction of that amount for the moneys previously advanced on April 29, 1987 to Southern Tier, leaving a balance due and owing from Southern Tier to petitioners of \$347,047.32. The agreement recited that the transfer of petitioners' limited partnership interest in the Hotel de Ville was required to be made without the encumbrance of the lease of Old City Hall Associates to Southern Tier.

We modify finding of fact "23" of the Administrative Law Judge's determination to read as follows:

On September 11, 1989, statements of proposed audit changes were issued to each petitioner in the amount of \$54,703.52 in tax and \$4,463.65 in interest, for a total of \$59,167.17. The adjustments were computed as follows:

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Disallowed acquisition costs:

Lease acquisition	\$ 55,000.00	
Organization costs	\$ 18,413.23	
Capital improvements	<u>\$796,140.24</u>	
	\$869,553.47	
	<u> x .67²¹</u>	582,600.82
Refinancing costs		30,801.57
Capital improvements (grants)		<u>500,000.00</u>
		1,113,400.96
Additional capital improvements verified at audit		(19,331.80)
Total costs disallowed		<u>1,094,069.10</u>
		<u> % 2</u>
Total disallowance per taxpayer		547,035.00
	Tax rate	<u> x .10</u>
Additional tax due		54,703.52 ²²

On November 6, 1989, notices of determination were issued to each petitioner assessing tax due of \$54,703.52, plus interest of \$5,536.81, a total of \$60,240.33.

After a conference in the Bureau of Conciliation and Mediation Services, the assessments were reduced to \$47,807.00, plus interest. This figure was arrived at as follows:²³

"Adjustment per Statement of Proposed Audit Changes \$547,035

Less:

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These acquisition costs were partially disallowed because 67% of these costs were attributable to the Sarkasian's and were included in the purchase price of petitioners' purchase of Sarkasian's 67% interest in Old City Hall Associates. The disallowance of these costs is not contested by petitioners.

²²The Administrative Law Judge's finding of fact "23(a)" through "23(e)" was restated to more clearly reflect the record.

²³Exhibit "Q," p. 1.

(1) Adjustment to step-up		
Originally claimed	\$661,077	
Allowable step-up	\$902,628	
a) Chase Lincoln Mortgage (67% 241,933)	\$161,733	
b) Sarkisian Bros. Mortgage (67% 285,976)	191,604	
c) George & John Sarkisian	78,115	
d) Sabra Realty Corp.	47,150	
e) Sarkids Ltd.	261,736	
f) John Sarkisian	14,315	
g) George Sarkisian	14,315	
h) leasehold improvements	133,660	
Adjustment to step	\$241,551	
50%		\$(120,776)
(2) Adjustment to refinance costs		
Disallowed per proposed audit change	\$30,802	
Revised disallowance	<u>25,631</u>	
Adjustment	5,171	
50%		(2,586)
Plus:		
(1) Adjustment to capital improvements		
Disallow 67% of 162,386	\$108,799	
50%		<u>\$54,400</u>
Revised adjustment		\$478,073
Revised tax		\$47,807"

Subsequent to the hearing, and after reviewing documentation submitted by petitioners, the Division of Taxation ("the Division") eliminated the \$108,799.00 adjustment to capital improvements (the third adjustment listed in Administrative Law Judge's determination Finding of Fact "25") and reduced the tax assessed against each petitioner by \$5,440.00.

OPINION

We deal first with petitioners' assertion that just because the Bill of Sale transferring ownership in the furniture, fixtures and equipment to SAC Leisure, Inc. incorrectly listed Southern Tier and not Old City Hall Associates as the seller, petitioners should not be precluded from including the amount of the sale in determining the original purchase price of the real property at issue. Rather, petitioners argue that "[a]ll of the entities of Petitioners should be treated in the aggregate in determining the taxable gain on the real estate" (Petitioners' brief, p. 4).

In the determination below, upon finding that the furniture, fixtures and equipment at 85 State Street were owned by Old City Hall Associates and not Southern Tier, and that petitioners did not appear to transfer their interests in Southern Tier, the Administrative Law Judge held that petitioners "failed to sustain their burden of [proving a] basis upon which they would be entitled to reduce the consideration for the sale by the value of [these items]" (Determination, conclusion of law "C").

Although petitioners claim that the cost of these items was improperly excluded from "original purchase price," they have not explicitly asserted, much less proven, that the \$125,980.00 amount cited was included in any of the disallowed costs (see, Modified finding of fact "23"; Determination, finding of fact "24"). Therefore, we find that petitioners have not met their initial burden of establishing that this cost was disallowed, nor that any additional tax was assessed because of such disallowance.

We deal next with petitioners' assertion that the \$500,000.00 grant used to fund capital improvements, when examined in light of 20 NYCRR 590.18, should be treated in the same manner as a gift, devise, bequest or inheritance and included in the original purchase price of the real property at issue.

The Administrative Law Judge held that the \$500,000.00 State and Federal grant monies spent on capital improvements were not includable in petitioners' "original purchase price." Specifically, the Administrative Law Judge concluded:

"Tax Law § 1440.5 (a) provides that 'original purchase price' means the consideration paid, or required to be paid by the transferor to acquire the real property or for capital improvements thereto. Here, \$500,000.00 of the \$1,296,140.24 consideration for the capital improvements was supplied not by the transferor, but through funds paid by public agencies directly to the respective contractors [Determination, finding of fact '9']. Petitioners' reliance on Tax Law § 1440.5(b), which deals with transfers by gift, devise, bequest or inheritance, is misplaced, as the grants were not the type of transfers covered by said subdivision. For one thing, the grants were not actually gifts, as they were not made without consideration (i.e., Southern Tier's compliance with the terms of the grants constituted consideration). Absent any showing of legislative intent to the contrary, said grants cannot be deemed to be payments made by petitioners for acquisition of the property, or for capital improvements thereto. Accordingly, the \$500,000.00 is not to be included in petitioners' 'original purchase price'" (Determination, conclusion of law "E").

The essence of petitioners' argument is that since a gift of property is included in the original purchase price at the cost to the donor (20 NYCRR 590.18), then a gift of a capital improvement would also be included in the original purchase price at the cost thereof. Therefore, it follows that a grant of money to do the capital improvement should be treated the same and should be included in the original purchase price.

In response, the Division states that:

"[t]he facts show conclusively that the grant monies were not 'paid . . . by the transferor' within the meaning of §1440.5(a). The words, 'by the transferor,' in §1440.5(a) were probably enacted to reflect the basic tax concept that, generally, a taxpayer cannot offset income with expenses that he has not incurred. These grants were the funds of the State of New York and the Federal government which were disbursed by the City of Binghamton. They do not qualify as consideration paid for capital improvements" (Division's brief at hearing, emphasis added).

On exception, the Division relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge on this issue.

Clearly neither the statute nor the regulations deal specifically with the treatment to be accorded State and Federal grants for purposes of determining original purchase price²⁴ nor with gifts of capital improvements. This issue, i.e., treatment of Federal and State grant monies for purposes of original purchase price, is one of first impression for this Tribunal and we are mindful of the policy consideration raised by petitioners, i.e., "[t]he State should not be allowed a windfall profit of \$50,000 [the proportional amount of the tax] on monies paid by the State and by the Federal Government" to further community development and preserve a historic structure, the "Old City Hall" (Petitioners' brief, Point II). However, the statute is quite clear in its requirement that the consideration be "paid . . . by the transferor" (Tax Law § 1440[5][a]). Applying the wording of the statute to the facts at hand, it is clear that the Federal and State grant monies "were disbursed by the City of Binghamton," thus, they were not "paid . . . by the

²⁴Reference to Federal law for guidance reveals no direct parallel. However, we note the extensive treatment in case law and private letter rulings of section 118 of the Internal Revenue Code and the accompanying regulations on the question of whether Federal grants are taxable as income to the recipient or should be treated as non-shareholder contributions to capital (see, United States v. Chicago, Burlington & Quincy R. R. Co., 412 US 401).

transferor," i.e., petitioners, as required by section 1440(5)(a) and, therefore do not qualify as consideration for capital improvements (Determination, conclusion of law "E").²⁵

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners James N. Cahill and Frank J. Cosentino is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of James N. Cahill and Frank J. Cosentino are denied; and
4. The notices of determination dated November 6, 1989 are sustained.

DATED: Troy, New York
October 28, 1993

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

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

²⁵The facts in this case do not require us to reach the issue of whether the transferor must be the source as well as the disburser of the funds.