STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
645 EAST 11th STREET ASSOCIATES	:	DECISION DTA No. 809295
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 645 East 11th Street Associates, 160 East 38th Street, Suite 16-B, New York, New York 10016 filed an exception to the determination of the Administrative Law Judge issued on May 21, 1992 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 Dwight A. Bowler, General Partner. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief in response. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner's gain on its rehabilitation and conversion of certain premises to condominium ownership may be reduced by certain interest expenses, sales expenses and construction expenses claimed by petitioner but disallowed by the Division of Taxation on audit.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact "11" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On October 30, 1989, following an audit, the Division of Taxation issued to petitioner, 645 East 11th Street Associates, a Notice of Determination assessing gains tax due in the amount of $4,463.00, plus penalty and interest.

Petitioner, a partnership, is engaged in acquiring, renovating and selling buildings. To this end, on June 10, 1986, petitioner acquired premises located at 645 East 11th Street, Borough of Manhattan, New York, New York. These premises consisted of a five-story brick structure, 25 feet wide and 70 feet deep, situated on a lot some 100 feet deep. The building housed a ground floor (street level) office space plus nine apartment units on the upper floors. The premises were originally zoned to allow ground floor commercial use and upper floor(s) residential use. The premises were rezoned, however, such that professional/medical use would be allowed in the ground floor space with the balance of the floors remaining zoned for residential use. Petitioner's aim was to completely rehabilitate the premises, convert to condominium ownership and sell the resulting condominium units.

Petitioner purchased the premises for $368,140.00. At closing, on June 10, 1986, the seller took back a one-year purchase money mortgage from petitioner in the amount of $173,000.00. Shortly thereafter, on August 25, 1986, this initial purchase money mortgage was replaced by a $200,000.00 first mortgage loan placed with Amalgamated Bank of New York. This loan from Amalgamated was used to retire the seller's loan and to commence construction. The loan proceeds of $200,000.00 were disbursed as follows:

(a) William Duran, in satisfaction of the existing mortgage $169,849.00;

(b) Szold & Brandwen, lender's attorney's fee $1,500.00;

(c) Amalgamated Bank of New York, appraisal fee $550.00;

(d) Amalgamated Bank of New York, 2 months real estate tax escrow $160.00;

(e) Askold Lozynsky, attorney for William Duran $150.00;

(f) Dennis Elkin, title closer $75.00;

(g) Omni Abstract Corp., to the charges pursuant to the bill annexed hereto $2,976.00;

(h) 645 East 11th Street Associates $24,740.00.

Petitioner commenced renovation of the premises, describing the same as a complete rehabilitation (a "gut"), including the removal of beams, roof, mechanical systems (plumbing, heating, electrical, etc.) and some walls.

On or about September 8, 1986, petitioner obtained a construction loan in the amount of $382,500.00 from the Progressive Credit Union secured by a second mortgage on the premises. This loan amount represented petitioner's estimate of the funds necessary to complete renovation of the premises. However, certain problems were encountered, both structural and economic, such that additional partner infusions in the amount of $155,597.00 were required in order to complete the rehabilitation, convert the premises to condominium ownership and effect sales of the units.

On April 21, 1987, a Certificate of Occupancy for the premises was issued by the City of New York - Department of Buildings. As of approximately the same time, petitioner had entered into agreements for the sale of certain units, with closings projected to occur in or about August 1987. Petitioner alleged, however, that the stock market crash during the summer of 1987, as well as the accompanying and ongoing general economic downturn, caused these sales to be lost and required petitioner to offer substantial price reductions in order to make any sales.

Petitioner's first condominium unit sale occurred in December of 1987, and sales of units continued thereafter until the last unit was sold in September of 1988.

Petitioner initially estimated that its gain on the project would range between $400,000.00 to $450,000.00, thus resulting in a gains tax liability in the area of $40,000.00 to $45,000.00. Petitioner had hoped, in effect, to prepay such gains tax liability by paying a higher percentage

of such tax on its earliest unit sales ("front loading"). However, due to certain unforeseen expenses of the project, as well as the described slowdown in the economy and resultant slowdown in sales, petitioner believed that, after its first few unit sales, it had significantly overpaid its gains tax liability. In turn, on May 1, 1989, the Division of Taxation received from petitioner a claim for refund alleging petitioner's gains tax liability to be $12,310.00.[1] This claim also alleged that petitioner had made gains tax payments totalling $43,000.00, thereby leading to a claimed refund due of $30,690.00.

In response to petitioner's claim for refund, the Division of Taxation conducted an audit. The Division of Taxation calculated petitioner's liability, post-audit, as follows:

Gross consideration.....	$1,248,211.00	
Less: brokerage ($6,840.00)		
reserve fund ($5,000.00).....	(11,840.00)	
Balance.....	$1,236,371.00	
Original purchase price.....	(892,955.00)	
Gain.....		$ 343,416.00

The Division of Taxation, in turn, calculated petitioner's gains tax liability to be $34,341.60. Despite petitioner's claim of having paid gains tax of $43,000.00, the Division of Taxation could only verify payments of $29,879.00. Thus, the Division of Taxation denied petitioner's claim for refund and issued a Notice of Determination in the amount of $4,463.00 as described above. The principal areas of audit change centered on disallowance of certain claimed expenses most of which were incurred after the April 21, 1987 issuance of the certificate of occupancy for the premises. These items relate to claimed interest expense, sales expenses and construction expenses.

By its post-hearing submissions, petitioner specified those claimed expenses disallowed by the auditor and remaining at issue to be the following:

(a) Interest Expense:

(1) Amalgamated Bank Loan: Total interest expense on the $200,000.00 Amalgamated Bank loan amounted to $31,412.00, while interest expense on the

[1]Petitioner's refund claim lists gross sales (consideration) of $1,233,256.00, basis (original purchase price) of $1,110,148.93, resulting gain of $123,107.00 and gains tax due of $12,310.70.

Progressive Credit Union construction loan incurred after issuance of the certificate of occupancy on April 21, 1987, totalled $44,617.00 (totalling together $76,029.00). Petitioner asserts that the auditor allowed all closing costs on the Amalgamated Bank loan but refused to allow any interest expense on such loan. Petitioner points out that while the Division of Taxation does not allow interest expense incurred on acquisition financing, such interest expense is in fact incurred and must be paid by the borrower (petitioner herein). In addition, petitioner alleges specifically that some $41,000.00 of such loan was used for construction, and that no interest expense was allowed on such portion of the loan.

(ii) Progressive Credit Union Construction Loan: With respect to the construction loan, petitioner argues that the severe economic conditions encountered should serve to allow deduction of the interest expense incurred after issuance of the certificate of occupancy notwithstanding that the building was physically ready for occupancy.

(iii) Progressive Credit Union Closing Costs: In this same area, petitioner also argues that there were "other closing costs" relative to the construction loan, in the amount of $6,282.00, disallowed upon audit.

(b) Sales Expenses:

(i) Advertising: Petitioner challenges the disallowance of claimed sales expenses in the amount of $23,618.00 incurred after the issuance of the certificate of occupancy. Petitioner claims that condominium sales do not result (in general) from "word of mouth" advertising, and alleges that the advertising expenses disallowed were necessary costs to create sales.

(ii) Legal and Related Fees: Petitioner also challenges the disallowance of $12,322.00 in claimed "legal and related fees" paid at the closings of various units. Petitioner described these amounts as "concession(s) to the buyer(s)", which allowances resulted in a net reduction of price and, therefore, of gain.

(c) Construction Expense:

(i) Payroll Items: Petitioner challenges the disallowance of certain alleged construction-related payroll expenses incurred during construction. According to petitioner, these expenses would have been paid during construction if there had been "sufficient profit" at the time. These amounts, totalling $20,167.00, include amounts for FUTA and for New York State income tax and unemployment insurance, as follows:

"DATE	CHECK #	PAYEE	PURPOSE	AMOUNT
2/25/87	342	NYS Inc. Tax	3rd Qtr 86 Banaco	$2,681.00
2/25/87	343	NYS Unemp Ins.	3rd Qtr 86 Banaco	$2,895.00
8/29/87	395	NYS Inc. Tax	4th Qtr.86 Banaco	$2,738.00
8/29/87	396	NYS Unemp Ins.	4th Qtr 86 & 1st ..... Qtr 87 for Banaco, Inc.	$2,999.00
12/10/87	407	IRS FUTA	1st Qtr 1987 ..... ID 13-3358339	$6,362.00
12/11/87	408	IRS FUTA	2nd Qtr 1987 ..... ID 13-3358339	$1,238.00
11/19/87	24206	NYS Unempl Ins.	1st Qtr. 1987	$1,254.00
			TOTAL	$20,167.00"

(ii) Construction Materials: Petitioner also challenges the disallowance of certain alleged construction expenses paid after issuance of the certificate of occupancy. Petitioner described these expenses as modifications required under contract such as physically combining apartments 3-A and 3-B into one unit, modifying the kitchen and closets in apartment 2-B and completing the façade in front of the commercial (medical) unit. Petitioner alleges that these modifications were not sales expenses but rather were modifications required by contract which allowed petitioner to close on the units and which in fact resulted in a reduction in price received. These costs are claimed in the amounts of $25,128.00 for 1987 and $54,876.00 for 1988.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

Petitioner alleges, in sum, that the total expenses allowed per audit ($524,775.00), plus the acquisition price for the premises ($368,140.00),

should be increased by the above-described disallowed costs which total $218,418.00.[2] Petitioner, thus, would calculate its

original purchase price for the premises to be $1,111,333.00 [$1,111,315.00]. Comparing such amount to gross consideration received of $1,236,371.00, leaves a $125,038.00 [$125,056.00] gain subject to tax.[3] Hence, petitioner reiterates its claim for refund of gains tax paid in excess of $12,503.80 [$12,505.60] (i.e.,

$125,038.00 [$125,056.00] x .10) and, in hand, seeks cancellation of the Notice of Determination described above.[4]

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[2] Although this is the figure submitted by petitioner (see, letter from Dwight A. Bowler to Kenneth J. Schultz, September 6, 1991, p. 4), it is evident from adding the numbers in the chart which follows, as well as from the Administrative Law Judge's conclusion of law "B," that the numbers petitioner lists add up to $218,400.00. With this number in mind, petitioner's claimed original purchase price would be $1,111,315.00 (instead of $1,111,333.00), its gain would be $125,056.00 (instead of $125,038.00), and its claim for refund should be for gains tax paid in excess of $12,505.60 (instead of $12,503.80). We have, therefore, placed the correct numbers in brackets after each of the numbers listed by the Administrative Law Judge.

The additional costs sought herein are summarized as follows:

Interest Expense	$ 76,029.00
Construction Mortgage Closing Costs	6,282.00
Sales Expense	35,918.00
Construction Expense	100,171.00
Total	$218,418.00 [$218,400.00]

[3] The dollar figures presented in petitioner's refund claim vary to some extent from those included in its post-hearing documents and from those appearing in the audit report and workpapers. For example, petitioner's refund claim and October 24, 1992 letter brief list gross consideration of $1,233,256.00, whereas its September 6, 1992 submission lists gross consideration of $1,232,000.00. By contrast, the audit report lists consideration (after brokerage and reserve fund) to be $1,236,371.00. Similarly, petitioner's refund claim lists original purchase price of $1,110,148.92, whereas its September 6, 1992 submission lists original purchase price of $1,105,033.00. However, adding the specific amounts listed in such latter submission totals to $1,111,333.00 [$1,111,315.00] -- the same figure set forth hereinabove. Finally, petitioner's refund claim seeks a refund of $30,690.00 and claims payments of $43,000.00, whereas petitioner's post-hearing submission speaks of a $16,000.00 refund sought, and the audit report lists payments of only $29,879.00. To establish certainty and absent clear reconciliation of any of these numbers by either party (and lacking any specific evidence from petitioner to establish the accuracy of its figures in place of those found on audit), the following amounts shall be accepted herein as calculational starting points:

Consideration (after brokerage and reserve)		$1,236,371.00
Original Purchase Price Allowed:	Expenses	524,775.00
	Acquisition	368,140.00
Gains Tax Payments by Petitioner		29,879.00
Additional Costs at Issue Herein		218,418.00[218,400.00]

[4] The Administrative Law Judge's finding of fact "11" read as follows:

"Petitioner alleges, in sum, that the total expenses allowed per audit ($524,775.00), plus

By its post-hearing submission, the Division of Taxation allowed two concessions to the areas in dispute. First, the Division of Taxation agreed to waive penalty as set forth on the Notice of Determination. In addition, the Division of Taxation agreed to reduce the amount of tax due as claimed on such Notice by the amount of $388.60. This reduction, as well as the Division of Taxation's position herein, was more specifically described in an affidavit submitted (as specifically permitted) with the Division of Taxation's post-hearing brief, as follows:

(a) Interest Expense:

(i) Amalgamated Bank Loan: The Division of Taxation initially disallowed all interest expense incurred on the Amalgamated Bank loan on the premise that the same represented interest expense on acquisition financing. However, the Division of Taxation notes that according to closing statements submitted by petitioner, together with disbursement checks relative to this loan, the total amount of loan proceeds disbursed to petitioner was $24,740.00. Since petitioner used these proceeds disbursed to it for construction (as opposed to acquisition), the Division of Taxation agreed to allow $3,886.00 of

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the acquisition price for the premises ($368,140.00), should be increased by the above-described disallowed costs which total $218,418.00*. Petitioner thus would calculate its original purchase price for the premises to be $1,111,333.00. Comparing such amount to gross consideration received of $1,236,371.00, leaves a $125,038.00 gain subject to tax**. Hence, petitioner reiterates its claim for refund of gains tax paid in excess of $12,503.80 (i.e., $125,038.00 x .10) and, in hand, seeks cancellation of the Notice of Determination described in Finding of Fact '1'."

* denotes footnote "2"

** denotes footnote "3"

We modified finding of fact "11" in order to correct for errors in calculation made by petitioner.

additional construction interest, thereby reducing the amount of tax due per the Notice of Determination by some $388.60.[5]

(ii) Progressive Credit Union Construction Loan: With respect to disallowing construction loan interest expense incurred after April 21, 1987, the Division of Taxation relies on 20 NYCRR 590.16(e) for the proposition that a construction period ends when the certificate of occupancy is issued.

(iii) Progressive Credit Union Closing Costs: With respect to additional closing costs of $6,282.00 on the construction loan, the Division asserts that, by reference to Audit Schedule "C",[6] the same expenses were in fact allowed with the exception of $163.00 in special additional mortgage recording tax. The Division of Taxation notes also that in addition to such additional closing costs, some $10,216.00 of costs and expenses not previously claimed on this loan were also allowed upon audit. No specific challenge was raised by petitioner regarding the $163.00 amount disallowed.

(b) Sales Expenses:

(i) Advertising: Sales and advertising expenses ($23,618.00), listed specifically as "office advertising" on Audit Schedule "E",[6] were disallowed on audit as not being "customary, reasonable and necessary legal, engineering and architectural fees incurred in selling real property".

(ii) Legal and Related Fees: The additional $12,322.00 in "legal and related fees" disallowed apparently represent the first two items listed on

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[5]The calculation of this allowance follows:

Total interest on Amalgamated Bank loan $ 31,412.00
Disbursed funds available for construction purposes $ 24,740.00
Total funds borrowed $200,000.00

$\frac{\$ 24,740.00}{\$200,000.00} \times \$31,412.00 = \$3,886.00$ (construction interest)

[6]Audit Schedules "C," "D" and "E" are included as part of Exhibit "H" introduced in evidence at hearing.

Audit Schedule "E", to wit, "legal, accounting and engineering fees" ($7,309.00) and "filing and recording fees" ($5,013.00), both disallowed for lack of substantiation. In fact, on such Schedule "E" the abbreviation "subs", presumably short for substantiation (or the lack thereof), appears next to these disallowed amounts. To further specify, the $7,309.00 disallowed amount represents a portion of the $21,550.00 total amount of legal, accounting and engineering fees claimed by petitioner on its initial gains tax filings.[7] Reference to Exhibits "O" and "H" introduced in evidence at hearing reveals that the $14,241.00 balance of such claimed expenses was allowed upon audit.[8] In turn, other than describing the disallowed amounts as "concessions to buyers" and "a net reduction of price", petitioner offered no specific evidence in substantiation of such amounts.

In the same manner, the $5,013.00 amount of filing and recording fees disallowed represents a portion of the $17,102.00 initially claimed as "filing and recording fees" on petitioner's gains tax filings. More specifically, the $17,102.00 claimed amount was reduced by construction loan title insurance of $7,413.50 and construction loan filing and recording fees of $4,675.00 (totalling together $12,088.50 per Exhibit "O", page 1) to result in the disallowed as unsubstantiated amount of $5,013.00. As above, petitioner described such disallowed amount as "concessions to buyers" and "a net reduction in price", but offered no specific substantiation for the disallowed amounts.

(c) Construction Expense:

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[7]Petitioner's Supplemental Form DTF 700 ("Schedule of Original Purchase Price for Condominiums and Cooperatives"), included in evidence as Exhibit "N," claims accounting fees of $2,000.00 (DTF 700, Part III, line 24) and legal, accounting and engineering fees of $19,550.00 (DTF 700, Part IV, line 1).

[8]This $14,241.00 allowed amount is comprised of $8,889.29 plus $1,475.00 in legal fees and $3,877.00 in engineering fees.

(i) Payroll Items: The Division of Taxation continues to disallow construction payroll expenses ($20,167.00) for lack of substantiation (presumably of payment).[9] In fact, footnote "3" to Audit Schedule "D" states, with respect to disallowed items, that "[d]isallowance is mostly due to lack of substantiation. The other reason is that construction period [is] being reduced to April '87." As part of its post-hearing submission, petitioner included certain letters and cancelled checks relating to Internal Revenue Service

levies against bank accounts for Federal payroll taxes owed for the fourth quarter of 1986 and the first three quarters of 1987, and a letter from petitioner to the I.R.S. claiming all Federal tax amounts had been paid by August or September of 1988. Review of these materials does not reveal any apparent correlation between the amounts shown thereon versus the payroll amounts claimed herein. Further, none of such materials relate to State payroll amounts claimed herein (see above), but rather indicate they relate to Federal withholding and FICA amounts and not the FUTA amounts at issue herein.

(ii) Construction Materials: With respect to the additional construction materials expense, the $25,128.00 of claimed expense for 1987 was allegedly allowed by the original auditor with the exception of one item (unspecified) which was disallowed as beyond the construction period. Review and comparison of Exhibit "O" to petitioner's post-hearing submission labeled Exhibit "F" (pertaining to 1987 disbursements made after April 1, 1987) supports this contention of allowance. With respect to the $54,876.00 claimed as construction expenses for 1988, the Division of Taxation was

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[9]Audit Schedule "D" lists claimed "payroll and fringe benefits for construction personnel" of $159,630.00 versus an allowance of $164,959.00 for such expenses (representing an increase of $5,328.00 over the amount claimed initially). While not specified directly, the $20,167.00 amount sought by petitioner may not have been included under this heading but may have been included among the $369,073.00 of "construction material" claimed (per Audit Schedule "D") and, in turn, been a part of the $213,479.00 amount of such item disallowed. This possibility is noted since petitioner's post-hearing submission describes the $20,179.00 payroll amount as within the construction materials category and notes "[t]he problem in this category is primarily one of nomenclature."

unable to determine petitioner's basis for such figure and, therefore, continues to disallow the same. Careful and repeated review of petitioner's post-hearing submission labeled Exhibit "F" relative to 1988 disbursements fails to present any apparent method for arriving at the amount claimed.

OPINION

Determining that, in sum, "the disallowances made upon audit are squarely within the parameters of the Tax Law (Article 31-B), regulations thereunder and existing case law" (Determination, p. 18), the Administrative Law Judge upheld the notice of determination issued to petitioner, as modified by the Division of Taxation's (hereinafter the "Division") concession to waive the penalty and reduce the tax due by $388.60.

Specifically, the Administrative Law Judge found that, as far as the claimed interest expenses were concerned, the Division properly disallowed the interest expense on the Amalgamated Bank loan to the extent that loan proceeds were used for acquisition of the premises. As for the Progressive Credit Union construction loan, the Administrative Law Judge denied petitioner's claim for allowance of the interest expense incurred after the certificate of occupancy was issued. The Administrative Law Judge noted that the costs of carrying completed units, including interest costs, are not allowable expenses in reduction of gain and, therefore, found that the Division properly disallowed the interest expense incurred after the certificate of occupancy was issued. As for the Progressive Credit Union closing costs, the Administrative Law Judge merely noted that the costs sought were, in fact, allowed by the Division, except for $163.00 representing special additional mortgage recording tax which petitioner did not challenge.

In regard to the allowance of various sales expenses, the Administrative Law Judge rejected petitioner's claim to allow the $23,618.00 of advertising costs, reasoning that these costs were "simply not legal, engineering or architectural fees incurred in selling real property" (Determination, p. 17). The Administrative Law Judge held that the Division properly disallowed such expenses. The Administrative Law Judge, for lack of substantiation, sustained

as well the disallowance of petitioner's claimed expenses for "legal, engineering and architectural fees" and "filing and recording fees."

In regard to construction expenses, the Administrative Law Judge, agreeing with the Division that petitioner had failed to substantiate its claim for $20,167.00 in payroll expenses, upheld the Division's disallowance of such claim. As for the $80,004.00 claimed by petitioner for construction materials ($25,128.00 for 1987 and $54,876.00 for 1988), the Administrative Law Judge pointed out that the 1987 amount was allowed by the original auditor (presumably because the auditor believed these expenses were incurred during the construction phase of the project, although paid for afterwards), but that the 1988 portion cannot be allowed, since the basis for that expense is not apparent from the evidence introduced.

Finally, the Administrative Law Judge rejected petitioner's argument that the gains tax laws (Article 31-B) and, in particular, the definition of original purchase price, are unconstitutional (citing, Trump v. Chu, 65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915).

On exception, petitioner, with a few modifications, basically reiterates its arguments made before the Administrative Law Judge, as well as its request for refund of gains taxes paid in the amount of $29,879.00 (see, Petitioner's brief on exception, p. 10).

Specifically, petitioner asserts that it was incorrect for the Division to disallow the Amalagamated loan interest as contrary to Article 31-B of the Tax Law merely because the disbursements were used to acquire the property. Furthermore, petitioner claims that because it treated both the Amalagamated and Progressive Credit Union loans and the interest thereon as capitalized items for tax and gains purposes, it would not be contrary to Article 31-B to include the first lien and interest thereon in calculating petitioner's original purchase price.

As for the second lien, the construction loan from the Progressive Credit Union, petitioner maintains that it was erroneous for the Administrative Law Judge to deny interest expenses incurred on this loan once the certificate of occupancy had been issued. Petitioner argues that such expenses should be allowed in the computation of basis because, contrary to the Administrative Law Judge's analysis, 20 NYCRR 590.16[d], [e] does not

disallow interest accruing from a valid construction loan from being recognized if a certificate of occupancy has been obtained. Rather, avers petitioner, while the legislative intent behind the regulation is that certain expenses incurred as a consequence of obtaining a certificate of occupancy should not be allowed in the calculation of basis in order to determine gain, these expenses are the costs of security, landscaping, maintenance and real estate taxes, not "the legitimate costs of completing a project" (Petitioner's brief on exception, p. 6). Furthermore, contends petitioner, as the Legislature is aware of the fact that a developer can, for the most part, control the date of receipt of a certificate of occupancy, it "is doubtful that the legislative intent of 31-B was to use a new [certificate of occupancy] date as a convenient point to exclude expenses . . . simply to facilitate the accounting for same" (Petitioner's brief on exception, p. 6).

In regard to sales expenses, petitioner argues that advertising expenses should be allowed as they "are expenses which arose out of the near completion of a given undertaking, and are an integral part of the process which culminates in sales, and therefore, gain" (Petitioner's brief on exception, p. 7). Moreover, petitioner asserts that the Administrative Law Judge's position that office/advertising is not a "legal" fee is erroneous. As for legal and related fees, petitioner reiterates its claim that the $7,309.00 of legal, architectural and engineering fees, as well as the $5,013.00 for "filing and recording" fees, should be allowed. As for the first figure, petitioner likens these fees to the payroll taxes (discussed below) -- paid after the certificate of occupancy was issued, for work done prior to that date -- which the Division allowed. Turning to the second figure, petitioner explains that in lieu of reducing the purchase price of a certain unit at the time of the closing, the sum of $5,022.82 was paid by petitioner to the First American Title Company. Because this, in effect, reduced the purchase price of the unit, petitioner urges, it caused a reduction in gains tax owed by petitioner.

As for construction expenses, petitioner asserts that, contrary to the Administrative Law Judge's finding, there was substantiation (in the form of cancelled checks) for the portion of these expenses attributable to payroll. However, rather than request the $20,176.00 petitioner claimed before the Administrative Law Judge, petitioner here claims only $14,600.00, having

discovered that $5,576.00 of the payroll expenses were, in fact, allowed by the Division. In regard to construction items, petitioner contends that construction materials totalling $25,128.00, which were allowed by the auditor and reviewed by the Administrative Law Judge, were never added back to petitioner's basis in calculating gains tax owed. Furthermore, petitioner argues that the fact that these expenses were allowed, even though the items in question were paid for after the issuance date of the certificate of occupancy, supports petitioner's claims regarding the legislative intent of Article 31-B. Finally, petitioner concedes that only $21,398.53 of the $54,876.00 originally claimed for 1988 construction expenses, and disallowed for lack of substantiation, should be allowed for remodeling expenses and J-51 tax abatement program expenses.

In response, the Division, noting that petitioner has not raised any new issues on exception, asks only that the Administrative Law Judge's determination be upheld and that petitioner's exception be denied in its entirety.

We affirm the determination of the Administrative Law Judge. Further, because the issues raised on appeal are, except for one, the same as those raised before the Administrative Law Judge[10] and because we find that the Administrative Law Judge completely and adequately addressed the issues before him, we deem it unnecessary to analyze these issues any further. As for the issue petitioner raises anew, i.e., that of the Administrative Law Judge having neglected to add back to petitioner's basis the $25,128.00 allowed by the Division for construction materials, we find no substantiation for this claim in the record. Therefore, we affirm the Administrative Law Judge for the reasons stated in his determination. Based on our decision herein, our consideration of petitioner's monetary concessions offered on exception are unnecessary.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner 645 East 11th Street Associates is denied;
2. The determination of the Administrative Law Judge is affirmed;

[10]Although petitioner has couched certain of the issues as the result(s) of errors in the Administrative Law Judge's analysis and rulings, in substance, the positions petitioner challenges on exception are the same as those held by the Division and contested by petitioner below.

3. The petition of 645 East 11th Street Associates is granted to the extent of the Division's concessions waiving penalty and reducing tax by $388.60 but is otherwise denied; and

4. The Notice of Determination, dated October 30, 1989, as adjusted in accordance with paragraph "3" above is sustained.

DATED: Troy, New York
January 21, 1993

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

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

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