

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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|--|---|-----------------|
| In the Matter of the Petitions                           | : |                 |
| of   | : |                 |
| <b>HEWLETT PARK REALTY CO.</b>                           | : | DECISION        |
| <b>AND GARDEN TOWN REALTY CO.</b>                        | : | DTA Nos. 809610 |
|  | : | and 810168      |
| 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.                             | : |                 |

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Petitioners Hewlett Park Realty Co. and Garden Town Realty Co., 107 Northern Boulevard, Great Neck, New York 11021, filed an exception to the determination of the Administrative Law Judge issued on July 22, 1993. Petitioners appeared by Michael P. Sanchirico, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. The six-month period to issue this decision began on November 8, 1993, the date by which petitioners could have filed a reply brief.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUE***

Whether petitioners, both cooperative conversion sponsors who took back unsold shares from their respective cooperative housing corporations, are entitled to "step-up" their original purchase price to the value of the cooperative shares at the time of the respective transfers to the cooperative housing corporations or whether each petitioner's original purchase price was properly determined by the Division of Taxation.

***FINDINGS OF FACT***

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

On June 10, 1992 and June 16, 1992, respectively, the parties, by their respective representatives, executed a stipulation of agreed facts. Said stipulation, which was submitted into the record herein, is reproduced here in its entirety as Findings of Fact "1" through "22" with minor editing for clarification and consolidation.

***HEWLETT PARK REALTY CO.***

1. Petitioner Hewlett Park Realty Co. ("Hewlett Park") is a partnership formed under the laws of the State of New York.

2. Hewlett Park was the sponsor of an offering plan to convert Hewlett Park Apartments, 1355-1395 Broadway, Hewlett, New York, to cooperative ownership (the "Hewlett Plan"). The approximate date of the first offering under the plan was November 12, 1980.

3. Hewlett Park acquired the premises on January 26, 1977 for consideration of \$1,291,413.42.

4. On June 1, 1981 (the "Closing Date"), Hewlett Park transferred title to the premises to Hewlett Park Apartment Owners, Inc. (the "Hewlett Park Cooperative"), the cooperative corporation, pursuant to the terms of the plan.

5. At the time of the transfer of title from Hewlett Park to the Hewlett Park Cooperative, out of a total of 23,480 shares, there were 12,871 unsold shares which were then being offered to nontenants at a price of \$200.00 per share cash plus an aggregate mortgage allocation of \$712,619.25 (12,871 divided by 23,480 x \$1,300,000.00).

6. On March 28, 1983, there were 4,635 unsold shares.

7. The Closing Report reflects that the shares unsold as of the Closing Date were purchased by Hewlett Park for the tenants' price of \$100.00 per share.

8. The Division of Taxation ("Division") determined Hewlett Park's original purchase price using the price it originally paid to acquire the property and the amount it paid for capital improvements, conversion costs and other acquisition costs. The Division did not compute Hewlett Park's original purchase price using the value of the shares it took back on June 1,

1981.

***GARDEN TOWN REALTY CO.***

9. Petitioner Garden Town Realty Co. ("Garden Town") is a partnership formed under the laws of the State of New York.

10. Garden Town was the sponsor of an offering plan to convert Garden Town Apartments, 1193-1215 East Broadway, Hewlett, New York to cooperative ownership (the "Garden Town Plan"). The approximate date of the first offering under the plan was April 26, 1982.

11. Garden Town acquired the property in 1977 for consideration of \$2,195,627.00.

12. On January 11, 1983 (the "Closing Date"), Garden Town transferred title to the premises at 1195-1215 East Broadway to Garden Town Apartment Owners, Inc. (the "Garden Town Cooperative"), the cooperative corporation, pursuant to the terms of the plan.

13. At the time of the transfer of title from Garden Town to the Garden Town Cooperative, out of a total of 49,950 shares, there were 39,045 unsold shares in the Garden Town Cooperative which were then being offered to nontenants at a price of \$200.00 per share cash plus an aggregate mortgage allocation of \$1,563,363.36 (39,045 divided by 49,950 x \$2,000,000.00).

14. On March 28, 1983, there were 25,920 unsold shares.

15. The Closing Report reflects that the shares unsold as of the Closing Date were purchased by Garden Town for the tenants' price of \$100.00 per share.

16. The Division determined Garden Town's original purchase price using the price it originally paid to acquire the property and the amount it paid for capital improvements, conversion costs and other acquisition costs. The Division did not compute Garden Town's original purchase price using the value of the shares it took back on January 11, 1983.

***ADDITIONAL STIPULATED FACTS***

17. Neither Hewlett Park nor Garden Town had filed returns with the Department of Taxation and Finance pursuant to Article 31-B of the Tax Law until an audit was commenced

by the Division. No gains tax has been paid.

18. At no time did Hewlett Park or Garden Town liquidate and/or distribute any unsold shares to their partners.

19. Both Hewlett Park and Garden Town have had conciliation conferences which resulted in the issuance of conciliation orders. The Conciliation Order for Hewlett Park fully sustained the Notice of Determination (see, Finding of Fact "23"). The Conciliation Order for Garden Town modified the Notice of Determination (see, Finding of Fact "24").

20. Neither Hewlett Park nor Garden Town contest the conciliation orders and the underlying notices of determination (the modified Notice of Determination in the case of Garden Town) as to the computation of tax, interest and penalties due.

21. It is agreed that should a determination or decision be rendered in favor of petitioners, the matter will be remanded to the Division to make the appropriate adjustment to the tax, interest and penalties asserted in the notices of determination and conciliation orders.

22. The issue in this proceeding is whether each petitioner is entitled to "step-up" its original purchase price to the value of the cooperative shares at the time of the respective transfers to the cooperative housing corporations as set forth in 20 NYCRR 590.35(f) or whether each petitioner's original purchase price was properly determined by the Division.

#### ***ADDITIONAL FACTS***

23. On September 25, 1989, the Division issued to petitioner Hewlett Park a Notice of Determination under Article 31-B of the Tax Law which assessed \$72,682.76 in gains tax due, plus interest and penalty. Said notice was sustained by a Conciliation Order dated May 3, 1991.

24. Also on September 25, 1989, the Division issued to petitioner Garden Town a Notice of Determination under Article 31-B of the Tax Law which assessed \$325,532.17 in gains tax due, plus interest and penalty. Pursuant to a Conciliation Order dated October 25, 1991, the statutory notice was recomputed to \$271,467.08 in gains tax due, plus penalty and interest.

**OPINION**

The Administrative Law Judge found that the Division properly calculated petitioners' respective original purchase prices. The Administrative Law Judge determined that the transfer of shares from the cooperative housing corporation to the sponsor was a nontaxable event (see, 20 NYCRR 590.35[d]). The Administrative Law Judge, relying on Matter of 1230 Park Ave. Assocs. v. Commissioner of Taxation & Fin. (170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455) and other relevant case law, further determined that since the sponsor acquired the shares from the cooperative housing corporation in a nontaxable transfer, the sponsor would have a carryover original purchase price in the shares.

The Administrative Law Judge rejected petitioners' argument that they should receive a stepped-up original purchase price pursuant to the second paragraph of 20 NYCRR 590.35(f). The Administrative Law Judge found that the transfers from the cooperative housing corporation back to the sponsor are not the same as the transfer described in the regulation. With respect to petitioners' contention that 20 NYCRR 590.35(f) unfairly discriminated against sponsors who did not distribute their shares to their owners prior to March 28, 1983, the Administrative Law Judge stated that:

"[a]s to the disparate treatment accorded certain pre-March 1983 transfers, petitioners have not established either that the Division's regulation is irrational or that their interpretation of the statute is the only reasonable one (see, Matter of Blue Spruce Farms v. New York State Tax Commn., 99 AD2d 867, 472 NYS2d 744, 745, affd 64 NY2d 682, 485 NYS2d 526). Nor have petitioners shown (or even attempted to show) that the Division's regulation constitutes 'invidious discrimination' (see, Trump v. Chu, 65 NY2d 20, 489 NYS2d 455, 459, appeal dismissed 474 US 915)" (Determination, conclusion of law "G").

Finally, the Administrative Law Judge, citing Mayblum v. Chu (109 AD2d 782, 486 NYS2d 89, mod 67 NY2d 1008, 503 NYS2d 316), rejected petitioners' contention that since the transfers to the cooperative housing corporation took place prior to the enactment of the gains tax, the transfers at issue here should be exempt from gains tax.

On exception, petitioners continue to argue that 20 NYCRR 590.35(f) is discriminatory as

applied to them. Petitioners assert that the regulation discriminates against them because certain sponsors who distributed shares to their nominees before the gains tax became effective were given a stepped-up original purchase price while other sponsors, like themselves, who distributed shares after the gains tax became effective were denied a stepped-up original purchase price.

In addition, petitioners argue that they should not have the burden of showing that the treatment afforded them is irrational and that the burden should be on the Division "where the statute neither expressly, nor implicitly authorizes a regulation which has the effect of affording different treatment to similarly situated taxpayers" (Petitioner's brief, p. 5).

In response, the Division argues that its calculation of the original purchase price is not rendered erroneous because of the last paragraph of 20 NYCRR 590.35(f). The Division, citing Matter of 470 Newport Assocs. (Tax Appeals Tribunal, September 2, 1993) and other case law, argues that the Tax Appeals Tribunal has upheld the Division's denial of requests for stepped-up original purchase prices in analogous situations and should uphold the Division's denial of petitioners' request for a stepped-up original purchase price here. In addition, the Division, relying on Trump v. Chu (supra), asserts that "Petitioners have not demonstrated that the treatment accorded by the last sentence of the regulation constitutes 'invidious discrimination'" (Division's letter brief in opposition, p. 3).

On exception, petitioners have raised the same arguments made before the Administrative Law Judge. Because the Administrative Law Judge adequately addressed these arguments, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Hewlett Park Realty Co. and Garden Town Realty Co. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Hewlett Park Realty Co. and Garden Town Realty Co. are denied; and

4. The Notice of Determination issued to Hewlett Park Realty Co., dated September 25, 1989, and the Notice of Determination issued to Garden Town Realty Co., dated September 25, 1989, as modified by the conciliation order, dated October 25, 1991, are sustained.

DATED: Troy, New York  
April 28, 1994

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner