STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
IVANCREST ASSOCIATES	:	DECISION DTA No. 810980
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 Ivancrest Associates, 1161 Meadowbrook Road, North Merrick, New York 11566, filed an exception to the supplemental determination of the Administrative Law Judge issued on June 1, 1995. Petitioner appeared by Margolin, Winer & Evens (James L. Tenzer, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief which was received on January 16, 1996 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the mortgage indebtedness to be allocated to the taxable units must be reduced to reflect actual and anticipated future amortization of the mortgages.

II. Whether petitioner is correct in its argument that no tax is due because: (a) its initial calculation of anticipated total consideration at the time of its first taxable sale did not exceed $1,000,000.00; and (b) its initial determination of anticipated total consideration does not, as yet, have to be recalculated since it has not reached the 50% sellout plateau.

III. Whether the Division of Taxation correctly calculated interest and properly imposed

penalty.

FINDINGS OF FACT

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

The parties do not disagree on the facts. Petitioner, Ivancrest Associates, 1161 Meadowbrook Road, North Merrick, New York 11566 (referred to herein variously as "petitioner," "sponsor" or "transferor") is the sponsor of a plan to convert to cooperative ownership, real property known as Rivercrest Apartments, 103 Gedney Street, Nyack, New York ("the property").

Petitioner acquired the property consisting of 94 apartment units for the sum of $1,715,562.00 in June 1966.

On March 12, 1980, petitioner, as sponsor, caused 103 Gedney Owners, Inc., a cooperative housing corporation ("CHC"), to be incorporated in the State of New York. In May 1980, petitioner caused the CHC to submit for approval to the Attorney General of the State of New York, a plan for the sale of the CHC's shares to persons intending to purchase the cooperative's apartment units ("units"). The plan was approved and declared effective April 24, 1981.

On March 4, 1980, petitioner entered into an agreement to convey the property to the CHC. On September 16, 1981, pursuant to the March 4, 1980 agreement, petitioner conveyed the property to the CHC in exchange for: (a) the total proceeds from the sale of shares; (b) the remaining unsold shares; (c) a purchase money mortgage note; and (d) the CHC taking the property subject to the first mortgage. The amount paid to petitioner by the CHC upon the transfer of the property was $4,936,276.00, computed as follows:

Cash	$1,550,961.00
Value of 14,917 unsold shares	924,400.00
Rome Savings Bank Mortgage Assumed by the CHC	1,260,915.00
Mortgage note from the CHC to petitioner	1,200,000.00

TOTAL: $4,936,276.00

The gains tax became effective March 28, 1983. After the effective date of the gains tax, petitioner sold shares representing interests in eight of the cooperative's residential apartments, but did not file gains tax forms or pay applicable tax to the Division of Taxation ("Division"). The Division wrote petitioner's attorney on December 1, 1988 advising him that petitioner, as sponsor of a cooperative housing plan, the shares of which have an aggregate value exceeding $1,000,000.00, was required by Article 31-B (§ 1447) of the Tax Law to file questionnaires, infra, with the Division at least 20 days prior to the date of each transfer. The letter went on to request that petitioner comply with these filing requirements.

On or about February 7, 1989, petitioner filed the required transferor's Real Property Transfer Gains Tax Schedule of Original Purchase Price (DTF-700[9/85]). On the schedule of original purchase price, petitioner reported its price to acquire the property as $4,936,276.00 as computed above. It is noted that petitioner did not report the price it paid in 1966 ($1,715,562.00) as the cost of acquiring the property, but rather, the amount contracted for by the CHC upon petitioner's transfer of the property to the CHC.

On February 7, 1989 and February 16, 1989, petitioner filed Unit Submission Questionnaires for Cooperatives and Condominiums (DTF-702[9/85]). These unit submission questionnaires together reflect that the subject property contains 94 apartment units, which constituted 54,685 shares in the CHC. The unit submission questionnaire dated February 7, 1989 reported that 79 units (46,321 shares) had been sold for $2,152,564.00. Of the 79 units reported as sold, 78 units (45,749 shares) were shown as exempt from gains tax by virtue of having been sold prior to the effective date of the gains tax statute (March 28, 1983). The 79th unit (Unit 5A representing 572 shares) was sold subsequent to March 28, 1983 and was, thus, a taxable unit; however, said unit submission questionnaire reported that no tax was due on the sale of this unit. The unit submission questionnaire dated February 16, 1989 reported the transfer of seven taxable units (3,506 shares). Once again, petitioner reported that no tax was due on the transfer of these seven units. The remaining eight units, representing 4,858 shares,

were reported as unsold. The cover letter from petitioner's representative, included with the questionnaire filed on February 7, 1989, stated, in pertinent part:

> "[W]e are enclosing the properly executed and notarized . . . forms in connection with the above-captioned matter reporting the transfer of 78 'grandfathered' units and one 'taxable' unit (i.e., a sale after March 28, 1983 which was not subject to a binding contract entered into prior to March 29, 1983).
>
> "Please note that since the transferor believed that 78 of the units previously sold were 'grandfathered' . . . that the 'total anticipated selling price,' as computed under 'safe harbor,' of the 16 'taxable' units was $473,778 (i.e., the $2,632,378 amount reported on Form DTF-701(6/85) . . . less the consideration includible therein attributable to the 'grandfathered' units in the amount of $2,158,600), which amount is less than one million dollars, and that the 'gain subject to tax' for any sales subsequent to March 28, 1983 was a loss, the Transferor, in good faith, did not previously file for such transfers and intended to file for the first transfer, if any, for which tax would become due" (emphasis in original).

In a March 15, 1989 letter from petitioner's representative, James L. Tenzer, to the Division, Mr. Tenzer urged that since petitioner's transfer of the property to the CHC occurred on September 16, 1981 and prior to the effective date of the gains tax, the original purchase price ("OPP") of the property must be "stepped-up" to the $4,936,276.00 contract amount set forth in petitioner's contract with the CHC. Further, petitioner urged that since the amounts represented by the Rome Savings Bank Mortgage ($1,260,914.00) and the mortgage issued by the CHC to petitioner ($1,200,000.00) were received by petitioner on September 16, 1981, prior to the March 28, 1983 effective date of the Tax Law's gains tax provisions, such mortgage amounts are "grandfathered" and cannot be included in computing total consideration for gains tax purposes.

The Real Property Gains Tax Questionnaire (DTF-701[6/85]) filed by petitioner on February 7, 1989 reported actual gross consideration (up to that time) of $2,152,564.00, estimated additional gross consideration upon the sale of remaining shares of $216,778.00, and total anticipated (actual plus estimated) gross consideration of $2,369,342.00 once all shares have been sold. This form indicated, inter alia, as the "Amount Anticipated for Mortgage Amortization" (Section III, Part B, Line 6), the number zero ($-0-). This form indicates that total anticipated consideration under the plan was computed using the actual selling price for the 79 units reported as sold on the unit submission questionnaire dated February 7, 1989

($2,152,564.00) and "safe harbor" estimates for the 15 unsold units (15 units representing 8,364 shares multiplied by "safe harbor" estimate of $49.83 per share equals $416,778.00 less $200,000.00 for working capital fund produces the estimated consideration figure of $216,778.00). Exhibit "C" attached to this questionnaire stated, in relevant part:

> "The Transferor respectfully asserts that the entire amount of $2,460,914.00 in mortgage indebtedness (the 'Mortgage Amount') is 'exempt' and, therefore, should be excluded from 'gross consideration' . . . . The sale of the Property and the 'receipt' by the Transferor of the Mortgage Amount . . . occurred on September 16, 1981, which was before the effective date (i.e., March 19, [sic] 1983) of the 'gains' tax . . . . The Transferor respectfully asserts that the entire Mortgage Amount is 'grandfathered.' Accordingly, the Mortgage Amount should be excluded from 'gross consideration,' which is consistent with the treatment of 'grandfathered' transfers of interests in real property prior to March 29, 1983."

The Division conducted an audit of petitioner's sales of cooperative units under the offering plan. The full list of actual post-March 28, 1983 sales by petitioner determined upon audit and upon which tax has been asserted in this case, are as follows:

Unit	Shares	Sale Price	Closing Date
5A	572	$ 57,000.00	July 22, 1983
6B	600	132,000.00	March 15, 1987
1E	467	105,000.00	August 4, 1986
1G	387	30,960.00	August 29, 1985
4G	490	80,000.00	May 9, 1986
LJ	400	40,000.00	August 29, 1985
LK	590	67,500.00	January 14, 1986
5P	572	93,500.00	January 14, 1986
TOTALS:	4,078	$605,960.00	

The Division determined that the total anticipated gross consideration to be received by petitioner for the 16 taxable units was $1,217,488.00. This amount was computed as follows:

Actual consideration for eight units sold after March 28, 1983	$ 605,960.00
Estimated consideration for eight unsold units (4,858 shares x $49.83 "safe harbor" estimate)	242,074.00
Portion of mortgage indebtedness attributable to taxable units and, as such, includable in consideration (8,936 taxable shares / 54,685 total shares x $2,460,914.00 mortgages)	402,134.00
Less portion of working capital fund attributable to taxable units (8,936 / 54,685 x $200,000.00)	(32,680.00)
Anticipated gross consideration	$1,217,488.00

The Division's audit determined that the portion of total original purchase price attributable to the eight units sold, plus the eight units yet to be sold, after the March 28, 1983 effective date of the gains tax, was $336,558.00. The Division's audit disallowed petitioner's brokerage fees for lack of substantiation.

As a result of the Division's audit, a Statement of Proposed Audit Changes was issued to petitioner on May 4, 1989, asserting real property gains tax in the amount of $40,201.74, plus penalty and interest. A Notice of Determination asserting this real property gains tax, plus penalties and interest, was issued to petitioner on September 25, 1989. Petitioner disagreed with the tax asserted and timely filed a request for a Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS").

At the BCMS conference, petitioner produced additional documentation to substantiate actual and anticipated brokerage fees in the amount of $53,213.00. In addition, the conferee allowed additional amounts for capital improvements. As a result, Conciliation Order No. 101444 was issued April 10, 1992 reducing the tax asserted to $36,672.63, plus penalty and interest.

The gains tax remaining in dispute in this proceeding is based solely upon sales occurring after the March 28, 1983 effective date of the gains tax, and is computed as follows:

Actual Consideration (8 units=4,078 shares)		$ 605,690.00
Estimated Consideration (8 unsold units = 4,858 shares x $49.83)	242,074.00	
Mortgage Indebtedness (8,936/54,685 x $2,460,914.00)	402,134.00	
Less Working Capital Fund (8,936/54,685 x $200,000.00)		(32,680.00)
TOTAL ANTICIPATED GROSS CONSIDERATION:	$1,217,218.00	
Less actual brokerage fees:		(26,489.00)
Less estimated brokerage fees:		(26,724.00)
Less capital improvements allowed:	(24,120.00)	
Less Original Purchase price allocated to 8,936 shares:		(336,558.00)
TOTAL ANTICIPATED GAIN (on 16 Units equalling 8,936 shares):	$ 803,717.00	
Gains Tax at 10%:		$ 80,359.70
Taxable shares = 8,936		

Tax Per Share = 8.9928

Unit No.	Shares	Closing Date	Tax/Share	Tax Due
5A	572	July 22, 1983	8.9928	$ 5,143.88
6B	600	March 15, 1987	8.9928	5,395.68
1E	467	August 4, 1986	8.9928	4,199.64
1G	387	August 29, 1985	8.9928	3,480.21
4G	490	May 9, 1986	8.9928	4,406.47
LJ	400	August 29, 1985	8.9928	3,597.12
LK	590	January 14, 1986	8.9928	5,305.75
5P	572	January 14, 1986	8.9928	5,143.88
	4,078	Gains Tax Asserted		$36,672.63

OPINION

In our first decision on this matter, we affirmed the determination of the Administrative Law Judge to the extent that it "(1) denied a step-up of original purchase price; (2) held that a portion of the mortgage indebtedness was includable in consideration; (3) found that petitioner's constitutional rights were not violated; and (4) concluded that the Division's method of computing consideration, gain and the allocation of gain to each unit was proper" (Matter of Ivancrest Assocs., Tax Appeals Tribunal, January 19, 1995). However, because we found that the Administrative Law Judge had failed to address two issues that had been raised before him, we remanded the matter to the Administrative Law Judge to address these issues: 1) whether the mortgage indebtedness to be allocated to the taxable units must be reduced to reflect actual and anticipated future amortization of the mortgages and 2) whether petitioner was correct in its claim that no tax is due because its initial calculation of anticipated total consideration did not exceed $1 million and the total anticipated consideration need not be recalculated because the conversion has not reached the 50% sellout plateau.

With respect to the first issue, the Administrative Law Judge on remand held that, pursuant to the Division's regulations at 20 NYCRR 590.37, petitioner was legally correct that mortgage debt could be included in consideration only to the extent of the unpaid principal balance of such debt. However, the Administrative Law Judge ruled that petitioner had failed to prove the extent to which the mortgage debt had been reduced and, thus, concluded that petitioner was not entitled to an adjustment on this point. On exception, the Division has conceded that a "reduction in consideration is proper for actual mortgage principal payments

totalling to $58,351 and anticipated mortgage principal payments totalling to $35,973" (Division's brief in opposition, p. 4). As petitioner accepts this figure (Petitioner's reply brief, p. 1), we need not address this issue.

With respect to the second issue, the Administrative Law Judge rejected petitioner's contention that no tax was due because the total anticipated consideration at the time of the initial taxable sale did not exceed the $1 million threshold. The Administrative Law Judge determined that petitioner's calculation was dependent upon using an estimate of consideration for the eight units sold at the time the audit was performed, rather than the actual consideration received for these units. However, the Administrative Law Judge concluded that petitioner had waived its right to estimate consideration for these units by failing to file returns for the eight taxable transfers and failing to elect any method of reporting.

On exception, petitioner continues to argue that if it had filed questionnaires, the questionnaires would have properly reported that the transfers were exempt because the anticipated consideration was less than $1 million. We believe that the Administrative Law Judge adequately and correctly addressed this issue in his determination on remand and affirm for the reasons stated in the determination.

In our prior decision on this matter, we reserved decision on whether interest had been properly computed and whether penalty was properly imposed. Having now agreed with the Administrative Law Judge that the Division properly calculated tax on the transfers, we also agree with the Administrative Law Judge that interest was properly calculated. With respect to the imposition of penalty, the Administrative Law Judge concluded in his first determination that "[g]iven the available information and case law, it was unreasonable for petitioner to have failed to file the transferor questionnaires and schedules for the eight taxable unit transfers and to fail to pay the gains tax due on those transfers. Therefore, petitioner has failed to establish reasonable cause" (Determination, conclusion of law "J"). On exception, petitioner continues to argue that it acted in good faith and relied upon a reasonable interpretation of the Tax Law. We sustain the imposition of penalty for the reasons stated in the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ivancrest Associates is granted to the extent that the Division of Taxation has conceded that a reduction to consideration in the amount of $94,324.00 should be made, but such exception is in all other respects denied;

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

3. The petition of Ivancrest Associates is granted to the extent indicated in paragraph "1" above, but is otherwise denied; and

4. The Division of Taxation is directed to modify the Notice of Determination in accordance with paragraph "1" but such Notice, as modified by Conciliation Order No. 101444, is otherwise sustained.

DATED: Troy, New York
June 6, 1996

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

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

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