

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
43RD STREET DEVELOPMENT CO.	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 811125
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner 43rd Street Development Co., c/o Herbert L. Weisman, Esq., 88 Meadow Woods Road, Great Neck, New York 11020, filed an exception to the determination of the Administrative Law Judge issued on May 19, 1994. Petitioner appeared by Dreyer and Traub, Esqs. (Michael Discafani, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (David C. Gannon, Esq., of counsel).

Petitioner filed a brief in support of its exception, the Division of Taxation filed a brief in opposition and petitioner replied. Oral argument was heard on December 15, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Division of Taxation properly denied petitioner's refund claim in the sum of \$48,796.60, the basis of which was petitioner's belief that it erroneously included costs reimbursed by its transferee in its calculation of consideration.

II. Whether petitioner was entitled to increase its refund claim in its amended petition to include reimbursement by the ultimate purchaser of costs incurred in the operation and maintenance of the property in issue for the period June 14, 1990 through the closing date.

FINDINGS OF FACT

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

New York International Hostel, Inc. ("Hostel") was the fee title owner of the real property located at 255 West 43rd Street, New York, New York (the "property"). The property was subject to a mortgage in the amount of \$8,425,000.00 held by petitioner, 43rd Street Development Company ("43rd Street"), the first mortgagee.

Hostel filed for Federal bankruptcy protection in an action under Chapter 11 of the United States Bankruptcy Code. As part of the case, the United States Bankruptcy Court for the Southern District of New York ordered that the property be auctioned for sale to the highest bidder. Subsequently, a public auction was conducted by the Bankruptcy Court examiners on June 14, 1990. When no other bids were received during the auction, the Bankruptcy Court accepted 43rd Street's credit bid in the amount of its first mortgage. Failure by 43rd Street to submit a credit bid in the amount of its first mortgage would have caused 43rd Street to lose its status as a secured creditor.

Judge Tina L. Brozman of the United States Bankruptcy Court issued the Order, dated August 7, 1990, approving the acceptance of 43rd Street's credit bid. The Order governed the conduct of the parties to the actual sale and defined each party's rights, duties and obligations.

The decision to accept the credit bid of petitioner was based on:

"[t]he Examiner and other interested parties hav[ing] advanced sound business reasons for seeking to sell the Property by way of an auction sale as [being] in the best interests of the estate. The record and all prior proceedings herein sufficiently establish that time is of the essence for the disposition of the Property and that a resolution of the myriad issues would entail extended delay and substantial potential reduction in the value of the Property."

The bid was also deemed fair and reasonable under the circumstances.

The Court designated petitioner as "purchaser" and ordered the debtor/ fee holder, Hostel, to transfer the property to petitioner, by bargain and sale deed, without any limitation on the fee except the first mortgage. The property was to be transferred free of all encumbrances.

Petitioner was authorized to operate and manage the property, and was granted possession as of June 14, 1990 at 5:00 P.M. until the date of closing, i.e., the transfer date from Hostel to petitioner. Petitioner was also authorized to collect and receive all income and rents from the property beginning June 14, 1990 and was charged with the duty to insure the property. The prior manager, Berger Hotels Corp., delivered the property to petitioner on June 14, 1990, and was thus relieved of all liability thereafter. Berger was merely a management company used by the Court to preserve the bankrupt's estate. It never had a fee interest.

Paragraph "D" of the Order defined the term "purchaser" as 43rd Street, its designee or assignee. Paragraph "8" of the Order required the "purchaser" to pay the fees of the bankruptcy examiners. In Paragraph "9" of the Order, the Bankruptcy Court deemed possession of the property to be delivered to the "purchaser" as of June 14, 1990 as follows:

"9. Possession of the Property is deemed delivered to the Purchaser as of June 14, 1990 at 5:00 p.m., and the Purchaser is authorized and empowered to operate and manage the Property from said date to the closing hereof. The Purchaser is authorized and empowered to collect and receive all income and rents from June 14, 1990 and thereafter, and shall not be liable or responsible for any costs or expenses in connection with operating the Property incurred or accrued for any period prior to June 14, 1990. The Purchaser shall insure the Property and the estate's interest therein pending the closing of the Sale."

Accordingly, the "purchaser" was authorized and empowered to collect income and rents; to operate and manage the property; and to insure the property and the Bankruptcy Estate's interest pending the closing of the sale. Paragraph "15" of the Order explicitly provided that:

"[t]his Order shall be binding upon and inure to the benefit of the estate and the Purchaser and their respective successors and assigns"

Moreover, Paragraph "16" of the Order provided that the Bankruptcy Court continued to retain jurisdiction over the parties and the property until the actual date of sale, to the extent necessary to effectuate the sale and to enforce the terms and conditions of the provisions of the Court's Order.

The initial closing was ordered to be by September 7, 1990. However, additional Bankruptcy Court orders were subsequently obtained extending the closing date until April 1, 1991. The reason for the subsequent orders was that the City of New York Department of

Housing Preservation and Development became interested in the property for use as a single-room occupancy hotel by the homeless and AIDS patients. The Department of Housing Preservation and Development ultimately agreed to fund an acquisition loan to Common Ground Community HDLC, Inc. ("Common Ground"), a New York not-for-profit corporation, to acquire the property from Hostel for the intended purpose.

On February 28, 1991, 43rd Street and Common Ground entered into an agreement for the assignment (the "assignment agreement") of 43rd Street's right, title and interest as "purchaser" under the Order. The assignment agreement provided: (1) that 43rd Street would transfer, convey or assign to Common Ground its right, title and interest as "purchaser" under the Order; (2) that Common Ground would accept the assignment and assume the obligations of the "purchaser" under the Order including the obligation to manage and operate the property; (3) that Common Ground would reimburse 43rd Street for the actual expenses incurred by 43rd Street in the operation of the property from June 14, 1990 through the closing date of the assignment, such that it was the intent of the parties that 43rd Street would be reimbursed or made whole insofar as possible and not realize any profit or gain; (4) that it was the intent of the parties that Common Ground take title to the property as 43rd Street's designee pursuant to the Order; (5) that Common Ground would pay any real estate taxes and water and sewer rents for the period covered by the Order; and (6) that Common Ground would take the premises subject to the first mortgage held by 43rd Street, which was to be satisfied within 180 days of closing. Common Ground was also to pay \$809,644.66 to 43rd Street in actual expenses and losses incurred in the operation of the premises from June 15, 1990.

The assignment agreement set forth the amounts to date of closing to be reimbursed to 43rd Street for the actual costs of managing and operating the property during the period that 43rd Street was deemed in possession by the Bankruptcy Court. 43rd Street was required by Common Ground to engage a New York City accounting firm to review the books and records of 43rd Street in connection with the reimbursed costs of managing and operating the property. The actual expenses and losses incurred were as follows:

Weisman & Weisman legal fees accrued since inception of bankruptcy proceeding June 1988	\$125,000.00
Interest on loan	21,921.66
Legal fees to Bruce Roswick and Jack Lerner	20,457.00
John Huber Management Fee	25,000.00
Arthur Schwebel Management Fee	75,000.00
Operating Losses from 6/15/90 to 3/14/91	<u>542,266.00</u>
Total	\$809,644.66

The assignment closed on March 25, 1991, at which time a gains tax was paid in the amount of \$101,661.93.

Prior to the transfer, a transferor questionnaire, dated March 6, 1991, was filed which set forth 43rd Street as the transferor of a contract assignment to Common Ground, for gross consideration of \$1,305,248.66, less acquisition costs of \$288,629.40, yielding gain subject to tax of \$1,016,619.26, and anticipated tax of \$101,661.93. The following exhibit was attached to the transferor questionnaire:

"EXHIBIT A
43rd Street Development Co., Transferor
Form TP-580

"An interest in real property includes an option or contract to purchase real Property. Tax Law Section 1440.4. 'Transfer of real property' is defined as the transfer or transfers of an interest in real property by any method including assignment. Tax Law Section 1440.7. The assignment of the Transferor's right to purchase the property located at 255 West 43rd Street, New York, New York 10036 (the 'Property') is therefore subject to the Gains Tax.

"Pursuant to Tax Law Section 1443.1(b) and NYCRR Section 590.55, for purposes of determining the application of the \$1,000,000.00 exemption, the purchase price under the contract is added to the amount of consideration received for the assignment. For purposes of this filing, it will be assumed that the \$1,000,000.00 exemption is not applicable to the assignment at issue.

"Consideration

"Pursuant to Paragraph 3 of the assignment agreement dated February 28, 1991 (copy attached), the transferee will pay to the transferor actual out of pocket expenses incurred in the operation of the Property; such that it is the intent of the parties that the Transferor be made whole, without profit or gain. Amounts being paid by the transferee to the transferor include:

Attorney fees paid to Weisman and Weisman	\$ 125,000.00
Interest on loans	21,921.66
Attorney fees paid to Bruce Roswick and Jack Lerner	20,457.00
Management fee to John Huber	25,000.00
Management fee to Arthur Schwebel	75,000.00

Operating losses of the Transferor from the Property	<u>546,644.00</u>
Sub Total	\$ <u>814,022.66</u>

Pursuant to the assignment agreement, the transferee shall pay:

Real Estate Taxes on the Property from 6/14/90 - 3/14/91	\$ 455,445.00
Water and sewer charges 6/14/90-3/14/91	30,579.00
'Gross up' for deeds stamps paid by Transferee ¹	<u>5,202.00</u>
Total Consideration	<u>\$1,305,248.66</u>

"¹ The Transferee has agreed to pay the New York State Real Property Transfer Taxes (the 'Deeds Stamps') in connection with the assignment. Pursuant to NYCRR Section 590.15 and Tax Law Section 1440.1(a), the consideration paid for the assignment must include the 'gross up' for the Deed Stamps paid by the transferee. The 'gross up' is computed as follows: \$1,300,046.66 is rounded up to \$1,300,500.00 x .4% = \$5,202.00.

"Original Acquisition Costs

Weisman and Weisman (attorney fees)	\$ 175,000.00
Bruce Roswick, Esq. (attorney fees)	41,129.40
Alan Nisselson, Esq. (examiners fee) ²	60,000.00
Ephraim Leibowitz (attorney fee) ²	<u>12,500.00</u>
	<u>\$ 288,629.40</u>

"² Fees were ordered to be paid by the Bankruptcy Court pursuant to the order dated August 7, 1990."

The transferee questionnaire filed by Common Ground indicated the consideration to be paid by it, \$1,305,248.66, but listed the interest to be acquired as "other", with no explanation in the record. Both questionnaires listed March 14, 1991 as the anticipated date of transfer, but the actual closing took place on March 25, 1991.

A tentative assessment and return was issued pursuant to these questionnaires setting forth tax due in the sum stated by the transferor in its questionnaire. Approximately three weeks later, on April 9, 1991, 43rd Street filed a claim for refund.

By letter, dated May 3, 1991, the Division of Taxation ("Division") denied, in part, the refund application of 43rd Street, stating, in pertinent part, as follows:

"We have considered the above referenced refund claim dated April 9, 1991 in the amount of \$49,371.10.

"The basis of the claim is as follows:

"A) Certain costs paid by the transferee were erroneously included inconsideration.

"B) Legal fees were incurred in connection with the assignment which were not claimed on the original submission.

"Section 1440.1(a) of the Tax Law provides that, 'Consideration means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor, including payment for an option or contract to purchase or use real property. Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to. Consideration includes the cancellation or discharge of an indebtedness or obligation.'

"A review of the U.S. Bankruptcy Court Order defines the purchaser of the property as 43rd Street Development Co., its designee or assignee. The order also states that possession of the property is deemed delivered to the purchaser as of June 14, 1990.

"Since claimant acquired the right to receive fee title to the property, the outstanding real estate taxes and sewer charges became the obligation of the claimant.

"On February 28, 1991 claimant entered into an agreement to assign its interest in the subject property to Common Ground Community HDFC, Inc. ('CGC'). Paragraph 7(F) of the agreement provides that CGC shall pay real estate taxes, sewer and water charges for the period prior to July 1, 1990.

"In accordance with Section 1440.1(a) of the Tax Law, the relief of the claimant's obligation to pay these charges is deemed to be consideration.

"Therefore, the amount of the real estate taxes, sewer and water charges were correctly included in the consideration received by the claimant.

"Regarding the second issue, the legal fees incurred during the assignment have been accepted as filed.

"Accordingly a refund in the amount of \$574.50, plus interest will be forwarded to the proper department for processing."

Petitioner appealed this denial to the Bureau of Conciliation and Mediation Services. By Conciliation Order, dated June 19, 1992, the conferee denied petitioner's appeal and sustained the Division's denial of the refund application, as modified.

Petitioner filed a petition, dated August 17, 1992, with the Division of Tax Appeals. The Division filed its answer to the petition, dated December 30, 1992. Petitioner filed an amendment to the petition, dated July 1993, which increased the amount of refund claimed from

\$49,371.10 to the entire amount of tax paid by petitioner, \$101,087.43, less the \$574.50 allowed for legal fees by the Division (see, above). The Division submitted an amended answer in response, dated August 10, 1993.

OPINION

Tax Law § 1441 states "[a] tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain."

Gain is defined as the "difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price" (Tax Law § 1440[3]).

Consideration is defined in Tax Law § 1440(1)(a) as the price paid or required to be paid for real property. It:

"includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to. Consideration includes the cancellation or discharge of an indebtedness or obligation."

The Administrative Law Judge determined that, although petitioner did not gain title pursuant to the Bankruptcy Court's Order, petitioner received an interest in the property, i.e., the right to receive title to the property. The Administrative Law Judge cited the following facts as supporting this proposition: (1) the Court ordered the debtor to convey the property to petitioner; (2) petitioner had the right to use and occupancy of the property; and (3) petitioner had the right to receive rents, profits and income from the property.

On exception, petitioner agrees with the Administrative Law Judge's conclusion that it did not gain title under the Order, only the right to receive it. In addition, petitioner accepts the Administrative Law Judge's conclusion that it transferred an interest in real property when it assigned its rights to Common Ground. Petitioner takes issue with the Administrative Law Judge's conclusion as to the consideration to be used to calculate the taxable gain on this transfer.

First, petitioner challenges the Administrative Law Judge's determination that the costs incurred for sewer and water charges and property taxes (the "taxes") were properly included in petitioner's consideration. The Administrative Law Judge so concluded because the agreement between petitioner and Common Ground provided for a request for an order from the Bankruptcy Court that the premises be transferred free of all claims prior to July 1, 1990. Consequently, the Administrative Law Judge found that the parties contemplated responsibility for the taxes from July 1, 1990 to March 25, 1991, which was the date of closing. The Administrative Law Judge determined that, as a result of the parties' decision to have Common Ground assume said costs, and given that petitioner was the purchaser and anticipated transferee under the order dated August 7, 1990, petitioner was responsible for the taxes. Given that Common Ground assumed liability for these expenses, the Administrative Law Judge concluded that they were properly included in consideration.

On exception, petitioner argues that pursuant to the August 7, 1990 Order, taxes for the period June 14, 1990 through the closing are to be paid by the "purchaser." Petitioner asserts that because of its assignment agreement with Common Ground, petitioner never became the purchaser and consequently cannot be held liable for costs to be borne by the title holder.

Petitioner also argues that:

"[t]he order in this case is equivalent to a purchase and sale agreement which sets forth the rights and obligations of the parties in connection with the acquisition of the real property. Accordingly, the assignment of a person's right under a purchase and sale agreement should be treated no differently than the assignment of the Petitioner's right to acquire the Property pursuant to the Order" (Petitioner's brief on exception, p. 4).

In the case of an assignment, petitioner notes that only the amount the assignor receives for the assignment is used to calculate the taxable gain. It is only for purposes of applying the \$1 million exemption to the assignment that the contract price of the property is treated as consideration. In this case, petitioner argues that the assumption of responsibility for the taxes was not an amount paid for the assignment.

The Division in response argues that petitioner's argument lacks merit because petitioner fails to consider that it received an interest in property from Hostel, making petitioner liable for expenses incurred on the property until it was assumed by Common Ground. The Division asserts that "[o]nce petitioner acquired its interest on June 14, 1990, Hostel was effectively out of the picture [references omitted]" (Division's brief in opposition, p. 4). The Division further argues that "[t]he taxes and rents at issue were not outstanding as of June 14, 1990. Rather, they accrued from June 14, 1990 to the date of closing. Accordingly, pursuant to the terms of the Order these taxes were the obligation of petitioner, not Hostel, and constitute an outstanding operating expense incurred by petitioner and assumed by Common Ground [references omitted]" (Division's brief in opposition, p. 6).

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

The record clearly reflects that petitioner did not bear the ultimate responsibility for the taxes. This responsibility was to be borne by the "purchaser" of the subject property, which petitioner was not. As found by the Administrative Law Judge, petitioner submitted a credit bid in the amount of its mortgage on the subject property. Petitioner's failure to do so would have caused it to lose its status as a secured creditor (Determination, finding of fact "2").¹ The August 7, 1990 Order of the Bankruptcy Court provided that the "purchaser" would assume responsibility for the property between the auction date and the date of closing, including: the collection of income and rents; operation and management of the property; and the insuring of the Bankruptcy Estate's interest pending the closing of the sale. As a result, the Order shifted the cost of maintaining the property from the transferor/debtor to the transferee/purchaser before title was actually transferred. Consequently, the Bankruptcy Court clearly contemplated that the costs at issue would be incurred by the "purchaser." The Order defined "purchaser" as "43rd Street Development Co., (petitioner), its designee or assignee." The right to receive the property was subsequently assigned to the ultimate purchaser, Common Ground, which took

¹Petitioner submitted its credit bid in full satisfaction of its claim pursuant to section 363(k) of the United States Bankruptcy Code (Division's Ex. "F"). Section 363(k) provided that: "at a sale . . . of property that is subject to a lien that secures an allowed claim . . . the holder of such claim may bid at such sale, and if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property."

title at closing. With the assignment of the right to take title, Common Ground also assumed the responsibilities attendant thereto pursuant to the August 7, 1990 Order. Because petitioner's responsibility for the taxes was contingent upon a fact that did not occur -- petitioner being the purchaser at the time title passed -- we conclude that Common Ground's assumption of liability for the taxes was not consideration to petitioner.

This result is consistent with the taxation of an assignment of a contract to purchase real property.² As petitioner notes, under section 1443(1)(b) of the Tax Law and the Division's regulation, former 20 NYCRR 590.55 (renumbered to be 20 NYCRR 590.56), on an assignment of a contract to buy real property, the assignor must calculate gains tax only on the consideration received for the assignment. The amount required to be paid pursuant to the contract to acquire the title to the real property is consideration for purposes of applying the \$1 million exemption, but it is not consideration for purposes of the assignor's calculation of tax on the assignment. The obvious rationale for the statute and regulation is that the assignor of the contract should pay tax only on the amount actually paid for the assignment, even though the assignee's assumption of the obligations under the contract to purchase would otherwise be consideration to the assignor.

We next address petitioner's claim that management costs incurred between the date of the auction and the closing were not properly included as consideration to determine taxable gain.

The Administrative Law Judge determined that petitioner's refund claim for an additional amount relating to management costs, or "negative carry," as set forth in its amended complaint was untimely. The Administrative Law Judge found that this additional refund claim was "based on a new theory for a different and distinct amount, i.e., all amounts paid in excess of those for which a refund application had been made, based upon the theory that the tax was

²Although the Order to purchase before us is not technically a contract to purchase, we can see no reason why it should receive different treatment. The Division has not directly responded to this argument and, therefore, has not offered us a basis to distinguish the transactions. The Division has limited its response to arguing that petitioner acquired an interest in the real property. This is so, as petitioner acknowledges, but it does not, in our view, resolve the issue because a contract vendee also acquires an interest in real property.

based on 'negative carry' which should not have been included in consideration" (Determination, conclusion of law "C"). Given that the amended petition was filed more than two years after the later of the date of transfer or the date the tax was paid, the Administrative Law Judge concluded that, pursuant to Tax Law § 1445(3), this forum did not have jurisdiction to review the untimely filing.

As a final matter, the Administrative Law Judge found that even if the claim were timely, the charges petitioner characterized as "negative carry" were properly includible in consideration. The Administrative Law Judge pointed out that the concept of negative carry has only been raised in the context of cooperative conversions and that the case law addressed the elimination of such costs from original purchase price not from consideration. The Administrative Law Judge found no basis to exclude from consideration the reimbursement for management losses in operating the subject property.

Petitioner relies on Matter of 61 East 86th St. Equities Group (Tax Appeals Tribunal, January 21, 1993) and Matter of 1230 Park Assocs. (Tax Appeals Tribunal, July 27, 1989, affd Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455) to argue that, because costs incurred to "carry" the property are not includible in a transferor's original purchase price, likewise, these costs should not be included in consideration. Petitioner further asserts that its increased claim for refund as set forth in petitioner's amended complaint should be considered timely. Petitioner contends that the Division was put on notice of petitioner's informal claim for refund in a two-fold manner. First, when petitioner submitted a memorandum in furtherance of settlement to the Division's former representative in this matter and, second, during alleged conversations with this attorney regarding settlement. Petitioner argues the Division was aware that petitioner was requesting that the full amount paid be returned. Petitioner further asserts that the Division did not object until its post-hearing reply brief to petitioner "perfecting" its informal claim by filing an amended complaint requesting this additional relief. As a result, asserts petitioner, any objection must be waived.

The Division contends that negative carry is a concept reserved for cooperatives and cannot be used in the matter before us. As a final matter, the Division points out that the conversations and memorandum petitioner seeks to rely on as the basis of an informal claim for refund were made during settlement negotiations and cannot be used in the manner sought by petitioner.

We affirm the determination of the Administrative Law Judge that the refund claim was not timely.

Petitioner's argument on exception that it filed an informal claim for refund must be rejected. We first note that the document and conversations petitioner rely on were not made part of the record. Petitioner sought to introduce both for the first time in petitioner's brief on exception. It is well settled that:

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record" (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

Even if part of the record, petitioner could not rely on oral communication with the Division's representative to satisfy its notice requirement for an informal refund claim. We have held in the past that an informal claim need be a written document which adequately apprises the taxing authority that a refund is sought and of the tax period in question (Matter of Greenburger, Tax Appeals Tribunal, September 8, 1994; Matter of Rand, Tax Appeals Tribunal, May 10, 1990).

Further, the letter was made in contemplation of settlement proceedings and could not now be used, even if it were part of the record, for another purpose. The document petitioner sought to introduce clearly states "[t]his letter is for settlement purposes only and shall not be admissible in evidence in any administrative or judicial hearing or trial involving the Petitioner and the New York State Department of Taxation and Finance" (Petitioner's brief on exception, Ex. "1"). Consequently, petitioner could not subsequently rely on this document or the oral communication as the basis of its informal claim for refund.

Although our decision with respect to the timeliness of the refund claim disposes of the claim, we will address the merits of the claim so as to create a complete decision for review. We disagree with the Administrative Law Judge's resolution of this matter on the merits.

We first note that we agree with the Administrative Law Judge's observation that "negative carry" has been a principle reserved for cooperative conversion issues (see, Matter of East 61st St. Co., Tax Appeals Tribunal, May 25, 1995; Matter of 61 East 86th St. Equities Group, supra; Matter of 1230 Park Assocs., supra). Further, we reject petitioner's argument that merely because an expense cannot be included in original purchase price, it is therefore not includible in consideration. The definition of "consideration" is broad in scope, i.e., "any price paid or required to be paid" (Tax Law § 1440[1][A]) and cannot be read as commensurate with the definition of original purchase price.

We find, however, that the only relevant matter for our purposes is that the management costs were, pursuant to the August 7, 1990 Order, to be incurred by the purchaser of the property. As we stated above with respect to the taxes, because petitioner's liability for these costs was contingent on this fact that never occurred -- petitioner was not the purchaser -- Common Ground's reimbursement of petitioner for such expenses cannot be included in consideration for gains tax purposes.

Nevertheless, because petitioner failed to file a timely claim for refund, the above discussion is rendered academic.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 43rd Street Development Co. is granted to the extent that the Division of Taxation is directed to refund the remaining amount claimed in petitioner's claim for refund dated April 9, 1991, but is otherwise denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but is otherwise affirmed;

3. The petition of 43rd Street Development Co. is granted to the extent indicated in paragraph "1," above, but is otherwise denied; and

4. The Division of Taxation is directed to grant the remainder of petitioner's refund request dated April 9, 1991, but the denial of petitioner's refund claim dated July 1993 is sustained.

DATED: Troy, New York
June 15, 1995

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

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

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