STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
J. ZELIGFELD AND M. NEUSTEIN	:	DECISION DTA NO. 818358
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.	:	

Petitioners J. Zeligfeld and M. Neustein, P.O. Box 221, Brooklyn, New York 11211 and the Division of Taxation each filed an exception to the amended determination of the Administrative Law Judge issued on October 24, 2002. Petitioners appeared by Meyer M. Lieber, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Barbara J. Russo, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioners' exception. Petitioners filed a brief in opposition to the Division of Taxation's exception and in reply to the Division of Taxation's brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the request of both parties, was heard on July 9, 2003 in Troy, New York.

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

ISSUES

I. Whether petitioners' partnership, which was a sponsor of a plan for the conversion to cooperative ownership of a Brooklyn apartment building, received consideration in excess of $1,000,000.00 from its transfer of 11 of 113 cooperative units so as to be subject to gains tax.

II. Whether the Division of Taxation properly utilized a per share method to allocate the partnership's original purchase price to the cooperative units subject to tax rather than a relative fair market value method because petitioners failed to establish the fair market value of the unsold units in the Brooklyn apartment building on June 15, 1996, the effective date on which the gains tax law was repealed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "10" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioners, J. Zeligfeld and M. Neustein, are partners in J & M Realty Associates ("the partnership"), which takes its name from the initials of the partner's first names. The partnership acquired a Brooklyn apartment building, with 113[1] residential units, at 540 Ocean Parkway on June 19, 1985 from 540 Ocean Parkway Corp. and became the sponsor and selling agent of a noneviction plan for the conversion to cooperative ownership ("offering plan") of the building.

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[1] The cover sheet for the cooperative offering plan noted that 89,125 shares were allocated to 113 residential units. In contrast, the text of the offering plan noted that "[t]he *89,295* shares being offered have been allocated in blocks to *114* residential apartments . . . [emphasis added]." The record does not include an explanation for this disparity. Since the partnership's filings with the Division of Taxation used 89,125 shares allocable to 113 units, such numbers have been used in this determination.

The offering plan was accepted for filing by the New York State Attorney General's Office and became effective on or about June 27, 1988.

The offering plan provided for the organization of a cooperative housing corporation known as Imperial Ocean Corp., which offered for sale 89,125 shares of its capital stock that were allocated to the 113 residential apartments. The purchaser of the shares allocated to an apartment was entitled to a proprietary lease for the apartment from the cooperative housing corporation.

On or about November 22, 1988, the partnership made its initial gains tax filing. On its transferor questionnaire, petitioners reported that there were 20 apartments subscribed at closing, 13 apartments of insiders with 11,018 shares and 7 apartments of outsiders with 3,762 shares, resulting in 14,780 subscribed shares and outstanding shares of 74,345 allocable to 93 unsubscribed units. It reported a total anticipated selling price of all units of $4,949,645.00 computed as follows:

Insiders (13 apartments)	11,018 shares @ $72.25/sh[2]	$ 796,050.00
Outsiders (7 apartments)	3,762 shares @ $96.225/sh	362,000.00
Unsubscribed (93 apartments)	74,345 shares@ $51.00/sh	3,791,595.00
Total		$4,949,645.00

In calculating its anticipated gross consideration of $7,746,098.00, the partnership added $3,000,000.00, which represented the amount of mortgage indebtedness, and subtracted

[2] The share price of $72.25 represented a reduction from the share price for insiders of $85.00 established initially in the offering plan.

$203,547.00, consisting of two amounts: (i) $193,547.00, an amount to be contributed to a "reserve fund," and (ii) $10,000, an amount to be contributed to a working capital fund.

On its transferor questionnaire, the partnership reported "actual to date" anticipated *gross* consideration of $1,158,050.00 for the 20 subscribed units as shown above, consisting of $796,050.00 for the 13 apartments subscribed by insiders and $362,000.00 for the 7 apartments subscribed by outsiders. No brokerage fees were subtracted, and $1,158,050.00 was also reported as the "anticipated consideration." In contrast, petitioner reported $189,580.00 as an estimated amount for brokerage fees "through Completion" on the sale of units which had not been subscribed at closing. Although the initial gains tax filing required the partnership to "attach a statement from the brokerage firm setting forth the total brokerage fee anticipated under the plan," no such statement was provided then or in the future. In addition, by a letter dated February 22, 1989 to the Division, Meyer M. Lieber, petitioners' representative and the partnership's accountant, advised that no brokerage fees "were incurred on the 20 subscribed apartments" albeit only 11 would actually go to closing.

On its transferor's questionnaire, the partnership elected to calculate the gains tax due based upon a per share method of apportionment, with the common denominator of all units being 89,125. It also reported a "total anticipated (Actual plus Estimated)" original purchase price of $4,793,638.00. Subtracting this amount from anticipated consideration of $7,556,518.00, the partnership reported a total anticipated gain subject to tax of $2,762,880.00.

Although the partnership had indicated on its transferor questionnaire, as detailed above, that there were 20 apartments subscribed at closing, only 8 of the 20 subscribed apartments actually closed at the initial transfer of title to the Brooklyn apartment building to the

cooperative housing corporation by the partnership. The apartments that went to closing on November 22, 1988 were the following eight apartments of insiders:

Apartment	Shares allocated to unit	Purchase price
2E	517	$ 41,254.75
3H	748	54,043.00
2L	620	44,795.00
2B	830	59,967.50
2D	920	66,470.00
3D	938	67,770.50
6A	468	33,813.00
6B	898	64,880.50
Totals	5,993 shares	$432,994.25

Only three additional apartments would be sold by the partnership, and all three were insider sales as follows:

Date of closing	Apartment	Shares Allocated to Unit	Purchase Price
December 1, 1988	1-0	1,200	$ 86,700.00
December 1, 1988	2-0	1,224	88,434.00
January 24, 1989	6I	1,320	95,370.00
Totals		3,744	$270,504.00

As of June 15, 1996, the effective date of the repeal of the real property transfer gains tax, no additional apartments had been sold by the partnership. Consequently, the 11 apartments sold to insiders as detailed above were the only apartments which went to closing in the 8-year period running from June 27, 1988, the effective date of the offering plan, to June 15, 1996, the effective date of the repeal of the gains tax. The total of the above 11 purchase prices for the

apartments sold by the partnership prior to the repeal of the gains tax is $703,498.25 for the 9,737 shares[3] which were allocated to these 11 units out of the total shares of 89,125 allocated to the 113 units in the Brooklyn apartment building, as noted above. The record does not disclose the reasons why the other 9 subscribed units, almost all subscribed to by outsiders as noted above, never went to closing.

The partnership paid gains tax in the amount of $30,185.00[4] on the sale of the 11 apartments detailed above. By a Notice of Determination dated December 29, 1997, the Division of Taxation ("Division") asserted gains tax due of $31,308.60 plus interest. A schedule included in the audit report detailed the Division's calculation of tax due as follows:

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[3] These apartments were therefore sold at a per share price of $72.25, which conforms to the per share price noted above for insiders.

[4] The record does not include the partnership's exact calculation of the gains tax paid in this amount of $30,185.00 although it includes a breakdown of the $30,185 as follows:

Unit	Shares apportioned to unit	Sales price	Date tax paid	Amount of tax paid
2B	830	$ 59,968	Nov. 22, 1988	$ 2,573
2D	920	66,470	Nov. 22, 1988	2,852
2E	571[sic,should be 517]	41,255	Nov. 22, 1988	1,770
2L	620	44,795	Nov. 22, 1988	1,922
3D	938	67,770	Nov. 22, 1988	2,908
3H	748	54,043	Nov. 22, 1988	2,319
6A	468	33,813	Nov. 22, 1988	1,451
6B	898	64,880	Nov. 22, 1988	2,784
10	1,200	86,700	Dec. 1, 1988	3,720
20	1,224	88,434	Dec. 1, 1988	3,794
6I	1,320	95,370	Jan. 1989	4,092
Total	9,737	$703,498		$ 30,185

Cash	$ 749,403
Mortgage 3,000,000 ÷ 89,125 × 9737	327,753
Reserve fund 193,547 ÷ 89,125 × 9737	(21,145)
Working capital fund 10,000 ÷ 89,125 × 9737	(1,093)
Discounts, credits and rebates	(1,970)
Brokerage fees	0
Net consideration received by partnership	$1,052,948
Purchase price paid to acquire $3,300,000 ÷ 89,125 × 9737	$360,528
Acquisition costs 100,654 ÷ 89,125 × 9737	10,997
Capital costs 251,625 ÷ 89,125 × 9737	38,997
Conversion costs 251,625 ÷ 89,125 × 9737	27,490
Selling expenses	0
Original purchase price	$438,012
Gain, i.e., net consideration of $1,052,948 less original purchase price of $438,012	$ 614,936.00
Gains tax @ 10%	61,493.62
Gains tax paid	30,185.00
Additional tax due	$ 31,308.60

By a conciliation order dated November 10, 2000 additional gains tax due was reduced from the $31,308.60 plus interest asserted due in the Notice of Determination to $26,729.10 plus interest. This change was based upon the reduction of the "net consideration" of $1,052,948.00 shown above to $1,007,153.00 with the original purchase price of $438,012 shown above remaining the same. "Net consideration" was recalculated as follows:

Cash consideration	$ 703,498.00
Mortgage indebtedness	327,753.00

Reserve fund	(21,155.00)
Working capital fund	(973.00)
Discounts, credits and rebates	(1,970.00)
Net consideration	$1,007,153.00

As noted above, the total of the partnership's sales of 11 apartments was $703,498.00, which corresponds to the amount used as "cash consideration" in the above recalculation. The parties do not contest this amount nor the amount of $327,753.00 used as "mortgage indebtedness" nor the amount of $1,970.00 used as "discounts, credits and rebates." In the above recalculation, the reasons why the amount for "reserve fund" was increased by $10.00 to $21,155.00 from $21,145.00 and the amount for "working capital fund" was decreased by $120.00 from $1,093.00 to $973.00 were not explained in the record. Nonetheless, the parties also do not disagree concerning the use of any of these amounts. Rather, the only amount in contention is petitioners' claim that the "net consideration" detailed above of $1,007,153.00[5] should be further reduced by $17,925.00 for brokerage commissions allegedly paid to petitioner M. Neustein by the partnership.

By an affidavit dated May 9, 2000, petitioner Mordechai Neustein affirmed that he "alone negotiated the terms of sale and other matters . . . with prospective Insider purchasers." He also affirmed in this affidavit that he "was paid a $20,000[6] commission, which was reflected as a Guaranteed Payment on my 1989 Schedule K-1 from the Partnership." However, neither

[5] On its Final Computation of gains tax dated November 26, 1996, petitioners' partnership reported "aggregate consideration" of $1,007,044.00 from which it deducted brokerage fees of $17,925.00 and claimed a gains tax refund in the amount of $30,185.00.

[6] In another undated submission by petitioners, a brokerage fee of $10,552.00 was claimed based upon a commission at a rate of 1.5%.

petitioner Neustein nor petitioner Zeligfeld appeared at the hearing to testify. The Division's auditor, George Mastrianni, who has conducted a substantial number of real property transfer gains tax audits, testified that in sales of apartments to insiders a brokerage fee would not normally be incurred:

> It's the person occupying the apartment actually buying the apartment. Normally an attorney would be sufficient for the typical closing (Tr., p. 44).

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

> At the conclusion of the hearing, the Administrative Law Judge asked Mr. Lieber, petitioners' representative, if he had any additional evidence. "You should be aware that you've offered no testimony of any witnesses. . . . So it comes down to – unless you decide that you would want to testify . . . it would come down to whether you have any documents that would be relevant for my consideration" (***see***, Tr., p. 60). Mr. Lieber, assured the Administrative Law Judge that all documents he wanted considered were in the record (***see***, Tr., pp. 70-71), but then inquired whether it was necessary to submit into the record whatever documentation he had related to the ***Bronxville*** fair market value computation (***see***, Tr., p. 72). The Division had requested that petitioners provide a fair market value analysis for some time prior to hearing. In any event, petitioners did not provide an expert fair market value analysis of the units for 1996 prior to, or at the hearing. Instead, Mr. Lieber took the stand and testified, as a CPA, concerning his computation (***see***, Tr., pp. 74-75). The substance of Mr. Lieber's testimony and computations follows.
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> According to Mr. Lieber, in September of 1999, petitioner Neustein sold 50 of the cooperative units through his entity, Em Ess Realty LLC, to a purchaser named PHA Associates VIII LLC for $1,805,000.00, and petitioner Zeligfeld sold 52 of the cooperative units through his entity, Shefa Brucha H LLC, to this same purchaser for $1,695,000.00. Consequently, the 102 unsold units out of the 113 units in the initial offering plan were eventually sold in bulk for a total amount of $3,500,000.00 in September of 1999 approximately 11 years after the effective date

of the offering plan and approximately 3 years after the repeal of the gains tax. As noted above, the sale of the 11 apartments subject to gains tax represented the sale of 9,737 shares of the total shares of 89,125 allocated to the 113 units in the Brooklyn apartment building. Consequently, the total amount of $3,500,000.00 divided by the 79,388 shares allocable to the 102 units sold in 1999 equals a per share value of $44.09. In comparison,[7] the 11 apartments sold prior to the repeal of the gains tax were sold at a per share price of $72.25. Mr. Lieber admitted that petitioners did not have any real estate broker or appraiser look at the unsold units to determine their fair market value in 1996 and no comparables were used to arrive at Mr. Lieber's computation of fair market value (***see***, Tr., pp. 80-81). Further, Mr. Lieber admitted he had no evidence to support the various percentages he used in his computation (***see***, Tr., pp. 83-84).[8]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge observed that only 11 transfers detailed in the findings of fact occurred prior to the repeal of the gains tax.[9] Eight transfers went to closing on November 22, 1988, two on December 1, 1988 and one on January 24, 1989 with no other transfers up to June 15, 1996, the effective date of the repeal. The Administrative Law Judge noted that the first issue to be determined was whether the transaction had reached the one million dollar threshold such that gains tax was due on the transfers. The Division claimed that the 11 transfers were subject to tax since the net consideration for their transfers amounted to $1,007,153.00. The Administrative Law Judge pointed out that petitioners paid gains tax in late 1988 and early 1989 in the amount of $30,185.00. Although petitioners vigorously argued to

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[7]As noted in Footnote "4".

[8]We modified finding of fact "10" to more fully reflect the record.

[9]The real property transfer gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996 and the repeal applies to transfers of real property that occur on or after June 15, 1996 (***see***, L 1996, ch 309, §§ 171-180).

move their transaction to the other side of the one million dollar threshold, the Administrative Law Judge determined that they failed to prove by clear and convincing evidence that the Division's computation of net consideration should be further reduced from $1,007,153.00. The Administrative Law Judge noted that petitioners' contention that the partnership should be allowed a deduction for a brokerage commission was not established by adequate proof. The Administrative Law Judge emphasized that the partnership's accountant at or near the time of the 11 transfers stated that no brokerage fees were incurred. The Administrative Law Judge found that petitioners changed their position years later, subsequent to the repeal of the gains tax, when it became apparent how close they came to taking advantage of the exemption under former section 1443(1) of the Tax Law. The Administrative Law Judge held that this clearly affected the weight that could be given to the affidavit dated May 9, 2000 of Mr. Neustein, in which he maintained that a brokerage fee was paid by the partnership to him in the form of a guaranteed payment. While the Administrative Law Judge properly accepted the affidavit into evidence, he concluded that such affidavit was not persuasive. The Administrative Law Judge noted that there was no explanation why neither petitioner, and especially Mr. Neustein, appeared to testify at the hearing. The Administrative Law Judge found that the failure to testify under oath, subject to cross-examination, concerning whether brokerage fees were incurred must be held against petitioners, especially in light of the earlier contradictory statement by the partnership's accountant that no brokerage commissions had been paid. Furthermore, the Administrative Law Judge observed, the *varying* amounts claimed as brokerage fees undercut petitioners' claim that any brokerage fee was incurred on the insider transfers of units at issue. In sum, the Administrative Law Judge concluded, petitioners did not carry their burden of proof that their

partnership was entitled to claim a deduction for brokerage commissions on the sale of the 11 insider units.

The Administrative Law Judge next pointed out that pursuant to Tax Law former § 1445, petitioners would have been required to "file an application for refund within two years from either the date of transfer or the date of payment, whichever is later." As noted earlier, the 11 units were transferred in a period ranging from November 22, 1988 to January 24, 1989, and gains tax was paid by petitioners' partnership at the time of such transfers. Therefore, under Tax Law former § 1445, petitioners' refund claim on these transfers would have been years late. However, the Administrative Law Judge reasoned that the 1996 law which repealed the gains tax directed the Division to review a taxpayer's final computation of gains tax and determine whether there had been an overpayment or an underpayment of tax. Further, section 180(b)(ii) of this session law provides that "[a]ny final computation of tax under this subdivision which shows an overpayment of tax shall be treated as an application for refund" (L 1996, ch 309). Since, the final computation dated November 26, 1996 filed by petitioners' partnership claimed a gains tax refund in the amount of $30,185.00, the Administrative Law Judge determined it must be treated as an application for refund. Therefore, the Administrative Law Judge found this application for refund was at issue as well as the Division's Notice of Determination dated December 29, 1997.

The Administrative Law Judge rejected petitioners' contention that the issue concerning the amount of original purchase price to be allocated to the units subject to tax may not be addressed at this time. In effect, petitioners were requesting the bifurcation of the hearing in this matter, which the Administrative Law Judge found had no basis in law or regulations.

Petitioners had the opportunity to present evidence concerning every element of their case, including the proper allocation of original purchase price to the units subject to tax at the hearing in this matter.

The Administrative Law Judge noted that the Division's Notice of Determination dated December 29, 1997 computed gains tax due by using a per share method to allocate the partnership's original purchase price to the 11 units subject to gains tax. This methodology for allocating original purchase price, the Administrative Law Judge observed, was held to be unreasonable by the Tax Appeals Tribunal (hereinafter the "Tribunal") in its decision in ***Matter of 244 Bronxville Assocs.*** (Tax Appeals Tribunal, June 10, 1999). The Administrative Law Judge stated that in this decision the Tribunal held that original purchase price should be apportioned to the units subject to tax "based upon the stated relative fair market value methodology" noted at 20 NYCRR 590.20 which it summarized as follows:

> The regulation addresses the apportionment of OPP in situations where only a part of an interest in real property is being transferred and part is being retained and dictates a fair market value ratio, as follows:
>
> $$\frac{\text{fmv of interest transferred}}{\text{fmv of the real property, including interest}}$$

In ***Matter of 244 Bronxville Assocs.*** (***supra***), the taxpayer provided evidence of the appraised value for the unsold units by a certified real estate appraiser who had previously valued over 7,500 properties throughout the New York Metropolitan area. This appraiser based his valuation on comparable sales and listings within the subject cooperative project and neighboring cooperative projects. In the matter at hand, the Administrative Law Judge recognized that petitioners had not offered similar evidence. The Administrative Law Judge allowed Mr. Lieber's testimony that approximately three years after the repeal of the gains tax,

the unsold units were sold in bulk for a total amount of $3,500,000.00. However, the Administrative Law Judge noted, testimony by petitioners' representative, who is a certified public accountant, concerning the discounting of such amount based upon (i) more units being vacant at the time of the sale three years after the repeal of the gains tax and (ii) an improved real estate market in New York, does not rise above the level of speculation. In fact, the Administrative Law Judge stated that petitioners' representative candidly admitted that he was not able to pinpoint the particular percentage discount that should be used in calculating the value of the unsold units at the time of the repeal of the gains tax. Consequently, the Administrative Law Judge found that such speculation by petitioners' representative did not provide a sufficient evidentiary basis to justify using an amount less than $3,500,000.00 as the fair market value for the unsold units at the time of repeal.

The Division urged that the $3,500,000.00 value resulted from a *bulk* sale, with the implication that if the units were sold individually the total sales amount would be significantly higher. The Administrative Law Judge conceded the merit of that argument but found this contention properly balanced against petitioners' argument that at the time of the bulk sale there were more vacant units, which were substantially more valuable, than occupied units. Consequently, the Administrative Law Judge determined that it was reasonable to use the undiscounted amount of $3,500,000.00 as the value for the unsold units at the time of the repeal of the gains tax. Accordingly, the Administrative Law Judge found that in computing the partnership's final gains tax liability, the original purchase price to be allocated to the 11 units subject to tax may be determined by using this undiscounted amount of $3,500,000.00 in the fraction noted above by the Tribunal in ***Matter of 244 Bronxville Assocs.*** (***supra***). Doing so, the

Administrative Law Judge determined, resulted in a refund due to petitioners, and the Division was directed to calculate the amount of such refund using such undiscounted amount of $3,500,000.00 for the value of the unsold units as of June 15, 1996, the effective date of the repeal of the gains tax.

ARGUMENTS ON EXCEPTION

Petitioners maintain on exception that the Administrative Law Judge erred in concluding that the partnership failed to prove by clear and convincing evidence that it was entitled to a deduction for brokerage commissions paid to a partner in connection with sales to purchasing tenants. Petitioners state that if brokerage commissions had been allowed, the net consideration for the sale of the 11 apartments would be less than $1,000,000.00 and thereby not subject to gains tax.

Petitioners also take exception to the determination by the Administrative Law Judge that computation of allocable original purchase price was a matter raised by the petition and before him for determination. It is petitioners' position that they should not have been required to submit proof on the issue of computation of allocable original purchase price, since that issue should have been decided at a second, separate hearing on that issue alone. Although this issue was raised by petitioners in the petition, it is their view that the only issue that was properly before the Administrative Law Judge for determination was the threshold issue of whether the net consideration for the sale of the 11 apartments would be less than $1,000,000.00 and thereby render the sale exempt from gains tax. If petitioners do not prevail on this threshold issue, they ask us to find that the computation of allocable original purchase price was not properly before

the Administrative Law Judge and to remand this matter to the Division of Tax Appeals for a hearing to determine the computation of tax or refund due.

Although not included in their exception, petitioners' brief in support contends that if the computation of original purchase price was correctly addressed, the Administrative Law Judge properly determined that, in calculating petitioners' gains tax liability, the original purchase price allocated to the 11 units subject to tax should be determined by using $3,500,000.00 as the fair market value of the unsold units.

In its exception, the Division argues that the Administrative Law Judge properly determined that petitioners did not prove that their partnership was entitled to claim a deduction for brokerage commissions on the sale of the eleven insider apartment units. The Division points out that petitioners failed to produce a brokerage agreement and offered no testimony from petitioner Neustein, the partner who allegedly acted as the broker. Petitioners, the Division claims, did not establish that any brokerage fees were even incurred, much less that such fees were related to the sale transactions.

The Division also agrees with the Administrative Law Judge that the issue of allocation of original purchase price was properly before the Administrative Law Judge for determination. It was therefore imperative, the Division argues, that petitioners produced the evidence at hearing necessary to support their argument that the Notice of Determination was erroneous or improper. Petitioners, according to the Division, are not entitled to a separate hearing on this issue.

The Division, however, takes exception to so much of the Administrative Law Judge's determination that found that, in computing the partnerships' final gains tax liability, the original purchase price to be allocated to the 11 units subject to tax should be determined by using

$3,500,000.00 as the fair market value for the unsold units. The Division rejects the values calculated by petitioners' representative, who admitted that he was not a real estate broker and was not directly involved in cooperative apartment sales. The Division contends that an independent appraisal or a well-documented fair market value analysis was required. The decision of the Tribunal in ***Bronxville*** was dated June 10, 1999, prior to the date petitioners filed their petition (i.e., February 7, 2001) and, as a result, the Division maintains that it was incumbent on petitioners to meet their burden of proof to show the validity of their fair market valuation at the hearing in this matter and to submit any evidence into the record at that time to support their arguments. It is petitioners, the Division states, that bear the burden of proving the validity of their valuation regarding the co-op shares' fair market value in 1996 (***citing, Matter of Ader***, Tax Appeals Tribunal, September 15, 1994). The Division claims that petitioners have failed to prove the fair market value of the unsold units and have not met their burden of proving that the Division's Notice of Determination was improper or erroneous.

OPINION

Treated first is the claim that petitioners are entitled to refunds based upon application of the fair market value original purchase price allocation methodology approved by the Tribunal in ***Matter of 244 Bronxville Assocs.*** (***supra***). In that case, the petitioners provided evidence of the fair market value of the unsold units based on comparable sales prepared by a certified real estate appraiser. The record in ***Bronxville*** also included the testimony of accounting professionals and experts in cooperative conversions. The petitioners in ***Bronxville*** established a record that supported their valuation of the unsold units. Our decision in ***Bronxville*** was premised on that evidence being in the record.

The central question to resolution of this issue is whether petitioners have provided sufficient proof of the fair market value of the unsold apartment units, as is required, in order to apply the methodology sanctioned in ***Bronxville***. We conclude that they have not and we reverse the Administrative Law Judge on this issue.

Neither petitioner appeared at the hearing to testify. Petitioners also failed to provide any evidence of the fair market value of the unsold units by an independent real estate appraiser based on comparable sales. Nor was any testimony of independent experts with knowledge of cooperative conversions offered in support of petitioners' case. Mr. Lieber's testimony and his computations are, at best, conjecture of what the value of the units would have been in 1996. His background does not qualify him as an expert in real estate. As such his testimony and his computation can be given little weight. A presumption of correctness attaches to the Division's notices of determination, and the burden was on petitioners to show by clear and convincing evidence that the notice of determination and the method used to arrive at the assessment was erroneous (***see***, ***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398). Since petitioners failed to offer sufficient proof of the fair market value of the unsold units in 1996, they have failed to carry their burden of proof to show that the Division's computation of gains tax due was unreasonable or erroneous. Petitioners' failure to provide such proof of fair market value rendered it impossible for the Division to compute the tax due using the formula we prescribed in ***Bronxville***. Based on the facts of this case, the Division's computation of gains tax due is sustained.

We reject petitioners' argument that they should not have been required to offer evidence of fair market value until they had an opportunity for a separate hearing on that issue. Petitioners

raised the issue of the Division's computation of gains tax due as it appears in the Notice of Determination. The hearing in this matter was petitioners' opportunity to be heard. To prevail, petitioners were required at that hearing to present whatever evidence they could muster concerning the amount of original purchase price to be allocated to the units subject to tax and to show that the Notice of Determination was erroneous. Once the hearing record is closed, additional evidence may not be offered by either party (***see***, ***Matter of Abex Corp.,*** Tax Appeals Tribunal, October 8, 1992). The record in this case was closed on November 14, 2001. As the Administrative Law Judge correctly noted, the hearing process must be defined and final (***see***, ***Matter of Schoonover***, ***supra***). Petitioners had the opportunity to present evidence concerning every element of their case, including the proper allocation of original purchase price. They failed to meet their burden in this regard.

We agree with the Administrative Law Judge that petitioners have failed to prove by clear and convincing evidence that they were entitled to a deduction for brokerage commissions. We affirm the Administrative Law Judge on this issue for the reasons stated in the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The exception of J. Zeligfeld and M. Neustein is denied;

3. The determination of the Administrative Law Judge is reversed to the extent that the Division of Taxation's methodology of allocating petitioners' original purchase price to the cooperative units subject to tax is upheld, but in all other respects is sustained;

4. The petition of J. Zeligfeld and M. Neustein is denied;

5. Petitioners' refund claim, based upon their partnership's final computation of gains tax dated November 26, 1996, is denied; and

6. The Notice of Determination dated December 29, 1997 is sustained.

DATED: Troy, New York
January 8, 2004

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner