STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NORMANDY ASSOCIATES	:	DETERMINATION
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, Normandy Associates, c/o Orsid Realty Corp., 250 West 57th Street, New York, New York 10107, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 804333).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 20, 1987 at 1:15 P.M., with all briefs to be submitted by November 30, 1987. Petitioner appeared by Joel E. Miller, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUES

I. Whether, under circumstances where a cooperative conversion is undertaken and the transfer of the underlying realty from the sponsor to the cooperative housing corporation occurs prior to the March 28, 1983 effective date of Tax Law Article 31-B, all transfers of cooperative apartment units thereafter pursuant to the plan of conversion (hereinafter denominated "co-oper sales") enjoy resultant exemption from tax under Article 31-B as "grandfathered" transfers.

II. Whether, assuming those cooperative apartment unit transfers at issue herein are exempt as "co-oper sales", said transfers may nonetheless alternatively be held taxable under Article 31-B as individual apartment unit transfers occurring after the March 28, 1983 effective date of Article 31-B.

III. Whether, in the course of its audit (and assuming the transfers in question were properly subject to tax), the Audit Division properly computed the total consideration received with respect to petitioner's transfers of certain individual cooperative apartment units.

IV. Whether (again assuming taxability) the Audit Division improperly reduced petitioner's claimed total original purchase price for the subject premises by its partial disallowance of the amount claimed as the "conversion manager's fee".

V. Whether the Audit Division's imposition of penalty based upon petitioner's failure to have timely filed returns and paid tax due (Tax Law § 1446.2[a]) was appropriate and should be sustained.

FINDINGS OF FACT

1. On November 7, 1986, following an audit, the Audit Division issued to petitioner, Normandy Associates, a Notice of Determination of Tax Due under Tax Law Article 31-B ("gains tax"), indicating gains tax due in the amount of $34,416.00, plus penalty and interest. This Notice pertained to an audit concerning Normandy Owners Corporation (the "corporation"), a cooperative housing corporation to which petitioner, as sponsor under a cooperative conversion plan, had transferred certain real property located at 140 Riverside Drive, New York, New York.

2. The subject premises consisted of a total of 248 individual apartment units in an apartment building acquired by petitioner by purchase on September 28, 1960. The subsequent closing between petitioner, as sponsor, and Normandy Owners Corporation, pursuant to the plan of cooperative conversion (the "realty transfer"), occurred on September 4, 1980.

3. Pursuant to the plan of cooperative conversion, a total of 22,575 shares of the cooperative corporation's stock were allocated to and among the 248 apartments. As of the time of the September 4, 1980 realty transfer, the shares allocated to 159 apartments had been subscribed to by various outside purchasers and, upon closing, petitioner itself received the balance of shares allocated to the other 89 apartments. The realty transfer was for a total expressed price of $16,200,000.00, broken down into 3 elements as follows: (a) $2,100,000.00 in cash; (b) a short-term mortgage note in the amount of $8,100,000.00 (carrying an interest rate of 10-3/8%); and (c) a ten-year wraparound mortgage note in the amount of $6,000,000.00 (carrying an interest rate of 8-3/4%). The corporation also retained a reserve fund of $575,000.00.

4. Subsequent to the realty transfer, petitioner made ongoing transfers of apartment units[1] in the ensuing years. During October of 1985, the Audit Division contacted petitioner with notice that a gains tax audit of the conversion would be conducted. This audit was commenced on November 7, 1985 and took approximately one year to complete (including a four-to five-month hiatus caused by the auditor's illness).

5. As determined upon audit, of the 89 apartments acquired by petitioner at the time of the September 4, 1980 realty transfer, 49 of such apartments had been transferred by petitioner prior to the March 28, 1983 effective date of the gains tax and hence were deemed "grandfathered" and not subject to tax. An additional 7 apartment units had been transferred by petitioner subsequent to the effective date of the gains tax and, as of the time of the conclusion of the audit, 33 units were still owned by petitioner. In terms of shares, of the 22,575 shares allocable to the 248 total apartments, 19,539 shares related to the 208 grandfathered apartments, and 3,036 shares related to the 40 potentially taxable apartments. Of these latter 40 apartments, 477 shares related to the 7 units transferred as of the close of the audit and subsequent to the effective date of the gains tax, thus leaving 2,559 shares pertaining to the remaining 33 units unsold as of the end of the audit.

6. With respect to the 7 apartment units transferred subsequent to the effective date of the gains tax, no gains tax returns were filed nor was any gains tax paid thereon prior to conclusion

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[1]Said transfers of cooperative apartment units are accomplished via the transfer (to the purchaser) of those shares of the corporation allocated to the particular apartment unit together with a proprietary lease appurtenant to the apartment.

of the audit. The Audit Division's auditor determined that tax was due on these 7 units, with the amount of tax as computed reflected in the aforementioned Notice of Determination of Tax Due (see___ Finding of Fact "1"). The Audit Division also calculated and imposed penalty on 5 of these 7 apartment unit transfers, excluding penalty from the last 2 of such transfers since they occurred during the pendency of the audit. To date, petitioner has paid $25,000.00 against the outstanding Notice of Determination, such payment being made "to demonstrate good faith" but without abandonment of any of the arguments advanced by petitioner in this proceeding.

7. In determining the total consideration to be received on the units deemed subject to tax, the Audit Division utilized the following calculation:

"Cash actually received (477 shares)		$1,312,500
Estimated future cash (2,559 shares)		1,173,108
Total Cash Consideration		$2,485,608
Less: Reserve fund[2]		77,338
$2,408,270		
10-year mortgage note[2]		807,000
$3,215,270		
Less: Brokerage fees		
(actually paid; 477 shares)	67,596	
Consideration		$3,147,674"

The "cash actually received" figure of $1,312,500.00 was calculated by the auditor based upon the amount of cash actually received by petitioner on the seven transfers at issue herein as follows:

Date	Apartment	Shares	Cash Price
5/11/83	11D	71	$ 145,000
6/1/83	2J	89	225,000
11/3/83	14P	67	130,000
3/14/84	15L	65	167,500
10/12/85	2O	62	205,000
9/27/86	12P	66	220,000
10/3/86	3P	57	220,000
		477	$1,312,500

8. As more fully discussed hereinafter, petitioner utilized the services of a conversion manager (consisting of 2 individuals working together but referred to herein in the singular for purposes of clarity) to "quarterback" the conversion process. With respect to the conversion fee received by the conversion manager, after long negotiations between petitioner and the two individuals involved (one of whom was a general partner in petitioner), it was agreed that the conversion fee would be calculated as $1,100,000.00, representing 18-1/3% of the face amount of the $6,000,000.00 wraparound mortgage. By contrast, upon audit petitioner was allowed $879,750.00 as a conversion fee (being 8-1/2% of the total cash offering price of $10,350,000.00). The auditor based the partial disallowance (totalling $220,250.00) on her belief that the 18-1/3% figure was an inordinately high percentage rate for a commission.

[2]Allocated amount of total based on 13.45% of total units being taxable.

SUMMARY OF PETITIONER'S POSITION

9. In this proceeding petitioner raises several issues, the first of which is that the entire transaction may not properly be subjected to gains tax inasmuch as the realty transfer occurred in 1980, which was well before the March 28, 1983 effective date of the gains tax. Petitioner maintains that the entire conversion is "grandfathered" pursuant to Tax Law § 1443.6. In this vein, petitioner maintains that Tax Law § 1442, which requires payment of tax on the date of each unit transfer, has no effect in determining whether or not any transfers are taxable. Petitioner asserts that this § 1442 so-called deferred payment rule is solely a relief measure enacted to allow taxpayers whose conversions are taxable to avoid the financial burden of requiring payment at the time of the realty transfer. Petitioner maintains that simply allowing payment subsequent to the realty transfer was never intended to provide a basis or nexus upon which to determine taxability, and thus asserts the sales in question are not taxable co-oper sales (i.e., sales under a co-op plan by a sponsor or someone standing in the sponsor's shoes). In sum, petitioner asserts that the realty transfer is the taxable event under a co-op plan, that its contract date is determinative as to exemption, and that the pre-March 28, 1983 date herein results in full exemption.

10. Petitioner further alleges, assuming the entire plan of conversion is not taxable because of the above-noted pre-March 28, 1983 realty transfer date, that the 7 individual units transferred and at issue herein could then only possibly be held taxable as individual co-op apartment unit sales. This presupposes acceptance of non-taxability as "co-oper sales" per the argument advanced above, and is based on the theory that taking such sales out of the category of co-oper sales related to the co-op plan renders them individual sales even though made by the sponsor. Petitioner maintains specifically that these transfers as individual sales involve the sale of personalty (i.e., corporate shares of stock) unconnected to any transfer of real property (the realty transfer) and hence are not subject to tax. In sum, it thus appears that petitioner would, based upon the realty transfer date, calculate no tax due and determine the sales at issue not to be co-oper sales but individual apartment unit sales. In turn, covering all possible bases, petitioner takes the next logical step and argues that the sales could be taxable only if either (a) such transfers rise to the level of a transfer of a controlling interest (i.e., 50 percent) in the corporation, or (b) any sale in its own right is for a consideration in excess of one million dollars. Petitioner also asserts that such individual sales would not properly be subject to aggregation to reach a one million dollar threshold because they were individual sales made to unrelated purchasers.

11. In addition to the foregoing potentially dispositive issues, petitioner also presents a number of other arguments addressing alleged errors in the method of computation utilized by the Audit Division in arriving at the asserted deficiency. These arguments are treated separately in petitioner's brief and, for clarity, are presented separately hereinafter. The alleged errors pertain to the calculation of (a) consideration (further broken down as to [i] cash, [ii] ten-year note and [iii] broker's fees) and (b) original purchase price, as follows:

(a) Consideration

(i) Cash

Petitioner maintains that the cash actually received figure (see___ Finding of Fact "7") should be reduced to reflect only the actual cash received on the first apartment sold ($145,000.00), with the balance of cash being entirely "estimated future cash", here equal to $1,359,369.00 (based on the balance of the shares unsold at the time of the first unit's transfer

[2,965 shares] multiplied by the insider price of $458.472 per share). This method of computation results in total cash (received plus estimated) of $1,504,369.00, as opposed to the Audit Division's total cash figure of $2,485,608.00. Petitioner asserts its method of calculation should be utilized because, at the time of the audit, petitioner had not reached the first 25% plateau (25% of shares/units transferred) at which point an updated calculation of the figures would have been required. Thus, according to petitioner's method, consideration as calculated by the Audit

Division is overstated at least in the amount of $981,239.00 ($2,485,608.00 less $1,504,369.00).[3]

(ii) The Ten-Year Note

Petitioner asserts that the $6,000,000.00 ten-year wraparound mortgage note (see___ Finding of Fact "3") is overvalued by 50 percent (thus allegedly leaving the allocated amount of $807,000.00 overstated by $403,500.00). In this regard, petitioner maintains that this note was, at the time of the 1980 realty transfer, carrying a comparatively low interest rate of 8-3/4%, which did not reflect the fair market value of the note. According to petitioner, this note's fair market value at such time would have been "in the nature of one-half of the $6,000,000.00 face amount of the mortgage". Petitioner notes, in comparison, that the short-term mortgage note received by petitioner at the time of closing carried a 10-3/8% interest rate. Petitioner asserts that the $6,000,000.00 note was structured to carry a comparatively low interest rate and high face value to make the terms of the cooperative conversion more attractive to the purchasing tenants. However, petitioner maintains that had it been known that the gains tax would be enacted, said note could easily have been structured to carry a lower face value and a higher interest rate. Under the latter scenario petitioner points out that the Audit Division's method of basing consideration on the face value of the note would result in far less gain to petitioner and far less gains tax due. In essence, petitioner maintains it is being forced to pay gains tax on fictional value, to wit the difference between the fair market value of the mortgage note and its $6,000,000.00 face value.

(iii) The Broker's Fees

By its brief, petitioner submits (and the Audit Division does not dispute) that the parties are in agreement that the brokerage fees on individual apartment unit transfers should be 6% of the cash amount of each apartment unit sale. Petitioner asserts with respect to this point that no allowance for brokerage fees was given based on estimated future cash on any of the sales in question or on any sales yet to be made. In this regard, petitioner maintains that based on the Audit Division's figures as used in computing consideration, the allowable brokerage fees should be $149,136.00 (total cash of $2,485,608.00 x .06) rather than the $67,596.00 allowed (on units actually transferred) and notes, alternatively, that if petitioner's figure for total cash ($1,504,369.00) is correct, then the amount of the brokerage fees allowed should be $90,262.00 ($1,504,369.00 x .06) rather than the $67,596.00 allowed.

(b) Original Purchase Price

In addition to the foregoing arguments that consideration was improperly calculated, petitioner also contests the computation of original purchase price, protesting specifically the disallowed portion of the fee paid to the conversion manager (hereinafter referred to as the "conversion fee"). Petitioner asserts that the $1,100,000.00 portion of the note received by the conversion manager was reasonable in light of the amount of time and effort expended and, based on the fair market value of the note, actually would be worth somewhere near $550,000.00 (refer_____ Findings of Fact "8" and "11-[a][ii]").

12. Lastly, petitioner seeks abatement of penalty, pointing to the questions surrounding the gains tax as it applied to cooperative conversions, the state of facts and circumstances particular to this case, and the fact that petitioner's actions (or inactions) were based upon reliance on counsel's advice as to potential exemption from the tax. In this regard, petitioner also notes that any penalties, as

well as interest thereon and on the unpaid tax, if imposed at all, should be computed based on the cash price for the first apartment sold ($145,000.00), with the balance computed at the reduced insider price (see generally Paragraph "11"), inasmuch as petitioner's sales had not as of the time of the end of the audit reached the called for updating plateau under the Audit Division's rules (refer Paragraph "11[a][i]" and footnote "3").

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. In this proceeding, petitioner raises a two-fold argument in favor of its alleged exemption from such tax. First, petitioner alleges the entire plan (including all sales of units by petitioner regardless of date of transfer) is exempt based on the date of the realty transfer. Second, petitioner argues that none of the unit transfers are taxable if viewed in the alternative as individual unit transfers.

B. Treated first is petitioner's argument that cooperative conversions wherein the realty transfer occurs on or prior to the March 28, 1983 effective date of Article 31-B (or pursuant to a contract therefor entered into on or prior to such date) escape taxation entirely pursuant to the so-called "grandfather" provision of Tax Law § 1443, which provides, in relevant part, as follows:

"A total or partial exemption shall be allowed in the following cases:

* * *

6. Where a transfer of real property occurring after the effective date of this article is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts and circumstances as determined by the tax commission. A written agreement to purchase shares in a cooperative corporation shall be deemed a written contract for the transfer of real property for the purposes of this subdivision."

Petitioner does not contest the applicability of Article 31-B to cooperative conversions as a general principle, but rather maintains that the realty transfer is the taxable event, and in this particular conversion since the realty transfer occurred in 1980 it, as well as any subsequent unit sales by the sponsor (denominated "co-oper" sales), are entirely exempt as grandfathered.

C. As a general proposition, and in simplest terms, a co-oper is one who owns a building and wishes to transfer the same in receipt of gain. By effecting this transfer through the co-oping method, the co-oper (sponsor) ultimately accomplishes his end purpose of transfer in receipt of gain via the transfer(s) of shares allocated to the various apartment units to unit purchasers. A necessary step in this overall process is the sponsor's transfer of the building and underlying realty to a cooperative housing corporation (the realty transfer). Thereafter, subscribed shares of the corporation as allocated to the apartment units are transferred to unit purchasers (in general simultaneously), with the balance of unsold shares taken back by the sponsor for future transfer to unit purchasers.

D. As petitioner points out, in Matter of Mayblum v. Chu (67 NY2d 1008 [1986]), plaintiff sought a declaratory judgment "to establish that the transfer of real property underlying a cooperative conversion plan (the Gerard Towers transaction) [was] the taxable event under Tax Law Article 31-B...." (Mayblum v. Chu, supra, at 1009.) The Court, however, ruled against plaintiffs, indicating in its decision that the gains tax "is imposed by the statute upon the overall cooperative plan...", that "the over-all transaction [is] taxable", and that "for purpose of computation of the tax the cooperative conversion is treated as a single transfer..." (Mayblum v. Chu, supra, at 1009 [emphasis added]).

E. As is borne out by the numerous statutory references to cooperatives, it is beyond dispute that the gains tax was intended to apply to cooperative conversions (see e.g. Tax Law §§ 1440.5[a], 1440.7, 1442, 1444.3, 1445.1). Further, it is clear that the Legislature recognized the unique nature of the cooperative conversion process and its ultimate aim. This comprehension is evidenced by the statutory provisions making share transfers to ultimate unit purchasers the key and culminating event(s) in the process through, and at which point, the ultimate aim of the co-oper per the co-op plan is achieved. For example, Tax Law § 1442 requires payment of tax on the date of transfer of each apartment unit as opposed to the date of the realty transfer. Even more significantly, Tax Law § 1443.6 (the grandfather provision) with respect to cooperative conversions specifically makes a written agreement for the purchase of shares in a cooperative corporation the "written contract" for purposes of the so-called grandfather exemption.

F. In light of the foregoing, petitioner's argument that the entire conversion herein escapes taxation under Tax Law Article 31-B due to the fact that the underlying realty transfer occurred prior to the effective date of the gains tax must fail. The Court of Appeals, in essence, has described the entire co-oping process, for gains tax purposes, as one indivisible transaction with tax to be computed in the sense of a single, overall transfer payable as of the date(s) of the sponsor's transfers(s) of the various unit(s). Thus, to adopt petitioner's argument is not only unwarranted but would appear to conflict with both the Court's reasoning and the terms of Tax Law Article 31-B.

Clearly, the statutory scheme relative to co-ops, the Court's decision in Mayblum commenting thereon, and the Audit Division's manner of implementation are consistent with the nature of the co-oping process and its overall end result. Given the nature of the co-oping process, it is eminently reasonable to treat such process (the overall conversion plan) as a "single transfer" for purposes of computing the tax, even though not so treated for purposes of date(s) of payment or for determining whether a given unit transfer is exempt via grandfathering. In effect, the statute looks to the entire unique co-oping process, recognizes it as such, and specifies each unit transfer as the transfer of consequence determinative for purposes of grandfathering and time of payment. This approach recognizes that there is, necessarily, a realty transfer, but recognizes such transfer as an intermediate step in the overall process of transferring under the co-oping method, and specifies the related "ultimate aim" transfer(s) as the determinative transfer(s) for purposes of taxability. Such approach relieves the potential hardship to a taxpayer (sponsor) of having to pay tax prior to the transfer of all of the units and receipt of all actual gain "in hand". It also acknowledges that the co-oping aim and process is not ultimately concluded until the end (unit) transfer(s) occurs and the co-oper's aim is achieved (see Conclusion of Law "C").

There is nothing explicit or implicit in either the statute or the Mayblum case which supports a rationale that the realty transfer is the taxable event or that such transfer exempts the later share transactions by virtue of the fact that it occurred prior to the effective date of the tax. By contrast, the statutory scheme takes the sensible approach of determining exemption or applicability of the tax in the co-op context based upon the ultimate transfer(s) in such process. Of note here too is the fact that the Mayblum matter involved a realty transfer pursuant to a contract entered into prior to the effective date of the gains tax (and a co-op plan accepted for filing [although not declared effective] prior to such effective date), yet the Court did not indicate that such a situation would render the entire co-op conversion exempt from tax based thereon. If such were so clearly the case, as petitioner argues, the Court could easily have so said (at least via dictum). In fact, the Legislature could have specified the realty transfer as the determinative event for grandfathering purposes, but it did not do so. Rather, while the sales in question are co-oper sales undeniably linked to the co-op plan, the determinative event for taxability or exemption and for payment is keyed to the date of each unit transfer.

Finally, in light of the foregoing, there is no basis for a conclusion that the sales of the units in question were other than sales by the sponsor/ co-oper as part of the entire overall transaction. Accordingly, petitioner's second argument that such sales are not taxable in that they are individual unit sales with no nexus to the realty transfer or co-op plan and thus escape taxation in that they are not transfers of realty but of personalty and/or are not transfers of a controlling interest in an entity is, while interesting and undoubtedly a potential future issue (e.g., in cases of re-sales of units by persons other than sponsors), rendered moot.

G. Petitioner raises a number of other issues in the nature of computational errors alleged to have been made by the Audit Division, with respect to which the following conclusions are reached:

(1) Consideration

(a) Cash

Petitioner claims the total cash as computed upon audit was overstated by $981,239.00. Petitioner asserts that the cash portion of anticipated consideration should have reflected the actual cash paid on the first transfer ($145,000.00), with the balance of the cash constituting anticipated consideration calculated at the insider price times the unsold shares (2,965 shares x $458.472 per share), thus resulting in total cash of $1,504,369.00 versus the Audit Division's calculation of total cash at $2,485,608.00. By contrast, the Audit Division's method of calculation is based on total cash actually involved in the 7 transactions in question, plus anticipated cash calculated on the remaining unsold shares times the insider per share price. Petitioner would assert that the first sale cash figure governs until at least a 25% sellout plateau has occurred, at which time re-evaluation would be made. Petitioner's argument must be rejected. It is sufficient to note that petitioner filed no returns at the time that such were due and did not elect calculation under either Option A or B, the two then-acceptable methods of calculation with respect to cooperative conversion plans. In turn, upon audit, the Audit Division chose to use known prices for those units transferred, plus anticipated consideration based on the insider price for non-transferred units. There is nothing unreasonable about this approach, and it is accepted. In turn, current practice (in essence a modified Option B approach) should and apparently will be used for future calculations on unit transfers. In sum, petitioner lost its ability to choose a method of calculation on its first 7 transfers by its failure to have filed returns when due. To decide otherwise would be to ignore petitioner's choice of taking a position of inaction (non-filing and non-payment) and accord petitioner the benefit of an election it consciously chose not to make. Finally, petitioner's argument with regard to the Audit Division's being bound until the noted plateaus are reached (see___ Finding of Fact "7") is unpersuasive in that at least prior to August of 1986 recalculations could be required by the Audit Division at more frequent interrals than simply the 25%, 50%, 75% and 100% plateaus specified under both Option A and

B (see Footnote "3").

(b) The Ten Year Note

Petitioner next argues that the allocated amount of the ten-year wraparound mortgage note in the face amount of $6,000,000.00 was overvalued by the amount of $403,500.00. Petitioner argues that "face" should not be the only amount considered, and that in this instance the note was structured with a lower interest rate and a higher face amount for the purpose of showing a below market note viewed as a bargain by potential investors. By affidavit (Exhibit "1") petitioner's general partner avers that if petitioner had known of the gains tax at the time the deal was structured, it would have structured the note differently (i.e., with a lower face value and a higher interest rate), that petitioner would have been entitled to do so, and that such structuring would have provided an advantage for gains tax purposes.

Tax Law § 1440(1)(a) provides that "consideration" includes "the amount of any mortgage, purchase money mortgage, lien or other encumbrance" (emphasis added). In turn, Regulations of the Commissioner, at 20 NYCRR 590.12, provide that consideration includes the "face amount" of any purchase money mortgage. The use of the term "amount" as opposed to the term "value" (as is used in the definition of consideration in Tax Law § 1440.1[b] [pertaining to, inter alia, leases and subleases]), is not without significance.

Although unstated, petitioner's partners may have received some benefit through a structuring of the note with a lower interest rate and a higher face amount other than the appearance of a below market note to investors. It is not implausible that the note was structured in this fashion so that interest income received by the holders of the note and subject to income tax at ordinary income rates would be comparatively low. In any event, petitioner made the choice to structure the note as it is and, once that choice is made, petitioner must live with the consequences of its business decision. It is assumed the decision was made for a valid business purpose, to gain some legitimate advantage, and it is clear that petitioner, as noted in an affidavit made by its general partner, was clearly entitled to structure the note to best meet its needs at the time. However, having done so, it is not proper (assuming arguendo it would even be permissible) to now revalue the note with the only apparent purpose being to allow for a gains tax advantage. Accordingly, since the statute speaks specifically of the amount as opposed to the value, including as consideration the (apportioned) face amount of the ten-year note was appropriate and is sustained.

(c) The Broker's Fees

The Audit Division and petitioner agree that 6% of the cash amount on each apartment to be sold is appropriate as the amount of the brokerage fee allowable on each apartment unit transfer. However, the Audit Division did not miscalculate when it allowed only $67,596.00 to petitioner as brokerage fees on the 7 units actually sold. This amount, while less than 6% of the actual cash of $1,312,500.00 received on such units ($1,312,500.00 x .06 = $78,750.00), represents the actual amount of broker's fees on such transfers . Limiting broker's fees on such transfers to their actual amount is consistent with using as consideration the actual cash amount received on such unit transfers (see Conclusion of Law "G[1][a]"). As noted, in calculations on future sales, current computational practice will be adopted (which will in determining gain per share give effect to allowing broker's fees at 6% on estimated future cash) (refer Conclusion "G[1][a]").

(2) Original Purhase Price

With respect to the conversion manager's "conversion fee"[4] claimed as a part of original purchase price, the Audit Division rejected petitioner's claim of 18-1/3% of the $6,000,000.00 face amount of the wraparound mortgage solely as being "too high of a percentage", and rather allowed 8½% of the cash offering price per the co-op prospectus. However, petitioner has established that an allowance of 18-1/3% of the face of the mortgage resulted in an appropriate amount (rate notwithstanding) under the facts of this particular conversion and there has been no showing wherein said amount is inappropriate.[5] In addition, such allowance is consistent with the reasoning followed in Conclusion of Law "G[1][b]". This decision does not, as a general proposition, establish 18-1/3% as an acceptable percentage for conversion fees, but only accepts said percentage and resultant amount as reasonable and allowable in this case.

H. With respect to the penalties Tax Law § 1446.2(a) provides, in part, that:

> "[a]ny transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount for each month of delay or fraction thereof after the expiration of the first month after such return was required to be filed or such tax became due, such interest penalty shall not exceed twenty-five per centum in the aggregate. If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

I. It is undisputed that, as a result of the position taken by petitioner with respect to calculating its gains tax liability, neither the proper amount of tax was remitted nor were returns timely filed in connection with any of the 7 transfers in question herein. The Audit Division excepted from the imposition of penalty 2 of such units since they were transferred during the course of the audit and were included by the auditor in her calculations at the time of audit. However, penalty was imposed on 5 of such units.

J. Petitioner maintains, in defense of its filing and payment record, that at the time of the subject conversions, the gains tax was then newly enacted and many questions existed surrounding the computation of tax and the requirements for filing and remittance, specifically with respect to cooperative conversions. Petitioner further asserts complete reliance was placed upon legal counsel regarding the manner of calculation of petitioner's gains tax liability, especially as to the initial question of whether petitioner was subject to the tax. In turn, noting the then nonexistence of judicial construction of the tax, specifically with respect to cooperatives, and also noting the then pendency of Matter of Mayblum v. Chu, supra, it is asserted that counsel's advice as reflected in petitioner's non-filing and non-payment constituted a reasonably

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[4]The term "conversion fee" is used instead of "commission" only to avoid confusion with the broker's fees previously discussed.

[5]It is particularly noteworthy that the conversion fee amount appears to have been a point of strong disagreement between petitioner and the two conversion managers, with the final dollar amount resolved only after protracted negotiations between these parties (see___ Finding of Fact "8").

taken position with respect to the manner of computing tax and remitting amounts due. Petitioner also notes its cooperation in the course of the audit, in terms of making books and records available, and its good faith payment of $25,000.00 at the conclusion of the audit.

K. Petitioner's assertions, centered essentially upon an interpretation of the law different from that taken by the Audit Division, do not establish and do not support a conclusion that penalty should be abated. Initially, it is noted that guidelines as to the taxability of cooperative conversions including, specifically, computational explanations, had been issued by the Audit Division and were available to the public early on.[6] Not only were such guidelines issued and the Audit Division's position made known at an early point (some 5 months after enactment of the statute), but there is no evidence of any request by petitioner or its counsel to the Audit Division for enunciation or clarification of the Audit Division's position. Further, it has been held, specifically with respect to gains tax penalties, that "the failure to pay a tax due to a different legal interpretation of a statute need not be considered 'reasonable cause'. In fact, if it were so considered, [the Commissioner] would rarely if ever be entitled to levy such penalties." (Matter of Auerbach v. State Tax Commn., Sup Ct, Albany County, March 27, 1987, Williams, J.) As explained at hearing, petitioner through its counsel was well aware of the Mayblum case and of the Audit Division's position, and consciously chose not to file or elect any option in the hope that the position advanced by the taxpayer in Mayblum would prevail. Thus, based on the facts, the Audit Division's imposition of penalty herein was appropriate and is sustained.

L. That the petition of Normandy Associates is granted to the extent indicated by Conclusion of Law "G(2)", such that the Audit Division is to reinstate as allowable the conversion manager's fee as claimed by petitioner. The petition, however, is in all other respects denied, and the Notice of Determination of Tax Due dated November 7, 1986, as modified in accordance herewith, together with such penalty and interest as is due, is sustained.

DATED: Albany, New York
June 9, 1988

_________________/s/_________________________
ADMINISTRATIVE LAW JUDGE

[6]Department of Taxation and Finance Publication 588, "Questions and Answers -- Gains Tax on Real Property Transfers", was issued in August 1983. Question and Answer number 20 in such publication, as well as Technical Services Bureau Memorandum 83-2(R), issued on August 22, 1983, discussed the taxability of and set forth the filing requirements for transferors of cooperative units.