STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of BERKELEY GROUP ASSOCIATES AARON ZIEGELMAN AND WILLIAM K. LANGFAN for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	: : : : : :	SUPPLEMENTAL DETERMINATION DTA NOS. 806126, 808574, 808575, 808576, 810096 AND 810097

Petitioners, Berkeley Group Associates, Aaron Ziegelman and William K. Langfan, c/o Joel Schneider, 152 West 57th Street, New York, New York 10019, filed petitions for revision of determinations or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A consolidated hearing was held with regard to four of the matters mentioned above, i.e., DTA Nos. 808574, 808575, 808576 and 806126, before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 28, 1992 at 9:15 A.M.

Subsequently, two additional matters, DTA Nos. 810096 and 810097 were consolidated with the first four by agreement of the parties and the permission of the Assistant Chief Administrative Law Judge on December 8, 1992. Although the parties were offered further time to submit documentation and briefs, the only further submission was petitioners' reply memorandum of law, upon which a due date of February 1, 1993 was agreed.

Petitioners appeared by Ziegler, Sagal & Winters, P.C. (Lanny Sagal, Esq., and Alan Winters, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed an exception to the determination of the Administrative Law Judge issued on July 30, 1993. In its decision, dated June 2, 1994, the Tax Appeals Tribunal denied

petitioners' exception, but remanded the matter to the Administrative Law Judge for the issuance of a supplemental determination to address the following issue which was not addressed in the determination of July 30, 1993.

ISSUE

Whether the transaction at issue herein should have been held open by the Division of Taxation in order to determine the actual amount of the adjustment payments made by petitioners.

FINDINGS OF FACT[1]

On July 28, 1992, the parties entered into a "Stipulation Admitting Certain Facts" which has been incorporated into the following Findings of Fact. In addition, petitioners submitted 18 proposed findings of fact which also have been incorporated in the following findings, except that paragraph "5" will be addressed in a different manner because it assumes the validity of the valuation ascribed to unsold shares established through expert testimony at hearing and only becomes relevant if the "value" of the negative carry is determined a proper factor in calculating original purchase price ("OPP"); paragraph "13" will be addressed in a different manner, but the facts will be presented; paragraphs "16(a)", "16(b)", "16(c)" and "16(d)" are in the nature of legal arguments and will not be included in the Findings of Fact.

Preamble

These matters involve four separate cooperative conversions of real property commonly known as 35-25 77th Street, 35-24 78th Street and 77-12 35th Avenue, Queens, New York (the "BGA Property"); 34-20 78th Street, Queens, New York (the "78 Property"); 61-41 Saunders Avenue, Queens, New York (the "Saunders Property"); and 102-12 and 102-32 65th Avenue, Forest Hills, New York (the "65th Avenue Property"). Petitioners, as sponsor of each cooperative conversion, transferred the subject real property to individual cooperative housing

[1]These findings incorporate the modifications made by the Tax Appeals Tribunal in their decision.

corporations prior to the effective date of the real property transfer gains tax ("gains tax") imposed by Tax Law Article 31-B. A portion of shares transferred to individual unit purchasers was conveyed pursuant to written contracts entered into prior to the effective date of the gains tax and thereby qualified for an exemption from the gains tax pursuant to Tax Law § 1443(6).

For each of the subject cooperative conversions, the Division of Taxation ("Division") determined that shares conveyed were subject to the gains tax. The Division, after determining the consideration received on taxable shares and the OPP allocated to such taxable shares, concluded that gains tax was required to be paid upon the transfer of units for each cooperative conversion. Notices of determination were issued by the Division that assessed gains tax on the transfer of shares for individual cooperative units of the 65th Avenue Property, the BGA Property, the 78 Property and the Saunders Property. It is notable that the Division recomputed the original gains tax determinations issued with respect to the BGA Property, the 78 Property and the Saunders Property.

Berkeley Group Associates ("BGA") was the sponsor of a cooperative conversion of the property known as the BGA Property (see, Preamble).

34-20 78th Associates was the sponsor of a cooperative conversion of the property known as the 78 Property (see, Preamble).

61-41 Saunders Associates was the sponsor of the property known as the Saunders Property (see, Preamble).

The conversions of the BGA Property, the 78 Property and the Saunders Property (collectively, the "Properties") were accomplished by the sponsor transferring the real property to the cooperative housing corporation ("CHC") in exchange for:

(a) the stock of the CHC not sold to unrelated parties at the time of conversion (the "unsold shares");

(b) the proceeds from the sale of stock of the CHC to unrelated parties at the time of conversion (net of certain expenses); and

(c) the assumption and/or the granting of a mortgage on the real property.

At hearing, petitioners' expert witness, Mr. James Levy, placed a value on the unsold shares in the BGA Property transfer from the sponsor to the cooperative housing corporation of $3,260,800.00. The closing statement valued the unsold shares at $5,100,626.30. The discount of the market value used by Mr. Levy was calculated by capitalizing the negative carry at 10% and deducting that amount from the discounted price of the unsold shares.

Using the same methodology for the 78 Property, Mr. Levy calculated a value for the unsold shares of $1,935,000.00, compared to the $2,323,320.36 set forth on the original closing statement. Finally, Mr. Levy calculated the value of the unsold shares for the Saunders Property to be $1,200,000.00, compared with the value ascribed to the property on the closing statement of $1,779,296.66.

The effective date of each of the BGA, 78 and Saunders conversions was prior to March 28, 1983, the effective date of the gains tax. In each case, there were sales of cooperative apartments which were exempt from the gains tax because the sales occurred on or before the effective date of the tax or were made pursuant to contracts entered into on or before the effective date of the tax (the "grandfathered sales"). The grandfathered sales in each of the foregoing conversions may be summarized as follows:

Property	Total Number of Shares [2]	% Grandfathered	Shares Allocable to Grandfathered Sales	Shares Allocable to Taxable Sales [2]
BGA	111,765	38.53	43,065	68,700

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[2] Includes all the shares in the conversion. The total number of shares covered in these conversions are as follows:

Property	Total Number of Shares	Number of Taxable Shares Sold
BGA	110,340	67,275
78	57,541	46,130
Saunders	20,288	16,385

78	57,864	19.72	11,411	46,453
Saunders	20,564	19.00	3,906	16,658

Each of the conversions was pursuant to a noneviction plan. Accordingly, the sponsor was required to make sales of apartments to at least 15% of the existing tenants of the Properties in order to have the plan effective. In each case, the sponsor offered discounts to the existing

tenants (the "insider discounts"). The sales to insiders were made at a discount in order to:

(a) achieve the level of insider sales necessary to have an effective plan; and

(b) achieve the lowest possible level of apartments occupied by protected tenants (as that term is defined below).

Under State and local laws, tenants of the Properties who did not wish to purchase their apartments (the "protected tenants") were entitled to remain as tenants as long as said tenants paid the rent increases permitted under the rent stabilization and rent control laws (which laws remained applicable to a protected tenant after the conversion) and did not breach their lease or statutory tenancy. Under these rent stabilization and rent control laws the sponsor, which becomes the owner of the apartments occupied by the protected tenants, is limited in its ability to raise the rents of protected tenants and may terminate their tenancies in only very limited circumstances.

From the effective date of the cooperative conversion until an apartment occupied by a protected tenant was sold, the sponsor was liable to the CHC for the maintenance payable with respect to such apartment and the sponsor was liable under the offering plan, the proprietary lease and applicable law for other expenses related to the tenancy of the protected tenant (e.g., interior repairs, appliance repairs, painting as required by rent stabilization laws). The sponsor was also entitled to the rent paid by the protected tenant occupying such apartment. (The excess of the maintenance payments and other expenses incurred as owners of the apartments occupied by protected tenants [i.e., insurance, repairs, management fees] over the

rent paid by the protected tenants is hereinafter referred to as the "negative carry".)

It is usual for a sponsor of a cooperative conversion to pay negative carry with respect to the unsold shares received by the sponsor in the conversion.

The failure of petitioners to pay the maintenance on the apartments represented by the unsold shares would have resulted in petitioners losing the ownership of such apartments (such maintenance charges constituting a first lien on the unsold shares).

The total negative carry for the BGA, 78 and Saunders conversions is as follows:

Property	Negative Carry
BGA	$536,133
78	121,869
Saunders	59,079
Total	$717,081

In each case, the sponsor sold to unrelated investors apartments occupied by protected tenants (the "investor sales"). The sales contract provided that the sponsor would pay the excess of the maintenance payments and other expenses incurred by the investors as owners of these apartments (e.g., insurance, repairs, management fees) over the rent paid by the protected tenants from the date the investor purchased the apartment until the date the protected tenant terminated its tenancy (such payment by the sponsor is hereinafter referred to as the "adjustment payment").

The adjustment payment provision first appeared in the contract of sale in paragraph "13" and is immediately preceded by the purchaser's promise to pay a fee of 6% of the monthly rents from the units of the protected tenants. Also, there was no allocation of the purchase price to this obligation or an explanation of a reduction in the consideration because of the adjustment payment incentive.

Paragraph "13" of the contract of sale reads as follows:

> "13. (a) Purchaser hereby designates Seller as its agent and Seller agrees to manage or retain a management company therefore and cause such manager to enter into a management agreement with the Corporation's managing agent to manage the Apartments in accordance with law, including General Business Law 352-eeee. Such agreement will be substantially on the same terms and conditions

as contained in the managing agent's agreement with the Corporation. Purchaser shall pay Seller a management fee equal to six (6%) percent of the monthly rents of the apartments to be conveyed hereunder and Seller shall be responsible for bearing the cost of the management fee charged by the managing agent of the Corporation. The provisions of this paragraph shall survive the Closing hereunder.

"(b) The term 'Operating Expenses' as used in this paragraph shall be deemed to mean:

"(i) all maintenance charges, utility charges, and any assessments payable by the Lessee to the Corporation under the terms of the Leases, except for assessments for capital improvements payable to the Corporation, (hereinafter 'Capital Improvement Assessments');

"(ii) the managing agent's fee as provided in paragraph 13(a) of this Agreement;

"(iii) the cost of liability insurance;

"(iv) the cost of repairs required to be made by the shareholder of the apartment under the By-Laws of the Corporation and the Lease and the cost of making repairs and furnishing services required under the provisions of the non-purchasing tenant's lease and as required by law, but in no event shall such costs be less than $30.00 per month per apartment; and

"(v) any other expenses which are ordinarily considered to be operating expenses in a cooperative building of a similar type.

"(c) In the event that any time during this Agreement there shall be insufficient monies on deposit with the managing agent to pay Operating Expenses as they become due, the Seller agrees to make prompt payment of same when due. Such payments, (hereinafter 'Operating Deficit Payments'), shall be reimbursed to Seller only as set forth in the following paragraph (d).

"(d) If in any calendar year the rental income from the Apartments shall exceed the Operating Expenses for such Apartments, such amount, (hereinafter the 'Surplus'), shall be paid to the Purchaser within thirty (30) days after the end of the calendar year; except that Seller shall be reimbursed from such Surplus to the extent that Seller has, during the term of this Agreement, made Operating Deficit Payments which have not been reimbursed. Such reimbursement shall be made annually on a cumulative basis within thirty (30) days from the end of each calendar year. For example, if Operating Deficit Payments for 1985 and 1986 are $1,000.00 and $2,000.00 respectively, then, if there shall be a Surplus in 1987 the Seller shall be reimbursed the sum of $3,000.00 out of such Surplus. Any amounts not so paid to Seller will be carried over and paid out of the next available Surplus. Proceeds from the sale of any Apartment shall not be included in rental income for the purposes hereof and there shall be no obligation to pay such advances from net sale proceeds. In addition thereto, any rent increase received due to capital improvements made by and paid for by the Seller shall inure to the benefit of the Seller and shall not be included in computing rental income.

"(e) Seller agrees to pay, when due, any Capital Improvement Assessments for an Apartment, but will be reimbursed by Purchaser from Purchaser's net profit from the sale of such Apartment.

"(f) Seller's obligation to make payments for Operating Deficit Payments and Capital Improvement Assessments for any Apartment shall cease (and Purchaser will be required to make such payments thereafter) upon the concurrence of any of the following events:

"(i) if a non-purchasing tenant in occupancy shall surrender possession of such Apartment, voluntarily or otherwise; or

"(ii) if that portion of Principal allocated to such Apartment, as evidenced by the Promissory Note and Pledge Agreement, is paid in full; or

"(iii) the expiration of fifteen (15) years from the date of the Closing."

It was highly unusual for a sponsor to assume the obligation to make adjustment payments after selling apartments occupied by protected tenants.

The actual amount of adjustment payments made by petitioners during the periods indicated below (prepared years after the transfers) is as follows:

	Amount of Adjustment Payments	Period
BGA	$ 814,536	1984-1990
78	23,678	1984-1990
Saunders	66,085	1984-1990
65	136,910	1983-1989
	$1,041,209	

Petitioners' expert, Mr. James Levy, calculated a fair market value of petitioners' obligation (within a month of the hearing) to make adjustment payments to the investors who purchased the unsold shares as follows:

	FMV of Adjustment Payment Obligation
BGA	$ 900,000
78	135,000
Saunders	23,000
65	265,000
	$1,323,000

Mr. Levy testified that these values were based on the actual adjustment payment made between 1983-1990 but did not explain the methodology or rationale for his calculation.

The Division computed the tax on the BGA, 78 and Saunders conversions as follows:

	BGA	78	Saunders
Consideration:			

Sales Price of Shares	$ 6,957,307	$ 2,821,640	$ 1,815,822
Mortgage	2,227,538	1,187,683	814,420
Less: Brokerage Fees	(347,865)	(141,082)	(90,791)
Less: Reserve Fund	(135,720)	(39,852)	(51,332)
Total Consideration	$ 8,701,260	$ 3,828,389	$ 2,488,119

Original Purchase Price:

Sponsor's Purchase Price to Acquire	$(1,926,357)	$(1,594,083)	$(1,314,448)
CHC Purchase Price to Acquire	-0-	-0-	-0-
Acquisition Costs	(35,943)	(55,549)	(42,296)
Capital Improvements	(706,768)	(490,494)	(312,220)
Conversion Costs	(218,105)	(89,940)	(70,327)
Selling Expenses	(39,960)	(48,053)	(4,021)
Negative Carry	-0-	-0-	-0-
Total Original Purchase Price	$(2,927,133)	$(2,278,119)	$(1,743,312)
Gain Subject to Tax	5,774,127	1,550,270	744,807
Tax (10%)	$ 577,412	$ 155,027	$ 74,481

These computations were made on the basis of the entire conversion. The Division also imposed penalties for late filing of returns, and penalties and interest for late payment of tax.

In March 1984, petitioners Ziegelman and Langfan timely filed a return TP-580 for the investor sales, the subject of DTA No. 806126.

In May 1988, petitioners filed an amended TP-580 electing to pay the tax in installments.

Petitioners converted property located at 102-12 65th Avenue and 102-32 65th Avenue, Forest Hills, New York on July 1, 1983, at which time petitioners filed the proper returns and paid tax of $40,142.00.

On January 5, 1984, petitioners sold shares and leases to a group of investors for an aggregate price of $3,994,038.00. The 134 apartments covered by these shares were occupied by protected tenants.

Petitioners received no cash consideration on the closing. Instead, petitioners received a promissory note secured by a pledge of the shares allocated to the cooperative apartment transferred and an assignment of the proprietary lease for said apartment.

At the time of this sale, petitioners filed a TP-580 reporting a gains tax liability of $147,612.00. The Division ultimately issued a Notice of Determination setting forth tax due of $131,723.00, plus penalty, interest penalty and interest.

Petitioners made no payment of tax under the incorrect assumption that a supplemental return had been filed and a deferred payment plan requested.

In May 1988, after they had protested the Statement of Proposed Audit Adjustment,

petitioners filed an amended return in which they elected to pay the gains tax in installments.

To the extent that the tax determined to be owing by petitioners is less than the tax set forth in Finding of Fact "14" above, there will be a corresponding reduction of interest and penalties owed to the Division.

The notices of determination issued in these cases are valid and petitioners timely filed petitions in these cases.

The Notice of Determination issued by the Division with regard to case number ("DTA#") 808574 concerned the cooperative conversion of buildings located at 35-25 77th Street, 35-24 78th Street and 77-12 35th Avenue in Queens, New York (the "Berkeley Conversion"). This Notice of Determination (Notice Number L-000749584-2), dated July 18, 1989, issued to Berkeley Group Associates, indicated a balance due of $1,059,573.87, representing $475,679.00 in tax, $417,407.22 in interest and $166,487.65 in penalty for the period ended March 29, 1983. A year later, on June 4, 1990, a redetermination occurred which increased the tax liability to $577,412.70. The Division issued two additional notices to cover this additional $101,731.70 liability, Notice Numbers L-001717155-7 for $51,532.19 (1985 and 1986) and L-001717224-9 for $50,193.93 (1983 and 1984).[3] These latter two notices were petitioned separately and are referenced as DTA# 810096. Finally, with regard to the cooperative conversions of the same properties listed above, the Division issued Notice Number L-001717166-6, for shares sold in 1987 and 1986, dated June 4, 1990, setting forth additional tax due in the sum of $6,503.19, plus penalty and interest. At conference, this amount was reduced to $4,664.83 and remains the amount in controversy. This matter was referenced as DTA# 810097 and, for unexplained reasons, was petitioned by Aaron Ziegelman, not Berkeley Associates. These cases dealt with the basis/mortgage issue, the negative carry issue and the adjustment payment issue.

DTA# 806126 concerned a Notice of Determination issued to Aaron Ziegelman and

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[3] There is a small unexplained discrepancy in the Division's amounts of tax, to wit: $51,532.19 + 50,193.93 = $101,726.12, not $101,731.70.

William K. Langfan, Notice Number 814-FA, dated July 13, 1988, which set forth additional tax due of $131,723.00, plus penalty and interest. The sole issue in this matter concerned the timeliness of petitioners' request to pay tax in installments.

DTA# 808575 concerned a Notice of Determination, Notice Number L-000749696-1, issued to Aaron Ziegelman on July 18, 1989, which set forth tax due of $581,400.00, plus penalty and interest, for the period ended March 29, 1983. The cooperative conversion in issue concerned premises at 61-40 Saunders Street, Rego Park, New York and involved the same issues set forth in Finding of Fact "18" above for DTA# 808574. Subsequently, on May 23, 1990, the Division redetermined the tax to be $74,435.70, plus penalty and interest.

Finally, DTA# 808576 concerned a Notice of Determination, Notice Number L-000749695-2, issued to Aaron Ziegelman on July 18, 1989, which set forth tax due of $1,177,000.00, plus penalty and interest, for the period ended March 29, 1983. The cooperative conversion in issue in DTA# 808576 concerned premises at 34-20 78th Street, 34-30 78th Street and 34-40 78th Street in Queens, New York and involved the same issues set forth in Finding of Fact "18" above for DTA# 808574.

Subsequently, on May 30, 1990, after further documentation was submitted, the Division redetermined tax due of $155,027.80, plus penalty and interest.

SUMMARY OF THE DIVISION'S POSITION

This case was remanded by the Tax Appeals Tribunal for the Administrative Law Judge to deal with the issue of whether the transfers at issue should be held open by the Division to determine the actual adjustment payments made by petitioners. Although the issue of adjustment payments was dealt with in the first determination, petitioners' argument that "the Department had consistently held open transactions which had contingent consideration", first mentioned in petitioners' hearing memorandum at page 77, was not addressed.

The Tribunal was particularly interested in: (1) whether the Division had a policy on whether a transaction like the one in issue should be held open to determine consideration; (2) if

so, the legal basis for this policy; (3) how it would be reconciled with the decision in Matter of Cheltoncort Co. v. Tax Appeals Tribunal (185 AD2d 49, 592 NYS2d 121); and (4) why the instant transaction would not be within the policy.

The Division responded to the Tribunal's questions in a letter to the Administrative Law Judge in which the Division referred to Tax Law § 1444.3(b), effective April 19, 1989, which provides that, in the case of a transfer where the total consideration is not determinable at the time questionnaires are submitted, no assessment of tax is allowed three years after the taxpayer notifies the Division that the total amount of consideration can be determined. The Division noted that before the effective date of Tax Law § 1444.3(b) there had been no provision in the Tax Law that extended the statutory period for assessing tax beyond three years. Under prior law, the Division had the ability to hold open a period of assessment only where a taxpayer executed an extension agreement. However, it was not until after the change in Tax Law § 1444.3(b) that the Division began notifying transferors and transferees of their responsibility to inform the Division of situations involving contingent consideration.

The Division specifically distinguished Matter of Cheltoncort Co. v. Tax Appeals Tribunal (supra [wherein the Division determined that a sponsor of a cooperative conversion plan realized consideration from a "sweetheart" lease with the cooperative housing corporation]) because therein it specifically concluded that it was possible to determine the economic gain from the sweetheart lease at the time of the transfer. The Division points out that Cheltoncort was not an instance where the provisions of Tax Law § 1444.3(b) would be relevant.

The Division further argued that the purchase price was allocated only to the shares of capital stock of the corporation, while the operating deficit payments ("adjustment payments") and the 6% fee on rental payments borne by investors related to responsibilities and rights which arose after the purchase of the shares by investors, and were unrelated to the consideration paid for the shares of stock upon which the tax was calculated.

The Division's arguments highlight the valuation problem which was directly dealt with

by the Tribunal in its decision. The Division noted that, in direct contrast to Cheltoncort, there was no observable economic loss or gain for the sponsor by virtue of the operative provisions of the agreements and, although the sponsor might be liable for operating deficits in one year, it could recognize an operating surplus in a future year which would offset its prior liability. This was further complicated by the ambiguous nature of the term of the sponsor's liability to make operating deficit payments, since the sponsor's obligation could be extinguished at any time, or at least within 15 years, when a nonpurchasing tenant-in- possession surrenders a unit. In contrast, the sweetheart lease in Cheltoncort was "under concededly advantageous terms" and of a measurable and specific value which resulted in economic gain for the sponsor that was held consideration for the building transfers. The operative provisions of the relevant agreements in issue herein do not demonstrate any relationship between the building transfers and there has not been a showing that the operative provisions would advantageous for either the plan sponsors or the purchasers of the shares.

CONCLUSIONS OF LAW

A. Tax Law § 1440.1(a) defines "consideration" as follows:

> "'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."

In Matter of Cheltoncort Co. (Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121), the Tribunal stated that:

> "In calculating the amount of tax due upon a taxable transaction, the value of the consideration has to be determined at the time of the transfer in order to finally fix the tax owed. Subsequent events do not alter the value that the consideration had at the time of the transfer" (emphasis added).

Petitioner, citing Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992), contends that the Division has consistently held open transactions which involved contingent consideration. In that case, the Tribunal considered an analogous (though converse) situation to

that found in the Cheltoncort matter. There, petitioner sought to include in consideration (for purposes of calculating its original purchase price) certain liabilities it had assumed from the seller upon its acquisition of real estate. Though it appeared the petitioner in V & V may not in fact have ultimately paid such liabilities, the Tribunal nonetheless allowed the same as part of consideration, holding that original purchase price includes "any consideration paid or required to be paid by the transferor." The Tribunal noted that:

> "[W]hether petitioner has paid this amount is not determinative, but rather, the determinative factor is whether petitioner was required to pay this amount at the time the transfer occurred. Subsequent events do not affect the amount of liability assumed by petitioner at the time it acquired the property" (emphasis added).

A footnote included in the Tribunal's decision in V & V specifically affirmed this holding as being consistent with prior Tribunal decisions stating that the amount of consideration must be determined at the time of transfer and cannot be reduced based on subsequent events (citing Matter of Cheltoncort Co., supra; Matter of Perry Thompson Third Co., Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121).

In the instant action, the Tax Appeals Tribunal addressed the substantive issue of whether petitioners' taxable gain should be reduced by the amount of adjustment payments made. In Matter of Berkeley Group Associates, Aaron Ziegelman and William K. Langfan (Tax Appeals Tribunal, June 2, 1994), the Tribunal affirmed the determination of the Administrative Law Judge which had held that petitioners were not entitled to reduce consideration by the obligation to make adjustment payments. The basis upon which the Administrative Law Judge and Tribunal made their determination and decision, respectively, was that, under the facts and evidence presented herein, the evidence of valuation, both testimony and documentation, failed to prove the value of the adjustment payments.

Further, the Administrative Law Judge and Tribunal also denied the allocation of consideration from the conversion to the adjustment payment obligation holding that the obligation was, at least in part, paid for by the purchaser's promise to pay a fee of 6% of the monthly rents to petitioners. Petitioners were found not to have established the value of the promise to pay the 6% of the rents or what portion of the payment was for petitioners' promise

to make the adjustment payments as opposed to other aspects of petitioners' management services.

The Administrative Law Judge and Tribunal also concluded that petitioners were not entitled to treat the adjustment payments as a discount, credit or rebate pursuant to 20 NYCRR 570.37 because no evidence was presented which demonstrated that these payments had been valued or that there had been an allocation of purchase price attributed to the payments at the time of the transfer. Since it was petitioners' own failure to present the evidence necessary to prove the fair market value of the adjustment payments at the time of the transfer or to attribute a reasonable value to these payments in the offering plan or contracts of sale, the transaction should not be held open by the Division to determine the actual amount of petitioners' adjustment payment obligation.

Petitioners argue that a Division memorandum, TSB-M-86(4)-R, issued May 28, 1986, containing summaries of the various letter opinions not specifically addressed in Publication 588 (November 1984) or in the regulations (effective September 24, 1985), supports their position that the adjustment payments should be allowed as an adjustment to consideration and that the transaction should be held open in order that the adjustment payments might be factored in the computation of consideration. That memorandum states, with respect to contingent payments, that:

> "Where a contract contains an unvalued benefit or provides for a contingent payment, the Department will issue either a Statement of Tentative Assessment or Statement of No Tax Due based on the known consideration. An agreement extending the statute of limitation of time for assessment will be required to be filed. If there is additional consideration received for the transfer at a later date, the transferor and transferee, [sic] are required to file updated questionnaires disclosing the actual consideration for the transfer of real property."

Petitioners argue that the memorandum recognizes that in some circumstances consideration cannot be determined at the time of transfer and has to be determined at a future time. Petitioners point out that the memorandum addresses the situation where, at the time of transfer, the minimum consideration is established and additional consideration is contingent on future events, while in the instant matter the maximum consideration is established at the time

of transfer and the actual consideration is contingent on future events. Petitioners conclude that they require analogous protection (like that afforded to the Division pursuant to the memorandum) because it was reasonably foreseeable that the consideration would likely be reduced in the future.

However, the facts of this matter do not support petitioners' conclusion. The Division more accurately portrayed the situation in its letter, wherein it stated:

> "In these matters it is important to consider that the relevant documents (stipulation Exhibit 'B') explain only that the purchase price was allocated to the shares of capital stock of the corporation. The contingent nature of the operating deficit payments does [sic] make the consideration for the sale of shares similarly contingent. The operating deficit payments relate to responsibilities and rights that arise with the purchase of the shares by the investors. Therefore, any debt that the investors may incur because of their obligation to pay the 6% fee on rental payments received, or any debt that the plan sponsor incurs due to its agreement to make operating deficit payments, would arise only after the transaction subject to tax (i.e., the transfer of shares) is completed. The operating provisions in the relevant agreements allow no right of 'set-off' against consideration due on the transfer of shares" (emphasis added).

Therefore, not only is it found that petitioners failed to present the evidence necessary to prove the fair market value of the adjustment payments at the time of the transfer or thereafter, it is also concluded that the investors' obligation to pay the 6% fee on rental payments received and the debt the plan sponsor incurred due to its agreement to make operating deficit payments arose after the transfer of shares was completed and that the provisions of the relevant agreements did not permit or imply a set-off against consideration due on the transfer of shares. Therefore, it has not been demonstrated that it was ever intended that the adjustment payments diminish the consideration paid for the shares.

B. The petitions of Berkeley Group Associates (DTA Nos. 808574 and 810096), Aaron Ziegelman (DTA Nos. 808575, 808576 and 810097) and Aaron Ziegelman and William K. Langfan (DTA No. 806126) are denied and the notices of determination dated June 4, 1990,

July 13, 1988 and July 18, 1988, as modified (see, Findings of Fact "18", "19", "20" and "21"), are sustained.

DATED: Troy, New York
February 2, 1995

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE