STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FISHER REALTY CO.	:	DETERMINATION DTA NO. 807086
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, Fisher Realty Co., 71 Park Avenue, New York, New York 10011, 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.

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 28, 1991 at 9:45 A.M., with all briefs to be submitted by August 5, 1991. Supplemental comments were received on behalf of petitioner on April 17 and May 11, 1992 and on behalf of the Division of Taxation on May 1, 1992. Petitioner appeared by Kostelanetz Ritholz Tigue & Fink (Kevin M. Flynn, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUE

Whether penalties based on the late payment of gains tax and on the late filing of certain gains tax returns should be abated.

FINDINGS OF FACT

Petitioner, Fisher Realty Co., is a New York general partnership. Its partners are Stephen Fisher and his wife, Renee Fisher.

On July 1, 1974, Stephen Fisher acquired the apartment buildings known as 425, 429 and 433 West 24th Street, New York City. The purchase prices ascribed to the three properties were as follows:

Street Address of Property	Price
425 West 24th Street	$ 690,000.00
429 West 24th Street	660,000.00
433 West 24th Street	650,000.00
Total	$2,000,000.00

The structures on the properties had been built in 1887, 1888 and 1889 as six 25-foot wide five-story tenements, two on each parcel. In 1968, 1970 and 1971, the buildings were renovated and converted into three 50-foot wide elevator apartment houses known as 425, 429 and 433 West 24th Street.

It appears that Stephen Fisher transferred title to petitioner on December 20, 1976.[1]

At some point, the partners decided to offer the property for sale under a cooperative conversion, and retained the law firm of Olnick, Boxer, Blumberg, Lane & Troy ("Olnick, Boxer") to handle the conversion. Petitioner was "Sponsor" of the offering.

By contract of sale dated July 15, 1981 and recorded in the office of the City Register of New York County on March 28, 1983, petitioner agreed to sell the subject premises to West 24th Owners Corp., a New York cooperative housing corporation. The property was to be sold subject to the following:

> "The lien of a purchase money 'wraparound' mortgage, maturing on June 30, 1989, to be taken back by Seller in the principal sum of $2,000,000.00 (the 'Wraparound Mortgage'), which will be subordinated to and will consist of (i) an aggregate of the unpaid principal balances of the first and second mortgages on the Property (as more fully described in the Plan) (the 'Mortgage') and (ii) the difference between such balances and $2,000,000 as same may be reduced from time to time (as more fully described in the Plan);"[2]

The offering plan to convert the premises to cooperative ownership was dated June 15, 1982

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[1]The Offering Plan, a copy of which is included in Exhibit "1", states on page 81 that petitioner "acquired the Property on December 20, 1976". The statement "Purchase Price to Acquire", also included in Exhibit "1", states that petitioner acquired the premises on July 1, 1974 for $2,000,000.00 plus $109,489.85 in expenses. The latter statement would appear to refer to Mr. Fisher's original purchase (Finding of Fact "2").

[2]Contract of Sale, paragraph 3(a)(1), as incorporated in Exhibit "2".

and was amended four times, by amendments dated September 28, 1982, November 1, 1982, March 18, 1983 and October 5, 1983. The Fourth Amendment, dated October 5, 1983, declared the plan effective as a non-eviction plan, based upon the receipt of 23 subscription agreements as of October 4, 1983. Accordingly, the closing date was set as January 10, 1984. Paragraph 3 of said amendment provided as follows:

> "3. GAINS TAX COMPLIANCE
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> The Sponsor shall pay out of the proceeds of this offering any New York State Real Property Transfer Gains Tax (the 'Gains Tax') which may be imposed pursuant to Article 31-B of the New York State Tax Law (the 'Gains Tax Law') as a result of the transaction contemplated by this offering. The Sponsor and each subscriber will be obligated to comply with any pre-audit procedures then pertaining to the Gains Tax and to sign and swear to such forms as are required under the Gains Tax Law. In addition, each subscriber, if requested by the Sponsor, agrees to appoint an individual designated by the Sponsor, as his true and lawful agent to: (a) execute on his behalf all required Gains Tax Law forms; (b) receive on his behalf a Statement of Tentative Assessment or Statement of No Tax due required under the Gains Tax Law; and (c) receive on his behalf the Release of Liability required under the Gains Tax Law.
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> Annexed hereto as Exhibit 'B' is the form of Transferee Questionnaire (TP-581) required under the Gains Tax Law to
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> be signed by each subscriber before a notary. Each subscriber must complete said form and deliver or mail it to the Selling Agent within five (5) days after receipt."

On December 19, 1983, Olnick, Boxer submitted to the Division of Taxation a letter requesting a "Statement of No Tax Due" with respect to the conveyance of the premises from petitioner to the apartment corporation, together with documentation in support of the request.[3] In essence, the basis for the requested exemption was that the contract had been entered into and, in fact, recorded, prior to the effective date of the real property gains tax.

Also on December 19, 1983, under separate cover from the documents referred to in Finding of Fact "8", Olnick, Boxer submitted to the Division of Taxation a letter and documentation in connection with the transfer of shares from the apartment corporation to

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[3]Exhibit "2".

individual subscribers and the transfer of the remaining unsold shares to the sponsor.[4]

Documentation Under Option B

The following was submitted as "documentation under 'OPTION B' for the original submission as requested pursuant to...TSB-M-83-(2)-R dated August 22, 1983":

(a) copies of the Offering Plan and the four amendments;

(b) statement of Gross Consideration executed by Stephen Fisher, as partner of petitioner stating that:

(i) 886 shares allocated to 11 apartments would close on January 10, 1984 for total cash consideration of $620,584.10;

(ii) 889 unsold shares allocated to 5 vacant apartments would be issued to petitioner for total cash consideration of $311,336.69;

(iii) 8,019 unsold shares allocated to 80 occupied apartments would be issued to petitioner for total cash consideration of $2,246,683.23; and

(iv) total anticipated gross consideration was $3,178,604.02.

(c) a letter of A. J. Clarke Management Corp. stating that said firm was to receive a brokerage commission of 6% on each apartment sold, upon closing; and

(d) statement of "Purchase Price to Acquire", stating that petitioner had acquired the premises on January 1, 1974. The purchase price was stated to be $2,109,489.85, consisting of $2,000,000.00 in consideration plus $109,489.85 in expenses. A schedule itemizing the claimed expenses was also attached. Copies of the closing statement and contract of sale with respect to Stephen Fisher's purchase of the premises on January 1, 1974 were also

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[4]Exhibit "1".

enclosed.

(e) schedule of "Capital Improvements".[5]

(f) statement of "Method of Apportionment" showing the number of shares of stock allocated to each apartment.

(g) "Summary Schedule".[6]

Documentation Under Procedure B

The following was submitted as "the requisite documentation under 'Procedure B' for the sale of certain Shares of the Apartment Corporation by the Sponsor to individual purchasers as required pursuant to your Department's Publication 587 dated June 1983, as amended by...TSB-M-83(2)-R dated August 22, 1983":

(a) for subscription agreements entered into prior to March 29, 1983:

(i) transferor questionnaire of the sponsor;

(ii) five transferee questionnaires for subscribers; and

(iii) five applicable subscription agreements.

(b) for subscription agreements entered into on or after March 29, 1983:

(i) transferor questionnaire of the sponsor;

(ii) six transferee questionnaires for subscribers;

(iii) six applicable subscription agreements; and

(iv) six schedules of apportionment applicable to each individual subscriber.

The aforementioned letter enclosing the above documents concluded, in part:

"Based upon the within documentation, your Department will have the

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[5]Copy not included in Exhibit "1".

[6]Copy not included in Exhibit "1".

necessary information to enable it to prepare a Tentative Assessment and Return or Statement of No Tax Due, as appropriate with respect to the conveyance of shares of the Apartment Corporation by the Sponsor to individual purchasers."

On February 17, 1984, Olnick, Boxer again wrote to the Division of Taxation advising that the closing took place on January 10, 1984 and that on said date petitioner conveyed fee title to the apartment corporation. The letter also advised that: 584 shares of stock were issued to purchasers who entered subscription agreements prior to March 29, 1983; 1,257 shares were issued to 15 purchasers who entered into subscription agreements on or after March 29, 1983; 7,953 unsold shares were issued to petitioner; and 87 shares allocated to one purchaser who entered into a subscription agreement on or after March 29, 1983 had not yet closed.

Documentation Under Option B

Enclosed with the letter was the following "supplemental documentation under 'OPTION B'":

(a) "Exhibit 'A' Summary Schedule", a recalculation of the "Original Summary Schedule...[submitted December 19, 1983] revised in accordance with the information contained in Tentative Assessment No. C-794-(7-12) dated January 10, 1984". This schedule showed total anticipated gain subject to tax as $475,499.02; and

(b) "Exhibit 'B' Summary Schedule", a "New Summary Schedule", based on the recalculation of the data on the Exhibit 'A' Summary Schedule and on the 11 subscription agreements submitted therewith. This schedule showed the total anticipated gain subject to tax as $403,191.44.

Documentation Under Procedure B

Also submitted as the "requisite documentation under 'Procedure B'" was:

(a) for subscription agreements entered into prior to March 29, 1983:

(i) transferor questionnaire of petitioner;

(ii) two transferee questionnaires; and

(iii) two applicable subscription agreements.

(b) for subscription agreements entered into on or after March 29, 1983:

(i) transferor questionnaire of petitioner;

(ii) nine transferee questionnaires;

(iii) nine applicable subscription agreements; and

(iv) nine schedules of apportionment applicable to each individual subscriber.

The letter of February 17, 1984 concluded, in part:

> "Based upon the within documentation, your Department will have the necessary information to enable it to prepare a Tentative Assessment and Return and/or Statement of No Tax Due, as appropriate, with respect to the conveyance of Shares of the Apartment Corporation by the Sponsor to individual purchasers."

On September 5, 1985, Olnick, Boxer submitted supplemental documentation under "OPTION B" consisting of the following:[7]

(a) "Exhibit 'C' Summary Schedule" based on a recalculation of data previously submitted on Exhibit "B" (Finding of Fact "10[b]"), and new data and correction of errors contained in Tentative Assessment No. C-794-(15-23);

(b) "Revised Schedule and Summary for Tentative Assessment No. C-794 (15-23)"; and

(c) certified check dated September 5, 1985 in the amount of $11,107.13 representing "tax due based upon the Revised Schedule and Summary for Tentative Assessment No. C-794-(15-23) prepared by our client".

As noted in Finding of Fact "10", the first cooperative closings took place on January 10, 1984. In the course of approximately one year, 27 of the 96 apartments had been sold. Petitioner entered into a contract of sale, dated as of January 21, 1985, for the sale of the 7,502 remaining shares and petitioner's interest in the proprietary leases to the 69 apartments

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[7]The letter of September 15, 1985 is in the record as Exhibit "7". Copies of the enclosures are not included with said exhibit.

represented by said shares, to Armand Lasky for $4,100,000.00 ("the bulk sale").

Petitioner retained the law firm of Schulte Roth & Zabel to handle the bulk sale, because Stephen Fisher's then son-in-law was a young attorney associated with that firm and Mr. Fisher wanted to help his then son-in-law's career. Olnick, Boxer, however, continued to represent petitioner in all other matters involving the cooperative, including gains tax.

The bulk sale to Mr. Lasky apparently closed on May 20, 1985.[8]

By letter dated February 11, 1986, Olnick, Boxer enclosed the following supplemental documentation under "OPTION B":

(a) A "Summary Schedule" dated December 23, 1985, covering the sale of all apartments except apartment 2E, which was subject to litigation and was not expected to close for several years;

(b) a "Schedule of Additional Capital Improvements and Conversion Expenses" dated December 23, 1985;

(c) transferor questionnaire of petitioner;

(d) transferee questionnaires, schedules of apportionment and contracts of sale regarding three separate apartments and the 69 apartments included in the bulk sale; and

(e) petitioner's check dated December 20, 1985 in the amount of $111,173.64, representing tax due based on the enclosed summary schedule, less prior payments made.

On March 6, 1986, the Division of Taxation responded to the submission of February 11, 1986, requesting additional breakdown and explanation as to various costs and expenses.

On April 16, 1986, Olnick, Boxer submitted the detailed information requested by the Division of Taxation and also conceded that nine renovation items totalling $122,050.00 were actually applicable to other buildings and that petitioner wished to correct the Schedule of Additional Capital Improvements and Conversion Expenses by deleting said amount.

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[8]Transferee Questionnaire of Armand Lasky sworn to February 4, 1986, copies of which are attached to Exhibits "8" and "9".

On May 5, 1986, a "Schedule of Adjustments" was issued to petitioner. The adjustments used petitioner's figures for consideration and brokerage, but disallowed certain components of the original purchase price claimed by petitioner, i.e., the original purchase price was adjusted from $2,648,388.52 to $2,356,568.90. The Schedule of Adjustments was as follows:

"Items and Explanation:		Adjusted Amounts
Option B Update Totals		
Consideration:	5,697,468.30	
Less Broker	341,848.10	
Net Consideration		$5,355,620.20

Original Purchase Price: (see Attached for Disallowances)[9]		2,356,568.90
Gain:		2,999,051.30
Less: Grandfathered Units		449,569.93
Taxable Gain	2,549,481.37	
Estimated Tax (10% of Gain)	254,948.14	
Less: Assessed	22,437.63	
Estimated Tax Remaining:	232,510.51	
Tax per Share (7,850 Shares Remaining)		$29.6192

Exp.: Unit 2C (433 West 24th St.)
Shares X Tax Per Share = Est. Tax on Unit
(87) X (29.6192) = (2,576.87)"

Also on May 5, 1986, the Division of Taxation issued tentative assessments and returns with respect to the sale of the three apartments and also with respect to the bulk sale of May 20, 1985. The tentative assessments for the three apartments were shown to be the amounts paid on February 14, 1986 with respect to said apartments, with no tax due. The tentative assessment for the bulk sale was shown to be $222,203.24, less $102,969.12 paid on February 14, 1986, for a total remaining due of $119,234.12. No penalty or interest was shown on any of the aforesaid tentative assessments and returns.

On June 2, 1986, Olnick, Boxer returned the tentative assessments and returns issued May 5, 1986, with the transferor affidavit portion thereof sworn to by petitioner on May 24, 1986 and enclosed a check for $119,234.12. The letter noted that there were discrepancies in certain allowances and that petitioner had been advised to apply for a refund.

On December 22, 1986, Olnick, Boxer

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[9] The attachment consisted of 11 pages of disallowed expenditures and has not been reproduced here.

wrote to the Division of Taxation advising that it had completed the last transfer (apartment 2E at 433 West 24th Street) and enclosed the following:

(a) transferor questionnaire of petitioner;

(b) transferee questionnaire for apartment 2E;

(c) schedule of apportionment;

(d) closing statement for apartment 2E;

(e) A "Final Summary Schedule", dated November 3, 1986, showing original purchase price of $2,356,568.90 and taxable gain of $2,551,658.90; and

(f) check in the amount of $2,320.51 "representing the final amount of gains tax due with respect to this project".

On January 13, 1987, the Division of Taxation wrote to Olnick, Boxer stating, in part, as follows:

> "Before we issue on unit 2E, which you claim to be your last unit, we will need answers to the following: 1. We have unit 433/3E being sold to R. Fox listed as a grandfathered unit, we also show the same unit being sold to K. W. Karlson with a tax assessed of $3,050.18 please explain. 2. According to our records we have issued no Tentative Assessment for unit 425/5D."[10]

With respect to the question as to apartment 5D at 425 West 24th Street, the attorney who

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[10] Exhibit "17".

handed the matter at Olnick, Boxer submitted his affidavit dated February 24, 1987 stating, in essence, as follows:

(a) That the closing originally scheduled for

January 10, 1984

had been adjourned at the request of the purchaser's attorney because the purchaser had not received a mortgage commitment.

(b) The apartment closed on February 16, 1984 for a purchase price of $59,316.60 and a transferee questionnaire was received by the law firm.

(c) The transferee questionnaire was inadvertently placed in the building's closing file and was not discovered until receipt of the Division of Taxation's letter of January 13, 1987 (supra).

On March 6, 1987, the Division of Taxation issued tentative assessments and returns showing the following adjustments:

"Items and Explanation: ADJUSTED AMOUNTS

OPTION 'B' PROJECT TOTALS

ACTUAL CASH	$5,713,567.00
MORTGAGE	$2,000,000.00
GROSS CONSIDERATION	$7,713,567.00
BROKERAGE FEES - 6%	$342,814.02
ORIGINAL PURCHASE PRICE	$2,356,568.90
ANTICIPATED GAIN	$5,014,184.08
TAX @ 10%	$501,418.41
LESS TAX ATTRIBUTABLE TO GRANDFATHER SALES	$38,216.80
LESS TAX ASSESSED ON PREVIOUS UNITS	$252,845.33
REMAINING TAX TO BE APPLIED TO LAST 2 UNITS	$210,356.23
TAX PER UNIT	$105,178.11

PLEASE NOTE THAT THE ABOVE CALCULATIONS WERE USED TO COMPUTE THE TAX DUE ON ALL SUBMISSIONS."

Tax of $105,178.11 each was calculated with respect to units 433 West 24th Street Apartment 2E and 425 West 24th Street Apartment 5D. Penalty and interest were also

computed. The sum of $2,320.51 previously paid with respect to 433 West 24th Street Apartment 2E was deducted from the total due on said apartment.

On April 28, 1987, the law firm of Stroock & Stroock & Lavan (the firm with which Olnick, Boxer had merged) wrote to the Division of Taxation enclosing petitioner's check for $210,356.22 representing the final tax due as shown on the schedule of adjustments of March 6, 1987. The letter protested the imposition of penalties on essentially two grounds:

(a) that the questionnaire for unit 5D had inadvertently been misfiled by a paralegal and thus had never been filed with the Division of Taxation; and

(b) that petitioner had "adopted the tax per share as calculated and reflected in the [Gains Tax] Bureau's worksheets".[11]

On May 27, 1987, the Division of Taxation wrote to petitioner's attorneys acknowledging payment of the penalty and interest and stating, in pertinent part, as follows:

> "Before we can make any adjustments to the penalty and interest imposed, we will need the following information and documents.
>
> (1) A schedule listing all 96 apartments in the cooperative project, and the date each apartment was transferred [sic] to their [sic] individual purchaser.
>
> (2) Copies of the cancelled checks used in payment of the Gains Tax. Also, schedules of what apartments were covered by each tax payment.
>
> In reviewing our file for Fisher Realty Co., we found that an Option 'B' project update was filed in February 1986. In the summary schedule, dated December 23, 1985, the total anticipated gross consideration was reported at $5,697,468. Did this amount include the mortgage indebtedness of 2,000,000? [sic]"

On June 23, 1987, petitioner's attorneys responded, submitting:

(a) A "Schedule of Units, Tentative Assessments and Returns and Gains Tax Payments";

(b) A "Schedule of Checks in Payment of Gains Tax"; and

(c) copies of original and cancelled checks.

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[11] Exhibit 20, page 3.

The letter stated in part, as follows:

> "Also, regarding the mortgage indebtedness of $2,000,000, please note that this amount was included in the Gains Tax Bureau's worksheets and in our Summary Schedule on file with the Gains Tax Bureau as of August 13, 1985.[12] It appears that the $2,000,000 in mortgage indebtedness, however, was not included in the Summary Schedule dated December 23, 1985. We would appreciate your forwarding to us a copy of the December 23, 1985 Summary Schedule contained in your files so that we can confirm that we are referring to the same schedule."

On July 22, 1987, the Division of Taxation responded, enclosing a copy of the December 23, 1985 Summary Schedule and requesting additional information. The letter also stated as follows:

> "In reviewing the information and documents filed, we found that check #137 for $111,173.64 was returned to us by the bank as uncollected. Therefore, the $111,173.64 remains due."

On August 20, 1987, petitioner's attorneys submitted additional information, together with a replacement check for the $111,173.64.

On October 8, 1987, the Division of Taxation recomputed the tax, penalty and interest due from petitioner. A letter of said date transmitting the recomputation to petitioner's attorneys stated, in pertinent part, as follows:

> "Based on the information and schedules received by our office, we have reviewed the file of Fisher Realty Co. It was revealed that in February 1986, an option 'B' project update was filed. The reported gross consideration of $5,697,468, did not include the mortgage indebtedness of $2,000,000. This resulted in an understatement of both the
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> gain subject to tax and the tax due on assessments number 24 through 27, which were issued on May 5, 1986.
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> * * *
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> The review of the information received, also revealed that the tax due on all apartment sales reported to our Office from February 14, 1986, was paid a year or more after the apartments were transferred from Fisher Realty Co. Therefore, we have computed penalty and interest for failure to pay the tax due on the date of transfer, pursuant to Section 1442 of the Tax Law."

The recomputation was as follows:

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[12] It is unclear to which Summary Schedule this statement refers.

Tax	$463,201.60
Penalty	160,341.43
Interest	90,642.48
Less: Payments made	(465,522.12)
Amount Due	$248,663.39

In response to a request by petitioner's attorneys, the Division of Taxation sent a copy of the returned check for $111,173.64 on October 29, 1987.

Background of the Uncollected Check

Petitioner's check number 137 dated December 20, 1985 in the amount of $111,173.64 (Finding of Fact "15[e]") was drawn on Chemical Bank ("Chemical") account number 114-290741, which was a money market account.[13] Petitioner had instructed Chemical that said account was to be closed on December 31, 1985 and the check was to be charged against account number 114-273707. As noted in Finding of Fact "15", the check was not sent to the Division of Taxation until February 11, 1986. The check was presented to Chemical on February 19, 1986 and was returned to the Division on February 26, 1986, unpaid, as the account had been closed. The

Division's transmittal memorandum[14] for the returned check bears the notation "Refer to Maker", however, the Division did not advise petitioner of the check's dishonor for 17 months (Finding of Fact "28"). Chemical has acknowledged that petitioner was not notified that the check had been returned, as the bank's computer system does not print an advice to notify a customer when a check is returned because an account has been closed. Chemical has confirmed that the balance in account number 114-273707 on February 19, 1986 was $722,875.69 and the check would have cleared if petitioner's instructions had been followed. It appears that Chemical's failure to follow the instructions may have been attributable to the sudden death, in late December, 1985, of the officer handling petitioner's accounts.

Notice Of Determination Of Tax Due

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[13]Transcript, page 61.

[14]Attachment to Exhibit "26".

On March 3, 1988, the Division of Taxation issued a Notice of Determination of Tax Due under Gains Tax Law, stating that petitioner had not shown sufficient grounds for abating the penalty and interest. Accordingly, the notice asserted penalty of $159,351.94, interest of $89,311.45 and additional interest (interest on $89,311.45 from August 22, 1987 through March 31, 1988) of $4,259.77, for a total due of $252,923.16.

SUMMARY OF THE PARTIES' POSITIONS

There are three separate aspects to the penalties at issue:

(a) The $2,000,000.00 Understatement of Gross Consideration.

Petitioner claims that it relied on the Division of Taxation's computation of the tentative assessments and paid whatever it was asked to pay and that the $2,000,000.00 wraparound mortgage had been specified in the

contract and offering plan submitted with other documentation on December 19, 1983. Petitioner asserts that it relied on the advice of counsel and that the advice was reasonable given the confusion existing at the time of the imposition of the new tax.

(b) The Returned Check.

Petitioner claims that no penalty or interest should be due with respect to the $111,173.64 tendered by the check which was returned by Chemical, that the original error was that of the bank and it was compounded by the Division's failure to notify petitioner that the check had been returned unpaid.

(c) The Unreported Transaction.

Petitioner claims that since the sale of apartment 5D at 528 West 24th Street was unreported due to a clerical error by a paralegal at its law firm's office, the penalty should be abated.

In essence, petitioner claims that its reliance on its attorneys with respect to the report of gross consideration and for filing returns, coupled with the bank error and the Division's laxity regarding the uncollected check, constitute reasonable cause and that the penalty and interest

penalty, as well as interest attributable to the returned check, should be cancelled. The Division of Taxation, however, asserts that reliance on counsel does not constitute reasonable cause and that the Division should not be held responsible when a check is tendered on a closed account. The Division also maintains that it has no obligation to do anything after a check is returned unpaid.

CONCLUSIONS OF LAW

A. The real property gains tax was enacted by the Laws of 1983 (ch 15, § 181), effective March 28, 1983, and is applicable to transfers made after said date.[15] The tax is 10% of the gain derived from the transfer of real property in New York State (Tax Law § 1441).

B. Tax Law § 1442, as originally enacted, provided, in pertinent part, as follows:

> "Payment of Tax. The tax imposed by this article shall be paid by the transferor to the tax commission, or to any agent of such commission appointed pursuant to section fourteen hundred forty-nine-b of this article, on the date of transfer. In the case of a transfer pursuant to a cooperative or condominium plan, the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred. For purposes of calculating the amount of tax due in each such transfer, an apportionment of the original purchase price of the real property and total consideration anticipated under such plan shall be made for each such cooperative or condominium unit."

It is noted that while petitioner elected the "Option B" method for calculating gains tax under TSB-M-83-(2)-R, the Technical Services Bureau Memorandum itself is not in the record. With respect to time of payment for tax calculated pursuant to said memorandum, however, it is noted that the Tax Appeals Tribunal has stated the following:

> "In August 1983 the Division issued Publication 588, Questions and Answers on the Gains Tax, which made it clear that in a cooperative conversion gains tax was due at the time the shares allocated to each unit were sold (Question and Answer No. 20). Also in August, 1983, the Division issued TSB-M-83-(2)-R which set forth two methods for calculating the gains tax due on each transfer of shares allocated to a unit in a cooperative plan. This TSB-M also made it clear that the 20 day pre-transfer audit procedure applied to each transfer of shares allocated to a unit in a cooperative plan. The Division restated its position that tax was due on the transfer of shares in in November 1984 a revised Publication 588 (Question and Answer Nos. 33 and 35)." (Matter of Baumstein, Borrok, et al.-Tenants in Common, Tax Appeals Tribunal, April 20, 1989)

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[15]Laws of 1983 (ch 15, § 184 [n]). The law also provided that the tax would not apply to certain transfers under existing cooperative or condominium plans under circumstances which are not pertinent here.

C. The term "gain" means the difference between the consideration for the transfer and the original purchase price, where the consideration exceeds the original purchase price (Tax Law § 1440.3).

D. The term "consideration" was originally defined in Tax Law § 1440.1, in pertinent part, 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. 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, lien, or other encumbrance, whether or not the underlying indebtedness is assumed, purchase money mortgage, or payment for an option."[16]

E. During the period at issue, Tax Law § 1446.2(a) provided as follows:[17]

> "Any 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."

F. As pointed out by petitioner's representative in a letter dated April 16, 1992, a new subdivision 5 was added to Tax Law § 1446 by Laws of 1992 (ch 55, § 65).[18] Said subdivision

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[16] Laws of 1984 (ch 900, § 1), added the words "or taken subject to" in connection with the underlying mortgage indebtedness.

[17] Laws of 1984 (ch 900, § 12), effective September 4, 1984, retroactive to March 28, 1983, added the 25% limitation and the provisions for reasonable cause. The existing subdivision 2 was designated paragraph 2(a) by the Laws of 1985 (ch 65, § 89), effective July 16, 1985, when the fraud penalty was added as paragraph 2(b). Other changes, including reference to tentative assessments and returns and the $100.00 minimum penalty, were added by the Laws of 1989 (ch 61, § 167).

[18] The said § 65 and also § 427(g), as referred to herein, are sections of the 1992 New York State Budget Bill (S. 7589; A. 10565) enacted April 1, 1992 and approved April 10, 1992.

reads as follows:

> "5. For the period from April first, nineteen hundred ninety-two through February twenty-eight, [sic] nineteen hundred ninety-three:
>
> (a) For the purposes of paragraph (a) of subdivision two of this section, 'reasonable cause' includes, but is not limited to, (1) the existence of substantial authority for the tax treatment of any item by the person liable for the tax or (2) the disclosure of such treatment in the pre-transfer audit procedure filing in the absence of any published authority, written instruction or guidance issued by the department of taxation and finance to the contrary. 'Substantial authority' shall include legal authority other than mere reliance on professional advice or the application of generally accepted accounting principles to the reporting of the tax imposed by this article. Notwithstanding such paragraph (a), the commissioner of taxation and finance may remit, abate, or waive a portion of the penalty and interest penalty imposed thereunder on a showing by the person liable for tax that there is reasonable cause for remittance, abatement or waiver of such portion.
>
> (b) Where penalty and interest penalty have been determined under such paragraph (a) of such subdivision in relation to the failure to timely file a tentative assessment and return, the commissioner may remit, abate, or waive a portion of such penalty or interest penalty upon a determination that the person required to file has subsequently demonstrated a consistent pattern of timely filing in compliance with the provisions of this article."

Petitioner claims that Laws of 1992 (ch 55, § 427[g]) provides that the new subdivision applies to cases for which penalty and interest have not been finally and irrevocably fixed prior to March 1, 1993 and is thus operative here.

Laws of 1992 (ch 55, § 427[g]) provides as follows:

> "(g) the provisions of sections sixty-five and sixty-six of this act shall take effect immediately and shall apply to transfers with respect to which (1) tax and any accrued interest due is paid prior to March 1, 1993, and (2) penalty and interest penalty have not been finally and irrevocably fixed prior to March 1, 1993 and, notwithstanding any provision of law to the contrary, if penalty and interest penalty have been remitted, abated or waived pursuant to subdivision 5 of section 1446 of the tax law as added by section sixty-five of this act, no refund shall be allowed with respect to the tax and interest paid in connection therewith; provided, further, that this act shall not apply to any penalty or interest penalty paid (1) on or before the date on which this act shall have become a law or (2) on or after March 1, 1993 nor where a determination has been issued by the division of tax appeals before March 1, 1993, and subdivision 5 of section 1446 of the tax law as added by section sixty-five of this act shall be deemed repealed on and after March 1, 1993...."

The Division of Taxation, in its letter of April 27, 1992, argues that Tax Law § 427(g)

must be interpreted as providing that the new subdivision 5 is to be used solely by the Commissioner of Taxation and Finance and not by the Division of Tax Appeals. It also argues that petitioner has not met the requirements of section 427(g) because petitioner has not yet paid all interest due on its gains tax liability.

G. While reasonable cause may be grounds for remission of penalty and interest penalty, consulting with and following the advice of a tax professional does not per se constitute reasonable cause insulating a taxpayer from penalties (LT & B Realty Corporation v. New York State Tax Commission, 141 AD2d 185, 535 NYS2d 121).

It is necessary to examine each of the three aspects of the penalties asserted herein separately:

(1) The $2,000,000.00 Understatement of Gross Consideration.

The fact that the tax was relatively new at the time of the transactions herein does not exculpate petitioner from reporting the correct consideration received for the property. As noted in Matter of 1230 Park Associates v. Commissioner of Taxation and Finance (170 AD2d 842, 566 NYS2d 957), explanatory publications and guidance became available shortly after the statute's effective date. Petitioner cannot shift the blame for failure to properly compute the tax from itself to the Division of Taxation. The $2,000,000.00 wraparound mortgage was omitted from petitioner's computation of gross consideration submitted under Option B. While the mortgage was referred to in the contract of sale (Finding of Fact "6") and several times in the offering statement (copies of which were submitted with the plan), the Division of Taxation was justified in relying on petitioner's statement of gross consideration for purposes of creating tentative assessments. It is noted that the failure to properly state the correct consideration was not an error due to a lack of knowledge of a latent rule or arcane requirement of the Division, but rather constituted disregard of the basic definition of consideration stated in Tax Law § 1440 as originally enacted, i.e., that consideration includes "any price paid or required to be paid...including the amount of any mortgage, lien, or other encumbrance, whether or not the

underlying indebtedness is assumed...."[19]

Even if the provisions of the newly-enacted subdivision 5 of Tax Law § 1446 including substantial authority and pre-transfer audit disclosure as reasonable cause are deemed, arguendo, to be applicable for purposes of this determination, they are not relevant under the facts of this case.

There was no authority for the $2,000,000.00 error made in stating the gross consideration and the tax treatment of said item was not properly disclosed.

Accordingly, petitioner has not shown reasonable cause for remission of the penalty with respect to this portion of the assessment.

(2) The Returned Check.

Petitioner has established that the check for $111,173.64 was returned uncollected due to its bank's error. The Division of Taxation was remiss in failing to take action when the check was returned and petitioner certainly should not be held liable for penalty or interest penalty for the period commencing with the date petitioner could have made payment if the Division of Taxation had notified it that the check was returned by the bank. As the check was returned to the Division by Chemical on February 26, 1986, the Division should have promptly notified petitioner of the check's dishonor, so that a replacement check could have been sent within a reasonable time. For purposes of this determination, it will be presumed that 10 days would have been a reasonable time and that if proper notice had been given, petitioner could have made payment by March 8, 1986. Under Tax Law § 1442, however, the tax for which the check was tendered appears to have been due upon transfer of the apartments sold in the bulk sale on May 20, 1985. It is unclear why petitioner did not issue the check until December 20, 1985, and further why the check was not mailed to the Division of Taxation until February 11, 1986. Accordingly, the penalty and interest are to be recalculated by the Division of Taxation under

[19]As noted in the footnote to Conclusion of Law "D", this definition was expanded by the Laws of 1984 (ch 900, § 1), which added the words "or taken subject to".

Option B with petitioner being given credit for payment as of March 8, 1986. Any penalty and interest penalty attributable to said portion of the deficiency after said date is to be cancelled. Interest, however, is to be computed. It is noted that the funds were in a money market account and petitioner was presumably receiving interest on same during said period.

(3) The Unreported Transaction.

The fact that the sale of apartment 5D at 525 West 24th Street was unreported due to a clerical error in the office of petitioner's counsel does not constitute reasonable cause for cancellation of penalty with respect to the portion of the assessment attributable thereto (see, LT & B Realty Corporation v. New York State Tax Commission, 141 AD2d 185, 535 NYS2d 121, supra). Moreover, this would be the case regardless of the applicability of subdivision 5 of Tax Law § 1446 (see, Conclusion of Law "G[1]").

H. The petition of Fisher Realty Co. is granted to the extent that the penalty and interest penalty are to be recalculated with petitioner being given credit for the payment of the sum of $111,173.64 as of March 8, 1986, with interest, however, remaining payable on that sum after said date. Except as so granted, the petition is denied and the notice of determination of tax due issued March 8, 1988 is otherwise sustained.

DATED: Troy, New York
June 18, 1992

/s/ Robert F. Mulligan
ADMINISTRATIVE LAW JUDGE