STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BELVEDERE GARDENS ASSOCIATES	:	DETERMINATION DTA NO. 807808
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, Belvedere Gardens Associates, c/o Jules Reich, 10 Cutter Mill Road, Great Neck, New York 11021, 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 Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 5, 1991 at 1:45 P.M., with all briefs to be submitted by April 23, 1991. Petitioner submitted its brief on March 12, 1991. The Division of Taxation did not submit a brief. Petitioner appeared by Ronald S. Kahn, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a credit or refund of real property gains tax paid on shares sold under a cooperative plan at the 50% update when such payment was not required under option B but was calculated as owing based on actual consideration received.

FINDINGS OF FACT

Petitioner, Belvedere Gardens Associates, filed a non-eviction cooperative conversion plan with regard to property located at 35-15 84th Street and 35-16 85th Street in Jackson Heights, New York. The plan became effective August 25, 1986.

Pursuant to the real property gains tax filing procedures with respect to cooperative plans, petitioner filed a schedule of original purchase price and a transferor questionnaire, dated

October 20, 1986, under Option B, which contained the following information:

	Column A Actual through Date	Column B Estimated Additional (Actual plus Estimated) Completion	Column C Total Anticipated
Anticipated Gross Consideration	---	$6,557,640.64	$6,557,640.64
Brokerage Fees	---	341,142.72	341,142.72
Anticipated Consideration	---	6,216,497.92	6,216,497.92
Purchase Price to Acquire Property	$1,660,000.00	---	1,660,000.00
Other Acquisition Costs	48,468.50	---	48,468.50
Cost of Capital Improvements	188,788.00	130,000.00	318,778.00
Conversion Costs	52,695.00	311,028.00	363,723.00
Allowable Selling Expenses	---	---	---
Original Purchase Price	1,949,941.50	441,028.00	2,390,969.50
Gain Subject to Tax	(1,949,941.50)	5,775,469.92	3,825,528.42

Based upon the information contained in the filing, the amount of anticipated tax per share was calculated to be approximately $42.657. Therefore, under Option B, the transferor paid approximately $42.00 in gains tax per share as the shares sold. The plan included 8,968 shares.

Under Option B, the transferor was required to update the filing information three times with the Division of Taxation -- when 50%, 75% and 100% of the shares were sold. Petitioner's 50% update filing, which was dated September 13, 1988, contained information with regard to the consideration actually received for shares sold as well as estimated consideration for shares to be sold in the future. The 50% update also contained new calculations with respect to the original purchase price as follows:

	Column A Actual through Date	Column B Estimated Additional (Actual plus Estimated) Completion	Column C Total Anticipated

Anticipated Gross Consideration	$4,484,366.26	$2,951,863.38	$7,436,229.64
Brokerage Fees	238,021.00	152,121.74	390,142.74
Anticipated Consideration	4,246,345.26	2,799,741.64	7,046,086.90
Purchase Price to Acquire Property	1,660,000.00	---	1,660,000.00
Other Acquisition Costs	48,468.50	---	48,468.50
Cost of Capital Improvements	414,333.00	---	414,333.00
Conversion Costs	255,219.00	---	255,219.00
Allowable Selling Expenses ---		---	---
Original Purchase Price	2,378,020.50	---	2,378,020.50
Gain Subject to Tax	1,868,324.76	2,799,741.64	4,668,066.40

Attached to the 50% update filing was a computer printout indicating the actual selling price for the units sold. Based on this information, petitioner recalculated the amount of gains tax due per share by dividing the actual gain received ($466,806.64) at the 50% update filing by the total number of shares (8,968). This calculation resulted in a new tax per share of approximately $52.05 which petitioner then multiplied by the number of shares sold to date (4,969) to arrive at a gains tax due of $258,648.77. Petitioner then subtracted from the amount of tax due the amount of gains tax paid as the shares were sold ($211,966.00)[1] to arrive at a gains tax due of $46,682.77. This amount was forwarded by check to the Division of Taxation along with petitioner's 50% update filing.

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[1]Petitioner paid this amount based on the estimates contained in the original filing which anticipated that the tax per share would be $42.657. Option B permitted petitioner to pay tax in this amount as the units sold rather than requiring petitioner to recalculate the tax actually due on each share as each unit sold. The amount of tax due per share would be recomputed at the 50% and 75% plateaus based upon actual consideration and then at the 100% sell-out point any underpayments or overpayments would be computed (see generally, TSB-M-83-[2]-R, TSB-M-86-[2]-R and TSB-M-86-[3]-R).

In response to petitioner's 50% update filing, the Division of Taxation wrote a letter, dated October 5, 1988, stating that it recalculated the amount of tax per share owing in the future as $63.7263 (tax remaining [$254,841.60] divided by shares remaining [3,999]). The Division noted that this new tax rate is to be used until petitioner submits a project update at which time a new tax rate will be established.

By letter dated October 11, 1988, the Division of Taxation acknowledged receipt of the $46,682.77 and stated that the amount would be used as a credit against future sales. The letter read as follows:

> "Please be advised that our update procedure establishes a new project tax which is reduced by tax previously assessed and the remaining tax is allocated over the remaining unsold units. Therefore, since no additional payment was required with the update a credit of $46,682.77 has been established for this case...."

On November 7, 1988, petitioner filed a claim for refund of real property transfer gains tax in the amount of $46,482.77 attaching the Division's two letters dated October 5 and 11, 1988.

By letter dated December 8, 1988, the Division denied the refund claim noting that, although the additional payment of $46,682.77 was not required at that time under Option B, a credit would be established for that amount to offset the tax due on future sales. The Division explained the operation of the Option B method for calculating tax owed on cooperative sales as follows:

> "In accordance with the 'Option B' method of filing elected by the sponsor, the total consideration and total original purchase price for a condominium or cooperative conversion are to be anticipated and apportioned to each unit based on the units percentage of the total units, utilizing a fixed common denominator. This option in effect is an allocation of the total anticipated gain to each unit. Therefore, by a sponsor selecting 'Option B', the apportioned amount of tax due is not affected if the actual consideration it receives for a particular unit is higher or lower than the apportioned amount. Pursuant to 'Option B', when the conversion reaches the 25%, 50%, 75% and 100% sellout points, the sponsor must furnish updated information to reflect the actual consideration received from each unit and the anticipated consideration for the unsold units in addition to updating the original purchase price for the project. The remaining tax due for the project is then apportioned to the unsold units rather than recalculating tax due on units already sold and assessed. In the event that the tax is overpaid based on actual figures at 100% sellout, then a refund may be applied for at that time. In the meantime, you may

apply your credit towards the tax due on future sales."

On July 12, 1989, a conciliation conference was held. By Conciliation Order dated November 3, 1989, the conciliation conferee denied petitioner's request for a refund.

Petitioner filed a petition, dated February 1, 1990, arguing that the Division erred in refusing to grant the refund of "an erroneous overpayment of a tax that may never become due" and that the conciliation conferee made an untimely determination on September 25, 1989 which was more than 30 days after the conciliation conference on July 12, 1989.[2]

On July 16, 1990, the Division filed an answer to the petition affirmatively stating that the refund claim was properly denied and that because the petition to the Conciliation Order was received by the Division on February 2, 1990 it was not filed within 90 days after the Conciliation Order was issued.

At the hearing held on February 5, 1991, the Division withdrew its claim that the petition was untimely filed and submitted as Exhibit "K" the mailing envelope which contained the petition and was postmarked February 1, 1990.[3]

In his post-hearing brief, petitioner's counsel affirmed that only one apartment has been sold since September 1988. He also affirmed that this apartment (Apartment 2E) was sold on August 7, 1989 for the purchase price of $77,000.00 and that gains tax was paid in the amount of $5,416.73.[4]

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[2]Petitioner has not raised the issue of an untimely determination at hearing or in its post-hearing brief; therefore, it appears that this argument has been abandoned. In any event, this argument has no merit. There are no facts in the record upon which there can be a finding that the conciliation determination was untimely inasmuch as the conciliation conference proceeding is not deemed concluded until the taxpayer fails to agree with the conferee's proposed resolution (see, 20 NYCRR 4000.5[c][3][iii]). Moreover, even if the Conciliation Order was untimely, petitioner has not indicated what remedy it seeks.

[3]This envelope was in the possession of the Division of Tax Appeals and was made available, at the Division's request, to the Division's counsel at hearing.

[4]The computer printout attached to the 50% update filing indicated that Apartment 2E concerned 85 shares of the cooperative. Based upon the amount of tax allegedly paid

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that its accountant paid $46,682.77 in additional taxes at the 50% update filing in the erroneous belief that the tax on the sales completed at the 50% update had to be recomputed and paid based on the actual consideration received. Therefore, petitioner contends, because no additional tax or reconciliation was due at the 50% update filing, the payment was an overpayment subject to refund. Petitioner further argues that because the real estate market has become depressed and only one apartment has been sold since September 1988, no other sales prospects are in sight and that, even if the remaining 43 apartments sold, it is possible that it may never owe the full $46,682.77 in gains tax. Petitioner demonstrates this point with the assumption that the remaining cooperative shares sell for $500,000.00. According to petitioner's calculations, using this assumed $500,000.00 selling price, the additional tax owing at the 100% sell-out point would be $29,682.44 -- approximately $17,000.00 below the $46,682.77 payment sought to be refunded.

The Division did not submit a brief responding to petitioner's brief; however, at hearing, the Division's counsel argued that Article 31-B provides that the tax is due at the time the shares are sold; that Option B is a method of billing the taxpayer as the units are sold; and that petitioner recomputed the amount of tax per share itself and found that it paid less tax than would be owed on all the shares sold and that, therefore, a credit would be applied against future sales.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax on gains derived from the transfer of real property at the rate of 10% of the gain. For purposes of computing the tax, a cooperative conversion is treated as a single transfer; however, the payment of tax is due upon the transfer of shares to individual purchasers pursuant to a cooperative plan (see, Tax Law § 1442[b]; Matter of

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($5,416.73), the amount of tax per share equals $63.726.

Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316). In computing the amount of tax due as each share is sold, an apportionment of the original purchase price of the real property and total consideration anticipated under such cooperative plan shall be made for each share (Tax Law § 1442[b]).

B. On August 22, 1983, the Division set forth two options, A and B, to estimate gain on cooperative and condominium plans (TSB-M-83-[2]-R). Under Option A, the actual consideration paid for each share with an apportionment of the total original purchase price to each share determined the gain subject to tax as each share sold. Under Option B, the total anticipated consideration less the total anticipated original purchase price determined the gain subject to tax as each share sold. By selecting Option B, the taxpayer was permitted to pay the estimated tax rate, even though the actual consideration received may have been greater when the shares actually sold. Once the number of sales reached the 25%, 50% and 75% levels, a new tax rate per share was determined based on actual consideration received plus estimated consideration for the remaining unsold shares. At the 100% sell-out point, any underpayments or overpayments based on the actual consideration received for the total number of shares sold would be adjusted accordingly. Thus, in contrast to Option A, Option B was less cumbersome to administer to the extent that, as units were sold, it was not necessary to recalculate the amount of tax owed based on the actual consideration received, as well as other costs, for each unit.

In 1986, the Division eliminated Option A as a method of paying the tax and directed that the new method for paying the tax would be a modified Option B (TSB-M-86-[2]-R). Under the new Option B, updating was optional at the 25% plateau and guidelines were provided for determining "safe harbor estimates" of anticipated taxes such that, in the event of underpayments, there would be no imposition of penalty or interest on the underpayments (TSB-M-86-[3]-R). In effect, if the safe harbor estimates were lower than the actual selling price, then the taxpayer received the benefit of postponing the full amount of tax owed based on actual consideration. If the safe harbor estimates were greater than the actual selling price, then

the taxpayer would be entitled to a lower tax rate for the remaining unsold shares when recalculated at the 50% and 75% plateaus or to a refund at the 100% sell-out point.

C. Here, petitioner's initial safe harbor estimates were less than the actual selling price of the shares for the period prior to the 50% update. Petitioner's accountant recalculated the tax rate not for just the remaining shares as permitted under Option B ($63.726 per share), but for the total number of shares and paid tax at that rate ($52.052 per share) thereby spreading out its tax liability to date over all the shares (past and future sales included) of the cooperative plan. Thus, in effect, while petitioner received the benefit of the safe harbor estimates for purposes of avoiding penalty and interest on the underpayment, it paid the underpayment at the 50% plateau thereby not taking advantage of delaying tax on this underpayment by spreading it out over future sales.

Petitioner does not challenge the Option B method of payment itself. Under Option B, the market fluctuations work to the advantage of either the Division or the taxpayer with respect to the time use of money until the tax rate is recomputed at the 50% and 75% plateaus or until the 100% sell-out point when underpayments or overpayments are ultimately reconciled. Option B was designed to ease the administration of collecting gains tax that was susceptible to the constant shifting of market prices. This method of payment is reasonable and petitioner does not argue otherwise. Instead, it asserts that because Option B did not require the underpayment to be reconciled at the 50% plateau, such amounts constituted an overpayment and, thus, petitioner is entitled to a refund of that amount rather than a credit against future gains tax sales. Petitioner also notes that because the real estate market is depressed, the Division has had use of its money for a number of years and that even if the 100% sell out occurs, it is possible, due to deflated prices, that the ultimate gains tax per share may drop to the point that a refund will ultimately be granted to petitioner.

Petitioner's claims have no merit. Contrary to petitioner's assertion, the $46,682.77 paid did not constitute an overpayment but was an underpayment based upon consideration actually received. Moreover, assuming it is possible under petitioner's hypothetical that petitioner may

be owed a partial refund, at the 100% sell-out point, of the amount of taxes already paid, this scenario has yet to occur. The important point is that, at the 50% plateau, the tax per share was underpaid based on the actual consideration received.

The fact that the payment in question was not required under Option B does not mean it was not owing at that time. The $46,682.77 payment constituted an underpayment of the tax that, under Option B, could be postponed without penalty or interest accruing. Under former Option A, this payment would have been required. The effect of the safe harbor estimates, under Option B, was to forgive penalty and interest on underpayments and to delay the actual payment of the tax itself, but was not intended to treat the underpayment as nonexistent or as an overpayment subject to refund if paid at the time of transfer. Because Option B is the only payment method now offered by the Division, petitioner is entitled to use the Option B method; however, Option B affects only the timing of the underpayment and does not affect the tax obligation by transforming an underpayment into an overpayment subject to refund before the 100% sell-out point as urged by petitioner. Petitioner is not entitled to a refund if by its own volition, even if unintentional, it paid tax owed as a result of an underpayment at the 50% plateau notwithstanding the fact that Option B permits a postponement of that underpayment without penalty or interest by recomputing the tax rate for the remaining unsold shares.

In addition, the guidelines under Option B reinforce the notion that the tax obligation is incurred at the time of transfer. They specifically noted that a taxpayer could evade the tax consequences of an underpayment based on actual consideration by refraining from selling the last unit of a plan. In order to eliminate this potential for abuse, Option B provides that a rebuttable presumption exists that the sell-out period has ended under a non-eviction plan if the transferor transferred 85% or more of his interest in the cooperative and more than one year has passed since the last unit was transferred. Once the sell-out period ends, the transferor owes tax based on the consideration received on all the interest sold, and penalty and interest may accrue on such tax (TSB-M-86-[3]-R). This sell-out presumption recognizes that Option B affects only the timing of the tax payment but does not change the fact that a tax payment obligation has

been incurred based on actual consideration received at the time of transfer. The proposition that the tax payment obligation is incurred at the time of transfer is also supported by the statute and case law (see, Conclusion of Law "A"; see also, Matter of 1230 Park Associates v. Commr. of Taxation and Finance, ___ AD2d ___, 566 NYS2d 957, lv denied ___ NY2d ___ [September 17, 1991]). If subsequent transfers result in a lower tax per share than estimated, then petitioner is entitled to recompute a lower tax rate at the 75% plateau and, ultimately, to a refund at the 100% sell-out point. However, at this point petitioner has not demonstrated that it is entitled to this amount as a refund. Based on the actual consideration received, petitioner incurred the tax obligation with respect to its payment of the $46,682.77 even though it was not required to make that payment at the 50% update filing under Option B.

The fact that the real estate market has become depressed since the 50% update does not affect this result inasmuch as this situation is no different from that where the safe harbor estimates themselves prove to be higher than subsequent selling prices. Therefore, inasmuch as the tax obligation based on an underpayment was incurred at the 50% update, petitioner is not entitled to a refund at this time, however, because the payment in question was not required under Option B, it is entitled, as stated by the Division in its refund denial, to apply the payment as a credit toward the tax due on future sales. Consistent with the safe harbor rule of Option B this credit should be exhausted before petitioner is required to make further gains tax payments on future sales.[5]

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[5]In his post-hearing brief, petitioner's counsel affirmed that a gains tax was paid on a unit sale subsequent to the 50% update (see, Finding of Fact "14" and footnote "4"). It would appear from the refund denial that petitioner was not required to pay gains tax on subsequent sales until the $46,682.77 credit was exhausted. Again, while the tax obligation is incurred at the time of the sale and, thus, if paid, is not subject to refund, an additional credit for the amount paid is permissible under Option B and gains tax does not have to be paid on future sales until this credit also is exhausted.

D. The petition of Belvedere Gardens Associates is denied and the refund denial is sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE