STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALBANY PUBLIC MARKETS, INC.	:	DETERMINATION DTA NO. 807968
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, Albany Public Markets, Inc., c/o Weis Markets, Inc., P.O. Box 471, Sunbury, Pennsylvania 17801, 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 Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on June 17, 1991 at 9:15 A.M. Petitioner appeared by Michael P. Mahoney, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether, for the purpose of applying the one million dollar exemption provided for by section 1443(1) of the Tax Law, the Division of Taxation properly treated as a single transfer the sale of two contiguous properties to one transferee.

II. Whether accounting and appraisal fees are allowable selling expenses and, therefore, properly includable in the transferor's original purchase price pursuant to section 1440(5)(a) of the Tax Law.

III. Whether the Division of Taxation bears the burden of proof to establish that petitioner is liable for penalties assessed by a notice of determination issued after the tax on gains was paid.

IV. Whether petitioner has shown reasonable cause for its failure to pay tax due under article 31-B of the Tax Law at the time of the transfer of interest in real property, thus providing grounds for abatement of the penalties asserted by the Division of Taxation.

FINDINGS OF FACT

Petitioner, Albany Public Markets, Inc. ("APM"), is the wholly-owned subsidiary of Weis Markets, Inc., ("Weis") a Pennsylvania corporation. In 1967 APM purchased two parcels of land (Parcel 1 and Parcel 2) located in Colonie, New York from a partnership consisting of three individuals who were also the former shareholders of APM. The real property was acquired in connection with the acquisition by Weis of all of the stock of APM. Parcel 1 and Parcel 2 were acquired by separate deeds and were transferred to APM on the same date, November 30, 1967.

In October 1986, APM contracted to sell substantially all of its business assets to Grand Union Company, including Parcels 1 and 2. APM filed separate gains tax questionnaires for each parcel of land to be transferred. Each questionnaire is dated October 17, 1986, and each indicates that the anticipated date of transfer was to be October 31, 1986, the date upon which the transfer actually occurred.

Attached to the questionnaire for Parcel 1 is a document entitled "SUPPLEMENTAL DOCUMENTATION TO NEW YORK STATE REAL PROPERTY TRANSFER GAINS TAX". The document states: "The selling price of the two non-contiguous parcels has been allocated based on an appraisal of their fair market value". An attached copy of the relevant provisions of the selling agreement between APM and Grand Union describes the two parcels of land with buildings and improvements as the "Distribution Center" and recites one purchase price ($3,600,000.00) for both. Petitioner did not provide a copy of the appraisal referred to. On the same document, petitioner indicated that independent documentation showing the purchase price of the properties was not available; therefore, the purchase prices were determined based upon amounts recorded in APM's books and records. The purchase price of Parcel 1 is shown as $1,443,143.00 consisting of land with a purchase price of $297,440.00 and building and improvements with a purchase price of $1,145,703.00. To this, petitioner added selling expenses of $20,000.00, resulting in an original purchase price of $1,622,057.00. Petitioner reported gross consideration to be paid for Parcel 1 of $3,085,200.00, yielding a gain

subject to tax of $1,622,057.00.

Petitioner's selling expenses consisted of two items: a payment to a Pennsylvania law firm and a payment to an accounting firm. The amount of each payment was not reported.

The questionnaire filed for Parcel 2 claimed that the transfer was exempt from gains tax on the basis that consideration for the transfer was less than $1,000,000.00. A schedule attached to the questionnaire states that the selling price of the two parcels was allocated based upon an appraisal of fair market value and indicates that the allocation for Parcel 2 is $514,800.00. Information regarding the purchase price of Parcel 2 was included with the questionnaire for Parcel 1. It states that, based on APM's books and records, the purchase price was determined to be $108,455.00, representing the cost of land ($49,630.00) and the cost of "improvements" ($58,825.00).

Grand Union Company filed one questionnaire for both parcels, indicating a single purchase price of $3,600,000.00.

On October 23, 1986, the parties executed an addendum to their sales agreement containing the following provision: "With respect to the Distribution Center described in paragraph 1 of the Agreement, it now appears that the Statement of Tentative assessment and Return (the 'Statement of Assessment') to be issued by the New York State Department of Taxation and Finance under Article 31-B of the Tax Law of the State of New York (the 'Gains Tax') will not be received within the time for Closing. Accordingly, the parties agree that they shall close under the Agreement, 'in escrow'....

By letters dated December 2, 1986 and December 5, 1986, petitioner submitted additional information to the Division. The letter of December 2, 1986 indicates that petitioner previously submitted statements of sale for the two parcels executed at the time of their transfer to APM. Based on those statements, petitioner asserted that the cost of the parcels should be adjusted as follows: the cost of Parcel 1 was asserted to be $1,316,723.00 consisting of land valued at $171,020.00 and building and improvements valued at $1,316,723.00; the cost of Parcel 2 was asserted to be $234,875.00 consisting of land valued at $176,050.00 plus building

and improvements valued at $58,825.00. Petitioner then stated its position that the consideration paid by Grand Union should be allocated between the two parcels of land based on each parcel's proportionate cost of land and improvements. Thus, petitioner calculated that the consideration paid for Parcel 1 was $3,060,000.00 and the consideration paid for Parcel 2 was $540,000.00.

The letter of December 5, 1986 was in the form of an affidavit signed by Richard L. Wetzel, Vice President-Accounting, and stated petitioner's position regarding aggregation of the two parcels of land. Mr. Wetzel stated that Parcel 1 contained a warehouse and office building and was used in petitioner's business of operating retail grocery stores, while Parcel 2 was a vacant lot and was held by APM as a passive investment. He also stated that since the parcels were not used for a common or related purpose they were not subject to aggregation.

On December 15, 1986, the Division issued to petitioner a Tentative Assessment and Return calculating a total tax due of $204,840.00 based on the aggregation of the consideration received for Parcel 1 and Parcel 2 and allowing no adjustments for selling expenses.

Petitioner paid the tax and filed a claim for refund in the amount of $32,641.00, calculated as follows:

		Parcel #1	Parcel #2
Sales Price		$3,060,000.00	$540,000.00
Less allocated expenses	(21,288.00)	(3,757.00)	
Net Sales Price		3,038,712.00	536,243.00
Cost		1,316,723.00	234,875.00
Gain		1,721,989.00	
301,368.00			
Gain Subject to Tax		1,721,989.00	
None			
Tax Due		172,199.00	None
Tax Paid		204,840.00	
None			
Refund Due		$ 32,641.00	
	None		

By letter dated September 13, 1988, the Division denied petitioners's claim for refund. Petitioner then made a timely request for a conciliation conference. In connection with that

conference, petitioner submitted certain documents to the conferee which were later submitted into the record of this hearing. These documents were the basis for a recalculation of tax due by the Division.

(a) Petitioner submitted itemized statements of account from its law firm and accounting firm for services rendered in connection with the sale of the assets of APM.

(b) Petitioner submitted a letter prepared by Hafner Appraisal Associates, Inc., reporting the results of an inspection of the subject property. The appraisal company clearly stated that a complete appraisal had not been made and that the field inspection did not constitute a complete appraisal. The appraisal company estimated the value of the property in issue as follows:

Improved Lot	$ 375,000.00	to	$ 420,000.00
Vacant Lot	325,000.00	to	360,000.00
Building Improvements	1,500,000.00	to	1,700,000.00

The letter describes the warehouse and office building situated on the improved lot and states: "The warehouse area is at truck height. An interior rail siding area is located at the east side of this section which can accommodate 5 average sized rail cars". The letter does not indicate that a railroad track or siding is located on the vacant lot. Although petitioner, in several documents, speaks of the properties as "non-contiguous", the appraisal company's letter describes the properties as follows: "The subject building sits on a 13.968 +/- acres parcel of land and is additionally adjoined by a 12.056 parcel of excess land <u>located adjacent and to the south of the improved lot</u>" (emphasis added).

(c) To substantiate its claim that the original purchase price of the two parcels of land was $345,000.00, petitioner submitted minutes of a Special Meeting of the Board of Directors, excerpts from the original purchase contract and notes from APM's 1967 financial statements. Copies of statements of sale, essentially worksheets prepared in connection with the closing, show an allocation of $175,000.00 for the 12.056 acre lot and $170,000.00 for the 13.968 acre lot. All other documents refer to an unallocated purchase price of $345,000.00.

(d) In a letter transmitting the documents described, petitioner's representative stated: "Another issue raised related to the improvements in the amount of $58,025 made to Parcel 2.

The amounts were expended for the construction of a railroad siding. We have enclosed a copy of the original general ledger account card to support this expenditure". The account card shows that APM depreciated the value of the railroad track and siding from 1967 through 1975.

Based upon all of the documentation submitted during the course of the conciliation conference, the Division recalculated petitioner's tax deficiency as follows:

Consideration	$ 3,600,000.00
Acquisition	345,000.00
Capital Improvements	1,204,528.00
Selling Expenses	14,599.00
Gain	2,035,873.00
Tax Due	203,587.00
Interest (10/31/86 - 12/23/86)	2,827.43
Total Due	206,414.73
Less Payment (12/23/86)	(204,840.20)
Balance Due thru 12/23/86	1,574.53
Interest thru 10/31/89	450.78
Balance due as of 10/31/89	2,025.31

Selling expenses as calculated by the Division included legal fees but not accounting or appraisal fees.

On October 31, 1989, the Division issued to petitioner a notice of determination of tax due under article 31-B of the Tax Law in the amount of $26,817.93. The notice shows a calculation of tax and interest reflecting the calculations shown above. In addition, the notice assessed penalty in the amount of $24,430.48 for the period October 31, 1986 through December 23, 1986 and penalty in the amount of $362.14 for the period December 24, 1986 through October 31, 1989.

Petitioner applied for a conciliation conference to challenge the denial of its refund claim. The notice of determination was not issued until the conciliation proceedings were underway. By order dated December 22, 1989, the conferee denied petitioner's request for a refund of tax paid and also sustained the statutory notice. Petitioner filed a petition with the Division of Tax Appeals on March 21, 1990. At hearing, the Division of Taxation conceded that the notice of determination was the subject of the conciliation conference, and thus, the petition was conceded to be timely with regard to both the claim for refund and the challenge to the correctness of the notice of determination.

By its petition, petitioner reiterated its position that the two parcels of land in question were not used for a common or related purpose. Petitioner's position rests, in part, on certain factual assertions: that the vacant parcel of land was not purchased to allow petitioner access to the developed parcel; that it was not necessary for petitioner to obtain the vacant parcel of land in order to make use of the railroad siding located on the developed parcel; that the vacant parcel was not acquired in contemplation of expansion of APM's warehouse and office facilities; and that petitioner's only purpose in acquiring the vacant parcel was as a passive investment.

The documents submitted in evidence contain conflicting descriptions of the two parcels of land involved in this transfer. Several documents refer to Parcel 1 as 13.968 acres of land upon which a warehouse and office building are situated (Transferor Questionnaire; Petitioner's Claim for Refund; letter to the Division dated December 2, 1986; letter to the Division dated December 5, 1986; letter to the State Tax Commission dated February 10, 1987; letter from appraisal company dated August 18, 1986; Petition to the Division of Tax Appeals). These documents are in conflict with others indicating that the improved lot contained 12.056 acres of land (Notes to APM's financial statement dated October 28, 1967; Agreement of Sale dated October 31, 1967). Petitioner claims that an easement was granted to New York Central Railway on the vacant lot and petitioner identifies the vacant lot as the parcel containing 12.056 acres; however, the deeds offered in evidence establish that the easement was on the 13.968 acre parcel of land. The appraiser's letter states that the vacant lot is located to the south of the improved lot, and the deeds establish that the 13.968 acre parcel is located to the south of the 12.056 acre parcel. The following description of the two parcels of land is based on a reconciliation of assertions made by petitioner with the deeds to the two parcels of land.

Parcel 1 consists of 12.056 acres upon which an office building and warehouse are located. The property line begins 1,000 feet to the south of Central Avenue in Colonie, New York. Ingress and egress to Parcel 1 from Central Avenue is over Jupiter Lane. At the time Parcel 1 was purchased by APM, Jupiter Lane ended at roadways extending into Parcel 1.

There are railroad tracks and a siding on Parcel 1 which allow railroad cars to pull into the warehouse for unloading. Parcel 1 was used by APM as an integral part of its operation of a retail grocery business.

Parcel 2 is essentially a vacant lot containing 13.968 acres of land. It adjoins Parcel 1 and lies to the southwest of it. Parcel 2 is subject to an easement granted to New York Central Railroad. The easement is approximately 24 feet wide and runs from Parcel 2's border with Parcel 1 south to lands owned by the railroad. There is a railway track and siding on Parcel 2 which existed at the time APM acquired the property. It was built by the prior owners of Parcel 2. Parcel 2 is also subject to the following easement: "a right of way and easement for ingress and egress from Central Avenue over Jupiter Lane.... Said easement...for the use of [APM], its employees, customers and invitees. The easement shall terminate when Jupiter Lane is accepted as a public street by the Village of Colonie".

At the time APM purchased the two parcels, it believed that the existing warehouse and office building would be sufficient to meet any future expansion needs of the retail grocery business. There was no intention of developing Parcel 2 in connection with APM's operation of that business. APM's parent company, Weis, regularly invested in real estate, stocks, bonds and other securities. Weis had been informed that Jupiter Lane would eventually be extended into an industrial park area which would enhance the value of Parcel 2.

After filing gains tax questionnaires in October 1986, petitioner was contacted by the Division and asked to submit additional information. After several conversations with a Division employee, petitioner's representative was left with the impression that "there existed uncertainty in the Department as to handling of properties which were not considered to be used for a common or related purpose" (Affidavit of Richard L. Wetzel). The Division requested additional information to support petitioner's contention that the two parcels of land were not used for a common or related purpose. The Division also requested additional information to substantiate petitioner's claimed selling expenses. At the time the transfer of property took place, petitioner had not yet received a tentative assessment from the Division, and it decided

not to pay the tax until such an assessment was received. For that reason, it entered into an agreement to escrow the consideration for the real property transfer until the amount of tax due was determined by the Division.

SUMMARY OF THE PARTIES' POSITIONS

It is petitioner's contention that Parcel 1 and Parcel 2, although adjacent to each other, were held and used for separate and distinct purposes and, therefore, were not subject to aggregation under section 1440.7 of the Tax Law. Petitioner asserts that Parcel 1 was used in the retail grocery store business while Parcel 2 was held only for investment purposes and had no relationship to the business.

Petitioner argues that the existence of a railway siding on Parcel 2 and access to Parcel 1 over that siding does not show that the properties were used for a common or related purpose. Petitioner reasons that it had no need to acquire Parcel 2 to gain access to railway service for Parcel 1, since the railway company had an easement running through Parcel 2. From its point of view, APM's depreciation of the railroad track and siding located on Parcel 2 is of no significance, since the siding was constructed before APM purchased the properties and the railway had an easement running through Parcel 2. Petitioner states: "since the business could have been operated solely from Parcel One with full rail access, the only possible reason for acquiring Parcel Two is for investment purposes" (Petition of APM).

Petitioner takes exception to the disallowance of professional accounting and appraisal services as selling expenses. Petitioner recognizes that accounting and appraisal fees are not among the enumerated fees includable in the calculation of "original purchase price" pursuant to section 1440(5)(a) of the Tax Law and 20 NYCRR 590.17. It argues that the failure to include these is discriminatory and unreasonable and an impermissible interference with its right of freedom to contract. Petitioner points out that an attorney might engage the services of an accountant or appraiser and bury those charges in his own fees for legal services. Thus, a seller who separately engaged the services of an accountant might pay more tax than one who hired only a lawyer.

Petitioner believes that it acted reasonably and prudently in escrowing the consideration for the transfer in anticipation of receiving a tentative assessment from the Division. Since it filed gains tax questionnaires as required and responded promptly to the Division's requests for additional information, petitioner believes it acted in a responsible manner and that there is no basis for asserting a penalty for late payment of the tax due.

In the alternative, petitioner argues that the assertion of penalty by notice of determination after a refund claim was made and denied is the equivalent of asserting a greater deficiency and, pursuant to section 1089 of the Tax Law, places the burden of proof to show lack of reasonable cause upon the Division.

The Division's position is that the two parcels were properly aggregated. The Division points out that the properties were purchased on the same date from the same grantor, held for the same period of time, and sold at the same time to a single purchaser. It sees a common or related purpose for the two properties in the publicly held corporation's goal of maximizing profits for its shareholders. From its viewpoint, any contiguous or adjacent properties transferred by a public corporation would be subject to aggregation, regardless of how those properties were used, since ultimately the properties could be considered to have been used for the single purpose of producing profits for the corporation's shareholders.

The Division points out that in disallowing petitioner's accounting and appraisal fees it properly applied the relevant provisions of the statute and regulations. Since the statute and regulations are unambiguous, the Division argues that petitioner has shown no grounds for disturbing the Division's determination.

The Division notes that pursuant to section 1442 of the Tax Law the gains tax is to be paid on the date of transfer. It is the Division's position that awaiting receipt of a tentative assessment does not constitute reasonable cause for failure to comply with the statute. In addition, the Division disputes petitioner's contention that it bears the burden of proof to show that petitioner did not have reasonable cause for its actions. The Division points out that penalty was assessed by notice of determination before a petition was filed with the Division of

Tax Appeals. On this basis, the Division contends that the provisions of section 1089 of the Tax Law, placing the burden of proof on the Division under certain circumstances, are not applicable here.

CONCLUSIONS OF LAW

A. The threshold issue is whether petitioner qualifies for the statutory exemption from the real property transfer gains tax that extends to property transfers having consideration of less than $1,000,000.00 (Tax Law § 1443[1]). The Division of Taxation has determined that the transfers of Parcel 1 and Parcel 2 constituted a single transaction for gains tax purposes with a consideration of $3,600,000.00; therefore, the exemption did not apply. Petitioner challenges the Division's authority to aggregate the consideration paid for the two parcels under the described circumstances.

Section 1440(7) of the Tax Law provides that "[the] transfer of real property means the transfer or transfers of any interest in real property by any method". Under the authority of this provision, the Division is authorized to treat the transfer of contiguous or adjacent parcels of land as a single transaction (see, 20 NYCRR 590.42; Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003; Matter of Sanjaylyn v. Tax Commn. of State of New York, 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55; Matter of Bombart v. Tax Commn. of State of New York, 132 AD2d 745, 516 NYS2d 989). However, the Division's interpretation of the statute allows for a limited exception to the rule. "[I]f the transferor establishes that the only correlation between the properties is the contiguity or adjacency itself, and that the properties were not used for a common or related purpose, the consideration will not be aggregated" (20 NYCRR 590.42; emphasis added). Because petitioner has not established that the only correlation between Parcel 1 and Parcel 2 is their contiguity or adjacency, aggregation of the consideration for the transfers is proper.

B. Parcel 1 and Parcel 2 were contiguous. They were acquired from a single grantor on the same date under a single contract of sale. The sales contract cited a single unapportioned

price for both parcels. The parcels were held by petitioner for the same length of time and transferred by it to a single purchaser, through a single sales contract, on the same day. The sales contract between petitioner and Grand Union Company allocated one unapportioned amount to the two parcels of land which were referred to collectively as the "Distribution Center". Thus, the transaction in issue strongly resembles the cases cited above. The one factor which differentiates this transaction from others where aggregation has been upheld is petitioner's contention that Parcels 1 and 2 were not used for a "common or related purpose". Petitioner's evidence in support of this contention consisted mainly of testimony or affidavits addressing petitioner's intention to hold Parcel 2 for investment at the time of its purchase. I find that the evidence of petitioner's intent is not determinative, since I am persuaded that the two properties were actually used for a common purpose. Parcel 2 was used by petitioner to gain railway access to Parcel 1. The easement on Parcel 2 was necessary to connect Parcel 1 with lands owned by the railway. The former owners of Parcel 2 built the railroad tracks and siding which were used by the railway to travel to Parcel 1. Petitioner carried the siding on its books and records as an asset of the corporation and continued to depreciate it over a period of years. These facts are sufficient to show a common purpose.

Petitioner argues that because of the easement that existed it would have had railway access to Parcel 1 whether or not it purchased Parcel 2. This argument is too speculative. Whether the purchase of Parcel 2 was necessary or not, the fact is that Parcel 2 was used by petitioner to gain railway access to Parcel 1. Moreover, petitioner's proof raised but failed to answer several questions with regard to the railway siding. For example, whose duty was it to repair and maintain the railway siding? If not the railroad's, would the sale of Parcel 2 to a separate purchaser endanger access by the owner of Parcel 1? In view of all the factors favoring aggregation, the presence of an easement on Parcel 2 is not enough to show that the properties were not used for a common purpose.

Petitioner's proof with regard to the proper valuation of Parcel 2 also tends to support aggregation. The sales contract between APM and the former owners of the real property cited

one unapportioned sales price for both parcels of land as did the contract between petitioner and Grand Union Company. In its gains tax questionnaire, petitioner stated that the selling price was allocated based on an appraisal of the fair market value of the two properties. However, the consideration shown for Parcel 2 of $514,800.00 is inconsistent with the appraisal company's valuation of $325,000.00 to $360,000.00. On its refund claim, petitioner claimed a value of $540,000.00 for Parcel 2, an amount it arrived at by allocating the consideration paid by Grand Union based on each parcel's proportionate cost. The only evidence of the "proportional" cost of Parcel 2 to petitioner were statements of sale, apparently prepared in connection with the recording of the deeds. All other evidence of the value of the property cites one unapportioned price for both parcels.

C. The Division argued at hearing that it had the authority to aggregate the consideration for any continguous or adjacent property, regardless of the use to which the property was put, if that property was owned and transferred by a publicly owned corporation. From its viewpoint, common ownership of real property for the purpose of producing profits for the corporation's shareholders would be sufficient to establish a correlation between two properties beyond contiguity or adjacency. This interpretation would either render the regulation meaningless, since property is almost always held for income or profit, or create an arbitrary distinction between publicly owned corporations and other entities. Since the record establishes that Parcel 2 was used by petitioner to service Parcel 1, this determination need not rest on such a broad interpretation of the regulation.

D. Section 1440(5)(a) of the Tax Law provides that the term "original purchase price" "shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property..., as such fees and expenses are determined under rules and regulations prescribed by the tax commission". The regulations adopted under the authority of this provision confine selling expenses to legal, engineering and architectural fees (20 NYCRR 590.17). The Division initially disallowed all of petitioner's claimed selling expenses because of petitioner's failure to substantiate the amount of

the expenses. After receiving copies of bills of account, the Division allowed all substantiated legal expenses but disallowed all accounting and appraisal fees (see Finding of Fact "10[d]).

Petitioner argues that the statute's failure to include accounting and appraisal fees incurred to sell the property in the definition of original purchase price is constitutionally impermissible. Petitioner asserts that the statute deprives taxpayers of due process of law and equal protection of the law and interferes with the right to contract.

The Tax Appeals Tribunal has held that it does not have jurisdiction to consider a constitutional challenge to a statute as written, as opposed to the Division's application or interpretation of the statute (see, Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). Since petitioner has not alleged any error in the Division's interpretation of section 1440(5)(a), the Division's calculation of selling expenses is upheld.

E. Section 1447(2) of the Tax Law provides that if the parties to a transfer file the required documents (a transferor and transferee questionnaire) at least 20 days prior to a transfer, the Division of Taxation shall issue a tentative assessment of the tax due within 20 days. Section 1442 of the Tax Law states that the tax is due on the date of the transfer. Under this statutory scheme a transferor and transferee who file the required questionnaires 20 days prior to the transfer are informed of how much tax to pay on the date of transfer by the tentative assessment. On the other hand, parties who do not comply with the 20 day pre-transfer filing are still obligated to pay the tax due on the date of transfer, but do not necessarily have a tentative assessment to tell them how much tax to pay. Section 1446(2)(a) imposes a penalty whenever a transferor fails to pay a tax within the time required.

It is petitioner's position that the Division of Taxation bears the burden of proof to establish that petitioner is liable for payment of penalty. The statutory provision cited for this proposition is section 1089(e)(3) of the Tax Law, found in article 27. In general, this provision places the burden of proof on the Division whenever an increased deficiency is asserted after a notice of deficiency was mailed and a petition filed. That provision is applicable only to taxes imposed under articles 9, 9-A, 9-B and 9-C (Tax Law § 1080). Article 31-B does not contain a

comparable provision.

Section 1446(c) of the Tax Law provides:

> "The penalties and interest provided for in this section shall be paid by the transferor to the tax commission and shall be determined, assessed, collected and distributed in the same manner as the tax imposed by this article and any reference to tax in this article shall be deemed to refer to the penalties and interest imposed in this subsection."

Here, the Division issued a notice of determination, essentially assessing penalties and interest, after petitioner paid the tax shown on the tentative assessment and applied for a refund. It was only in conjunction with the refund claim and the conciliation conference that petitioner provided the Division with the documentation necessary to determine the correct amount of tax due. The Division then recalculated, and reduced, the amount of tax due, imposed penalty and interest in accordance with the applicable statutory provisions and issued a notice of determination. At hearing, petitioner protested both the denial of its refund claim and the imposition of penalty and had a full opportunity to be heard on both issues. 20 NYCRR 3000.10(d)(4), governing hearings before administrative law judges in the Division of Tax Appeals, provides "[t]hat the burden of proof shall be upon the petitioner except as otherwise provided by law". There is no statutory provision placing the burden of proof upon the Division of Taxation to show liability for penalties imposed pursuant to section 1446. Accordingly, the burden was on petitioner to establish that its failure to pay the gains tax on the date of the transfer was due to reasonable cause and was not due to willful neglect.

Petitioner and Grand Union filed gains tax questionnaires dated October 17, 1991, indicating a date of transfer of October 31, 1991; thus, they failed to comply with the 20-day pre-transfer filing requirement and could not reasonably have expected to receive a tentative assessment prior to closing. Furthermore, the questionnaires submitted lacked required documentation: petitioner did not submit independent documentation pertaining to the original purchase of the property, and petitioner did not submit an itemized list of expenses claimed, notably selling expenses and capital improvements. In fact, adequate documentation of expenses was not submitted until after the tentative assessment was issued.

The failure to receive the tentative assessment did not relieve petitioner of its obligation to pay the gains tax on the date of the transfer (cf., Matter of Baumstein, Borrok, Tax Appeals Tribunal, April 20, 1989). Its explanation for failing to do so, namely, the Division's indecisiveness with regard to whether the parcels should be aggregated, has a hollow ring in light of the fact that petitioner did not even pay the gains tax it concedes was owing on the consideration for the transfer of Parcel 1, an amount representing approximately 85 percent of the total tax assessed. Uncertainty as to the exact amount of tax due does not constitute reasonable cause for failure to pay any tax on the date of transfer. Moreover, escrowing of the consideration may have been a reasonable and prudent act, but it does not establish reasonable cause for failing to pay the tax when due.

F. The petition of Albany Public Markets, Inc. is denied, and the notice of determination issued on October 31, 1989 is sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE