STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| SEASIDE DEVELOPMENT CORPORATION | : | DETERMINATION<br>DTA NO. 808089 |
| 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, Seaside Development Corporation, 182-12 Northern Boulevard, Flushing, New York 11358, 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 July 1, 1993 at 1:15 P.M. Petitioner filed a brief on November 9, 1993 and the Division of Taxation filed a brief on November 23, 1993. Petitioner did not file a reply brief. The six-month statutory period for issuance of a determination commenced on January 5, 1994, the date established for the filing of petitioner's reply brief. Petitioner appeared by Certilman, Balin, Adler & Hyman (Howard M. Stein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (David C. Gannon, Esq., of counsel).

ISSUES

I. Whether petitioner's original purchase price for the acquisition of real property included amounts paid pursuant to contracts for the sale of two restaurant businesses.

II. Whether the assignment fee paid for the assignment of five contracts to petitioner was subject to apportionment.

III. Whether the assignment fee was properly calculated by the Division of Taxation.

IV. Whether maintenance fees paid by petitioner to the cooperative housing corporation after transfer of shares of stock to the cooperative housing corporation may be included in petitioner's

calculation of original purchase price.

V. Whether the apportionment of the original purchase price to residential units and a retained commercial unit based on the relationship between the square footage of the commercial unit and the saleable space of the residential units was proper.

FINDINGS OF FACT

Petitioner, Seaside Development Corporation ("Seaside"), was the developer and sponsor of a cooperative housing corporation named Hamilton House Owners, Inc. (the "CHC"). Seaside acquired the real property upon which the cooperative apartment buildings were constructed in October 1984. This acquisition came about through a series of contractual arrangements.

Seaside was the assignee of five sales contracts. The assignors of those contracts were actually four separate individuals. For ease of discussion, they will be referred to collectively by the last name of one of the individuals, Pappas. On January 24, 1984, Pappas entered into the following contractual agreements.

(1) Pappas contracted for the purchase of real property, including buildings and improvements, located at 10031 4th Avenue, Brooklyn, New York. At that time, the property included a one-story restaurant called Hamilton House, which was something of a landmark in Bay Ridge, Brooklyn. The sellers of this property were Louis Vames (the restaurant corporation's president), Adelaide Nicholas, George Georges, Gregory Coutoupis and the Estate of Gus Nicholas. The purchase price cited in the agreement was $500,000.00.

(2) The sellers of 10031 4th Avenue were also the sellers of an adjacent property located at 10015 4th Avenue. A building on this property housed a banquet hall and catering business operated by Narrows Restaurant, Inc. ("Narrows"). The principal shareholders of Narrows were also the owners of the Hamilton House Restaurant. Pappas agreed to purchase the property located at 10015 4th Avenue for a price of $500,000.00.

(3) Pappas entered into a contract with Narrows for the purchase of "the catering and banquet business located at 10015-4th Avenue". The assets purchased under the contract

included furniture, fixtures, equipment and merchandise. The sale was conditioned upon the State Liquor Authority's approval of Pappas's application for a liquor license.

(4) Pappas entered into a contract for the purchase of the restaurant business known as Hamilton House Restaurant for the sum of $1,000,000.00. Again, the sale was to include furniture, fixtures, equipment and merchandise and was conditioned upon Pappas's success in obtaining a liquor license.

(5) On April 13, 1984, Pappas entered into a fifth contract. This contract was in the form of a lease with an option to purchase three unimproved parcels of land adjacent to the Hamilton House restaurant, known as 415, 417 and 419 101st Street. The owner of these properties, Adelaide Nicholas, was one of the principals of Hamilton House, Inc. and Narrows Restaurant, Inc.

All of the contracts discussed above contain a similar provision identifying the other four contracts and then stating:

> "The parties in each of said agreements have a community of interest with the parties in this agreement. It is a condition of this agreement that all of the agreements are interdependent and shall close simultaneously and that the assignment of any agreement shall require the assignment of all agreements. A default in the terms of any of the agreements shall be considered a default in all of said agreements."[1]

The contract for sale of the Narrows contains the following provision:

> "In connection with the catering business being conducted by the Seller, Seller agrees that at the time of closing it will assign and transfer to the Buyer all such catering contracts scheduled to be fulfilled on dates after the closing of title, together with the sums deposited by the customers under each such catering contract. The Buyer shall in such event assume the obligation to fulfill the Seller's obligations under such catering contract and shall hold Seller harmless for any failure or alleged failure in the performance of such contracts."

On April 13, 1984, Pappas assigned his rights under the five contracts to NVNG Development Corp. ("NVNG"). James Gherardi was the sole shareholder of both NVNG and Seaside, and NVNG later assigned its rights to Seaside. The agreement between Pappas and NVNG contains the following provision:

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[1] This provision is from the agreement for sale of the catering and banquet business located at 10015 4th Avenue. The four other contracts contain similar or identical language.

> "It is the intention of the parties that all five (5) transactions entered into this date are indivisible, mutually dependent and it is the intention of all parties hereto that all transactions close simultaneously. In the event of the failure of anyone [sic] transaction, and at the option of the PURCHASER, all other transactions shall be abrogated and all contract monies deposited by the PURCHASER herein shall be returned to the PURCHASER."

The actual closing on all of these contracts occurred on October 31, 1984. On the closing date, Seaside and Narrows executed a bill of sale by which Narrows conveyed to Seaside "the catering and banquet business" conducted by Narrows together with furniture, fixtures, equipment, and all logos, trademarks and designs used in connection with the business. Among the items transferred were a couch, drapes, loveseats, mirrors, wall sconces, chandeliers, plants, silver, pottery, glassware, ovens, sinks, dishwashing equipment, refrigeration equipment and stainless steel storage shelves. Seaside and Hamilton House, Inc. executed a similar bill of sale.

Seaside filed two real property gains tax transferee questionnaires, dated September 17, 1984. One questionnaire reported the transfer of the property located at 10015 4th Avenue for consideration of $500,000.00 and the other reported the transfer of the property located at 10031 4th Avenue for the same consideration. The questionnaire filed in connection with the transfer of the property at 10015 4th Avenue contained the following statement:

> "The transferee is also acquiring a business being operated on the premises for an additional consideration of $500,000.00. Transferee Questionnaire also being filed in connection with premises 10031 Fourth Ave., Brooklyn, N.Y. In addition to the transaction indicated above, Transferee is exercising an option to purchase premises 415, 417, and 419 101 St., Brooklyn. The purchase price for the 3 aforementioned parcels is $200,000.00. The Transferee is an assignee of contracts to purchase the aforementioned properties and is paying to Constantine Spiropoulos, Steve Pappas, Giovanni Aprea, Luigi Silvestri, A.S.P.S. Rest., Inc. and N.R. Rest., Inc. an additional sum of $825,000.00 in consideration for the assignment of their respective interests in the properties above mentioned and premises 10031 Fourth Ave., Brooklyn."

A letter, dated June 12, 1984, enumerates the terms of the agreement for the assignment of the contracts between NVNG and Pappas. As relevant here, it states:

> "[I]t is understood and agreed that the undersigned, NVNG Development Corp., shall pay you, in certified funds simultaneously with the closing of title, the sum of $875,000.00 in addition to paying the Sellers the sums that are required in order to

close the various titles and sales.

Said sum of $875,000.00 is arrived at as follows:

$825,000.00 -- consideration paid for the assignments
+ 75,000.00 -- adjustment for the deposits heretofore paid by you to the Sellers on signing of the original contracts for which NVNG Development Corp. is to receive credit from the Seller.

- 25,000.00 -- balance of escrow held by Thomas A. Vafides, Esq.

$875,000.00"

Seaside purchased the subject properties with the intention of constructing a residential apartment complex and never intended to continue operation of the restaurant businesses purchased. Seaside never operated a restaurant or catering business. Because of zoning requirements, Seaside was required to reserve a portion of the ground floor facing 4th Avenue for commercial space. The original blueprints submitted with Seaside's application for a building permit show a commercial space divided into three stores on the first floor of one of the planned buildings. The building permit was issued on October 18, 1984. Demolition of the existing buildings began in February 1985 by which time Seaside had decided to put a restaurant in the reserved commercial unit.

Two buildings were constructed on the property acquired by Seaside. A six-story apartment building was built at the corner of 4th Avenue and 101st Street and a three-story apartment building was constructed on adjoining property. Altogether the project, which was marketed under the name Hamilton House, included 106 residential units, a commercial unit, an underground parking garage, and a landscaped plaza.

The offering plan issued by Seaside shows total shares to be issued of 24,228 with an anticipated purchase price for all shares of $12,114,000.00 and mortgage indebtedness of $5,200,000.00, yielding a total acquisition cost of $17,314,000.00. The offering plan contains the following general description of the property:

"The property will consist of one six (6) story High Rise, the High Rise being a legal 76-family dwelling, and one three (3) story Townhouse, the Townhouse being a legal 30-family dwelling. The adjacent commercial space is not part of the property but is subjacent thereto and all air rights will be owned entirely by the Apartment Corporation."

Building was substantially completed in August 1986 and a certificate of occupancy was issued by the City of New York dated August 19, 1986. Seaside then transferred the property to the CHC. At the time of transfer, 45 to 55 of the residential units were sold.

The Division of Taxation ("Division") issued a schedule of proposed audit adjustments to Seaside.[2] The schedule shows a number of adjustments made by the Division to Seaside's original purchase price and calculates total anticipated gain for the transfer of 24,288 shares of stock in the amount of $2,864,064.00. The parties provided no evidence regarding the event that triggered the issuance of the schedule. No transferor or

transferee questionnaires were placed in evidence regarding the transfer from Seaside to the CHC. Seaside's original submission of its computations of anticipated gross consideration and original purchase price (assuming they were submitted) was not placed in evidence.[3]

The Division issued to Seaside a Notice of Determination, dated June 8, 1988, assessing real property gains tax in the amount of $264,726.18, plus interest and penalty calculated for the period August 29, 1986 through July 7, 1988, for a total amount due of $400,813.58. The notice contains the following statement:

"For failure to either agree or disagree within 30 days of the date of the Statement of Proposed Audit Adjustment issued on April 4, 1988, has resulted in the issuance of

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[2]Two such schedules were issued to Seaside. One schedule, dated December 3, 1986, was placed in evidence as an attachment to Seaside's petition. Another, undated schedule, was placed in evidence as an attachment to the Division's answer. Neither party explained the sequence of events that led to the issuance of the two documents. Although they are clearly two different documents, they contain identical calculations; therefore, they are referred to collectively as though there was only one schedule.

[3]It appears that petitioner submitted a computation of original purchase price which became the basis for the Division's calculation of tax due; however, there is no evidence in the record of this.

> this Notice of Determination of tax due under Article 31-B of the Tax Law, for Real Property Transfer Gains Tax."

In its answer, the Division alleges that it "determined that some 22,394 shares were sold by petitioner with respect to the cooperative conversion . . . ." There is no evidence in the record describing the basis for the Division's determination of the number of shares sold. Assuming that 22,394 shares were sold at the time the notice was issued, it would have to be concluded that over 90% of the shares were sold by July 1988. In its petition, Seaside states:

> "Taxpayer must be given an opportunity to update its calculations during the progress of construction and upon its completion. The NYSDTF Notice of Determination of Tax Due gives the appearance of improperly fixing the tax penalties [sic] and interest without permitting an appropriate adjustment which is required by way of the updating of cooperative and condominium projects."

At hearing and in its brief, Seaside did not follow up this allegation. It offered no evidence or legal argument to support the contention that the assessment includes transfers not subject to tax at the time the notice of determination was issued.

The Division's schedule of adjustments shows a number of adjustments to (presumably) Seaside's calculation of original purchase price consisting of the disallowance of certain expenses claimed as initial acquisition costs and capital improvements. In its petition, Seaside challenged only five of the adjustments, although it contested the entire amount of tax assessed by the Notice of Determination.

One of the adjustments challenged in the petition was the disallowance of an expenditure for an architectural scale model. Seaside did not address this adjustment at hearing or in its brief; therefore, its original protest of that disallowance is being considered abandoned. As a result, there are only four audit adjustments at issue in this proceeding.

(a) The Division disallowed amounts paid by Seaside under the contracts for the purchase of the Hamilton House restaurant business and the Narrows catering business. This reduced Seaside's acquisition costs by $1,500,000.00.

(b) The Division determined that Seaside paid $850,000.00 for the assignment of the contracts between Pappas and the sellers of the real property and restaurant businesses. The

Division allocated this amount to the real property and to personal property. This reduced Seaside's acquisition costs by $377,740.00. The Division determined that $50,000.00 paid to Pappas by Seaside was attributable to reimbursing the assignors for downpayments made by them on the purchase contracts and was not includable in the assignment fee. As a result, original purchase price was reduced by $50,000.00.

(c) The Division apportioned Seaside's original purchase price to the retained commercial unit and the real property transferred to the CHC. After other disallowances were accounted for, total original purchase price was determined to be $1,672,260.00, and 10.22% of this amount (or $170,905.00) was apportioned to the commercial unit. The percentage figure was obtained by dividing the square footage occupied by the commercial unit by the square footage of what the Division calls "habitable space". These were determined to be 4,354 square feet and 42,592 square feet, respectively. The Division did not explain how these measurements were arrived at or provide a clear definition of the term "habitable space". The apportionment of the original purchase price to the commercial unit further reduced acquisition costs by $170,905.00.

(d) After the transfer to the cooperative corporation, Seaside retained the unsold shares and was required to pay maintenance charges, representing a proportionate share of the expenses of the corporation. The Division eliminated these expenses from Seaside's calculations of the cost of capital improvements.

With regard to each party's calculation of the total number of square feet apportionable to the commercial unit, neither party offered to explain how it determined the figures it used. Petitioner offered in evidence a blueprint of the first floor of the building in which the commercial unit is located. The Division's representative stated:

> "While we were off the record I reviewed the blueprints submitted by petitioner, in regards to the issue concerning the square feet of the commercial space of the property. And it's agreeable with the Division that we will accept the total square footage, as set out in petitioner's petition, for the project, and that it's discernible, from the blueprints, the square footage of the commercial space. And that based on those numbers, the administrative law judge can make a determination as to what percentage of the commercial space, in relation to the entire building, exists for this property." (Tr., p. 79).

The petition states:

> "The residential space of the project constitutes 68,212.41 square feet. The commercial space constitutes 4,201 square feet, yielding a total of 72,413.41 square feet of saleable space. (See page BB-22 of the Offering Plan)."

Page BB-22 of the Offering Plan shows the number of square feet on each floor of the two buildings. According to the plan, the residential area of the first floor of the six-story building is 3,210 square feet plus a lobby of 1,166 square feet. It is apparent from reviewing the schedule that petitioner calculated 68,212.41 square feet of "saleable space" by including the total square footage of the residential areas of each floor of each building. Its calculations did not include lobbies, basement rooms, the parking garage or outdoor spaces.[4]

Approximately eight months after a certificate of occupancy was issued for 10031 4th Avenue, a restaurant named Zio's was opened in the retained commercial unit. It bore no resemblance to the previous restaurant, Hamilton House, and it was not owned or operated by Seaside or Seaside's principal owner, James Gherardi. James Gherardi, Jr., Seaside's office manager and bookkeeper, described the layout of the restaurant. He stated that the restaurant occupied a portion of the first floor and the

basement underneath, with a full kitchen and serving area on each floor. He testified that the restaurant occupied a little over 3,000 square feet on the first floor and a basement area of approximately the same size. He changed this testimony after reviewing the petition and stated that the restaurant occupied a total of approximately 4,200 square feet. In its petition and brief, Seaside claimed that the commercial unit occupied 4,201 square feet. Mr. Gherardi also testified that local zoning requirements mandated that 50% of the first floor of the building be used as a commercial space. Seaside never described the method by which it determined that

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[4]In his testimony, Mr. Gherardi stated that the overall size of the two buildings is approximately 72,000 square feet, giving the impression that the calculation in the petition included all common areas, such as the parking garage. That testimony is in direct conflict with the offering plan (pp. BB-21 - BB-22) which describes over 100,000 square feet, including the parking garage, basement area and lobbies. I consider the offering plan to be the most reliable source of information.

the commercial unit occupied 4,201 square feet.

The blueprints do not clearly state the inside dimensions of the various units and common spaces shown. As a consequence, the dimensions of the commercial unit can only be estimated based on the outside dimensions. These are segregated into smaller units which allows some reasonable estimate of the actual dimensions. Using the outside dimensions, it can be determined that the entire building fronting on 4th Avenue is 55 feet wide and 163 feet long. Therefore, the square footage of each floor is approximately 8,965. The commercial unit is less than half this size. The width of the commercial unit is 55 feet. The length of the unit is the sum of the following measurements: 16 feet, 16 feet, 26 feet, 6 inches, 17 feet, 3 inches, 2 feet, 6 inches (one-half of an outside measurement of 5 feet) or 78 feet, 3 inches. Based on these calculations, it can be concluded that the commercial unit occupies approximately 4,303 square feet on the first floor. Consistent with Mr. Gherardi's testimony that the restaurant occupies the same amount of space in the basement, it can be concluded that the commercial unit occupies 8,606 square feet.

Seaside continued making capital improvements to the cooperative project after the transfer to the CHC. Carpeting and tiling, painting of the common areas, landscaping and roofing work were among the improvements which took place after the certificate of occupancy was issued in August 1986. The apartment units sold at the time of transfer were completed, but other units needed carpeting, installation of appliances and other work. Seaside maintained a full crew of workers on the site through March 1987. A smaller number of workers continued finish-up work through mid-1988. Invoices offered in evidence by petitioner show that carpeting and tiling were installed, roof work was performed and appliances were delivered and installed after the certificate of occupancy was issued.

As the owner of unsold shares in the corporation, Seaside paid maintenance fees to the CHC after the transfer.

CONCLUSIONS OF LAW

A. Petitioner claims that the Division erred in calculating its original purchase price for

the property and challenges four specific adjustments which resulted in lowering the original purchase price. First, petitioner contends that, since it purchased the restaurant businesses only to obtain the real property and not for the purpose of operating such businesses, amounts paid for the businesses are properly includable in original purchase price for the real property. Next, petitioner argues that the amount paid to Pappas for the assignment of the contracts should not be apportioned to the real and personal property because "the entire transaction was one deal to acquire and develop a single project" (Petitioner's Brief, p. 13). Petitioner also claims that the Division erred in disallowing $50,000.00 as part of the assignment fee. In addition, petitioner argues that the portion of the maintenance fees attributable to real estate taxes, mortgage interest, accounting and legal fees and insurance are properly includable in the calculation of petitioner's capital improvement expenses. The maintenance fees in issue are those paid by petitioner to the CHC after transfer of the property. Finally, petitioner states that the Division improperly apportioned the original purchase price to the residential units and the retained commercial unit.

The Division contends that petitioner is bound by the terms of its contracts which were structured as a sale of real and personal property. It takes the position that petitioner's original purchase price includes only the consideration paid for the real property under the terms of the contract. It claims that the assignment fee must likewise be apportioned to the real and personal property, since the fee was paid for the assignment of five contracts, two of which were for personal property. In response to petitioner's argument that maintenance fees paid to the CHC are properly includable in original purchase price, the Division states: "the construction period for the Seaside project ended August 19, 1986, the date the Certificate of Occupancy was issued" (Division's Brief, p. 7). As a consequence, the Division contends that the maintenance fees were properly excluded from costs of capital improvements. Finally, the Division claims that it properly apportioned the original purchase price to the commercial unit using a fraction the denominator of which is square feet of habitable space in the cooperative project and the numerator of which is square feet of space occupied by the commercial unit. The Division

states that the habitable space occupied 42,592 square feet and relies on the Administrative Law Judge to determine the square footage of the commercial unit.

B. Tax Law § 1440(5)(a) defines "original purchase price", in pertinent part, as "the consideration paid or required to be paid by the transferor . . . to acquire the interest in real property . . . ." Petitioner notes that pursuant to the regulations of the Division "consideration" includes money, property or anything of value, including any lien or encumbrance on the property "whether the underlying indebtedness is assumed or taken subject to" (20 NYCRR 590.8).

Petitioner argues that the price it paid for the real property included the amounts paid for the restaurant businesses, since it was required to purchase those businesses as a condition of obtaining the real property. Petitioner notes that it never intended to operate a restaurant business on the real property and only purchased those businesses in order to raze the existing buildings and build the cooperative apartment buildings on the land. Petitioner finds a corollary to its purchases of the restaurant businesses in 20 NYCRR 590.39 which provides an illustrative list of costs incurred to create ownership interests in cooperative or condominium form. Among the allowable costs are the costs of buying out nonpurchasing tenants and the costs of relocating nonpurchasing tenants.

I find no merit in petitioner's position on this issue and find that the purchase prices of the restaurant businesses are not includable in original purchase price. In determining petitioner's original purchase price for the real property, it is appropriate to look to the terms of the contracts. Three of the contracts were for the purchase of real property and two were for the purchase of the restaurant businesses. The parties apportioned the purchase prices of the real property and personal property by the terms of the contracts. Petitioner may not have intended to operate the restaurant businesses, but it purchased those businesses nonetheless. The terms of the contracts for Hamilton House and the Narrows included the sale of furniture, fixtures and equipment. The bill of sale for the Narrows included an extensive listing of furniture, fixtures, equipment and merchandise transferred in the sales. The disposition of the tangible personal

property acquired is not known since petitioner did not offer evidence on this point. However, it is known that tangible and intangible personal property was acquired by petitioner, and the price paid for that property was the price negotiated by the parties. Petitioner's intended use of the property cannot vary the terms of the contracts. It is true that the contracts were mutually dependent; however, this does not change the fact that the parties agreed to structure this transaction as a sale of real and personal property.

Petitioner makes much of the fact that it was the assignee of the contracts and did not negotiate the terms of the five contracts. Although petitioner did not negotiate the original contracts, it agreed to be bound by the terms of those contracts. The fact that it was an assignee does not change the fact that the contracts were for the sale of realty and personal property. It is significant that, as the purchaser of the property, petitioner filed transferee questionnaires reporting gross consideration for the two parcels of real property of $500,000.00 each. In its questionnaire filed in connection with the property at 10015 4th Avenue, petitioner stated that it was also acquiring a business being operated on the premises for an additional consideration of $500,000.00. It did not include the latter in gross consideration paid for the real property, nor did it include the $1,000,000.00 paid for the Hamilton House Restaurant in gross consideration.

The purchase of the restaurant businesses appears to have been an indivisible part of the deal negotiated by the seller and buyer so that petitioner could not purchase the real property without also purchasing the restaurant businesses. But this does not establish that the prices paid for the restaurant businesses were "intended to be part of the purchase price for the transfer of the real property" (Matter of V & V Properties, Tax Appeals Tribunal, July 16, 1992, quoted in Petitioner's Brief, p. 12). Petitioner has presented no persuasive evidence that the contracts do not contain the full agreement and understanding of the parties at the time of the sales. Two of the contracts were for the sale of personal property, and the Division properly excluded those purchase amounts from petitioner's original purchase price for the realty.

C. Petitioner claims that even if the cost of the restaurant businesses is not includable in original purchase price, the entire assignment fee should be because "the entire transaction was

one deal to acquire and develop a single project" (Petitioner's Brief, p. 13).

There was one agreement for the assignment of five contracts. The assignment summarizes the contracts being assigned as three contracts for the sale and purchase of real property and two for the sale and purchase of businesses. The assignment fee for all five contracts was $850,000.00. Petitioner has not offered any rationale for not apportioning the assignment fee. It merely states that the entire assignment fee should be included in original purchase price, since petitioner did not intend to operate the restaurant businesses it purchased. Petitioner's intended use of the personal property it purchased does not change the terms of the contracts. Since the two contracts for the sale and purchase of real property are not includable in the calculation of original purchase price, neither are the fees paid for the assignment of those contracts. Accordingly, it was proper for the Division to apportion the assignment fee to the contracts to buy real property and the contracts to buy personal property.

Petitioner also states that:

> "the $50,000 paid by petitioner to reimburse the assignors for the down payments made by them initially on the contracts, was an intrinsic part of the agreement entered into by and between the parties . . . . Thus, the Department also improperly disallowed same as part of the original purchase price."[5] (Petitioner's Brief, p. 14.)

The agreed upon consideration for the assignment was $850,000.00 ($25,000.00 escrowed prior to the closing of the five contracts and $825,000.00 payable at the closing). In addition, petitioner agreed to reimburse the assignors $50,000.00 for deposits paid to the sellers. This amount was to be credited to petitioner by the seller, reducing petitioner's obligation under the five contracts. The $50,000.00 thus appears to be a part of the price paid under the contracts and not part of the assignment fee. Petitioner has not proven that the reimbursement to the assignors increased the original purchase price of the real property.

D. The next issue to be addressed is whether a portion of the maintenance fees paid to the CHC by petitioner are includable in the calculation of original purchase price. The original

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[5] The letter of June 12, 1984 (Finding of Fact "8") shows the amount of the downpayment as $75,000.00, but both parties agree that the disputed amount is $50,000.00.

purchase price of real property includes "consideration paid or required to be paid for the construction of any capital improvements made or required to be made to the real property" (20 NYCRR 590.14). The regulations state that certain specific costs, "if paid for by a transferor . . . during a construction period", are allowable in determining original purchase price (20 NYCRR 590.16[d]). In addition to direct construction costs, the regulations allow the inclusion of additional costs. The following explanation is provided by the regulation:

> "Other costs that are clearly associated with construction of a real estate project can also be included as a cost of constructing a capital improvement. If the capital improvement requires a construction period, a period of time in which necessary activities are conducted to bring the improvement on the real property to that state or condition necessary for its intended use, the interest cost paid during that period on a construction loan, real property taxes, insurance or similar items are includible as a cost of construction. Amounts designated as points or loan processing fees on a construction loan also are includible in original purchase price so long as the fees were paid by the borrower for the receipt of the loan funds and were not paid for specific services." (Id.)

Petitioner claims that those portions of the maintenance fees attributable to real estate tax payments, mortgage interest, accounting and legal expenses and insurance are includable in its costs of construction because the maintenance fees were paid during the construction period.[6] The Division argues that the construction period ended when the certificate of occupancy was issued in August 1986, and, therefore, the maintenance fees were not paid during the construction period. Before considering when the construction period ended, there is a larger issue that must be resolved: whether the maintenance fees can be deemed to be consideration paid by petitioner for costs associated with construction of the project.

The maintenance fees are paid by the shareholders of the corporation, and petitioner's

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[6]The petition states that maintenance fees for the period in issue totalled $168,590.00, of which 82.52568% is attributable to real estate taxes, mortgage interest, accounting & legal and insurances. Petitioner offered no evidence to substantiate the total amount of the maintenance fees or the percentages in the various categories. Petitioner did not describe the expenses in each of the four categories in any detail. Mr. Gherardi did state that the CHC assumed liability for a construction loan.

liability for those fees was incurred as the owner of the unsold shares. None of the expenses claimed by petitioner were paid directly. The CHC paid the expenses, and petitioner paid them indirectly as a shareholder of the corporation. Petitioner's claim that the maintenance fees include construction costs can be compared with an argument made by the taxpayer in Matter of 1230 Park Associates (Tax Appeals Tribunal, July 27, 1989, confirmed 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455). There the taxpayer argued that "negative carry", i.e., the excess of maintenance and management costs over gross rents incurred after the transfer to the CHC, should be included in the original purchase price as a "customary, reasonable and necessary expense" under Tax Law § 1440(5)(a). The Tribunal rejected this argument reasoning that negative carry represents a cost of carrying ownership in the cooperative form not a cost of creating ownership and, therefore, may not be included in original purchase price. Likewise here, the maintenance fees were not costs associated with construction of capital improvements, rather they represent a cost of carrying ownership in a cooperative form. As such, they are not includable in the calculation of original purchase price.

It should also be noted that petitioner did not establish the period during which the maintenance fees were paid or the exact amounts attributable to such expenses as insurance, taxes and interest. Had I determined that a portion of the maintenance fees were includable in construction costs, I would not be able to find that petitioner carried its burden of proof to show the exact amount which should be included.

E. The final issue to be addressed concerns the apportionment of the residential and commercial units. The Division's regulations appear to be directly applicable to this issue. 20 NYCRR 590.19 states, in part:

> "Apportionment of original purchase price for transfers involving less than the transferor's complete interest in real property.
>
> "(a) Question: If a transfer of less than a transferor's entire interest in real property is made (i.e., an easement, transfer of development rights or a subdivision of a parcel of real property), with no reversion of the transferred interest to the transferor, what are the original purchase prices of the interest transferred and of the remaining interest?
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> "Answer: The transferor's original purchase price of the real property must

> be apportioned between the property interest being transferred and the property interest being retained, whether or not a tax is due on such transfer. The apportionment should be made by multiplying the original purchase price of the real property by a fraction, the numerator of which is the fair market value of the interest being transferred and the denominator of which is the fair market value of the real property, including such interest.
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> "Upon a subsequent sale of the remainder of the real property (the real property less the interest transferred) the original purchase price of the real property which has been apportioned to such remainder should be subtracted from the consideration paid upon such subsequent sale to arrive at the gain subject to the tax" (20 NYCRR 590.19; emphasis added).

The parties did not directly address the applicability of this regulation. However, in its petition, petitioner asserted that its calculations were based on an assumption that "all square footage in the residential and commercial space is of equal value." The Division's calculation also assumes a correlation between the fair market value of the residential units and the fair market value of the commercial unit. Therefore, I must conclude that the use of square footage as a measure of fair market value is acceptable under the regulation. The parties' disagreement centers around the calculation of the square footage to be attributed to the residential and commercial units.

Petitioner alleges that all "saleable" space is to be included in the calculation. It does not include the parking garage, lobbies, basement rooms or the outdoor areas in the calculation of saleable space. Petitioner calculates total saleable space of 72,413.41 square feet, of which 68,212.41 square feet is residential space. Petitioner's computation of the residential area is based on figures taken from the Offering Plan. The Division maintains that "[t]he proper area for consideration is the amount of habitable space in the project" (Division's Brief, p. 9); however, it does not explain how it calculated 42,592 square feet of "habitable space" and the computation cannot be discerned from evidence in the record. The petition states: "The NYSDTF . . . has determined that only ground level spaces should be utilized on the allocation totally ignoring the transfer of the air rights and that the residential structure is six stories high." If this was the Division's position on audit, it was not repeated at hearing or in the Division's brief. On the other hand, the Division's brief suggests that petitioner's calculation of total square footage includes the entire space occupied by the condominium project, both indoor and

outdoor spaces and "uninhabitable spaces" such as the parking garage. This is not the case. I cannot understand what difference there might be between the "habitable" space and the "saleable" space and conclude, therefore, that the spaces are coextensive.

Assuming that there is a relationship between square footage and fair market value, it seems reasonable to make an apportionment by multiplying the original purchase price of the real property by a fraction, the numerator of which is the square footage of the commercial unit and the denominator of which is the square footage of all sellable space, including the commercial unit. Based on a review of the evidence, I conclude that the commercial unit occupied 8,606 square feet, the residential unit occupied 68,212.41 square feet and the total sellable space is 76,818.41 square feet, from which I calculate an apportionment percentage of 11.203. This is somewhat higher than the percentage asserted by the Division. Inasmuch as my calculations are necessarily inexact, I conclude that petitioner failed to carry its burden of proof to overcome the Division's computation of square footage apportionable to the commercial unit and do not find any basis for recalculating the Division's final percentage.

F. The petition of Seaside Development Corporation is denied, and the Notice of Determination issued on June 8, 1988 is sustained.

DATED: Troy, New York
June 16, 1994

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE