

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
JAMES N. CAHILL	:	
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.	:	DETERMINATION
	:	DTA NOS. 809172
	:	AND 809173

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In the Matter of the Petition	:	
of	:	
FRANK J. COSENTINO	:	
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.	:	

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Petitioner James N. Cahill, 145 Washington Avenue, Endicott, New York 13760 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.

Petitioner Frank J. Cosentino, 70 Burdick Road, Ithaca, New York 14850 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 consolidated hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 25, 1991 at 1:15 P.M., with all briefs to be filed by January 31, 1992. Petitioners appeared by James N.Cahill, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUES

I. Whether certain furniture, fixtures and equipment transferred with real property were

owned by the partnership Old City Hall Associates and thus the consideration for the sale of petitioners' interest in the real property should be reduced by the value of such items.

II. Whether the "original purchase price" of the real property included \$500,000.00 paid for capital improvements thereto by State and Federal grants.

#### FINDINGS OF FACT

In the early 1970's, the City of Binghamton, New York ("the City"), vacated the City Hall building located at 80 State Street in Binghamton, and moved into a new government plaza. The old structure, which had been built in 1894, was considered to be a landmark and was on the Federal and State historic registers. The building remained vacant for several years and local citizens formed a "Save City Hall Committee" in an attempt to preserve it.

The City obtained a \$250,000.00 New York State Department of Parks and Recreation grant for preservation and salvage of the old City Hall. It invited bidders to submit proposals to restore the building and to return it to the tax rolls by using it for an approved purpose. The City went through the bidding process twice, and each time the high bidder failed to obtain financing. The City then received a matching grant for an additional \$250,000.00 from a Federal community development program and reopened bidding.

Petitioners, James N. Cahill and Frank J. Cosentino, were each 50% shareholders in Southern Tier Management Company, Inc. ("Southern Tier"). Petitioners' plan was that Southern Tier renovate the building and create a hotel. When the bidding was opened for the third time, Southern Tier bid \$55,000.00 on its proposal, with a \$5,500.00 "good faith deposit" and the balance to be paid when financing was secured and the lease executed.

Southern Tier was the successful bidder and entered into a Development Agreement and Option to Lease dated February 27, 1979 with the City. The agreement set forth the timetable for the project, the obligations of the parties and other provisions. The lease was to be for a term of 30 years and the lessee was to have the right to purchase the property in the 30th year

for the sum of \$1.00.<sup>1</sup>

Section 5.01 of the agreement provided as follows:

"Section 5.01 The City of Binghamton though [sic] its Community Development Department shall have the obligation to administer a contract for the restoration and repair of the structure to the extent allowable under a grant from the State of New York Department of Parks and Recreation and matching funds from Community Development sources which shall not exceed Five Hundred Thousand Dollars (\$500,000.)."

Southern Tier was unable to obtain bank financing. Petitioners approached George K. Sarkisian and John Sarkisian, local contractors, who agreed to finance the project in return for a two-thirds interest.

Petitioners formed a limited partnership with the Sarkisian brothers, which partnership was known as Old City Hall Associates.

On September 25, 1981, Southern Tier agreed to assign all of its right, title and interest to the 30-year lease to Old City Hall Associates, simultaneously with the execution by Southern Tier of the lease and easement agreements. Old City Hall Associates agreed to lease the hotel back to Southern Tier for 50 years, on a triple net basis, at a rental amount to be agreed upon when the rate of interest of permanent financing and the cost of construction were determined.<sup>2</sup>

Because of the Sarkisians' involvement, Old City Hall Associates was able to obtain financing for the balance of the funds necessary and work on the hotel, which was to be known as the Hotel de Ville, started in October 1981. Financing included a \$500,000.00 mortgage loan from Lincoln First Bank and a \$325,000.00 mortgage loan from Sarkisian Brothers, Inc.<sup>3</sup>

Capital improvements for the project cost \$1,296,140.24, consisting of \$796,140.24 in

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<sup>1</sup>A copy of the lease was apparently attached to the original agreement, but it is not attached to the copy in the record (Exhibit "K"). Mr. Cahill explained that the Federal grant required that the City not alienate ownership for 30 years and that petitioners (perhaps meaning Southern Tier) had immediately sent the City a check for \$1.00 exercising the option (Transcript, page 29).

<sup>2</sup>Transcript, page 25.

<sup>3</sup>Exhibit "N", page 2.

improvements financed by the Sarkisians and \$500,000.00 paid for by the public funding.<sup>4</sup> The grant monies were paid directly from the public sources to the contractors. The breakdown was as follows:<sup>5</sup>

"HOTEL deVILLE  
(OLD CITY HALL RESTORATION PROJECT)  
PUBLIC FUNDING BREAKDOWN

REVISED TO REFLECT CHANGE ORDERS AND AMENDMENTS 1 AND 2

<u>BID PACKAGE</u> <u>DS</u>	<u>SUBCONTRACTOR</u>	<u>STATE FUNDS</u>	<u>CDD FUN</u>
'C' Lightgauge Metal Framing Structural Steel Metal Framing Miscellaneous Metals	Elsand Steel, Inc.	\$ -0-	\$ 83,300
'J' Wood Window Rehabilitation and Wood Doors New Wood Windows	Sarkisian Brothers, Inc.	\$ 57,000	\$ -0-
'E' Hollow Metal Frames/ Doors	Luster-Life, Inc.	\$ 23,279	\$ -0-
'F' Hardware	Luster-Life, Inc.	\$ -0-	\$ 12,859
'G' Elevator	Midstate Elevator Co., Inc.	\$ -0-	\$ 70,314
'M' Plumbing	J. & K. Plumbing & Heating Co., Inc.	\$ 107,731	\$ 83,527
'O' Electrical	Nelson's Lamp Lighters, Inc.	\$ 39,490	\$ -0-
Architectural Fees	Cummings & Pash, Architects	\$ 22,500	\$ -0-
TOTALS		\$ 250,000	\$ 250,000"

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<sup>4</sup>These amounts are not in dispute. See Item 2 attachment sheets to statements of proposed audit changes (Exhibits "E" and "J").

<sup>5</sup>Exhibit "L".

Southern Tier was to pay Old City Hall Associates the \$796,140.24 in capital improvements not paid for through the grants by rental payments which were calculated to amortize such costs. Terms were 17½% interest for 7 years.<sup>6</sup>

Old City Hall Associates supplied the basic shell of the hotel building. Southern Tier furnished it, providing all lighting, wall coverings, floor coverings, furniture and fixtures and trade fixtures. Southern Tier also added four rooms to the original design, increasing it from 58 to 62 rooms.<sup>7</sup>

The Hotel de Ville opened for business in May 1983.

While operating the hotel, petitioners determined that there was a need for a large banquet hall. The Sarkisian family owned a building at 85 State Street, directly across the street from the hotel, two-thirds of the downstairs floor of which was set up as a banquet hall. The remaining one-third was a bar which was leased out by the Sarkisians. By a lease dated October 29, 1985,<sup>8</sup> Southern Tier rented the banquet facilities at 85 State Street and commenced to operate same.

In 1987, petitioners decided to buy out the Sarkisians. Pursuant to a Purchase and Sale Agreement dated April 20, 1987,<sup>9</sup> Binghamton Hotel Corporation, 50% of the stock of which was owned by each of the petitioners, purchased the 67% interest of George K. Sarkisian, John Sarkisian and Sarkids, Ltd. for \$953,000.00. Petitioners had obtained a mortgage commitment for a mortgage loan from The Savings Bank of Utica to Old City Hall Associates. The

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<sup>6</sup>Transcript, page 25.

<sup>7</sup>While petitioner James N. Cahill testified that he and Mr. Cosentino furnished the hotel and added the four rooms (Transcript, page 26), it is presumed from the context of the testimony that he was referring to Southern Tier.

<sup>8</sup>Transcript, page 27; see also reference in Exhibit "N", page 4.

<sup>9</sup>Exhibit "N"

mortgage loan was to close at the same time

as the transfer of the two-thirds interest in Old City Hall Associates. The Lincoln First Bank, N.A. (Chase Lincoln First Bank, N.A.) mortgage with a balance of \$241,393.37, as well as the Sarkisian Brothers, Inc. mortgage, with a balance of \$285,976.15, were to be paid in full from the proceeds of the mortgage loan.

In compliance with a condition subsequent to the Purchase and Sale Agreement, Southern Tier purchased from Stephens Square Realty Associates all the furniture, fixtures, trade fixtures, equipment and supplies located in the banquet facilities at 85 State Street for \$123,340.00, pursuant to a bill of sale dated April 29, 1987.<sup>10</sup> Southern Tier also purchased from George K. Sarkisian and John Sarkisian all the leasehold improvements on said premises for \$133,659.84, pursuant to a bill of sale also dated April 29, 1987.<sup>11</sup> The lease dated October 29, 1985 was terminated and a new 99-year lease was entered into between Stephens Square Associates as landlord and Southern Tier as tenant.

The mortgage loan of The Savings Bank of Utica to Old City Hall Associates was \$2,100,000.00 and the proceeds were disbursed as follows:<sup>12</sup>

<u>Payable to</u>	<u>Amount</u>
Chase Lincoln First Bank, N.A.	\$ 241,393.37
Sarkisian Brothers, Inc.	285,976.15
George K. Sarkisian and John Sarkisian	78,114.54

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<sup>10</sup>Exhibit "3". It is noted that the bill of sale recites the consideration as \$133,659.84, which is the amount ascribed to the leasehold improvements in the agreement (infra). Petitioners' Exhibit "7" (accountant's worksheet) uses the \$123,340.00 figure. See also Finding of Fact "15" (disbursement schedule).

<sup>11</sup>Exhibit "2". This bill of sale recites the consideration to be \$123,340.00, which is the price ascribed to the furniture, fixtures, etc. by the agreement (supra). Petitioners' Exhibit "7" uses the \$133,660.00 figure. See also Finding of Fact "15" (disbursement schedule).

<sup>12</sup>See Exhibit "1".

Sarbro Realty Corp.	47,150.00
Sarkids, Ltd.	261,736.00
George K. Sarkisian	14,315.05
John Sarkisian	14,315.05
Southern Tier Management Co., Inc. and Stephens Square Associates	123,340.00
Southern Tier Management Co., Inc. and George K. Sarkisian and John Sarkisian	133,659.84
Old City Hall Associates	900,000.00
TOTAL	\$2,100,000.00

The furniture, fixtures and equipment located in the banquet facilities at 85 State Street were carried on the books of Old City Hall Associates<sup>13</sup> and depreciated on Old City Hall Associates' Federal Form 4562 for 1987.<sup>14</sup> (It is noted that the 1987 and 1988 partnership returns, as well as the ledger sheet, refer to Old City Hall Associates as "Old City Hall Associates II". The parties have not alluded to the difference in name and it will be assumed for purposes of this determination that Old City Hall Associates and Old City Hall Associates II were one and the same.) The cost claimed for the furniture, fixtures and equipment at issue is \$125,980.00, consisting of the \$123,340.00 purchase price and \$2,640.00 in refinancing charges.<sup>15</sup>

Petitioners' accountant testified that the furniture, fixtures and equipment and the leasehold improvements at 85 State Street had actually been purchased by Old City Hall Associates, because Old City Hall Associates provided the financing and that he accordingly carried them as assets on the books of said partnership.<sup>16</sup>

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<sup>13</sup>Exhibit "7".

<sup>14</sup>Exhibit "6".

<sup>15</sup>Exhibits "5" and "8".

<sup>16</sup>Transcript, p. 55.

Pursuant to a Purchase and Sales Agreement dated August 3, 1988,<sup>17</sup> Binghamton Hotel Corporation, as the general partner of Old City Hall Associates, petitioners, as limited partners in Old City Hall Associates, Southern Tier and Old City Hall Associates, agreed to sell their interests in the following to James R. McCoy and Nicholas G. Serafini, Jr.:

- (a) lease between the City of Binghamton and Old City Hall Associates for the Hotel de Ville;
- (b) driveway, light and air easements;
- (c) all furniture, fixtures and equipment located in the Hotel de Ville (except television sets, telephones, switchboard and front desk computer system, which were leased);
- (d) 92 leased parking spaces;
- (e) leasehold interest in the lower floor of 85 State Street, together with leasehold improvements, furniture, fixtures, trade fixtures and equipment located therein; and
- (f) a limousine.

The purchase price was stated as follows:<sup>18</sup>

"The purchase price hereinafter will be the assumption of a Mortgage and Note presently held by The Savings Bank of Utica on the Hotel de Ville, with a current balance of approximately Two

Million Forty-Seven Thousand Five Hundred Forty-one Dollars and Six-one [sic] cents (\$2,047,541.61), and the payment of Nine Hundred Forty-seven Thousand Five Hundred Forty-one Dollars and Sixty-one cents (\$947,541.61), said amount being allocated as follows:

- A. \$ 5,000.00 - Goodwill of Southern Tier Management Co., Inc.
- B. \$ 60,000.00 -Covenant Not to Compete of STM
- C. \$ 15,000.00 - 1983 Limousine
- D. \$147,000.00 - Sale by STM of all of its' [sic] interest in the furniture and fixtures.

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<sup>17</sup>Exhibit "O".

<sup>18</sup>Exhibit "O", pages 4 and 5.



- E. \$ 3,000.00 - STM supplies in the subject premises.
- F. \$170,000.00 - Sale by STM of all of its' [sic] leasehold improvements in the subject premises.
- G. \$ 2,737.71 - The sale of fifty (50%) per cent of the stock in Binghamton Hotel Corporation by James N. Cahill.
- H. \$ 2,737.70 - The sale of fifty (50%) per cent of the stock in Binghamton Hotel Corporation by Frank J. Cosentino.
- I. \$271,033.10 - The sale by Frank J. Cosentino of his 49 1/2% per cent [sic] interest in Old City Hall Associates.
- J. \$271,033.10 - The sale by James N. Cahill of his 49 1/2% per cent [sic] interest in Old City Hall Associates.

TOTAL \$947,541.61"

The closing was apparently held on November 8, 1988. The furniture, fixtures, trade fixtures, equipment and linens, including electric, plumbing, sewer and water systems and leasehold improvements in the leased premises at 85 State Street, and electrical, plumbing, water and sewer fixtures, ceilings, wall and floor coverings, interior partitions, doors and a 30-day supply of cleaning materials, all room keys and leasehold improvements at the Hotel de Ville, were transferred by Southern Tier to SAC Leisure, Inc. by a bill of sale dated November 8, 1988 for the sum of \$320,000.00.

Gains tax questionnaires showing a transfer date of November 8, 1988 stated that each petitioner sold his 50% interest in Binghamton Hotel Corporation and 49.5% limited partnership share in Old City Hall Associates (the other 1% share was owned by Binghamton Hotel Corporation, as general partner) to Nicholas G. Serafini, Jr. and James R. McCoy. The computation of anticipated tax due was the same for each petitioner:

"1. Gross consideration to be paid for transfer by Transferee.....	1,297,541.61
2. Brokerage fees to be paid by Transferor (attach brokerage agreement).....	7,500.00
3. Consideration (line 1 less line 2).....	1,290,041.61
4. Purchase price paid to acquire real property.....	27,500.00
5. Other acquisition costs (see instructions).....	611,221.45
6. Cost of capital improvements to real property.....	648,070.12
7. Allowable selling expenses (see instructions).....	

8. Original purchase price (add lines 4, 5, 6 and 7).....	1,286,791.57
9. Gain subject to tax (line 3 less line 8).....	3,250.00
10. Anticipated tax due (10% of line 9) (If exemption is claimed at Schedule A, line 3, leave blank).....	325.00"

Other gains tax questionnaires showing a transfer date of November 8, 1988 stated that Southern Tier transferred its sub-lease and leasehold improvements at 80 State Street and 85 State Street to SAC Leisure, Inc.<sup>19</sup> The computation of tax due was as follows:

"1. Gross consideration to be paid for transfer by Transferee.....	170,000.00
2. Brokerage fees to be paid by Transferor (attach brokerage agreement).....	-0-
3. Consideration (line 1 less line 2).....	170,000.00
4. Purchase price paid to acquire real property.....	
5. Other acquisition costs (see instructions).....	
6. Cost of capital improvements to real property.....	161,698.93
7. Allowable selling expenses (see instructions).....	
8. Original purchase price (add lines 4, 5, 6 and 7).....	161,698.93
9. Gain subject to tax (line 3 less line 8).....	8,301.07
10. Anticipated tax due (10% of line 9) (If exemption is claimed at Schedule A, line 3, leave blank).....	830.11"

Additional questionnaires with a transfer date of November 8, 1988 stated that Southern Tier assigned its leasehold interest to the Hotel de Ville at 80 State Street to petitioners for \$498,000.00. The computation of tax due was as follows:

"1. Gross consideration to be paid for transfer by Transferee.....	498,000.00
2. Brokerage fees to be paid by Transferor (attach brokerage agreement).....	-0-
3. Consideration (line 1 less line 2).....	498,000.00
4. Purchase price paid to acquire real property.....	
5. Other acquisition costs (see instructions).....	
6. Cost of capital improvements to real property.....	254,184.07
7. Allowable selling expenses (see instructions).....	1,000.00
8. Original purchase price (add lines 4, 5, 6 and 7).....	255,184.07
9. Gain subject to tax (line 3 less line 8).....	242,815.93
10. Anticipated tax due (10% of line 9) (If exemption is claimed at Schedule A, line 3, leave blank).....	24,281.59"

The assignment agreement<sup>20</sup> provided that the \$498,000.00 was to be paid by reduction of that amount for the moneys previously advanced on April 29, 1987 to Southern Tier, leaving a

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<sup>19</sup>The questionnaire does not provide a breakdown. It is noted that the gross consideration of \$170,000.00 is the same amount as was attributed to Southern Tier's sale of leasehold improvements in the Purchase and Sales Agreement (Finding of Fact "18").

<sup>20</sup>Attachment to Exhibit "P(4)".

balance due and owing from Southern Tier to petitioners of \$347,047.32. The agreement recited that the transfer of petitioners' limited partnership interest in the Hotel de Ville was required to be made without the encumbrance of the lease of Old City Hall Associates to Southern Tier.

On September 11, 1989, statements of proposed audit changes were issued to each petitioner in the amount of \$54,703.52 in tax and \$4,463.65 in interest, for a total of \$59,167.17. The adjustments were computed as follows:

(a) Certain acquisition costs were partially disallowed because 67% of said costs were attributable to the Sarkisian's and were part of their original purchase price upon the sale of their 67% interest in Old City Hall Associates to petitioners:

(1) lease acquisition -  $\$55,000.00 \times 67\%$  disallowed = \$36,850.00;

(2) organization costs -  $\$18,413.23 \times 67\%$  disallowed = \$12,336.86;

(3) an adjustment was made to Old City Hall Associates' refinancing costs:  $\$661,077.00$  divided by  $\$2,100,000.00 = 31.48$  allowable percentage;

(4) costs claimed -  $\$44,952.68 \times 68.52\%$  = \$30,801.57 disallowed;

Total of the above disallowances was \$79,988.43. The amount of disallowance allocated to each partner was \$39,994.22.

(b) Capital improvements were reduced by \$500,000.00, on the grounds that this represented maintenance and repairs or had not been verified:

Sarkisian Brothers capital improvements claimed	\$1,296,140.24
Less: Amount verified (including construction interest)	796,140.24
Balance	\$ 500,000.00

It was noted that of the \$796,140.24 in capital improvements, only 33% would be allowable for the same reason that only 33% of the acquisition costs had been allowed:

Allowable capital improvements  $\$796,140.24 \times 33\% = \$262,726.28$

Amount allocated to each partner \$131,363.14

Disallowance allocable to each partner \$516,706.98

(c) Total disallowances to each partner for (a) and (b) above were \$556,701.20.

(d) Additional capital improvements were verified for Southern Tier as follows:

(1) \$254,184.07 claimed

272,828.64 allowed

\$ 18,644.57 additional

Each partner's share of this sum was \$9,322.29.

(2) \$161,698.93 claimed

162,386.16 allowed

\$ 687.23 additional

Each partner's share of this sum was \$343.62.

(3) The additional capital improvements allowed each partner totalled \$9,665.91.

(e) The net adjustment for each partner was \$547,035.29, which at the 10% gains tax rate resulted in the additional tax due of \$54,703.52 for each petitioner.

On November 6, 1989, notices of determination were issued to each petitioner assessing tax due of \$54,703.52, plus interest of \$5,536.81, a total of \$60,240.33.

After a conference in the Bureau of Conciliation and Mediation Services, the assessments were reduced to \$47,807.00, plus interest. This figure was arrived at as follows:<sup>21</sup>

"Adjustment per Statement of Proposed Audit Changes \$547,035

Less:

(1) Adjustment to step-up	
Originally claimed	\$661,077
Allowable step-up	\$902,628
a) Chase Lincoln Mortgage (67% 241,933)	\$161,733
b) Sarkisian Bros. Mortgage (67% 285,976)	191,604
c) George & John Sarkisian	78,115
d) Sabra Realty Corp.	47,150
e) Sarkids Ltd.	261,736
f) John Sarkisian	14,315
g) George Sarkisian	14,315
h) leasehold improvements	133,660

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<sup>21</sup>Exhibit "Q", page 1.

Adjustment to step 50%	\$241,551	\$(120,776)
(2) Adjustment to refinance costs		
Disallowed per proposed audit change	\$30,802	
Revised disallowance	<u>25,631</u>	
Adjustment 50%	5,171	(2,586)
Plus:		
(1) Adjustment to capital improvements		
Disallow 67% of 162,386 50%	\$108,799	<u>\$54,400</u>
Revised adjustment		\$478,073
Revised tax		\$47,807"

Subsequent to the hearing, and after reviewing documentation submitted by petitioners, the Division of Taxation ("the Division") eliminated the \$108,799.00 adjustment to capital improvements (the third adjustment listed in Finding of Fact "25") and reduced the tax assessed against each petitioner by \$5,440.00.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners claim that:

(a) The disallowance of the furniture, fixtures and equipment in the sum of \$125,980.00 is proper only if the consideration for the sale is reduced by the fair market value of same.

(b) The "original purchase price" computed for gains tax purposes should include the \$500,000.00 in government funding.

The Division claims that:

(a) The furniture, fixtures and equipment at 85 State Street were owned and transferred by Southern Tier, not by Old City Hall Associates and that, since petitioners did not sell their stock in Southern Tier, the consideration from the sale of their partnership interest in Old City Hall Associates should not be reduced by the value of such property.

(b) The \$500,000.00 in government funding was not "consideration paid or required to be paid by the taxpayer" and is not to be included in computing the original purchase price.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax at the rate of 10% on gains derived from the transfer of real property within New York State.

B. Tax Law § 1440(1)(c) provides as follows:

"In the case of a transfer which includes other assets which are in addition to real property or an interest therein and for which there is no reasonable apportionment of the consideration for such real property or interest, consideration means that portion of the total consideration which represents the fair market value of such real property or interest. In the case of a transfer of a controlling interest in an entity with an interest in real property, there shall be an apportionment of the fair market value of the interest in real property to the controlling interest for the purpose of ascertaining the consideration for the transfer of such controlling interest."

The regulations treat apportionment of consideration as follows:

"(a) Question: How is the consideration for the real property or interest therein ascertained when the transfer includes an interest in real property and other assets?

Answer: In the case of a transfer which includes other assets which are in addition to real property or an interest therein, the consideration must be reasonably allocated between the real property and the other assets pursuant to a written agreement signed by both the transferor and transferee. If there is no reasonable apportionment of the consideration for such real property, the consideration is that portion of the total consideration which represents the fair market value of such real property." (20 NYCRR 590.11[a].)

C. There was a written agreement allocating the consideration for the furniture, fixtures and equipment at 85 State Street and the amount so allocated is not in dispute.<sup>22</sup> These assets were clearly acquired by Southern Tier pursuant to the Purchase and Sale Agreement dated April 20, 1987 and bill of sale dated April 29, 1987 (Finding of Fact "14"). Moreover, said furniture, fixtures and equipment were sold by Southern Tier to SAC Leisure, Inc. pursuant to the Purchase and Sales Agreement dated August 3, 1988 (Finding of Fact "17") and bill of sale dated November 8, 1988 (Finding of Fact "19"). The fact that petitioners' accountant carried said assets on the books of Old City Hall Associates and depreciated same on said partnership's tax return on the theory that Old City Hall Associates provided the financing, does not alter the

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<sup>22</sup>The amount allocated was \$123,340.00. The cost claimed of \$125,980.00 includes \$2,640.00 in refinancing charges (Finding of Fact "16").

fact that ownership was clearly in Southern Tier. Accordingly, since it does not appear that petitioners transferred their interests in Southern Tier, the consideration received should not be reduced by the value of the furniture, fixtures and equipment included in the sale. Petitioners have essentially failed to sustain their burden of proof to show any basis upon which they would be entitled to reduce the consideration for the sale by the value of the said furniture, fixtures and equipment.

D. Tax Law § 1440.5 provides, in pertinent part, as follows:

"(a) 'Original purchase price' means the consideration paid or required to be paid by the transferor; (i) to acquire the

interest in real property, and (ii) for any capital improvements made or required to be made to such real property, including solely those costs which are customary, reasonable, and necessary, as determined under rules and regulations prescribed by the tax commission, incurred for the construction of such improvements. 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 and those customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative or condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission.

(b) In the case of a transfer of real property by a gift, devise, bequest or inheritance, the original purchase price of the real property in the hands of the transferee immediately after the transfer shall be the same as the original purchase price of such property in the hands of the transferor immediately before the transfer."

The regulations provide as follows:

Question: What is the original purchase price of real property acquired by gift, devise, bequest or inheritance?

Answer: The original purchase price of real property acquired by gift, devise, bequest or inheritance is the same as the original purchase price of the real property in the hands of the transferor immediately before the transfer. This means that if there has been a series of transfers by gift, devise, bequest or inheritance, the original purchase price of real property is the consideration paid by the last transferor who paid consideration to acquire the real property plus the consideration paid for capital improvements by all intervening transferors.

If in connection with a transfer by gift the transferee/donee assumes or takes subject to a liability encumbering the real property, the original purchase price of such property in the hands of the transferee shall be increased by the amount of gain, if any, to the transferor on the transfer. If there is no gain, the transferee will have a carry-over original purchase price as determined under the above paragraph. (See section 590.10 of this Part for more information about the computation of gain to a transferor/donor.)" (20 NYCRR 590.18.)

E. Tax Law § 1440.5 (a) provides that "original purchase price" means the consideration paid, or required to be paid by the transferor to acquire the real property or for capital improvements thereto. Here, \$500,000.00 of the \$1,296,140.24 consideration for the capital improvements was supplied not by the transferor, but through funds paid by public agencies directly to the respective contractors (Finding of Fact "9"). Petitioners' reliance on Tax Law § 1440.5 (b), which deals with transfers by gift, devise, bequest or inheritance, is misplaced, as the grants were not the type of transfers covered by said subdivision. For one thing, the grants were not actually gifts, as they were not made without consideration (i.e., Southern Tier's compliance with the terms of the grants constituted consideration). Absent any showing of legislative intent to the contrary, said grants cannot be deemed to be payments made by petitioners for acquisition of the property, or for capital improvements thereto. Accordingly, the \$500,000.00 is not to be included in petitioners' "original purchase price".

F. The petitions of James N. Cahill and Frank J. Cosentino are granted to the extent of the reduction of tax of \$5,440.00 to each petitioner made by the Division of Taxation after hearing (Finding of Fact "26"), but except as so granted are otherwise denied, and the notices of determination dated November 6, 1989, as adjusted pursuant to the Bureau of Conciliation and Mediation Services conference (Finding of Fact "25"), are otherwise sustained.

DATED: Troy, New York  
December 24, 1992

/s/ Robert F. Mulligan  
ADMINISTRATIVE LAW JUDGE