STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
44 WEST 62ND STREET ASSOCIATES	:	DETERMINATION DTA NO. 809545
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, 44 West 62nd Street Associates, 645 Madison Avenue, New York, New York 10022, 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.

On July 30, 1992, petitioner appearing by James L. Tenzer, Esq., and the Division of Taxation appearing by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel) consented to have the controversy determined on submission without hearing. On August 28, 1992, the Division of Taxation submitted documentary evidence. On October 16, 1992, petitioner filed its initial brief. On November 25, 1992, the Division of Taxation filed its brief. On March 12, 1993, petitioner submitted its reply brief. After due consideration of the record, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the original purchase price for certain shares of a cooperative housing corporation acquired by petitioner should be based on an allocation of petitioner's original cost for the property or the cooperative housing corporation's cost for such property.

II. Whether the cooperative housing corporation's mortgage indebtedness on the property should be allocated to and included in consideration received by petitioner upon its sale of cooperative housing corporation shares.

III. Whether the Division of Taxation's different treatment of cooperative and non-cooperative corporations with regard to the determination of original purchase price and the

treatment of mortgages in determining consideration violates the Equal Protection clauses of the New York State and Federal constitutions.

IV. Whether petitioner is entitled to compute its gains tax liability with respect to the cooperative conversion it sponsored by utilizing the "Option B" calculation method as opposed to the method employed by the Division of Taxation on audit.

V. Whether petitioner's original purchase price should include the conversion period interest and conversion period real property taxes that petitioner claims it incurred.

VI. Whether petitioner has established that penalties asserted for failure to timely file certain returns and failure to timely remit tax due should be abated.

FINDINGS OF FACT

Petitioner, 44 West 62nd Street Associates, a joint venture, acquired, on December 15, 1980, pursuant to a contract of sale dated January 21, 1980, the leasehold interest in the property located at 44 West 62nd Street, New York, New York, for $8,000,000.00. On May 6 and 7, 1982, pursuant to a contract of sale dated November 7, 1980, petitioner acquired by purchase the fee interest in the property for $2,200,000.00.

Petitioner was the sponsor of an offering plan to convert 44 West 62nd Street, New York, New York, to cooperative ownership. The approximate date of the first offering under the plan was December 1, 1981.

On October 15, 1981, petitioner entered into a contract of sale to sell the property located at 44 West 62nd Street to the Lincoln Plaza Tenants Corporation ("Lincoln Plaza"). On October 20, 1982, petitioner transferred title to the premises to Lincoln Plaza, the cooperative housing corporation ("CHC"), pursuant to the terms of the plan.

Petitioner received as consideration from Lincoln Plaza upon the sale of the premises the amount of $14,914,507.00, which was comprised of the following:

Proceeds of sale of apartments (cash)	$ 751,077.00
Mortgage to which 44 West was subject	5,000,000.00
Unsold shares	9,163,430.00
	$14,914,507.00

A total of 40,000 shares of capital stock of Lincoln Plaza were allocated to 158

residential apartment units and issued by Lincoln Plaza. Prior to March 28, 1983, individual subscribers made capital contributions to the corporation, Lincoln Plaza, in exchange for 31,204 shares, representing 124 residential apartments. Subsequent to March 28, 1983, individual subscribers made capital contributions to Lincoln Plaza totalling $472,030.00 in exchange for 1,354 shares, representing five residential apartment units. On June 26, 1984, petitioner transferred, in bulk, the remaining 7,442 shares for $3,640,000.00, representing 29 residential apartment units.

On or about March 11, 1985, petitioner submitted a transferor questionnaire for the bulk transfer of the 29 apartment units. The questionnaire indicated that petitioner, as transferor, transferred 7,442 shares, representing 29 units, in Lincoln Plaza to five individuals taking as tenants-in-common, as transferees. The purchase money mortgage was apportioned to each unit transferred.

A transferor questionnaire was not filed for the five apartment units transferred on the following dates:

July 7, 1983
July 18, 1983
September 14, 1983
March 6, 1984
November 4, 1984

The Division of Taxation ("Division") determined petitioner's original purchase price ("OPP") using the price originally paid to acquire the property and the amount paid for capital improvements, cooping expenses and other acquisition costs. The Division did not include in the category of capital improvements items entitled "conversion period interest" and "conversion period real property taxes". In addition, the Division did not compute petitioner's original purchase price using the fair market value of the premises on the date it was sold by petitioner to Lincoln Plaza (October 20, 1982).

Petitioner incurred $3,387,332.00 in conversion period interest, which, according to petitioner, was the interest expense incurred "from inception in connection with all amounts borrowed to fund amounts paid to convert the property to cooperative ownership." Petitioner

also incurred $579,816.00 in conversion period real property taxes, which were the real property taxes paid on vacant units during the conversion period.

The conversion period interest that petitioner included in the capital improvements portion of OPP and which the Division disallowed was described by petitioner as follows:

Fee and Leasehold Loan	$3,310,192.00
Construction Advances	977,140.00
	$4,287,332.00

The Division, on audit, requested contract/construction loans to verify the construction advances. It appears that such documentation was provided in the amount of $900,000.00, as $3,387,332.00 remains in issue.

By Notice of Determination of Tax Due under Gains Tax Law, dated November 19, 1988, the Division assessed gains tax, relating to the 8,796 shares of stock sold by petitioner between March 28, 1983 and the date of the audit, in the amount of $30,948.00, plus interest of $16,655.00 and penalty of $10,832.00, for a total amount due of $58,435.00. On July 20, 1988, petitioner paid the total amount due in full.

The gains tax due was computed as follows:

Consideration	$4,111,030.00
Less: reserve fund	131,940.00
Add: mortgage indebtedness	1,099,500.00
Gross consideration	$5,078,590.00
Less: brokerage	77,284.00
	$5,001,306.00
Less: OPP[1]	4,691,829.00
Gain on shares - taxed per audit	$ 309,477.00
Tax due @ 10%	$ 30,948.00
Penalty ($30,948.00 x 35%)	10,832.00
Interest	16,655.00
Total	$ 58,435.00

Petitioner submitted a series of interrogatories to the Division. The interrogatories and the responses of the Division are

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[1] Original purchase price ("OPP") was computed without the inclusion of "conversion period interest" and "conversion period real property taxes" that had been claimed by petitioner.

summarized as follows:

> (a) Individuals purchase real property and transfer the real property to a partnership, which thereafter transfers it to a corporation in exchange for its stock, all prior to March 28, 1983.
>
> The OPP for determining the gain on the sale of the stock so acquired by the partnership is the fair market value of the property on the date of the transfer to the corporation.
>
> (b) The partnership in (a) above distributes the stock of the corporation to its partners before March 28, 1983. The OPP for determining the gain on the subsequent sale of the stock by the partners is the fair market value of the property on the date of the distribution. There is no distinction between shares of stock of a corporation that is qualified to sell its stock to tenant-

shareholders and shares of other corporations.

(c) Property transferred by a partnership to a corporation (including a cooperative corporation), prior to March 28, 1983, is subject to the encumbrance of a bargain lease.[2] The value of the bargain lease is consideration received prior to the effective date of the gains tax law and, therefore, is not included in the consideration on the subsequent sale of the stock to the tenant-shareholders after March 28, 1983.

(d) Property, transferred by a partnership to a corporation (including a cooperative corporation), prior to March 28, 1983, is subject to the encumbrance of a mortgage. The value of the

[2]A "bargain lease" is a lease providing for a rent below fair market rent. Such a lease is valued at the time that it is created at the present value of the difference between the rent payable under the lease and the fair market rent over the term of the lease.

mortgage is not consideration received prior to March 28, 1983 and, therefore, is included in the consideration on the subsequent sale of the stock.

(e) Subsequent to March 28, 1983, property is transferred by a partnership to a corporation (including a cooperative corporation) which is subject to the encumbrance of both a bargain lease and a mortgage. The value of both is included on a pro-rata basis in the consideration on the subsequent sale of the stock.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of 10% on gains derived from the transfer of real property within New York State. Tax Law § 1440(3) defines "gain" as "the difference between the consideration for the transfer of real property and the original purchase price for the property." The term "original purchase price" is defined as, generally, the consideration paid or required to be paid by the transferor to acquire the interest in real property, plus the cost of certain improvements and customary expenses as set forth in the statute (Tax

Law § 1440[5][a]). The threshold level at which this tax first applies is reached when the consideration for the property transferred equals or exceeds $1,000,000.00 (Tax Law § 1443).

B. For purposes of computing the gains tax, a cooperative conversion is treated as a single transfer rather than as two separate transfers (i.e., the sponsor-to-CHC transfer is viewed as part of the overall conversion process and is not itself treated as a taxable event separate from transfers of shares to individual apartment unit purchasers). In turn, the payment of tax is not due until the transfers of shares to the purchasers of individual apartment units (Tax Law § 1442[b]; see, Matter of Mayblum v. Chu, Sup Ct, Queens County, May 11, 1984, Graci, J., affd 109 AD2d 782, 486 NYS2d 89, mod 67 NY2d 1008, 503 NYS2d 316; 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). In calculating the amount of tax due on each cooperative apartment unit transferred, Tax Law § 1442(b) calls for "an apportionment of the original purchase price of the real property and total consideration anticipated under such cooperative . . . plan."

C. Petitioner argues that the OPP should be based upon the fair market value of the property when petitioner transferred it to the cooperative housing corporation rather than upon the transfer to petitioner. This position of petitioner is based upon the different treatment provided by the Division to cooperative corporations as compared to non-cooperative corporations. In the non-cooperative corporation situation, it is the Division's practice to use the real property's fair market value on the date of the last transfer prior to the effective date of the gains tax, March 28, 1983, as the OPP so long as consideration was paid for the transfer. In the situation where the sponsor transferred the real property prior to March 28, 1983, the basis of the OPP is the transferor's acquisition costs.

Petitioner's argument is without merit. Initially it is noted that the courts and the Tax Appeals Tribunal have ruled that the gains tax statutory scheme was designed with the concept that the cooperative corporation exists as a conduit in transferring residential apartment units to third parties. In Mayblum v.

Chu (supra), the Court of Appeals held that the gains tax:

> "is imposed by the statute upon the overall cooperative plan except as the Article exempts transfer of shares in the cooperative pursuant to a written subscription agreement entered into prior to March 28, 1983, the effective date of the Article."

The court further stated that:

> "In interpreting article 31-B, we are guided by what the Legislature intended. The necessary implication of section 1443(6), which exempts from its tax on real property a transfer after the effective date of the act because made pursuant to a written contract entered into before its effective date, is that the transfer of shares as part of a cooperative plan (which is the only way a cooperative corporation can transfer an interest in real property) is taxable. That construction is supported by the exception in section 1440(7) of the transfers pursuant to a cooperative or condominium plan, and by section 1442 fixing the date of a transfer under a cooperative plan. That the latter section deals with payment of the tax is not inconsistent with construing the over-all transaction as taxable; it merely demonstrates that although for purpose of computation of the tax the cooperative conversion is treated as a single transfer, it is not to be so treated with respect to date of payment, just as it would not be so treated with respect to exemption from tax (§1443[6])."

The Tax Appeals Tribunal, in Matter of Normandy Associates (March 23, 1989), discussed the gains tax statutory scheme as it relates to the cooperative conversion process as follows:

> "The essence of petitioner's argument is that the transfer of the real property by the realty transferor to the cooperative housing corporation is the taxable event for gains tax purposes . . . . In contrast to the structure petitioner would impose on the gains tax, we conclude that the tax treats the transfer of shares by the realty transferor to unit purchasers as the taxable event. However, the gain on these transfers is measured by the difference between the consideration for the shares and the realty transferor's original purchase price in the real property prior to its transfer to the cooperative housing corporation. This scheme in effect ignores the realty transferor's transfer to the cooperative housing corporation and instead treats the realty transferor as if he were directly transferring his interest in the real property to the unit purchasers. Under this scheme the gains tax is imposed on the entire cooperative conversion plan, encompassing the real property prior to its transfer to the cooperative housing corporation and the sale of shares by the realty transferor subsequent to the property's conversion to cooperative ownership. The transfer to the cooperative corporation is then treated merely as a conduit which allows the transformation of the real property into shares allocated to units." (See also, Matter of 1230 Park Associates, supra; Matter of Birchwood Associates, Tax Appeals Tribunal, July 27, 1989.)

The Tribunal, in both Normandy and Birchwood, went on to state that provisions of Article 31-B, specifically former sections 1440.7, 1442 and section 1443.6, "articulate a statutory scheme which treats the realty transferor in a cooperative conversion as if he is

transferring his real property interest directly to the unit purchasers."

Under this scheme, the transfer to the cooperative corporation is treated differently than transfers to non-cooperative corporations. However, former sections 1440.7, 1442 and section 1443.6 provide ample support for the Division's decision to tax transfers pursuant to a cooperative plan like transfers pursuant to a condominium plan and, as a result, to treat cooperative corporations differently from non-cooperative corporations.

D. Petitioner argues that the Division must treat mortgages and bargain leases the same in determining the consideration for the sale of each share of stock. Where the consideration attributable to a mortgage or bargain lease is created or assumed at the time the real property is sold to a corporation (with such sale occurring after March 28, 1983), the consideration is presumed to relate to all shares of stock in the corporation and a proportionate share of the mortgage and/or bargain lease relates to each share of stock. However, where the bargain lease was created in a sale to a corporation prior to March 28, 1983, the Division considers the consideration attributable to the bargain lease, unlike a mortgage, to have been entirely received prior to March 28, 1983 and "grandfathered" and not included in determining the gain on shares of stock sold after March 28, 1983. Petitioner wishes to have the mortgage involved in its transaction treated as a bargain lease.

This issue has been previously decided by the Tax Appeals Tribunal in Matter of Birchwood Associates (supra). The Tribunal held that a mortgage given by the cooperative housing corporation to the sponsor (petitioner), in a transaction occurring prior to the enactment of the gains tax law, is treated as consideration to the sponsor.

Although Birchwood, as decided by the Tribunal, is dispositive of this issue, the Division has, in addition, put forth a rational basis for the different treatment it affords mortgages and bargain leases that directly addresses petitioner's argument. The Division's position is adopted and presented as follows:

A cooperative conversion which includes a bargain lease is typically accomplished in the following steps:

(1) Sponsor conveys real property to CHC:
(CHC = cooperative housing corporation)
Sponsor ----------[real property]----------} CHC

(2) In return for the conveyance of the real property to the cooperative housing corporation, the sponsor receives cash, debt (a mortgage), a bargain lease on commercial space and the unsold units (shares).
CHC----[cash, debt, bargain lease, unsold units]----} sponsor

(3) Sales of Residential Units to Purchasers
Sponsor-----[shares and *proprietary lease]-----} purchasers
* the proprietary lease has no relation to the bargain lease.

The Gains Tax Effect of the Bargain Lease

For the bargain lease, the cooperative corporation is the lessor and the sponsor is the lessee. The difference between fair market rent and the nominal rent charged to the sponsor under the terms of the bargain lease is valued to the sponsor at the moment the lease is executed. Clearly, this value is "consideration" within the meaning of Tax Law § 1440.1(a). It is this economic gain to the sponsor which the Division focuses on for gains tax purposes. To the extent, however, that this lease transaction occurs prior to the effective date of the gains tax, the Division views this as consideration received at the time of the conveyance of the lease. Through present value calculations, the consideration arising from this lease transaction is fixed and ascertainable at the time the lease is formed. Therefore, the Division treats the consideration attributable to the bargain lease as grandfathered, just like the Division treats the consideration received from units sold before the effective date of the tax as grandfathered.

The Gains Tax Effect of the Mortgage

For the mortgage, the cooperative corporation is the mortgagor and the sponsor is the mortgagee. The mortgage is an encumbrance on all units (shares). The bargain lease encumbers only a commercial unit or units; it is not an encumbrance on any of the residential units and the unit purchasers are not parties to, and assume no obligations under, the bargain lease.

The servicing of the purchase money mortgage is directly linked to the sales of the residential units. Upon the sale by the sponsor of each unit, the purchaser assumes that portion of the purchase money mortgage which the number of shares allocated to the purchaser's unit

bears to the total number of shares. The consideration received by the sponsor which is attributable to the purchase money mortgage is therefore recognized when units (shares) are sold to purchasers. Subject to occupancy requirements, each unit purchaser may claim the mortgage interest he or she pays as an itemized deduction for Federal income tax purposes (see, Internal Revenue Code § 163[h][4][B]).

Subject only to the Tax Law § 1443.6 grandfather exemption, the tax on the sale of cooperative units is due on the date of the transfer of each unit (Tax Law § 1442[b]); see also, Mayblum v. Chu, supra). Those units that are sold before the effective date of the gains tax are grandfathered and that consideration is excluded; those units sold after the effective date of the gains tax are taxed.

In addition to case law, this analysis provides a basis for the different treatment afforded mortgages and bargain leases created before March 28, 1983, the effective date of the gains tax.

E. Petitioner claims that the Division's refusal to use the fair market value as of the date of the last transfer before the effective date of the gains tax to transfers of real property into a cooperative corporation and the Division's refusal to grandfather mortgages placed on the real property before the effective date of the gains tax in determining the sponsor's consideration are violative of the Equal Protection clauses of the New York State and Federal constitutions.

The issues raised by petitioner have been previously addressed and decided contrary to the position of petitioner. In Trump v. Chu (65 NY2d 20, 489 NYS2d 455), the Court of Appeals held that the gains tax statute's different treatment of developers of condominiums and cooperatives from developers of subdivided improved real property was constitutional. The Court of Appeals provided the following analysis for its decision:

> "Turning to the Legislature's different tax treatment of condominium and cooperative developers on the one hand and subdivided improved realty on the other, it is apparent that the classification employed is rationally related to the legitimate State purpose of raising the revenues necessary to finance the State budget and provide needed government services because: (1) condominium and cooperative developments involve greater administrative cost to State government as a result of more extensive special laws, regulations and inquiries than apply to subdivided improved realty (see, e.g., General Business Law §§ 352-e - 352-eeee [application of Martin Act to condominiums and cooperatives]; Real Property Law §§ 339-d - 339-ii [Condominium Act]); (2) condominium and cooperative

> developments, because they are more likely to occur in urban areas than subdivisions, make greater demands on needed public services; and (3) treating sales of condominium and cooperative units as separate tax transactions would entail greater administrative costs than in the case of subdivided realty, thereby reducing the net revenue produced by the tax. In addition, the Legislature rationally could have believed that the challenged classification would further the conceivable purpose of encouraging the development of individually owned residences while at the same time discouraging the rapid conversion of scarce rental apartments to condominiums and cooperatives." (Trump v. Chu, supra.)

The rationale provided by the Court of Appeals is directly applicable to the present matter, rendering petitioner's constitutional argument untenable.

F. Petitioner argues that the Division is applying a two-step method (using Option A and Option B) to compute gain (and tax due) upon audit, that such method is inappropriate (and in fact not allowable), and that petitioner is entitled to calculate gain (and tax due) under Option B. In short, petitioner disputes the Division's allocation to the taxable units sold the actual cash portion of consideration, the mortgage portion of consideration and OPP, and then computing the gain on such taxable units. Petitioner argues that all unit transfers, including grandfathered transfers, be counted in calculating gain per share under Option B.

It is noted that in this case the transfers subjected to tax on audit had already occurred and thus were not, at the time of audit, anticipated. Petitioner did not report the five taxable transfers, file returns for the five taxable transfers, elect any method (i.e., then available Option A or Option B) of reporting when any of the transfers were made, or pay tax until the audit was completed. No reason has been advanced for this failure. As a result, petitioner lost its entitlement to choose between Option A or Option B (Matter of Normandy Associates, supra).

G. In a related argument, petitioner claims that since the gains tax is applied to and treats the cooperative conversion process as a single transfer of real property then all unit transfers, including grandfathered transfers, must be counted in calculating gain per share under Option B. Including grandfathered transfers (which occur early in the conversion) would nearly always result in a lower overall gain-per-share amount because such early transfers are frequently made at discounted prices and because in times of rising real estate prices early sales will be for lower

prices than later sales. However, it is noted that Tax Law § 1442 refers to calculating "tax due" on cooperative apartment unit transfers, and requires an apportionment of total consideration anticipated and original purchase price "for each such . . . unit." In turn, Tax Law § 1443(6) exempts "grandfathered" units from the tax. Thus, each "such" unit under Tax Law § 1442 would clearly mean only those units subject to tax (i.e., non-grandfathered units) and would exclude from such calculation those units upon which tax would not be due (i.e., grandfathered units). Accordingly, the Division's computational method which deals specifically with consideration received only on taxable (non-grandfathered) units is reasonable. It is in harmony with determining whether the cooperative conversion itself is taxable in its own right based on whether consideration anticipated on taxable (non-grandfathered) units alone reaches $1,000,000.00. Hence, petitioner's argument to include grandfathered units is rejected.

H. Petitioner claims that the $3,387,332.00 of "conversion period interest" and the $579,816.00 of "conversion period real property taxes" are properly includible in the real property's OPP. The "conversion period interest" is comprised of the following, as described by petitioner:

Fee and Leasehold Loan	$3,310,192.00
Construction Advances	77,140.00
	$3,387,332.00

Petitioner argues that a combined reading of Tax Law § 1440.5(a) and 20 NYCRR 590.39 establishes that the illustrative list contained in section 590.39 is not exclusive, and there is no proscription contained therein against the inclusion in OPP of other interest or real property tax expenses. Petitioner argues that interest incurred on amounts borrowed to fund the expenditures incurred to create ownership interests in cooperative form and real property taxes incurred on vacant apartment units during the conversion period are "customary, reasonable and necessary expenses incurred to create . . ." and therefore such interest and taxes are properly includible in OPP.

With regard to the conversion period interest, the record is unclear as to the purpose of the funds borrowed. There is nothing in the record which establishes the purpose of the

conversion period interest. Therefore, it is determined that the Division properly denied the inclusion of the conversion period interest in the OPP. In addition, it appears, in part, that petitioner is arguing that the interest expense is a "reasonable" and "necessary" expense incurred to create an ownership interest in cooperative form. However, it seems that the interest expense was incurred to acquire the real property, not to allow its conversion to cooperative ownership. Interest charges on funds used to acquire real property are not allowable as part of the transferor's OPP (Matter of Mattone v. State of New York Dept. of Taxation & Fin., 144 AD2d 150, 534 NYS2d 478; Matter of 61 East 86th Street Equities Group, Tax Appeals Tribunal, January 21, 1993).

As previously noted, petitioner's arguments relating to the inclusion of conversion period real property taxes in OPP are similar to the arguments presented for conversion period interest. The crucial issue to be addressed is whether conversion period real property taxes can be characterized as an expense incurred to create ownership in the cooperative form. That question must be answered in the negative as conversion period real property taxes represent a cost of carrying the ownership in the cooperative form, not creating it and that, therefore, it is not includible in the OPP (Matter of 1230 Park Associates, supra; Matter of 61 East 86th Street Equities Group, supra).

I. Tax Law former § 1446.2(a) provides that:

> "[a]ny transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty . . . . If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

Petitioner transferred five taxable units without any gains tax filing or the payment of any tax. On June 24, 1984, petitioner transferred 29 taxable units, in bulk, without the filing of any gains tax questionnaires or the payment of the tax due. On March 11, 1985, petitioner submitted a transferor questionnaire for the 29 units. On July 20, 1988, petitioner paid the tax, penalty and interest due as determined on audit.

Petitioner initially argued that the penalties should be abated because it was aware of the Division's policy to permit the encumbrance of a bargain lease to be excluded from the

consideration received on the sales of stock in the determination of gain for the purposes of the gains tax and treated the encumbrance of the mortgage in a similar manner. Petitioner claimed it filed its gains tax submissions on this basis. When it was subsequently pointed out to petitioner by the Division that it apportioned the purchase money mortgage to each of the 29 units transferred and therefore did not treat the encumbrance of a mortgage similar to the encumbrance of a bargain lease, petitioner argued that the penalties should be eliminated because of the complicated nature of the gains tax.

It is uncontested that petitioner late-filed returns and late-paid the tax due. Therefore, the question is whether the delay in filing and paying the tax may be considered reasonable.

In determining reasonable cause, all of the actions of a taxpayer are considered relevant (Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121). The review of these actions must be made in light of information available at that time (Matter of 1230 Park Assoc. v. Commr. of Taxation & Fin. of the State of New York, supra; Matter of 61 East 86th Street Equities Group, supra).

In August 1983, the Division issued Publication 588, "Questions and Answers - Gains Tax on Real Property Transfers". Question and answer number 20 addressed the application of the gains tax to cooperative conversions.

On August 22, 1983, the Division issued TSB-M-83-(2)R, "Computation and Original Purchase Price for Condominium or Cooperative Projects". This document describes the two methods of computing the gains tax due upon the sale of a unit in a cooperative scenario, and is consistent with the August 1983 Publication 588.

On May 11, 1984, Mayblum v. Chu (supra) was decided, and set forth the proposition that, in a CHC scenario, the taxable event is the transfer of shares. This decision was affirmed by the Appellate Division, Second Department on March 11, 1985 (Mayblum v. Chu, 109 AD2d 782, 486 NYS2d 89).

Finally, in November 1984, a revised Publication 588 was issued by the Division. Question and answer number 33 reiterated the proper treatment of cooperative conversions

under the gains tax law.

Given the available information, it was unreasonable for petitioner to have delayed filing the transferor questionnaire for the bulk transfer for approximately nine months after the transfer, to have failed to file the transferor questionnaires for the five taxable unit transfers and to have delayed payment of the gains tax due until after the completion of the audit. Therefore, petitioner has failed to establish reasonable cause.

J. The petition of 44 West 62nd Street Associates is denied and the Notice of Determination dated November 19, 1988 is sustained.

DATED: Troy, New York
September 9, 1993

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE