STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

RICHARD ADER :

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. :

In the Matter of the Petition :

of :

JAY D. CHAZANOFF :

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. :

In the Matter of the Petition :

of :

PHILIP COHEN :

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. :

In the Matter of the Petition :

of :

DANIEL N. DAVIS :

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. 809649
THROUGH 809666

In the Matter of the Petition :

of :

ARTHUR GOLDBERG :

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. :

In the Matter of the Petition :

of :

ALBERT W. GORTZ :

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. :

In the Matter of the Petition :

of :

ARNOLD J. LEVINE :

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. :

In the Matter of the Petition :

of :

PAUL NUSSBAUM :

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. :

In the Matter of the Petition :

of :

HAROLD TODD PARROTT :

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. :

In the Matter of the Petition :

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ARTHUR PASHCOW :

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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ROBERT ROSEN :

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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JACK D. RULE :

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. :

In the Matter of the Petition :

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JACK SCHRIBER :

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. :

In the Matter of the Petition :

of :

GERALD SILBERT :

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. :

In the Matter of the Petition :

of :

HERBERT T. WEINSTEIN :

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. :

In the Matter of the Petition :

of :

JAY ZISES :

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. :

In the Matter of the Petition	:
of	:
SELIG A. ZISES	:
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.	:
	:

In the Matter of the Petition	:
of	:
SEYMOUR ZISES	:
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.	:
	:

Petitioners Richard Ader, Jay D. Chazanoff, Philip Cohen, Daniel N. Davis, Arthur Goldberg, Albert W. Gortz, Arnold J. Levine, Paul Nussbaum, Harold Todd Parrott, Arthur Pashcow, Robert Rosen, Jack D. Rule, Jack Schriber, Gerald Silbert, Herbert T. Weinstein, Jay Zises, Selig A. Zises and Seymour Zises, c/o Proskauer, Rose, Goetz, et al, 1585 Broadway, New York, New York 10036, filed respective petitions for revision of determinations or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On October 22, 1992 and October 29, 1992, respectively, petitioners by their representative, James L. Tenzer, Esq., and the Division of Taxation by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel), waived a hearing and agreed to submit this case for determination. All documents and briefs to be submitted by the parties were due by May 3, 1993. The Division of Taxation submitted documents on December 3, 1992. A stipulation was submitted on February 19, 1993. Petitioners submitted their brief on March 8, 1993. The Division of Taxation's answering brief was received on April 8, 1993, and petitioners' reply

brief on May 3, 1993. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly calculated the original purchase prices for certain cooperative apartments for purposes of determining gains tax due.

II. Whether the Division of Taxation utilized a proper method for allocating gain between the transfer of units not subject to tax as "grandfathered" units and transfers of units subject to tax.

III. Whether, if it is determined that gains tax was not timely paid, penalty should be abated due to reasonable cause and an absence of willful neglect for such late payment.

FINDINGS OF FACT

Petitioner Herbert T. Weinstein, an attorney practicing with the Manhattan law firm of Proskauer, Rose, Goetz, et al,[1] devised a speculative real estate investment with a real estate firm related to Martin J. Raynes.[2] Mr. Weinstein packaged for investment a group of apartments, located at 201 East 66th Street, Manhattan, a building undergoing conversion of rental apartments into cooperative housing units. These apartments were occupied by tenants, who did not wish to purchase their units, but who could not be evicted and had a continued right

[1]Petitioners Arnold J. Levine and Gerald Silbert are also associated with the law firm of Proskauer, Rose, Goetz, et al. It appears that petitioner Jack Schriber is related to Wendy Schriber, an attorney associated with the same law firm. Furthermore, petitioner Daniel N. Davis is an attorney practicing in Manhattan.

[2]Included in the record are contracts of sale of cooperative apartments between 201 East 66th Street Associates, c/o MJR Development Corp., and petitioner Herbert T. Weinstein. Signing the contracts on behalf of the seller, 201 East 66th Street Associates, was a general partner of Ranoff Associates (described as a partner of 201 East 66th Street Associates). The general partner of Ranoff Associates, who executed the contracts, appears to be Martin J. Raynes. These contracts and their later assignments are referenced in the schedule of original purchase price noted in Finding of Fact "8".

to occupancy under rent control or rent stabilization laws and regulations. However, the 20166 Tenants Corp. ("tenants' corporation"), whose relationship to the building at 201 East 66th Street is not clearly set forth in this record on submission, refused to consent to the transfer of shares, allocated to the occupied apartments, to a so-called tenants-in-common entity, which was apparently Mr. Weinstein's chosen mechanism for the deal. Nonetheless, Mr. Weinstein crafted a way around the opposition of the tenants' corporation. He would assign his contractual rights to purchase the occupied apartments as agent for a tenants-in-common entity to individual investors. Then, the individual investors, pursuant to a tenancy-in-common agreement, would transfer their ownership rights to a tenancy-in-common entity, despite the fact that 16 of the 18 petitioners, as individuals, executed forms entitled "Acceptance of Assignment and Assumption of Lease" which included the following provision:

> "Assignee [respective individual petitioner] hereby represents and warrants to Lessor Corporation that he is acquiring and will hold the Lease and the shares appurtenant thereto for his own account and not as a nominee for any other person, firm, partnership, corporation or other entity."

The audit of petitioners resulted from a review by the Division of Taxation ("Division") of records of the New York State Department of Law, which revealed that 201 East 66th Street Associates was "the sponsor of a Cooperative Housing Corporation located at 201 East 66th Street" in Manhattan. By a letter dated November 7, 1988 to 201 East 66th Street Associates at 150 East 58th Street, New York, New York, a tax technician in the Division's Real Property Transfer Gains Tax Unit requested a copy of the offering plan with all amendments and explained the requirements under Tax Law § 1447 that "the transferor and transferee file questionnaires with the Tax Department at least 20 days prior to the date of each transfer." Noting that the "aggregate consideration to be received . . . will exceed $1 million" and that a search of the Division's files disclosed "that you have not met the . . . filing requirements", the tax technician requested "a complete schedule for all units sold to date, include unit number, transferee(s) full name, number of shares allocated to each unit, sales price of each unit, and the date the shares were transferred to the purchaser(s)."

By a letter dated January 13, 1989, on the letterhead of the certified public accountants, Margolin, Winer & Evens, petitioners' representative, attorney James L. Tenzer, transmitted the following completed forms:

(1) DTF-700, Schedule of Original Purchase Price for Cooperatives and Condominiums ("schedule of original purchase price");

(2) DTF-701, a transferor's questionnaire for cooperatives and condominiums ("transferor's questionnaire"); and

(3) DTF-702, Unit Submission Questionnaire for Cooperatives and Condominiums ("unit submission questionnaire") as completed by the transferor.

Each of the three forms referenced a separate "exhibit A" attached to the transferor's questionnaire for a description of the transferor which consisted of a listing of the 18 petitioners herein. Described as "tenants-in-common", the following addresses were provided for the respective petitioners:

(1) 300 Park Avenue, New York, New York: Gerald Silbert, Herbert T. Weinstein and Arnold J. Levine;

(2) 666 Third Avenue, New York, New York: Philip Cohen, Richard Ader, Joel Pashcow, Jay Chazanoff, Arthur Goldberg, Daniel N. Davis, Selig Zises, Seymour Zises, and Jay Zises;

(3) 460 Park Avenue, New York, New York: Paul Nussbaum;

(4) 1 Sheraton Plaza, Suite 701, New Rochelle, New York: Robert Rosen;

(5) 5347 South Valentia Way, Englewood, Colorado: Jack D. Rule and Harold Todd Parrott;

(6) 611 Delsey Drive, Westville, New Jersey: Jack Schriber; and

(7) Gulfstream Building, Suite 415, 150 East Palmetto Park Road, Boca Raton, Florida: Albert W. Gortz.

The transferor's questionnaire noted that the non-eviction cooperative offering plan consisted of 16 units. Petitioners reported an original purchase price of $2,342,536.00 for the

16 units calculated as follows:

	Actual to Date	Estimated Additional Through Completion	Total Anticipated (Actual plus Estimated)
Purchase Price to Acquire Property	$2,204,994.00	-0-	$2,204,994.00
Cost of Capital Improvements	9,373.00	$ 9,000.00	18,373.00
Conversion Costs	37,150.00	70,000.00	107,150.00
Allowable Selling Expenses	6,619.00	5,400.00	12,019.00
Original Purchase Price	$2,258,136.00	$84,400.00	$2,342,536.00

Petitioners reported anticipated consideration of $1,573,482.00 calculated as follows:

	Actual to Date	Estimated Additional Through Completion	Total Anticipated (Actual plus Estimated)
Anticipated Gross Consideration	$1,030,500.00	$624,279.00	$1,654,779.00
Less: Brokerage Fees	43,840.00	37,457.00	81,297.00
Anticipated Consideration	$ 986,660.00	$586,822.00	$1,573,482.00

Further details concerning the total anticipated gross consideration of $1,654,779.00 for the 16 units (7 sold, 9 unsold) were provided as follows:

Unit #	Status	Anticipated Selling Price	Purchase Price [3]	Number of Shares
11A	Unsold	$ 83,605.00	$ 71,242.54	621
12A	Unsold	84,548.00	72,045.60	628
10B	Sold	141,000.00	54,378.37	474
11B	Sold	215,000.00	55,066.70	480
9C	Sold	130,000.00	--	666
16D	Sold	125,000.00	47,609.75	415
6E	Unsold	87,240.00	74,340.05	648
4F	Unsold	45,909.00	39,120.30	341
7F	Sold	176,000.00	40,496.97	353
18G	Unsold	42,408.00	36,137.52	315
14K	Sold	123,500.00	46,691.97	407

[3]This information was obtained from a review of the so-called "assignment and assumption agreements" included in the record, although one was not supplied for unit 9C.

4L	Unsold	89,125.00	75,946.16	662
8N	Sold	120,000.00	47,380.31	413
6P	Unsold	60,584.00	51,625.03	450
11P	Unsold	64,622.00	55,066.70	480
14P	Unsold	66,238.00	56,443.37	492
Totals		$1,654,779.00	$823,591.34	7,845

Petitioners noted that the sales of units 9C for $130,000.00 and of unit 8N for $120,000.00 (hereinafter, "grandfathered units") were pursuant to written contracts entered into before the effective date of the Gains Tax Law and thereby exempted from tax. The unit submission questionnaire showed the following totals for the seven units sold:

Date of Contract of Sale[4]	Unit Number	Seller[5]	Transferee	Actual Consideration	Number of Shares
May 6, 1983	10B	Jay Zises	Johnson	$ 141,000.00	474
November 28, 1984	11B	Arthur Goldberg	Terezakis	215,000.00	480
--[6]	9C	--	Berger	130,000.00	660[7]
April 26, 1983	16D	Selig Zises	Zarour	125,000.00	415
October 7, 1987	7F	Seymour Zises	Haber	176,000.00	353
November 23, 1982	8N	Richard Ader	Lee	120,000.00	413
April 7, 1983[8]	14K	Albert Gortz	Colladon	123,500.00	407

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4 These dates were obtained by a review of the contracts of sale included in the record. The unit submission questionnaire did not include such information.

5 The contracts of sale of the respective cooperative apartments show these individual petitioners as the respective sellers.

6 A contract of sale for this transaction was not included in the record.

7 The transferor's questionnaire allocated 666 shares for unit 9C which appears to be the correct number of shares. The Division used 666 shares in calculating "shares remaining" of 6,766.

8 A typed date of March 18 was crossed out and April 7 written over it.

Totals	$1,030,500.00	3,202[9]

The schedule of original purchase price provided the following explanation for petitioners' reported "purchase price to acquire real property" of $2,204,994.00:

> "In January, 1982 Mr. Herbert T. Weinstein entered into contracts ('Contracts') to acquire the 16 units listed below. On March 30, 1982, by 'Assignment and Assumption Agreements,' ('Assignments') Mr. Weinstein assigned his right to acquire the following units to the following individuals:
>
> | Unit | Assignee |
> |---|---|
> | 11A | Harold Todd Parrott |
> | 12A | Arthur Pashcow |
> | 10B | Jay Zises |
> | 11B | Arthur Goldberg |
> | 9C | Jay Chazanoff |
> | 16D | Selig Zises |
> | 6E | Herbert T. Weinstein |
> | 4F | Robert Rosen |
> | 7F | Seymour Zises |
> | 18G | Jack Schriber |
> | 14K | Albert W. Gortz |
> | 4L | Paul Nussbaum |
> | 8N | Richard Ader |
> | 6P | Gerald Silbert |
> | 11P | Philip Cohen |
> | 14P | Jack D. Rule |
>
> ". . . Pursuant to the Contracts, each of the above assignees then acquired their respective unit listed above.
>
> "On July 28, 1982 (i.e., prior to March 29, 1983) each of the assignees listed above transferred his separately owned unit to a tenancy in common composed of each of the foregoing sixteen assignees plus two other individuals [petitioners Daniel N. Davis and Arnold J. Levine].
>
> "Immediately after the July 28, 1982 transfer, each assignee then owned an individual one-eighteenth interest in an entity (i.e., tenancy-in-common) in which the assignees agreed to 'pool' the profits and losses from the operation and sale of the units. On the other hand, immediately prior to the transfer, each assignee simply operated [sic] and was entitled to the profits or losses from the sale of his separately owned unit. The fair market value of the property transferred on such date was determined as follows:
>
> | | |
> |---|---|
> | Contract price for Unit 8N (Contract dated November 23, 1982) | $120,000 |

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[9] Petitioners reported 4,643 unsold shares (7,845 less 3,202).

Shares Allocated to Unit 8N	:	413
Contract price (i.e., fair market value) per share		~~$290.5569~~/share
Contract price per share discounted back to July, 1982 using the Department's 10% per annum discount factor for 4 months	$281.0701/share	
Total number of shares transferred to the Tenancy-in-Common	x	7,845
'Purchase Price Paid to Acquire Real Property' upon the July 28, 1982 transfers	~~$2,024,995~~"	

As a result of the above calculations (i.e., original purchase price for the 16 units of $2,024,995.00 in excess of total anticipated consideration of $1,654,779.00), petitioners reported no gains tax due on the seven units sold.

The record does not disclose the specific date on which petitioners, as individuals, paid the purchase prices for the cooperative units. The assignments were dated March 30, 1982 and the tenancy-in-common agreement was dated July 28, 1982. It is not known, for example, if the purchase prices for the cooperative units were actually paid on July 28, 1982 as well.

A review of three audit worksheets, all dated February 14, 1989, reveals that the Division disagreed with petitioners' calculations reported a month earlier. The Division recomputed petitioners' original purchase price as follows on the worksheet, AU-201:

Purchase price per sponsor	$2,204,994.00
Total disallowed	1,428,782.00
Purchase price allowed	~~$ 776,212.00~~[10]

[10] As noted in Finding of Fact "6", the total purchase price for 15 of 16 units was $823,591.34. The purchase price for unit 9C, one of two grandfathered units, was not included in this total. Subtracting out $47,380.31, the purchase price for Unit 8N, the other grandfathered unit, equals $776,211.03.

Capital improvements per sponsor	$ 18,373.00
Disallowed: Amount apportioned to 2 grandfathered units	(2,527.00)
Capital improvements allowed	$ 15,846.00
Conversion cost per sponsor	$ 107,150.00
Disallowed: Amount apportioned to 2 grandfathered units	(14,737.00)
	$ 92,413.00
Selling expense per sponsor	$ 12,019.00
Disallowed: Amount apportioned to 2 grandfathered units	(1,654.00)
	$ 10,365.00
Original purchase price allowed ($776,212.00 plus $15,846.00 plus $92,413.00 plus $10,365.00)	$ 894,836.00

This worksheet, in disallowing $1,428,782.00 of the "purchase price per sponsor", noted: "entire calculation wrong". Expenses were apparently apportioned to the grandfathered units based upon a fraction where actual consideration paid for the two grandfathered units was the numerator and total consideration to be received, including actual amounts and estimated amounts, was the denominator.

The Division calculated gains tax due of $43,881.00 on the worksheet, AU-201.3, as follows:

Consideration	$1,404,779.00
Broker fees	71,135.00
Project original purchase price	894,836.00
Shares remaining	6,766
Gains tax due	$ 43,881.00
Gains tax per share	$ 6.4854

Although the computation was not specifically shown on this worksheet, gains tax due of $43,881.00 represents 10% of $438,808.00, which is the difference between consideration, net of broker fees, of $1,333,644.00 ($1,404,779.00 less $71,135.00) and the Division's calculation of petitioners' original purchase price of $894,836.00.

The Division prepared a schedule of adjustments dated October 15, 1990, which also showed gains tax due of $43,881.00, or tax per share of $6.4855, as follows:

Consideration:		
Actual (Less Grandfathered)	$ 780,500.00	
Estimated:	624,279.00	
Gross Consideration		$1,404,779.00
Less: Broker		71,135.00

Net Consideration			$1,333,644.00
Original Purchase Price:			
Acquisition	$2,204,994.00		
Less: Grandfathered & Disallowed Step-up	1,428,782.00		
Acquisition OPP Allowed		$ 776,212.00	
Other OPP allowed less Grandfathered		118,624.00	
Allowable OPP			$ 894,836.00
Gain			$ 438,808.00
Tax: at 10% of Gain			$ 43,881.00
Tax per Share (6,766 shares)			$ 6.4855

The estimated consideration of $624,279.00 corresponds to petitioners' use of anticipated gross consideration of $624,279.00, as noted in Finding of Fact "6". The Division has not contested these amounts utilized by petitioners which, according to their representative, represented 50% of the unit's "vacant market value per percent of common elements." Petitioners' "actual to date" gross consideration of $1,030,500.00, as noted in Finding of Fact "6", was decreased by the amount of consideration received on the grandfathered units 9C and 8N of $250,000.00 ($130,000.00 plus $120,000.00, as noted in Finding of Fact "7").

As noted in Finding of Fact "6", petitioners reported total brokerage fees of $81,297.00, which they subtracted from total consideration, while the Division used $71,135.00 as brokerage fees, as noted in Finding of Fact "10". This variance apparently results from the disallowance of brokerage fees allocated to the sale of the grandfathered units.

The Division issued statements of proposed audit changes, all dated May 4, 1989, to each petitioner, respectively, asserting gains tax due of $767.07, plus penalty and interest, computed as follows:

Unit Number[11]	Shares	Tax Period Ended	Selling Price	Tax[12]	Interest	Penalty	Totals

[11] The record does not include specific information concerning the particular cooperative unit transferred on the particular dates noted above. As noted in Finding of Fact "7", the record does disclose the dates of the contracts of sale for the cooperative units sold by petitioners. Although somewhat speculative, it is reasonable to relate the earliest contract of sale with the earliest transfer and to relate subsequent contracts and transfers similarly (which has been done in this Finding of Fact). However, this methodology was varied to the extent that a finding is made

14K	407	05-06-83	$123,500.00	$146.64	$119.91	$ 51.28	$ 317.83
10B	474	07-08-83	141,000.00	170.78	133.46	59.69	363.93
16D	415	07-27-83	125,000.00	149.52	115.21	52.32	317.05
11B	480	01-30-85	215,000.00	172.94	84.82	60.41	318.17
7F	353	10-08-87	176,000.00	127.19	17.92	44.46	189.57
Totals			$780,500.00	$767.07	$471.32	$268.16	$1,506.55

The statements included the following explanation:

> "Section 1442 of the Tax Law provides that in the case of a transfer pursuant to a cooperative or condominium plan, the Gains Tax is due on the date of transfer of each cooperative or condominium unit."

The Division then issued notices of determination, all dated September 25, 1989, to each petitioner, respectively, asserting tax due of $767.07, plus penalty and interest. The notices referenced the earlier statements of proposed audit changes.

The parties, by their representatives, entered into a stipulation dated February 17, 1993 which provided that the Division's response to interrogatories that were submitted to the Division in an unrelated matter should be made a part of this record as a description of the Division's

"practices". Petitioners emphasize the Division's position with regard to the following factual circumstances (which apparently was set forth in a response to such interrogatories):

> "[W]here prior to March 29, 1983, individuals buy property for $100 and immediately transfer that property to a partnership and that partnership, in turn, sells the property to a newly formed corporation in exchange for shares of the corporation's stock before March 29, 1983, at a time when the fair market value of the property is $10 million, the 'original purchase price' on the subsequent sale of the shares of stock by the partnership is $10 million, not $100 . . . . This 'step-up' applies even though the transfer into the corporation would not have been taxable if it had occurred after March 28, 1983."

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that unit 10B was sold before 16D, based upon the number of shares allocated to these respective units and tax calculated due on such shares.

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Tax due appears to have been calculated as follows. For example, the sale of unit 14K represented the sale of 407 shares. 407 multiplied by $6.4855 (the tax per share as noted in Finding of Fact "10") is $2,639.59. $2,639.59 divided by 18 petitioner shareholders is $146.64.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that the original purchase price for the cooperative units sold should be based upon the value of the shares, allocable to the units sold, as of July 28, 1982, the date on which the shares were transferred by petitioners as individuals to a so-called "tenancy-in-common" entity. Petitioners argue that the Division's "practice is 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 Law, March 29, 1983, as the OPP [original purchase price] (PPPARP) [purchase price paid to acquire real property] so long as 'consideration' was paid for the transfer, i.e., where the last transfer was not a gift, devise or bequest." They contend that the matter at hand is similar to the circumstances described in Finding of Fact "14" and that the Division's practice therein must be applied to their situation.

In the alternative, petitioners argue that original purchase price "must be increased by the gain on the 'non-mere change of identity' portion (i.e., seventeen-eighteenths) of the 'gain recognized' upon the July 28, 1982 transfers."

With regard to the second issue concerning the allocation of gain between the grandfathered units not subject to tax and the units subject to tax, petitioners argue that "[t]he 'taxable gain' is the overall project 'gain' divided by the total number of shares allocated to petitioners' units and then multiplied by the total number of shares allocable to the taxable units." Petitioners contend that the Division incorrectly used "a 'two-step' process which first allocates the actual 'cash consideration' and 'OPP' between the Grandfathered Units and the Taxable Units based on 'Option A' [set forth in TSB-M-83-2R], and then computes the Gain for the Taxable Units and allocates such Gain and 'tax' to each of the Taxable Units based on 'Option B'." According to petitioners, Option B, not a "hybrid" method, should have been used for computing any gains tax liability.

Finally, petitioners contend that penalty should be abated because "there was a reasonable basis for any failure to timely pay the tax [and] it could not be said that such failure was due to willful neglect."

In contrast, the Division maintains that it properly disallowed a step-up in petitioners' original purchase price. According to the Division, "the separate individuals would not have been taxed at the time of their conveyance of property to the tenancy in common by reason of [the $1,000,000.00 exemption] found at Tax Law § 1443(1)." Furthermore, since "[i]n the instant matter there is no transfer of a controlling interest in an entity", petitioners' analogy to the partnership transferring property to a newly-formed corporation in exchange for corporate stock is irrelevant.

In the alternative, the Division argues that "the actual purchase price paid by the petitioners in acquiring the cooperative apartment units more accurately reflects the fair market value of the cooperative apartment units at the time of the conveyances to the tenancy in common." No credible appraisal was provided by petitioners, and petitioners ignored the fact that "the occupied or nonoccupied status of a cooperative apartment unit significantly affects such unit's value."

With regard to the second issue, the Division's method for determining gain was not a distortion of the prescribed methods but rather was the Division's "method of acknowledging that certain units sold are not subject to tax pursuant to the exemption found at Tax Law § 1443(6) [for grandfathered units]."

Finally, the Division argues that penalties were properly imposed because "the petitioners failed to timely report the transfer of any [of] the cooperative units taxed by the Division of Taxation."

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a 10% tax upon gains derived from the transfer of real property located within New York State. The "gain" which is taxed is the difference between the "original purchase price" for the property and the "consideration" received for the property (Tax Law § 1440[3]).

B. Original purchase price is defined, generally, as "the consideration paid or required to be paid" to acquire the interest in the property, plus the cost of capital improvements and certain

selling expenses (Tax Law § 1440[5]).

C. Applying this statutory definition to the matter at hand, the Division's position, that the consideration or price paid for the tenancy-in-common to acquire its interest in the 16 cooperative units subject to tax was, as noted in Footnote "10", the sum of the purchase prices shown as paid on the assignment and assumption agreements, conforms to a plain reading of this statutory language (cf., United States Life Ins. Co. v. Tax Appeals Tribunal, ___ AD2d ___, 599 NYS2d 168).

As noted in Finding of Fact "8", the record does not disclose the exact date on which monies were paid to 201 East 66th Street Associates c/o MJR Development Corp. for the units at issue. In any event, petitioners' method for calculating the fair market value of the units as described in Finding of Fact "8" is without merit. The Division persuasively argued that "the occupied or nonoccupied status of a cooperative apartment unit significantly affects such unit's value." Petitioners' methodology, which utilized the contract price for a vacant unit, is badly flawed. In short, the Division's position, that "the actual purchase price paid by the petitioners in acquiring the cooperative apartment units more accurately reflects the fair market value of the cooperative apartment units at the time of the conveyance to the tenancy in common", has merit.

D. In addition, it seems clear from the record that the transfer of the units to the tenancy-in-common was a "mere change of identity" transfer under Tax Law § 1443.5 so that the tenancy-in-common would have a carryover original purchase price equal to the total of the purchase prices paid by the individual petitioners (see, Matter of Loscalzo, Tax Appeals Tribunal, January 21, 1993; Matter of Schrier, Tax Appeals Tribunal, July 16, 1992).

E. Petitioners' contention that the Division's practice in similar circumstances requires a step-up in the original purchase price for the units at issue is rejected. Even if the factual circumstances described in Finding of Fact "14" were sufficiently similar to the facts at hand, the Division would be free to correct an erroneous interpretation (see, Fox v. Board of Regents, 140 AD2d 771, 527 NYS2d 651).

F. On August 22, 1983, the Division set forth two options, labelled A and B, either of

which the taxpayer could elect to use in computing gain on cooperative and condominium plans (TSB-M-83-[2]-R). Under Option A, the actual consideration paid for each share less the amount of the total original purchase price apportioned to each share determined the gain subject to tax on each share sold. Under Option B, the total anticipated consideration less the total anticipated original purchase price was used to determine the gain per share subject to tax as each share sold. By selecting Option B, the taxpayer was permitted to pay the estimated tax rate, even though the actual consideration received may have been more (or less) when the shares actually sold. Once the number of shares sold reached the 25%, 50% and 75% plateaus, a new tax rate per share was determined based on actual consideration received plus estimated consideration for the remaining unsold shares. At the 100% sell-out point, any underpayment or overpayments based on the actual consideration received for the total number of shares sold would be adjusted accordingly. Thus, in contrast to Option A, Option B was less cumbersome to administer to the extent that, as units were sold, it was not necessary to recalculate the amount of tax owed based on the actual consideration received, as well as other costs, for each unit.

In 1986, the Division eliminated Option A as an available method of computing and paying the tax and directed that the new method for paying the tax would be a modified Option B (TSB-M-86-[2]-R). Under the new Option B, updating was optional at the 25% plateau and guidelines were provided for determining "safe harbor estimates" of anticipated consideration such that, in the event of underpayments, there would be no imposition of penalty or interest on the underpayments (TSB-M-86-[3]-R). In effect, if the safe harbor estimates were lower than the actual selling prices, then the taxpayer received the benefit of postponing the full amount of tax owed based on actual consideration (and also avoided penalty and interest which would otherwise accrue on underpayments). Conversely, if the safe harbor estimates were greater than the actual selling price, then the taxpayer would be entitled to a lower tax rate for the remaining unsold shares when recalculated at the 50% and 75% plateaus or to a refund at the 100% sell-out point. In sum, Option B permits a gain-per-share estimated amount to be

calculated at the outset based on anticipated amounts, with payment of tax on ongoing sales based upon such estimated amount. Thereafter, the estimated amount is updated periodically based on actual amounts to arrive at a new estimated gain per share more closely paralleling actual selling prices. Ultimately, on sellout, tax due is calculated on actual amounts and liability (or refund) for the entire conversion is finalized.

G. As noted in Finding of Fact "9", the Division apportioned expenses for capital improvements, conversion costs and selling expenses to the two grandfathered units based upon a fraction where actual consideration paid for the two grandfathered units was the numerator and total consideration to be received, including actual amounts and estimated amounts, was the denominator. As noted in Finding of Fact "10", the Division did not contest petitioners' estimated consideration of $624,279.00 for the unsold units. Although not clearly articulated, it appears that petitioners contend that the Division's use of actual selling prices on those units already sold was improper. This contention is without merit. The Division upon audit simply used known amounts in calculating gain. Petitioners ignore the fact that certain transfers subjected to tax on audit had already occurred and thus were not, at the time of audit, anticipated. Petitioners did not report such transfers, file returns, elect any method (i.e., then available Option A or Option B) of reporting when the transfers were made, or pay tax. As a result, petitioners lost their entitlement to chose between Option A or Option B (Matter of Normandy Associates, Tax Appeals Tribunal, March 23, 1989; compare, Matter of Belvedere Garden Associates, Tax Appeals Tribunal, June 18, 1992). In light of this fact, the Division's use of actual (as opposed to theoretical anticipated) prices is entirely reasonable; actual consideration on units transferred but not reported was known and was used in calculating tax upon audit. Furthermore, under Option B, the Division is entitled to update to actual figures not only at certain selling plateaus, as noted, but more frequently if requested (see, TSB-M-86-[3]-R). Thus, the Division's audit computation is, in fact, an Option B approach updated to current amounts. In sum, petitioners' apparent position that gain should be recalculated by employing Option B from the outset thereby using estimated figures instead of known amounts is rejected

(Matter of Normandy Associates, supra).

H. Pursuant to Tax Law § 1446.2(a):

> "Any person failing to file a tentative assessment and return or to pay any tax within the time required by [Article 31-B] shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount for each month of delay or fraction thereof . . . ."

Said section goes on to provide that if the Commissioner of Taxation:

> "determines that such failure or delay was due to reasonable cause and not due to willful neglect, [the commissioner] shall remit, abate or waive all of such penalty and such interest penalty."

Petitioners have the burden of proving both that the failure to file and pay was due to reasonable cause and not due to willful neglect. Petitioners have not shouldered this burden. The transaction at issue, the packaging for investment of a group of occupied apartments in a building undergoing conversion of rental apartments into cooperative housing units, was extremely complex and sophisticated. In addition, several of the petitioners were attorneys. Moreover, only in response to a letter dated November 7, 1988, over five years after the effective date of the Gains Tax Law, did petitioners submit required questionnaires and schedules. In short, considering the particular facts of this case, petitioners did not establish reasonable cause for nonpayment of taxes (see, Matter of Brounstein, Tax Appeals Tribunal, January 30, 1992).

I. The petitions of Richard Ader, Jay D. Chazanoff, Philip Cohen, Daniel N. Davis, Arthur Goldberg, Albert W. Gortz, Arnold J. Levine, Paul Nussbaum, Harold Todd Parrott, Arthur Pashcow, Robert Rosen, Jack D. Rule, Jack Schriber, Gerald Silbert, Herbert T. Weinstein, Jay Zises, Selig A. Zises and Seymour Zises are denied, and the notices of determination, all dated September 25, 1989, are sustained.

DATED: Troy, New York
October 21, 1993

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE