STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
I. MILES POLLACK	:	DETERMINATION DTA NO. 813191
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, I. Miles Pollack, 140 Grand Street, Suite 401, White Plains, New York 10601, 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 September 14, 1995 and October 2, 1995, respectively, petitioner appearing pro se, and the Division of Taxation appearing by Stephen U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based upon documents and briefs to be submitted by January 26, 1996. The Division of Taxation submitted its documents on November 6, 1995. Petitioner submitted a letter brief with two pages of documents attached on December 4, 1995, and included in such brief a request to submit additional documentation then being transmitted to petitioner. Petitioner received such documentation, consisting of a seven-page handwritten list of expenses, and submitted thesame on December 11, 1995.[1] The Division of Taxation submitted its brief on January 3, 1996. Petitioner, in turn, submitted a reply brief on January 25, 1996, which date commenced the six-

[1]The Division argued in its brief that petitioner should not be permitted to submit additional documents "at a later date", and in the alternative requested time to respond to any such submission if allowed. The only documents submitted after petitioner's brief and documents date of December 4, 1995 was the seven-page handwritten list of expenses described above. Petitioner had specifically noted with the submission of his brief that he was awaiting receipt of such documents by mail, and requested to submit the same upon receipt. Petitioner did submit such list upon receipt, and such submission occurred approximately three and one-half weeks before the due date for the Division's brief thereby affording the Division an opportunity to review and respond thereto. Thus, there is no apparent prejudice to the Division occasioned by the fact that the list was submitted one week after the due date for petitioner's brief and documents. Accordingly, the seven-page list of expenses is included as a part of the record in this matter.

month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the evidence and arguments, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed certain costs claimed by petitioner with respect to a conversion of premises to cooperative ownership thereby resulting in an assessment of tax against petitioner under Tax Law Article 31-B.

FINDINGS OF FACT

1. Petitioner, I. Miles Pollack, together with one Aaron Gelbwaks, sponsored a plan to convert to cooperative ownership certain premises located at 622 West End Avenue, New York, New York. The transfers of shares and proprietary leases to nine apartment units (the "unit sales") which give rise to the tax assessment at issue herein took place between February 18, 1986 and November 7, 1987.

2. Petitioner originally reported a loss with respect to the transfers at issue. Thereafter, in May 1990, the Division of Taxation ("Division") issued the first in a series of requests for information regarding the subject conversion and unit transfers. These requests continued from such initial request in May 1990 through December 1992. However, none of the requested information was provided to the Division.

3. On January 4, 1993, the Division issued to petitioner a Notice of Determination assessing tax due under Tax Law Article 31-B ("gains tax") in the amount of $179,000.00, plus penalty and interest. Due to petitioner's failure to submit information as requested, the amount of tax assessed was computed based on consideration of $1,790,000.00 for the conversion as reported to the Attorney General's office per petitioner's offering plan. In the same manner, since petitioner had submitted no information in substantiation, the Division made no allowance for original purchase price in reduction of such consideration.

4. Petitioner responded to the notice by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conciliation

conference was held on November 18, 1993, at which petitioner presented documentation concerning consideration and expenses with regard to the transfers at issue. Additional information and documentation was supplied after the conference.

5. On July 22, 1994, Conciliation Order 128071 was issued to petitioner sustaining the notice but recomputing and reducing the amount of tax due to $30,022.50, plus penalty and interest.

6. Petitioner challenged the assessment, as reduced at conference, by filing a petition with the Division of Tax Appeals. Petitioner specifically challenges three expense items which were not allowed in reduction of the gain on the transfers at issue, to wit, advertising costs of $42,187.00, appliance costs of $5,496.00, and the cost of real estate taxes and interest expense on certain loans. This latter item involves expenses incurred and/or paid before or after the ten-month construction period recognized by the Division. Each of these challenged items will be discussed further hereinafter.

7. With regard to advertising costs ($42,187.00), petitioner argues that the same represent directly related expenses of sale which should be allowed. Petitioner maintains that advertising expenses are usually borne by the real estate broker, but are recouped through the transferor's payment of the broker's commission. Such commission payments, allowable in reduction of consideration received by a transferor per Tax Law § 1440(1)(a) are, according to petitioner, typically in the range of six or seven percent. However, petitioner argues that in this case, the broker was a small operation, lacked the cash to cover advertising expenses, and that petitioner paid the same while the broker agreed to accept a lower, three percent, commission.

8. Turning to appliances ($5,496.00), petitioner's list of expenses included a category "Appliances and Miscellaneous Improvements" wherein a total of $8,361.00 is reflected. The Division allowed the expense for carpeting under this category ($2,865.00), but disallowed the balance thereof ($5,496.00) which consisted of items labelled "personal property, printing, sign, etc." Petitioner apparently maintains these expenses represent the purchase of appliances which were necessary to make the units saleable.

9. The third adjustment challenged by petitioner involves the length of the construction period. Based on a January 5, 1994 letter from petitioner's co-sponsor, Aaron Gelbwaks, the Division allowed the time frame spanning June 25, 1985 through May 1, 1986 (i.e., ten months) as the construction period for this project. In response, petitioner alleges that construction went on in various phases for more than one and one-half years, as opposed to only ten months. In addition, petitioner maintains that certain changes to Tax Law Article 31-B, enacted April 15, 1993 (the particular changes were not specified by petitioner), make it clear that interest expenses and real estate taxes incurred prior to the start of physical construction may be allowed as part of original purchase price. Petitioner also argued that the end of a construction period depends on the final use and disposition of the property, and that in this case such period would end when the property was sold or leased.

10. Brokerage agreements with respect to the transfers at issue are not included with the documents submitted herein, nor is there evidence describing the appliances and/or the manner of their installation at the premises. Finally, other than the reference to changes in the Tax Law, petitioner has not specified any particular construction period in lieu of the June 25 1985 through May 1, 1986 time frame noted above.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax (commonly known as the "gains tax") at the rate of 10% upon the gain derived from the transfer of real property within New York State where the consideration received for such transfer is $1,000,000.00 or more (Tax Law §§ 1441, 1443[1]). Tax Law § 1440(3) defines "gain" for purposes of Article 31-B as the "difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price."

B. The last unit transfer in this proceeding occurred on November 7, 1987. At such time, the definition of original purchase price, as contained in Tax Law § 1440 (former [5][a]), provided as follows:

> "'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.

As detailed above, petitioner seeks to include in original purchase price certain costs incurred in three areas, to wit, advertising expenses, appliances, and interest and taxes allegedly incurred during a construction period.

C. Dealing with the last item first, during the period in issue 20 NYCRR former 590.16(e) provided as follows:

> "Question: When does a construction period begin and end?
>
> "Answer: A construction period usually begins on the date on which construction, development, erection or complete renovation of all or part of the property begins, and ends on the date that the real property or other improvement is ready to be placed in service or is ready for sale."

Petitioner has offered only a very general assertion that the construction period for the subject project was longer than the period June 25, 1985 through May 1, 1986 as allowed by the Division. In fact, this specific period was identified by petitioner's co-sponsor as the project's construction period via a January 5, 1994 letter in response to the Division's inquiry on the subject. Furthermore, petitioner presented no evidence or proof that construction took place during any period outside of the period allowed by the Division. Accordingly, the period June 25, 1985 through May 1, 1986 was properly determined to be the construction period for the project, and the Division's limitation of claimed expenses for interest and real estate taxes to such period is sustained.

D. Petitioner's claim regarding appliances must be rejected. On this score, petitioner has offered no specifics regarding the type of appliances or the nature or manner of their affixation to the premises. While 20 NYCRR former 590.16 provided that built-in appliances may be allowable in original purchase price as a cost of capital improvements, there is no evidence in

the record from which to conclude that the costs claimed by petitioner were incurred for built-in appliances or otherwise constituted capital improvements made to real property.

E. The last item in dispute involves advertising expenses of $42,187.00. During the time period at issue, neither the above definition of original purchase price per Tax Law § 1440(5)(a), nor the regulations with respect thereto, included advertising expenses as allowable costs. Petitioner argues that the choice to pay advertising expenses on its own was made because the broker utilized for this project was a small scale broker which did not have sufficient cash to cover (front) advertising costs in anticipation of recouping such costs through commissions on sales of units. Petitioner maintains the broker's fee (commission) was lower than the customary amount (three percent as opposed to six or seven percent). In turn, petitioner claims that if he had opted to use the services of a larger scale broker, he would have paid a higher commission amount, had no advertising expenses, and that the higher commission amount would have been allowable in its entirety in reduction of the consideration received by petitioner.

F. There is no dispute that the expenses at issue were advertising expenses. On this score, the record includes no documentary evidence as to the arrangement between petitioner and the broker, nor any other basis upon which to conclude that the amount in question was anything other than advertising expenses paid by petitioner. In turn, advertising expenses were not listed as includable in original purchase price per statute or regulation during the period at issue. Petitioner cannot now recast its business choice to use a particular broker and pay its own advertising expenses so as to convert such advertising expenses to commissions.

Finally, petitioner points to certain 1993 changes to Article 31-B as providing a basis to allow the advertising expenses in question. On this score, Tax Law § 1440(5)(a) was amended in 1993 to provide that original purchase price shall include, inter alia, "customary, reasonable and necessary advertising and marketing costs not included in customary brokerage fees paid by the transferor" (L 1993, ch 57, § 61). However, this change was specifically effective April 15, 1993, and was made applicable to taxable years beginning on and after January 1, 1993 and

transfers occurring on or after April 15, 1993 (L 1993, ch 57, § 418[8]). It would appear that petitioner's payment of advertising costs would now qualify for inclusion in original purchase price under the noted change to Tax Law § 1440(5)(a). However, this change was explicitly made applicable to transfers occurring on or after April 15, 1993, thus dispelling any argument that such change was intended to be applied to earlier transfers. Given that such date falls well after the final transfer date in this case, petitioner's claim with regard to advertising expenses is denied.

G. Petitioner has not specifically challenged the imposition of penalties, or submitted evidence or argument in support of reduction or abatement thereof. Given the nature of the adjustments made by the Division in arriving at its assessment as well as the history of this case, including specifically the long delay before any information was submitted notwithstanding numerous Division requests therefor, it would appear that the imposition of penalty was (and is) entirely appropriate. Accordingly, penalty as imposed is sustained.

H. The petition of I. Miles Pollack is hereby denied and the Notice of Determination dated January 4, 1993, reduced per Conciliation Order 128071 to $30,022.50, together with penalty and interest, is sustained.

DATED: Troy, New York
July 3, 1996

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE