STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
244 BRONXVILLE ASSOCIATES	:	DETERMINATION DTA NOS. 814542
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.	:	AND 815566

Petitioner, 244 Bronxville Associates, c/o Houlihan Parnes Realtors, 455 Central Park Avenue, Scarsdale, New York 10583-1034, filed petitions 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 December 4, 1996 and December 30, 1996, respectively, petitioner by its representative, Howard M. Koff, Esq., and the Division of Taxation, by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel), waived a hearing and agreed to submit these matters for determination based on documents and briefs to be submitted by August 8, 1997, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether, as a result of the repeal of the gains tax law, the Division of Taxation, in calculating petitioner's final real property transfer gains tax liability on cooperative apartment units sold prior to June 15, 1996 (the date on which the gains tax law became ineffective), properly utilized a per share method to allocate petitioner's original purchase price to units subject to tax rather than a relative fair market value method.

FINDINGS OF FACT

1. Petitioner, 244 Bronxville Associates, is a partnership which was the sponsor of a plan for the conversion to cooperative ownership of a garden apartment complex consisting of two buildings with 54 apartments located in Yonkers, Westchester County at 240-246 Bronxville Road and 931-935 Palmer Road, an area of Yonkers with a Bronxville mailing address.

2. The offering plan, which was accepted for filing by the New York State Attorney General's Office on or about November 20, 1987, was a noneviction plan so that no tenant of the Yonkers property could be evicted by reason of the conversion to cooperative ownership. In addition, the tenants were entitled to continued occupancy in their rent-controlled or rent-stabilized apartments under New York rent protection laws and regulations.

3. The offering plan provided for the organization of a cooperative housing corporation known as Bronxville Palmer Owners, Inc., which subsequently changed its name to Bronxville Court, Inc. Pursuant to the offering plan, the cooperative housing corporation offered for sale 28,520[1] shares of its capital stock that were allocated to 54 residential apartments. The purchaser of the shares allocated to an apartment was entitled to a proprietary lease for the apartment from the cooperative housing corporation.

4. On or about June 7, 1988, 244 Bronxville Associates converted the Yonkers property to cooperative ownership by conveying fee title to the property to the cooperative housing corporation. In accordance with the provisions of the offering plan, all shares of the capital stock of the cooperative housing corporation that were not sold to purchasers prior to the date of the conversion were issued by the cooperative housing corporation to 244 Bronxville Associates ("unsold shares").

---

[1]Subsequent to the filing of the plan, there was a change in the allocation of shares for three apartments which resulted in a decrease to 28,470 as the total number of shares for sale.

Gains Tax Filings

5. A couple of months earlier, on or about April 11, 1988, petitioner made its initial gains tax filing. As of the initial filing, petitioner reported the sale of 34 of the 54 apartment units. It elected to calculate the gains tax due based upon a per share method of apportionment, with the common denominator of all units being 28,470. A complete copy of petitioner's initial gains tax filing[2] was not made a part of the record so the specific computation of tax due is not known. For example, the specific numerator representing the shares allocated to the 34 apartment units, which had been sold, is not known. However, a fraction based upon a numerator representing the shares allocated to the 34[3] apartment units sold and a denominator of 28,470 representing the shares allocated to all 54 apartment units making up the Yonkers property at issue was applied to the anticipated gain on the conversion project to determine gains tax due as of the initial filing. In computing the anticipated gain, petitioner also elected to utilize the "safe harbor" guidelines. It calculated the safe harbor price for the unsold shares at $112.50 per share so that the total anticipated gross consideration to be received for the unsold units was $989,438.00 based upon 8,795 shares allocated to the unsold units according to the parties' stipulation.

6. Since the conversion project was over 50% sold-out at the time of petitioner's initial filing, it did not file a 50% update with the State. When the project reached 75% sold-out in October of 1992 with 21,240 out of the total 28,470 shares having been sold, petitioner did not file the required 75% update with the State.

7. On June 1, 1993, the Division sent a letter to petitioner requesting that petitioner file a 75% update within 20 days. On July 9, 1993, the Division sent a second letter to petitioner again requesting a 75% update and certain information regarding the conversion project. Petitioner's

---

[2]Only the first pages of various multiple-page forms were made a part of the record by the parties.

[3]It is observed that the parties' stipulation noted that there were only 18 unsold units as of the date of petitioner's initial filing while the letter of petitioner's then attorney, dated April 11, 1988, which transmitted the documents pertaining to the initial gains tax filing to the State, noted that 34 units had been sold which would have left 20 unsold units. This inconsistency cannot be explained by the documents in the record, and it may be that the numerator used above represented the number of shares allocated to 36 units. Since this matter involves basically a legal issue, this factual variance is not critical.

agent, Houlihan-Parnes Realtors, subsequently informed the Division that its previous letters had been transmitted to the wrong address and had listed the incorrect first name for petitioner's principal partner, James J. Houlihan. On September 14, 1993, the Division sent a letter to petitioner's corrected address again requesting that petitioner file a 75% project update within 20 days.

8. On or about November 15, 1993, the Division received petitioner's 75% update. At the time of this submission, the conversion project was at approximately 78% sell-out (i.e., 42 units sold with 12 remaining unsold units). In its 75% update, petitioner used the per share apportionment methodology originally selected by it in its initial filing as noted in Finding of Fact "5". The 75% update indicated that 12 units representing 6,005 shares remained unsold and that the total anticipated gross consideration to be received for these units pursuant to safe harbor estimates was $675,563.00 ($112.50 per share X 6,005 shares). It is observed that the 42 units sold for prices ranging from $37,500.00, for a unit to which 125 shares had been allocated, to $135,000.00, for a unit to which 675 shares had been allocated.

9. Petitioner's attorney in his letter transmitting the 75% update to the State indicated that petitioner had requested an appraisal of the unsold shares and that such appraisal would be provided to the Division in lieu of the safe harbor estimates.

Audit and Adjustments

10. The Division conducted a field audit of petitioner's records to verify the costs claimed on its 75% update which resulted in the issuance of a Statement of Proposed Audit Adjustment dated March 28, 1994 against petitioner. The Division's adjustments consisted of the following disallowances:

(1) $51,833.00 in unsubstantiated brokerage fees;

(2) $16,000.00 in overstated mortgage commitment fees;

(3) $52,092.00 in unsubstantiated county real estate taxes;

(4) $71,010.00 in unsupported estimated capital improvement costs;

(5) $6,000.00 in erroneously claimed conversion costs;

(6) $3,679.00 in legal and accounting fees for preparation of petitioner's 1989 tax returns;

(7) $1,051.00 in nonallowable photocopying, postage and other miscellaneous administrative costs; and

(8) $15,600.00 in overstated additional selling expenses.

The Statement of Proposed Audit Adjustment dated March 28, 1994 was not introduced into the record. However, the parties stipulated that this statement asserted a total amount due on the previously sold units of $10,231.44 consisting of gains tax, penalty, and interest.

11. The amount of total anticipated gross consideration of $5,923,248.00 reported by petitioner on the 75% update was not adjusted by the Division which accepted petitioner's use of the safe harbor estimates for the 6,005 unsold shares.

12. A little over a month later, the Division issued a Revised Statement of Proposed Audit Adjustment dated May 5, 1994 asserting a total amount due of $53,075.91 consisting of tax, penalty, and interest. The revised statement was also not made part of the record, and it is unknown what portion of the total amount asserted due of $53,075.91 constituted gains tax asserted due. The parties stipulated that in the previous statement dated March 28, 1994, the auditor had mistakenly used an unapproved method to calculate the amount of tax due, and that the revised statement was issued to set forth the amount of tax due using the tax per share method.

13. The Division issued a third revised Statement of Proposed Audit Adjustments dated June 16, 1994 following the receipt of additional information from petitioner. This statement allowed an additional:

(1) $43,132.00 in substantiated brokerage fees;

(2) $52,092.00 in substantiated construction period real property taxes;

(3) $12,002.00 in estimated capital improvement costs; and

(4) $9,600.00 in selling expenses.

This third revised statement was also not introduced into the record, but the parties stipulated that the total amount of tax, penalty, and interest asserted due on the previously sold units was reduced to $36,867.84.

14. The Division then issued a Notice of Determination dated August 12, 1994 against petitioner asserting additional gains tax due of $20,035.18, plus substantial understatement penalties of $2,003.51 and interest of $15,134.05, for a total amount asserted due of $37,172.74.

15. The real property transfer gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996. (See, L 1996, ch 309, §§ 171-180.) The repeal applies to transfers of real property that occur on or after June 15, 1996. For partial or successive transfers that were treated as a single transfer of real property in accordance with Tax Law former § 1440(7), such as transfers pursuant to a cooperative plan like the matter at issue, the repeal provisions provide that no tax is due on any units remaining unsold on June 15, 1996, and that all taxpayers, such as petitioner, must file a final computation of tax with the Division by May 31, 1997.

16. As noted in Finding of Fact "14", the Division issued a Notice of Determination of gains tax due dated August 12, 1994 of $20,035.18 plus penalty and interest against petitioner. Nonetheless, the parties have stipulated that a larger amount is at issue in this matter:

> "As a result of the repeal of Article 31-B, and the fact that no additional units were sold by the Petitioner after the 75% update was filed and the Notice of Determination was issued, the Audit Division was able to compute the final calculation of tax due by the Petitioner based upon the records available. The aforementioned calculation, which computed a total additional gains tax due of $42,075.00, was provided to the Petitioner on August 15, 1996."

17. As noted above, the record does not disclose any specific details concerning the Division's calculation of gains tax due of $20,035.18, the amount asserted due in the Notice of Determination dated August 12, 1994, which is the statutory notice at issue in this matter. In contrast, the record details the calculation of gains tax due of $42,075.00, which was, in the terminology of the stipulation, "provided" to petitioner.[4] An Exhibit "3" to the stipulation shows the following calculation of gains tax due of $42,074.63:

Project shares	28,470	
Actual sold	22,465	
Actual consideration (42 units/22465 shares)		$3,228,885.00
Allocated:		
Mtg. Indebtedness	1,688,623.00	

[4]It does not appear that a notice of determination was issued against petitioner asserting such amount as due.

Reserve fund	(62,337.00)
W/C fund	(11,836.00)
Discounts, credits	(21,462.00)
Gross consideration	$4,821,873.00
Less: actual brokerage fees	(86,487.00)
Less: original purchase price	
Allocated purchase price	($2,564,497.00)
Allocated other acquisition	(118,963.00)
Allocated capital improvements	(407,967.00)
Allocated conversion	(289,050.00)
Actual selling expenses	(1,822.00)
Total original purchase price	$(3,382,299.00)
Gain	$ 1,353,077.00
Tax at 10%	$ 135,307.70
Tax paid	$ 93,233.07
Tax due	$ 42,074.63

18. In response to the Division's assertion that gains tax of $42,074.00 was due, petitioner contended that it was due a refund of gains tax in the amount of $43,680.00 as shown in its own computation dated November 1, 1996, which the Division treated as a claim for credit or refund. Petitioner claimed a refund of gains tax due of $43,680.00 calculated as follows:

Project shares	28,470
Actual sold	22,465
Actual consideration (42 units/22463 shares)	$3,204,685.00[5]
Mortgage indebtedness	1,688,623.00[6]
Reserve fund-paid sold units	(42,000.00)
Reserve fund-allocated	(24,361.00)
Working capital fund-allocated	(14,617.00)
Discounts and credits	(20,450.00)
Total consideration	$4,791,880.00
Actual brokerage paid	(86,497.00)
Allocated purchase price	($3,166,988)
Allocated other acquisition	(178,938)
Allocated capital improvements	(505,241)
Allocated conversion	(356,959)
Actual selling expenses	(1,822)

[5]As noted in Finding of Fact "17", the Division used an amount of $3,228,885.00 for actual consideration for the 42 units sold. The Division has agreed that petitioner may use a lower selling price of $57,500.00 instead of the $81,700.00 which it used for one unit. This $24,200.00 difference in selling prices explains the lesser amount of $3,204,685.00 used by petitioner for actual consideration in its calculation.

[6]Petitioner, like the Division, allocated mortgage indebtedness to the 42 sold units by use of a per share methodology.

Total original purchase price	(4,209,948.00)[7]
Gain	$495,435.00
Gains tax on sold units final update	49,543.00
Gains tax paid	(93,223.00)
Gains tax refund	$43,680.00

19. The Division by a letter dated November 21, 1996 denied petitioner's claim for refund of gains tax in the amount of $43,680.00. In response, petitioner filed a second petition dated December 12, 1996 with the Division of Tax Appeals. Pursuant to a stipulation of the parties, petitioner waived the Division's answer to its second petition and agreed that its claim for refund of gains tax would be consolidated with its earlier petition contesting the Notice of Determination dated August 12, 1994 described in Finding of Fact "14".

20. The parties have stipulated that two issues which arose as a result of petitioner's refund claim have been resolved. As noted in Footnote "5", the Division has agreed to the reduction of the consideration paid for one of the sold units from $81,700.00 to $57,500.00. In addition, the Division has agreed that petitioner may use an amount "approximately $7,000.00" greater than it used for working capital and reserve funds, which were subtracted from actual consideration received by petitioner for the 42 units sold. Accordingly, the Division has conceded that if it "ultimately prevail[s] on the merits in this matter, the amount of tax determined to be due . . . will be appropriately adjusted." Furthermore, the parties stipulated that:

> "Any additional discrepancies that may exist between the figures used in the Petitioner's final computation and the figures used in the Division's final computation will be decided in favor of the Division."

21. The parties have stipulated that the only issue remaining involves:

> "[T]he proper method of allocating the original purchase price (e.g. purchase price, acquisition costs, capital improvements and conversion costs) for purposes of computing a final calculation of tax/refund due for the cooperative conversion project."

---

[7]The photocopy included in the record which shows petitioner's calculation of its original purchase price is of poor quality. The amount shown for total original purchase price of $4,209,948.00 has been discerned by calculating back from the gain shown by petitioner of $495,435.00. The amounts shown above for the various components of the original purchase price used by petitioner are best guesses based upon the poor quality of the photocopy. Since the matter at hand involves a legal issue, this inability to be sure of the exact amounts is not critical.

22. In calculating gains tax due of $42,074.63, as noted in Finding of Fact "17", the Division allocated original purchase price to the sold units based upon a per share method. Under this method, the purchase price to acquire the property of $3,250,000.00, for example, is divided by the total project shares of 28,470, and the resulting price per share of 114.1553 is then multiplied by the number of shares sold of 22,465 (allocable to the 42 sold units) to arrive at the allocated original purchase price of $2,564,497.00 or 78.9% of the total original purchase price. The same methodology was used by the Division to allocate amounts for (i) acquisition costs, (ii) capital improvements, and (iii) conversion costs, which are the other components of petitioner's original purchase price to the 22,465 shares representing the 42 sold units subject to gains tax.

23. In contrast, in calculating a refund of gains tax claimed by petitioner of $43,680.00, as noted in Finding of Fact "18", petitioner allocated 97.45% of its original purchase price to the 22,465 shares representing the 42 units sold. Petitioner calculated this allocation percentage of 97.45% by dividing the actual consideration for the 42 sold units of $3,228,885.00 by the total of such actual consideration for the 42 sold units plus the fair market value of the 12 unsold units, which according to an appraisal requested by petitioner had an estimated value as of April 2, 1997 of $82,000.00. Accordingly, $3,228,885.00 divided by $3,310,885.00 ($3,228,885.00 plus $82,000.00) equals .9745, expressed in percentage form as 97.45%

24. The appraised value for the 12 unsold units of $82,000.00 as of April 2, 1997 was prepared by Alan Offenberg, a certified real estate appraiser who "[o]ver the past 10 years . . . has valued over 7,500 properties including commercial, industrial, and residential properties throughout the New York Metropolitan area." Mr. Offenberg based his valuation on comparable sales and listings within the subject cooperative project and neighboring cooperative projects:

> "Although there have been very few block sales or auctions of occupied apartments in and around the immediate subject area, the few that did occur resulted in occupied units being purchased (as a block) for between 10% and 15% of their actual value if they were vacant . . . . In summary, there is an extremely limited if nonexistent market for occupied, rent controlled Coop apartments in the subject area, and if a buyer can be found for occupied units, the price per unit is a

very small fraction of the units[’] actual value if they were vacant.

He concluded in his appraisal the following:

> "[I]t is our considered opinion that the value (as a block sale) of the 12 unsold apartments is estimated to total $82,000 for all of the occupied apartments, which is 15% of the 'vacant' market value."

The Division did not offer an appraisal or any other evidence to contradict Mr. Offenberg's appraisal.

Petitioner also offered the opinion of various accounting professionals as follows:

(1) Estela Lorenzo, a certified public accountant, who stated in an affidavit that:

> "The allocation of cost basis using the relative sales value accounting method matches income and expense and, therefore, clearly reflects income. On the other hand, a pro-rata or per share allocation would distort income."

According to Ms. Lorenzo, generally accepted accounting principles require such allocation method.

(2) Philip H. Levine, a certified public accountant and an expert in cooperative conversions, who is in agreement with Ms. Lorenzo's allocation methodology, noted the changing values of cooperative units depending on the stage of the cooperative conversion project:

> "The three distinct segments of the project are as follows:
> (i) Sales at the initial closing of an effective cooperative . . . offering plan. This is normally a 90 to 180 day period beginning with approval date of the offering plan.
> (ii) The periodic sales during the intended holding period of the building. This period is based on the owners[’] plan or financial conditions at the time. Many properties have been sold in bulk shortly after the initial sales period is complete.
> (iii) Bulk sale of the residual units, which are primarily occupied rent stabilized apartments.
> The sales value of individual apartments varies dramatically at each of these individual stages. At the initial closing, the sales are predominantly at original insiders[’] price (approximately 60% of outside market prices[])].
> Sales at the second stage are primarily at outsiders[’] market prices, which can vary based on market conditions. The prices at this stage usually average at a higher price than the initial closing since the apartments sold are almost exclusively destabilized (free market) sales.
> Sales at the third stage are primarily rent stabilized apartments and worth only a small fraction of the other prices per unit."

(3) Robert Frank, an attorney and expert in cooperative conversions, who stated in an affidavit that:

"The sponsor of a cooperative conversion in the New York City area (including Westchester County) will always be left with a significant number of occupied units that have no substantial value."

(4) Richard B. Portney, a certified public accountant, who agreed with Ms. Lorenzo's methodology for apportioning original purchase price, stated in an affidavit:

"Where, as here, there are two types of property as opposed to homogenous properties, in order to clearly reflect income and match income and expenses, you must allocate acquisition costs, etc. in accordance with the relative fair market values of the two different types of units (i.e. sold vs. unsold). On the other hand, a per share approach distorts income and economic reality as it does not match costs properly with income."

26. Included in the offering plan for the project at issue was an "Opinion of Reasonable Relationship" prepared by Barhite and Holzinger, Inc., a licensed real estate broker and management company. This opinion set forth the relative values of each unit based upon an allocation of shares. A similar document was also prepared by the law firm of Snow, Becker, Kraus, P.C. The share allocation set forth in these documents is based upon the relative apartment size, number of rooms, number of baths, location within the building and other "facets of comparable value". In the opinion of Stephen Godfrey, an experienced auditor within the Division's Real Property Transfer Gains Tax Unit, a per share method of allocation of petitioner's original purchase price to the 42 sold units:

"is the most logical method to use when comparing the relative value of each apartment, as opposed to comparing them with units in another project (per an appraisal)."

27. Philip H. Levine, petitioner's expert, disagrees with Mr. Godfrey's opinion noting that the offering plan's Opinion of Reasonable Relationship is relevant to the apportioning of operating costs such as maintenance fees and not relevant to the apportioning of acquisition costs:

"In making such allocation, only the physical attributes (e.g., size, location) are taken into account. Other factors which bear on the fair market value of the units (e.g., whether the unit(s) is occupied under rent stabilization) are not considered. . . . [T]he opinion of reasonable value (and the related allocation) has nothing to do with the sponsor's apportionment of his acquisition costs."

28. Relevant portions of the parties' stipulation, dated February 21, 1997 by petitioner's representative and February 27, 1997 by the Division's representative, have been incorporated

into this determination.

29. The Division has proposed 36 findings of fact. All of these proposed findings of fact are accepted except for proposed finding of fact "29". Proposed finding of fact "29" is accepted except for the last sentence which states that:

> "[t]he increase in the deficiency from the 75% update arose due to the exclusion of estimated consideration and OPP attributable to the unsold shares."

As noted in Finding of Fact"17", the record does not disclose any specific details concerning the Division's calculation of gains tax due of $20,035.18, which was the amount asserted due in the Notice of Determination dated August 12, 1994. Consequently, it cannot be specifically found why the amount of gains tax asserted due by the Division at a subsequent date of $42,075.00 was in an amount $22,039.82 greater than in the original Notice of Determination, although, in general, the Division's proposed finding that its subsequent calculation involved the exclusion of estimated consideration and original purchase price attributable to the unsold shares appears correct.

SUMMARY OF THE PARTIES' POSITIONS

30. Petitioner contends that the relevant law which repealed the real property gains tax mandated an allocation or apportionment of original purchase price to the cooperative units which were subject to gains tax upon their respective transfers. Noting that the Laws of 1996, chapter 309, did not specify any particular methodology for allocating or apportioning original purchase price, petitioner argues that original purchase price "must be allocated on a relative fair market value basis" because such methodology "matches income and expense and clearly reflects income." According to petitioner, the Division's pro-rata or per share methodology ignores reality and in this case generates a gross distortion of income.

31. The Division rejects petitioner's methodology for allocating original purchase price to the units subject to gains tax:

> "As is evident from both the repeal legislation and the Division's TSB memoranda, the determination of the final gain or loss from the successive transfers of real property occurring pursuant to a cooperative conversion plan is to be based on the actual shares transferred prior to June 15, 1996. [Citation omitted.] Thus, the Division respectfully submits that the estimated anticipated consideration

> for the remaining unsold units . . . is wholly irrelevant for purposes of the final computation" (Division's brief, p. 17 [emphasis in original]).

In contrast, the Division maintains that the use of the per share method to allocate original purchase price is consistent with petitioner's initial submission by which it irrevocably elected such method. Further, according to the Division, using petitioner's method "a taxpayer would be required to submit an appraisal virtually every time a unit was sold in order to value the remaining unsold units" (Division's brief, p. 17).

The Division contends that petitioner has already benefitted from the protection of the safe harbor provisions. It now seeks to change its method of allocating original purchase price because it "no longer likes the tax ramifications of the allocation method it chose" (Division's brief, p. 20). The Division argues that:

> "Such a blatant attempt to disregard the existing rules and avoid its gains tax obligations should not be condoned" (Division's brief, p. 20).

The Division points out that its per share method of allocation is a stable method while the fair market value of the unsold shares could rise or fall based upon the real estate market in the New York City area and the elimination or further significant modification of the laws regulating rents.

The Division also contends that it is irrational for petitioner to allocate mortgage indebtedness by a per share method while allocating original purchase price by a different method.

Citing to the Tax Appeals Tribunal decision in Matter of Empire Realty Group 62nd Street Corp. (March 17, 1994), the Division emphasizes that the use of fair market value to allocate original purchase price was used in a situation where a commercial unit was retained by the transferor and did not involve the transfer of any units pursuant to a cooperative or a condominium plan. The Division notes that the Tribunal indicated that if the transaction had involved the transfer of units pursuant to a condominium plan, the fair market value method of allocation would not have been permitted. In sum, the Division maintains that original purchase price should be allocated based upon the per share method specified in TSB-M-86-(2)-R which

was in effect for the transfers of cooperative units at issue.

32. In its reply brief, petitioner maintains that based upon the Tribunal's decision in Matter of Empire Realty Group 62nd Street Corp. (supra), where a portion of the subject property is not being taxed, the relative fair market value method of allocation under 20 NYCRR 590.19 (renumbered 590.20) is properly used.

CONCLUSIONS OF LAW

A. The real property transfer gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996. (See, L 1996, ch 309, §§ 171-180.) The above-cited 1996 sessions law, which provided for the repeal of the gains tax, included the following specific provision concerning the effect of the repeal on cooperative conversion projects, such as petitioner's, at section 180(b)(i), as follows:

> "In the case of partial or successive transfers which are treated in the aggregate pursuant to subdivision seven of section 1440 of the tax law, including transfers pursuant to a condominium or cooperative plan, in which the taxpayer has paid or was required to pay tax pursuant to subdivision (b) of section 1442 of the tax law but had not made the last transfer pursuant to such plan or aggregated transfer prior to June 15, 1996, a final computation of tax shall be filed with the commissioner of taxation and finance by May 31, 1997. The determination of gain or loss in such cases shall be based only on the actual units, shares, parcels of real property or interests in real property sold prior to June 15, 1996. For purposes of such determination, original purchase price shall include only those amounts allowable pursuant to subdivision five of section 1440 of the tax law which are directly attributable to those actual units, shares, parcels of real property or interests in real property sold and those amounts allowable pursuant to such subdivision five which are indirectly attributable to those units, shares, parcels of real property or interests in real property sold. The commissioner of taxation and finance shall review all such final computations of tax and determine whether there has been an overpayment or an underpayment of tax."

B. Tax Law former § 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.

C. Tax Law former § 1440(3) defined "gain" 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."

Tax Law former § 1440(5)(a) defined "original purchase price" to mean:

> "the consideration paid or required to be paid by the transferor; (A) to acquire the interest in real property, and (B) for any capital improvements made or required to be made to such real property . . . ."

Tax Law former § 1440(1)(a) defined "consideration" to mean in relevant part:

> "the price paid or required to be paid, for real property or any interest therein . . . including the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to."

D. Tax Law former § 1442(b) provided that original purchase price and the total consideration anticipated under a cooperative plan shall be made with regard to each partial or successive transfer as follows:

> "For purposes of calculating the amount of tax due in each such . . . transfer pursuant to a cooperative or condominium plan, an apportionment of the original purchase price of the real property and total consideration anticipated under such cooperative or condominium plan . . . shall be made for each such cooperative or condominium unit . . . ."

E. Neither the sessions law which repealed the gains tax, as detailed in Conclusion of Law "A", nor the provisions of the former gains tax law specified the methodology to be used to apportion original purchase price in order to calculate tax due on successive transfers pursuant to a cooperative plan. Instead, by the issuance of Technical Services Bureau Memoranda (TSB-M's), the Division provided guidance to taxpayers concerning acceptable methods to apportion original purchase price. On August 23, 1983, the Division set forth two acceptable methods of computing gain and calculating the tax due upon transfers of cooperative apartment units, Option A and Option B, either of which the taxpayer could elect to use. (See, TSB-M-83-[2]-R.)

Under Option A, gain was computed based on the actual consideration received for each unit, less the pro-rata portion of original purchase price allocated to each unit. The original purchase price was allocated to each unit based on the unit's relationship to the total units, utilizing a fixed common denominator. The acceptable methods of apportionment included using a percentage of either common interest, square footage or shares of stock. The method of apportionment utilized was irrevocable for all units sold under the plan unless the taxpayer obtained prior written approval from the Division.

Under Option B, a taxpayer could elect, prior to the time it started making taxable sales to estimate the consideration to be received on all future sales. The total consideration anticipated, total brokerage fees anticipated and the total original purchase price anticipated was apportioned to each unit based upon the unit's percentage to the total units, utilizing a fixed common denominator. The acceptable methods of apportionment were the same as for Option A: using a percentage of either common interest, square footage or shares of stock. Again, the method of apportionment utilized was irrevocable for all units sold under the plan unless the taxpayer obtained prior written approval from the Division.

By selecting Option B, the taxpayer was permitted to pay the estimated tax rate even though the actual consideration received may have been greater (or less) when the shares actually sold. Once the number of shares reached the 25%, 50% and 75% sell-out 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 underpayments or overpayments based upon the actual consideration received for the total number of shares sold would be adjusted accordingly. Under Option B, 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, as it was under the more cumbersome Option A.

F. In 1986, the Division eliminated Option A as an available method of computing and paying gains tax and directed that the new method for paying gains tax, for filings made on or after August 1, 1986, would be a modified Option B (see, TSB-M-86-[2]-R). In this TSB memorandum, the Division included guidelines for estimating the consideration to be received on all such plans entitled "Safe Harbor Estimate for Transfers Pursuant to Condominium and Cooperative Plans". Pursuant to this memorandum, the gains tax is based on the total estimated consideration, an apportionment of original purchase price to each unit based on the unit's percentage to the total units (utilizing a fixed common denominator) and an anticipated gain allocated to each unit. The method of apportionment could be based upon the unit's percentage of common interest, square footage or shares of stock as compared to the total common interest,

square footage or shares of stock of all the units. Once again the method elected for apportionment was irrevocable for all units sold under the plan. While a taxpayer could still file on a unit-by-unit basis using actual consideration, if it chose to use the modified Option B, it would only have to file periodic updates and would receive the benefit of the safe harbor provisions. For a noneviction conversion plan, the safe harbor estimate for anticipated consideration was calculated by taking the lower of (a) 100% of the total of the offering plan prices established for insiders for the unsold units, or (b) 50% of the total of the vacant market value for the unsold units.

G. The Division's guidelines for the apportionment of original purchase price to transfers pursuant to a cooperative plan, as set forth in the TSB memoranda, were reasonable and logical, and, in short, a proper way for the Division to regulate the reporting and payment of gains tax due for such transfers (cf., Teresian House v. Chassin, 218 AD2d 250, 636 NYS2d 484). Consequently, petitioner must shoulder a heavy burden to establish that its formula for apportioning original purchase price should supersede the method set forth in these guidelines (cf., Matter of Custom Shop 5th Ave. Corp. v. Tax Appeals Tribunal, 195 AD2d 702, 600 NYS2d 295). Petitioner has failed to meet this burden.

H. As noted in Findings of Fact "5" and "8", petitioner utilized the per share method of allocating original purchase price for its initial gains tax filing on or about April 11, 1988 as well as its 75% update filed on or about November 15, 1993. As noted in Conclusion of Law "F", petitioner's election to use the per share method was irrevocable under the Division's guidelines set forth in the applicable TSB memorandum, TSB-M-86-(2)-R.

I. Petitioner has attempted to alter the method for allocating original purchase price for purposes of its final gains tax filing based upon its contention that a relative fair market value methodology "clearly reflects income." However, for purposes of the former gains tax law, income tax principles are not relevant (cf., Matter of V & V Properties, Tax Appeals Tribunal, June 16, 1992). Moreover, gains tax has been imposed in situations where there is, in fact, no actual economic gain (see, Matter of Brockman, Tax Appeals Tribunal, April 4, 1996,

confirmed, ___ AD2d ___, 656 NYS2d 429).

J. Petitioner is correct that 20 NYCRR 590.20 (previously numbered 590.19) provides that fair market value is a proper method for allocating original purchase price for transfers involving less than the transferor's complete interest (i.e., an easement, transfer of development rights or a subdivision of a parcel of real property). However, transfers pursuant to a cooperative conversion plan are not covered by this regulation. Further, the case cited by the Division in its brief, Matter of Empire Realty Group 62nd Street Corp. (Tax Appeals Tribunal March 17, 1994), which petitioner now relies upon, does not support petitioner's position for a similar reason. It involved the use of fair market value to allocate original purchase price where a commercial unit was retained by the transferor and did not involve the transfer of any units pursuant to a cooperative plan.

K. Further, petitioner's reliance upon the decisions of the Tax Appeals Tribunal in Matter of Mendler (September 23, 1993) and Matter of Westport Realty Corporation (January 12, 1995) is misplaced because these cases are not analogous to the situation at hand. Both involved the calculation of anticipated consideration at an update in a pre-safe harbor situation.

L. Finally, it is true that the Division's guidelines on the repeal of the gains tax set forth in TSB-M-96(4)-R provide that a determination of what constitutes a reasonable apportionment of the amount of original purchase price attributable to the transfer of cooperative units subject to tax "will vary depending on the facts and circumstances of each case." Here, the facts and circumstances are that petitioner made an irrevocable election to utilize the per-share method of apportionment, which therefore must also be used for purposes of its final gains tax filing.

M. The petitions of 244 Bronxville Associates are denied, and the Notice of Determination dated August 12, 1994 is sustained, and petitioner's refund claim dated November 1, 1996 is denied.

DATED: Troy, New York
January 29, 1998

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE