STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **475 ASSOCIATES AND ANDREW CLARKE, HARVEY CLARKE, MICHAEL GARBOW AND EDWIN MICKENBERG.** 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 NO. 819618

Petitioners, 475 Associates, Andrew Clarke, Harvey Clarke, Michael Garbow and Edwin Mickenberg, c/o Goldberg, Weprin & Ustin, LLP, 1501 Broadway, 22nd Floor, New York, New York 10036, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 7, 2004 at 11:00 A.M., with all briefs to be submitted by November 5, 2004, which date commenced the six-month period for issuance of this determination. Petitioners appeared by Goldberg, Weprin & Ustin, LLP (Matthew E. Hearle, Esq., and Lisa R. Radetsky, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel).

ISSUE

Whether mortgage indebtedness incurred by a cooperative housing corporation from refinancings undertaken subsequent to the date of conversion to cooperative ownership should be

allocated to the cooperative apartment units (shares) and included in consideration received by petitioners upon the sale of cooperative housing corporation shares.

FINDINGS OF FACT [1]

1. Petitioner 475 Associates was a partnership with offices c/o Gelbwaks & Pollack, 299 Broadway, New York, New York during all relevant periods. Petitioners Andrew Clarke, Harvey Clarke, Michael Garbow and Edwin Mickenberg (the "partners") were principals of the 475 Associates partnership during all relevant periods.

2. On October 1, 1982, 475 Associates converted premises located at 475 Bronx River Road, Yonkers, New York (the "premises") to cooperative ownership. The mortgage indebtedness at the time of conversion to cooperative ownership (i.e., at the time of the transfer from the sponsor to the cooperative housing corporation ["CHC"]) was $288,829.67, consisting of a first mortgage to the Long Island Savings Bank in the amount of $232,395.00 and a second mortgage to Marion Norton Guidin in the amount of $50,312.50.

3. On March 28, 1983, the Tax on Gains Derived From Certain Real Property Transfers (the "Gains Tax") imposed pursuant to Tax Law Article 31-B became effective. The Gains Tax remained in existence until its repeal effective July 13, 1996.

4. Between April 5, 1983 and July 17, 1986, 475 Associates sold 602 shares of stock in the cooperative for consideration including total cash of $215,820.00. The shares sold were those relating to the following apartment units:

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[1] With its brief, the Division submitted Proposed Findings of Fact numbered "1" through "24", each of which has been included in the Findings of Fact set forth herein except for proposed facts numbered "20" through "24" which deal with procedural matters not disputed and not relevant or necessary for resolution of this matter.

APARTMENT UNIT	DATE OF SALE
Unit 4E	April 5, 1983
Unit 6C	August 15, 1983
Unit 1D	March 29, 1984
Unit 3H	July 5, 1984
Unit 6H	August 22, 1984
Unit2G	May 10, 1985
Unit 2D	September 5, 1985
Unit 2K	July 17, 1986

5. On January 30, 1986, the first and second mortgages were refinanced into a consolidated first mortgage with National Cooperative Bank in the amount of $360,000.00.

6. Unit 2K, as set forth above, was sold subsequent to the January 30, 1986 mortgage refinancing. Petitioners included only a portion of the outstanding mortgage allocable to Unit 2K as consideration received upon sale. In this regard, petitioners calculated that the remaining amount of the original mortgages on the January 30, 1986 refinancing date ($263,363.95) represented 73.157 percent of the amount of the new mortgage ($360,000.00) in favor of National Cooperative Bank ("NCB Mortgage"). Accordingly, petitioners calculated the amount of mortgage allocable to Unit 2K based on 73.157 percent of the outstanding balance of the NCB Mortgage on the date of the transfer of Unit 2K (i.e., 73.157 percent of the NCB Mortgage as amortized to the date of the unit transfer).[2]

[2] It is noted that petitioners' Exhibit "1" reflects $34,783.00 as consideration based on allocated mortgage indebtedness applicable to the 602 shares sold by 475 Associates between April 5, 1983 and July 17, 1996. In contrast, the Final Gains Tax Return filed by 475 Associates reflects $41,631.00 as consideration based on allocated mortgage indebtedness applicable to such shares. The difference in amount is not explained in the record.

7. On October 1, 1986, 475 Associates transferred 2,700 unsold cooperative shares to the four partners, Andrew Clarke, Harvey Clarke, Michael Garbow and Edwin Mickenberg, as tenants in common.

8. Between February 6, 1987 and December 15, 1987, the partners sold 218 shares of stock in the cooperative as follows:

APARTMENT UNIT	DATE OF SALE
Unit 3E	February 6, 1987
Unit 1G	June 24, 1987
Unit 6B	December 15, 1987

9. On January 14, 1988, the cooperative obtained a second mortgage from Clark Financial Services in the amount of $375,000.00.

10. Subsequent to the January 14, 1988 second mortgage, the partners sold an additional 330 shares of stock in the cooperative as follows:

APARTMENT UNIT	DATE OF SALE
Unit 6E	December 15, 1988
Unit 4J	April 18, 1990
Unit 1A	November 8, 1990
Unit 5E	February 28,1991

11. On March 29, 1991, the cooperative again refinanced the mortgages with a new mortgage in the amount of $805,000.00.

12. Subsequent to the March 29, 1991 refinancing, the partners sold an additional 591 shares of stock in the cooperative as follows:

APARTMENT UNIT	DATE OF SALE
Unit 1C	June 28, 1991
Unit 3J	February 3, 1992
Unit 6F	April 30, 1992
Unit 4H	September 23, 1992
Unit 5K	July 15, 1995
Unit 5J	July 19, 1995
Unit 2B	January 5, 1996

13. The Gains Tax was repealed effective July 13, 1996. On May 7, 1997, the partners filed a Gains Tax Final Computation, reporting their sale of a total of 1,139 shares pertaining to units transferred prior to June 15, 1996, for cash consideration in the amount of $706,500.00 plus allocated mortgage indebtedness consideration in the amount of $78,793.00 thus resulting in gross consideration in the amount of $785,293.00. The partners reduced such amount by $12,026.00 (reserve fund), to arrive at allocated aggregate consideration in the amount of $773,267.00. In turn, such amount was reduced by $42,390.00 (brokerage fees), to arrive at consideration in the amount of $730,877.00.[3]

14. On May 7, 1997, 475 Associates also filed a Gains Tax Final Computation, reporting its sale of a total of 602 shares pertaining to units transferred prior to June 15, 1996, for cash consideration in the amount of $215,820.00 plus allocated mortgage indebtedness consideration in the amount of $41,631.00 thus resulting in gross consideration in the amount of $257,451.00. 475 reduced such amount by $6,382.00 (reserve fund), to arrive at allocated aggregate

[3] It is noted that on petitioner's Exhibit "1", the amount of mortgage debt allocated is the lesser amount of $62,127.00, and that there is a reduction for allocated mortgage amortization in the amount of $3,232.00, such that (after the same reductions for reserve fund and brokerage), Exhibit "1" reports consideration in the amount of $710,979.00. The distinction between petitioners' Gains Tax Final Computation versus Exhibit "1" is that the latter is based on allocation of the remaining amount of amortized mortgage on the date of each share sale coupled with a claimed expense for allocated amortization.

consideration in the amount of $251,069.00. In turn, 475 reduced such amount by $8,201.00 (brokerage fees), to arrive at consideration in the amount of $242,868.00.[4]

15. Petitioners' two returns (Final Computations) as filed thus reported consideration in the aggregate amount of $973,745.00 ($242,868.00 for 475 Associates plus $730,877.00 for the partners). Under petitioners' calculations, the project thus did not reach the one million dollar gains tax threshold, and petitioners have requested a refund of gains tax paid in the aggregate amount of $36,195.29 ($16,392.70 to 475 Associates and $19,803.59 to the partners).[5]

16. The Division audited petitioners' Gains Tax Final Computations and, by letter dated August 13, 1997, denied petitioners' claims for refund.

SUMMARY OF THE PARTIES' POSITIONS

17. The Division asserts that consideration received for transfers pursuant to a cooperative plan is determined on the date each cooperative unit is transferred to the unit purchaser and, most specifically, consideration includes the relief from indebtedness of the pro rata portion of the mortgage debt allocated to each such unit at the time of its sale. Thus, the Division posits that the additional mortgage indebtedness on the property (incurred through obtaining new mortgage financing and by refinancing existing mortgages) subsequent to the conversion to cooperative ownership, and not just the amount of mortgage debt existing at the time of conversion, should be allocated to the units and included in consideration received by petitioners upon their transfers of the units. Accordingly, by including in consideration the allocated share of the total

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[4] As before, petitioner's Exhibit "1" differs from the Final Computation in that, on Exhibit "1", the mortgage amount is the lesser amount of $34,743.00 and there is a reduction for allocated mortgage amortization in the amount of $12,280.00, such that after the same reductions for reserve fund and brokerage fees, Exhibit "1" reflects reported consideration in the (lesser) amount of $223,700.00.

[5] The total consideration under both of petitioners' calculations falls below one million dollars, to wit, totaling $973,745.00 on petitioners' Final Returns and $934,679.00 on Exhibit "1", thus in each instance resulting in a claim that the cooperative conversion was not subject to the gains tax.

amount of mortgage debt encumbering each unit on the date of each unit transfer, the total consideration for the cooperative conversion exceeds one million dollars and thus is subject to gains tax.

18. Petitioners, in contrast and relying specifically upon 20 NYCRR former 590.36, maintain that it is only the amount of any mortgage encumbering the premises at the time of the transfer of the premises to the cooperative corporation, and not any subsequent mortgage indebtedness incurred thereafter via refinancing or otherwise, which may be included in the determination of consideration received for the sale of the real property or interest therein. Hence, petitioner would include only the portions of the Long Island Savings Bank mortgage and the Marion Guidin Norton mortgage allocated to the shares sold, and no portion of the subsequent (refinanced or new) debt incurred by the cooperative, as constituting consideration received. In turn, such allocated mortgage amounts together with the cash received by petitioners for the units transferred result, after relevant and undisputed reductions (e.g., reserve fund, brokerage fees, etc.), in total consideration received of less than one million dollars. Accordingly, petitioners assert that the gains tax does not properly apply and seek a refund of the gains tax they paid. Petitioners also claim the unsold shares in this case were not transferred until after the effective date of the repeal of the gains tax, thus leaving no tax due in any event.[6]

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[6] The primary issue in this case is whether or not mortgage debt incurred after the sponsor-to-CHC transfer should be allocated to and included in consideration upon share/unit transfers. While the Division included such debt in its calculations and petitioners did not, both parties nonetheless allocated mortgage debt to the shares based on the amortized actual balance of such debt on the date of each of the unit transfers. In addition, however, petitioners also reduced total consideration by some $15,512.00 ($12,280.00 for the Partnership plus $3,232.00 for the partners), based on the amount of the debt paid by petitioners while they owned their shares (***see*** Footnotes "3" and "4"). At hearing, the parties disagreed over the propriety of this reduction. Such a reduction from consideration would be allowable where the initial total amount of the debt was simply allocated to the shares (and included in consideration upon their sale), with no provision to account for interim debt principal amortization during the period of petitioners' share ownership (***see*** 20 NYCRR 590.36, renum 20 NYCRR 590.37). However, where, as here, allocated consideration is based on the (lower) amortized amount of debt actually remaining due on each share transfer date, then the amount being included as consideration and subjected to tax would not include the portion of the debt already amortized. Thus, the amortization reduction taken by petitioners should properly be denied.

CONCLUSIONS OF LAW

A. Article 31-B of the Tax Law, now repealed, imposed a tax at the rate of ten percent on gains derived from the transfer of real property or certain interests therein, as defined, where the consideration for the transfer met the one million dollar gains tax threshold (Tax Law former § 1441). "Gain" was defined as the difference between the "Consideration" for the transfer of the real property or interest therein and the "Original Purchase Price" ("OPP") of such property or interest therein where the consideration exceeded the OPP (Tax Law former § 1440[3]).

B. "Consideration" was defined, in relevant part, as follows:

> the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor . . . . Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of *any* mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to. Consideration includes the cancellation or discharge of an indebtedness or obligation. (Tax Law former § 1440[1][a]; emphasis added.)

"Original purchase price" ("OPP") was defined as "the consideration paid or required to be paid by the transferor to acquire the interest in the real property, plus the amount paid for any capital improvements made or required to be made to the real property . . ." (Tax Law former § 1440[5][a][i]; 20 NYCRR 590.8).

C. Regulations of the Commissioner of Taxation addressed the methodologies to be utilized in determining consideration and original purchase price (20 NYCRR 590.9 - 590.20). For purposes of computing the gains tax, cooperative and condominium conversions were treated as a single transfer, with the date of such transfer deemed to be the date on which each cooperative or condominium unit was transferred. Tax due upon such transfers to individual cooperative apartment unit purchasers was to be based upon an apportionment, among the shares, of the original purchase price for the real property and the total consideration anticipated

under the cooperative plan (Tax Law former § 1442[b]; ***Matter of Mayblum v. Chu***, 67 NY2d 1008, 503 NYS2d 316.) The gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996. The repeal applied to transfers of real property that occur on or after June 15, 1996. (***See***, L 1996, ch 309, §§ 171-180.) Pursuant to the repeal legislation, final returns were to be filed reflecting and accounting for taxable transfers.

D. Petitioners do not dispute the general proposition that upon sales of shares in a cooperative housing corporation, the discharge of the seller's pro rata share of mortgage repayment obligation allocated to the shares pertaining to the units sold (i.e., the portion of the mortgage obligation taken on by the purchaser/transferee) constitutes "relief from debt" and thus consideration for gains tax purposes. However, petitioners assert that the amount of consideration arising from mortgage debt must be determined at the time of the sponsor to CHC transfer, and that subsequent events, including obtaining new mortgages or refinancings by which additional debt is undertaken, have no bearing on consideration. This position is simply incorrect in the case of cooperative conversions and subsequent unit (share) transfers.

E. Petitioners' argument is based directly upon 20 NYCRR 590.36 which, as in effect on the dates of the transfers in issue, provided as follows:

> Q. How does the mortgage on the real property transferred to the cooperative corporation affect the calculation of the gains tax?
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> A. The amount of any mortgage to which the real property is subject when transferred by the realty transferor to the cooperative . . . is included as consideration to the realty transferor.[7]

[7] 20 NYCRR 590.36, filed new September 3, 1985; amd. filed December 8, 1995; Part (*Tax On Gains Derived From Certain Real Property Transfers, §§ 590.1 - 590.74*) renum. Appendix 12, filed April 29, 1998 eff. May 20, 1998. The relevant regulation is now numbered 20 NYCRR 590.37.

F. Petitioners would read this regulation, which specifically includes in consideration mortgages extant at the time of the transfer from the sponsor to the CHC, as prescribing a limitation affirmatively excluding from such consideration any subsequent refinancings or new mortgage debt. Such a reading is too narrow and is, moreover, inconsistent with the nature of the gains tax as the same has been applied to cooperative conversions. First, the relevant statute, Tax Law former § 1440(1), broadly defined consideration to include any mortgage (***see*** Conclusion of Law "B"). Furthermore, the regulation at 20 NYCRR 590.36 simply did not address the issue of subsequent refinancings or new mortgages, nor did it impose any limitation on including such debt as consideration. Instead, the regulation specifically stated only that mortgage debt existing at the time of the transfer to the CHC was included in consideration. In this respect, the gains tax regulations set forth at 20 NYCRR 590.1 - 590.74 reflect a codification of a series of questions and answers addressing specific gains tax issues (***see,*** Publication 588 "Questions and Answers–Gains Tax on Real Property Transfers," first published August 1983, expanded and republished November 1984). As noted, the regulation at 20 NYCRR 590.36 addressed the specific question of whether mortgage debt existing at the time of the transfer to the CHC was to be included as consideration. That specific question was answered in the affirmative. At the same time, the absence of a question and answer concerning later undertaken debt simply does not mean such debt was not to be included in consideration upon transfers of shares after such debt was incurred. Rather, consistent with the nature of cooperative transfers, such later undertaken debt must be included in consideration, and the relevant statute, regulations and case law bear out this conclusion.

G. Tax Law former § 1442(b) provided that:

> [i]n the case of a transfer pursuant to a cooperative or condominium plan, the date of transfer shall be deemed to be the date on which each

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

The regulations go on to explain that it is not the transfer of the real property to the cooperative corporation which is the event requiring payment of tax, but rather it is the transfers of shares pursuant to the plan to the individual unit purchasers which are the events requiring the payment of the tax (***see,*** 20 NYCRR 590.33, renum 20 NYCRR 590.34). In ***Mayblum v. Chu (supra.)***, the Court of Appeals held that the gains tax "is imposed by the statute upon the overall cooperative plan . . . that the overall transaction is taxable . . . and that for purposes of computation of the tax, the cooperative conversion is treated as a single transfer." The taxable event is the transfer of the shares to the individual unit purchasers, and the consideration for each unit is determined at the time each such unit is transferred. In this regard, the Tax Appeals Tribunal noted, in ***Matter of Birchwood Associates*** (July 27, 1989), as follows:

> the tax treats the transfer of shares by the realty transferor to unit purchasers as the only taxable event. However, the gain on these transfers is measured by the difference between the consideration for the shares and the realty transferor's original purchase price in the real property prior to its transfer to the cooperative housing corporation. This scheme in effect ignores the realty transferor's transfer to the cooperative housing corporation and instead treats the realty transferor as if it were directly transferring its interest in the real property to the unit purchasers. Under this scheme the gains tax is imposed on the entire cooperative conversion plan, encompassing the real property prior to its transfer to the cooperative housing corporation and the sale of shares by the realty transferor subsequent to the property's conversion to cooperative ownership. The transfer to the cooperative corporation is then treated merely as a conduit which allows the transformation of the real property into shares allocated to units.

Thus, the Tribunal clearly rejected the concept of treating cooperative conversions as two-step processes whereunder the amount of mortgage debt would be consideration only on the transfer from the sponsor to the CHC.

H. Petitioners have argued that the consideration must be fixed at the time of transfer and that "subsequent events" do not alter the value of the consideration for the transfer. In support, petitioners cite to numerous cases which set forth the proposition that events subsequent to the taxable realty transfer do not alter the value of the consideration for the property as it existed on the date of the taxable transfer (***see, e.g.***, ***Wanat v. Tax Appeals Tribunal***, 224 AD 2d 873, 874 NYS2d 251; ***31/32 Lexington Associates v. Tax Appeals Tribunal***, 258 AD2d 684, 685 NYS2d 329; ***Forty Second Street Company v. Tax Appeals Tribunal***, 219 AD2d 98, 641 NYS2d 151). It is true that the value of the consideration received must be fixed at the time of the taxable transfer, and that events occurring thereafter do not affect such value (***id.***) However, petitioners' argument overlooks the fact that the refinancings and new mortgages in this instance (or for that matter in any cooperative conversion), which occur after the sponsor-to-CHC transfer but prior to the transfers of unit shares, are not events *subsequent* to the taxable transfers (i.e., the share transfers), and thus are not excluded from consideration as events impacting the value of the consideration subsequent to the taxable transfers.[8]

I. In the case of cooperative conversions, gain is measured by the difference between the consideration received *upon the sales of the shares* and the transferor's cost of acquiring the property prior to its transfer to the CHC (***Matter of Normandy Associates***, Tax Appeals

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[8] As the Division points out, all but two of the cases cited by petitioners did not involve transfers pursuant to a cooperative conversion. The two matters cited which involved cooperative conversions dealt, respectively, with a post-closing settlement (a "subsequent event") which occurred *after* the transfer dates by which all of the units (shares) had been sold to the unit purchasers (***93rd Street Associates v. Tax Appeals Tribunal,*** 259 AD2d 855, 686 NYS2d 210), and with the value of a leasehold interest as opposed to the value of the consideration for cooperative units (***Cheltoncort Company v. Tax Appeals Tribunal***, 185 AD2d 49, 592 NYS2d 121).

Tribunal, March 23, 1989). Thus, consideration received upon the sales of the shares properly includes the portion of the mortgage debt existing at the time of such transfers of the shares, as such debt is allocated to the shares being transferred. Until the shares are sold, the mortgage debt repayment obligation rests with the share owners (here petitioners). Such obligation is not limited only to the mortgage amount existing at the time of the transfer to the CHC, but rather to the entire outstanding mortgage debt obligation, including debt undertaken after the transfer of the property from the sponsor to the CHC. Upon sales of shares, the unit (share) transferee undertakes the mortgage repayment obligation, the share transferors (petitioners herein) are thus relieved of such obligation, and such relief constitutes consideration to the transferors.

J. The gains tax reporting requirements for cooperative conversions are consistent with this conclusion. Transferors were required to file returns and pay tax at the times of the taxable transactions, that is, as sales of shares to individual units occurred. In recognition that such sales would be ongoing over a period of time, the gain and the tax due on such sales were to be based upon an estimate of the anticipated consideration to be received for the entire property versus the OPP for the property, as each was allocated to the various shares and units (Tax Law former § 1442[b]). Periodic update filings were to be made with the Division as certain share sellout plateaus were reached, pursuant to which estimated (anticipated) consideration was to be updated to actual consideration such that, as sales progressed, the amount of initially estimated consideration drew closer to the amount of consideration actually received. Ultimately, upon sellout (or, as in this case, upon the repeal of the gains tax), a final return was to be filed under which estimated consideration was updated to actual consideration (***see***, TSB-M-83-[2]-R; TSB -M-86-[2]-R; TSB -M-86-[3]-R; ***Matter of 61 East 86th Street Equities Group***, Tax Appeals Tribunal, January 21, 1993; ***Matter of Briarwood Associates,*** Tax Appeals Tribunal, July 25,

1996). Even though the initial estimate may have been that consideration would be less than one million dollars, if it turned out that actual consideration upon sales of units exceeded one million dollars (due, for example, to rising real estate prices), the gains tax would apply notwithstanding such initial estimate.[9]

K. Accepting petitioners' proposition that it is only the amount of debt existing at the time of the sponsor-to-CHC transfer which may be included in the calculation of consideration is inconsistent with the nature of the gains tax as applied to cooperative conversion. Moreover, such proposition would result, with but a minimum of ingenuity, in a means of easily escaping the imposition of tax. That is, by the simple expedient of structuring the financing such that a minimal amount of debt existed at the time of the sponsor-to-CHC transfer, and then thereafter immediately refinancing so as to take on additional debt, the tax could be severely limited or eliminated. Ultimately, petitioners' position must fail since the financing activities (refinancings and additional mortgages) did not occur subsequent to the taxable transfers (the share sales) and thus were not barred from impacting the amount of consideration as "subsequent events."

L. Finally, petitioners have argued that no tax is due because the unsold shares were not sold prior to the repeal of the gains tax, and thus there was no relief from debt with respect thereto. While it appears that there were shares (units) unsold as of the date of the repeal of the gains tax, the record clearly established that the shares (and units) included in the Division's

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[9] In fact, the Division's methods for reporting ongoing sales anticipated this situation and provided "safe harbor" (good faith) provisions with respect to estimating and allocating consideration and, ultimately, gain. If the methods set forth were adhered to, a taxpayer's estimates of consideration would be deemed reasonable and the transferor would avoid the imposition of penalties notwithstanding that the ultimate amount of actual consideration received exceeded the one million dollar gains tax threshold (***see, e.g.***, TSB -M-86-[3]-R; ***Matter of Briarwood Associates, supra***).

calculations were sold prior to the repeal of the gains tax.[10] Accordingly, the pro rata share of mortgage debt allocated to such shares, including the mortgage debt taken on after the sponsor to CHC transfer, was properly included in consideration received by petitioners.

M. The petition of 475 Associates and Andrew Clarke, Harvey Clarke, Michael Garbow and Edwin Mickenberg is hereby denied and the Division's August 13, 1997 notice of disallowance of petitioners' claims for refund is sustained.

DATED: Troy, New York
April 14, 2005

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[10] The documents in the record reveal that some 1,741 shares out of a total of 4,732 shares were sold subsequent to the enactment of the gains tax and prior to its repeal.