STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
330 THIRD AVENUE OWNERS' CORP.	:	DECISION DTA NO. 809615
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 1986.	:	

The Division of Taxation and petitioner 330 Third Avenue Owners' Corp., c/o Edward M. Virshup, 330 Third Avenue, New York, New York 10010, each filed an exception to the determination of the Administrative Law Judge issued on September 26, 1996. Petitioner appeared by Martin A. Stoll, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq. and James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in support of its exception and in opposition to the exception filed by the Division of Taxation. The Division of Taxation filed a reply brief in support of its exception and in opposition to the exception filed by petitioner. Petitioner filed a brief in reply. Oral argument, at the request of both parties, was heard on September 10, 1997 in New York, New York. By an order dated October 14, 1997, the Tax Appeals Tribunal granted the motion brought by petitioner and Ocean Terrace Owners, Inc. (DTA No. 809719) to consolidate their matters since both cases deal with the issue of whether each petitioner, a cooperative housing corporation pursuant to Internal

Revenue Code § 216(b)(1), is properly subject to subchapter T of the Code or whether it is governed by section 277 of the Code.[1]

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner, a cooperative housing corporation as defined in section 216(b)(1) of the Internal Revenue Code (hereinafter the "IRC"), is subject to subchapter T of the Code or whether it is governed by the provisions of IRC § 277(a).

II. If governed by section 277(a), whether a portion of the New York depreciation deduction otherwise allowable should be disallowed as a consequence of the application of the principles of section 277(a) and Revenue Ruling 90-36.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, 330 Third Avenue Owners' Corp., was incorporated on March 31, 1982 under the Business Corporation Law of the State of New York.

During 1989 the Division of Taxation ("Division") commenced a franchise tax audit of petitioner's books and records for 1986.

Petitioner filed a 1986 New York State corporation franchise tax report (Form CT-3) on a calendar year basis.

---

[1]Although the matters of petitioner and Ocean Terrace Owners, Inc. are consolidated, we are issuing separate decisions on the same date due to the different facts of each case.

Petitioner filed a 1986 Federal corporation income tax return (Form 1120) on a calendar year basis.

Petitioner's 1986 Form 1120 reported Federal taxable income (loss), before an allowance for a net operating loss deduction carryover, of ($384,247). Such loss of ($384,247) did not reflect the adjustments required by Section 277 of the Internal Revenue Code of 1986, as amended ("IRC § 277"), to be made by certain organizations.

Petitioner reported on its 1986 Form 1120 deductions of $1,423,009 which included a deduction $516,733 for accelerated cost recovery system depreciation ("ACRS Depreciation") pursuant to Section 168 of the Internal Revenue Code, and a deduction of $4,993 for New York State franchise tax (the "NYS Tax").

Petitioner reported on line 29 of its 1986 Form CT-3 an allowable depreciation deduction of $316,479 (the "NYS Depreciation").

In two statements of audit adjustment, dated August 10, 1989, the Division recomputed petitioner's 1986 franchise tax and metropolitan transportation business tax liabilities and determined deficiencies for 1986, as follows:

Federal taxable income before net operating loss deduction		$(384,247)
Total deductions in computing Federal taxable income	$ 1,423,009	
Total deductions allowed to the extent of membership income	(1,002,846)	
Excess membership deductions		420,163
Federal taxable income required to be shown on report		$ 35,916
Add: New York State franchise tax deducted on Federal return	$ 4,993	
ACRS depreciation	516,733	521,726
Total additions		$ 557,642
Subtract: Allowable New York depreciation		(316,479)

Adjusted entire net income	$ 241,163
Tax at 10%	$ 24,116
Tax per report	(3,972)
Deficiency	$ 20,144
Metropolitan transportation business tax deficiency	3,424
Total deficiencies	$ 23,568

In one of the statements of audit adjustment the Division advised petitioner of the basis for adjusting its tax liabilities, as follows:

> Section 208.9(a), of Article 9-A, provides in pertinent part - entire net income is presumed to be the same as taxable income which the taxpayer is required to report to the United States Treasury Department, subject to certain modifications.
>
> Section 277 of the Internal Revenue Code limits the membership expenses (deductions) in computing federal taxable income, to the extent of membership income.

As a result of the audit, the Division issued to petitioner notices of deficiency numbered C890810712N and C890810713M, dated October 2, 1989, which asserted deficiencies in franchise tax and metropolitan transportation business tax totalling $23,568, plus interest, for tax year 1986.

The notices of deficiency are premised on the proposition that IRC § 277 applies to petitioner. They assert the same $23,568 of deficiencies as set forth in the statements of audit adjustment.

Petitioner filed a request for a conference with the Bureau of Conciliation and Mediation Services (the "BCMS") within 90 days of the issuance of the notices of deficiency, and a Conciliation Order was issued on February 22, 1991 which reduced the deficiencies asserted in the statutory notices to a total of $6,059.

Based on a Federal taxable income of $9,978 determined pursuant to IRC § 277, BCMS revised petitioner's 1986 NYS tax liability by determining an adjusted New York State entire net income of $97,330, as follows:

Federal taxable income required to be shown on report	$ 9,978
Add: NYS and local taxes ($4,993 x 61.119%)	3,122
ACRS depreciation ($516,733 - $18,602 (commercial) x 61.119% + $18,602)	323,055
Less: NY depreciation ($316,479 - $11,393 (commercial) x 74.547% + $11,393)	(238,825)
Adjusted entire net income	$ 97,330

Based on the calculation of New York State entire net income of $97,330, BCMS determined that petitioner's tax liabilities, and deficiencies, for 1986 were as follows:

Franchise tax at 10%	$ 9,733
Met. trans. bus. tax	978
Total taxes	$10,711
Taxes per report	(4,652)
Deficiencies	$ 6,059

After the Division's audit, petitioner submitted additional evidence upon which BCMS revised petitioner's tax liability. Pursuant to those revisions, petitioner's gross income of $1,038,762 that was reported on its 1986 Form 1120 consisted of income of $970,246 from its tenant-stockholders, income of $32,600 from its commercial lessees, and interest income of $35,916.

During 1986 petitioner owned and operated an apartment building at 330 Third Avenue in New York City which, in addition to containing dwelling units leased to tenant-stockholders,

also contained a garage and a laundry room leased to two unrelated lessees for commercial purposes to provide garage and laundry services to the tenant-stockholders. During 1986 petitioner received rent from its tenant-stockholders and the two commercial lessees, and interest income.

During 1986 petitioner was a "cooperative housing corporation" within the meaning of Section 216(b)(1) of the Internal Revenue Code of 1986, as amended.

Based on the BCMS revisions, and the parties' agreement, the expense items listed below that were deducted on petitioner's 1986 Form 1120 should be classified as follows, if IRC § 277 applies to petitioner:

Deductions	Form 1120 Total	Allowable Membership	Allowable Commercial	Disallowed
R/E tax	$ 280,814	$270,705	$10,109	$ -0-
Interest	82,830	79,848	2,982	-0-
Depreciation	516,733	288,045	45,447	183,241
Franchise tax	4,993	3,051	-0-	1,942
Gas/elec.	38,979	23,823	-0-	15,156
Fuel	49,685	30,367	-0-	19,318
Water/sewer	18,866	11,530	-0-	7,336
Payroll	251,550	153,744	-0-	97,806
Misc.	178,559	109,133	-0-	69,426
	$1,423,009	$970,246	$58,538	$394,225

If IRC § 277 applies to petitioner, (a) the Federal taxable income required to be shown on petitioner's 1986 Form 1120 would have been $9,978, which $9,978 amount was set forth in the Conciliation Order, and (b) petitioner's 1986 Form 1120 would have reflected the following income and allowable deductions in arriving at such $9,978 of Federal taxable income:

Income:		
Tenant-stockholders	$970,246	
Commercial lessees	32,600	
Interest	35,916	$ 1,038,762
Deductions:		
R/E tax	$280,814	
Interest	82,830	
Depreciation	333,492	
Franchise tax	3,051	
Gas/elec.	23,823	
Fuel	30,367	
Water/sewer	11,530	
Payroll	153,744	
Misc	109,133	(1,028,784)
IRC § 277 1986 Federal taxable income		$ 9,978

If IRC § 277 applies to petitioner, the amount of petitioner's allowable and disallowed deductions for New York State tax and ACRS Depreciation would be as follows:

NYS Tax:	
Reported on Form 1120	$ 4,993
Allowable under IRC § 277	(3,051)
Disallowed under IRC § 277	$ 1,942
ACRS Depreciation:	
Reported on Form 1120	$ 516,733
Allowable under IRC § 277	(333,492)
Disallowed under IRC § 277	$ 183,241

In determining the amount of petitioner's 1986 New York State entire net income, based on the BCMS revisions and the parties' agreement that the expense items should be classified as set forth above, the Division subsequently made the following adjustments to petitioner's $9,978 of 1986 IRC § 277 Federal taxable income:

Federal taxable income required

to be shown on Form 1120		$ 9,978
Add:		
NYS Tax	$ 3,051	
ACRS Depreciation	333,492	336,543
Subtract: NYS Depreciation		(243,010)
NYS entire net income		$ 103,511

While the Division's New York State entire net income amount exceeds the entire net income figure upon which the BCMS order was based ($103,511 rather than $97,330), the Division does not assert a deficiency in the instant case greater than the deficiency set forth in the Conciliation Order.

Petitioner timely filed a petition with the Division of Tax Appeals within 90 days of the issuance of the Conciliation Order.

On October 15, 1991 petitioner made a payment to the New York State Income Tax Bureau (the "Bureau") in the amount of $9,427.12, representing the $6,059 of deficiencies set forth in the Conciliation Order, plus interest through the date of payment of $3,368.12.

In a letter dated September 27, 1993 the Office of Counsel confirmed that it would not object to petitioner's amending the pleadings in the instant case to show that petitioner now seeks a refund of the $9,427.12 payment previously made by it.

Petitioner's certificate of incorporation provides, in part, the following with respect to the purposes for which petitioner was formed:

> The primary purpose of this Corporation is to provide homes for its shareholders by leasing to them, under leases known commonly as proprietary leases, apartments in the building or buildings on such premises and all of its shareholders shall be entitled solely by reason of their share ownership in the Corporation to proprietary leases, entitling them to occupy for dwelling purposes, apartments in the building or buildings.

Similarly, petitioner's by-laws provide the following with respect to the purposes for which petitioner was formed:

> The primary purpose of the Corporation is to provide residences for shareholders who shall be entitled, solely by reason of their ownership of shares, to proprietary leases for apartments in 330 Third Avenue, New York, New York.

Petitioner's board of directors allocates shares to each apartment in petitioner's building. The proprietary lessee of an apartment in the building must own the number of shares allocated to the lessee's apartment.

Petitioner's stockholders are entitled to one vote per each share of stock owned. Petitioner's stockholders may cast such votes either in person or by proxy. There is no limit as to the number of shares an individual stockholder may acquire.

Petitioner's tenant-stockholders were not required to occupy their apartments. With the consent of the board of directors such persons could sublet their apartments. The consent of the board of directors was also required to sell shares of petitioner's stock or to assign a proprietary lease.

The operation of petitioner was vested in a board of directors. Members of petitioner's board were not required to be shareholders.

Petitioner's standard proprietary lease provided the following with respect to services to be provided by petitioner as lessor, under the lease:

> Services by Lessor. The Lessor shall maintain and manage the building as a first-class apartment building, and shall keep the elevators and the public halls, cellars and stairways clean and properly lighted and heated, and shall provide the number of attendants requisite, in the judgment of the Directors, for the proper care and service of the building, and shall provide the apartment with a proper and sufficient supply of hot and cold water and of heat, and if there be central air conditioning equipment supplied by the Lessor, air conditioning when deemed appropriate by the Directors. The covenants by the Lessor herein contained are subject, however, to the discretionary power of the Directors to determine from time

> to time what services and what attendants shall be proper and the manner of maintaining and operating the building, and also what existing services shall be increased, reduced, changed, modified or terminated.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Relying on our decision in ***Matter of Beechwood Gardens Owners*** (Tax Appeals Tribunal, May 25, 1995), the Administrative Law Judge determined that petitioner, a cooperative housing corporation, was a membership organization within the meaning of IRC § 277(a). However, petitioner contended that it was not operated primarily to furnish services or goods which is a requirement under IRC § 277(a). The Administrative Law Judge noted that ***Beechwood Gardens*** did not address the issue of whether the petitioner therein was operated primarily to furnish services or goods.

The Administrative Law Judge found that petitioner was not operated primarily to furnish services or goods and concluded that section 277 did not apply to petitioner. In referring to petitioner's certificate of incorporation and its by-laws, the Administrative Law Judge stated that petitioner's primary purpose was to provide residences to its shareholders. The Administrative Law Judge then decided that providing residences to its shareholders clearly could not be characterized as furnishing either services or goods since a real property interest is neither a service nor a good within the commonly accepted meaning of those terms. The Administrative Law Judge noted, however, that petitioner did "service" its property by repairing and maintaining its property. The Administrative Law Judge stated that this fact did not establish that petitioner provided "housing services" to its shareholders since such services were performed as part of petitioner's duties and obligations as the owner/lessor of the property.

The next issue addressed by the Administrative Law Judge was whether petitioner was subject to subchapter T. Subchapter T provides special tax treatment for "any corporation

operating on a cooperative basis," with certain enumerated exceptions not relevant to petitioner herein (IRC § 1381[a][2]). The Administrative Law Judge noted that a determination as to whether a corporation is "operating on a cooperative basis" is properly made based upon the principles of economic cooperative theory as discussed in ***Puget Sound Plywood v. Commissioner*** (44 TC 305) which principles are (1) subordination of capital, (2) democratic control by the worker-members themselves and (3) the vesting in and the allocation among the worker-members of all fruits and increases arising from their cooperative endeavor in proportion to the worker-members' active participation in the cooperative endeavor. The Administrative Law Judge agreed with the Division that petitioner lacked two of the three characteristics of economic cooperative theory: subordination of capital and democratic control of the cooperative enterprise. Accordingly, the Administrative Law Judge determined that petitioner was not subject to subchapter T.

Lastly, assuming that petitioner was properly treated by the Division as being subject to § 277(a), the Administrative Law Judge concluded that the Division's calculation of petitioner's depreciation deduction under Tax Law § 208(9)(a)(11) and (j) was reasonable.

ARGUMENTS ON EXCEPTION

The Division continues to argue that petitioner is properly subject to IRC § 277 since it was operated primarily to furnish goods or services. It disagrees with the Administrative Law Judge's conclusion that petitioner was operated primarily to provide real property interests to its shareholders. Rather, the Division asserts that petitioner provided housing goods and services to its members.

Petitioner takes exception to the Administrative Law Judge's analysis and determination with respect to the application of subchapter T. Petitioner states that it meets both the

subordination of capital requirement of subchapter T as well as the requirement that it function under the principles of democratic control. Petitioner relies on the decision rendered by the Tax Court in ***Thwaites Terrace House Owners Corp. v. Commissioner*** (T.C. Memo. 1996-406, 72 TCM 578) in support of its position. Accordingly, petitioner argues that since it is subject to subchapter T, then as a matter of law, it cannot be governed by section 277 of the Code.

If found to be subject to subchapter T, petitioner argues that it would not be subject to taxation on its patronage sourced income. Petitioner states that its income from its two commercial lessees is not subject to tax. It asserts that the building contains a garage and a laundry room leased to two unrelated lessees for commercial purposes to provide garage and laundry services to its tenant-shareholders as determined by the Administrative Law Judge in his findings of fact. Therefore, petitioner argues that the garage and laundry income is directly related to the services it provides to its tenant-shareholders and, thus, is not subject to tax.

Lastly, petitioner states that, if we find that petitioner was properly subject to section 277, then under Tax Law § 208(9)(j), it is entitled to a depreciation deduction in the amount of $316,479.

OPINION

The determination of the Administrative Law Judge did not analyze the decision rendered by the Tax Court in ***Thwaites Terrace House Owners Corp. v. Commissioner*** (***supra***) which case is controlling upon the outcome of the facts presented herein. In ***Thwaites***, the question presented was whether the petitioner therein, a housing cooperative under section 216, was subject to subchapter T or whether it was a membership organization under section 277. The Court, relying on its decision in ***Park Place v. Commissioner*** (57 TC 767), concluded that conventional cooperative housing corporations should be subject to subchapter T and that the

petitioner had established that it met the three-prong test of economic cooperative theory as set forth in ***Puget Sound Plywood v. Commissioner*** (***supra***). The Court stated that because the petitioner was subject to subchapter T, it was not subject to section 277. The Court concluded that: "[i]n ***Buckeye Countrymark, Inc. v. Commissioner*** [103 TC 547, 581], we said that 'the provisions of section 277 conflict with the provisions of subchapter T and that the application of section 277 to nonexempt cooperatives would lead to absurd or futile results'" (***Thwaites Terrace House Owners Corp. v. Commissioner***, ***supra***, 72 TCM, at 581).

Petitioner herein is a cooperative housing corporation pursuant to section 216(b)(1). The Division, however, continues to maintain that petitioner does not operate on a cooperative basis and, thus, is not governed by subchapter T. The Division asserts that petitioner lacks two characteristics of the economic cooperative theory: subordination of capital and democratic control of the cooperative enterprise.

In ***Puget Sound***, the Court identified three guiding principles of economic cooperative theory:

> (1) Subordination of capital, both as regards control over the cooperative undertaking, and as regards the ownership of the pecuniary benefits arising therefrom; (2) democratic control by the worker-members themselves; and (3) the vesting in and the allocation among the worker-members of all fruits and increases arising from their cooperative endeavor (i.e., the excess of the operating revenues over the costs incurred in generating those revenues), in proportion to the worker-members' active participation in the cooperative endeavor [***Puget Sound Plywood v. Commissioner***, ***supra,*** at 308].

As stated by the Administrative Law Judge, to demonstrate subordination of capital, the Tax Court stated that "limitations must be imposed upon the amounts that can be distributed with respect to the cooperative's stock, and control over management and direction of the cooperative

must be vested in the members of the cooperative, as opposed to the stockholders" (***Trump Village Section 3 v. Commissioner***, T. C. Memo 1995-281, 69 TCM 2985, 2995). The Administrative Law Judge concluded that petitioner lacks both of these elements of subordination of capital. We disagree.

In ***Thwaites Terrace House Owners v. Commissioner*** (***supra***), the Tax Court set forth a more concise test of subordination of capital. In ***Thwaites***, the Court stated that the petitioner therein met the subordination of capital criteria "because its tenant-shareholders and patrons are identical and petitioner operated for the benefit of its patrons" (***Thwaites Terrace House Owners v. Commissioner, supra***, 72 TCM, at 581).

The purposes for which petitioner was formed, as stated in petitioner's certificate of incorporation, in pertinent part, are as follows:

> [t]he primary purpose of this Corporation is to provide homes for its shareholders by leasing to them, under leases known commonly as proprietary leases, apartments in the building or buildings on such premises and all of its shareholders shall be entitled solely by reason of their share ownership in the Corporation to proprietary leases, entitling them to occupy for dwelling purposes, apartments in the building or buildings [exhibit "D"].

Moreover, petitioner's by-laws, under the title Purpose of Business, provides that "[t]he primary purpose of the Corporation is to provide residences for shareholders who shall be entitled, solely by reason of their ownership of shares, to proprietary leases for apartments in 330 Third Avenue, New York, New York" (exhibit "E"). We conclude that the language contained in petitioner's certificate of incorporation and its by-laws establishes that its tenant-stockholders are identical to its patrons.

In reviewing the operations of petitioner, we focus on the language contained in the standard proprietary lease with respect to the services that petitioner provides to its tenant-shareholders. Such language, in pertinent part, states that:

> [t]he Lessor shall maintain and manage the building as a first-class apartment building, and shall keep the elevators and the public halls, cellars and stairways clean and properly lighted and heated, and shall provide the number of attendants requisite, in the judgment of the Directors, for the proper care and service of the building, and shall provide the apartment with a proper and sufficient supply of hot and cold water and of heat, and if there be central air conditioning equipment supplied by the Lessor, air conditioning when deemed appropriate by the Directors. The covenants by the Lessor herein contained are subject, however, to the discretionary power of the Directors to determine from time to time what services and what attendants shall be proper and the manner of maintaining and operating the building, and also what existing services shall be increased, reduced, changed, modified or terminated [exhibit "F," p. 4].

Furthermore, other provisions of the proprietary lease indicate that the cash requirements consider the creation of a reserve for contingencies and repairs and take into account income other than rent and cash on hand. From a review of the rent (maintenance) provision, it is clear that the rents established by petitioner are limited to cover its costs of operations (***see***, exhibit "F," pp. 1-2). As such, we find that this meets the subordination of capital criteria set forth by the Court in ***Thwaites*** of operating for the benefit of its patrons.

The next requirement to be discussed is whether petitioner functions under principles of democratic control. The Administrative Law Judge determined that petitioner also failed to meet this criteria. The Administrative Law Judge relied on ***Puget Sound*** wherein the Court stated that the principle of democratic control was effected "by having the worker-members themselves periodically assemble in democratically conducted meetings at which each member has one vote and one vote only, and at which no proxy voting is permitted" (***Puget Sound Plywood v.***

Commissioner, ***supra,*** at 308). In this case, petitioner's shareholders are entitled to one vote, in person or by proxy, per share of stock owned. The Administrative Law Judge reasoned that relevant case law pointed toward the conclusion that "one member - one vote" control is a necessary element of a cooperative association for purposes of Tax Law § 1381(a). We disagree.

As stated by the Court in ***Thwaites***:

> the fact that petitioner's shareholders have one vote for each share they own (instead of one vote per shareholder) and that they own shares based on the relative sizes of their various dwelling units is not contrary to democratic principles. The ownership percentage of shareholders of a housing cooperative is not only a measure of their investment, it is also a measure of their relative "patronage" of the housing cooperative [***Thwaites Terrace House Owners v. Commissioner, supra***, 72 TCM, at 581].

Consequently, we hold that petitioner does adhere to principles of democratic control.

The third and final principle of economic cooperative theory was not in dispute. Therefore, we reverse the determination of the Administrative Law Judge and find that petitioner is subject to subchapter T and, as such, is not subject to section 277.

In their briefs on exception, the parties raise for the first time in this proceeding the issue of whether or not petitioner's commercial lease income and its interest income are "patronage sourced," pursuant to IRC § 1388(j). We have held that new legal issues may be raised on exception (***Matter of Chuckrow***, Tax Appeals Tribunal, July 1, 1993). However, the raising of factual issues after the closing of the record is not allowed as it "deprives the party with the burden to prove the disputed fact of the opportunity to submit evidence" (***Matter of Howard Enterprises***, Tax Appeals Tribunal, August 4, 1994). This is consistent with the treatment by the courts, which have been liberal in allowing amendments, even *sua sponte*, where no new factual issues are created and only the theory of law upon which relief is granted is changed (***Sellnow v.***

Sellnow, 70 AD2d 980, 417 NYS2d 790; ***see***, ***Diemer v. Diemer***, 8 NY2d 206, 203 NYS2d 829).

Although this issue is first presented by petitioner in its brief on exception, it does so in an apparent effort to distinguish itself from the taxpayer in ***Thwaites*** who failed to carry its burden to prove whether its interest income was patronage or nonpatronage-sourced. In ***Thwaites***, however, the taxpayer had alleged in its petition to the Tax Court that its nonmembership income was patronage sourced; the Commissioner had denied this allegation in its Answer; and the Tax Court found that the taxpayer bore the burden of proof on this issue. The Tax Court in ***Thwaites*** held that "petitioner has been on notice that the character of its interest income as either patronage or nonpatronage- sourced income has been at issue since the pleadings were filed" (***Thwaites Terrace House Owners v. Commissioner***, ***supra***, 72 TCM, at 582).

In the present matter, the issue of patronage and nonpatronage-sourced income was never raised before the Administrative Law Judge by either party. The subchapter T issue, however, was raised to distinguish petitioner from cooperatives subject to section 277. The assessment herein was premised solely on the applicability of IRC § 277 to petitioner. The record in this proceeding is clearly distinguishable from the record presented in ***Thwaites*** and it is unnecessary and inappropriate for us to entertain the new factual issue concerning the character of petitioner's nonmembership income as patronage or nonpatronage-sourced. .

As in ***Trump Village Section 3 v. Commissioner*** (***supra***), the narrow issue for our decision herein is whether or not petitioner is a cooperative subject to subchapter T. If so, then it is not subject to IRC § 277. As did the Tax Court in ***Trump Village***, we have concluded herein that petitioner was operated on a cooperative basis and governed by subchapter T, not subject to IRC § 277.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The exception of 330 Third Avenue Owners' Corp. is granted;

3. The determination of the Administrative Law Judge is affirmed consistent with the reasoning and conclusions of this decision;

4. The petition of 330 Third Avenue Owners' Corp. is granted; and

5. The notices of deficiency are canceled and petitioner's claim for refund is granted.

DATED: Troy, New York
March 26, 1998

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner