STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

BRIARWOOD ASSOCIATES LIMITED PARTNERSHIP :

for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. : :

In the Matter of the Petition :

of :

DUNOLLOY ASSOCIATES LIMITED PARTNERSHIP :

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. : :

DECISION
DTA NOS. 811891 AND 811892

Petitioners Briarwood Associates Limited Partnership and Dunolloy Associates Limited Partnership, c/o Steven M. Terk, 501 Eighth Avenue, New York, New York 10018, filed an exception to the determination of the Administrative Law Judge issued on November 22, 1995. Petitioners appeared by Howard M. Koff, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a brief in opposition. Any reply brief would have been due on February 7, 1996, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether the Division of Taxation improperly included in its calculation of consideration the actual amounts received on units sold subsequent to petitioners' last update filings.

FINDINGS OF FACT

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

The initial letter to the parties (after the waiver of hearing had been executed) from the Administrative Law Judge, dated October 31, 1994, advised that "[c]opies of any documents submitted to me should be sent to your opposing party."

By cover letter dated January 12, 1995, the Division of Taxation ("Division") sent 41 documents to the Administrative Law Judge. Of these documents, 19 related to Dunolloy Associates Limited Partnership ("Dunolloy") and 22 related to Briarwood Associates Limited Partnership ("Briarwood").[1] The letter set forth a list of each of these documents submitted and it indicated that a copy of the letter had been sent to Howard M. Koff, Esq.

A letter dated January 20, 1995 to the Division's representative, Andrew J. Zalewski, Esq., from petitioners' representative, Howard M. Koff, Esq., demanded that the Division furnish petitioners with copies of the documents submitted to the Administrative Law Judge.

A letter from Mr. Zalewski to Mr. Koff, dated January 23, 1995, indicated that, pursuant to 20 NYCRR 3000.8(b), the Division was required to provide the taxpayer only with a list of the documents submitted. The letter further advised that the Division would provide petitioners with copies of any documents not already in the possession of petitioners.

By letter dated January 24, 1995 from Mr. Koff to the Administrative Law Judge, petitioners requested that, since the Division had defaulted on its obligation to file and serve its jurisdictional documents on or before January 13, 1995, the documents submitted should be

[1]Although the exhibits were numbered "1" through "42," the Division, by an apparently inadvertent omission, failed to include an Exhibit "39."

returned to the Division and not be accepted into evidence. In addition, the letter sought to have the notices of determination cancelled for "lack of proof (i.e., failure to introduce into evidence the necessary jurisdictional documents)."

A letter to Mr. Koff from the Administrative Law Judge, dated January 25, 1995, advised that the remedy sought in Mr. Koff's letter of January 24, 1995 was not provided for by statute or regulation and further advised him to make a written request to the Division for any documents not currently in his possession.

By letter dated January 27, 1995 from Mr. Koff to Mr. Zalewski, petitioners renewed their request "for copies of all documents (other than the offering plans)."

Mr. Koff's letter to the Administrative Law Judge, dated February 13, 1995, advised that the Division had failed to furnish any documents and, therefore, requested a 30-day extension (from receipt thereof) to file and serve additional documents and objections to the Division's documents.

By letter to the parties dated February 22, 1995, the Administrative Law Judge revised the schedule for submission of briefs and directed the Division to provide copies of all documents to petitioners by March 10, 1995.

A cover letter, dated February 28, 1995, to Mr. Koff from Mr. Zalewski advised that copies of documents (except the offering plans and the contract of sale dated August 2, 1984 which the Division stated were in the possession of the Division of Tax Appeals) were enclosed.

BRIARWOOD

On February 1, 1985, a two-thirds interest in the premises known as Briarwood Gardens was sold to Stephen Shalom and Arthur Cohen for $2,933,387.96. On the same date, Lawrence Goodman and Cynthia Levine conveyed their 33-1/3% interest in Briarwood Gardens to Briarwood, a New York limited partnership, in return for 33-1/3% of the limited partnership interest in Briarwood (see, Division's Exhibits "24" and "40").

On October 19, 1987, Briarwood, as sponsor, transferred the aforementioned property (Briarwood Gardens) to the cooperative housing corporation, Briarwood Owners' Corp. A gains tax filing was made by Briarwood, as sponsor, with respect to initial sales and the gains tax rate was established by the Division on a per-share basis for a total of 73,460 shares for the project. These initial filings are not part of this record. Apparently, Briarwood indicated that this was a noneviction conversion plan.

On October 30, 1989, Briarwood filed a submission update (see, Division's Exhibits "32", "33" and "34"). At that time (see, ¶ 3 of Petition [Division's Exhibit "22"]), 33,958 shares (46% of total sales) had been sold in anticipation of a sale of 34,138 additional shares to a single investor. Pursuant to the transferor questionnaire therein submitted, Briarwood indicated:

"SHARES			
68,096	Sold and Contracted		$8,235,808
5,364	Unsold Avg Fair Market ($112.71953 x 50%)		302,314
73,460	Total Anticipated Selling Price		8,538,122
	Mortgage Indebtedness (4th Amendment)		6,576,000
			15,114,122
	Reserve Fund	($198,105)	
	Supplemental Reserve Fund	(76,895)	(275,000)
	Working Capital Fund		(75,000)
	Rebates		(18,517)
			$14,745,605
	Sales Commission: 8,528,122 x 5%		$426,406

We have elected the safe harbor method of valuing unsold shares (50% of unsold outsider average price per share)."

This update was deemed to be a 75% update since 68,096 out of a total of 73,460 shares, or 92.7%, were sold or contracted to be sold as of this update.

In response thereto, the Division sent a letter to Briarwood's accountant, dated November 21, 1989 (see, Division's Exhibit "38"), which stated as follows:

> "Pursuant to your project update of 75% on the above referenced case, the tax has been established as:

Per Share	$1.6026
Per 1% of Common Element	$0.00

Per Unit	$0.00
Per Square Foot	$0.00

"Please be advised that per your request this case has not been audited. The tax has been established by using the calculations submitted on the form DTF-701. As a result, your rights under the safe harbor provisions are forfeited. A subsequent review of the overall project may result in an adjustment to the amount of tax, penalty and interest due.

"The tax rate, as set forth above, will be required to be used until such time as a project update is made and a new rate established. The procedure for project update filings is set forth in our form DTF-701-I (6-86)."

In November and December 1990, the Division conducted a field audit of Briarwood. At that time, 70,012, or 95.31%, of the shares had been sold; 3,448, or 4.69%, of the shares remained unsold.

As a result of the audit, a Statement of Proposed Audit Adjustment was issued to Briarwood on December 17, 1990 which asserted additional gains tax due of $113,670.00, plus penalty and interest.

On March 4, 1991, the Division issued a Notice of Determination to Briarwood in the amount of $113,670.00, plus penalty and interest, for a total amount due of $133,167.30.

One of the adjustments made as a result of the audit was the disallowance by the Division of a stepped-up basis used by Briarwood in computing the purchase price to acquire the property (utilized in Briarwood's original purchase price ["OPP"] computation). Out of a total of $4,400,095.00 which Briarwood claimed to have been the purchase price paid to acquire the property, $2,933,388.00 paid to acquire a two-thirds interest (see above) was allowed in full. However, out of the balance claimed, $1,466,707.00, the Division disallowed $858,552.00. Therefore, total purchase price per audit was $3,541,543.00.[2] The rationale, per the audit comments (see, Division's Exhibit "24"), is that this represents the one-third interest conveyed

[2]An examination of the relevant exhibits (Division's Exhibits "24," "29," "30" and "40") does not reveal the source of the $1,466,707.00 claimed. Apparently, from a review of the audit comments (see, Division's Exhibit "24"), it relates to the one-third interest conveyed to Briarwood in exchange for a one-third limited partnership interest in Briarwood. However, the pertinent audit workpaper, Schedule B-1(a) (see, Division's Exhibit "30"), does not explain the allowance of $608,155.00 out of the $1,466,707.00 claimed. Form DTF-700 (see, Division's Exhibit "32"), at Part I thereof, lists purchase price to acquire real property as $4,400,095.00 "per initial filing." Since these filings are not part of the record herein, the source of this figure cannot be ascertained.

by Goodman and Levine which the auditor treated as a mere change of identity thereby justifying use of a carryover basis rather than a stepped-up basis.

Also at issue herein was the auditor's utilization of actual consideration received in computing Briarwood's anticipated consideration for unsold shares. As was the case with the previous adjustment (see above), the source of some of the numbers used by the auditor is not clear. However, for purposes of clarity, reference to specific exhibits will, wherever possible, be made.

In its brief, the Division has attempted to compute that portion of the gains tax assessment which is attributable to its use of actual consideration (as determined by audit) rather than the anticipated consideration determined by Briarwood in its last update on October 30, 1989 (see above). As of the audit in November and December 1990, 70,012 shares had been sold; as of Briarwood's update filing, 68,096 shares had been sold. The difference was, therefore, 1,916 shares. The Division's computation, as set forth on pages 12 and 13 of its brief, are summarized below:

Actual Consideration
Audit - 70,012 shares with consideration of $8,450,877.00
(see, Division's Exhibit "26")

75% filing - 68,096 shares with consideration of $8,235,808.00
(see, Division's Exhibit "33", p. 3)

Actual consideration per share on shares sold between the update and the audit:

$8,450,877.00 - $8,235,808.00 = $215,069.00

$215,069.00 ÷ 1,916 shares = $112.25 per share

Briarwood (see, Division's Exhibit "33", p. 3) determined anticipated consideration using 50% of unsold outsider average price per share, which it determined to be $112.71953.

Utilizing the audit figure of $112.25 per share rather than 50% of Briarwood's $112.71953 resulted in an increase of $55.89 per share ($112.25 - [$112.71953 x 50%] = $55.89).

Therefore, according to the Division, using the actual consideration as calculated by the auditor results in an increase in consideration of $107,085.24 ($55.89 x 1,916 shares sold between update and audit). Gains tax, at 10% thereof, would be $10,708.52. Accordingly, the Division asserts that, out of the total assessment at issue, only $10,708.52 resulted from use of actual consideration, rather than Briarwood's anticipated consideration.

It must be pointed out, however, that in determining anticipated consideration, the auditor used a per-share figure of $122.16 (see, Division's Exhibit "27"). When applied to the balance of unsold shares after audit (3,448), anticipated consideration of $421,208.00 was calculated (see, Division's Exhibit "26"). In arriving at the $122.16 figure, the Division analyzed the sale of 6,020 shares from which consideration of $1,470,866.00 was received ($1,470,866.00 ÷ 6,020 = $244.33 ÷ 2 = $122.16). Why the proceeds from the sale of 6,020 shares was used has not been explained. Since 50% of the $244.33 was used, it may be inferred that this was the Division's calculation of 50% of the vacant market value for the unsold units, although it begs clarification.

A Conciliation Order (CMS No. 114497) reduced the assessment from $113,670.00 to $105,012.00 (see, Division's Exhibit "21"), plus applicable penalty and interest. The attached Report of Tax Conferences indicates that the recomputation was due to an increase in anticipated brokerage fees of 1½%.

The audit summary (see, Division's Exhibit "24") indicated that "penalty and interest was not assessed on additional tax due to additional consideration based on the Safe Harbor rule requirements." Penalty and interest was imposed for underpayment of tax using Briarwood's tax-per-share calculation (see, Division's Exhibit "28").

In paragraph 12 of its petition (see, Division's Exhibit "22"), Briarwood alleged that $15,818.00 attributable to Special Additional Mortgage Recording Tax was improperly excluded from original purchase price as determined by the Division. However, Briarwood has failed to address this issue in its brief and has presented no evidence concerning this issue. Accordingly, it is deemed abandoned and shall not be addressed in this determination.

DUNOLLOY

On October 4, 1984, Sadie Blank, and others, as owners of a 70% interest in premises in Jackson Heights (Queens) known as Dunolloy Gardens, sold such interest in these premises to Stephen Shalom and Arthur Cohen for $6,895,000.00. On the same date, the remaining 30% interest in the premises, which was owned by Lawrence Goodman and Cynthia Levine, was conveyed to obtain a 30% limited partnership interest in Dunolloy (see, Division's Exhibit "5" and Petitioners' Exhibit "7" attached to brief).

On September 22, 1987, Dunolloy, as sponsor, transferred the aforementioned property to Dunolloy Owners Corp., the cooperative housing corporation. A gains tax filing was made by Dunolloy, as sponsor, with respect to initial sales, and the gains tax rate was established by the Division on a per-share basis for a total of 141,062 shares for the project. These initial filings are not part of the record. Apparently, Dunolloy indicated that this was a noneviction conversion plan.

On October 30, 1989, Dunolloy filed a submission update (see, Division's Exhibits "12", "13" and "14"). At that time (see, ¶ 3 of Petition [Division's Exhibit "3"]), 56,521 shares were sold (40% of total shares) in anticipation of a sale of 75,426 additional shares to a single investor. Pursuant to the transferor questionnaire therein submitted, Dunolloy indicated:

"SHARES

13,1947 [sic] Sold and Contracted		$15,830,050
9,115 Unsold avg. FMV $111.84723 - 50%		509,744
14,1062		$16,339,794
MORTGAGE INDEBTEDNESS		12,000,000
		$28,339,794
RESERVE FUND	600,924	
WORKING CAPITAL	299,076	
REBATES	106,450	(1,006,450)
		$27,333,344
SALES COMMISSIONS		
OUTSIDERS 5%		
11,541,404		
509,744		
12,051,148 x 5%		602,557

INSIDERS	3%	4,288,646 x 3%	128,659
			731,216

* We have elected the safe harbor method of valuing unsold shares."

Since approximately 93.5% of shares were sold and/or contracted for, this update was apparently considered to be a 75% update per safe harbor rules.

In response thereto, the Division sent a letter to Dunolloy's accountant, dated November 21, 1989 (see, Division's Exhibit "18"), which stated as follows:

> "Pursuant to your project update of 75% on the above referenced case, the tax has been established as:

Per Share	$0.9349
Per 1% of Common Element	$0.00
Per Unit	$0.00
Per Square Foot	$0.00

> "Please be advised that per your request this case has not been audited. The tax has been established by using the calculations submitted on the form DTF-701. As a result, your rights under the safe harbor provisions are forfeited. A subsequent review of the overall project may result in an adjustment to the amount of tax, penalty and interest due.

> "The tax rate, as set forth above, will be required to be used until such time as a project update is made and a new rate established. The procedure for project update filings is set forth in our form DTF-701-I (6-86)."

In October and November 1990, the Division conducted a field audit of Dunolloy. At that time, 137,640, or 97.57%, of the shares had been sold; 3,422, or 2.43%, of the shares remained unsold.

As a result of the audit, a Statement of Proposed Audit Adjustment was issued to Dunolloy on December 21, 1990 which asserted additional gains tax due of $419,302.00, plus penalty and interest.

On March 11, 1991, the Division issued a Notice of Determination to Dunolloy in the amount of $419,302.00, plus penalty and interest, for a total amount due of $577,826.91.

One of the adjustments made as a result of the audit was the disallowance by the Division of a stepped-up basis used by Dunolloy in computing the purchase price to acquire the property (utilized in Dunolloy's OPP computation).

Out of a total of $9,850,000.00 which Dunolloy claimed to have been the purchase price paid to acquire the property, $6,895,000.00 paid to acquire a 70% interest (see above) was allowed in full. Of the balance of $2,955,000.00 claimed, the Division allowed $802,208.00 and disallowed $2,152,792.00 (see, Division's Exhibit "9"). Therefore, total purchase price per audit was $7,697,208.00. The rationale, per the audit comments (see, Division's Exhibit "5"), was that the 30% interest conveyed by Goodman and Levine was treated as a mere change of identity and carryover basis should be used. The stepped-up basis used by Dunolloy for this 30% interest was, therefore, disallowed.

Also at issue was the auditor's utilization of actual consideration received in computing Dunolloy's anticipated consideration for unsold shares. In its brief, the Division has attempted to compute that portion of the gains tax assessment which is attributable to its use of actual consideration (as determined by audit) rather than the anticipated consideration determined by Dunolloy in its last update on October 30, 1989 (see above). As of the audit in October and November 1990, 137,640 shares had been sold; as of Dunolloy's update filing, 131,947 shares had been sold. The difference was, therefore, 5,693 shares. The Division's computation, as set forth on pages 11 and 12 of its brief, is summarized below:

ACTUAL CONSIDERATION

Audit - 137,640 shares with consideration of $17,027,762.00 (see, Division's Exhibit "7")

Dunolloy's Update - 131,947 shares with consideration of $15,830,050.00 (see, Division's Exhibit "13")

Actual consideration per share on shares sold between the update and the audit:

$17,027,762.00 - $15,830,050.00 = $1,197,712.00

$1,197,712.00 ÷ 5,693 shares = $210.39 per share

Dunolloy (see, Division's Exhibit "13", p. 3) determined anticipated consideration using 50% of unsold average fair market value, which it determined to be $111.84723.

Utilizing the audit figure of $210.39 per share rather than 50% of Dunolloy's $111.84723 resulted in an increase per share of $154.466385 ($210.39 - [$111.84723 x 50%] = $154.466385).

Therefore, according to the Division, using the actual consideration as calculated by the auditor results in an increase in consideration of $879,377.13 ($154.466385 x 5,693 shares sold between audit and update). Gains tax, at 10% thereof, would be $87,937.71. Accordingly the Division asserts that, out of the total assessment at issue, only $87,937.71 resulted from use of actual consideration, rather than Dunolloy's anticipated consideration.

It should be noted that on the WEC & Audit Schedule (Division's Exhibit "7"), on line 1 thereof, the auditor utilized a figure of $142.00 which supposedly is "100% insider". Just where this figure was derived from remains unclear. The auditor determined anticipated cash consideration of $485,924.00 ($142.00 x 3,422 unsold shares).

A Conciliation Order (CMS No. 114496) reduced the assessment from $419,302.00 to $397,019.00 (see, Division's Exhibit "2"), plus applicable penalty and interest. The attached Report of Tax Conferences indicates that the recomputation was due to an increase in anticipated brokerage fees of 1½%.

The audit summary (see, Division's Exhibit "5") indicated that "penalty and interest was not assessed on additional tax resulting from additional consideration based on the safe harbor rules requirement." Penalty and interest was imposed for additional tax due to underpayments of tax using Dunolloy's tax-per-share calculation (see, Division's Exhibit "8").

In paragraph 12 of its petition (see, Division's Exhibit "3"), Dunolloy alleged that $32,128.00 of other acquisition costs and $4,950.00 of capital improvements disallowed on audit attributable to the Special Additional Mortgage Recording Tax were improperly excluded from OPP as determined by the Division. However, Dunolloy has failed to address this issue in its brief nor has it presented any evidence concerning this issue. Accordingly, it is deemed abandoned and shall not be addressed in this determination.

Attached to Dunolloy's brief is the closing statement relating to the purchase by Dunolloy of a 70% interest in the premises from Sadie Blank, et al., and the exchange of a 30% interest in the premises by Cynthia Levine and Lawrence Goodman in return for a 30% limited partnership interest in Dunolloy. On page 9 of the closing statement is the basis upon which Dunolloy valued the 30% interest at $2,955,000.00. It stated that the fair market value of the premises was $9,850,000.00 based on a contract price of $6,895,000.00 for the purchase of the 70% interest; 30% is, therefore, equal to $2,955,000.00.

Also attached to Dunolloy's brief was an affidavit of Leora Willins, C.P.A., which set forth the basis upon which the auditor arrived at the actual consideration amount of $17,027,762.00 as set forth on the WEC & Audit Schedule (see, Division's Exhibit "7").

OPINION

Tax Law § 1441 imposes a tax on gains derived from the transfer of real property at the rate of 10% of the gain. A cooperative conversion is treated as a single transfer and tax is due upon the transfer of shares to individual purchasers pursuant to the cooperative plan. Tax due is calculated by apportioning for each share the original purchase price of the real property and the estimated total consideration which is anticipated under such cooperative plan.

Under the Division's methodology for calculating tax on cooperative plans, the transferor of shares pursuant to a cooperative plan was required to estimate the consideration to be received on the entire plan. This estimate was to be made on the initial gains tax submission for the plan and at each required update point. When sales of shares reached the 50% and 75% levels, an update was required and a new tax rate per share was determined based on actual consideration received plus estimated consideration for the remaining unsold shares. When 100% of the shares were sold, any underpayments or overpayments based on the actual consideration received for the total number of shares sold were adjusted accordingly.

The Division provided guidelines for calculating "safe harbor estimates" for the consideration to be received on units offered for sale that were not yet sold or contracted for (TSB-M-86-[3]-R). For non-eviction conversion plans such as those of petitioners, these estimates were to be based on the lower of 100% of the total of the offering plan prices established for insiders for unsold units or 50% of the total of the vacant market value for unsold units based on the price of such units transferred at the initial closing. If the safe harbor guidelines were followed, the taxpayer was permitted to pay tax at the estimated rate even if the actual consideration received on the sale of shares was greater than estimated. Neither penalty nor interest accrued against a transferor during the sellout period "to the extent that such underpayment is the result of the excess of the actual consideration received on the sale of units over the Safe Harbor Estimate of consideration used for these units. Penalty and interest may accrue during the Sell Out Period, however, for the underpayment of Gains Tax resulting from the understatement of any other component of the Plan Consideration or the overstatement of the original purchase price" (TSB-M-86-[3]-R).

On audit, the Division adjusted the original purchase price claimed by petitioners as well as total estimated consideration. This total estimated consideration included actual consideration received and anticipated consideration for the remaining unsold shares. The Administrative Law Judge upheld the Division's adjustment to the original purchase price and petitioners did not take exception to this. The only issue raised on exception is whether the Division "improperly included actual consideration received on units sold subsequent to Petitioners' last update filings" (Petitioner's Exception, p. 2).

Petitioners argue that the Division failed to follow the holding of Matter of Belvedere Garden Assocs. (Tax Appeals Tribunal, June 18, 1992) and ignored the safe harbor estimates provided by petitioners for calculating anticipated consideration. Petitioners argue that the accuracy of the vacant market value for unsold units which they used in their estimates was not an issue that was properly raised before the Administrative Law Judge since it was first set forth in the Division's post-hearing brief.

In opposition, the Division argues that Belvedere can be distinguished from the present case in several respects: (1) at the time of the audit, the only remaining filing which was required was a 100% sellout filing; (2) in the present matter, the Division disclaimed the 75% sellout filings and never evaluated the filings which had reported estimated consideration; and (3) petitioners offered no evidence to establish that they properly filed estimates of consideration for each of their particular projects based upon a safe harbor filing rate of 50% of the total of the vacant market value as asserted in their transferor filings.

As the Administrative Law Judge stated in his determination:

> "[a]s previously indicated, the initial gains tax filings by these petitioners were not made a part of this record. On their 75% update filings (see, Division's Exhibits "13" and "33"), Briarwood and Dunolloy employed figures of $112.71953 and $111.84723, respectively, as unsold average fair market values. An examination of the cooperative offering plans (and amendments thereto) does not reveal the source of these figures. Neither petitioner, in the brief or the reply submitted, has made any attempt to substantiate that the number used was correct.
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> * * *
>
> "Clearly, then, the Division correctly determined gains tax due based upon actual consideration received on shares sold between the filing of the 75% updates and the audits (1,916 shares in the case of Briarwood and 5,693 shares for Dunolloy). As of the date of audit, however, the Division calculated anticipated consideration for unsold shares using not each petitioner's figures, but its own.
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> "The Division's audit brought petitioners' gain-per-share calculations current by its use of actual consideration on units sold to the date of the audit. This is, in all respects, proper. However the issue to be resolved herein is whether the Division, at the time of the audit, may also redetermine anticipated consideration by utilizing actual consideration amounts to date rather than permitting such anticipated consideration to be calculated based upon the taxpayer's safe harbor estimates.
>
> "It must be found that, in each of these matters, had Briarwood and/or Dunolloy proven that it complied with the safe harbor provisions, the Division would, pursuant to the terms thereof, be compelled to compute anticipated consideration based upon petitioners' estimates. While the source of the Division's figures ($122.16 per share for Briarwood and $142.00 per share for Dunolloy) remains unclear, it is petitioners which bear the burden of proof. The parties have chosen, in the instant matters, to have the controversies determined on submission without hearing. Upon reflection, perhaps the resolution of these matters would have been better accomplished through the hearing process, i.e., with clarifying testimony. In the alternative, documentary evidence such as petitioners' initial gains tax filings and calculations indicating the source of petitioners' vacant market value for unsold units may have aided petitioners in sustaining their burden of proof. Petitioners were certainly made aware that the source of these figures was in dispute, since this was a contention of the Division which was set forth in its brief. Absent such proof, however, the assessments cannot be cancelled or modified. This determination does not stand for the proposition that the Division may simply change a taxpayer's estimate of anticipated consideration on unsold shares where such taxpayer has validly elected safe harbor treatment; it merely holds that such action was proper in these cases because petitioners did not sustain their burden of proving that they validly elected and complied with the safe harbor guidelines" (Determination, conclusions of law "D" & "E").

We reject the contention of petitioners that, based on Matter of Belvedere Garden Assocs. (supra), the Division could not update petitioners' total consideration by including in its calculations the actual amounts received on sales of cooperative units between the time of the 75% update filing and the audit. Further, Belvedere does not require that the notices of determination at issue be adjusted to reflect a calculation of anticipated consideration for the remaining unsold shares based on the alleged safe harbor estimate of petitioners. In Belvedere, the taxpayer made a 50% update filing with the Division showing that actual consideration received had exceeded anticipated consideration. The taxpayer then remitted payment to the Division for the resulting difference in tax. The taxpayer subsequently claimed a refund alleging that it had erroneously paid this additional tax and that the tax was only due, if at all, when the cooperative plan had sold out. We agreed and stated:

> "[a]t the 50% and 75% sell-out points, the transferor is required to update his filing and to recalculate the consideration, and thus the gain, anticipated under the plan. The anticipated consideration at each update point is the sum of the actual consideration received to date on sales and the total consideration anticipated on the remaining units (see, Form DTF-701 and Instructions). Any increase in the anticipated consideration caused by the actual consideration received on the sale of units, exceeding that which was anticipated for those units, results in an increase in anticipated consideration, which in turn results in an increase in the tax required to be paid on the sale of future units (see, Form DTF-701). Such an increase does not require an additional payment of tax at the 50% or 75% update points.
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> ". . . There is absolutely nothing in this procedure, prior to the complete sellout of the plan, which requires tax to be paid on a prior sale based on the actual consideration received for a unit. . . .
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> * * *
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> "The Division does not dispute that petitioner's estimate of anticipated consideration was a safe harbor estimate (Division's letter on exception, p. 2). Therefore, the difference between this estimate and the actual consideration received cannot, under the TSB-M-86-(3)-R, be subject to interest and cannot be determined by the Division to be an underpayment of tax" (Matter of Belvedere Garden Assocs., supra).

The issue on exception is not whether the Division improperly assessed additional tax on prior sales based on the actual consideration received for a unit. Petitioners have not raised this as an issue. Rather, the issue presented by petitioners on exception is whether the Division has improperly included in its calculation of consideration the actual amounts received on units sold subsequent to petitioners' last update filing. Therefore, Belvedere is not dispositive of this issue. We agree with the Administrative Law Judge that the Division correctly determined gains tax due based upon actual consideration received on shares sold between the filing of the 75% updates and the audits.

Further, in Belvedere there was no dispute that the taxpayer correctly followed the safe harbor guidelines in calculating its anticipated consideration. Here, petitioners provided no evidence that they either properly calculated a safe harbor estimate or that, if they did so, they followed their own initial estimates. The Administrative Law Judge noted that petitioners were put on notice by the Division's brief that the source of petitioners' estimates of anticipated consideration was in dispute. If that were the first time that such an issue was presented to petitioners, it would be insufficient notice. As we have previously stated:

> "[t]he Tax Appeals Tribunal has consistently held that new legal issues can be raised on exception [citations omitted]. However, the raising of factual issues after the closing of the record has been distinguished from the raising of legal issues [citation omitted]. The introduction of factual issues after the record is closed is not allowed as it deprives the party with the burden to prove the disputed fact of the opportunity to submit evidence, thereby prejudicing that party" (Matter of Howard Enters., Tax Appeals Tribunal, August 4, 1994).

However, the Division advised petitioners by letters on November 21, 1989 that: "[t]he tax has been established by using the calculations submitted on the form DTF-701. As a result [of your update filing], your rights under the safe harbor provisions are forfeited. A subsequent review of the overall project may result in an adjustment to the amount of tax, penalty and interest due." These letters were submitted by the Division as exhibits and made part of the record. While the explanation provided by these letters is somewhat cryptic, it leaves no doubt of the Division's position that petitioners had not satisfactorily complied with the safe harbor guidelines.

Finally, as the Administrative Law Judge correctly noted, petitioners and not the Division bore the burden of proof in this matter. It was petitioners' obligation to prove by clear and convincing evidence that the notices of determination at issue were erroneous or improper. This they failed to do. Petitioners' argument that "the parties waived a hearing and agreed to submit the cases with the express understanding that there were no factual issues" is without support in the record. Therefore, the Administrative Law Judge properly denied petitioners the relief they sought and sustained the notices of determination issued by the Division.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Briarwood Associates Limited Partnership and Dunolloy Associates Limited Partnership is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Briarwood Associates Limited Partnership and Dunolloy Associates Limited Partnership is denied; and

4. The notices of determination issued to petitioners on March 4, 1991 and March 11, 1991, respectively, as adjusted at the conciliation conference, are sustained.

DATED: Troy, New York
July 25, 1996

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

/s/Francis R. Koenig
Francis R. Koenig
Commissioner