STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION DTA NOS.
BROADWAY-111TH STREET ASSOCIATES, LLC,	:	818599
CELESTIAL SEVEN CO.,		818600
CREATIVE DEVELOPMENTS CO.,	:	818601
DOWNING DEVELOPMENT CO.,		818602
50 KING STREET CO.,	:	818603
54 SATELITE CO.,		818604
467 ASSOCIATES,	:	818605
FOUR STAR HOLDING CO.,		818606
155 ASSOCIATES,	:	818607
THIRD 28TH COMPANY,		818608
WEST 83RD ASSOCIATES, and	:	818609
ZURICH HOLDING COMPANY		818610
	:	
for Revision of Determinations or for Refunds of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	
	:	

Petitioners Broadway-111th Street Associates, LLC, Celestial Seven Co., Creative Developments Co., Downing Development Co., 50 King Street Co., 54 Satelite Co., 467 Associates, Four Star Holding Co., 155 Associates, Third 28th Company, West 83rd Associates, and Zurich Holding Company, c/o Buchbinder & Warren, One Union Square West, New York, New York 10003, filed an exception to the determination of the Administrative Law Judge issued on May 15, 2003. Petitioner appeared by Goldberg, Weprin & Ustin, LLP (Matthew E. Hearle, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners request, was held on December 10, 2003 in New York, New York.

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

ISSUES

I. Whether petitioners, each of which is the sponsor of a condominium or cooperative offering plan, are entitled to refunds of gains tax paid on apartment units sold under such plans based on reducing the consideration received on such sold apartment units by the total amount of contributions to the working capital and reserve funds under such plans.

II. Whether petitioners, who timely filed their refund claims concerning the foregoing issue of working capital and reserve fund treatment, may amend such claims to include additional refund claims based upon the decision in ***Matter of 244 Bronxville Assocs.*** (Tax Appeals Tribunal**,** June 10, 1999), notwithstanding that the period of limitations on filing claims for refund had expired.

III. Whether, assuming such amended claims are not barred by the period of limitations, petitioners have established the fair market value of the unsold apartment units as would be necessary for purposes of applying the allocation methodology sanctioned in ***Bronxville***.

FINDINGS OF FACT

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

Petitioners Broadway-111th Street Associates, Creative Developments Co., Downing Development Co., 50 King Street Co., and West 83rd Street Associates, were sponsors of plans

pursuant to which certain buildings were converted to cooperative ownership. Petitioners Celestial Seven Co., 54 Satelite Co., 467 Associates, Four Star Holding Co., 155 Associates, Third 28th Company and Zurich Holding Company, were sponsors of plans pursuant to which certain buildings were converted to condominium ownership.

In accordance with the plans of conversion, petitioners were required to, and did, deposit certain sums into reserve accounts and working capital accounts. The dollar amounts so deposited are not in dispute.

On July 13, 1996, Article 31-B of the Tax Law, pursuant to which the Real Property Transfer Gains Tax ("gains tax") had been imposed, was repealed (***see,*** L 1996, ch 309, § 171, *et seq*). Pursuant to this repeal, conversion plans, including those at issue herein, were deemed final for gains tax purposes as of June 15, 1996. The repeal legislation required taxpayers to file a gains tax final return accounting for the transfers made during the effective life of the gains tax, such that a final computation of gains tax liability could be made. With respect to conversion plans which had not been completed (i.e., those which straddled the June 15, 1996 date with taxable pre-June 15, 1996 transfers and nontaxable post-June 15, 1996 transfers), the legislation directed taxpayers to allocate the consideration received from the transfers of apartment units and the original purchase price ("OPP") for the property, such that gain on the taxable transfers could be calculated and taxed (***see,*** L 1996, ch 309, § 180[b][i]).

Following the legislative repeal of the gains tax, the Division of Taxation ("Division") issued Form DTF-1001 ("Final Return Form"), by which taxpayers would make their final gains tax filing. Section II, line 7 of such form required allocation, among and between the taxable and nontaxable units, of the reserve accounts and working capital accounts which had been established pursuant to the cooperative or condominium conversion plans. There is no dispute

that funds in the reserve accounts and working capital accounts of each of the petitioners were to be used for repairs, replacements and improvements to the buildings and units therein.

In late May 1997, each of the petitioners filed its final return. On each of such returns, each petitioner reduced the consideration received on sold apartments by a portion of its reserve account and working capital account determined via allocation between sold apartment units and unsold apartment units in accordance with Section II of the Final Return Form.[1]

The gains tax repeal legislation required that all claims for refund of overpaid gains tax be filed no later than May 31, 1999. On or about May 26, 1999, petitioners each filed a claim for refund of gains tax paid. These claims were each premised on the specific position that petitioners were entitled to exclude from consideration potentially subject to gains tax the entire amounts contributed to reserve accounts and working capital accounts, as opposed to excluding only the amounts contributed to such accounts which were allocable to the gains taxable sold units. Petitioners' refund requests each referenced 20 NYCRR 590.39 in support of their specific claims that the entire amounts of such contributions are not consideration and thus must be entirely excluded.[2] The dollar amounts of the refunds claimed by petitioners were as follows:

TAXPAYER NAME	DTA NUMBER	REFUND AMOUNT
Broadway-111th Street Assoc.	818599	$27,867.00
Celestial Seven Co.	818600	$ 5,657.00
Creative Development Co.	818601	$ 8,987.00

1 Petitioner Zurich Holding Company did not reduce consideration received by any amount of its reserve account or its working capital account. However, it is undisputed that Zurich Holding Company has since been allowed a partial refund in the amount of $6,121.00 based on reduction of consideration by an allocated portion of its reserve account and its working capital account in accordance with Section II of the Final Return Form.

2 The correct cite is 20 NYCRR 590.38.

Downing Development Co.	818602	$ 1,959.00
50 King Street Co.	818603	$ 11,248.20
54 Satelite Co.	818604	$ 7,053.50
467 Associates	818605	$ 10,060.10
Four Star Holding Co.	818606	$ 5,866.10
155 Associates	818607	$ 42,043.00
Third 25th Company	818608	$ 3,425.90
West 83rd Street Associates	818609	$ 86,708.00
Zurich Holding Company	818610	$ 7,053.50

On or about July 21, 1999, the Division notified petitioners of the disallowance of their claims for refund.[3] Each Notice of Disallowance specified the basis for denial as follows:

> The section in the Offering Plan which is entitled Reserve Fund and Working Capital Fund states the funds are to be used for making capital repairs, replacements and improvements for the health and safety of the residents of the building. Since the subject funds are intended to benefit all of the residents, whether they be tenants or unit owners, it is appropriate to allocate the portion of those funds to the taxable units or shares transferred after March 28, 1983 and before June 15, 1996. The remainder of those funds are attributable to unsold units or shares which are not taxable.

Petitioners each filed requests for conciliation conferences ("requests") with the Division's Bureau of Conciliation and Mediation Services ("BCMS") challenging the denials of their refund claims based on the Division's refusal to allow petitioners to exclude the full amounts contributed to the reserve accounts and working capital accounts from consideration. Each of the requests, except for that filed for Celestial Seven Co., also specifically identified and asserted that petitioners were entitled to further refunds on the basis of the Tax Appeals Tribunal's

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3 In the case of Downing Development Co., the Notice of Disallowance was dated October 1, 1999.

decision in ***Matter of 244 Bronxville Assocs.*** (***supra***).[4] In ***Bronxville***, the Tribunal held that taxpayers were not limited to allocating OPP between taxable and nontaxable apartment units based strictly on such objective criteria as the number of shares allocated to particular apartment units, square footage, number of units or common elements, but rather that OPP should be apportioned to the units subject to tax "based upon the stated relative fair market value methodology" noted at 20 NYCRR 590.20, a result which reflects and accounts for the sometimes comparatively far lower value of unsold units as opposed to sold units.

Computational and explanatory statements attached to petitioners' requests list the total amount of refund claimed by each petitioner based on both the reserve account and working capital account issue and the ***Bronxville*** issue, as follows:

TAXPAYER NAME	DTA NUMBER	REFUND AMOUNT
Broadway-111th Street Assoc.	818599	$322,396.00
Celestial Seven Co.	818600	$ 5,657.00
Creative Development Co.	818601	$ 28, 671.00
Downing Development Co.	818602	$ 4,470.00
50 King Street Co.	818603	$ 70,528.00
54 Satelite Co.	818604	$ 87,884.00
467 Associates	818605	$173,457.00
Four Star Holding Co.	818606	$112,103.00
155 Associates	818607	$601,707.00
Third 28th Co.	818608	$ 28,994.00

4 With regard to Celestial Seven Co., the ***Bronxville*** issue is referenced in the petition. The record does not specify why such issue was not raised in the request. However, it appears that the amount of refund which would be generated by the claimed reserve account and working capital account full exclusion would result in this petitioner's receiving a refund of all gains tax paid, thus initially obviating the need to rely on the second (***Bronxville***) issue.

West 83rd Street Associates	818609	$ 86,708.00
Zurich Holding Co.	818610	$ 10, 671.00

A conciliation conference was held on November 15, 2000 and thereafter, by conciliation orders dated March 30, 2001, petitioners' requests were denied and the Division's notices of disallowance of petitioners' claims (the "statutory notices") were sustained.

Petitioners continued their challenges by filing petitions for hearings before the Division of Tax Appeals. Each of the petitions identifies petitioners' challenges to include both the reserve account and working capital account allocation question and the ***Bronxville*** method of valuation issue.

The Division filed its answers to the petitions, asserting that petitioners' refund claims concerning reserve account and working capital account amounts were properly denied. The Division also asserted that petitioner's claim for additional refunds on the basis of ***Bronxville Associates*** should be denied as untimely since such claims were not filed within the period of limitations for filing gains tax refund claims.

At the hearing, petitioners provided the testimony of Rosemary Paparo concerning the valuation of the unsold units. Ms. Paparo was employed by Buchbinder and Warren, the general partner of each of the sponsors, during the period 1974 through 1984. Thereafter, she operated her own business as a real estate consultant on cooperative and condominium conversions. In 1994, Ms. Paparo returned to Buchbinder and Warren, where she assumed her current title of Director of Management. Ms. Paparo is a licensed real estate broker and has been extensively involved with the properties at issue herein. She is not licensed or certified as a real estate appraiser.

Ms. Paparo testified to her opinion of the value of the unsold apartment units and submitted a summary document listing, on a separate page for each petitioner, the unsold units in the various buildings, the number of rooms and bathrooms in each, the status of each (rent controlled, rent decontrolled, rent stabilized), and her opinion of the likely selling price of each. Ms. Paparo, who lives in an apartment unit in one of petitioners' buildings, explained that unsold occupied apartment units subject to rent control or rent stabilization (i.e., rent regulated units) are less valuable than rent decontrolled apartments (for which market value rent can be charged). Hence, the former units are subject to a substantial discount and are often offered for sale in blocks of such units. Such blocks of units may include a decontrolled unit as a purchase enticement. Ms. Paparo's assignment of value to the unsold units in question was based on her many years of experience in the field of cooperative and condominium conversions and on her employment familiarity with the conversions and units at issue in this matter.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that former Article 31-B of the Tax Law imposed a ten percent tax on gains derived from the transfer of interests in real property where the consideration received for such real property was $1 million or more. For cooperative and condominium conversions, tax was due on the transfer of shares to individual apartment unit purchasers pursuant to the plan, based upon an apportionment of the original purchase price for the real property and the total consideration anticipated under the plan. The Administrative Law Judge recited applicable provisions of former Article 31-B defining "consideration," "original purchase price" and "gain."

The Administrative Law Judge considered petitioner's first argument that because contributions to reserve accounts and working capital accounts are not included in consideration subject to gains tax, the entire amounts contributed to such accounts with respect to each petitioner's conversion, rather than just the amounts allocated to the gains taxable units, should serve as reductions to consideration potentially subject to gains tax. He also considered the Division's position that the amounts in the reserve accounts and working capital accounts should first be allocated ratably to and among all of the units in the conversion. Thereafter, the amounts so allocated to the taxable units would be removed or excluded from the consideration for such units pursuant to 20 NYCRR 590.38.

The Administrative Law Judge concluded that the Division's approach:

> is entirely consistent with the clear aim of the regulation at 20 NYCRR 590.38, and its mandate that such fund amounts are not to be included in consideration subject to gains tax. The Division's method accomplishes its result in a manner which recognizes the fact that such fund amounts are intended for uses (i.e., repairs, replacements and improvements for the health and safety of the residents of the buildings) which benefit *all* units and not just the gains taxable units. Hence, it is entirely reasonable to first allocate such fund amounts among all of the units, and then exclude, from gains taxable consideration, the portions of the funds so allocated to such taxable units. The Division's method achieves the desired result of excluding reserve and working capital account amounts from consideration subject to gains taxation, while at the same time avoiding any windfall or disproportionate tax advantage (conclusion of law "F," determination of the Administrative Law Judge).

The Administrative Law Judge found that petitioners' method of deducting the entire contributions to reserve accounts and working capital accounts from consideration subject to gains tax disproportionately reduced the taxable consideration attributable to the gains taxable units and, thus, understated the gains tax liability properly attaching to such units.

The Administrative Law Judge determined that allocation of the contributions to reserve accounts and working capital accounts was not a new requirement but simply carried out the aim of the regulation in a manner consistent with the result it mandated. Accordingly, the Administrative Law Judge sustained the Division's method of eliminating reserve account and working capital account amounts from consideration subject to gains tax.

Next, the Administrative Law Judge considered petitioners' claims that they were entitled to refunds based upon application of the fair market value OPP allocation methodology approved by the Tax Appeals Tribunal in ***Matter of 244 Bronxville Assocs.*** (***supra***). The Administrative Law Judge noted two issues associated with petitioners' claims: whether such claims may be considered timely; and whether, assuming the claims may be considered timely, petitioners have provided sufficient proof of the fair market value of the unsold apartment units as is required in order to apply the methodology sanctioned in ***Bronxville***.

The Administrative Law Judge noted that pursuant to the gains tax repeal legislation, Final Return Forms from which taxable gains and gains tax due could be computed were to be filed by May 31, 1997 and the period of limitations for claiming overpayments of gains tax expired on May 31, 1999. The Administrative Law Judge found that petitioners complied with this requirement when they filed their initial claims for refund based on the challenge to the Division's required reserve account and working capital account allocation method. Although each of petitioners' initial refund claims directly referenced 20 NYCRR 590.38 and sought refunds solely on the very specific basis that the entire amounts contributed to reserve accounts and working capital accounts should be excluded from the consideration allocated to the taxable units, none of these claims mentioned the fair market value OPP allocation method ultimately

sanctioned in ***Bronxville*** as a basis or claim for refund. The Administrative Law Judge noted that it was not until the Division denied petitioners' initial refund claims and petitioners challenged the notices of disallowance by filing requests for conciliation conferences that they first raised the claims for refund based upon the ***Bronxville*** decision and methodology. The Administrative Law Judge rejected petitioners' claims that these latter claims were timely because they represented amendments to the initial, timely filed, refund claims and, further because the Division responded by requesting and reviewing information concerning the value of the unsold units, thereby waiving any statute of limitations defense. The Administrative Law Judge found that the ***Bronxville*** determination and methodology did not have any bearing on the subject matter of the initial claims and the ***Bronxville*** claims were newly filed refund claims asserting totally different grounds for refund which were submitted after the expiration of the statute of limitations. As a result, the Administrative Law Judge concluded that the Division had no authority under the statute to consider such untimely claims.

Further, the Administrative Law Judge found that even if the ***Bronxville*** refund claims had been timely filed or the statutory timeliness bar could be waived, it was incumbent upon petitioners to satisfactorily prove the fair market value of the unsold units in order to establish entitlement to the refunds sought. The Administrative Law Judge concluded that petitioners' ***Bronxville***-based claims would fail because the evidence provided by petitioners was insufficient to establish the fair market value of the unsold units.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that by requiring them to allocate payments made to reserve and working capital accounts instead of making such payments fully deductible, the

Division ignored its own regulatory authority as well as several of its previously issued private letter rulings. Petitioners claim to have relied on these rulings, which they believe are harmonious with 20 NYCRR § 590.38 and Tax Law former § 1440(1). Petitioners claim that the inclusion of the allocation requirement on the Final Return Form was *ultra vires* as it was a new requirement in direct contradiction of statutory and regulatory authority.

Petitioners also assert that they "are entitled to the benefits" of the ***Bronxville*** decision (Petitioners' brief in support, p. 20). Petitioners had timely claims for refund based on their overpayments of gains tax which were nonfinal in that such claims were still in the hearing process when the ***Bronxville*** issue was raised. Therefore, petitioners believe that they should benefit from an evolution in the law such as that represented by the ***Bronxville*** decision. Petitioners argue that they are entitled to file amended refund claims to include additional or even time barred claims, not dependent on whether petitioners' original claims were specific or general in nature.

Petitioners additionally maintain that when the Division began to investigate petitioners' ***Bronxville*** refund claims by requesting information concerning the value of the unsold units, it waived any objection to the untimeliness of their claims. Further, petitioners assert that they provided uncontroverted evidence of the value of the unsold units which was not contradicted by any evidence offered by the Division.

In opposition, the Division argues that the Administrative Law Judge correctly determined each of the issues presented to him and requests that the determination be affirmed.

OPINION

Petitioners have raised the identical arguments on exception that were presented to the Administrative Law Judge at hearing. We find that the Administrative Law Judge fully and correctly addressed each of the issues presented to him and petitioners have presented no

evidence below or argument on exception to cause us to modify the Administrative Law Judge's determination in any respect. Thus, we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Broadway-111th Street Associates, LLC, Celestial Seven Co., Creative Developments Co., Downing Development Co., 50 King Street Co., 54 Satelite Co., 467 Associates, Four Star Holding Co., 155 Associates, Third 28th Company, West 83rd Associates, and Zurich Holding Company is denied;

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

3. The petitions of Broadway-111th Street Associates, LLC, Celestial Seven Co., Creative Developments Co., Downing Development Co., 50 King Street Co., 54 Satelite Co., 467 Associates, Four Star Holding Co., 155 Associates, Third 28th Company, West 83rd Associates, and Zurich Holding Company are denied; and

4. The notices of disallowance of petitioners' claims for refund are sustained.

DATED: Troy, New York
June 10, 2004

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

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