

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EAST 54TH STREET ASSOCIATES	:	DETERMINATION ON REMAND DTA NO. 805197
for Redetermination or for Refund of Mortgage Recording Tax under Article 11 of the Tax Law with Reference to a Mortgage Recorded on April 24, 1987.	:	

Petitioner, East 54th Street Associates, c/o Bernard Friedman, 5 East 86th Street, New York, New York 10028, filed a petition for redetermination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to a mortgage recorded on April 24, 1987.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 27, 1991 at 1:15 P.M., with all briefs to be submitted by August 24, 1991. Petitioner appeared by Dreyer and Traub (Eugene Mittelman, Esq., of counsel). The City of New York appeared by Victor A. Kovner, Esq. (Helene Rosenthal Jaffa, Esq., of counsel). The Division of Taxation did not appear.

ISSUES

I. What was the value of the property covered by a mortgage as of April 24, 1987, the date on which said mortgage was recorded.

II. What was the proper amount of mortgage recording tax due on the recording of the subject mortgage.

III. Whether petitioner was entitled to a refund of mortgage recording tax erroneously paid upon the recording of a mortgage on April 24, 1987 or, in the alternative, whether additional mortgage recording tax is due and owing from petitioner.

FINDINGS OF FACT

After hearings were held before Administrative Law Judge Nigel G. Wright on

October 17, 1988 and December 1, 1988, a determination was issued on October 10, 1989. Exceptions were filed with the Tax Appeals Tribunal by both the Division of Taxation and the City of New York to that determination. On November 15, 1990, the Tax Appeals Tribunal issued a decision which remanded the case to the Supervising Administrative Law Judge to schedule a hearing on the issue of the value of the property covered by the mortgage as of the recordation date in order to properly determine whether, as the City of New York asserts, petitioner owes additional mortgage recording tax or, as petitioner contends, it is entitled to a refund of mortgage recording tax. For purposes of clarity, relevant facts found by the Tax Appeals Tribunal will hereinafter be restated in Findings of Fact "2" through "6", inclusive.

Prior to March 1985, petitioner, East 54th Street Associates ("Associates"), had eight notes outstanding to Dollar Dry Dock Savings Bank of New York ("Dollar Dry Dock") totaling \$1,407,507.23. These notes were secured by various mortgages on property located at 320 East 54th Street, New York City.

On March 8, 1985, Associates secured from Dollar Dry Dock a loan of \$6,992,492.57 and signed a note to that effect. The loan was for the purchase of the East 54th Street property (for approximately \$6,375,000.00) and for the development of that property into condominiums. The term of the loan was for three years, becoming due on March 8, 1988. All sums payable under the notes were payable out of the property at 320 East 54th Street and not otherwise from Associates.

The loan was secured by a mortgage on the premises of 320 East 54th Street which had consolidated with it the mortgages securing the eight prior notes. This consolidated mortgage secured the total amount of \$8,400,000.00 and constituted a single lien. The consolidated mortgage included the following terms:

- (a) Associates had the right to prepay the entire balance of the mortgage indebtedness.
- (b) The consolidated mortgage secured only the notes and mortgages specified and "no further or other indebtedness or obligation".
- (c) The lien on the mortgage would automatically attach, without further act, to all

after-acquired property connected with the mortgaged property.

(d) The note and the lien would be increased by the amounts of any taxes, insurance payments, or other payments including the costs of any default that the mortgagee (Dollar Dry Dock) had to make on behalf of the mortgagor (Associates).

(e) The mortgage was also given as security "for any and all other sums, indebtedness, obligations and liabilities of any and every kind now or hereafter during the term hereof owing and to become due from Mortgagor [Associates] to Mortgagee [Dollar Dry Dock]". This is generally known as a "dragnet clause."

(f) No mortgage other than the mortgage in issue and one other intended to be recorded simultaneously would be placed against the premises without the prior written consent of the mortgagee which would not be unreasonably denied.

The note of \$6,992,492.57 was partially paid off by Associates by the application to the note of a portion of the proceeds of the sale of each condominium unit. The eight notes totaling \$1,407,507.23 were not paid off.

The consolidated mortgage was not recorded when it was first executed on March 8, 1985, but instead was recorded over two years later on April 24, 1987.

On April 24, 1987, the principal due on the consolidated mortgage had been reduced to \$4,724,100.00. This amount consisted of \$1,407,507.23 due under the eight earlier notes and \$3,331,607.13 remaining due under the March 8, 1985 note. The consolidated mortgage was presented to the recording officer for recordation. No supplemental or revised document was presented to indicate partial repayment of the debt or that the parties now intended the mortgage to secure a lesser lien.

A mortgage recording tax was paid by Dollar Dry Dock on April 24, 1987, in the amount of \$157,331.25, computed on a mortgage amount of \$6,992,492.57, the original principal amount advanced on March 8, 1985. Petitioner subsequently reimbursed Dollar Dry Dock for that payment.

Petitioner requested a refund on July 21, 1987 on the basis that the taxable amount of

the mortgage should be the amount owing on the date it was recorded, i.e., \$3,331,607.43 (the tax on such amount would be \$74,961.17). Since \$157,331.25 had been paid, the request was for the difference of \$82,320.04. This refund request was denied by a letter of John Merrithew, Tax Auditor, on August 11, 1987. The denial was based on the ground that the mortgage "secures an indeterminate amount in addition to the stated amount of \$8,400,000.00" and the tax should be based on "the greater of \$8,400,000.00 or the fair market value of the real property".

An additional tax was asserted on August 11, 1987 (at the same time as the denial of the refund claim) on the basis that the mortgage was "indeterminate" under Tax Law § 256 because of the existence of the dragnet clause. The recording officer was instructed to note upon the recorded mortgage that tax remained due and that the provisions of Tax Law § 258 concerning the effect of nonpayment of tax would apply to such mortgage until the matter was resolved.

On September 14, 1987, petitioner requested that the Commissioner of Taxation issue an order permitting the recording officer to file a "maximum amount statement" nunc pro tunc as of April 24, 1987, the date of the recording of the mortgage. The effect of this would be to limit the taxable amount of the mortgage under Tax Law § 256. Two statements, one executed by an officer of Dollar Dry Dock dated September 2, 1987 and one by petitioner dated September 4, 1987, were submitted with this request. Both documents stated that when the consolidated mortgage was recorded, "the maximum principal debt or obligation which, under any contingency, was secured thereunder, and for which a New York State Mortgage Recording Tax was due and owing was \$3,331,607.43." It was also stated therein that it was petitioner's intent that the mortgage secure the subject lien in the fixed amount of \$8,400,000.00 and that "[i]t was not the intent...that the Consolidated Mortgage operate as ongoing security to secure unrelated transactions between the mortgagor and mortgagee." Further, it was asserted that when the mortgagee filed the mortgage, it was unaware that any such sworn statement was necessary.

The request to file a maximum amount statement was denied on October 1, 1987. The

reason given for the denial was that the parties to the instrument and the recording officer all considered the instrument to be a mortgage the recording of which was taxable, and that therefore, there was not an honest misconception as to the nature of the instrument or its taxability as is required by Tax Law § 256.

At the hearing held on December 1, 1988 before Administrative Law Judge Wright, Associates introduced proof, including sworn affidavits by two appraisers, regarding the issue of the value of the property securing the consolidated mortgage as of the date (April 24, 1987) it was presented for recordation. The appraisal of Irwin Steinberg appraised the value of the property at \$4,882,979.00. A second appraisal, by Philip Ribolow, set the value of the property at \$4,800,000.00. The appraised value of the property was based upon the value of the 49 units which remained unsold at the date of recording. Appraiser Ribolow appeared at the hearing and testified as to his qualifications and the methodology used in the valuation of the subject property. The City introduced a document entitled "The Record and Guide Quarterly" (hereinafter "Guide") which sets forth certain condominium unit sales by Associates during the period January through December 1987.

The decision of the Tax Appeals Tribunal modified the determination of the Administrative Law Judge and held, in summary, as follows:

- (a) The mortgage at issue is subject to mortgage recording tax pursuant to Tax Law § 256 as an indeterminate mortgage and is not taxable pursuant to Tax Law § 253;
- (b) Petitioner's attempt to obtain a refund of mortgage recording tax by filing a maximum statement nunc pro tunc as of the recordation date is not permitted under the provisions of Tax Law § 256;
- (c) The tax due is to be measured based upon the value of the property covered by the mortgage and such value is to be determined as of the recordation date; and
- (d) As to the value of the property covered by the mortgage, neither party offered conclusive proof on this issue at the hearings held before Administrative Law Judge Wright. Petitioner's valuation was flawed because no evidence was presented to establish

that the units not included in the appraisals (which were sold prior to the recordation date) were satisfied of record and released from the consolidated mortgage. The City's valuation was also found to be flawed because the valuation (\$11,589,611.00 was set forth in the City's brief) was based solely upon the Guide (see, Finding of Fact "6") and was unaccompanied by any testimony or other proof linking the City's valuation with this document. In addition, the Tribunal found that the City's valuation figure (\$11,589,611.00) included units sold subsequent to the recordation date. Based upon the foregoing, the matter was remanded to establish the correct amount of tax due and whether petitioner owes additional mortgage recording tax or is entitled to a refund.

At the hearing held herein, the testimony of Irwin Steinberg was offered.

Mr. Steinberg's appraisal had been introduced at the December 1, 1988 hearing (see, Finding of Fact "6"), but he did not testify at that hearing. Mr. Steinberg is the founder and president of Appraisal Group International and has been a real estate appraiser for approximately 40 years. He is a member (and holder of an MAI designation) of the American Institute of Real Estate Appraisers (now called the Appraisal Institute), is a senior member in the American Society of Appraisers and is a past international director of the American Right of Way Association. He is licensed in New York, New Jersey and Florida and maintains offices in those states. He has lectured and has written articles on appraising. A complete list of Mr. Steinberg's qualifications are attached to his appraisal (Exhibit "N" - December 1, 1988 hearing). Mr. Steinberg appraised the real property at 320 East 54th Street at \$4,882,979.00 as of the date of recordation of the consolidated mortgage (April 24, 1987). This calculation was made as follows:

(a) There were 27 apartments which were either vacant or subject to a contract of sale. Most of the unsold apartments were sold between the recordation date and the date on which the appraisal was prepared, so actual sales prices were available. The total fair market value of these 27 apartments was determined to be \$3,969,940.00. Mr. Steinberg then utilized a one-year absorption period (because, as of April 24, 1987, the seller did not have the proceeds and it would take about one year to receive it) at a 12 percent

discount rate to arrive at a fair market value of \$3,544,589.00. He testified that the 12 percent discount rate was normal for the industry at the time since 10-year treasury bonds were yielding approximately 8 percent and that the risk factor was 4 percent higher on holding these condominiums. He also stated that the 12 percent figure was the standard discount rate which he applied in other appraisals performed approximately at the same time.

(b) There were 22 apartments occupied by rent-stabilized tenants on April 24, 1987. Mr. Steinberg appraised the fair market value of these apartments, if vacant, at \$4,461,300.00. Based upon his experience and upon the fact that it could be several years before the tenants vacated these apartments, he valued these apartments at 30 percent of their value if vacant and arrived at a fair market value of \$1,338,390.00.

(c) Total fair market value was, therefore, determined to be \$4,882,979.00.

The appraisal (and testimony) of Philip Ribolow was offered by petitioner at the hearing held on December 1, 1988. Mr. Ribolow is a senior appraiser at Brown, Harris, Stevens, Inc. and, at the time of his testimony, was a candidate for the MAI designation of the American Institute of Real Estate Appraisers, having completed six of the seven courses required for such designation. He is also the president of Ribolow & Associates, a real estate appraisal firm. Prior to his current employment, he was employed by Dempsey and Company where he appraised real estate in New York City and surrounding counties. Mr. Ribolow appraised the real property at 320 East 54th Street at \$4,753,273.00 as of the date of the recordation of the mortgage. This calculation was made as follows:

(a) There were 27 apartments which were vacant or which were subject to a contract of sale. The projected sellout period for the 17 occupied apartments (insiders were given a 40 percent discount to the offering plan price) and the 10 vacant apartments was projected to be approximately one year. Contract prices to outsiders were reviewed and figured out on a square-footage basis (\$268.00 per square foot). Using a 12 percent discount rate (the rate necessary to attract capital to the investment and to account for the

associated risk factors) yielded an estimated fair market value of \$3,570,304.00.

(b) With respect to the 22 apartments occupied by rent-stabilized tenants, Mr. Ribolow determined that their value was less than if vacant since the tenants held what amounted to a life estate over these units. The fair market value, if vacant, was derived by utilizing the price per square foot paid by outsiders (\$4,224,889.00). Mr. Ribolow's appraisal indicated that investors, in the New York market, had been purchasing occupied units at discounted prices ranging from 25 to 30 percent of market value at the time of valuation. The appraisal applied a discount factor to arrive at 28 percent of the value of the units as if vacant to yield a fair market value of these units of \$1,182,969.00.

(c) Total estimated market value, as of April 24, 1987, was, therefore, determined to be \$4,753,273.00 (which was rounded to \$4,800,000.00).

At the December 1, 1988 hearing, the City produced selected pages from the Guide for the period January through December 1987. Petitioner's witness, Philip Ribolow, stated that personnel from the Guide are present when deeds are recorded and that the publication reports such information to the public at large. He further stated that it is used as a general guide; however, to confirm the information contained therein, it would be necessary to contact the parties to the various transactions.

Among the information contained in the Guide is the names of the buyer and seller, the selling price and the transaction date.

At the hearing held on March 27, 1991, petitioner introduced into evidence a status list which set forth all sales of condominiums at 320 East 54th Street which allegedly occurred between February 1987 and August 1988. The status list set forth the unit number, purchaser, purchase price, amount (if any) applied to reduce the Dollar Dry Dock loan and the closing date. While the list did closely correspond to the information found in the Guide, there were some discrepancies in the closing dates on petitioner's list and the transaction dates in the publication.

In its memorandum of law in support of its exception to Administrative Law Judge

Wright's determination, the City valued the property subject to the mortgage at \$11,589,611.00.

The memorandum of law provided, in pertinent part, as follows:

"Respondent's evidence showed the amount realized by Associates upon sale of the building as condominium units. The apartment building, as purchased by Associates in 1985 contained 91 units, all of which must be included in assessing its value. Prior to April 24, 1987, the date the mortgage was submitted for recordation, 28 units were sold for a total price of \$3,106,500 (Respondent's Exhibit 1). Subsequently, through September 1988, 40 more sales were recorded at a total amount of \$5,469,500 (Respondent's Exhibits 1 and 2). At that time, nine units in the hands of Associates at the time of recordation had not yet been sold. Since the recorded sales included some units initially in the hands of rent stabilized tenants but the prices reflect the real value on the open market for the period after recordation, it is reasonable to include an average value for the unsold units computed by dividing the aggregate price by the 40 units sold. These nine units would then be worth about \$136,739 each or \$1,230,637 together. Thus the total worth of the 77 accounted for units is \$9,806,637. Additionally, 14 units remain unaccounted for. These were not subject to sales reported in Record and Guide prior to the appraisal nor included in the 49 units held by Associates as of the time of recordation. Allowing only the lower average value of those units sold before and after recordation jointly, these 14 units would each be worth \$127,359, to add \$1,783,025 to the worth of the total holdings. Thus, the aggregate value of the 91 apartments owned initially by Associates was \$11,589,611."

At the hearing held herein, the City offered no additional testimony or documentary evidence in support of its valuation of the subject property.

In its decision, the Tax Appeals Tribunal noted (Finding of Fact "7[d]", supra) that no evidence had been presented to show that the units not included in petitioner's appraisals had been satisfied of record and sold prior to the recordation date of the mortgage. At the hearing on March 27, 1991, petitioner produced, as Exhibit No. 101, a series of 41 releases of part of mortgaged premises relative to condominium units which petitioner contends were sold prior to the recordation of the mortgage on April 24, 1987. It must be noted that 13 of these releases were recorded subsequent to April 24, 1987 despite the fact that all contain execution dates which were on or before the date of recordation. The following releases were recorded after April 24, 1987:

<u>Unit</u>	<u>Release No. (Per Exhibit 101)</u>	<u>Release Recorded</u>
7H	5	7-22-87
2D	18	4-29-87
5H	19	5-1-87
9E	20	4-29-87
7F	22	5-4-87

4F	24	5-11-87
10H	32	4-28-87
6B	33	12-31-90
6G	34	5-8-87
1G	36	5-4-87
9C	39	5-20-87
2A	40	6-17-87
10D	41	6-10-87
5E	Submitted Post-Hearing	4-24-91

CONCLUSIONS OF LAW

A. As previously indicated in Finding of Fact "7", supra, the Tax Appeals Tribunal held that the mortgage at issue is subject to mortgage recording tax pursuant to Tax Law § 256 as an indeterminate mortgage. Such section specifically provides that the tax is to be measured based upon "the value of the property covered by the mortgage". The Tribunal also held that the value of the property is to be determined as of the recordation date of the mortgage.

B. While the record does not actually disclose the total number of condominium units contained within the 320 East 54th Street property, both parties indirectly agree that there was a total of 91 such units. Petitioner's Exhibit No. 103 alleges that 42 units were sold on or before the date of the recordation of the mortgage (April 24, 1987) and its two appraisals indicate and provide appraised values for 49 remaining units. The City's valuation also states that there are 91 condominium units (see, Finding of Fact "10").

The City's valuation commences with the contention that, prior to recordation of the mortgage, 28 units were sold for a total price of \$3,106,500.00. A review of the evidence presented reveals that this portion of the City's valuation is based strictly upon information from the Guide (both as to date of sale and selling price). This valuation excludes (as occurring after recording of the mortgage) the sale of three units (4H, 7D and 12C) which both the Guide and the releases (Exhibit No. 101) indicate took place on April 24, 1987, the date of recordation of the mortgage. However, as will hereinafter be shown, the City's valuation includes, within the 28 units which it contends were sold prior to mortgage recordation, four units (2A, 5E, 6B and 7H) which, while the Guide states were sold prior to April 24, 1987, the dates on which releases were filed for such units indicates otherwise.

Petitioner's evidence (Exhibit No. 103) indicates that, prior to April 24, 1987, 42 units were sold. While it may be argued (as petitioner does) that the Guide is not conclusive proof as to the date of sale of each of the units, the date of recordation of the releases, by Dollar Dry Dock, of its liens on the various condominium units, as they were sold, does provide credible evidence as to whether or not such units were, in fact, sold prior to the recordation of the mortgage.

Of the 41 releases produced at the hearing (one such release was submitted after its conclusion) by Associates, the following are hereby found to have been recorded on or before the date of recordation of the mortgage:

<u>Unit</u>	<u>Date Release Filed</u>	Dollar Dry Dock Loan Reduction ¹	Release No. (from Exhibit Nos. 101, <u>103</u>)
1A	3-23-87	\$108,000	4
1D	3-23-87	103,000	11
1E	4-17-87	46,000	26
1H	3-23-87	55,000	6
2E	4-15-87	78,000	13
3A	4-23-87	51,000	37
3B	4-23-87	87,000	38
3D	4-15-87	116,600	7
3H	3-13-87	90,000	1
4A	4-13-87	45,000	23
4G	3-24-87	105,600	8
4H	4-24-87	43,000	16
5A	4-17-87	52,000	27
5D	4-15-87	143,000	12
6A	3-24-87	59,900	9
6H	4-8-87	43,000	17
7D	4-24-87	88,000	25
7G	4-17-87	91,000	28
8A	4-15-87	45,000	15
8B	4-17-87	88,000	29
8C	3-23-87	170,000	2
9D	4-17-87	101,000	35
9H	3-24-87	58,800	10
10B	4-17-87	89,000	31
10E	3-23-87	202,000	3
11D	4-17-87	92,000	30
12C	4-24-87	99,000	21

¹The amounts applied to reduce the Dollar Dry Dock loan have been taken from petitioner's Exhibit No. 103 and, absent any evidence to the contrary, are accepted as accurate.

In addition to the above units, special circumstances exist with respect to Units 5E and 6B, the releases for which were filed on April 24, 1991 and December 31, 1990, respectively. With regard to all other units, the date of sales listed in the Guide coincides with the date on which the releases were filed. Pursuant to the Guide, the date of sale for Unit 5E is

April 15, 1987 and the date of sale for Unit 6B is April 22, 1987. At the hearing, Robert G. Friedman, a general partner in Associates, testified that the only possible explanation for the filing of the releases so long after the sales allegedly occurred is that the title companies, in whose possession the releases were, failed to properly record the releases at the time of sale. Therefore, since both the Guide and petitioner's evidence indicate that the sales of these units occurred before the recording of the mortgage, such evidence will be accepted and, along with the 27 units listed above, it is hereby determined that a total of 29 units were sold on or before April 24, 1987. It should be noted herein that the City's valuation failed to properly credit petitioner for Units 4H, 7D and 12C, the releases for which were filed on the same date as the mortgage. Accordingly, as of the date of the recordation of the mortgage, 62 condominium units remained unsold.

C. As indicated in Findings of Fact "8" and "9", supra, petitioner's appraisers, Irwin Steinberg and Philip Ribolow, appraised the 49 units (which is the number of units which petitioner contends remained unsold as of the date of recordation of the mortgage) at \$4,882,979.00 and \$4,753,253.00 (which Mr. Ribolow rounded off to \$4,800,000.00), respectively.

However, based upon Conclusion of Law "B", supra, it has heretofore been determined that, as of the date of the recordation of the consolidated mortgage, 62 rather than 49 units remained unsold. Based upon the evidence produced by Associates (Exhibit No. 103), it is clear that the following units, not contained in the listing set forth in Conclusion of Law "B", were considered by Associates' appraisers to have been sold as of April 24, 1987:

<u>Unit</u>	Purchase Price (Per Ex. 103)	Purchase Price (per Guide)	Release <u>Filed</u>
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1G	\$ 120,540.00	Not listed	5-4-87
2A	67,740.00	\$ 68,500.00	6-17-87
2D	133,740.00	136,000.00	4-29-87
4F	123,540.00	125,500.00	5-11-87
5H	110,400.00	112,000.00	5-1-87
6G	122,040.00	124,000.00	5-8-87
7F	124,440.00	126,500.00	5-4-87
7H	66,840.00	68,000.00	7-22-87
9C	142,140.00	144,500.00	5-20-87
9E	123,240.00	125,000.00	4-29-87
10D	136,140.00	138,500.00	6-10-87
10H	67,740.00	69,000.00	4-28-87
11B*	<u>118,440.00</u>	<u>120,500.00</u>	None provided
	\$1,456,980.00		

* While no release was provided, the Guide indicates that the unit was sold on April 30, 1987.

D. Both of petitioner's appraisers stated that, of the 49 units which petitioner contends were unsold as of the date of recordation of the mortgage, 27 were subject to contracts of sale or were vacant and 22 were occupied by rent-stabilized tenants. Irwin Steinberg testified that, with respect to the 27 subject to contract or vacant, he took the total sales prices (since the appraisal was performed in November 1988, he had actual selling prices) and, since most of these units were sold within one year, he discounted the total selling prices by a rate of 12 percent (Philip Ribolow's appraisal also used a 12 percent discount rate).

By adding up the selling prices of those units which petitioner's Exhibit No. 103 indicates were sold after April 24, 1987 (there were 26 such units), a total of \$3,880,300.00 is computed. The 27th unit is not set forth on this exhibit. However, Mr. Steinberg's appraisal states that the total selling price for the 27 units was \$3,969,940.00 while Mr. Ribolow's appraisal computed the total at \$3,998,740.00. Since no evidence was presented as to this unit, the higher figure will be assumed to be correct, thereby making the selling price of such unit \$118,440.00.

It cannot be determined from the record whether the 13 units, listed in Conclusion of Law "C", supra, were subject to sales contracts or vacant or, in the alternative, were occupied by rent-stabilized tenants. Because all were sold within three months of April 24, 1987, it can only be assumed that these units were subject to sales contracts or were vacant.

Since it has been determined that these 13 units were not sold prior to the recordation of

the mortgage, the total selling prices of these units (if the prices set forth in Exhibit No. 103 are correct, such total would be \$1,456,980.00) must be added to the 27 units (\$3,998,740.00) yielding a total selling price of unsold (as of April 24, 1987) units, subject to contract or vacant, of \$5,455,720.00. Applying the discount rate of 12 percent (utilized by both appraisers) would result in an appraised value for these units of \$4,801,034.00.

With respect to the rent-stabilized units, Irwin Steinberg's appraisal stated that these 22 units, having a book value of \$4,461,300.00, should be discounted to 30 percent to arrive at a fair market value of \$1,338,390.00. Philip Ribolow's appraisal set a book value of \$4,224,889.00 and stated that these units would sell at 25 to 30 percent thereof (he utilized a 28 percent rate) and calculated a fair market value of \$1,182,969.00. Using an average of these two appraisals, a fair market value for these rent-stabilized units is determined to be \$1,260,680.00.

By combining the fair market value of the 40 units subject to contract or vacant (\$4,801,034.00) with the 22 rent-stabilized units (\$1,260,680.00), the total fair market value of the 62 units, determined to have been unsold as of the date of recordation of the mortgage, is hereby found to be \$6,061,714.00.

There has been no evidence presented herein that Dollar Dry Dock advanced any other sums of money to Associates nor is there any evidence of any other liabilities, obligations or indebtedness to Dollar Dry Dock on the part of Associates. Therefore, for purposes of valuation, the provisions of the "dragnet clause" (see, Finding of Fact "2[e]") shall not be deemed to have impacted upon the fair market value as was heretofore determined.

E. As indicated in Finding of Fact "10", supra, the City valued the 91 units, owned initially by Associates, at \$11,589,611.00. If one were to add the total selling prices (per the Guide) of the 29 units heretofore determined to have been sold on or before April 24, 1987, the sum would be equal to \$3,329,500.00. Adding thereto the value of the 40 units subject to contracts of sale or vacant, prior to application of a rate of discount (\$5,455,720.00), plus the 22 rent-stabilized units, prior to discount (\$4,461,300.00 or \$4,224,889.00), would yield a total

value of approximately \$13,000,000.00. Therefore, the City's valuation of the entire 91 units cannot be found to be excessive. This valuation is, however, not without serious flaws.

First, it fails to exclude, for purposes of valuation of the mortgage at the time of recordation, the 29 units which clearly were sold prior thereto. Second, despite being granted time at the conclusion of the hearing to submit a memorandum of law (after having had the time to digest both the written appraisals and the testimony of each of petitioner's appraisers), the City has failed to refute the appraisals (most notably, the discount rates applied to the unsold units). It should be noted that the Tribunal's decision refers to a motion made by the City, after the December 1, 1988 hearing, in which it requested permission to introduce additional evidence on the issue of valuation. Since the present hearing was held for the purpose of addressing the issue of valuation and all of the parties were permitted to introduce all evidence relevant to the issue, there is no need to address the matter of whether or not petitioner was apprised of this motion. Furthermore, neither party raised the issue of the propriety of the motion at this hearing. Certainly, the credentials of both Mr. Steinberg and Mr. Ribolow are impressive and, without documentary or testimonial evidence indicating that the rates of discount applied to both the units which were vacant or subject to contracts of sale and the units which were occupied by rent-stabilized tenants were unreasonable, such rates must, therefore, be accepted.

F. As indicated in Finding of Fact "3", supra, Associates reimbursed Dollar Dry Dock for mortgage recording tax paid, on April 24, 1987, in the amount of \$157,331.25 which tax was computed on a mortgage amount of \$6,992,492.57.

For the year at issue (1987), Tax Law § 253 provided for a total State mortgage recording tax (including the additional and special additional mortgage recording tax) to be imposed at a rate of \$1.00 for each \$100.00 and each remaining major fraction thereof of principal debt or obligation. Tax Law § 253-a imposed a City mortgage recording tax at the rate of \$1.25 for each \$100.00 or major fraction thereof, since the principal debt or obligation at issue herein was in an amount greater than \$500,000.00. The total (State and City) mortgage recording tax was,

therefore, imposed at a rate of \$2.25 for each \$100.00 or major fraction thereof.

Based upon the determination that the fair market value of the 62 units, which were not sold as of the date of recordation of the mortgage, was \$6,061,714.00, the mortgage recording tax which petitioner should have paid was $(\$6,061,714.00 \times 2.25\%)$ \$136,388.57.

G. The final matter to be determined herein is whether petitioner is entitled to a refund of mortgage recording tax which was paid over and above the amount which should have been paid at the time the mortgage was recorded.

Tax Law § 263 provides that no refund of tax paid under Article 11 of the Tax Law shall be allowed unless the application for refund is filed within two years from the time the erroneous payment of tax was received. As indicated in Findings of Fact "3" and "4", supra, the tax was paid on April 24, 1987 and the request for refund was filed on July 21, 1987, clearly within the statutory time period. It should be noted herein that approximately one year prior to the recording of the subject mortgage and the payment of the tax (\$157,331.25), chapter 409 of the Laws of 1986 amended Tax Law § 263 to permit a refund of tax erroneously paid where, previous to such amendment, a refund application could be entertained, with certain limited exceptions, only when the tax was erroneously collected by a recording officer.

Since petitioner erroneously paid mortgage recording tax in the amount of \$157,331.25 when, as provided in Conclusion of Law "F", supra, the proper amount of tax which should have been paid was \$136,388.57, petitioner, having timely filed an application therefor, is entitled to a refund in the amount of \$20,942.68, plus applicable interest.

H. The petition of East 54th Street Associates is granted to the extent indicated in Conclusion of Law "G" and the Division of Taxation is hereby directed to refund to petitioner mortgage recording tax erroneously paid in the amount of \$20,942.68, plus such interest as may

be lawfully due and owing.

DATED: Troy, New York
June 18, 1992

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE