STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
J. ZELIGFELD AND M. NEUSTEIN	:	AMENDED DETERMINATION
	:	DTA NO. 818358
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.	:	
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Petitioners, J. Zeligfeld and M. Neustein, PO Box 221, Brooklyn, New York 11211, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 14, 2001 at 10:30 A.M., with all briefs to be submitted by April 26, 2002, which date began the six-month period for the issuance of this determination. Petitioners appeared by Meyer M. Lieber, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel).

ISSUES

I. Whether petitioners' partnership, which was a sponsor of a plan for the conversion to cooperative ownership of a Brooklyn apartment building, received consideration in excess of $1,000,000.00 from its transfer of 11 of 113 cooperative units so as to be subject to gains tax.

II. Whether the Division of Taxation properly utilized a per share method to allocate the partnership's original purchase price to the cooperative units subject to tax rather than a relative

fair market value method because petitioners failed to establish the fair market value of the unsold units in the Brooklyn apartment building on June 15, 1996, the date on which the gains tax law became ineffective.

FINDINGS OF FACT

1. Petitioners, J. Zeligfeld and M. Neustein, are partners in J & M Realty Associates ("the partnership"), which takes its name from the initials of the partner's first names. The partnership acquired a Brooklyn apartment building, with 113[1] residential units, at 540 Ocean Parkway on June 19, 1985 from 540 Ocean Parkway Corp. and became the sponsor and selling agent of a noneviction plan for the conversion to cooperative ownership ("offering plan") of the building. The offering plan was accepted for filing by the New York State Attorney General's Office and became effective on or about June 27, 1988.

2. The offering plan provided for the organization of a cooperative housing corporation known as Imperial Ocean Corp., which offered for sale 89,125 shares of its capital stock that were allocated to the 113 residential apartments. The purchaser of the shares allocated to an apartment was entitled to a proprietary lease for the apartment from the cooperative housing corporation.

3. On or about November 22, 1988, the partnership made its initial gains tax filing. On its transferor questionnaire, petitioners reported that there were 20 apartments subscribed at closing, 13 apartments of insiders with 11,018 shares and 7 apartments of outsiders with 3,762 shares, resulting in 14,780 subscribed shares and outstanding shares of 74,345 allocable to 93

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[1] The cover sheet for the cooperative offering plan noted that 89,125 shares were allocated to 113 residential units. In contrast, the text of the offering plan noted that "[t]he *89,295* shares being offered have been allocated in blocks to *114* residential apartments . . . [emphasis added]." The record does not include an explanation for this disparity. Since the partnership's filings with the Division of Taxation used 89,125 shares allocable to 113 units, such numbers have been used in this determination.

unsubscribed units. It reported a total anticipated selling price of all units of $4,949,645.00 computed as follows:

Insiders (13 apartments) 11,018 shares @ $72.25/sh[2]	$ 796,050.00
Outsiders (7 apartments) 3,762 shares @ $96.225/sh	362,000.00
Unsubscribed (93 apartments) 74,345 shares@ $51.00/sh	3,791,595.00
Total	$4,949,645.00

In calculating its anticipated gross consideration of $7,746,098.00, the partnership added $3,000,000.00, which represented the amount of mortgage indebtedness, and subtracted $203,547.00, consisting of two amounts: (i) $193,547.00, an amount to be contributed to a "reserve fund," and (ii) $10,000, an amount to be contributed to a working capital fund.

4. On its transferor questionnaire, the partnership reported "actual to date" anticipated *gross* consideration of $1,158,050.00 for the 20 subscribed units as shown in Finding of Fact "3", consisting of $796,050.00 for the 13 apartments subscribed by insiders and $362,000.00 for the 7 apartments subscribed by outsiders. No brokerage fees were subtracted, and $1,158,050.00 was also reported as the "anticipated consideration." In contrast, petitioner reported $189,580.00 as an estimated amount for brokerage fees "through Completion" on the sale of units which had not been subscribed at closing. Although the initial gains tax filing required the partnership to "attach a statement from the brokerage firm setting forth the total brokerage fee anticipated under the plan," no such statement was provided then or in the future. In addition, by a letter dated February 22, 1989 to the Division, Meyer M. Lieber, petitioners' representative and the

[2] The share price of $72.25 represented a reduction from the share price for insiders of $85.00 established initially in the offering plan.

partnership's accountant, advised that no brokerage fees "were incurred on the 20 subscribed apartments" albeit only 11 would actually go to closing.

5. On its transferor's questionnaire, the partnership elected to calculate the gains tax due based upon a per share method of apportionment, with the common denominator of all units being 89,125. It also reported a "total anticipated (Actual plus Estimated)" original purchase price of $4,793,638.00. Subtracting this amount from anticipated consideration of $7,556,518.00, the partnership reported a total anticipated gain subject to tax of $2,762,880.00.

6. Although the partnership had indicated on its transferor questionnaire, as detailed in Finding of Fact "3", that there were 20 apartments subscribed at closing, only 8 of the 20 subscribed apartments actually closed at the initial transfer of title to the Brooklyn apartment building to the cooperative housing corporation by the partnership. The apartments that went to closing on November 22, 1988 were the following eight apartments of insiders:

Apartment	Shares allocated to unit	Purchase price
2E	517	$ 41,254.75
3H	748	54,043.00
2L	620	44,795.00
2B	830	59,967.50
2D	920	66,470.00
3D	938	67,770.50
6A	468	33,813.00
6B	898	64,880.50
Totals	5,993 shares	$432,994.25

Only three additional apartments would be sold by the partnership, and all three were insider sales as follows:

Date of closing	Apartment	Shares Allocated to Unit	Purchase Price
December 1, 1988	1-0	1,200	$ 86,700.00
December 1, 1988	2-0	1,224	88,434.00
January 24, 1989	6I	1,320	95,370.00
Totals		3,744	$270,504.00

As of June 15, 1996, the effective date of the repeal of the real property transfer gains tax, no additional apartments had been sold by the partnership. Consequently, the 11 apartments sold to insiders as detailed above were the only apartments which went to closing in the 8-year period running from June 27, 1988, the effective date of the offering plan, to June 15, 1996, the effective date of the repeal of the gains tax. The total of the above 11 purchase prices for the apartments sold by the partnership prior to the repeal of the gains tax is $703,498.25 for the 9,737 shares[3] which were allocated to these 11 units out of the total shares of 89,125 allocated to the 113 units in the Brooklyn apartment building, as noted in Finding of Fact "2". The record does not disclose the reasons why the other 9 subscribed units, almost all subscribed to by outsiders as noted in Finding of Fact "3", never went to closing.

[3] These apartments were therefore sold at a per share price of $72.25, which conforms to the per share price noted in Finding of Fact "3" for insiders.

7. The partnership paid gains tax in the amount of $30,185.00[4] on the sale of the 11 apartments detailed above. By a Notice of Determination dated December 29, 1997, the Division of Taxation ("Division") asserted gains tax due of $31,308.60 plus interest. A schedule included in the audit report detailed the Division's calculation of tax due as follows:

Cash	$ 749,403
Mortgage 3,000,000 ÷ 89,125 × 9737	327,753
Reserve fund 193,547 ÷ 89,125 × 9737	(21,145)
Working capital fund 10,000 ÷ 89,125 × 9737	(1,093)
Discounts, credits and rebates	(1,970)
Brokerage fees	0
Net consideration received by partnership	$1,052,948
Purchase price paid to acquire $3,300,000 ÷ 89,125 × 9737	$360,528

[4] The record does not include the partnership's exact calculation of the gains tax paid in this amount of $30,185.00 although it includes a breakdown of the $30,185 as follows:

Unit	Shares apportioned to unit	Sales price	Date tax paid	Amount of tax paid
2B	830	$ 59,968	Nov. 22, 1988	$ 2,573
2D	920	66,470	Nov. 22, 1988	2,852
2E	571[sic,should be 517]	41,255	Nov. 22, 1988	1,770
2L	620	44,795	Nov. 22, 1988	1,922
3D	938	67,770	Nov. 22, 1988	2,908
3H	748	54,043	Nov. 22, 1988	2,319
6A	468	33,813	Nov. 22, 1988	1,451
6B	898	64,880	Nov. 22, 1988	2,784
10	1,200	86,700	Dec. 1, 1988	3,720
20	1,224	88,434	Dec. 1, 1988	3,794
6I	1,320	95,370	Jan. 1989	4,092
Total	9,737	$703,498		$ 30,185

Acquisition costs 100,654 ÷ 89,125 × 9737	10,997
Capital costs 251,625 ÷ 89,125 × 9737	38,997
Conversion costs 251,625 ÷ 89,125 × 9737	27,490
Selling expenses	0
Original purchase price	$438,012
Gain, i.e., net consideration of $1,052,948 less original purchase price of $438,012	$ 614,936.00
Gains tax @ 10%	61,493.62
Gains tax paid	30,185.00
Additional tax due	$ 31,308.60

8. By a conciliation order dated November 10, 2000 additional gains tax due was reduced from the $31,308.60 plus interest asserted due in the Notice of Determination to $26,729.10 plus interest. This change was based upon the reduction of the "net consideration" of $1,052,948.00 shown above to $1,007,153.00 with the original purchase price of $438,012 shown above remaining the same. "Net consideration" was recalculated as follows:

Cash consideration	$ 703,498.00
Mortgage indebtedness	327,753.00
Reserve fund	(21,155.00)
Working capital fund	(973.00)
Discounts, credits and rebates	(1,970.00)
Net consideration	$1,007,153.00

As noted in Finding of Fact "6", the total of the partnership's sales of 11 apartments was $703,498.00, which corresponds to the amount used as "cash consideration" in the above recalculation. The parties do not contest this amount nor the amount of $327,753.00 used as "mortgage indebtedness" nor the amount of $1,970.00 used as "discounts, credits and rebates."

In the above recalculation, the reasons why the amount for "reserve fund" was increased by $10.00 to $21,155.00 from $21,145.00 and the amount for "working capital fund" was decreased by $120.00 from $1,093.00 to $973.00 were not explained in the record. Nonetheless, the parties also do not disagree concerning the use of any of these amounts. Rather, the only amount in contention is petitioners' claim that the "net consideration" detailed above of $1,007,153.00[5] should be further reduced by $17,925.00 for brokerage commissions allegedly paid to petitioner M. Neustein by the partnership.

9. By an affidavit dated May 9, 2000, petitioner Mordechai Neustein affirmed that he "alone negotiated the terms of sale and other matters . . . with prospective Insider purchasers." He also affirmed in this affidavit that he "was paid a $20,000[6] commission, which was reflected as a Guaranteed Payment on my 1989 Schedule K-1 from the Partnership." However, neither petitioner Neustein nor petitioner Zeligfeld appeared at the hearing to testify. The Division's auditor, George Mastrianni, who has conducted a substantial number of real property transfer gains tax audits, testified that in sales of apartments to insiders a brokerage fee would not normally be incurred:

> It's the person occupying the apartment actually buying the apartment. Normally an attorney would be sufficient for the typical closing (tr., p. 44).

10. In September of 1999, petitioner Neustein sold 50 of the cooperative units through his entity, Em Ess Realty LLC, to a purchaser named PHA Associates VIII LLC for $1,805,000.00, and petitioner Zeligfeld sold 52 of the cooperative units through his entity, Shefa Brucha H LLC,

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[5] On its Final Computation of gains tax dated November 26, 1996, petitioners' partnership reported "aggregate consideration" of $1,007,044.00 from which it deducted brokerage fees of $17,925.00 and claimed a gains tax refund in the amount of $30,185.00.

[6] In another undated submission by petitioners, a brokerage fee of $10,552.00 was claimed based upon a commission at a rate of 1.5%.

to this same purchaser for $1,695,000.00. Consequently, the 102 unsold units out of the 113 units in the initial offering plan were eventually sold for a total amount of $3,500,000.00 in September of 1999 approximately 11 years after the effective date of the offering plan and approximately 3 years after the repeal of the gains tax. As noted in Finding of Fact "6", the sale of the 11 apartments subject to gains tax represented the sale of 9,737 shares of the total shares of 89,125 allocated to the 113 units in the Brooklyn apartment building. Consequently, the total amount of $3,500,000.00 divided by the 79,388 shares allocable to the 102 units sold in 1999 equals a per share value of $44.09. In comparison, as noted in Footnote "3", the 11 apartments sold prior to the repeal of the gains tax were sold at a per share price of $72.25.

11. The Division included in its brief 21 proposed findings of fact which are all accepted and incorporated into this determination.

SUMMARY OF THE PARTIES' POSITIONS

12. Petitioners maintain that the partnership should be allowed a deduction for a brokerage commission "paid to a partner in connection with sales to purchasing tenants" (Petitioners' brief, p. 7). According to petitioners, the guaranteed payment of $20,000.00 to petitioner Neustein by the partnership in 1989 reflected the payment of a brokerage commission, and that an affidavit dated May 9, 2000 of petitioner Neustein supports this contention. Petitioners assert that Mr. Neustein was responsible for negotiating the reduction from the share price for insiders of $85.00, established initially in the offering plan, to the share price of $72.25 which permitted the project to go forward and the consequent sale of the 11 apartments at issue. If a brokerage commission is allowed, the net consideration for the sale of the 11 apartments would be less than $1,000,000.00 and thereby not subject to gains tax. Petitioners maintain that the administrative law judge does not "have the jurisdiction to rule upon a Bronxville

computation arising from a Notice of Determination issued in December 1997" (Petitioners' brief, p. 2). Petitioners argue that they raised that Bronxville matter in their petition "merely to alert the Tax Department that even if the latter were to prevail on the commission issue, a refund would still be due" (Petitioners' brief, p. 15). If the Bronxville computation is addressed, petitioners contend that "the value of Petitioners' unsold units at June 15, 1996 could not possibly be greater than the $3,500,000 sales price in September 1999" (Petitioners' brief, p. 12). Further, according to petitioners, the $3,500,000.00 sales price should be discounted due to "the upturn in the NY City coop market since June 15, 1996" and the "value increase @ September 1999 that is solely attributable to the increase in the number of vacant units" (Petitioner's brief, p. 13).

13. The Division counters that petitioners "have failed to establish by clear and convincing evidence that they should have been allowed a deduction from the net consideration for alleged brokerage commissions" (Division's brief, p. 6). The Division emphasizes that petitioners failed to produce a brokerage agreement and offered no testimony from petitioner Neustein, the partner who allegedly acted as the broker, and as a result, "petitioners have failed to prove that any brokerage fees were even incurred, much less that any were related to the sale transactions" (Division's brief, p. 8). In addition, the Division points to a letter dated February 22, 1989 of petitioner's representative stating that no brokerage fees were incurred. The Division notes that this letter is dated a month after the last sale occurred in January 1989. Further, the Division points to the varying amounts claimed as brokerage fees by petitioners: in the Real Property Transfer Gains Tax Final Computation dated November 26, 1997, fees of $17,925.00; in petitioner Neustein's affidavit dated May 9, 2000, fees of $20,000.00.; during the conciliation conference phase during the spring of 2000, fees of $10,552.00; and after the

hearing in a reply brief, fees of $10,552.00 representing 1.5% of cash consideration of $703,498.00. The Division argues that because petitioner Neustein was a related partner of the co-op sponsor, "it was incumbent upon petitioners to correctly document any brokerage fees, because there is a question of whether the transaction is at arm's length" (Division's brief, p. 10). Furthermore, according to the Division, the selling price of units sold to insiders is set in the offering plan and there was nothing in the plan or the amendments to the plan stating anything about brokerage commissions. The Division also maintains that petitioners have failed to establish that the Notice of Determination dated December 29, 1997 "was incorrect or improper in computing the original purchase price" (Division's brief, p. 11). The Division asserts that petitioners "failed to provide any substantiating information regarding a fair market value analysis for purposes of apportioning the original purchase price" (Division's brief, p. 11). In particular, the Division notes that "no appraiser looked at the unsold units in 1996 to determine their fair market value" (Division's brief, p. 13). It also emphasizes that petitioners rely upon a bulk sale of the units in 1999 "and the purchase price was for the whole amount of units sold, rather than determined per unit" (Division's brief, p. 13). The Division rejects the values calculated by petitioners' representative, who admitted that he was not a real estate broker and was not directly involved in cooperative apartment sales. The Division contends that an independent appraisal or a well-documented fair market value analysis was required. The decision of the Tax Appeals Tribunal in ***Matter of 244 Bronxville Associates*** was dated June 10, 1999, prior to the date petitioners filed their petition dated February 7, 2001 in which they cited this Tribunal decision, and as a result, the Division maintains that "It was incumbent on petitioners to meet their burden of proof to show the validity of their fair market valuation at the

hearing in this matter and submit any evidence into the record at that time to support their arguments" (Division's brief, p. 16).

CONCLUSIONS OF LAW

A. The real property transfer gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996. (***See***, L 1996, ch 309, §§ 171-180.) This 1996 session law, which provided for the repeal of the gains tax, included the following specific provision concerning the effect of the repeal on cooperative conversion projects, such as the one of petitioners' partnership, at section 180(b)(i), as follows:

> In the case of partial or successive transfers which are treated in the aggregate pursuant to subdivision seven of section 1440 of the tax law, including transfers pursuant to a condominium or cooperative plan, in which the taxpayer has paid or was required to pay tax pursuant to subdivision (b) of section 1442 of the tax law but had not made the last transfer pursuant to such plan or aggregated transfer prior to June 15, 1996, a final computation of tax shall be filed with the commissioner of taxation and finance by May 31, 1997. The determination of gain or loss in such cases shall be based only on the actual units, shares, parcels of real property or interests in real property sold prior to June 15, 1996. For purposes of such determination, original purchase price shall include only those amounts allowable pursuant to subdivision five of section 1440 of the tax law which are directly attributable to those actual units, shares, parcels of real property or interests in real property sold and those amounts allowable pursuant to such subdivision five which are indirectly attributable to those units, shares, parcels of real property or interests in real property sold. The commissioner of taxation and finance shall review all such final computations of tax and determine whether there has been an overpayment or an underpayment of tax.

B. Only the 11 transfers detailed in Finding of Fact "6" occurred prior to the repeal of the gains tax. Eight transfers went to closing on November 22, 1988, two on December 1, 1988 and one on January 24, 1989 with no other transfers up to June 15, 1996, the date of repeal. At the center of the dispute at hand is Tax Law former § 1443(1) which provided an exemption from gains tax when the consideration is less than a one million dollar threshold. As noted in

Finding of Fact "8", the Division's case that the 11 transfers are subject to tax is premised on a computation of net consideration for their transfer which amounted to $1,007,153.00, a sum just barely over the threshold for tax. It is easy to understand the frustration of petitioners in facing a 10% tax on such consideration when a slight adjustment to this calculation would result in the application of the exemption under former section 1443(1). Petitioners' frustration is compounded because during 1988 and early 1989 when the transfers at issue occurred, if one unit was sold for $10,000.00 less, for example, the gains tax at a 10% tax rate could have been avoided. However, no one at the time could have predicted such a turn in events, and petitioners in due course, as detailed in Footnote "4", paid gains tax in late 1988 and early 1989 in the amount of $30,185.00. Although petitioners have waged a vigorous fight to move their transaction to the other side of the one million dollar threshold, they have failed to prove that the computation of net consideration should be further reduced from $1,007,153.00. Their contention that the partnership should be allowed a deduction for a brokerage commission has not been established by adequate proof. The Division has correctly pointed out that the partnership's accountant at or near the time of the 11 transfers stated that no brokerage fees were incurred. Petitioners' changed position years later, subsequent to the repeal of tax, when they can now see how close they came to taking advantage of the exemption under former section 1443(1), clearly affects the weight that may be given to the affidavit dated May 9, 2000 of petitioner Neustein, in which he maintained that a brokerage fee was paid by the partnership to him in the form of a guaranteed payment. This affidavit was clearly admissible in the administrative hearing (***see, Matter of Sholly***, Tax Appeals Tribunal, January 11, 1990). However, the weight to be given it requires careful consideration because the evaluation of the credibility of a witness, an important part of the hearing process, is shortchanged by use of an

affidavit (***cf., Stevens v. Axelrod***, 162 AD2d 1025, 557 NYS2d 809). Here, petitioners have provided no explanation why neither petitioner, and especially petitioner Neustein, offered oral testimony at the hearing. This failure to testify and offer relevant evidence under oath and subject to cross-examination concerning the incurring of brokerage fees is properly held against petitioners especially in light of the contradictory, earlier statement by the partnership's accountant which works against petitioners' current position (***see, Matter of Furniture Warehouse***, Tax Appeals Tribunal, October 22, 1992; ***Meixsell v. Commissioner of Taxation***, 240 AD2d 860, 659 NYS2d 325, ***lv denied*** 91 NY2d 811, 671 NYS2d 714). Furthermore, the *varying* amounts claimed as brokerage fees, as detailed in paragraph "13", undercut petitioners' claim that a brokerage fee was incurred on the insider transfers of units at issue. In sum, petitioners have not shouldered their burden of proving by clear and convincing evidence that their partnership was entitled to claim a deduction for brokerage commissions on the sale of the 11 insider units (***see, Matter of R.A.F. General Partnership and Edex General Partnership***, Tax Appeals Tribunal November 9, 1995).

C. Pursuant to Tax Law former § 1445, petitioners were required to "file an application for refund within two years from either the date of transfer or the date of payment, whichever is later." As noted in Finding of Fact "6", the 11 units were transferred in a period ranging from November 22, 1988 to January 24, 1989, and as noted in Footnote "4", gains tax was paid by petitioners' partnership at the time of such transfers. Consequently, under Tax Law former § 1445, petitioners' claim for refund of gains tax paid on these transfers would be years late. However, as noted in Conclusion of Law "A", the 1996 session law which repealed the gains tax directed the Division to review a taxpayer's final computation of gains tax and determine whether there has been an overpayment or an underpayment of tax. This session law went on to

provide at section 180(b)(ii) that "[a]ny final computation of tax under this subdivision which shows an overpayment of tax shall be treated as an application for refund." As noted in Footnote "5", the Final Computation dated November 26, 1996 filed by petitioners' partnership claimed a gains tax refund in the amount of $30,185.00, and is properly treated as an application for refund. This application for refund is at issue in this proceeding as well as the Division's Notice of Determination dated December 29, 1997 detailed in Finding of Fact "7". Petitioners' contention that the issue concerning the amount of original purchase price to be allocated to the units subject to tax may not be addressed at this time is rejected. In effect, petitioners are requesting the bifurcation of the hearing in this matter which has no basis in law or regulations. Furthermore, the hearing process must be defined and final (***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). Petitioners were provided with the opportunity to present evidence concerning the proper allocation of original purchase price to the units subject to tax at the hearing in this matter. Consequently, the issue designated as "II" is properly addressed herein.

D. As detailed in Finding of Fact "7", the Division's Notice of Determination dated December 29, 1997 computed gains tax due by using a per share method to allocate the partnership's original purchase price to the 11 units subject to real property gains tax. This methodology for allocating original purchase price was held to be unreasonable by the Tax Appeals Tribunal in its decision in ***Matter of 244 Bronxville Associates*** (June 10, 1999). In this decision, the Tribunal held that original purchase price should be apportioned to the units subject to tax "based upon the stated relative fair market value methodology" noted at 20 NYCRR 590.20 which it summarized as follows:

> The regulation addresses the apportionment of OPP in situations where only a part of an interest in real property is being transferred and part is being retained and dictates a fair market value ratio, as follows:

$$\frac{\text{fmv of interest transferred}}{\text{fmv of the real property, including interest}}$$

E. In ***Matter of 244 Bronxville Associates*** (***supra***), the taxpayer entered into evidence an appraised value for the unsold units by a certified real estate appraiser who had previously valued over 7,500 properties throughout the New York Metropolitan area. This appraiser based his valuation on comparable sales and listings within the subject cooperative project and neighboring cooperative projects. In the matter at hand, petitioners have not offered similar evidence. Nonetheless, as noted in Finding of Fact "10", petitioners established that approximately three years after the repeal of the gains tax, the unsold units were sold in bulk for a total amount of $3,500,000.00. However, testimony by petitioner's representative, who is a certified public accountant, concerning the discounting of such amount based upon (i) more units being vacant at the time of the sale three years after the repeal of the gains tax and (ii) an improved real estate market in New York, does not rise above the level of speculation. In fact, petitioner's representative candidly admitted that he was not able to pinpoint the particular percentage discount that should be used in calculating the value of the unsold units at the time of the repeal of the gains tax. Consequently, such speculation by petitioners' representative does not provide a sufficient evidentiary basis to justify using an amount less than $3,500,000.00 as the fair market value for the unsold units at the time of repeal. Further, the Division's complaint that the $3,500,000.00 value resulted from a *bulk* sale, with the implication that if the units were sold individually the total sales amount would be significantly higher, has some merit. Nonetheless, this contention is properly balanced against the petitioners' argument that at the time of the bulk sale there were more vacant units, which were substantially more valuable, than occupied units. Consequently, it is reasonable to use the undiscounted amount of $3,500,000.00 as the value for the unsold units at the time of the repeal of the gains tax ***(cf., Beekman Coutry***

Club, Inc. v. Wetzler, 199 AD2d 640, 604 NYS2d 989 [wherein the court recognized that the fair market value of real property was properly based upon the value stated in a purchase agreement and that gains tax was not required to be computed on the basis of an appraisal of the real property.]) In computing the partnership's final gains tax liability, the original purchase price to be allocated to the 11 units subject to tax may therefore be determined by using this undiscounted amount of $3,500,000.00 in the fraction noted above by the Tribunal in ***Matter of 244 Bronxville Associates*** (***supra***). The Division is therefore directed to recalculate the amount of gains tax due using such undiscounted amount of $3,500,000.00 for the value of the unsold units as of June 15, 1986, the effective date of the repeal of the gains tax.

F. The petition of J. Zeligfeld and M. Neustein is granted to the extent indicated in Conclusion of Law "E", the Notice of Determination dated December 29, 1997 is modified to so conform, and petitioners' refund claim, based upon their partnership's Final Computation of gains tax dated November 26, 1996, is denied.

DATED: Troy, New York
October 24, 2002

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE