STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EAST 54TH STREET ASSOCIATES	:	DECISION
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.	:	

The Division of Taxation and the City of New York filed exceptions to the determination of the Administrative Law Judge issued on October 10, 1989 with respect to the petition of East 54th Street Associates, c/o Bernard Freidman, 5 East 86th Street, New York, New York 10028, 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 (File No. 805197).

Petitioner appeared by Dreyer and Traub (Eugene Mittelman, Esq., and John S. Sinadinos, Esq., of counsel). The City of New York appeared by Victor A. Kovner, Esq. (Anshel David, Esq. and Helene Jaffa, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Petitioner and the City of New York filed briefs. A letter in lieu of a reply brief was filed by the City of New York. Oral argument was heard on May 16, 1990.

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

ISSUES

I. Whether an indeterminate mortgage is taxed exclusively by section 256 of the Tax Law or by both sections 253 and 256 of the Tax Law.

II. Whether petitioner is entitled to file a maximum statement nunc pro tunc as of the recording date of the mortgage pursuant to Tax Law § 256.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we modify finding of fact "6" and delete finding of fact "8" as indicated below. We also find certain additional facts as noted below.

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:

(1) Associates had the right to prepay the entire balance of the mortgage indebtedness.

(2) The consolidated mortgage secured only the notes and mortgages specified and "no further or other indebtedness or obligation".

(3) The lien on the mortgage would automatically attach, without further act, to all after acquired property connected with the mortgaged property.

(4) 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).

(5) 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."

(6) 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.

We modify finding of fact "6" as follows:

> On April 24, 1987, the principal due on the consolidated mortgage had been reduced to $4,724,100.00. This 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 to indicate that the parties now intended the mortgage to secure a lesser lien.[1]

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, $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

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[1] The original finding of fact read as follows:

"On April 24, 1987, the principal due on the consolidated mortgage had been reduced to $4,724,100.00. This 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."

We modified this fact to more fully reflect the record.

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.[2]

We find the following additional facts:

> At the hearing held on December 1, 1988, petitioner introduced proof, including sworn affidavits by two appraisers, on the issue of the value of the property securing the consolidated mortgage at the time it was presented for recordation on April 24, 1987. Appraiser Irwin Steinberg appraised the value of the property at $4,882,979.00 (Exhibit N). A second appraisal, conducted by Philip Ribolow, set the value of the property at $4,800,000.00 (Exhibit M). The appraised value of the property is based upon the value of the 49 units which remained unsold at the date of recording. Ribolow appeared at the hearing and testified as to his qualifications and the methodology used in the valuation of the subject

[2]We deleted finding of fact "8" in the Administrative Law Judge's determination since it consisted of statements of the parties' positions.

property. The City introduced a document entitled "The Record and Guide Quarterly" which sets forth certain condominium unit sales by East 54th Street Associates during the period January through December 1987.

OPINION

In the determination below, the Administrative Law Judge decided that the mortgage at issue was indeterminate within the meaning of Tax Law § 256 due to the inclusion of a dragnet clause in the mortgage. Because the mortgage had been recorded as a determinate mortgage, the Administrative Law Judge concluded that there was a misconception with regard to its taxability since both the recording officer and the bank misunderstood the mortgage to be a determinable one. Since it was found that there was an honest misconception as to the nature and taxability of the mortgage within the meaning of Tax Law § 256, petitioner was granted permission to file a maximum statement nunc pro tunc as of the recordation date of the mortgage. The taxable amount specified in the maximum statement was less than the original amount secured by the mortgage and represented the principal amount remaining unpaid at the time of recording. The Administrative Law Judge held that to impose a tax on the full amount secured by the mortgage without an allowance for the amount paid off prior to recording would constitute an unconstitutional tax on intangible personal property.

On exception, both the Division and the City of New York (hereinafter the City) assert that the determination is in error. The City contends that the express language and intent of the mortgage recording tax statute was ignored when Tax Law § 256 was allowed to supplant Tax Law § 253. The proper interpretation of the mortgage recording tax law, according to the City, requires that section 253 and section 256 be applied together where a mortgage contains both a determinate minimum amount and an additional indeterminate lien created by a dragnet clause. It is further argued that the tax imposed pursuant to those two sections be based on the highest value of the real property at "any time between execution or recordation, or thereafter" (City's brief, p. 14). The City urges that it is illogical and contrary to proper statutory construction to impose a tax pursuant to Tax Law § 256 on an amount less than the original amount secured by

the mortgage. It is further argued that petitioner is not entitled to a refund because the tax was not "erroneously collected"[3] pursuant to Tax Law § 263. Lastly, the City argues that the excise tax on recordation of mortgages is not a tax on the underlying debt and therefore not an unconstitutional ad valorem tax on property.

In response, petitioner contends that its mortgage is indeterminate and must be taxed exclusively under Tax Law § 256. Petitioner further argues that an honest misconception as to the nature and taxability of the instrument occurred allowing for the filing of a maximum amount statement nunc pro tunc. Alternatively, petitioner asserts that if the statement is not allowed to be filed nunc pro tunc, then the tax should be based on the value of the property as of the date of recording. Petitioner maintains that the City's valuation of the subject property is without statutory support and patently absurd. Petitioner further argues that it would be unconstitutional to ignore the maximum amount statement filed by petitioner and to compute the tax based on the original amount advanced under the mortgage. Lastly, petitioner points out that Dollar Dry Dock is a savings bank and therefore not required to record mortgages under Article 10 of the Banking Law.

We modify the determination of the Administrative Law Judge for the reasons stated below.

The first question we will address is the characterization of the subject mortgage under the mortgage recording tax law. Petitioner contends that the mortgage is indeterminate since the total amount secured cannot be precisely determined due to the inclusion of the dragnet clause. Accordingly, petitioner argues that taxation of the subject mortgage is exclusively governed by Tax Law § 256. The City agrees that the dragnet clause creates an indeterminacy in the subject mortgage. The City, however, contends that Tax Law §§ 253 and 256 are to be construed together to provide a method for taxing the mortgage. It is the City's position that a single mortgage can have a hybrid character in that it may be both determinate and indeterminate, and therefore must be taxed by both sections of the mortgage recording tax law.

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[3] By the Laws of 1986, Chapter 409, the phrase "erroneously collected" in Tax Law § 263 was modified to read "erroneously paid".

We find that the statutory framework of Article 11 compels the conclusion that a mortgage is either determinate and taxable under Tax Law § 253 or indeterminate and taxable under Tax Law § 256. The mortgage recording tax law provides a specific statutory framework which allows for the taxation of mortgages which are determinate (see, Tax Law § 253) and mortgages which are indeterminate (see, Tax Law § 256). Tax Law § 253 provides that a mortgage recording tax is due when a mortgage is recorded and shall be based upon the "principal debt or obligation which is, or under any contingency may be secured at the date of execution thereof or at any time thereafter by a mortgage". Where however, "the principal indebtedness secured or which by any contingency may be secured by a mortgage is not determinable from the terms of the mortgage" (Tax Law § 256), section 256 provides an entirely separate method for determining the amount of tax due. Specifically, that section states that the indeterminate mortgage shall be taxed pursuant to the rates set out in section 253 based "upon the value of the property covered by the mortgage, which shall be determined by the recording officer . . . unless at the time of presenting such mortgage for record the owner thereof shall file with the recording officer a sworn statement of the maximum amount secured" (Tax Law § 256). Thus, the section 256 tax is not an add-on tax measured only by the amount attributable to the value of the indeterminacy, but rather is imposed on an amount representing the total amount secured by the mortgage (i.e., either the value of the property or the amount sworn to in the maximum amount statement). Consequently, the simultaneous application of sections 253 and 256 to the indeterminate mortgage as urged by the City would result in a cumulative tax measured by the stated amount on the face of the mortgage (pursuant to section 253) and a duplicative tax due to indeterminacy based on either the value of the property or the maximum amount statement filed by the taxpayer (pursuant to section 256). Such an absurd and patently unfair result where the same indebtedness would be counted twice certainly could not have been intended by the Legislature or seriously advocated by the City here.

The City's argument that both sections 253 and 256 apply where the mortgage is indeterminate is also completely unsupported by the case law interpreting those sections. The City has failed to cite, and our research has not revealed, a single instance in which sections 253 and 256 were both applied simultaneously to a single indeterminate mortgage as urged here by the City. Moreover, a review of the cases construing sections 253 and 256 indicates that section 253 has been consistently applied where the mortgage is found to be determinate and section 256 exclusively applied to indeterminate or indefinite mortgages (see, Matter of Woodmere Knolls v. Procaccino, 52 AD2d 979, 383 NYS2d 105 [taxpayer not entitled to refund where instrument was properly recorded and taxed as a determinate mortgage under § 253]; Matter of WBVM Associates, 120 Misc 2d 434, 466 NYS2d 136 [§ 253 applied where exact amount of indebtedness was clearly expressed in the mortgages]; see also, People v. Gass, 206 NY 609 [instrument filed which secured indeterminate liens taxed under predecessor to § 256 on value of property where no statement filed]; Rockefeller Center v. Bragalini, 8 AD2d 657, 185 NYS2d 82 [§ 256 applied where mortgage found to be indeterminate where clause in mortgage created indeterminacy in principal indebtedness]; Citizens Nat. Bank & Trust Co. of Oneonta v. State Tax Commn., 274 App Div 722, 87 NYS2d 321 [§ 256 applied to amount stated in trust agreement where deed offered for recording did not specifically state an amount]). These cases clearly demonstrate that the City's argument urging the application of section 253 in conjunction with section 256 to the subject mortgage must be rejected. For all of these reasons, we conclude that under the mortgage recording tax law, a mortgage is either determinate and taxable under section 253 or indeterminate and taxable under section 256. The mortgage at issue is, therefore, subject to tax pursuant to section 256.

We now turn to the issue of the proper amount of tax due on the mortgage pursuant to Tax Law § 256 and whether petitioner is entitled to a refund under the circumstances present here. Section 256 sets forth two alternative bases for calculation of the tax imposed upon the recordation of an indeterminate mortgage. Specifically, that section states, in pertinent part, that the tax shall be based upon:

> ". . . the value of the property covered by the mortgage, which shall be determined by the recording officer to whom such mortgage is presented for record, unless at the time of presenting such mortgage for record the owner thereof shall file with the recording officer a sworn statement of the maximum amount secured . . . by the mortgage" (Tax Law § 256).

Where a maximum amount statement has been filed by the owner of the mortgage, that statement "shall thereafter at all times be binding upon and conclusive against such owner, the holders of any bonds or obligations secured by such mortgage and all persons claiming through the mortgagee any interest in the mortgage or the mortgaged premises" (Tax Law § 256). Section 256 goes on to provide that where an indeterminate mortgage is recorded without payment of the required tax and where "the failure to pay such tax was due to an honest misconception on the part of the recording officer or the owner of the instrument as to the nature of such instrument and its taxability", the taxpayer may be permitted to file the maximum statement nunc pro tunc as of the recording date of the mortgage (Tax Law § 256).

The City contends that petitioner's nunc pro tunc maximum statement which sets the value of the mortgage at $3,331,607.43 should be disregarded because an honest mistake as to the nature of the instrument did not occur at the time the mortgage was recorded. The City posits in its exception that the language of section 256 limits correction by a nunc pro tunc statement to instruments not apparently mortgages on their face. The City maintains that because the parties here were aware at the time of filing that the subject document was a mortgage, the mechanism for a nunc pro tunc correction is not available to petitioner. Petitioner, however, contends that the application of section 256 is not limited to the case where the parties did not understand the instrument to be a mortgage but includes mistakes as to the nature and taxability of a mortgage itself. Petitioner asserts that its maximum statement should be allowed to be filed nunc pro tunc as the basis of the tax due on the mortgage.

We cannot agree with the City's unduly narrow reading of section 256 that the honest mistake provision is restricted to the situation where the parties did not understand that the instrument was in fact a mortgage. That interpretation directly contradicts the clear language of the statute that mistakes as to both "the nature of such instrument and its taxability" may be

correctable by a nunc pro tunc statement.[4] While we agree with petitioner that the language of section 256 encompasses the situation where there has been an error as to the nature and taxability of the instrument, we cannot agree with petitioner's argument that the language of section 256 permits it to obtain a refund by filing a nunc pro tunc statement.

Petitioner's argument ignores the clear language of the last paragraph of section 256 that correction by a nunc pro tunc statement is limited to where there has been a "failure" to pay the appropriate amount of tax. That language indicates to us that the remedial application of a statement nunc pro tunc is intended to allow parties to rectify an error where there has been an underpayment or nonpayment of the proper amount of tax. Where an insufficient amount of tax or where no tax at all has been paid, the nunc pro tunc mechanism enables the parties to secure complete and adequate protection of the secured amount of their interests. In our view, the remedial application of section 256 does not envision allowing the parties to obtain a refund when a change in circumstances (i.e., partial repayment of the original amount of the mortgage principal) makes the full amount of the lien originally secured no longer necessary. Moreover, construing section 256 as allowing a taxpayer to obtain a refund by filing a nunc pro tunc statement would disregard the meaning and application of section 263, which specifically deals with refund claims by taxpayers under Article 11. It is a basic tenet of statutory construction that where possible all parts of an enactment should be harmonized with each other as well as with the general intent of the whole enactment so as to give effect to all provisions of the statute (McKinney's Consolidated Laws of NY, Book 1, Statutes § 98). For these reasons, we conclude that petitioner's attempt to obtain a refund by filing a maximum statement nunc pro tunc as of the recordation date is not permitted under section 256.

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[4] The legislative history cited by the City in support of its interpretation indicates that the addition of the last paragraph of section 256 by the Laws of 1920, Chapter 75 was aimed at instruments not apparently mortgages upon their face (1920 NY Legis Doc No. 118, at 35). Contrary to the City's contention, however, that history contains no indication whatsoever that the amendment was intended to apply exclusively to that situation only. Indeed, the broad language subsequently adopted by the Legislature in the last paragraph of section 256 clearly undermines the City's narrow reading of the statute.

In any event, section 256 provides that the taxpayer may be permitted to file the maximum amount statement nunc pro tunc. The word "may" is used within the same paragraph as "shall" in section 256, clearly indicating that the filing of such statement is a matter of discretion and that the granting of such remedy is intended to be optional (see, Matter of Maggie M. v. Douglas B., 138 Misc 2d 370, 524 NYS2d 616, 620; see also, Matter of F & W Oldsmobile v. Tax Commn. of State of New York, 106 AD2d 792, 484 NYS2d 188, 189; Matter of Posner, Tax Appeals Tribunal, June 2, 1990). We conclude that granting such relief would be inappropriate here.

Petitioner contends that if we determine that it is not entitled to file a sworn statement nunc pro tunc, then Tax Law § 256 provides an alternative measure for the tax based "upon the value of the property covered by the mortgage" (Tax Law § 256). At the hearing below, petitioner introduced proof, including sworn affidavits by two appraisers, on the issue of the value of the property covered by the mortgage at the time it was presented for recordation on April 24, 1987. The City argues here, as it did at the hearing, that the measure of the tax imposed should be based upon the highest value of the real property at any time between execution and recordation or thereafter. In its brief, the City alleges that value to be $11,589,661.00.

We deal first with the City's contention. There is absolutely no support, either by statute or regulation, to support the City's contention regarding the valuation of the property. The language of section 256 specifically provides that the tax is to be measured based upon "the value of the property covered by the mortgage." That value shall be determined by the recording officer to whom such mortgage is presented for record and the recording officer may require additional proof in order to compute the value of the property covered by the mortgage (Tax Law § 256). Implicit in that language is that the value of the property is to be determined as of the recordation date. Notably, the form provided by the Division for the purpose of valuing the property covered by an indeterminate mortgage explicitly defines fair market value as the value of the real property described in the instrument "at the date of record" (Exhibit M).

That the term "value" means the value of the property as of the date of recording is also evident from the regulations pertaining to Tax Law § 260. That section governs the determination and apportionment of tax on a mortgage covering real property situated partly within and without the State. Where additional proofs and data are submitted to indicate the value of the property, 20 NYCRR 400.2 specifies that such proofs and data "must reflect the status of the properties as of the date of recording the mortgage" (emphasis added). Accordingly, we conclude that the proper measurement of the tax pursuant to section 256 is to be based on the value of the property covered by the mortgage as of the recordation date.[5]

Both parties introduced evidence at the hearing regarding the value of the property covered by the mortgage as of the recordation date. Our review of this evidence, however, indicates that neither party has offered conclusive proof on this issue. Petitioner introduced evidence at the hearing which consisted of two appraisals and sworn affidavits which appraised the value of the property covered by the mortgage as of April 24, 1987, the date of recording. One appraisal set the value at $4,882,979.00 (Exhibit N). A second appraisal, conducted by Philip Ribolow, set the value of the property at $4,800,000.00 (Exhibit M). The testimony of Ribolow, as well as the sworn affidavits, indicates that the value set forth in the appraisals are based on the fair market value of the 49 units owned by petitioner as of April 24, 1987 (Hearing Tr. II, pp. 51-54; Exhibits M and N). Petitioner's valuation is flawed, however, because petitioner has not presented any evidence which establishes that the units not included in the appraisals and which were sold prior to the recordation date, were satisfied of record and released from the consolidated mortgage. While satisfaction and release of those units in conformity with the requirements of Real Property Law § 339-r would presumably have occurred in accordance with the Condominium Act, there is absolutely no evidence in the record from which we may conclude that such releases were, in fact, executed. While certain statements of petitioner's representative would seem to suggest that these units were indeed

[5]This conclusion, that the correct measure of the tax imposed under section 256 is to be based on the value of the property covered by the mortgage as of the recordation date, renders moot the constitutional arguments raised by the parties.

satisfied of record and released, these statements, which were unsworn and of a general nature, are clearly insufficient to establish that such releases were executed in this matter (Hearing Tr. I, pp. 28-29). There is no evidence before us, either documentary or testimonial, that the units excluded from petitioner's appraisals were not subject to the underlying mortgage. In the absence of such evidence, we are unable to conclude that the value of those units is properly excluded from the value of the property covered by the mortgage.

The City's evidence relating to the value of the subject property is also seriously flawed. The City, which was on notice at the adjournment of the first hearing on October 17, 1988 that petitioner intended to prove the value of the subject property as an alternative measure of the tax under section 256, offered a document into evidence entitled "The Record and Guide Quarterly". That document is a summary of the sale prices of certain condominiums in the subject property during the period of January to December 1987. The introduction of that document was unaccompanied by any testimony or other proof linking the City's figure of $11,589,611.00 with the document. Even if we were to assume that the City's valuation is based upon the document, that figure is seriously flawed since it includes units sold subsequent to the recordation date. Accordingly, the proof offered by the City likewise fails to establish the value of the property covered by the mortgage at the date of recording.

Given the parties' failure of proof on the very element necessary for the Tribunal to resolve this case, i.e., the value of the property covered by the mortgage at the time of recordation, we are left in the unique position of being unable to determine the proper measure of the tax pursuant to Tax Law § 256. This situation contrasts with that where the notice of determination or deficiency is sustained because the taxpayer has failed to meet its burden to challenge the validity of the assessment. Here, the additional amount of tax alleged to be due was not defined by a statutory notice or other assessing document (see, Exhibits E and K [these documents provide that an undefined additional amount of tax is due and instruct the recording officer to make a notation to this effect on the recorded mortgage]). Accordingly, the grant of a remand is necessary here to establish the correct amount of tax due and whether petitioner owes

additional monies or is entitled to a refund. Therefore, under these peculiar circumstances, and in light of certain procedural irregularities which occurred during the course of the hearing and thereafter, we find this an appropriate circumstance in which to exercise our discretion to grant a remand on the narrow issue of the value of the property covered by the mortgage as of the recordation date pursuant to Tax Law § 256.

As noted above, the only evidence relating to the satisfaction of record and release of the units sold prior to recordation is in the form of unsworn statements by petitioner's representative. Extended portions of the hearing below consisted of unsworn statements on crucial facts by the parties' representatives. As we have noted on other occasions, it is inadvisable, poor practice and potentially damaging to the integrity of the hearing process for the Administrative Law Judge to encourage, condone or permit the offer of unsworn statements as proof of facts by the representatives (Matter of Cafe Europa, Tax Appeals Tribunal, July 13, 1989). The Administrative Law Judge's tacit approval of such practice in this case and the resulting confusion thereby, should not inure to the detriment of petitioner's case with regard to the valuation of the subject property. We further note that the record indicates that a motion dated February 21, 1989 was made by the City after the final hearing held on December 1, 1988. By this motion, the City requested permission to introduce additional documentary evidence on the valuation issue. The Administrative Law Judge inexplicably failed to rule on this motion. We are also seriously troubled by the fact that the motion papers submitted by the City do not indicate whether petitioner's representative was ever apprised of this motion. Consequently, the grant of the remand here is also necessary so as to afford petitioner notice and opportunity to respond to the City's motion. Our grant of the remand here is strictly limited to the unusual circumstances presented in this matter.

For all these reasons, we direct that a hearing be held in this matter on the narrow issue of the value of the property covered by the mortgage as of the recordation date. We further direct the Division of Tax Appeals to expedite the remand in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The case is remanded 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.

DATED: Troy, New York
November 15, 1990

/s/John P. Dugan
John P. Dugan
President

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

/s/Maria T. Jones
Maria T. Jones
Commissioner