STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
645 EAST 11TH STREET ASSOCIATES	:	DETERMINATION DTA NO. 809295
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.	:	

Petitioner, 645 East 11th Street Associates, 160 East 38th Street, Suite 16-B, New York, New York 10016, 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 Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 23, 1991 at 9:15 A.M., with all briefs and additional documents to be submitted by December 27, 1991. Petitioner submitted a letter brief, together with additional documents,[1] on October 24, 1991. The Division of Taxation filed a responding letter brief, including an affidavit, on November 15, 1991. Petitioner appeared by Dwight A. Bowler, General Partner. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether petitioner's gain on its rehabilitation and conversion of certain premises to condominium ownership may be reduced by certain interest expenses, sales expenses and construction expenses claimed (by petitioner) but disallowed by the Division of Taxation on audit.

[1]Including material submitted to the Division of Taxation on or about September 6, 1991.

FINDINGS OF FACT

On October 30, 1989, following an audit, the Division of Taxation issued to petitioner, 645 East 11th Street Associates, a Notice of Determination assessing gains tax due in the amount of $4,463.00, plus penalty and interest.

Petitioner, a partnership, is engaged in acquiring, renovating and selling buildings. To this end, on June 10, 1986, petitioner acquired premises located at 645 East 11th Street, Borough of Manhattan, New York, New York. These premises consisted of a five-story brick structure, 25 feet wide and 70 feet deep, situated on a lot some 100 feet deep. The building housed a ground floor (street level) office space plus nine apartment units on the upper floors. The premises were originally zoned to allow ground floor commercial use and upper floor(s) residential use. The premises were rezoned, however, such that professional/medical use would be allowed in the ground floor space with the balance of the floors remaining zoned for residential use. Petitioner's aim was to completely rehabilitate the premises, convert to condominium ownership and sell the resulting condominium units.

Petitioner purchased the premises for $368,140.00. At closing, on June 10, 1986, the seller took back a one-year purchase money mortgage from petitioner in the amount of $173,000.00. Shortly thereafter, on August 25, 1986, this initial purchase money mortgage was replaced by a $200,000.00 first mortgage loan placed with Amalgamated Bank of New York. This loan from Amalgamated was used to retire the seller's loan and to commence construction. The loan proceeds of $200,000.00 were disbursed as follows:

(a) William Duran, in satisfaction of the existing mortgage $169,849.00;

(b) Szold & Brandwen, lender's attorney's fee $1,500.00;

(c) Amalgamated Bank of New York, appraisal fee $550.00;

(d) Amalgamated Bank of New York, 2 months real estate tax escrow $160.00;

(e) Askold Lozynsky, attorney for William Duran $150.00;

(f) Dennis Elkin, title closer $75.00;

(g) Omni Abstract Corp., to the charges pursuant to the bill annexed hereto $2,976.00;

(h) 645 East 11th Street Associates $24,740.00.

Petitioner commenced renovation of the premises, describing the same as a complete rehabilitation (a "gut"), including the removal of beams, roof, mechanical systems (plumbing, heating, electrical, etc.) and some walls.

On or about September 8, 1986, petitioner obtained a construction loan in the amount of $382,500.00 from the Progressive Credit Union secured by a second mortgage on the premises. This loan amount represented petitioner's estimate of the funds necessary to complete renovation of the premises. However, certain problems were encountered, both structural and economic, such that additional partner infusions in the amount of $155,597.00 were required in order to complete the rehabilitation, convert the premises to condominium ownership and effect sales of the units.

On April 21, 1987, a Certificate of Occupancy for the premises was issued by the City of New York - Department of Buildings. As of approximately the same time, petitioner had entered into agreements for the sale of certain units, with closings projected to occur in or about August 1987. Petitioner alleged, however, that the stock market crash during the summer of 1987, as well as the accompanying and ongoing general economic downturn, caused these sales to be lost and required petitioner to offer substantial price reductions in order to make any sales.

Petitioner's first condominium unit sale occurred in December of 1987, and sales of units continued thereafter until the last unit was sold in September of 1988.

Petitioner initially estimated that its gain on the project would range between $400,000.00 to $450,000.00, thus resulting in a gains tax liability in the area of $40,000.00 to $45,000.00. Petitioner had hoped, in effect, to prepay such gains tax liability by paying a higher percentage of such tax on its earliest unit sales ("front loading"). However, due to certain unforeseen expenses of the project, as well as the described slowdown in the economy and resultant slowdown in sales, petitioner believed that, after its first few unit sales, it had significantly overpaid its gains tax liability. In turn, on May 1, 1989, the Division of Taxation received from petitioner a claim for refund alleging petitioner's gains tax liability to be

$12,310.00.[2] This claim also alleged that petitioner had made gains tax payments totalling $43,000.00, thereby leading to a claimed refund due of $30,690.00.

In response to petitioner's claim for refund, the Division conducted an audit. The Division calculated petitioner's liability, post-audit, as follows:

Gross consideration.....	$1,248,211.00	
Less: brokerage ($6,840.00)		
reserve fund ($5,000.00).....	(11,840.00)	
Balance.....	$1,236,371.00	
Original purchase price.....	(892,955.00)	
Gain.....		~~$ 343,416.00~~

The Division, in turn, calculated petitioner's gains tax liability to be $34,341.60. Despite petitioner's claim of having paid gains tax of $43,000.00, the Division could only verify payments of $29,879.00. Thus, the Division denied petitioner's claim for refund and issued a Notice of Determination in the amount of $4,463.00 as described in Finding of Fact "1" (supra). The principal areas of audit change centered on disallowance of certain claimed expenses most of which were incurred after the April 21, 1987 issuance of the certificate of occupancy for the premises. These items relate to claimed interest expense, sales expenses and construction expenses.

By its post-hearing submissions, petitioner specified those claimed expenses disallowed by the auditor and remaining at issue to be the following:

(a) Interest Expense:

(1) Amalgamated Bank Loan: Total interest expense on the $200,000.00 Amalgamated Bank loan amounted to $31,412.00, while interest expense on the Progressive Credit Union construction loan incurred after issuance of the certificate of occupancy on April 21, 1987, totalled $44,617.00 (totalling together $76,029.00). Petitioner asserts that the auditor allowed all closing costs on the Amalgamated Bank

[2]Petitioner's refund claim lists gross sales (consideration) of $1,233,256.00, basis (original purchase price) of $1,110,148.93, resulting gain of $123,107.00 and gains tax due of $12,310.70.

loan but refused to allow any interest expense on such loan. Petitioner points out that while the Division does not allow interest expense incurred on acquisition financing, such interest expense is in fact incurred and must be paid by the borrower (petitioner herein). In addition, petitioner alleges specifically that some $41,000.00 of such loan was used for construction, and that no interest expense was allowed on such portion of the loan.

(ii) Progressive Credit Union Construction Loan: With respect to the construction loan, petitioner argues that the severe economic conditions encountered should serve to allow deduction of the interest expense incurred after issuance of the certificate of occupancy notwithstanding that the building was physically ready for occupancy.

(iii) Progressive Credit Union Closing Costs: In this same area, petitioner also argues that there were "other closing costs" relative to the construction loan, in the amount of $6,282.00, disallowed upon audit.

(b) Sales Expenses:

(i) Advertising: Petitioner challenges the disallowance of claimed sales expenses in the amount of $23,618.00 incurred after the issuance of the certificate of occupancy. Petitioner claims that condominium sales do not result (in general) from "word of mouth" advertising, and alleges that the advertising expenses disallowed were necessary costs to create sales.

(ii) Legal and Related Fees: Petitioner also challenges the disallowance of $12,322.00 in claimed "legal and related fees" paid at the closings of various units. Petitioner described these amounts as "concession(s) to the buyer(s)", which allowances resulted in a net reduction of price and, therefore, of gain.

(c) Construction Expense:

(i) Payroll Items: Petitioner challenges the disallowance of certain alleged construction-related payroll expenses incurred during construction. According to petitioner, these expenses would have been paid during construction if there had been "sufficient profit" at the time. These amounts, totalling $20,167.00, include amounts for

FUTA and for New York State income tax and unemployment insurance, as follows:

"DATE	CHECK #	PAYEE	PURPOSE	AMOUNT
2/25/87	342	NYS Inc. Tax	3rd Qtr 86 Banaco	$2,681.00
2/25/87	343	NYS Unemp Ins.	3rd Qtr 86 Banaco	$2,895.00
8/29/87	395	NYS Inc. Tax	4th Qtr.86 Banaco	$2,738.00
8/29/87	396	NYS Unemp Ins.	4th Qtr 86 & 1st ..... Qtr 87 for Banaco, Inc.	$2,999.00
12/10/87	407	IRS FUTA	1st Qtr 1987 ..... ID 13-3358339	$6,362.00
12/11/87	408	IRS FUTA	2nd Qtr 1987 ..... ID 13-3358339	$1,238.00
11/19/87	24206	NYS Unempl Ins.	1st Qtr. 1987	$1,254.00
			TOTAL	$20,167.00"

(ii) Construction Materials: Petitioner also challenges the disallowance of certain alleged construction expenses paid after issuance of the certificate of occupancy. Petitioner described these expenses as modifications required under contract such as physically combining apartments 3-A and 3-B into one unit, modifying the kitchen and closets in apartment 2-B and completing the façade in front of the commercial (medical) unit. Petitioner alleges that these modifications were not sales expenses but rather were modifications required by contract which allowed petitioner to close on the units and which in fact resulted in a reduction in price received. These costs are claimed in the amounts of $25,128.00 for 1987 and $54,876.00 for 1988.

Petitioner alleges, in sum, that the total expenses allowed per audit ($524,775.00), plus the acquisition price for the premises ($368,140.00), should be increased by the above-described disallowed costs which total $218,418.00.[3] Petitioner thus would calculate its original purchase price for the premises to be $1,111,333.00. Comparing such amount to gross

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[3]The additional costs sought herein are summarized as follows:

Interest Expense		$ 76,029.00
Construction Mortgage Closing Costs	6,282.00	
Sales Expense		35,918.00
Construction Expense		100,171.00
Total		$218,418.00

consideration received of $1,236,371.00, leaves a $125,038.00 gain subject to tax.[4] Hence, petitioner reiterates its

claim for refund of gains tax paid in excess of $12,503.80 (i.e., $125,038.00 x .10) and, in hand, seeks cancellation of the Notice of Determination described in Finding of Fact "1".

By its post-hearing submission, the Division of Taxation allowed two concessions to the areas in dispute. First, the Division agreed to waive penalty as set forth on the Notice of Determination. In addition, the Division agreed to reduce the amount of tax due as claimed on such Notice by the amount of $388.60. This reduction, as well as the Division's position herein, was more specifically described in an affidavit submitted (as specifically permitted) with the Division's post-hearing brief, as follows:

(a) Interest Expense:

(i) Amalgamated Bank Loan: The Division initially disallowed all interest expense incurred on the Amalgamated Bank loan on the premise that the same

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[4]The dollar figures presented in petitioner's refund claim vary to some extent from those included in its post-hearing documents and from those appearing in the audit report and workpapers. For example, petitioner's refund claim and October 24, 1992 letter brief list gross consideration of $1,233,256.00, whereas its September 6, 1992 submission lists gross consideration of $1,232,000.00. By contrast, the audit report lists consideration (after brokerage and reserve fund) to be $1,236,371.00. Similarly, petitioner's refund claim lists original purchase price of $1,110,148.92, whereas its September 6, 1992 submission lists original purchase price of $1,105,033.00. However, adding the specific amounts listed in such latter submission totals to $1,111,333.00 -- the same figure set forth hereinabove. Finally, petitioner's refund claim seeks a refund of $30,690.00 and claims payments of $43,000.00, whereas petitioner's post-hearing submission speaks of a $16,000.00 refund sought, and the audit report lists payments of only $29,879.00. To establish certainty and absent clear reconciliation of any of these numbers by either party (and lacking any specific evidence from petitioner to establish the accuracy of its figures in place of those found on audit), the following amounts shall be accepted herein as calculational starting points:

Consideration (after brokerage and reserve).....	$1,236,371.00	
Original Purchase Price Allowed: Expenses.....	524,775.00	
Acquisition.....		368,140.00
Gains Tax Payments by Petitioner.....	29,879.00	
Additional Costs at Issue Herein.....	218,418.00	

represented interest expense on acquisition financing. However, the Division notes that according to closing statements submitted by petitioner, together with disbursement checks relative to this loan, the total amount of loan proceeds disbursed to petitioner was $24,740.00. Since petitioner used these proceeds disbursed to it for construction (as opposed to acquisition), the Division agreed to allow $3,886.00 of additional construction interest, thereby reducing the amount of tax due per the Notice of Determination by some $388.60.[5]

(ii) Progressive Credit Union Construction Loan: With respect to disallowing construction loan interest expense incurred after April 21, 1987, the Division relies on 20 NYCRR 590.16(e) for the proposition that a construction period ends when the certificate of occupancy is issued.

(iii) Progressive Credit Union Closing Costs: With respect to additional closing costs of $6,282.00 on the construction loan, the Division asserts that, by reference to Audit Schedule "C",[6] the same expenses were in fact allowed with the exception of $163.00 in special additional mortgage recording tax. The Division notes also that in addition to such additional closing costs, some $10,216.00 of costs and expenses not previously claimed on this loan were also allowed upon audit. No specific challenge was raised by petitioner regarding the $163.00 amount disallowed.

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[5]The calculation of this allowance follows:

Total interest on Amalgamated Bank loan	$ 31,412.00
Disbursed funds available for construction purposes	$ 24,740.00
Total funds borrowed	$200,000.00

$\frac{\$\ 24{,}740.00}{\$200{,}000.00} \times \$31{,}412.00 = \$3{,}886.00$ (construction interest)

[6]Audit Schedules "C", "D" and "E" are included as part of Exhibit "H" introduced in evidence at hearing.

(b) Sales Expenses:

(i) Advertising: Sales and advertising expenses ($23,618.00), listed specifically as "office advertising" on Audit Schedule "E",[6] were disallowed on audit as not being "customary, reasonable and necessary legal, engineering and architectural fees incurred in selling real property".

(ii) Legal and Related Fees: The additional $12,322.00 in "legal and related fees" disallowed apparently represent the first two items listed on Audit Schedule "E", to wit, "legal, accounting and engineering fees" ($7,309.00) and "filing and recording fees" ($5,013.00), both disallowed for lack of substantiation. In fact, on such Schedule "E" the abbreviation "subs", presumably short for substantiation (or the lack thereof), appears next to these disallowed amounts. To further specify, the $7,309.00 disallowed amount represents a portion of the $21,550.00 total amount of legal, accounting and engineering fees claimed by petitioner on its initial gains tax filings.[7] Reference to Exhibits "O" and "H" introduced in evidence at hearing reveals that the $14,241.00 balance of such claimed expenses was allowed upon audit.[8] In turn, other than describing the disallowed amounts as "concessions to buyers" and "a net reduction of price", petitioner offered no specific evidence in substantiation of such amounts.

In the same manner, the $5,013.00 amount of filing and recording fees disallowed represents a portion of the $17,102.00 initially claimed as "filing and recording fees" on petitioner's gains tax filings. More specifically, the $17,102.00 claimed amount was

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[7]Petitioner's Supplemental Form DTF 700 ("Schedule of Original Purchase Price for Condominiums and Cooperatives"), included in evidence as Exhibit "N", claims accounting fees of $2,000.00 (DTF 700, Part III, line 24) and legal, accounting and engineering fees of $19,550.00 (DTF 700, Part IV, line 1).

[8]This $14,241.00 allowed amount is comprised of $8,889.29 plus $1,475.00 in legal fees and $3,877.00 in engineering fees.

reduced

by construction loan title insurance of $7,413.50 and construction loan filing and recording fees of $4,675.00 (totalling together $12,088.50 per Exhibit "O", page 1) to result in the disallowed as unsubstantiated amount of $5,013.00. As above, petitioner described such disallowed amount as "concessions to buyers" and "a net reduction in price", but offered no specific substantiation for the disallowed amounts.

(c) Construction Expense:

(i) Payroll Items: The Division continues to disallow construction payroll expenses ($20,167.00) for lack of substantiation (presumably of payment).[9] In fact, footnote "4" to Audit Schedule "D" states, with respect to disallowed items, that "[d]isallowance is mostly due to lack of substantiation. The other reason is that construction period [is] being reduced to April '87." As part of its post-hearing submission, petitioner included certain letters and cancelled checks relating to Internal Revenue Service levies against bank accounts for Federal payroll taxes owed for the fourth quarter of 1986 and the first three quarters of 1987, and a letter from petitioner to the I.R.S. claiming all Federal tax amounts had been paid by August or September of 1988. Review of these

materials does not reveal any apparent correlation between the amounts shown thereon versus the payroll amounts claimed herein. Further, none of such materials relate to State payroll amounts claimed herein (see Finding of Fact "10[c]"), but rather indicate they relate to Federal

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[9]Audit Schedule "D" lists claimed "payroll and fringe benefits for construction personnel" of $159,630.00 versus an allowance of $164,959.00 for such expenses (representing an increase of $5,328.00 over the amount claimed initially). While not specified directly, the $20,167.00 amount sought by petitioner may not have been included under this heading but may have been included among the $369,073.00 of "construction material" claimed (per Audit Schedule "D") and, in turn, been a part of the $213,479.00 amount of such item disallowed. This possibility is noted since petitioner's post-hearing submission describes the $20,179.00 payroll amount as within the construction materials category and notes "[t]he problem in this category is primarily one of nomenclature".

withholding and FICA amounts and not the FUTA amounts at issue herein.

(ii) Construction Materials: With respect to the additional construction materials expense, the $25,128.00 of claimed expense for 1987 was allegedly allowed by the original auditor with the exception of one item (unspecified) which was disallowed as beyond the construction period. Review and comparison of Exhibit "O" to petitioner's post-hearing submission labeled Exhibit "F" (pertaining to 1987 disbursements made after April 1, 1987) supports this contention of allowance. With respect to the $54,876.00 claimed as construction expenses for 1988, the Division was unable to determine petitioner's basis for such figure and, therefore, continues to disallow the same. Careful and repeated review of petitioner's post-hearing submission labeled Exhibit "F" relative to 1988 disbursements fails to present any apparent method for arriving at the amount claimed.

SUMMARY OF PETITIONER'S POSITION

Petitioner maintains that in practical effect it is impossible to sell condominium units until a certificate of occupancy is acquired, but goes on to argue that once a certificate of occupancy is acquired, construction costs are no longer allowable for gains tax purposes. Petitioner argues, in this vein, that "if we'd known that up front, what we would have done is try to set up as many sales as possible and gone for our certificate of occupancy at the last minute...." Petitioner also argues that a construction period should not necessarily stop when a certificate of occupancy is issued, alleging that even under the best of circumstances it usually takes a substantial period of time to sell out all units. Petitioner points to the stock market crash of 1987 claiming the same to constitute extraordinary circumstances entitling petitioner to extend its construction period. Petitioner noted, with respect to payroll items, that payment of the same was "put off" since petitioner had to continue paying principal and interest on its acquisition/construction loans. Petitioner characterizes its main problem as "carrying completed units for several months with underlying debt at a 15% interest rate..." (emphasis added). Petitioner summarizes its overall position as follows:

> "Our contention has always been that the only substantive 'gain' from this undertaking was that reflected in all our tax and partnership returns.... The State, on the other hand, by selectively ignoring loans, interest thereon, setting arbitrary cutoff dates for allowable expenses, and disregarding the economic chaos which followed the 1987 Stock Market crash, contends that there were profits of some $300,000.00 on this project."

Finally, petitioner argues that "the gains tax laws as currently written are both unconstitutional and confiscatory".

CONCLUSIONS OF LAW

A. Tax Law Article 31-B, effective March 28, 1983, provides for the imposition of a tax at the rate of 10%, commonly known as the "gains tax", upon gains derived from the transfer of real property within New York State. Tax Law § 1440.3 defines "gain" as:

> "the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price".

B. In this case, no specific dispute as to the amount of consideration received by petitioner has been raised (as described more fully in Finding of Fact "11", footnote "4", the same is $1,236,371.00). Rather, the only dispute centers upon certain expenses claimed as allowable by petitioner but rejected by the Division as the result of its audit. More specifically, petitioner seeks to increase allowable expenses (and hence reduce the amount of gain subject to tax) by the specific items described in Findings of Fact "10" and "12" summarized as follows:

Item	Amount
Interest Expense	$ 76,029.00
Construction Mortgage Closing Costs	6,282.00
Sales Expense	35,918.00
Construction Expense	100,171.00
Total	~~$218,400.00~~

C. Each of the above additional expenses sought will be dealt with separately, as follows:

(a) Interest Expense:

(i) Amalgamated Bank Loan: With respect to the Amalgamated Bank loan it is well established that interest expense on acquisition financing is not an allowable expense for gains tax purposes, notwithstanding the fact that a purchaser incurs and is obligated to pay interest on funds borrowed to acquire property (20 NYCRR 590.15[c]; Matter of

Mattone v. Dept. of Taxation and Finance, 144 AD2d 150, 534 NYS2d 478). Accordingly, the Division properly disallowed interest expense on the Amalgamated Bank loan to the extent that loan proceeds were used for acquisition of the premises. In contrast, however, interest expense incurred on funds borrowed and used for the construction of capital improvements is an allowable expense at least as incurred during the period of construction (20 NYCRR 590.16[c]; Matter of Mattone v. Dept. of Taxation and Fin., supra). To this end, the Division allowed interest expense on the $24,740.00 portion of the Amalgamated Bank loan proceeds disbursed to petitioner and used for construction (see, Finding of Fact "12" and footnote "5"). While petitioner alleges the entire difference between the $200,000.00 loan amount and the portion thereof used to satisfy the seller's existing first mortgage was used for construction, the facts do not support such assertion. Specifically, the closing statement and disbursement checks on this loan (submitted post-hearing) show a disbursement of only $24,740.00 to petitioner and support the Division's calculation of allowable interest expense using such figure.

(ii) Progressive Credit Union Construction Loan: Petitioner seeks allowance of all interest expense on its second (construction loan) mortgage including, as at issue, interest expense incurred after issuance of the certificate of occupancy. In essence, petitioner seeks to extend its construction period to a date after issuance of the certificate of occupancy claiming ongoing and unanticipated difficulties due to the state of the economy. This position is rejected. Petitioner itself characterized its problem as economic, to wit, "carrying completed units for several months with underlying debt..." (see Finding of Fact "13). While the economic conditions during the summer of 1987 and thereafter undeniably affected petitioner's ability to sell its units, the same does not mean that such units were not completed and ready for occupancy, as is supported by the issuance of the certificate of occupancy. Costs of carrying completed units, including interest costs, are not allowable expenses in reduction of gain and the Division properly disallowed interest expense incurred after April 21, 1987 (20 NYCRR 590.16[d], [e];

Matter of Mattone v. Dept. of Tax & Fin., supra; Matter of 1230 Park Assoc., Tax Appeals Tribunal, July 27, 1989, confirmed 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455).

(iii) Progressive Credit Union Closing Costs: As detailed in Finding of Fact "12(a)(iii)", these costs were, in fact, allowed by the Division of Taxation upon audit, except for some $163.00 of special additional mortgage recording tax. Petitioner offered no specific argument with regard to the disallowance of such latter amount.

(b) Sales Expenses:

(i) Advertising: The $23,618.00 portion of this item labeled "office advertising" is simply not legal, engineering or architectural fees incurred in selling real property and thus the Division properly disallowed the same (20 NYCRR 590.17).

(ii) Legal and Related Fees: The expenses claimed in this area, labeled on audit "legal, engineering and architectural fees" ($7,309.00) and "filing and recording fees" ($5,013.00), were disallowed as unsubstantiated. In turn, other than the description that these items were "concessions to buyers" and "reductions of price", there has been no direct substantiation or other evidence offered which would support allowance of such claimed expenses. Hence, disallowance of such expenses is sustained.

(c) Construction Expenses:

(i) Payroll Items: The portion of claimed construction expense for payroll items was disallowed as unsubstantiated. As described in Finding of Fact "12(c)(i)", the materials submitted post-hearing do not substantiate or even specifically tie to the claimed amounts. Hence, disallowance of such items is sustained.

(ii) Construction Materials: As detailed in Finding of Fact "12(c)(ii)", the expenses for 1987, totalling $25,128.00, were allowed on audit.[10] However, the basis or means of

[10]The dates of payment on these allowed expenses all fall after the date of issuance of the certificate of occupancy. While the record does not specify as much, it is presumed the auditor allowed such expenses as having been incurred during the construction period (though paid after).

calculating the dollar amount of construction materials expense claimed for 1988 ($54,876.00) cannot be gleaned from the evidence proferred and thus such amount must remain disallowed.

D. In sum of the foregoing, the disallowances made upon audit are squarely within the parameters of the Tax Law (Article 31-B), regulations thereunder and existing case law. In this regard, it is noted that gain for purposes of Article 31-B is not the same as profit, gain or income for income tax purposes. Further, the fact that economic decline may have depressed unit sales does not mean that such units were not substantially completed and ready to be placed in service as of the date petitioner received its certificate of occupancy. Similarly, the fact that sales revenue was less than anticipated and/or that expenses were higher than initially projected does not provide a basis for changing the rules as to how gain is calculated. Finally, the constitutionality of Tax Law Article 31-B, and specifically its definition of original purchase price, has been sustained (see, Trump v. Chu, 65 NY2d 20, 27, appeal dismissed 474 US 915).

E. The petition of 645 East 11th Street Associates is granted to the extent of the Division of Taxation's concessions waiving penalty and reducing tax due by $388.60 (see, Finding of Fact "12"), but is otherwise

denied and the Notice of Determination dated October 30, 1989, as adjusted in accordance herewith, is sustained.

DATED: Troy, New York
May 21, 1992

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE