STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioners, Broadway-111th Street Associates, LLC, Celestial Seven Co., Creative Developments Co., Downing Development Co., 50 King Street Co., 54 Satelite Co., 467 Associates, Four Star Holding Co., 155 Associates, Third 28th Company, West 83rd Associates and Zurich Holding Company, c/o Buchbinder & Warren, One Union Square West, New York, New York 10003, filed petitions for revision of determinations or for refunds of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 17, 2002 at 11:20 A.M., with all briefs to be submitted by December 9, 2002, which date commenced the

six-month period for issuance of this determination. Petitioners appeared by Goldberg, Weprin & Ustin, LLP (Matthew E. Hearle, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

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

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

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

FINDINGS OF FACT

1. Petitioners Broadway-111th Street Associates, Creative Developments Co., Downing Development Co., 50 King Street Co., and West 83rd Street Associates, were sponsors of plans pursuant to which certain buildings were converted to cooperative ownership. Petitioners Celestial Seven Co., 54 Satelite Co., 467 Associates, Four Star Holding Co., 155 Associates, Third 28th Company and Zurich Holding Company, were sponsors of plans pursuant to which certain buildings were converted to condominium ownership.

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

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

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

5. In late May 1997, each of the petitioners filed its final return. On each of such returns, each petitioner reduced the consideration received on sold apartments by a portion of its reserve

account and working capital account determined via allocation between sold apartment units and unsold apartment units in accordance with Section II of the Final Return Form.[1]

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

TAXPAYER NAME	DTA NUMBER	REFUND AMOUNT
Broadway-111th Street Assoc	818599	$27,867.00
Celestial Seven Co.	818600	$ 5,657.00
Creative Development Co.	818601	$ 8,987.00
Downing Development Co.	818602	$ 1,959.00
50 King Street Co.	818603	$ 11,248.20
54 Satelite Co.	818604	$ 7,053.50
467 Associates	818605	$ 10,060.10
Four Star Holding Co.	818606	$ 5,866.10

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

2 The correct cite is 20 NYCRR 590.38.

155 Associates	818607	$ 42,043.00
Third 25th Company	818608	$ 3,425.90
West 83rd Street Associates	818609	$ 86,708.00
Zurich Holding Company	818610	$ 7,053.50

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

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

8. Petitioners each filed requests for conciliation conferences ("requests") with the Division's Bureau of Conciliation and Mediation Services ("BCMS") challenging the denials of their refund claims based on the Division's refusal to allow petitioners to exclude the full amounts contributed to the reserve accounts and working capital accounts from consideration. Each of the requests, except for that filed for Celestial Seven Co., also specifically identified and asserted that petitioners were entitled to further refunds on the basis of the Tax Appeals Tribunal's decision in ***Matter of 244 Bronxville Associates*** (Tax Appeals Tribunal, June 10, 1999).[4] In ***Bronxville***, the Tribunal held that taxpayers were not limited to allocating OPP

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

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

between taxable and nontaxable apartment units based strictly on such objective criteria as the number of shares allocated to particular apartment units, square footage, number of units or common elements, but rather that OPP should be apportioned to the units subject to tax "based upon the stated relative fair market value methodology" noted at 20 NYCRR 590.20, a result which reflects and accounts for the sometimes comparatively far lower value of unsold units as opposed to sold units.

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

TAXPAYER NAME	DTA NUMBER	REFUND AMOUNT
Broadway-111th Street Assoc	818599	$322,396.00
Celestial Seven Co.	818600	$ 5,657.00
Creative Development Co.	818601	$ 28, 671.00
Downing Development Co.	818602	$ 4,470.00
50 King Street Co.	818603	$ 70,528.00
54 Satelite Co.	818604	$ 87,884.00
467 Associates	818605	$173,457.00
Four Star Holding Co.	818606	$112,103.00
155 Associates	818607	$601,707.00
Third 28th Co.	818608	$ 28,994.00
West 83rd Street Associates	818609	$ 86,708.00
Zurich Holding Co.	818610	$ 10, 671.00

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

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

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

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

14. Ms. Paparo testified to her opinion of the value of the unsold apartment units and submitted a summary document listing, on a separate page for each petitioner, the unsold units in the various buildings, the number of rooms and bathrooms in each, the status of each (rent

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

CONCLUSIONS OF LAW

A. Article 31-B of the Tax Law, now repealed, imposed a tax at the rate of ten percent on gains derived from the transfer of real property or certain interests therein, as defined. For purposes of computing the gains tax, cooperative and condominium conversions were treated as a single transfer, with the tax due upon the transfer of shares to individual apartment unit purchasers pursuant to the plan, based upon an apportionment, among the shares, of the original purchase price for the real property and the total consideration anticipated under the plan (Tax Law former § 1442[b]; ***Matter of Mayblum v. Chu***, 67 NY2d 1008, 503 NYS2d 316.)

B. "Consideration" was defined as "the price paid or required to be paid for real property or any interest therein . . ." (Tax Law former § 1440[1][a]; 20 NYCRR 590.8). "Original purchase price" ("OPP") was defined as "the consideration paid or required to be paid by the transferor to acquire the interest in the real property, plus the amount paid for any capital improvements made or required to be made to the real property . . ." (Tax Law former § 1440[5][a][i]; 20 NYCRR 590.8). Regulations of the Commissioner of Taxation and Finance

addressed the methodologies to be utilized in determining consideration and original purchase price (20 NYCRR 590.9). Ultimately, "gain" subject to tax was defined 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" (Tax Law former § 1440[3]). The gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996. The repeal applied to transfers of real property that occur on or after June 15, 1996. (***See***, L 1996, ch 309, §§ 171-180.) Pursuant to the repeal legislation, final returns were to be filed reflecting and accounting for taxable transfers (***see***, Findings of Fact "3" and "4").

C. Petitioners' first argument is that contributions to reserve accounts and working capital accounts are not to be included in consideration subject to gains tax. Thus, petitioners argue, the entire amounts contributed to such accounts with respect to each petitioner's conversion, rather than just the amounts allocated to the gains taxable units, should serve as reductions to consideration potentially subject to gains tax. Petitioners' position is premised on 20 NYCRR 590.38, which excluded amounts paid to reserve accounts and working capital accounts from consideration subject to gains tax, as follows:

> Q. Are payments by the realty transferor to a reserve fund or working capital fund included in consideration?
>
> A. No, payments made by a sponsor to a reserve fund or working capital fund held by an apartment corporation do not constitute consideration paid by purchasers for occupancy if such payments are required pursuant to the offering plan. Such payments are not included in consideration whether the realty transferor pays amounts directly to such funds on the transfer of the shares or if part of the purchase price goes directly to such funds from the transferee of the shares.

D. The Division's refund denial letters (notices of disallowance) explain the Division's position, which requires allocation of the reserve and working capital amounts among all of the units, as follows:

> The section in the Offering Plan which is entitled Reserve Fund and Working Capital Fund states that funds are to be used for making capital repairs, replacements and improvements for the health and safety of the residents of the building. Since the subject funds are intended to benefit all the residents, whether they are tenants or unit owners, it is appropriate to allocate the portion of those funds to the taxable units or shares transferred after March 28,1983 and before June 15, 1996.

E. Petitioners refer, in their brief, to a number of Division letter rulings which have consistently concluded and applied the subject regulation under the following rubric:

> [T]he consideration paid by the unit purchasers for their shares in the cooperative should not include the total of [the reserve] funds. This result applies whether the money for such funds is paid directly by the unit purchasers to the cooperative corporation or if it is paid by the unit purchaser to the realty transferor who in turn pays it over to the cooperative. In either case, because the amounts going into the funds are not costs of the unit purchaser to acquire the interest in real property, do not benefit the realty transferor and do ultimately benefit the unit purchasers, the amount of the funds do not constitute consideration paid by the unit purchasers for their shares. (Private Letter Ruling 44, 1984 NY Tax LEXIS 584 [January 30, 1984].)

> As set forth at Gains Tax Regulation Section 590.38, when the sponsor of a cooperative plan who is the realty transferor for Gains Tax purposes is required to make payments pursuant to the offering plan, to a reserve fund or working capital fund, such payments may be subtracted from the total anticipated selling price of all the units when computing the anticipated gross consideration. The subtraction of the payments is allowed since it is the position of the Department that it would not be equitable to compute the gain subject to tax by including amounts in consideration that must be paid to such funds in order to comply with the requirements of the offering plan. (Private Letter Ruling 249, 1986 NY Tax LEXIS 1354 [June 11, 1986].)

The Division does not dispute the existence of these letters, nor does it dispute the theory and result expressed therein. Rather, the Division notes that such rulings are not binding except with respect to the particular taxpayers to whom they were issued, and that such rulings (as well as the regulation at 20 NYCRR 590.38) were issued in the context of fully taxable conversion projects. There is no question that in fully taxable projects all of the reserve account and working capital account amounts, though allocable to taxable units, would not be included in consideration subject to gains tax per 20 NYCRR 590.38.

F. The Division's position herein, as carried out on its Final Return Form, is that the amounts in the reserve accounts and working capital accounts should first be allocated ratably to and among all of the units in the conversion. Thereafter, the amounts so allocated to the gains taxable units would be removed or excluded from the consideration for such units per 20 NYCRR 590.38. Petitioner's position, in contrast, is that such amounts are simply not consideration and are thus excluded from any computations. Both the Division's approach and petitioner's approach, in fact, arrive at the result that no part of the reserve account and working capital account amounts are subjected to gains tax. Petitioners' position, however, overlooks the fact that such amounts are indeed a part of the monies required under the plans of conversion and, most importantly, that the same are deposited, held and ultimately are used for the benefit of all of the units, as required under the terms of each of the conversion plans. The Division's method, which first requires an allocation of these funds among all of the units, achieves the result required under 20 NYCRR 590.38 (i.e., nontaxability) by excluding each taxable apartment's pro-rata share of such account amounts so as to avoid subjecting the same to gains tax. In turn, the balance of the account amounts (i.e., the amounts allocated to the nontaxable

units) are excluded from gains tax by virtue of the fact that such units, to be transferred on or after June 15, 1996, are not subject to gains tax at all.

The Division's approach is entirely consistent with the clear aim of the regulation at 20 NYCRR 590.38, and its mandate that such fund amounts are not to be included in consideration subject to gains tax. The Division's method accomplishes its result in a manner which recognizes the fact that such fund amounts are intended for uses (i.e., repairs, replacements and improvements for the health and safety of the residents of the buildings) which benefit *all* units and not just the gains taxable units. Hence, it is entirely reasonable to first allocate such fund amounts among all of the units, and then exclude, from gains taxable consideration, the portions of the funds so allocated to such taxable units. The Division's method achieves the desired result of excluding reserve and working capital account amounts from consideration subject to gains taxation, while at the same time avoiding any windfall or disproportionate tax advantage. As noted, it is true that petitioners' method also achieves the result that none of the reserve account and working capital account amounts are subjected to gains tax. However, petitioners' proposed method of excluding reserve and working capital from consideration, in effect, allocates all of such fund amounts to the gains taxable units only, and effectively ignores the premise that such amounts are available for and intended to benefit all of the units. As a result, petitioners' method disproportionately reduces the taxable consideration attributable to the gains taxable units and thus understates the gains tax liability properly attaching to such units.

G. Contrary to petitioners' assertions, the allocation required under the Division's method has not engrafted a new requirement on the regulation. Rather, the Division has simply applied and carried out the ultimate aim of the regulation in a manner consistent with the nature of the funds in issue so as to arrive at the result mandated by the regulation, to wit, that such funds not

be included in gains taxable consideration or subjected to gains tax. At first glance, one might conclude that reducing the gains taxable units' consideration only by an amount equal to such units' allocated shares of the reserve account and working capital account, results in the balance of such account amounts being subject to the gains tax. However, such is not the case, since the balance of units (and the reserve and working capital amounts allocated thereto) are simply not subject to the tax. In end result, the Division's method eliminates all of such fund amounts from being subjected to gains tax, as is required under the applicable regulation, using a method consistent with the nature of the funds and the repeal of Article 31-B. Accordingly, the Division's method of eliminating reserve account and working capital account amounts from consideration subject to gains tax is sustained, and petitioners' claims for refund based on their challenge to such method were properly disallowed.

H. Treated next is the claim that petitioners are entitled to refunds based upon application of the fair market value OPP allocation methodology approved by the Tax Appeals Tribunal in ***Matter of 244 Bronxville Associates (supra)***. There are two aspects to petitioners' claims. The first question is whether such claims, admittedly raised after the period of limitations for filing refund claims had expired, may nonetheless be considered because they were either: 1) proper amendments to petitioners' initial, timely filed, refund claims and thus were themselves timely by relation thereto or, 2) the Division waived any timeliness issue when it began to consider the merits of such claims. The second question is whether, assuming the claims may be considered timely, petitioners have provided sufficient proof of the fair market value of the unsold apartment units as is required in order to apply the methodology sanctioned in ***Bronxville***.

I. Pursuant to the gains tax repeal legislation, final return forms from which taxable gains and gains tax due could be computed were to be filed by May 31, 1997 (***see***, L 1996, ch 309, §

180[b][i]). Petitioners complied with this filing requirement. In turn, the period of limitations for claiming overpayments of gains tax closed on May 31, 1999 (***see***, L 1996, ch 309, § 180[c]). Again, petitioners complied with this requirement when they filed their initial claims for refund based on the challenge to the Division's required reserve account and working capital account allocation method.

J. As detailed in Finding of Fact "6", each of petitioners' initial refund claims directly referenced 20 NYCRR 590.38 and sought refunds solely on the very specific basis that the entire amounts contributed to reserve accounts and working capital accounts, as opposed to only the amounts allocated to the taxable units, should be excluded from the consideration allocated to the taxable units and potentially subject to gains tax. None of these claims mentioned the fair market value OPP allocation method ultimately sanctioned in ***Bronxville*** as a basis or claim for refund. For its part, the Division did not assert that any additional tax was due on any basis at any time. Instead, the Division denied petitioners' refund claims by rejecting the specified basis upon which they were brought, and asserting that the reserve account and working capital account allocation called for in the final return forms was correct.

K. The final paragraph of each refund denial letter recited the following:

> This determination denying your refund claim shall, according to law, be final and irrevocable unless you file a request for a Conciliation Conference with the Bureau of Conciliation and Mediation Services or a Petition for Tax Appeals Hearing with the Division of Tax Appeals within ninety (90) days of the date of this letter.

The Division's letter determinations denying petitioners' claims were, as specified by their last paragraph, the Division's final action on petitioners' claims. As such, they were the statutory documents which gave rise to petitioners' right to challenge such denials by filing, within 90 days thereafter, either a Request for a Conciliation Conference (***see***, Tax Law § 170[3-a][a]) or a

petition for a hearing before the Division of Tax Appeals (***see***, Tax Law former § 1444, § 2006[4]). Petitioners challenged the notices of disallowance by filing requests for conciliation conferences. It was with the filing of these requests, at which point in time the period for filing gains tax refund claims was admittedly closed, that petitioners first raised the claims for refund based upon the ***Bronxville*** decision and methodology. Petitioners maintain these latter claims are timely because they represent merely amendments to the initial, timely filed, refund claims and, further because the Division responded by requesting and reviewing information concerning the value of the unsold units thereby waiving any statute of limitations defense.

L. Petitioners' claims for refund based on the ***Bronxville*** decision and methodology must be denied. As a general proposition, a timely filed general claim for refund may be amended at any time, including after the statute of limitations for filing a claim for refund has expired, so long as such claim has not been finally acted upon (i.e., so long as a statutory notice of disallowance has not been issued) by the taxing authority (***United States v. Memphis Cotton Oil Co.***, 288 US 62, 53 S Ct 278, 77 L Ed 619). A specific claim for refund may also be amended before it is acted upon, even if the statute of limitations for filing a claim has expired, but only if no new investigation of facts is required (***United States v. Andrews***, 302 US 517, 58 S Ct 315, 82 L Ed 398; ***United States v. Garbutt Oil Company***, 302 US 528, 58 S Ct 320, 82 L Ed 405). Petitioners' initial refund claims were clearly specific claims, as opposed to general claims, and such claims were clearly disallowed by the Division in a manner which responded only to the very specific basis upon which such claims were brought. In contrast, the subsequently raised ***Bronxville*** claims were premised upon a basis for refund totally distinct from the initial claims which had already been disallowed. Clearly, the ***Bronxville*** claims required an examination of new information relating to entirely new facts, to wit, the information necessary to arrive at a

determination of the fair market value of the unsold units. The ***Bronxville*** based claims were thus not merely amendments further specifying the initial claims, nor did they involve matters which would rise or fall upon facts which would inevitably have been discovered or even examined as a part of considering the initial claims. The ***Bronxville*** determination and methodology does not have any bearing on the subject matter of the initial claims. Rather, the ***Bronxville*** claims were newly filed refund claims asserting totally different grounds for refund which were submitted after the expiration of the statute of limitations, and the Division had no authority under the statute to consider such untimely claims (L 1996, ch 309, § 180[c]; ***United States v. Garbutt Oil Company, supra.***).

M. The only actual commonality between the initial claims and the ***Bronxville*** based claims is that both seek refunds of gains tax. The initial claims turned upon determining the proper treatment of undisputed dollar amounts of reserve account and working capital account funds, whereas the ***Bronxville*** claims require the unrelated and distinctly different determination of the fair market sale value of the unsold apartment units. Petitioners' attempt to link the claims by asserting that the entire matter was held open by the initial claims, since the amount of gains tax actually due had not been finally determined, is unavailing. Petitioners' assertion in this regard overlooks the fact that the Division had not asserted any tax due, as well as the fact that specific notices of disallowance had already been issued with respect to the initial claims. Similarly unpersuasive is the claim that by beginning to examine petitioners' submissions in support of the fair market value of the unsold units the Division, at least implicitly, waived the statue of limitations vis-a-vis ***Bronxville***. On this score, the Division was simply without authority to waive the legislatively imposed statute of limitations on refund claims (L 1996, ch 309, § 180[c]). Ultimately, petitioners were not perfecting existing claims for refund, but rather

were filing entirely new claims, founded upon a separate and unrelated basis, after expiration of the period of limitations for filing. As the Supreme Court explained in ***United States v Garbutt Oil Company (supra)***, "[t]he statement filed after the period for filing claims was not a permissible amendment of the original claim presented. It was a new claim untimely filed and the Commissioner was without power, under the statute, to consider it." Accordingly, petitioners' claims that they are entitled to refunds based on application of the ***Bronxville*** decision and its fair market value OPP allocation methodology, are denied because such claims were not timely.

N. Petitioners argue, citing ***Montgomerie v. Tax Appeals Tribunal*** (291 AD2d 129, 740 NYS2d 141), that their refund claims, including their ***Bronxville***-based claims, were in the ongoing normal litigation resolution process, that they are entitled to the benefit of the "evolution of the law," and that consequently the ***Bronxville*** methodology should apply notwithstanding that the ***Bronxville*** decision was not issued until after the statute of limitations on filing refund claims had closed. There is no question, and the Division does not dispute, that the ***Bronxville*** methodology would be available to petitioners *if* petitioners' ***Bronxville*** claims had been timely filed. Unfortunately, as concluded above, such claims were not timely and therefore petitioners are foreclosed from obtaining the refunds claimed on the basis of the ***Bronxville*** decision (***see, Brault v. Tax Appeals Tribunal***, 265 AD2d 700, 696 NYS2d 579 [Federal pensioners who had included their pensions in income subject to State income tax were denied refunds thereof for lack of timely refund claims, notwithstanding that State taxation of such amounts was subsequently held unconstitutional]).

While not disputing that the ***Bronxville*** methodology would be available (assuming timely refund claims had been filed or that the statutory timeliness bar could be waived), the Division

did not concede that a refund would necessarily be granted. In this regard, under the ***Bronxville*** methodology, it would nonetheless remain incumbent upon petitioners to satisfactorily prove the fair market value of the unsold units in order to establish entitlement to the refunds sought (***see***, Conclusion of Law "O"). Finally, petitioners' argument that a refund may be granted pursuant to Tax Law § 697(d) is misplaced. Such provision, known as the "special refund authority," is found in Tax Law Article 22 (personal income tax), and there is no parallel provision in Tax Law former Article 31-B (gains tax). Moreover, Tax Law § 697(d) requires, as a condition to its application, that there be no questions of fact or law involved. In this case, there is clearly a question of fact, to wit, the fair market value of the unsold units. Thus, Tax Law § 697(d) would be inapplicable in any event.

O. Even if petitioners' ***Bronxville*** based claims were not barred by operation of the period of limitations, they would nonetheless fail. In ***Matter of 244 Bronxville Associates (supra)***, the taxpayer entered into evidence an appraised value for the unsold units determined 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 contrast, petitioners have provided the testimony of a long-time employee of the general partner of the sponsors. Without impugning Ms. Paparo's depth of personal or professional knowledge, it remains that as an employee of petitioners' general partner, her testimony must be viewed as that of an interested witness. As such the objectivity and, hence the value of her testimony, is tempered by the potential for the same to be self-serving. Whatever experience Ms. Paparo had from her dealings concerning the properties in question must be balanced against her lack of independence. Combining this fact with the lack of any corroborating objective evidence of the

fair market value of the unsold units, such as comparable listings or sales, undermines the independent reliability of the testimony as to the value of the units in question. In fact, the record does not specify or identify the actual prices of any units or blocks of units sold after the repeal of the gains tax. Ms. Paparo's testimony might best be described as informed speculation lacking, unfortunately, in independence and complementing objectively verifiable supporting information. On balance, it cannot be concluded that petitioners have met their burden of establishing the fair market value of the unsold units so as to be able to utilize the method of allocation recognized in ***Bronxville***.

P. The petitions of Broadway-111th Street Associates, LLC, Celestial Seven Company, Creative Developments Company, Downing Development Company, 50 King Street Company, 54 Satelite Company, 467 Associates, Four Star Holding Company, 155 Associates, Third 28th Company, West 83rd Associates and Zurich Holding Company are hereby denied and the Division's notices of disallowance of petitioners' claims for refund are sustained.

DATED: Troy, New York
May 15, 2003

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE