STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ASTORIA FINANCIAL CORPORATION	:	DETERMINATION DTA NO. 820197
for Redetermination of a Deficiency or for Refund of Franchise Tax on Banking Corporations under Article 32 of the Tax Law for the Years 1999, 2000 and 2001.	:	

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Petitioner, Astoria Financial Corporation, One Astoria Federal Plaza, Lake Success, New York 11042, filed a petition for redetermination of a deficiency or for refund of franchise tax on banking corporations under Article 32 of the Tax Law for the years 1999, 2000 and 2001.

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 August 17, 2005 at 10:30 A.M., with all briefs to be submitted by February 10, 2006, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Marcum & Kliegman, LLP (Steven P. Bryde, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer Baldwin, Esq., of counsel).

***ISSUE*S**

I. Whether petitioner is entitled to an investment tax credit pursuant to Tax Law § 1456(i) for the year 1999 based upon its acquisition and improvement of a building and its acquisition of the equipment contained therein.

II. Whether petitioner improperly omitted certain assets in its computation of the asset base upon which the alternative minimum tax measured by taxable assets is calculated pursuant to Tax Law § 1455 for the years 2000 and 2001.

FINDINGS OF FACT

ISSUE ONE

1. Petitioner, Astoria Financial Corporation ("Astoria"), and its subsidiaries included in the New York State combined corporation franchise tax returns for the years 1999, 2000 and 2001 are banks and bank holding corporations pursuant to Tax Law Article 32. Astoria's principal place of business is located at One Astoria Federal Plaza, Lake Success, New York. Astoria is the holding company of Astoria Federal Savings and Loan Association ("Astoria Federal").

2. Prior to the years at issue, Astoria acquired Fidelity New York FSB ("Fidelity"), The Greater New York Savings Bank FSB ("The Greater"), and The Long Island Savings Bank ("LISB"). The acquisitions of Fidelity and The Greater were completed in 1995 and 1997, respectively, both acquisitions were accounted for as purchases, and together generated $281.5 million in total goodwill. The LISB acquisition was completed in 1998, and was accounted for as a pooling-of-interests. LISB's mortgage banking operations included offices in 11 states outside of New York State.

3. After the acquisition of LISB, Astoria decided to close all such out-of-state offices and consolidate their mortgage operations into one building in New York State. To this end, Astoria Federal purchased an office building in 1999, located at 2000 Marcus Avenue, Lake Success, New York. This building, including its structural components and significant building improvements made thereto during 1999, as well as all tangible personal property located therein, is owned by Astoria Federal, was acquired during 1999 by purchase (per Internal Revenue Code [IRC] § 179[d]), is depreciable property (per IRC § 167), has a useful life of four years or more, has a situs

in New York, and is principally used (i.e., more than 50% of the building's usable floor space and more than 50% of the operating time of the tangible personal property) in the ordinary course of Astoria Federal's overall business.[1]

4. For the years 1996, 1997, 1998 and 1999, all of Astoria Federal's employees were located in New York State.

5. As part of the regular practice of its mortgage banking operations, Astoria originates mortgage loans, purchases mortgage loans, sells mortgage loans and terminates mortgage loans (via both principal repayments and "charge offs"). Each of these aspects of Astoria's mortgage banking operations is described, briefly, as follows:

Loan Originations: Astoria's loan origination activities include receiving and processing mortgage loan applications and researching the creditworthiness of potential borrowers. Underwriters review the information gathered and determine whether to approve the loans. If a loan is approved, Astoria provides the borrower with cash in exchange for a promissory note. Astoria's mortgage loan originations for the years 1999, 2000, and 2001 totaled $3,338,905,000.00, $1,891,229,000.00 and $3,131,178,000.00, respectively.

Loan Purchases: Astoria purchases mortgage loans, which have already been originated, from third parties. Astoria's mortgage loan purchases for the years 1999, 2000 and 2001 totaled $417,641,000.00, $836,782,000.00 and $1,427,099,000.00, respectively.

Loan Sales: Astoria sells mortgage loans to third parties. Astoria sets loan sale prices, finds buyers, bundles and packages the loans for sale and verifies such sales. Astoria's mortgage loan sales for the years 1999, 2000 and 2001 totaled $490,687,000.00, $125,086,000.00 and $379,929,999.00, respectively.

Loan Terminations: Astoria terminates positions in loans, either as the result of loans being paid off by the borrowers or in instances where the borrower has ceased making loan payments such that Astoria charges the loans off of its books as "bad loans." For the years 1999, 2000 and 2001, Astoria's loan

[1] The last portion of this finding of fact, stating that the building, structural components, improvements and tangible personal property therein is "principally used . . . in the ordinary course of Astoria Federal's business," is not to be read as a fact that such use is in the "ordinary course of business" as a *"broker or dealer . . . of stocks, bonds or other securities . . .,"* in accordance with Tax Law § 1456(i)(2). Such a reading would result in the finding of fact constituting an "ultimate fact" for purposes of the Conclusions of Law reached herein.

terminations totaled $1,953,327,000.00, $1,480,860,000.00 and $3,463,650,000.00, respectively.

6. Included with Astoria's Banking Corporation Combined Franchise Tax Return (Form CT-32-A) for 1999 was a Claim for Investment Tax Credit for the Financial Services Industry (Form CT-44), by which Astoria claimed a credit in the amount of $701,785.00, consisting of $660,000.00 pertaining to the building at 2000 Marcus Avenue and $41,785.00 pertaining to the equipment therein.

7. As the result of an audit, the Division issued to Astoria a Notice of Deficiency dated August 4, 2003 asserting, for the year 1999, additional banking corporation franchise tax due in the amount of $701,785.00 plus Metropolitan Transportation District Surcharge due in the amount of $118,301.00, for a total amount of $820,086.00, plus interest. This notice resulted from the Division's disallowance of Astoria's investment tax credit claimed with respect to the building and equipment at 2000 Marcus Avenue.

8. On July 14, 2005, Astoria filed an Amended Banking Corporation Franchise Tax Return for the year 1999, and a Claim for Credit or Refund of Corporation Tax Paid (Form CT-8) for such year, claiming additional investment tax credit and a resulting tax refund in the amount of $712,277.00 based on additional qualified improvements made to the building at 2000 Marcus Avenue. Subsequent to the date of the hearing, and by mutual agreement of the parties, the Division audited Astoria's claim for additional credit or refund. As a result of this audit, the parties have executed a stipulation whereby the dollar amount of such claim has been reduced to $330,206.00, with such amount remaining in dispute in the same manner as the amount of investment tax credit originally claimed ($701,785.00) and disallowed by the Division.

9. By including mortgage originations as a qualifying activity for purposes of the investment tax credit, Astoria concluded that all of its "usable" floor space and all of the

equipment in the building at 2000 Marcus Avenue were principally used in qualifying activities such that Astoria was entitled to the investment tax credit with respect to such building and equipment. By reference to the floor plans for the building, Astoria presented a breakdown by floor showing total square footage, nonusable square footage and qualifying square footage in the building, as follows:

AREA	NONUSABLE[2]	QUALIFYING	NONQUALIFYING	TOTAL
Cellar	32,002	1,653	0	33,655
First Floor	9,262	24,519	0	33,781
Second Floor	2,376	31,279	0	33,655
Third Floor	2,376	31,279	0	33,655
TOTAL	46,016	88,730	0	134,746

As noted, by including mortgage origination activities as qualifying activities for purposes of determining broker or dealer status, Astoria concluded that 100 percent of the total usable square footage (total square footage [134,746] less nonusable square footage [46,016] equals total usable square footage [88,730]) in the building was "qualifying footage" for purposes of the investment tax credit. While no information was provided as to the amount of time the equipment in the building was used, Astoria reasoned that since all of the activity in the building was qualified activity, then all of the equipment usage was, likewise, qualified usage.

10. In light of the Division's assertion that mortgage origination activities are not qualifying activities for broker or dealer status, and that the building and equipment therein did not, as a consequence, meet the "principal usage" test under Tax Law § 1456(i)(2), Astoria presented an additional breakdown by floor showing its calculation of qualifying and

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[2] Nonusable business floor space included the square footage for elevators, stairs, bathrooms, cafeterias, lounges and cellar parking area. There is no dispute between the parties as to the total amount treated as nonusable space (***see***, TSB-M-98(08)C).

nonqualifying square footage in the building upon the assumption that mortgage origination activities are not qualifying activities, as follows:

AREA	NONUSABLE	QUALIFYING	NONQUALIFYING	TOTAL
Cellar	32,002	1,653	0	33,655
First Floor	9,262	15,069	9,450	33,781
Second Floor	2,376	19,379	11,900	33,655
Third Floor	2,376	17,250	14,028	33,655
TOTAL	46,016	53,352	35,378	134,746

Astoria continues to maintain that mortgage origination activities are qualified activities. However, even assuming such is not the case, by comparing total qualifying square footage (53,352) to total usable square footage (88,730) Astoria concluded that 60.13% of the usable square footage was qualifying square footage, and that the principal usage test for purposes of the investment tax credit was, in any event, met.

11. In recalculating the qualifying square footage under the assumption that mortgage origination activities were not qualified activities, Astoria continued to assert that the square footage devoted to the activities undertaken in certain areas of the bank, such as the mail room, computer systems, conference rooms and lobby, were properly classified as space entirely used in performing qualified activities, notwithstanding that origination activities occurred in such spaces. For other areas and activities, such as sales, closing rooms, compliance, retail processing, and the like, Astoria utilized a calculation to segregate qualifying activities from origination activities, by square footage, as follows:

QUALIFYING ACTIVITIES	NONQUALIFYING ACTIVITIES
Loans purchased $417,641,000	Loans purchased ..... $ 417,641,000
Loans sold 490,687,000	Loans originated 3,218,269,000
Total $908,328,000	Total $3,635,910,000

By comparing qualifying activities ($908,328,000) to allegedly nonqualifying activities ($3,635,910,000), Astoria calculated that 24.98 percent of the usable square footage in these areas was qualified square footage. In turn, in areas where space allocations were made, the calculation of qualified square footage versus nonqualified square footage was based on 24.98%, as computed above, with the exception of:

—the category "appraisal," where Astoria calculated the qualified square footage at 15.247%, based on a comparison of loans sold ($490,687,000) to loans originated ($3,218,269,000); and

—the category "financial accounting," where Astoria calculated the qualified square footage at 23.72%, but did not specify the comparison used to arrive at such percentage.

12. The results of the foregoing calculations with regard to usable square footage for each area and each floor of the building are presented as follows:

CELLAR[3]

AREA	TOTAL SQ. FOOTAGE	QUALIFYING	NONQUALIFYING
Cellar	33,655	1653	0

FIRST FLOOR

AREA	TOTAL SQ. FOOTAGE	QUALIFYING	NONQUALIFYING
Mail room	864	864	0
Total lobby	1,884	1,884	0
Systems	2,376	2,376	0
Bank attorneys	3,744	3,744	0
Total sales	11,156	2,787	8,369

[3] As noted in footnote "2", the parties do not dispute the calculation of nonusable business square footage, and such square footage is not included in the presentation of space allocation herein. Further, the Division has raised no dispute to Astoria's claim that 1,653 square feet of cellar space was used as a file room for loans sold and that this space would constitute qualifying square footage for purposes of the principal use test.

Closing rooms	1,440	360	1,080
Conference rooms	3,055	3,055	0
Total	24,519	15,070	9,449

SECOND FLOOR

AREA	TOTAL SQ. FOOTAGE	QUALIFYING	NONQUALIFYING
Secondary marketing	8,688	8,688	0
Total compliance	1,680	420	1,260
Systems	2,952	2,952	0
Appraisal	1,028	157	871
Total retail processing	4,442	1,110	3,332
Total underwriting	4,968	1,241	3,727
Broker	1,200	300	900
Conference rooms	2,663	2,663	0
Correspondent	1,273	1,273	0
Financial. accounting	2,385	577	1,808
Total	31,279	19,379	11,898

THIRD FLOOR

AREA	TOTAL SQ. FOOTAGE	QUALIFYING	NONQUALIFYING
Commercial lending	5,440	0	5,440
Real estate owned	1,280	1,280	0
Payment processing	1,936	484	1,452
Collections	3,362	840	2,522
Total foreclosure	2,799	2,799	0
Customer service	2,600	649	1,951
Escrow & tax admin.	3,550	887	2,663
Payoffs	2,040	2,040	0
Conference rooms	3,232	3,232	0
Investor accounting	4,680	4,680	0
Systems	360	360	0

Total	31,279	17,251	14,028

ISSUE TWO

13. For the years 2000 and 2001, Astoria determined its franchise tax liability on the basis of the alternative minimum tax measured by taxable assets. In determining the basis of tax for years prior to 2000, Astoria computed its alternative minimum tax measured by taxable assets using a balance sheet prepared in accordance with generally accepted accounting principles ("GAAP"). In contrast, for the years 2000 and 2001, Astoria computed its alternative minimum tax measured by taxable assets using a "tax balance sheet." The distinction between the two approaches is that Astoria arrived at its tax balance sheet by excluding or adjusting the amount of certain assets on its GAAP balance sheet which, Astoria asserts, gave rise to no specific income or expense item includible in the calculation of alternative entire net income. Among the various included and excluded asset amounts was the entire amount for goodwill related to Astoria's acquisitions of Fidelity and The Greater, which Astoria eliminated from its GAAP balance sheet in arriving at its tax balance sheet (and hence its taxable assets for alternative minimum tax purposes) on the premise that the annual amortized portion of such goodwill was not a deductible item in calculating Astoria's alternative entire net income.

14. The particular asset items and adjustment amounts for the two years are as follows:

-YEAR 2000-

ASSET CATEGORY	GAAP BALANCE SHEET	DEBIT (+)	CREDIT (-)	TAX BALANCE SHEET
Trade Notes & Acc'ts Rec'ble				
Accrued Interest Receivable	125,357,757	-----	(19,273,246)	106,084,511
Less: Allowance for bad debt	(2,007,915)	2,007,915	-----	-----
Total Trade Notes & Acc'ts Rec'ble	123,349,842	2,007,915	(19,273,246)	106,084,511
Mortgage and Real Estate Loans	7,663,569,728	4,041,231	(255,047,685)	7,412,563,274
Investment in Service Corp.	5,639,301	-----	(5,639,301)	-----
Mark to Market	(45,119,616)	45,119,616	-----	-----
Building & Other Deprec. Assets				
Office, Properties & Equipment	200,761,150	-----	-----	200,761,150
Less: Accumulated Deprec.	(78,331,425)	-----	(7,428,599)	(85,760,024)
Buildings & Other Deprec. Assets, Net	122,429,725		(7,428,599)	115,001,126
Goodwill	204,649,163	-----	(204,649,163)	-----
Due to/from AFC	272,159	-----	(272,159)	-----
Undistributed Earnings/Service Corps	4,779,646,712	-----	(571,838,026)	4,207,808,686
Deferred Acquisition Costs	1,075,379	-----	(1,075,379)	-----
Misc. Assets	33,250,424	-----	(32,789,810)	460,614
Net Deferred Tax Asset	121,935,415	-----	(121,935,415)	-----

-YEAR 2001-

ASSET CATEGORY	GAAP BALANCE SHEET	DEBIT (+)	CREDIT (-)	TAX BALANCE SHEET
Trade Notes & Acc'ts Rec'ble				
Accrued Interest Receivable	121,488,354	-----	(19,273,246)	102,215,108
Less: Allowance for bad debt	(1,757,252)	1,757,252	-----	-----
Total Trade Notes & Acc'ts Rec'ble	119,731,102	1,757,252	(19,273,246)	102,215,108
Mortgage and Real Estate Loans	8,270,077,081	4,041,231	(255,047,685)	8,019,070,627
Investment in Service Corp.	5,269,201	-----	(5,269,201)	5,639,301
Mark to Market	(3,101,616)	3,101,616	-----	-----
Building & Other Deprec. Assets				
Office, Properties & Equipment	209,293,415	-----	-----	209,293,415
Less: Accumulated Deprec.	(90,622,916)	-----	(7,428,599)	(98,051,515)
Buildings & Other Deprec. Assets, Net	118,670,499		(7,428,599)	111,241,900
Goodwill	185,406,922	-----	(185,406,922)	-----
Due to/from AFC	(1,495,337)	-----	1,495,337	-----
Undistributed Earnings/Service Corps	4,899,709,969	-----	(571,838,026)	4,327,871,943
Misc. Assets	64,822,059	331,132	(70,519,226)	(5,366,035)
Net Deferred Tax Asset	26,474,776	-----	(26,474,776)	-----

15. Astoria's balance sheet adjustments, as set forth above, resulted in net decreases to total assets for purposes of the alternative minimum tax based on taxable assets for each of the years 2000 and 2001. For 2000, GAAP (book) balance sheet total assets of $22,419,056,703.00 were increased by $51,168,762.00 and decreased by $1,219,948,783.00, to arrive at tax balance sheet total assets of $21,250,276,682.00. For 2001, GAAP (book) balance sheet total assets of $22,770,334,420.00 were increased by $9,231,231.00 and decreased by $1,139,762,344.00, to arrive at tax balance sheet total assets of $21,639,803,307.00. At hearing, Astoria conceded that

the adjustment made to “office, properties and equipment” in the amount of $7,428,599.00 for each of the years, represented the annual depreciation on such assets and was incorrectly taken as an adjustment reducing the amount of such assets.

16. The August 4, 2003 Notice of Deficiency issued by the Division to Astoria (***see*** Finding of Fact “7”) asserted additional banking corporation franchise tax due in the amount of $147,410.00 plus Metropolitan Transportation District Surcharge due in the amount of $25,059.00 for the year 2000, plus interest, and additional banking corporation franchise tax due in the amount of $121,765.00 for the year 2001, plus interest. This additional tax due results from the Division’s calculation of Astoria’s alternative minimum tax measured by taxable assets using the GAAP balance sheet rather than the tax balance sheet approach.

CONCLUSIONS OF LAW

ISSUE ONE

A. Treated first is the issue of whether Astoria has established that it is entitled to reduce its liability for the franchise tax on banking corporations (Tax Law Article 32) for the year 1999 by the credit, commonly referred to as the Investment Tax Credit (“ITC”), provided for pursuant to Tax Law § 1456(i). The criteria for entitlement to this credit are set forth at Tax Law § 1456(i)(2), which provides in relevant part as follows:

> A credit shall be allowed under this subsection with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the Internal Revenue Code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the Internal Revenue Code, have a situs in this state and are (A) principally used in the ordinary course of the taxpayer’s trade or business as a broker or dealer in connection with the purchase or sale (which shall include but not be limited to the issuance, entering into, assumption, offset, assignment, termination, or transfer) of stocks, bonds or other securities as defined in section four hundred seventy-five (c)(2) of the Internal Revenue Code, or of commodities as defined in

> section four hundred seventy-five (e) of the Internal Revenue Code, or (B) principally used in the ordinary course of the taxpayer's trade or business of providing investment advisory services for a regulated investment company as defined in section eight hundred fifty-one of the Internal Revenue Code, or lending, loan arrangement or loan origination services to customers in connection with the purchase or sale (which shall include but not be limited to the issuance, entering into, assumption, offset, assignment, termination or transfer) of securities as defined in section four hundred seventy-five (c)(2) of the Internal Revenue Code . . . .

B. There is no apparent dispute that Astoria meets all of the requirements for entitlement to the ITC save for the final portion of Tax Law § 1456(i) and its requirement that the property upon which the credit is sought must meet the "principal use" test, to wit, that it must be

> principally used in the ordinary course of the taxpayer's trade or business as a broker or dealer in connection with the purchase or sale (which shall include but not be limited to the issuance, entering into, assumption, offset, assignment, termination, or transfer) of stocks, bonds or other securities as defined in section four hundred seventy-five (c)(2) of the IRC.[4]

This matter turns initially on the question of whether loan originations, characterized by Astoria as the equivalent of "entering into" a position in a security, constitute a qualifying activity for purposes of "broker or dealer" status and entitlement to the ITC. If such originations constitute a qualifying activity, then Astoria would meet the principal use test of Tax Law § 1456(i) and would be entitled to the claimed credit. Assuming that loan originations do not qualify, Astoria argues in the alternative that its other activities (i.e., purchase, sale and termination of positions in securities) fulfill the "principal usage" test for purposes of the ITC.

C. IRC § 475 provides special "mark to market" accounting rules with regard to "securities" held by a "dealer in securities." Under such rules, any security which is inventory in the hands of the dealer (in securities) shall be included in inventory at its fair market value (IRC

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[4] Since, during the ITC year in question (1999), all of Astoria's employees were located in New York State, it follows that all of its employees performing administrative and support functions with respect to Tax Law § 1456(i) qualified activities were located in New York State, thus fulfilling the ITC eligibility requirement set forth at Tax Law § 1456(i)(1).

§ 475[a][1]). In contrast, for any security which is not inventory in the hands of the dealer (in securities) and which is held (by the dealer) at the close of the taxable year, the dealer shall recognize gain or loss as if such security were sold for its fair market value on the last business day of such taxable year, and any gain or loss shall be taken into account for such taxable year, with adjustments made thereafter for any gain or loss subsequently realized in later years (IRC § 475[a][2]). IRC § 475(b), however, allows exceptions to the mark to market rules. In relevant part, section 475(b) provides that such rules (including specifically the rule that "as if" gain or loss on noninventoried securities must be recognized and accounted for annually) shall not apply to "any security described in subsection (c)(2)(C) which is acquired (*including originated*) by the taxpayer in the ordinary course of a trade or business of the taxpayer and *which is not held for sale* . . ." (IRC § 475[b][1][B]; emphasis added).

D. IRC § 475(c)(1) and (2) furnishes the following definitions of "dealer in securities" and "securities":

> (1) Dealer in securities defined.
>
> The term "dealer in securities" means a taxpayer who–
>
> (A) regularly purchases securities from or sells securities to customers in the ordinary course of a trade or business; or
>
> (B) regularly offers to enter into, assume, offset, assign or otherwise terminate positions in securities with customers in the ordinary course of a trade or business.
>
> (2) Security defined.
>
> The term "security" means any–
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> * * *
>
> (C) note, bond, debenture, or other evidence of indebtedness;
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> * * *

E. The ITC is available with respect to property principally used (i.e., used more than 50%) in the taxpayer's ordinary course of business as a *broker or dealer* in connection with the purchase or sale of stocks, bonds, or other securities. As set forth above, IRC § 475(c)(2)(C) includes a "note, bond, debenture, or other evidence of indebtedness" within the definition of a "security" and the Division, citing to Holding "8" of Internal Revenue Service Revenue Ruling 97-39 (Rev Rul 97-39; 1997-2 CB 62; Internal Revenue Bulletin No. 1997-39 [September 29, 1997]), does not dispute that mortgage loans (and the notes evidencing the same) fall within the definition of a "security" for purposes of IRC § 475(c)(2)(C). Furthermore, as set forth above, IRC § 475(c)(1) includes, within the definition of a "dealer," a taxpayer who regularly purchases securities from or sells securities to customers or who regularly offers to enter into, assume, offset, assign or otherwise terminate positions in securities with customers. The Division, citing to Holding "2" of Internal Revenue Service Revenue Ruling 97-39, does not dispute that banks may fall within the definition of a "dealer in securities." Indeed, the Division admits that Astoria is a dealer in securities with respect to its activities of purchasing, selling and terminating mortgage loans, but asserts that Astoria's mortgage loan originations which do not result in loans that are sold do not constitute dealer activities.[5]

F. Astoria claims the exception to the mark to market rule of IRC § 475(b)(1)(B). In order to do so the subject securities, including specifically securities originated by the taxpayer,

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[5] In relevant part, Revenue Ruling 97-39 provides as follows:

> Issue 2: Is a bank or an insurance company excepted from the mark-to-market rules on the grounds that it is, per se, not a dealer in securities within the meaning of [IRC] § 475(c)(1)?
>
> Holding 2: No. A bank or an insurance company is subject to the mark-to market rules if its activities bring it within the definition of a dealer in securities in [IRC] § 475(c)(1). For example, many banks are dealers because they regularly *originate and sell* loans. As another example, an insurance company that regularly *makes and sells* policyholder loans is a dealer for purposes of [IRC] § 475(c)(1).

so excepted from the rule may not be held by the taxpayer in inventory for sale. Astoria's witness testified that those loans Astoria originates and sells are sold immediately, thus leaving the balance of its originated loans, presumably, not held for sale but rather remaining in Astoria's portfolio of investments. It follows, therefore, that Astoria would not properly be considered a dealer or trader with regard to the balance of such originated, but unsold, loans. This conclusion is consistent with Holding "2" of Revenue Ruling 97-39 which states that "many banks are dealers because they regularly originate *and* sell loans." (***see also***, Rev Rul 72-523, 1972-2 CB 242).

G. The largest part of Astoria's mortgage origination activities, by dollar volume, result in mortgage notes held in portfolio by Astoria. Such activity of creating and holding a security is simply not a brokering or dealing activity, which contemplates the sale of securities to customers or the purchase of securities from customers. Originating a mortgage loan which results in the creation of a mortgage note is not purchasing a security from (or on behalf of) a customer, nor is originating and holding such created security a sale of a security. There is a clear distinction between a bank's lending activities (the origination of a mortgage loan to a borrowing customer in conjunction with which a security is created) and the subsequent sale of that loan (and security) to a third-party customer. In essence, while the activities and result of mortgage loan originations may properly be said to put Astoria in a position to be a broker or dealer with regard to such mortgage loans, such originating activities which result in the creation of a security do not constitute dealing or trading with respect thereto. Thus, Astoria's banking function of loan origination, in isolation, is properly distinguished from the broker or dealer activity of originating a mortgage coupled with the sale of the resulting security. Accordingly, such loan

originations without sales of the resulting securities may not be considered broker or dealer activities as required under Tax Law § 1456(i)(2)(A) for purposes of the ITC.

H. Having concluded that loan origination activities may not be considered broker or dealer activities leads to Astoria's alternative argument that, even after eliminating such origination activities, more than 50 percent of the usable business floor space at the 2000 Marcus Avenue building was utilized in the regular course of Astoria's activities as a broker or dealer such that the principal use test is satisfied and the claimed ITC should be allowed. The Division admits that Astoria is a dealer with respect to its other activities of purchasing, selling and terminating positions in securities, but maintains that the level of such dealer activities simply do not constitute 50 percent of Astoria's activities so as to meet the "principally used" test for purposes of the ITC. Resolution of this alternative argument turns on a review of the square footage calculations presented by Astoria and set forth at Findings of Fact "9", "10", "11" and "12".

I. Astoria's alternative calculations result in a conclusion that 60.13 percent of its usable floor space at 2000 Marcus Avenue is utilized for broker or dealer qualifying activities (***see*** Finding of Fact "10"). To reach this conclusion, Astoria adjusted and reduced the qualifying square footage in several areas of the building so as to recognize and eliminate the amount of square footage attributable to originations. While Astoria adjusted and allocated qualifying and nonqualifying space in a number of categories and areas, it made no such adjustments for others, such as computer systems, mail room, lobby, conference rooms, bank attorneys, and investor accounting. This failure to allocate is inconsistent in some areas and unexplained in others. For example, 100 percent of the floor space devoted to computer systems, the mail room and the lobby is treated as qualifying space. While Astoria argues that none of its activities (qualifying

or nonqualifying) could occur without its computer systems, mail room and lobby, it does not follow that all of such space should therefore be attributed to qualifying activities. Stated differently, while 100 percent of Astoria's loan sales, loan purchases, and loan terminations may go through its computer systems and mail room, it does not follow that 100 percent of its computer systems and mail room activities are devoted only to such activities with no part of such space devoted to or used in its origination activities. Similarly, it does not follow that none of Astoria's origination customers use the lobby of the building. Hence, consistency alone dictates that an allocation of such space must be made. Furthermore, no allocation was made nor was any explanation proffered as to why all conference room activities involved only qualifying activities and no origination activities. In fact, making such an additional allocation to include the systems, mail room, lobby and conference room space, utilizing Astoria's own 24.98% method, results in less than 50 percent (to wit, 45.34%) of the usable floor space in the building being devoted to qualifying broker or dealer activities (***see***, Appendices "A", "B" and "C"). It would also appear that the sale of loans, itself an admittedly qualifying dealer activity, would properly be distinguished from the ongoing servicing of such sold loans (labeled "investor accounting") thereafter. Further, consistent with the conclusion that originations alone, without sales, are not broker or dealer activities, it does not follow that terminations via foreclosure, customer payoff of a loan held in portfolio, or the charge off of such a nonperforming portfolio loan as a bad debt would constitute a qualifying broker or dealer activity. In sum, no allocation of qualifying versus nonqualifying space in these areas was made, as would reasonably and consistently be expected, nor was any plausible explanation for the absence of such an allocation provided. Finally, no evidence or explanation was provided with respect to the usage of the equipment in the building, and thus there is no basis, either independently or even by reference

to floor space allocation, from which to grant the investment tax credit with respect to such equipment. Accordingly, Astoria's alternative argument and basis for entitlement to the ITC is denied.

ISSUE TWO

J. Treated next is the issue of whether Astoria erroneously omitted certain assets and adjusted the value of certain other assets in its computation of the alternative minimum tax based on taxable assets ("AMT") for the years 2000 and 2001. As a starting point, Tax Law § 1451 imposes a tax on banking corporations such as Astoria, with the tax due being the greatest amount resulting under the following four computation bases, as specified at Tax Law § 1455:

1) the "basic" tax computed on entire net income, per Tax Law § 1455(a).
2) the alternative minimum tax based on taxable assets, per Tax Law § 1455(b)(1);
3) the tax computed on alternative entire net income, per Tax Law § 1455(b)(2);
4) the fixed minimum tax of $250.00, per Tax Law § 1455(b)(3).

For years prior to 2000, Astoria computed its AMT based upon the assets reflected on its balance sheet prepared from its books and records in accordance with generally accepted accounting principles ("GAAP"). However, for the years 2000 and 2001, Astoria did not compute such tax based upon all of the assets reflected on its balance sheet in accordance with GAAP, but rather utilized a "tax-based" balance sheet which, according to Astoria, reflected adjustments (inclusions and exclusions) with respect to assets the income or expense from which were not included in the computation of Astoria's alternative minimum taxable income. The Division, for its part, disallowed the entirety of the tax balance sheet presented by Astoria and utilized instead the assets set forth on Astoria's GAAP balance sheet, since "no adjustments thereto were necessary," essentially a conclusion that the income or expenses of every asset on the GAAP

balance sheet were reflected in the computation of Astoria's alternative entire net income.[6] Thus, the initial question presented is the legal propriety of making eliminations and adjustments to the GAAP balance sheet listing of assets for purposes of the AMT. Assuming such eliminations and adjustments may properly be made, Astoria would thereafter bear the burden of establishing the propriety of the particular eliminations and adjustments it made to such assets in arriving at its tax balance sheet.

K. As to the propriety of adjusting a GAAP balance sheet asset listing by elimination of an asset or by changing an asset's value, the Tax Law and the Commissioner's Regulations provide certain definitions relevant to resolving this issue, as follows:

> The term *"taxable assets"* shall mean the average value of *total assets* [less amounts received from the federal deposit insurance corporation or the federal savings and loan insurance corporation]. *Total assets* are those *assets* which are properly reflected on a *balance sheet the income or expenses of which are properly reflected (or would have been properly reflected if not fully depreciated or expensed or depreciated or expensed to a nominal amount) in the computation of alternative entire net income* for the taxable year . . . . (Tax Law §1455[b][1][v][A]; 20 NYCRR 18-5.2[a]; emphasis added.)
>
> The term *"balance sheet"* . . .shall mean the balance sheet of the taxpayer prepared from the books and records of the taxpayer in accordance with generally accepted accounting principles and used for purposes of preparing the taxpayer's financial statements. The *"book value"* of intangible property. . . shall mean the amount of the intangible property shown on the books and records of the taxpayer in accordance with generally accepted accounting principles and included in the balance sheet described in the preceding sentence. In the case of loans, the book value shall be loans net of the reserve for losses on loans. (20 NYCRR 18-5.2[d]; emphasis added.)
>
> Tangible real and personal property, such as building, land, machinery and equipment, is to be valued at cost. Intangible property, such as loans, investments, coin and currency, is to be valued at book value . . . . (20 NYCRR 18-5.2[c].)

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[6] Astoria's GAAP balance sheet refers to the book balance sheet included as Schedule L to Form 1120 ("U.S. Corporation Income Tax Return") as filed by Astoria for the years in issue.

> *Alternative entire net income* means *entire net income* as determined pursuant to section fourteen hundred fifty-three, except that the deductions described in paragraphs eleven and twelve of subsection (e) of section fourteen hundred fifty-three shall not be allowed. (Tax Law § 1453-A; emphasis added.)
>
> *Entire net income* means total net income from all sources which shall be the same as the entire taxable income (but not alternative minimum taxable income)
>
> (1) which the taxpayer is required to report to the United State treasury department . . . . (Tax Law § 1453[a]; emphasis added.)

Pursuant to Tax Law § 1453 and 20 NYCRR 18-2.2(a), the definition of *entire net income* is further refined to mean total net income from all sources, which is the same as the taxable income required to be reported by the taxpayer to the IRS, as modified by certain specific addition and subtraction adjustments set forth in Tax Law § 1453 (***see***, Tax Law § 1453[b]; 20 NYCRR 18-2.3, 18-2.4, 18-2.5). *Federal taxable income* is defined to mean taxable income as defined in section 63 of the Internal Revenue Code, and is the starting point in computing entire net income (20 NYCRR 18-2.2[b]).

L. The parties are in agreement that the balance sheet prepared from Astoria's books and records in accordance with GAAP is the proper starting point in determining "total assets," from which the "taxable assets" upon which the AMT may be computed are determined. As will be explained hereinafter, the statute and regulations provide for a two-step process in arriving at the asset base upon which the AMT is determined. The first step is essentially an "asset inclusion" analysis, whereby only those GAAP balance sheet assets the income *or* expenses of which are reflected in the computation of alternative entire net income are included in "total assets" per Tax Law § 1455(b)(1)(v)(A). The second step is the determination of the value of such GAAP assets which are included in "total assets." Guidance in this latter step is provided by the Commissioner's regulations at 20 NYCRR 18-5.2 (***see***, Conclusion of Law "K"). The

distinction between "total assets" and "taxable assets," as each is defined at Tax Law § 1455(b)(1)(v)(A), is that the latter (taxable assets) represents the *average value* of the former (total assets), as opposed to a "snapshot" of asset values at any one particular point in a given year (***see***, 20 NYCRR 18-5.2[c]). Thus, in order to determine "taxable assets" (i.e., the average value of "total assets") a taxpayer must first determine "total assets." Accordingly, the most critical distinction in this matter lies between the assets reflected on Astoria's GAAP balance sheet, and "total assets" per Tax Law § 1455(b)(1)(v)(A), to wit, those assets which appear on such a GAAP balance sheet *the income or expenses of which are properly reflected* (or would be properly reflected save for having been depreciated or expensed fully or to a nominal amount) *in the computation of alternative entire net income*.

M. It follows from the specific statutory language requiring that "total assets" means only those assets whose income or expenses are reflected in the computation of alternative entire net income, that there is the possibility of a distinction between GAAP balance sheet assets and "total assets" for purposes of Tax Law § 1455, and that not all assets set forth on a GAAP balance sheet will, necessarily, be included in "total assets." Pursuant to this language, then, any asset on a GAAP balance sheet the income or expenses of which are not reflected in the computation of alternative entire net income is not among a taxpayer's "total assets" under Tax Law § 1455, and must, accordingly, be eliminated. Any conclusion to the contrary would render the specific statutory language defining "total assets" meaningless and unnecessary, and would essentially result in the simple adoption of the GAAP balance sheet and the inclusion of all of the assets reflected thereon as "total assets." Thus, as Astoria argues, each asset on a taxpayer's GAAP balance sheet must be examined in order to determine whether its income *or* expenses are reflected in the *computation* of alternative entire net income, and if such income *or* expenses of a

particular asset are not so reflected then elimination with respect to the particular asset may be made.

N. Having concluded that adjustments may be made to a GAAP balance sheet leaves for resolution the specific adjustments made by Astoria in this case. As a starting point, Astoria bears the burden of establishing the propriety of each of the adjustments it made to its GAAP balance sheet to arrive at its tax balance sheet. The most significant discussion at hearing and in the parties' briefs with regard to particular asset items omitted or adjusted by Astoria in its determination of "total assets" for purposes of the AMT was the GAAP balance sheet asset "goodwill." In this case, some $281.5 million dollars was initially recorded on Astoria's books as goodwill, an asset resulting from Astoria's purchase of 100% of the common stock of Fidelity in 1995 and The Greater in 1997 (***see***, Finding of Fact "2"). Goodwill is generally considered an unidentifiable intangible asset representing an economic advantage which exists when the total value paid for an acquired business is more than the value of all of the identifiable net assets (i.e., identifiable assets minus liabilities assumed) of the acquired business. This economic advantage arises because the expected earnings of the business exceed the level of earnings on only its identifiable net assets, and it results from numerous factors such as customer acceptance, service to customers, efficient operations, reputation for dependability and location (***see generally***, Pahler and Mori, Advanced Accounting-Concepts and Practice-2d Ed., at 73 [1985]; Welsch, Zlatkovich, Harrison, Intermediate Accounting, at 438, 439 [6th ed 1982]). Astoria clearly did pay more than the value of the identifiable net assets of the banks it purchased, and such excess amount paid properly constitutes goodwill. In turn, the Division posits, and Astoria does not dispute, the proposition that goodwill allowed Astoria an economic benefit, such that it could "get additional branches, [to] grow and, in essence, produce more income . . . ." That is,

goodwill may clearly enhance the ability and performance of an entity's operations and thus allow such operations, and the assets associated therewith, to produce income in excess of that which otherwise might have been produced. Stated differently, but for the existence and value of the goodwill acquired by Astoria in its purchases of Fidelity and The Greater, Astoria's income, and hence its alternative entire net income, might have been less, such that to exclude goodwill from "total assets" and hence "taxable assets" for purposes of Tax Law § 1455(b)(1) fails to acknowledge the contribution such asset gives to the level of Astoria's total income, entire taxable income, and Federal taxable income (for purposes of the Internal Revenue Code) and, in turn, entire net income and alternative entire net income (for purposes of New York Tax Law Article 32). The contribution of this economic benefit to Astoria's ability to generate income is thus apparently the theoretical underpinning by which the Division seeks to include goodwill as an asset the income from which is properly reflected in the computation of Astoria's alternative entire net income, such that to exclude goodwill would "undervalue" assets.

O. Resolution of the issue of goodwill inclusion may be had by direct reference to the words contained in the relevant statutory provision, Tax Law § 1455(b)(1)(v)(A). Specifically, for an asset reflected on a GAAP balance sheet to be carried over and included among those total assets upon which the AMT is calculated, such asset must be one "the income or expenses of which are properly reflected . . . in the *computation* of alternative entire net income . . . " (Tax Law § 1455(b)(1)(v)(A); emphasis added). While any asset might be said to generically contribute to an entity's income, inclusion of an asset in total assets here requires that the income

or expenses of such asset must be reflected in the *computation*, i.e., the particularly prescribed statutory formula or method by which alternative entire net income is determined.[7]

P. The "expenses" side of the goodwill issue is clear, and neither side disputes that the annual amount of amortization expense for goodwill is not, pursuant to IRC § 197(e), allowed as a deduction (i.e., an expense reflected) in the *computation* of total income, entire taxable income, Federal taxable income, entire net income or alternative entire net income, and thus the "expenses" side provides no basis to include goodwill in total assets for AMT purposes.

In contrast, the "income" side of the issue is less clear for, as explained above, goodwill can add to the ability of an entity to generate income and, in this case, the parties accede to the proposition that Astoria's performance and resulting income was enhanced by the intangible goodwill value included in the overall asset value of the entity. However, while goodwill undeniably contributes to the entity as a whole and its ability to generate income, it remains that the AMT is based on those assets which are to be included because the income or expenses therefrom are properly reflected in the *computation* of total income, entire taxable income, Federal taxable income, entire net income and alternative entire net income. There is, in fact, no income statement or other income item labeled "income from goodwill." Thus, notwithstanding its generic contribution to or enhancement of Astoria's ability to produce income, there is no income from the asset goodwill which can be found in the statutory "formula" or "method" of *"computation"* by which Astoria's total income, entire taxable income, or Federal taxable

[7] "Alternative entire net income" (Tax Law § 1453-A) is computed by specific deduction add-back adjustments (i.e., income increases) to "entire net income" (Tax Law § 1453)which itself is computed based on addition, subtraction and other adjustments to "total net income from all sources." "Total net income from all sources" is defined as "entire taxable income" or "taxable income" or "Federal taxable income" per IRC § 63. Thus, the particular statutory formula or method by which alternative entire net income is computed, which is the determinative measure for inclusion or exclusion of GAAP balance sheet assets among "total assets" and "taxable assets" subject to the AMT, is found in the application of such IRC and Tax Law provisions.

income is arrived at pursuant to IRC § 63 or, in turn thereafter, by which its entire net income or alternative entire net income is arrived at pursuant to Tax Law §§ 1453 and 1453-A. If the Legislature had sought a broader base for asset inclusion with regard to the AMT, it might have chosen to identify for inclusion among total assets all of those assets the income or expenses of which "contributed to" or were "in the composition of" the income generated by the entity.[8] Instead, the statute specifically uses the term "*computation,*" and income from goodwill is simply not part of the formula by and from which alternative entire taxable income is computed. Since goodwill is a GAAP balance sheet asset the income and expenses of which are not reflected in the *computation* of alternative entire taxable income, it follows that Astoria properly omitted such asset from its total assets subject to the AMT.

Q. The foregoing discussion has focused on the propriety of eliminating the asset goodwill from the base of total assets upon which the tax in question is based. However, Astoria made a number of other adjustments, both positive and negative, to its GAAP balance sheet to arrive at the "tax balance sheet" for purposes of the AMT, as detailed in Finding of Fact "14". As noted earlier, Astoria bears the burden of establishing the propriety of each of such adjustments. Thus, as set forth above and as explained with some detail in Astoria's briefs and in testimony, since the GAAP balance sheet asset "goodwill" provided neither an expense nor an income in the *computation* of alternative entire net income, it was proper to adjust the GAAP balance sheet assets by eliminating goodwill therefrom in arriving at the total asset base for the AMT. Furthermore, Astoria has admitted that one of the adjustments, an asset value reduction for "office, properties and equipment" in the amount of $7,428,599.00 for each of the years at

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[8] Such other terms might be viewed as a more elaborate or even obtuse manner of simply saying that the tax is imposed on the average value of all assets appearing on a taxpayer's balance sheet as prepared in accordance with GAAP.

issue representing the annual depreciation on such assets, was incorrectly made since such assets are to be valued at "cost" (as opposed to book value) pursuant to 20 NYCRR 18-5.2(c). Accordingly, such reduction adjustment must be eliminated (or added back) such that the asset "office, properties and equipment" would be valued at cost for purposes of the tax in question in arriving at total assets.[9]

R. Unfortunately, from the record in this matter it is not possible to determine the propriety of the remainder of the particular adjustments made by Astoria in arriving at its "tax balance sheet" and thus its "total assets" for purposes of the tax in question. As shown by Finding of Fact "14", Astoria's balance sheet changes include both eliminations of certain assets (i.e., "investment in service corp.," "mark-to-market," "goodwill," "due to/from AFC," "deferred acquisition costs," and "net deferred tax asset") and value adjustments for certain assets (i.e., "trade notes and accounts receivable," "mortgage and real estate loans," "office, properties and equipment," "undistributed earnings/service corps.," and "miscellaneous assets"). While the claim that all assets on Astoria's balance sheet were examined (by Astoria) to determine whether or not an income or expense item was generated so as to require inclusion of a given asset in total assets for purposes of the AMT may be true, the same does not explain either the examination process or the basis upon which the conclusions therefrom resulting in the claimed adjustments may be justified. More to the point, Astoria's eliminations and adjustments appear to focus on an analysis of whether the expense of a given asset was allowable as a tax deduction for purposes of computing alternative entire net income. The words of the statute, however, speak to determining whether an asset's income *or* expenses are reflected in the computation of

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[9] This "add-back" change to Astoria's "tax balance sheet" simply restores the asset category "office, properties and equipment" to its GAAP balance sheet status as utilized by the Division in its determination of total assets.

alternative entire net income for purposes of including or excluding such asset. Furthermore, with respect to the valuation adjustments made by Astoria, 20 NYCRR 18-5.2(c) provides that intangible assets such as loans, investments, coin and currency, are to be valued at book value. In turn, 20 NYCRR 18-5.2(d) defines book value to mean the amount shown on the taxpayer's GAAP balance sheet as used for purposes of preparing the taxpayer's financial statements, with the "book value" of "loans" to be loans "net of the reserve for losses on loans." These regulations do not provide that the value of included assets is to be determined based on whether and to what extent tax deductions are allowable, but rather provide that those assets determined to be included (i.e., those assets whose income *or* expenses are properly reflected in the computation of alternative entire net income) are generally to be valued at GAAP balance sheet amounts (20 NYCRR 18-5.2[d]). Thus, under the two-step process, GAAP assets are first included or excluded according to whether their income or expenses are reflected in the computation of alternative entire net income. Once inclusion or exclusion is so determined, those included assets are, in turn, valued in accordance with 20 NYCRR 18-5.2. Thus, for example, mortgage and real estate loans, an asset admittedly includible, is not to be valued based on the amount of the New York bad debt allowance (i.e., the net tax bad debt allowance), but rather was properly valued by the Division based at its GAAP balance sheet value (i.e., such loans net of the GAAP reserve for losses on loans).

With regard to those assets eliminated, except for goodwill, the record is simply lacking in detail from which a conclusion may be drawn that the income *or* expenses are not reflected in the computation of alternative entire net income. For example, Astoria provided no information regarding the asset "mark-to-market," nor any significant detail with respect to, *inter alia*, "miscellaneous assets" and "undistributed earnings/service corps." In this regard and as defined,

the distinction between entire net income and alternative entire net income is that the latter is computed without the allowance for the deductions provided at Tax Law § 1453(e)(11), pertaining to interest and dividend income and net gains from subsidiary capital, and Tax Law § 1453(e)(12), pertaining to interest income on obligations of New York State and its political subdivisions and of the United States (***see***, Tax Law § 1453-A). Thus, the *computation* of alternative entire net income requires an "add-back" of such previously deducted income items, leaving such items "properly reflected" in alternative entire net income. Such distinction thus may have an impact upon the assets giving rise to such previously deducted income items. It is simply not clear from the record whether or not the assets pertaining to "service corps.," for example, are so impacted.

Contrary to Astoria's assertion that the testimony, documentary evidence and briefs provide clear and convincing evidence that the adjustments made were proper, such evidence was largely presented as a summary explanation, with scant detail or particulars provided as to how the claimed adjustments were determined. Accordingly, except for the elimination of the asset "goodwill" from total assets, the record simply does not provide sufficient detail or explanation such that an independent analysis may be made based thereon confirming that Astoria would be entitled to the adjustments claimed in arriving at total assets (its "tax balance sheet") for purposes of the tax in issue. Accordingly, the portion of the Notice of Deficiency pertaining to the alternative minimum tax based on taxable assets, as recomputed and reduced only insofar as to reflect the elimination of goodwill from the taxable assets upon which the tax is based, is sustained.

S. The petition of Astoria Financial Corporation is hereby granted to the extent indicated in Conclusion of Law "P" (requiring elimination of goodwill from total assets), the Notice of

Deficiency dated August 4, 2003 is to be recomputed accordingly, and such Notice of Deficiency, as recomputed and reduced, is sustained.

DATED: Troy, New York
August 10, 2006

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

APPENDIX "A"

(Recalculation of qualifying and nonqualifying square footage to reflect systems, mail room, lobby and conference room areas at 24.98% qualified [***compare***, Finding of Fact "12"]).

CELLAR

AREA	TOTAL SQ. FOOTAGE	QUALIFYING	NONQUALIFYING
Cellar	**33,655**	**1653**	**0**

FIRST FLOOR

AREA	TOTAL SQ. FOOTAGE	QUALIFYING	NONQUALIFYING
Mail room	864	216	648
Total lobby	1,884	471	1413
Systems	2,376	594	1782
Bank attorneys	3,744	3,744	0
Total sales	11,156	2,787	8,369
Closing rooms	1,440	360	1,080
Conference rooms	3,055	763	2,292
Total	24,519	8,935	15,584

SECOND FLOOR

AREA	TOTAL SQ. FOOTAGE	QUALIFYING	NONQUALIFYING
Secondary marketing	8,688	8,688	0
Total compliance	1,680	420	1,260
Systems	2,952	737	2,215
Appraisal	1,028	157	871
Total retail processing	4,442	1,110	3,332
Total underwriting	4,968	1,241	3,727
Broker	1,200	300	900
Conference rooms	2,663	665	1,998
Correspondent	1,272	1,272	0
Financial. accounting	2,384	577	1,808
Total	31,279	15,167	16,111

THIRD FLOOR

AREA	TOTAL SQ. FOOTAGE	QUALIFYING	NONQUALIFYING
Commercial lending	5,440	0	5,440
Real estate owned	1,280	1,280	0
Payment processing	1,936	484	1,452
Collections	3,362	840	2,522
Total foreclosure	2,799	2,799	0
Customer service	2,600	649	1,951
Escrow & tax admin.	3,550	887	2,663
Payoffs	2,040	2,040	0
Conference rooms	3,232	807	2,425
Investor accounting	4,680	4,680	0
Systems	360	90	270
Total	31,279	14,556	16,723

APPENDIX “B”

(Recalculation of qualifying and nonqualifying total usable square footage to reflect mortgage origination activities as nonqualifying activities and that systems, mail room, lobby and

conference room areas are additional space properly subject to allocation [***compare***, Finding of Fact “10”]).

AREA	**NON-USABLE**	**QUALIFYING**	**NONQUALIFYING**	**TOTAL**
Cellar	32,002	1,653	0	33,655
First Floor	9,262	8,935	15,584	33,781
Second Floor	2,376	15,167	16,111	33,655
Third Floor	2,376	14,556	16,723	33,655
TOTAL	46,016	40,311	48,418	134,746

APPENDIX “C”

(Comparison of total qualifying square footage, as determined by allocation herein, to total usable square footage [***compare***, Finding of Fact “10"]).

Total qualifying square footage..40,311
divided by:
Total usable square footage..88,730
Percentage of qualifying square footage..........................45.43%