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DISTRICT OF COLUMBIA
COURT OF APPEALS

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TAX DIVISION

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DISTRICT OF COLUMBIA
TAX DIVISION

A. BRADLEY ASKIN	:	
	:	
Petitioner	:	
	:	Tax Docket No. 5572-93
v.	:	Judge Cheryl M. Long
	:	
	:	
DISTRICT OF COLUMBIA	:	
	:	
Respondent	:	

MEMORANDUM OPINION AND ORDER

The above-captioned case came before this Court pursuant to petitioner's appeal of the assessment of recordation and transfer taxes on several properties for tax year 1993. Oral arguments were presented by both parties.

This litigation presents a case of first impression, on the issue of whether the law of the District of Columbia currently requires that the recordation and transfer taxes on real property sold in foreclosure be computed solely on the basis of "fair market value" rather than the amount that was actually paid. On the basis of the following analysis, this Court has concluded that the current law of the District of Columbia imposes no such requirement.

As a practical matter, the parameters of the dispute highlight the distinction between what the Government

contends that the law ought to provide, versus what the law now requires.

There is an additional issue of whether the petitioner has failed to timely file his appeal as to one of the properties involved, without regard to the merits of his tax liability for that particular piece of property. Based upon the analysis herein, the Court fully agrees with the Government that the appeal as to this one property is untimely.

I. Pertinent Facts

Petitioner is appealing the assessment of recordation and transfer taxes on Lots 2114, 2115, 2117, 2124, 2130 and 2132 in Square 207. Each of the six lots represents one condominium unit in the Gladstone Condominium located at 1423 R Street, N.W., Washington, D.C. The aforementioned properties were purchased by petitioner for \$5,000 per unit at various foreclosure sales.

Petitioner purchased Lot 2114 on January 19, 1990 by deed in lieu of foreclosure sale for \$5,000.00. The Recorder of Deed assessed recordation and transfer taxes of \$792.00 using the real property's assessed value of \$36,000 as the value that is subject to these taxes.

Petitioner purchased Lots 2115 and 2117 on March 20, 1992 by deed in lieu of foreclosure sale for \$5,000.00 each. The Recorder of Deeds assessed recordation and transfer taxes of \$1,518.00 using the unpaid balance of an

existing mortgage on both lots, totaling \$69,000.00, as the basis for calculating the taxes.

Petitioner purchased Lot 2124 through a foreclosure sale on November 8, 1990 for \$5,000.00. The Recorder of Deeds assessed recordation and transfer taxes of \$660.00 using the real property's assessed value of \$30,000.00 as determinative of its value.

Petitioner purchased Lots 2130 and 2132 through foreclosure sale on June 19, 1992 for \$5,000.00 each. The Recorder of Deeds again ignored the sale price and instead formulated the recordation and transfer taxes of \$1,804.00 using the real property's assessed value of \$41,000.00 as the basis on which the taxes were calculated.

Petitioner filed Claims for Refund on March 12, 1992 for Lots 2114 and 2142, on August 21, 1992 for Lots 2130 and 2132 and on October 28, 1992 for Lots 2115 and 2117. The Recorder of Deeds denied each of petitioner's Claims for Refund.

Specifically, the claim for refund for lot 2114 was denied because petitioner did not file the claim within the two year statutory period.¹ The Recorder of Deeds denied the remaining claims, stating only that an assessment of recordation and transfer taxes based upon fair market value rather than consideration paid was

¹ Pursuant to D.C. Code § 47-3310(a), "no refund shall be allowed after 2 years from the date the tax is paid unless the taxpayer files a claim before the expiration of that period."

justified because the consideration paid by petitioner was "nominal".²

On March 22, 1993, petitioner filed an appeal of the decisions of the Recorder of Deeds on the basis that the District erroneously calculated recordation and transfer taxes according to the fair market value of the real property rather than based upon consideration paid.

Petitioner seeks a refund of recordation and transfer taxes in the total amount of \$4,114.00, plus interest.

II. Summary of the Legal Disputes

A. Petitioner's Position.

Petitioner argues that the recordation and transfer tax should be computed based upon the consideration actually paid for the conveyance of these properties, rather than their fair market value.

Petitioner asserts that the Recorder of Deeds erred in determining that the consideration paid by petitioner was "nominal" under the standards delineated in Sections 904 and 923 of Title 47 of the Code.

With regard to the statute of limitations issue, petitioner argues that the statute of limitations for

² D.C. Code §§ 45-924 and 47-904 describe the basis for computing the recordation and transfer taxes of a conveyance of real property as the consideration paid. There are three exceptions: (1) where no price or amount is paid; (2) where no amount was required to be paid for; or (3) where the amount of consideration paid is only "nominal." Where any one of these three factors is present, the proper basis of computing the tax is instead the "fair market value" of the property.

filing a claim for refund was tolled by a misrepresentation made by the Deputy Recorder of Deeds [hereinafter "the Deputy"].

Petitioner alleges that the Deputy orally informed petitioner that he had three years to file a Claim for Refund. This was wrong information. Therefore, petitioner argues, he should not be prohibited from receiving a refund for Lot 2114 despite the filing of the claim after the two year statute of limitations had elapsed.

Petitioner relies on the "lulling doctrine" to support his argument that the statute of limitations was tolled as a result of the misrepresentation. Petitioner also asserts that the statute of limitations should be tolled because the Government affirmatively gave incorrect information to the Petitioner regarding the deadline for filing an appeal.

B. Respondent's Position.

The Government proffers that any consideration received in a real estate sale that is not "arm's length" should be deemed "nominal" and therefore fair market value, rather than consideration paid, must be used as the basis for calculating recordation and transfer taxes.

The District broadly asserts that a foreclosure sale can never be considered "arms length," suggesting that there is a definitional relationship between these two

terms. Hence, property conveyed at such sales should be assessed recordation and transfer taxes based upon the fair market value of the property purchased, rather than the consideration paid.

In requesting this Court to disregard petitioner's statute of limitations claim with respect to Lot 2114, the Government contends that petitioner, who is an attorney, failed to exercise due diligence where the alleged fraudulent misrepresentation (i.e. that petitioner had three years rather than two to file claim for refund) could have been discovered by simply reviewing the applicable statute.³

III. Resolution of the Petition

A. Determining the Correct Basis for Calculating Recordation and Transfer Taxes on Conveyances of Real Property

The law provides that recordation tax on the transfer of real property shall be based on consideration paid. 45 D.C. Code § 923. Consideration is defined as the "price or amount actually paid". 45 D.C. Code § 921(5).

³ The Government notes that petitioner is a lawyer and should be held to a higher standard than a lay person with respect to excuses for failure to comply with a statute. Respondent argues that petitioner failed the "reasonable reliance" test that is an element of fraud (1) because petitioner is an attorney and (2) because he relied solely on an oral statement of an agency employee where no written notice of the statute of limitations was issued or required to be issued.

Similarly, the Code provides that transfer tax on the transfer of real property shall be based on consideration paid. 47 D.C. Code § 903. Where transfer taxes are concerned, the law identically defines consideration as the "price or amount actually paid". 47 D.C. Code § 901(5).

The statute identifies three situations where consideration paid is not the appropriate measure for calculating recordation and transfer taxes. Section 924 of Title 45 and Section 904 of Title 47 both state:

"Where no price or amount is paid or required to be paid for real property or where such price or amount is **nominal**, the consideration for the deed to such property shall be construed to be the fair market value of the real property, and **the tax shall be based upon such fair market value.**"

[emphases supplied].

The Government essentially argues that whenever real property is conveyed at a foreclosure sale, the correct value to be used for assessing recordation and transfer taxes is the fair market value of the property.

The District's theory is that where some price was paid (rather than no consideration at all), a sales price should be deemed "nominal"⁴ if it was not the product of an "arm's length" exchange.

⁴The Code does not provide a definition for the term "nominal" as it is referred to in section 904.

This Court concludes as a matter of law that the District's position lacks merit for at least three reasons.

First, the District's argument is conceptually faulty because it is based upon a confusion of characteristics that are not comparable or interdependent upon each other. The term "nominal" refers to the character and quality of the price in relation to the actual value of the property. See further discussion herein, infra. The term "arm's length" does not modify the price itself. Rather, it is a phrase that describes the nature of the relationship between the buyer and seller.⁵ Price and relationship are two different things and neither can possibly define the other.

These two characteristics ("nominal" and "arm's length") are descriptive of distinctly different component

⁵The phrase "arm's length transaction" is defined in terms of the lack of pre-ordained relationship or circumstances of collusion and is "commonly applied in areas of taxation when there are dealings between related corporations, e.g. parent and subsidiary. Inecto, Inc. v. Higgins, D.C.N.Y., 21 F.Supp. 418. The standard under which unrelated parties, each acting in his or her own best interest, would carry out a particular transaction." Black's Law Dictionary, 6th Ed. (West Publishing Co., 1990), at 109. Under this definition, which this Court fully accepts, there is no connection between the price itself and the level of independence between the parties to the contract. This definition evidently is not acceptable to the Government because, in its Memorandum of Law filed in the instant case, the District contends, "[t]he facts of the sale of the properties involved in this case are not disputed. None of the sales were arm's length transactions." Respondent's Memorandum of Law at page 8. The Government is wrong; there is no suggestion anywhere in this record that there was any prior relationship between the petitioner and the foreclosure agent or any unsatisfied mortgage holder.

parts of a transaction. There is no causal relationship between them. For example, it is possible for an "arm's length" sale of property between total strangers to involve a "nominal" sales price due to the peculiarities of an agreement to settle a lawsuit.⁶

Second, the sole judicial authority that was proffered by the District is an unpublished Superior Court opinion that is not on point. That case is McDonald's Corporation v. District of Columbia, Tax. No. 4645-90 (August 25, 1993). This Court pauses to review this opinion in detail in order to illustrate why it is not helpful.⁷

The District seizes upon a certain passage in McDonald's and argues that such language offers a prior judicial determination that the term "nominal" necessarily denotes a price that was derived exclusively from an "arm's length" transaction.

The opinion in McDonald's is scarcely three pages in length and nothing in that opinion yields the broad holding that the District attributes to it.

McDonald's involved a petitioner's purchase of real property pursuant to a lease-purchase agreement negotiated eighteen years prior to the conveyance at issue. The

⁶Of course, the offer or acceptance of a nominal price need only make sense to the settling parties themselves.

⁷A copy of the opinion is attached to the Government's Memorandum of Law as Exhibit D.

price paid was \$554,899.00. These facts were embodied in stipulations that were set forth in the trial court's opinion. Clearly, then, McDonald's did not involve a foreclosure sale or any other type of transaction that mirrors what occurred in the instant case. As far as the relationship between buyer and seller is concerned, there is no hint in the trial judge's opinion in McDonald's that the relationship was anything other "arm's length."

In calculating recordation and transfer taxes, the Government in McDonald's had used the assessed value of the property at the time of the conveyance. The assessed value was \$1,980,500.00.

McDonald's Corporation challenged this tax bill in the Superior Court, arguing that the recordation and transfer taxes should have been calculated based upon a value of \$554,899.00, the consideration that was actually paid pursuant to the agreement.

According to Government counsel in the instant case, the Recorder of Deeds took the position in McDonald's that the sales price had been "nominal." Categorizing the sales price as "nominal," the Recorder of Deeds then proceeded to calculate the tax based upon the property's fair market value. The issue in McDonald's was whether the negotiated sum of over a half million dollars was indeed "nominal" as a matter of law. The trial court

found that the actual sale price was not merely nominal and the petitioner therein prevailed.

The trial court's legal conclusions in McDonald's are set forth in only a single paragraph:

The tax imposed under D.C. Code §§ 45-923 and 924 and 47-903, and 904 must be computed on the basis of the **actual and real consideration arrived at in an arm's length transaction** for the transfer of real property or an interest therein and for the recordation of the deed or other transferring instrument, unless there is no consideration or the consideration is not the **actual consideration arrived at as a result of an arm's length transaction**. In which latter cases the tax must be imposed on the basis of the **fair market value of the property**.

Id. at 2 [emphasis supplied]. There was no further elaboration as to why the Recorder of Deeds originally deemed the price to be "nominal."⁸

Indeed, in the instant case the various claims for refund were rejected in boilerplate letters from the Acting Recorder of Deeds. In each letter, the Acting Recorder merely recited in conclusory fashion that "the stated consideration of \$5,000.00 is considered to be nominal."⁹ There was no clue provided in those letters as to the methodology by which this sales price was

⁸Similarly, in the present case, Government counsel also has not articulated the theory under which the Government argued that the price in McDonald's was only "nominal."

⁹Copies of such letters are attached to the Government's pleading.

determined to be "nominal." Thus, the Recorder of Deeds issued a capricious decision.

The only apparent basis for the McDonald's decision appears to be the trial court's agreement with the petitioner that the particular price paid could not be categorized as nominal. The end result in McDonald's is not surprising, since it is absurd to suggest that a sales price of over a half million dollars should be deemed "nominal" by any definition, especially when its ratio to the assessed value was less than one to four.¹⁰

The language quoted above from McDonald's is not dispositive of the instant case because the references to "arm's length transaction" appear to be surplusage that only emphasizes the conventional nature of the transaction itself. On the face of the opinion, there is no indication that the outcome would have been different if the phrase "arm's length" had not been included.¹¹

To boot, the references to "arm's length" in the language quoted above appear in such an arrangement that no distinction is drawn between transactions that occur at arm's length and those that do not. The trial court sets apart sales prices that are "actual and real consideration

¹⁰The very brief and terse opinion in McDonald's may be a candid reflection of the short shrift that this absurd contention deserved.

¹¹The phrase "arm's length" appears to be entirely unnecessary simply because there was no dispute about the arm's length nature of the buyer-seller relationship in McDonald's.

paid in an arm's length transaction" **only** from sales in which no consideration was paid whatsoever. There is absolutely no mention of the term "nominal." The opinion in McDonald's does not purport to link the concepts of "fair market value" and "arm's length."

Third, on its own merits the particular price paid for each of the properties in the instant case well satisfies this Court that no sale of these properties was nominal. Each price that was bid at each auction was a winning bid. While a bid of \$5,000.00 is a low price and a handsome bargain for a condominium in the District of Columbia, this figure does not fulfill the standard definitions of the term "nominal."¹²

"Nominal consideration" is defined in Black's Law Dictionary as follows:

One bearing no relation to the real value of the contract or article, as where a parcel of land is described in a deed as being sold for 'one dollar,' no actual consideration passing, or the real consideration being concealed. This term is also sometimes used as descriptive of an inflated or exaggerated value placed upon property for the purpose of an exchange.

Black's Law Dictionary, 6th Ed. (West Publishing Co., 1990) at 307.

¹²It appears to be a coincidence that this same bid was successful each time.

The law-related term, "nominal" is defined as something that is

Titular; existing in name only; not real or substantial; connected with the transaction or proceeding in name only, not in interest. Park Amusement Co. v. McCaugh, D.C. Pa., 14 F.2d 553, 556. Not real or actual; merely named, stated, or given, without reference to actual conditions; often with the implication that the thing named is so small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the name; e.g. a nominal price. Lehman v. Tait, C.C.A.Md., 58 F.2d 20, 23.

Black's Law Dictionary, 6th Ed. (West Publishing Co., 1990), at 1049.

In non-legal terminology, the definition of the term "nominal" is hardly different. "Nominal" is defined further as "existing or being something in name only or form but not usually not in reality. . . trifling, insignificant. . . . Webster's Third New International Dictionary of the English Language Unabridged (Springfield, Mass: Meriam-Webster, Inc. 1986), at 1534.

Finally, it is significant to reiterate that the District itself has never argued to this Court that the sales prices for these properties are nominal merely because of the auction price of \$5,000.00 itself. The District should be precluded from claiming that the prices paid in the instant case are merely "nominal," because it is undisputed that the Recorder of Deeds has accepted

\$5,000.00 as the "fair market value" for yet another condominium unit in the Gladstone, as recorded in Instrument No. 46170 on July 14, 1993. This anomaly has never been explained or distinguished in any way by the Government.

This Court concludes as a matter of law that sales prices in the instant case are not nominal. There is no present statutory basis on which to rule otherwise.

A review of the relevant portions of the Code reveals the total absence of any specific reference to the assessment of recordation and transfer taxes on real property conveyed through a foreclosure sale or through any other type of auction. Likewise, the Code itself does not require that all sales be the result of an "arm's length transaction."

In its arguments before this Court, government counsel emphasized why the law ought to require that foreclosure prices should be ignored in favor of the "fair market value" of a property. However, even a meritorious argument on the wisdom of such a tax policy cannot serve as an invitation for this Court to legislate. The District's proper remedy is to lobby the legislature to add this requirement to the Code in order to fill what the petitioner has implied is a loophole. The Judicial Branch

cannot create a statutory requirement that simply does not exist.¹³

Notably, the Council of the District of Columbia was silent on the issue at hand when it last addressed the subject of transfer and recordation taxes.

The "District of Columbia Recordation of Economic Interests in Real Property Tax amendment Act of 1989" reflects the most recent change in the law with regard to recordation and transfer taxes. Specifically, this statute created a 2.2% tax on the transfer of economic interest in District real property, in order to eliminate the avoidance of such taxes whenever a party transfers only the ownership of a piece of property rather than the real property itself.

The enactment of this particular law in 1989 would have been an appropriate point at which to add (if the Council had so intended) an unambiguous Code requirement that the taxable value of a property sold in foreclosure or at any auction can only be the fair market value, irrespective of price paid. Yet, this legislation does not mention foreclosure sales or auctions at all.¹⁴

¹³Indeed, this is exactly why this Court gives no weight to the academic comments that have been cited by the Government in its Memorandum of Law. Such sources cannot substitute for what our own statute actually says (or plainly ignores), regardless of whether this Court might agree with other published views.

¹⁴At oral argument, the petitioner suggested that no transfer or recordation taxes were imposed upon sales of real property through the foreclosure process prior to the 1989 legislation. The

Parenthetically, this Court inquired of Government counsel at oral argument whether the District planned to seek such a legislative change in order to bring clarity to this issue. The Government responded in the negative and stated that it was more likely that the Government would pursue its views through the implementation of executive branch regulations. It remains to be seen whether an Executive Branch regulation can properly become a substitute for something that purports to be an enlargement of legislative intent. However, the issue of the constitutional sufficiency of any such potential regulation is not before this Court.

Under the statute **as written**, the District erroneously determined petitioner's payments to be nominal and improperly assessed recordation and transfer taxes based on the fair market value of the property.

The remaining issue before the Court focuses on whether the taxing decision as to one of the properties is shielded from review by this Court because of a violation of the statute of limitations. A discussion of that issue follows herein.

B. The Statute of Limitations Issue

Government did not disagree, although it is not clear whether the prior failure to collect these taxes was ended solely through certain technical language in the Act itself.

The law sets forth a two-year statute of limitations for filing a claim for refund for recordation and transfer taxes. 47 D.C. Code § 3310(a).

Petitioner purchased Lot 2114 on January 19, 1990 by deed in lieu of foreclosure sale for the sum of \$5,000.00. The Recorder of Deeds assessed recordation and transfer taxes of \$792.00 using the real property's assessed value of \$36,000. Petitioner filed a Claim for Refund on March 12, 1992 for Lot 2114, which was denied because petitioner did not file the claim within the two year statutory period.

In seeking relief before this Court, petitioner argues that the statute of limitations for filing a claim for refund was tolled by an allegedly "fraudulent" statement made to him by the Deputy Recorder of Deeds who incorrectly informed him that he had three years to file a Claim for Refund.

To prevail on his fraudulent misrepresentation claim, petitioner must establish that (1) the Deputy made the statement, (2) the statement was false, (3) the statement was material, (4) the Deputy knew the statement was false or recklessly made the statement without knowledge of its truth, (5) the Deputy intended to deceive petitioner, and (6) petitioner relied on the statement. Blake Const. Co., Inc. v. C. J. Coakley Co., Inc 431 A.2d 569, 577 (D.C.

App. 1981); Howard v. Riggs Nat. Bank, 432 A.2d 701, 706 (D.C. App. 1981).

Additionally, "[o]ne pleading fraud must allege such facts as will reveal the existence of all requisite elements of fraud. Facts which will enable court to draw inference of fraud must be alleged, and allegations in the form of conclusions on the part of the pleader as to the existence of fraud are insufficient." Bennett v. Kiggins, 377 A.2d 57, 59-60 (1977), cert. denied, 434 U.S. 1034 (1978).

D.C. Superior Court Civil Rule 9(b) requires that "in all averments of fraud, the circumstances constituting fraud shall be stated with particularity".

In the instant matter, petitioner proffers no facts to support his allegation that the Deputy intended to deceive him. Petitioner also fails to provide any proof that the Deputy knew the statement was false or made the statement with reckless disregard.

Despite his rather specific allegation of fraud, as such, petitioner seems to rely alternatively on the "lulling doctrine" to defeat the statute of limitations defense. His reliance upon this doctrine is misplaced.

Petitioner argues that the "lulling doctrine" provides that the statute of limitation requirements should be ignored when a party justifiably delays filing due to reasonable reliance on agency conduct leading the

party to believe the time to file has been stayed or extended. In re Alexander, 428 A.2d 812, 815 n.4 (D.C. 1981). In Alexander, however, the references to "lulling" were made solely to "a statement or action of the trial court. . . ." Id. The opinion in Alexander does not address statements by Executive Branch agency employees. Petitioner cites no authority supporting the existence of a "lulling doctrine" based upon statements or actions by non-judicial personnel.

Assuming arguendo that petitioner could prove that the Deputy made the alleged statement and that the lulling doctrine might apply, this Court finds that petitioner did not reasonably rely on it for several reasons.¹⁵ Since petitioner seeks an equitable remedy, the reasonableness factor is important.

First, petitioner is a practicing attorney. Because of petitioner's presumed familiarity with the law or at least his ability to educate himself on legal requirements, this Court finds that it was unreasonable for petitioner to rely solely on the Deputy's alleged statement. Petitioner needed only to review the appropriate Code provision to verify the time deadline for pursuing judicial remedies.

¹⁵The Government declined an offer by the Court to convene an evidentiary hearing for the purpose of airing any disputed facts. Thus, the fact that it was made is uncontested.

Second, even if petitioner were not an attorney, the Court would require more Government action than the actions on which petitioner relied in order to invoke the lulling doctrine, i.e. the Court would require that the agency in question have an obligation to provide notice of the incorrect statute of limitations period. Without such an obligation, it is difficult to hold that a citizen (especially a lawyer) would or should normally rely upon the agency's word for this particular, critical type of information.¹⁶

Petitioner makes a thoughtful argument that the Deputy Recorder of Deeds, if anyone, should certainly know the correct statutory deadline for seeking an appeal. Nonetheless, the Office of the Recorder of Deeds is not involved in the judicial review process itself -- unlike the Clerk of the Court of Appeals or his deputies, or the Clerk of the Superior Court and his deputies. Moreover, it is not an agency that administers an entitlement program wherein the denial of public funds could invoke a due process challenge whenever there is a failure to give

¹⁶In two published opinions, the District of Columbia Court of Appeals has recognized the fault of an administrative agency in providing misleading or ambiguous directives in the process of giving a claimant notice of the opportunity to appeal. See Bailey v. District of Columbia Department of Employment Services, 499 A.2d 1223 (D.C. 1985) and Ploufe v. District of Columbia Department of Employment Services, 497 A.2d 464 (D.C. 1985). In both of these cases, the predicate of affording relief to the petitioner was the fact that the agency specifically took upon itself the obligation to communicate the deadline for perfecting an appeal.

adequate notice of appeal rights. Accordingly, it is not reasonable for anyone (especially this petitioner) to rely upon the personal word of the a Deputy Recorder of Deeds for definitive advice as to the deadline for seeking a judicial remedy. For all of the reasons stated herein, petitioner's appeal of his Claim for Refund for Lot 2114 must be denied for lack of jurisdiction.

WHEREFORE, it is by the Court this 19th day of April, 1995

ORDERED that petitioner's Claims for Refund for Lots 2115, 2117, 2124, 2130, and 2132 are granted; and it is

FURTHER ORDERED that the District of Columbia shall refund to petitioner the sum of \$4,114.00,¹⁷ with an additional sum calculated at the statutory rate of interest commencing on the filing date of the petition herein (March 22, 1993); and it is

FURTHER ORDERED that petitioner's Claim for Refund for Lot 2114 is denied as barred by the applicable statute of limitations.


Cheryl M. Long
Judge

¹⁷The District has not disputed that this figure would represent the amount of the excess between the tax that was paid and the tax that should have been calculated under the petitioner's theory.

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