

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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EARLA ASSOCIATES,

Petitioner,

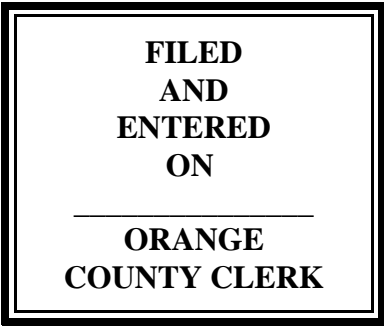
-against-

THE BOARD OF ASSESSORS AND THE BOARD
OF ASSESSMENT REVIEW OF THE CITY OF
MIDDLETOWN,

Respondents.

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DICKERSON, J.



Index No. 4779-05

DECISION & ORDER

SUTTON HILL : VALUATION OF AN APARTMENT COMPLEX

The trial of this Real Property Tax Law [" R.P.T.L. "] Article 7 proceeding challenging the real property tax assessment for the year 2005 imposed upon the subject property [a 276 unit garden apartment complex constructed 30 years ago in 1974 known as the Sutton Hill Apartments¹], owned by the Petitioner, Earla Associates [" Earla "] by the Respondents, The Board of Assessors and the Board of Assessment

Review [" BAR "] of the City of Middletown, took place on June 26, 2006 and June 27, 2006.

After careful consideration of the trial record and exhibits, the excellent post-trial Memorandum of Law and proposed Findings of Fact and Conclusions of Law of the Petitioner² and the Respondents³, the Court is now prepared to render its Decision on valuation.

The Assessor's Full Value Figure

The assessment imposed upon the subject property for the taxable status date at issue was \$2,750,000. The stipulated equalized tax rate for the year at issue was 15.50%. An application of the equalization rate to the \$2,750,000 assessment yields the Assessor's full value figure of \$17,741,935.

The Petitioner's Full Value Figure

Petitioner's Appraisal Report [" Petitioner's Appraisal "]⁴ created by Beckmann Appraisals, Inc. and the trial testimony of its expert, William R. Beckmann, MAI [" Beckmann "], asserts that the full value of the subject property for the year at issue was \$10,000,000.

The Respondents' Full Value Figure

Respondents' Appraisal Report [" Respondents' Appraisal "]⁵ created by Griffin Valuation & Realty Services, LTD. and the trial testimony of their expert, Gerald Griffin, Jr., MAI [" Griffin "], states that the full value of the subject property for the year at issue was \$15,000,000.

Overcoming The Presumption Of Validity

A party seeking to overturn an assessment must first overcome the presumption of validity in that the Petitioner's Appraisal must be based upon standard and accepted appraisal techniques. This presumption of validity must be overcome through the submission of substantial evidence [See e.g. Matter of FMC Corp. [Peroxygen Chems. Div.] v. Unmack , 92 N.Y.2d 179, 187, 677 N.Y.S.2d 269 (1998)(" 'In the context of tax assessment cases, the 'substantial evidence' standard merely requires that petitioner demonstrate the existence of a valid and credible dispute regarding valuation. The ultimate strength, credibility and persuasiveness are not germane during this threshold inquiry...a court should simply determine whether the documentary and testimonial evidence proffered by petitioner is based on 'sound theory and objective data' "); Matter of Niagara Mohawk Power Corp. v. Assessor of the Town of Geddes, 92 N.Y.2d 192, 196, 677 N.Y.S.2d 275 (1998)(" In the context of a

proceeding to challenge a tax assessment, substantial evidence proof requires a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser ")].

Sound Theory & Objective Data

This Court finds that the Petitioner has submitted substantial evidence based upon " sound theory and objective data " consisting of an Appraisal and the testimony of Mr. Beckmann, and as such has demonstrated the existence of a valid dispute concerning the propriety of the disputed assessment. Having met its initial burden, the Petitioner must prove, through a preponderance of evidence, that the assessment is excessive. The Court has considered and evaluated the weight and credibility of the evidence submitted to determine whether the Petitioner has proven that the assessment is excessive.

The Selected Valuation Methods

The Petitioner's expert, Mr. Beckmann, and the Respondents' expert, Mr. Griffin, utilized the income capitalization approach to value the subject property.

Respondents' Use Of Comparable Sales

Mr. Griffin also used the sales comparison approach, wherein he based his market approach on four sales with raw sale prices ranging from \$55,107 per unit to \$81,538 per unit⁶. These sales were adjusted downward by up to 28% to a range of \$51,778 per unit to 71,278 per unit⁷. As a result of this analysis he found a \$15,180,000 market approach value. He found a reconciled full market value of \$15,000,000 for the subject property, as compared to his income approach value of \$13,900,000⁸.

Petitioner's Use Of Comparable Sales

Mr. Beckmann utilized his analysis of three comparable sales to a very limited degree, relying, primarily, on the value from his income approach. In his appraisal, he stated, " These sales provide a general range of values of garden-style apartment complexes in the subject marketplace. After adjustments, the sales presented herein indicate a range from a low of \$35,064 per unit to a high of \$51,910 per unit. Due to the prime importance of income when valuing income producing properties, the value range indicated above is utilized as a check on the reasonableness of our value estimate indicated by the Income Capitalization Approach, upon which we rely "⁹. Hence, the Petitioner

relied only on the income capitalization approach using comparable sales to provide a value range as a check of his income approach.

Sales Comparison Approach Is Inapplicable

The Court rejects the sales comparison approach used by Mr. Griffin. This is not to say that the sales comparison approach or any other approach which is adequately supported by the record cannot be used to value real property in tax assessment proceedings. However, without a detailed understanding of the income and expenses of the proposed comparable sales, there is no factual basis for concluding that the sales are in fact comparable to the subject property [See e.g. Reckson Operating Partnership, L.P. v. Assessor of the Town of Greenburgh, 2 Misc. 3d 1005(A), 784 N.Y.S.2d 923 (West. Sup. 2004) (" a buyer of income producing property purchases an income stream "); The Appraisal of Real Estate [12th ed.], Appraisal Institute, Chicago, Ill., 2001, at 419-420 (" The sales comparison approach usually provides the primary indication of market value in appraisals of properties that are not usually purchased for their income producing characteristics. These types of properties are amenable to sales comparison because similar properties are commonly bought and sold in the same market. Typically, the sales comparison approach provides the best indication of value for owner-occupied commercial and industrial properties. Buyers of income-producing properties usually

concentrate on a property's economic characteristics. Thoroughly analyzing comparable sales of large, complex, income-producing properties is difficult because information on the economic factors influencing the decisions of buyers is not readily available from public records or interviews with buyers and sellers...[a]n appraiser may not have sufficient knowledge of the existing leases applicable to a neighborhood shopping center that is potentially comparable to the subject. Property encumbered by a lease is a sale of rights other than fee simple rights and requires knowledge of the terms of all leases and an understanding of the tenant(s) occupying the premises. Some transactions include sales of other physical assets or business interests. In each instance, if the sale is to be useful for comparison purposes, it must be dissected into its various components. Even when the components of value can be allocated, it must be understood that because of the complexity of the mix of factors involved, the sale may be less reliable as an indicator of the subject's real property value ")].

Respondents' Sales Comparison Approach Rejected

Without information on the most crucial aspect of comparability, the income stream, Mr. Griffin's sales comparison approach will be given no weight [See e.g. Reckson, supra; Matter of Blue Hill Plaza Associates v. Assessor of Town of Orangetown, Sup. Ct. Rockland Co.,

Index Nos. 5093/90 et al., Slip Op. dated December 23, 1994 (n.o.r.), modified 230 A.D.2d 846, 646 N.Y.S.2d 836 (2d Dept. 1996), lv. denied. 89 N.Y.2d 804 (1996); Taxter Park Associates v. Assessor of Town of Greenburgh, Sup. Ct. West. Co., Index Nos. 16189/96 et al., Slip Op. dated October 8, 1996 (n.o.r.)].

The Income Approach Is The Preferred Method

The income approach is the preferred method of appraising income producing property [See e.g. Merrick Holding Corp. v Board of Assessors of the County of Nassau, 45 N.Y.2d 538, 542, 410 N.Y.S.2d 565, 567 (1978), (" in the absence of sufficiently reliable market data, alternative methods such as income capitalization or, where necessary, reproduction cost, may be employed [citations omitted]. Not surprisingly, as to income producing property, income capitalization has been the preferred mode..."); 41 Kew Gardens Road Associates v. Tyburski, 70 N.Y.2d 325, 331, 520 N.Y.S.2d 544, 546 (1987), ("The income capitalization approach is generally regarded as the preferred method of determining the value of income-producing property, which is the issue in this case."); Farash v. Smith, 5. N.Y.2d 952, 955-956, 466 N.Y.S.2d 308,310 (1983) ("both appraisers relied on the preferred capitalization of income approach to finding market value...")]. Hence, this Court finds that the income capitalization approach is the proper method to value the subject property.

Comparison of Income and Expenses

The following is a comparison of Mr. Beckmann's and Mr. Griffin's estimated income and expenses:

	<u>Petitioner</u> ¹⁰	<u>Respondents</u> ¹¹
Gross Income	\$2,849,260.	\$2,705,580.
Less Vac/Col (4%)	<u>111,170.</u>	(5%) <u>135,300.</u>
Eff. Gr. Inc.	2,738,090.	2,570,280.
Less Staff/ Office Apts.	<u>n/a</u>	<u>39,570.</u>
Total Income	2,738,090.	2,530,710.
Less Expenses	<u>1,481,309.</u>	<u>1,243,000.</u>
	\$1,256,781.	\$1,287,710.
Net Oper. Inc.	<u>\$1,260,000.</u>	<u>\$1,290,000.</u>

Capitalization & Equalization Rates

The parties disagree on the capitalization and equalized tax rates as follows:

	<u>Petitioner</u> ¹²	<u>Respondents</u> ¹³
Cap. Rate	.0925	.0705
Equ. Tax Rate	.0330	.0256
Overall Cap. Rat	.1255	.0961

Adjusted Fair Market Value

The two appraisers reach the following values through the income capitalization approach:

	<u>Petitioner</u> ¹⁴	<u>Respondents</u> ¹⁵
Income Appr. FMV	\$10,039,841.	\$14,024,037.
Less Def. Maint.	<u>n/a</u>	<u>151,745.</u>
	\$10,039,841.	\$13,872,292.
Adjusted FMV	<u>\$10,000,000.</u>	<u>\$13,900,000.</u>

Similarity Of Net Operating Income

Both Mr. Beckmann and Mr. Griffin have concluded remarkably close estimates of income and expenses in their Appraisal Reports with net operating incomes that differ by only \$30,000. As a result, both appraisers appear to agree that the only significant areas of dispute are the capitalization rate, the equalized tax rate, and the related issue of whether or not the subject property is institutional grade. Hence, upon a review of the credible evidence presented at trial, this Court will accept Mr. Beckmann's income capitalization analysis including his net operating income figure of \$1,260,000, and will focus the remainder of this decision on the issues that are actually in dispute.

Institutional Grade & Capitalization Rate

The Petitioner's View

It is the Petitioner's view, as stated by Mr. Beckmann, that the subject property " is not institutional-grade and that the capitalization rate determination should be made using Korpacz figures for non-institutional apartment properties "¹⁶. " The non-institutional capitalization rates are higher than institutional grade as by definition, institutional grade properties are considered less risky by lenders and investors...The subject property is not considered an institutional (investment grade) property. Further, the subject property is an older property that is in direct competition with newer apartment complexes with modern amenities. The subject units are considerably smaller (square footage) than the size of units in newly constructed apartment complexes. Therefore, a prudent investor will most likely choose a capitalization rate that recognizes the added risk associated with owning an older 'lower grade' property...Based on the above and recognizing that the subject property is not considered institutional (investment grade), we have selected 9.25% as the appropriate overall capitalization rate as appropriate for the subject property as of the valuation date, July 1, 2004 "¹⁷.

Requirements For Institutional Grade Properties

Mr. Beckmann stated at trial " And the requirements for institutional properties are located in my addendum on page 174, which is another publication from Korpacz Real Estate Investment Survey, division of PriceWaterhouse Coopers, where in the fourth paragraph it talks about physical characteristics of the property, high quality construction, above average design, modern mechanical layouts, good amenities. And the most important is the property being in excellent condition and less than ten years old and having an effective age of less than ten years."¹⁸

Brochure Quality With Street Appeal

The above Korpacz Real Estate Investment Survey that Mr. Beckmann relies on defines institutional-grade real estate as, " real property investments that are sought out by institutional buyers and have the capacity to meet generally prevalent institutional investment criteria...Institutional-grade real estate is 'brochure quality.' It is located in a major market or submarket that is recognized in the institutional investment community. The property is impressive, has 'street appeal'. The physical construction; above-average architectural design, configuration, and layout; modern mechanical systems, sprinklers, heat and smoke detectors, and alarms; good amenities; and

in some areas and property types, good adjacent parking. The property is in excellent condition and is less than 10 years old or has an effective age of less than 10 years "19.

The Insurance Company Mortgage

Although the subject property has a 2003 mortgage on it for \$5,500,000 to the Principal Life Insurance Company, it is Petitioner's position that this fact does not *per se* make it an institutional [investment] grade property. " This is all the more so since the mortgage is for far less than the usual 70% to 80% loan to value ratio prevalent in the market. The \$5,500,000 mortgage is 36.66% of the City's appraisal value of \$15,000,000 and 55% of the Petitioner's appraisal value of \$10,000,000 "20

Taking A Hard Look At The Subject Property

Mr. Beckmann testified that a property does not necessarily become an investment grade property simply because a life insurance company placed a mortgage on it. He stated, " A lot of different organizations invest in a lot of property. One has to look at the property. After determining, after I looked at the property, went through it, that the property has an effective age, probably in excess of 20 years, was built in the early '70s, I felt that it's a noninstitutional grade

property...My feeling is that the property as it existed was noninstitutional. Whether somebody would invest in it is a different story "²¹.

The Respondents' Position

Mr. Griffin's position is that the subject property is institutional grade. He testified that the property is "brochure" quality with curb appeal²².

Lukewarm & Not Convincing

Mr. Griffin testified in a lukewarm fashion regarding his reasons for finding the subject property to be institutional grade, and was not at all convincing. He stated, " In inspecting this property, I felt it was an average property. It was well rented I mean. And it had consistently been well rented from the managers. As far as she knew, as long as she's been there, it had been pretty full. And also the fact that the owners were attempting to build more properties adjacent. It spoke to its successful operation. It was being remodeled. I mean, the units were being upgraded, being repainted. All of the blacktop, except the area I mentioned, is decent. They rebuilt the swimming pool at substantial expense. So the property seemed quite solid to me ".

Deferred Maintenance

" And it has deferred maintenance, which I refer to on page 28 of my appraisal, toward the bottom, and subtract \$150,000 to rectify the problem. And that's how I arrived at it. I thought it was an average property that would be quite acceptable to an institutional type of investor, and used the average cap rate as published - as analyzed, researched and published by Korpacz " ²³.

No Better Than Average

In response to whether the subject property was large size, high grade construction, Mr. Griffin testified that, "It's 70s. No. It's, I'd say average construction...Considering it was built in the 70s. Considering the economic problems that were brought ahead in the apartment industry in the 70s, considering when it was built and everything. I didn't tear the sheetrock off the walls to find out, but I would say it was probably what we would consider average " ²⁴. In addition, Mr. Griffin testified that the subject property has an effective age of 20 to 25 years ²⁵.

Institutional Grade Property?

Mr. Griffin concluded that the subject property is institutional grade and that the Korpacz average capitalization rate for institutional grade properties of 7.05% should apply. He also stated that if the property is found to be non-institutional grade, than the Korpacz non-institutional average of 8.15% should apply, rather than the 9.25% proposed by Mr. Beckmann.

Federal Case Law

There is little New York State case law discussing whether or not a property is institutional grade [See e.g., VGR Associates, LLC. v. Assessor of the Town of Windsor, 13 Misc. 2d 1218(A), 2006 WL 2851618 (West. Sup. 2006) (" After considering all of the factors presented by the parties, this Court determines that, although the subject property [shopping center] contains many factors consistent with an institutional grade property, it does not reach the level of institutional grade. Hence, in determining the appropriate capitalization rate to be used, we reject the capitalization rates of both Mr. Beckmann and Mr. Herbold. The Court finds that the appropriate capitalization rate for the tax years in question to be 13.8% for 2002 and 13.3% for 2003 ")]. However, the Court of Federal Claims has addressed this issue on, at least, two occasions. In Cienega Gardens v.

United States, 67 Fed. Ct. 434 (Ct. Fed. Cl. 2005), the Court considered whether five assisted living garden apartment complexes [circa 1970] were institutional grade properties [for the purpose of determining a discount rate] and found they were not because their age exceeded 10 years.

Much Too Old

The Cienega Gardens Court stated, " One of the factors in evaluating investments in real property is whether the properties are "institutional-grade," with non-institutional grade properties being a riskier investment than institutional grade properties...Whether a property is considered institutional-grade depends upon the character of the properties more than the investors who purchase the property...Among the characteristics of institutional-grade properties are location in a major market, impressive appearance, large size, high quality construction, above-average design, good amenities, and excellent condition...The court finds that the properties in this case possessed these characteristics of institutional-grade properties. Nonetheless, institution-grade properties are usually less than ten years old, and although these properties do not look their age, they do not satisfy that element of institutional grade property...".

Age & Location

In Fraconia Associates v. Unites States, 61 Fed. Cl. 718, 765-766, (Ct. Fed. Cl. 2004) the Court relied on the Korpacz Real Estate Investment Survey definition for institutional grade property and Court held that " While the record suggests that plaintiffs' properties have some of these features, on the whole, they do not meet the definition of 'institutional-grade real estate' based, in particular, on their age and location. As such, it appears that they more closely resemble what the Korpacz Survey terms 'noninstitutional-grade properties,' for which the average discount rate is 13.01 percent..."

The Subject Property Is Not Institutional Grade

Applying the Korpacz definition for institution-grade property to the credible evidence presented by both Mr. Beckmann and Mr. Griffin [in their Appraisal Reports and trial testimony] this Court concludes that the subject property at issue is not institutional grade. Although the subject property appears to be in very good condition for an apartment complex built in 1974 the subject property fails to meet the necessary requirements [two of which are above-average design and excellent condition] that are essential for institutional-grade property [See e.g., VGR Associates, LLC, supra], particularly since

the property is 30 years old with an effective age, as stated by Mr. Griffin, of 20 to 25 years, far greater than the 10 year " cut-off " set forth by Korpacz and relied upon by the Court in Cienega Gardens, supra and Fraconia Associates, supra.

The Proper Capitalization Rate

Both appraisers agree that the average Korpacz capitalization rate applicable to non-institutional grade properties is 8.15%. Although Mr. Beckmann has selected 9.25% as the capitalization rate for the subject property, this Court disagrees, finding the 8.15% average as the more appropriate rate. There has been insufficient evidence presented to justify a capitalization rate so far above the average Korpacz figure for non-institutional grade properties.

A Disparity In Equalized Tax Rates

A large disparity exists between the parties with respect to calculating the equalized tax rate for the 2005/2006 tax year with a July 1, 2004 tax valuation date.

Petitioner's Equalized Tax Rate

Mr. Beckmann calculated his equalized tax rate on the taxes in effect as of July 1, 2004 and the equalization rate for the assessment upon which such taxes were levied.

Respondents' Equalized Tax Rate

Mr. Griffin calculated his equalized tax rate on the taxes for the upcoming tax year 2004/05, but applied the State rate for the following 2005/06 assessment, which is the tax year at issue. His tax years and his State rates clearly did not match.

Petitioner's Alternate Methodology: Fiscalization

During the trial, the Petitioner offered an alternative method of calculating the equalized tax rate as a means of bridging the large gap between the two appraisers²⁶. This method is known as "fiscalization" and was prepared by Mr. Beckmann as "an analysis for the calendar year bracketing the July 1st tax status date 2004 "²⁷. Mr. Beckmann testified that he has prepared "probably a hundred" appraisals using fiscalization methodologies²⁸.

Authority For Fiscalization

The case law regarding equalized tax rates deals not with calculating those rates but rather with the need for utilizing equalized tax rates in the capitalization process. As the Petitioner pointed out, the appraiser in Senpike Mall Company v. Assessor of the Town of New Hartford, 136 A.D.2d 19, 22, 525 N.Y.S.2d 104, 106 [4th Dept. 1988] used a calculation to determine the equalized rate, adopted by both the Referee and the Court, which is very similar to that of Mr. Beckmann's alternate fiscalization methodology²⁹. This Court takes note that the fiscalization method used by the appraiser Robert Sterling, MAI and adopted by the Court in Tarrytown Hall Care Center v. Board of Assessors, Index #14267/98, [Sup. Ct. 3/12/04] Rosato, J., is " exactly the same " fiscalization method proffered by Mr. Beckmann's alternate method herein³⁰.

Mr. Beckmann's fiscalization analysis pro-rates the tax rates in effect for the fiscal year beginning July 1, 2004 and applies the applicable State rate for the assessment upon which the tax rate was levied, resulting in an equalized tax rate of 2.93%³¹.

Fiscalization Methodology Accepted

Upon a review of all the credible evidence submitted by the parties regarding the equalized tax rate, this Court accepts Mr. Beckmann's

alternate fiscalization method for determining the equalized tax rate, and, therefore, accepts the rate of 2.93%.

The Overall Capitalization Rate

When the capitalization rate accepted by this Court of 8.15% is added to the equalized tax rate determined by Mr. Beckmann's fiscalization method of 2.93%, the overall capitalization rate accepted by this Court is 11.08%.

The Fair Market Value

Applying the overall capitalization rate of 11.08% to the net operating income of \$1,260,000 results in a fair market value of \$11,371,841, rounded to \$11,370,000.

The Assessed Value

Applying the equalization rate of 15.50% to the indicated fair market value of \$11,370,000 produces an indicated assessed value of \$1,762,350, rounded to \$1,760,000. When compared with the actual assessed value of \$2,750,000, the difference is \$990,000.

The Petition, with costs [RPTL 722[1]], is sustained to the extent indicated above, the assessment roll is to be corrected accordingly, and any overpayments of taxes are to be refunded with interest.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, N.Y.
December 8, 2006

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. The average size apartment in the subject property is 737 square feet, with one bedroom units ranging in size from 611 to 673 square feet, two bedroom, one and a half bath units ranging in size from 815 to 837 square feet, and two bedroom, two bath units ranging in size from 815 to 832 square feet [p. Ex. A at p. 56]. Although 522 parking spaces are required for the subject property, only 405 are provided, with 42 being offsite on an adjacent parcel [R. Ex. 1 at p. 15]. The subject property fails to meet " setbacks required by zoning " [R. Ex. 1 at p. 15] and a portion of the blacktop parking and roof " are due to be replaced " [R. Ex. 1 at p. 16]. A small number of apartment units were renovated as of 2004.

2. Petitioner's Post-Trial Memorandum of Law dated October 4, 2006 [" P. Memo. "]; Petitioner's Proposed Findings of Fact and Conclusions of Law dated November 14, 2006.

3. Respondents' Post-Trial Memorandum of Law dated October 13, 2006 [" R. Memo. "]; Respondents' Reply Brief [" R. Reply Memo. "]; Respondents' Findings of Fact and Conclusions of Law undated.

4. P. Ex. A.

5. R. Ex. 1.

6. R. Ex. 1, p. 20.

7. R. Ex. 1, p. 20.

8. R. Ex. 1, p. 30.

9. P. Ex. A, p. 83.

10. P. Ex. A, p. 150.

11. R. Ex. 1, p. 27.

12. P. Ex. A, p. 153.

13. R. Ex. 1, p. 28.

14. P. Ex. A, p. 155.

15. R. Ex. 1, p. 30.
16. P. Ex. A, pp. 151-152.
17. P. Ex. A., pp. 151-152.
18. Trial Tr., pp. 26-27.
19. P. Ex. A., p. 174.
20. P. Memo., pp. 9-10.
21. Trial Tr., p. 88.
22. Trial Tr., p. 210.
23. Trial Tr., p. 196.
24. Trial Tr., p. 212.
25. Trial Tr., p. 215.
26. Trial Tr., p. 46.
27. Trial Tr., p. 47; Ex. C.
28. Trial Tr., pp. 50-51.
29. P. Memo., p. 34.
30. P. Memo., p. 34.
31. P. Memo, p.21.