

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

BAUMSTEIN, BORROK, ET AL. - TENANTS-IN-COMMON

DECISION
DTA NO. 803564

for Revision of a Determination or for Refund
of Tax on Gains Derived from Certain Real
Property Transfers under Article 31-B of the
Tax Law.

Petitioners, Baumstein, Borrok, et al. - Tenants-in-Common, c/o Tenzer, Greenblatt, Fallon & Kaplan, 405 Lexington Avenue, New York, New York 10174, filed an exception to the determination of the Administrative Law Judge issued on June 30, 1988 with respect to their petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 803564). Petitioners appeared by Tenzer, Greenblatt, Fallon & Kaplan, Esqs. (S. Sidney Mandel, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

Neither of the parties filed a brief on exception. Oral argument was heard on November 9, 1988 at the request of petitioners.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

Issue

Whether penalty and penalty interest imposed against petitioners pursuant to Tax Law section 1446.2(a), based upon petitioners' late filing of returns and late remittance of tax due under Tax Law Article 31-B, should be abated.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. The relevant facts are summarized below.

Petitioners, Baumstein, Borrok, et al., are a group of 25 tenants-in-common who, until the transfer at issue herein, were the owners of 7,034 shares of stock in a cooperative housing corporation. These shares of stock were allocated to and among the 28 individual cooperative apartment units in an apartment building located at 330 West 72nd Street, New York, New York (the "premises"). Petitioners acquired said shares of stock on March 24, 1983 pursuant to the liquidation and dissolution of The 330 Company, the sponsor under a plan to convert the premises to cooperative ownership.

The 330 Company had acquired the premises in 1970 as the result of a foreclosure. The 330 Company subsequently converted the premises to cooperative ownership, with the underlying realty transfer (transfer of the premises from The 330 Company to 33072 Owners Corp.) occurring on March 26, 1980. At such time, the managing partner of The 330 Company, a limited partnership, was one Mr. Steingart. Mr. Steingart died in or about October of 1980, at which time one Wolfe Charney, Esq., took over as managing partner.

Subsequent to the conversion of the premises to cooperative ownership, a number of the shares allocated to certain apartment units were transferred to various individual apartment unit purchasers. As of the March 28, 1983 effective date of Tax Law Article 31-B ("gains tax"), a total of 28 apartment units were neither sold nor then subject to subscription agreements for their sale. It is these 28 apartments to and among which the 7,034 shares of stock were allocated.

One of the 28 apartment units was transferred in August of 1983, two of such apartment units were transferred in September of 1983, and one of such apartment units was transferred in April of 1984. Thereafter, in January of 1985, the balance of the apartment units (24 units) was transferred in bulk by petitioners to an individual purchaser. As of the dates of each of the aforementioned transfers, including the January 1985 "bulk" transfer, no gains tax returns had been filed nor had any gains tax been paid.

On or about March 6, 1985, some two months after the last of the apartment units had been transferred, petitioners submitted transferor and transferee questionnaires to the Division seeking a

tentative assessment of gains tax due on the aforementioned transfers. On March 21, 1985, the Division contacted petitioners, indicating that additional information was necessary. Although not particularly specified, the information requested, in general, pertained to documentation in substantiation of petitioners' claimed original purchase price for the premises and of certain capital improvements made to the premises.

On or about May 20, 1985, in response to the Division's request, petitioners furnished certain additional information to the Division. Thereafter, on May 21, 1985, the Division again contacted petitioners requesting additional information with respect to petitioners' original purchase price and capital improvements claimed to have been made to the premises. It appears from the record that petitioners' original submission (the transferor and transferee questionnaires) had listed merely a lump-sum amount for original purchase price and for capital improvements claimed to have been made. Thereafter, in early July 1985, petitioners responded to the Division's second request with additional information.

On August 5, 1985, the Division issued to petitioners a Tentative Assessment and Return in connection with the transfers in question, indicating thereon a gains tax due in the amount of \$247,777.79, together with penalty in the amount of \$54,612.21 and interest in the amount of \$22,053.46.

On or about August 14, 1985, petitioners made a payment in the amount of \$269,831.25, representing the amount of tax and interest as shown on the Tentative Assessment and Return. By a letter dated August 21, 1985, petitioners sought abatement of the penalty and penalty interest included as part of the Tentative Assessment and Return.

On January 28, 1986, the Division issued to petitioners a revised Tentative Assessment and Return indicating a revised amount of tax due of \$99,231.60, plus penalty in the amount of \$25,300.00 and interest in the amount of \$9,287.15.

On February 20, 1986, petitioners filed a Claim for Refund in the amount of \$161,312.50, plus interest. This claim, in essence, sought a refund of the difference between the amount paid by petitioners under the original tentative assessment versus the amount shown on the revised tentative

assessment. By their manner of computing the claim, as well as by their letter of explanation attached thereto, petitioners sought abatement of the \$25,300.00 penalty shown on the revised tentative assessment.

By a letter dated April 11, 1986, the Division granted petitioners' claim for refund to the extent of \$136,012.50. However, the Division denied petitioners' request for abatement of penalty, in effect reducing the full amount of refund claimed (\$161,312.50) by the \$25,300.00 penalty shown on the revised tentative assessment.

At hearing, petitioners presented the testimony of Messrs. Wolfe Charney, Esq., and Stuart Goldstein, Esq. As noted, Mr. Charney was involved as the managing partner with respect to the conversion subsequent to Mr. Steingart's death. Mr. Goldstein was involved as tax counsel subsequent to the transfer of the units in question. Mr. Charney testified that he knew of the statutory language requiring the payment of tax at the time of the closing and transfer of the units (Tax Law { 1442). He also testified that he knew of the general requirement for filing transferor and transferee questionnaires in connection with real estate transfers at least 20 days prior to the date of such a transfer, in return for which a tentative assessment was to be issued by the Division. However, both Mr. Charney and Mr. Goldstein testified to their belief and understanding that gains tax, notwithstanding the statutory language, was payable only after the issuance of a Tentative Assessment and Return. This belief and understanding was based upon conversations with individuals working within their law firm (Tenzer, Greenblatt, Fallon & Kaplan, Esqs.) who had spoken with members of the Division's gains tax staff, and upon conversations with practitioners as to the custom within the cooperative conversion industry.

Mr. Charney testified that the four unit transfers which occurred in late 1983 and early 1984 included no filings or remittance because, at that time, petitioners were unsure as to whether gains tax applied to the sales of cooperative units under circumstances where the underlying realty transfer from the sponsor to the cooperative housing corporation had occurred prior to the effective date of the gains tax. Mr. Charney testified that as of the January 1985 date of the bulk transfer of the remainder of the shares/units, the same uncertainty initially caused petitioners not to file transferee

and transferor questionnaires in connection with such bulk transfer, and that it was only after Mr. Goldstein advised petitioners some two months later that the questionnaires were necessary that steps were taken to effect the filing of such questionnaires in March of 1985.

In connection with this March 1985 filing of questionnaires, petitioners contacted one Norman Cherry, who was the accountant with respect to the conversion, to obtain cost records for purposes of establishing petitioners' original purchase price for the premises and for capital improvements made thereto. The delay in submitting this original purchase price information, both initially in connection with the filing of the questionnaires and thereafter in response to the Division's requests for information, was attributed to a difficulty in assembling records pertaining to over 10 years' worth of capital improvements made to the premises, as well as, more specifically, to both Mr. Cherry's and the law firm's involvement in "tax season".

At hearing, petitioners conceded that the imposition of penalty on those unit sales occurring in August and September of 1983 and April of 1984 was not being contested. Thus remaining in question is the propriety of the penalty asserted with respect to the January 1985 bulk transfer of the balance of the shares/units.

OPINION

The Administrative Law Judge determined that petitioners did not establish reasonable cause for their failure to timely file gains tax questionnaires with respect to the January 1985 "bulk" transfer of units and to pay the tax due on such transfers.

On exception, petitioners argue that they established reasonable cause for their delay in filing and paying tax based on the difficulty in obtaining documentation for the original purchase price of the real property and on the advice received from the Division of Taxation that payment of tax should not be made until receipt of the Tentative Assessment and Return. Petitioners also argue that they substantially complied with the pre-transfer audit procedure of the gains tax and thus fall within the good faith guidelines for penalty abatement set forth in the Division's TSB-M-85-(3)-R.

The Division of Taxation responds that the petitioners failed to comply with the pre-transfer audit procedure which requires the filing of questionnaires 20 days before the transfer. Further, the

Division argues that the petitioners' excuse for such failure, the difficulty in obtaining original purchase price information is not reasonable cause. Finally, the Division argues that the petitioners have not proven exactly what question was asked by the petitioners when they received the advice to not pay the tax until the tentative assessment was issued.

We affirm the determination of the Administrative Law Judge.

Section 1447.2 of the Tax Law provides that if the parties to a transfer file the required documents (a transferor and transferee questionnaire) at least 20 days prior to a transfer, the Division of Taxation shall issue a tentative assessment of the tax due within 20 days. Section 1442 of the Tax Law states that the tax is due on the date of the transfer. Under this statutory scheme a transferor and transferee who file the required questionnaires 20 days prior to the transfer are informed of how much tax to pay on the date of transfer by the tentative assessment. On the other hand, parties who do not comply with the 20 day pre-transfer filing are still obligated to pay the tax due on the date of transfer, but do not necessarily have a tentative assessment to tell them how much tax to pay.

In August 1983 the Division issued Publication 588, Questions and Answers on the Gains Tax, which made it clear that in a cooperative conversion gains tax was due at the time the shares allocated to each unit were sold (Question and Answer No. 20). Also in August 1983, the Division issued TSB-M-83-(2)-R which set forth two methods for calculating the gains tax due on each transfer of shares allocated to a unit in a cooperative plan. This TSB-M also made it clear that the 20 day pre-transfer audit procedure applied to each transfer of shares allocated to a unit in a cooperative plan. The Division restated its position that tax was due on the transfer of shares in November 1984 in a revised Publication 588 (Question and Answer Nos. 33 and 35).

Given this background we cannot find that petitioners could have reasonably concluded that they were not required to file gains tax questionnaires 20 days prior to the transfer of the units in January 1985. Nor can we find that petitioners' difficulty in assembling detailed original purchase price information justified their complete failure to comply with the pre-transfer audit procedure. First, petitioners had over 15 months from the time of the first taxable transfer in September 1983 to

the time of the January 1985 transfers to assemble original purchase price information. Secondly, while the difficulty in obtaining information might be relevant to establish reasonable cause for an underpayment of tax, where, for example, tax was underestimated due to the unavailability of information, such a difficulty does not explain the complete failure to file and pay tax.

Next we address petitioners' claim that their delay in paying tax was based on their reliance on advice received from the Division to not pay until a tentative assessment was received. First, we note that petitioners did not establish precisely what question they asked to receive this advice. In any event, we find it incredible that petitioners believed that no matter how long they delayed in filing completed questionnaires with respect to the January transfers that they would be protected from penalties for failing to pay tax. Such a system would reward noncompliance and we find that a reasonably prudent taxpayer could not believe that the gains tax functioned in such a manner.

We agree with the Administrative Law Judge's conclusion that the delay in issuing the tentative assessment was caused by the petitioners' failure to timely file and provide the required information. First, petitioners completely failed to comply with the pre-transfer audit procedure. When petitioners did commence to file in March 1985 with respect to the January 1985 transfer, they submitted insufficient documentation. The petitioners did not respond to the Division's March 21, 1985 request for information until May 20, 1985. On May 21, 1985 the Division requested additional information to which the petitioners did not respond until early July. On August 5, 1985 the Division issued the tentative assessment. Petitioners exhibited a pattern of noncompliance and delay throughout this period which cannot reasonably be attributed to advice received from the Division.

Finally, we address petitioners' reliance on TSB-M-85-(3)-R. Petitioners assert that this memorandum from the Division substantiates the reasonableness of petitioners' belief that they need not pay tax until a tentative assessment was issued. This memorandum opens with the statement:

"This is to clarify the time at which gains tax is due in those cases where questionnaires are filed less than 20 days before the transfer and the Tentative Assessment and Return is not issued before the transfer."

At paragraph 9 the memorandum states:

"9. Nothing herein is intended to imply that the Tax Commission will waive penalty and interest penalty in a case where a tentative assessment has been issued and the transfer has occurred but the tax was not paid, nor in a case where the transferor substantially failed to comply with the pre-transfer audit procedures for a transfer." (Emphasis supplied.)

Clearly this memorandum was intended by the Division to remove any ambiguity that may have existed with respect to payment of the tax where a pre-transfer filing had been made, but less than the required 20 days before the transfer. We see absolutely nothing in this memorandum to suggest that there was any ambiguity with respect to the result of a transferor's complete failure to comply with the pre-transfer audit procedure.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Baumstein, Borrok, et al. - Tenants-in-Common is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Baumstein, Borrok, et al. - Tenants-in-Common is in all respects denied.

Dated: Albany, New York
April 20, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner