STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
KAREN BROUNSTEIN	:	DECISION DTA No. 806846
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.	:	
	:	

Petitioner Karen Brounstein, HC4, Box 109B, Gloversville, New York 12078 filed an exception to the determination of the Administrative Law Judge issued on May 16, 1991 with respect to her 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. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioner did not submit a brief on exception. The Division of Taxation replied to petitioner's exception by submitting a brief.

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

ISSUE

Whether petitioner has established that penalties asserted by the Division of Taxation for failure to timely file certain returns and failure to timely remit tax due pursuant to Article 31-B of the Tax Law should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On September 8, 1988, the Division of Taxation (hereinafter the "Division") issued to Karen Brounstein, petitioner herein, a Notice of Determination of Tax Due under Gains Tax Law Article 31-B, section 1444, which set forth tax due of $33,596.00, penalty and interest on said penalty of $11,758.53 and interest of $9,006.00, for a total amount due of $54,360.53. Petitioner paid $42,602.00 of this amount on January 29, 1988,[1] leaving only the penalty and interest on said penalty of $11,758.53 in issue.

Petitioner held a 16.106% interest in 134-40 West 26th Street Owners Corporation.

After the cooperative conversion of the premises at 134-40 West 26th Street on October 14, 1983, as stated above, petitioner held 16.106% of the shares in the corporation and proprietary leases to the third and fourth floors in the premises. The third floor represented 79 shares and the fourth floor, which was divided into two units, "4N" and "4S", represented 39 shares and 40 shares, respectively.

On or about November 12, 1983, petitioner sold the unit designated as "4N" representing 39 shares in the corporation for a cash consideration of $150,000.00. On July 8, 1986, petitioner sold the third floor, or what was designated as unit number "3", representing 79 shares in the corporation for a cash consideration of $632,250.00. Petitioner did not file a gains tax return or questionnaire or pay any gains tax with regard to either of these transfers.[2]

The Division commenced an audit of the transferor/sponsor on October 9, 1987 and concluded the audit on December 30, 1987. Based upon the audit, petitioner was sent a Statement of Proposed Audit Adjustment on January 25, 1988 which set forth tax due of $33,596.00, penalty of $11,758.53 and interest of $9,006.00, for a total amount due of

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[1]The notice of determination incorrectly stated that the payment was made on February 1, 1988.

[2]The cover page from the offering statement submitted in evidence as Division's Exhibit "G" and the annexed fifth amendment to the offering statement and attached schedule indicate that the consideration paid by the cooperative housing corporation for the real property was well in excess of $1,000,000.00 and, therefore, beyond the threshold subjecting the transfer to real property gains tax. It is also noted that neither party disputed the fact that the transfer of the real property by the realty transferor to the cooperative housing corporation was in excess of $1,000,000.00.

$54,360.53. Petitioner remitted $42,602.00 representing the tax and interest due by check dated January 27, 1988. Said check was received on January 29, 1988 by the Division.

As stated above, the Division issued a notice of determination to petitioner setting forth the tax, penalty and interest due in the total sum of $54,360.53 on September 8, 1988. The notice set forth the following explanation:

> "Recently a field audit was conducted by our New York District Office. As a result of the audit, it was determined that Real Property Transfer Gains Tax, plus penalty, interest penalty and interest was due. By letter dated 01-11-88, it was requested that the penalty and interest penalty imposed be abated. We have reviewed this request, and do not find sufficient grounds to recommend abatement of the penalty and interest penalty. Since the penalty and interest penalty have not been paid, this Notice of Determination is being issued for the following amount."

OPINION

In the determination below, the Administrative Law Judge held that penalties imposed upon petitioner for failure to timely pay real property transfer gains tax were proper. Specifically, the Administrative Law Judge determined that in light of published guidelines available at the time of transfers of cooperative units (hereinafter "units") 4N and 3, petitioner failed to show that her delay in paying the tax in a timely manner was due to reasonable cause.

On exception, petitioner contends that because both of the sales involved transfers of stock of a cooperative corporation and that she was represented by counsel who failed to inform her that such taxes were due, petitioner had a good-faith belief that no taxable event had occurred in either instance. Petitioner also contends that given current economic conditions, there exists a real possibility that a sale of the 40 shares appurtenant to unit 4S would be insufficient to trigger a gains tax. Additionally, petitioner argues it had been agreed upon by petitioner and the Division that the sale of unit 4N for a cash consideration of $150,000.00 did not result in any gains tax owed. Thus, she contends that the imposition of penalty and interest prior to the transfer of unit 3 was erroneously assessed, as prior to this time no taxable event had occurred.

In response to petitioner's argument that her ignorance of the law constituted reasonable cause, the Division contends that in light of the clear Tax Law provisions, regulations, Tribunal decisions, and numerous Department publications, as well as petitioner's failure to contact the Tax Department for guidance, petitioner cannot be excused from the penalties imposed.

In response to petitioner's speculation that the gross consideration eventually received for all three units may not reach the $1 million gains tax threshold, the Division argues that even if this scenario did occur, it would not constitute reasonable cause for petitioner's failure to timely file gains tax returns or pay gains tax. It contends that petitioner's remedy would be to apply for a refund in the event that total consideration does not reach $1 million when unit 4S is transferred.

We affirm the determination of the Administrative Law Judge. Tax Law § 1441, effective March 28, 1983, imposes a ten percent tax upon gains derived from the transfer of real property located within New York State where the consideration received is $1 million or more (Tax Law §§ 1441, 1443[1]).

The phrase "transfer of real property" is defined in Tax Law § 1440(7), in pertinent part, as "the transfer or transfers of any interest in real property by any method, including but not limited to sale." Within this provision, the Legislature has specifically provided for the taxation of transfers pursuant to cooperative or condominium plans. The fourth sentence of section 1440(7) states:

> "For purposes of this article, transfers pursuant to a cooperative plan shall include all transfers of stock in a cooperative corporation which owns real property" (Tax Law § 1440[7]).

Tax Law § 1442 provides that the tax imposed by Article 31-B shall be paid by the transferor to the Division at the time of transfer (Tax Law § 1442[a]). This section further states that in the case of a transfer pursuant to a cooperative or condominium plan, the date of

transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred (Tax Law § 1442[b]).

Tax Law § 1446(2)(a) requires that a ten percent penalty plus interest be imposed on taxpayers who fail to timely pay the transfer gains tax or file a transfer gains tax return. This statute requires the Division to abate the penalty and interest if it determines that the delay or failure was due to reasonable cause and not willful neglect. The burden is on the taxpayer to demonstrate that the penalty was improperly assessed (Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121).

Petitioner asserts that her good-faith belief that sales of stock in a cooperative corporation were not taxable under Article 31-B, which was reinforced by the advice of her attorney, supports her position that her failure to file tax returns or pay taxes in a timely manner was reasonable.

Ignorance of the law does not, per se, constitute reasonable cause for nonpayment of taxes (Matter of 1230 Park Assoc. v. Commissioner of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455; Matter of LT & B Realty Corp. v. New York State Tax Commn., supra), nor does reliance upon advice from a professional (Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of LT & B Realty Corp. v. New York State Tax Commn., supra). Rather, the determination of whether reasonable cause exists should be made after considering all of the particular facts of the case (Matter of LT & B Realty Corp. v. New York State Tax Commn., supra). In addition, we have consistently held that the reasonableness of a taxpayer's position must be evaluated by a comparison to the Division's articulated policy (Matter of Birchwood Assoc., Tax Appeals Tribunal, July 27, 1989; Matter of Copley Plaza Co., Tax Appeals Tribunal, June 8, 1989). Petitioner's husband testified that petitioner's attorney was unaware of the requirement of aggregating sales or including anticipated sales in calculating the tax. However, this bare contention, regardless of its accuracy, is unpersuasive in light of the Division's policy regarding

the taxation of cooperative conversions published prior to petitioner's initial transfer (Publication 588, "Questions and Answers - Gains Tax on Real Property Transfers" [August, 1983];[3] Technical Services Bureau Memorandum 83-(R), "Computation of Consideration and Original Purchase Price for Condominium or Cooperative Projects" [August 22, 1983]).[4] Given these policy explanations by the Division that predate petitioner's first transfer by more than two months, petitioner's claim of ignorance of the law, as well as her reliance on her attorney to inform her whether gains tax arose, fail to establish reasonable cause for failure to pay the gains tax when it became due (see, Matter of 1230 Park Assoc. v. Commissioner of Taxation & Fin., supra, 566 NYS2d 957, 959; Matter of Copley Plaza Co., supra).

Petitioner next argues that the present real estate market conditions create the possibility that upon the sale of unit 4S - the anticipated price for which was included when applying the $1 million exemption at the time units 4N and 3 were sold - the total actual consideration received would be insufficient to trigger gains tax. Thus, petitioner contends that this "distinct possibility" should serve to abate the penalties and interest thereon. Unfortunately, Article 31-B does not provide a taxpayer the benefit of such hindsight. Tax Law § 1442 requires that the payment of transfer gains tax be made on each cooperative unit at the time of transfer (Tax Law § 1442[a],[b]). In the event that the total actual consideration does not reach $1 million when unit 4S is transferred, we agree with the Division that petitioner's remedy would be to apply for a refund. The anticipation of such a contingency does not permit a taxpayer to disregard her clearly defined responsibilities under the Tax Law. Therefore, this argument also fails to establish that petitioner's failure to pay was due to reasonable cause and not willful neglect.

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[3]Question and Answer 20 in this publication addresses in some detail the application of the tax to a cooperative conversion.

[4]This publication explains the filing procedures and tax calculation methods that cooperative conversions are to utilize.

We will now address petitioner's contention that penalty and interest for the period prior to the transfer of unit 3 were erroneously assessed. Petitioner asserts that an agreement was reached between petitioner and the Division that the sale of unit 4N for a cash consideration of $150,000.00 did not result in any gains tax being due. In response, the Division's attorney stated that he had no recollection of entering into such an agreement. After a thorough examination of the record, we are unable to find evidence of such an agreement. Further, such an agreement would have been contrary to Tax Law § 1442(b) which provides, in pertinent part, that:

> "in the case of partial or successive transfers, other than transfers pursuant to a cooperative or condominium plan, no tax is due until the consideration paid or required to be paid for the real property transferred equals or exceeds one million dollars" (Tax Law § 1442[b], emphasis added).

Because petitioner's contention that penalty and interest were erroneously assessed prior to the transfer of unit 3 is without foundation, this argument also must fail.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Karen Brounstein is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Karen Brounstein is denied; and

4. The Notice of Determination issued on September 8, 1988 is sustained.

DATED: Troy, New York
January 30, 1992

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner