

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HOWARD MICHAELS	:	DECISION
	:	DTA NO. 816086
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 Howard Michaels, 75 Bacon Road, Old Westbury, New York 11568, filed an exception to the determination of the Administrative Law Judge issued on May 7, 1998.

Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on October 27, 1998 in Troy, New York.

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

ISSUE

Whether petitioner is personally liable for the tax due under Article 31-B¹ of the Tax Law.

¹The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

FINDINGS OF FACT

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

Glen Cove Associates, L.P., a New York limited partnership, was the sponsor of a cooperative project known as Trousdell Village in Glen Cove, New York. The General Partner of Glen Cove Associates, L.P. was HLM/Glen Cove, Inc. The president and sole shareholder of HLM/Glen Cove, Inc. was petitioner, Howard Michaels. The project consisted of 204 units and petitioner was not the transferee of any of the units sold by Glen Cove Associates, L.P.

Petitioner executed the Transferor Questionnaire, filed by the sponsor with the Division of Taxation (“Division”), as president of HLM/Glen Cove, Inc., general partner of Glen Cove Associates, the transferor. In addition, petitioner executed the Sponsor’s Affidavit and the Certificate of Sponsor and Sponsor’s Principals for the Cooperative Project, both of which were part of the cooperative offering plan.

After audit, the Division issued a notice of determination to petitioner as a responsible person for the sponsor pursuant to Tax Law § 1440. In issuing the notice, the Division determined that petitioner was a “person” pursuant to Tax Law § 1440(8), who as a member of a partnership was under a duty to perform an act under Article 31-B of the Tax Law. Petitioner does not contest any of the factual issues surrounding his authority and duties as a member of the partnership sponsor and his responsibilities to perform the acts required by Article 31-B.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Petitioner brought a motion before the Administrative Law Judge for summary determination in his favor. After due consideration, the Administrative Law Judge denied

petitioner's motion. However, in considering the motion, the Administrative Law Judge determined that there were no material issues of fact in dispute that petitioner was a person under a duty to perform required acts under Article 31-B on behalf of the sponsor. The Administrative Law Judge concluded, therefore, that petitioner was liable for the gains tax incurred by the sponsor. Pursuant to section 3000.9(b) of the Rules and Regulations of the Tax Appeals Tribunal (20 NYCRR 3000 *et seq.*), the Administrative Law Judge granted summary determination in favor of the Division.

In his determination, the Administrative Law Judge noted that Tax Law former § 1442(a) provided that the gains tax was to be paid by the "person liable for the tax." Tax Law former § 1440(9) defined a "person" who was liable for the real property transfer gains tax as one who was personally liable for the tax whether as a transferor or as a transferee pursuant to Tax Law former § 1447(3)(a). The term "person" was defined by Tax Law former § 1440(8) to include an officer or employee of any corporation who, as such officer or employee, was under a duty to perform an act required under Article 31-B.

The Administrative Law Judge found that it was clear from the law that a person liable for payment of the gains tax included a "person" as defined by Tax Law former § 1440(8) and is not limited to the actual transferor or a transferee, as argued by petitioner. Petitioner was the president and sole shareholder of the corporate general partner of the sponsor; he executed and filed the Transferor Questionnaire relating to the transfer at issue with the Division on behalf of the sponsor; and he executed the Sponsor's Affidavit and the Certificate of Sponsor and Sponsor's Principals which were both part of the cooperative offering plan. Further, petitioner did not contest his authority and responsibility to act on behalf of the sponsor in performing acts

required by Article 31-B. As a result, the Administrative Law Judge concluded that there was ample evidence in the record to support the conclusion that petitioner was liable for the gains tax due.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that liability for the real property transfer gains tax is limited, pursuant to Tax Law former § 1440(9), only to transferors and transferees. Since petitioner was neither a transferor or transferee of the property forming the basis of the assessment at issue, petitioner cannot be a person liable for the gains tax.

The Division, in opposition, argues that petitioner's argument fails to account for the provisions of Tax Law former § 1440(8), which defined "person" broadly to include not only the actual transferor and transferee but also an officer or employee of any corporation who, as such officer or employee, was under a duty to perform an act required under Article 31-B.

OPINION

Tax Law former § 1440(9) defined a "person liable for the [real property transfer gains] tax" as "a person who is personally liable for the tax whether as a transferor or as a transferee pursuant to [Tax Law former § 1447(3)(a)]."

Tax Law former § 1440(8) defined the term "person" as follows:

"Person" means an individual, corporation, partnership, limited liability company, association, trust, estate or other entity, or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform an act required under this article.

Our research has not disclosed any precedential decisions (either by the courts or by this Tribunal) which relate to personal liability for the gains tax of a corporate officer or employee under a duty to perform acts required by former Article 31-B on behalf of a corporation. In the present case, the transferor of the property at issue is a limited partnership whose general partner is a corporation. Petitioner is the president of the corporate general partner of the transferor. Since petitioner's authority and responsibility to perform acts required by former Article 31-B on behalf of the corporate general partner of the transferor are not at issue, the matter is one of determining whether a "person" liable for the gains tax means a "person" as defined by Tax Law former § 1440(8) or whether Tax Law former § 1440(9) must be read without reference to Tax Law former § 1440(8).

We note that former § 1440(8) and (9) were added to the Tax Law by Chapter 61 of the Laws of 1989. Prior thereto, liability for payment of the gains tax was imposed on the transferor pursuant to Tax Law former § 1442(a). That section was also amended by Chapter 61 to place liability for payment on the "person liable for the tax" instead of solely on the transferor. It seems clear to us that section 1440(9) cannot be read without consideration of section 1440(8). As a result, we find that the Administrative Law Judge has fully and correctly addressed each of the issues raised by petitioner and we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Howard Michaels is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Howard Michaels is denied; and
4. The notice of determination, L-011270899, as modified by the conciliation order, is sustained.

DATED: Troy, New York
April 8, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner