

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BAUMSTEIN, BORROK, ET AL. - TENANTS-IN-COMMON :
DETERMINATION :
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 a 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).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 11, 1987 at 2:45 P.M., with all briefs to be filed by April 15, 1988. Petitioners appeared by Tenzer, Greenblatt, Fallon & Kaplan, Esqs. (S. Sidney Mandel, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether penalty and penalty interest imposed against petitioners pursuant to Tax Law § 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

1. Petitioners, Baumstein, Borrok, et al., are a group of 25 tenants-in-common¹ 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.

2. 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

¹The names of the 25 individual petitioners are listed in the Appendix attached hereto.

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.

3. 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.

4. 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.

5. 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 Audit Division seeking a tentative assessment of gains tax due on the aforementioned transfers. On March 21, 1985, the Audit 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.

6. On or about May 20, 1985, in response to the Audit Division's request, petitioners furnished certain additional information to the Audit Division. Thereafter, on May 21, 1985, the Audit 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 Audit Division's second request with additional information.

7. On August 5, 1985, the Audit 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.

8. 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.

9. On January 28, 1986, the Audit 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 \$9,287.15.²

10. On February 20, 1986, petitioners filed a Claim for Refund wherein they compared their payment (\$269,831.25 including interest) to the tax due per the revised assessment (\$108,518.75 including interest), thereby leaving a refund claimed 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.

11. By a letter dated April 11, 1986, the Audit Division granted petitioners' claim for refund to the extent of \$136,012.50. However, the Audit 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. Thereafter petitioners timely commenced this proceeding to contest the Audit Division's denial of their request for abatement of penalty.

12. 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 Audit 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 Audit Division's gains tax staff, and upon conversations with practitioners as to the custom within the cooperative conversion industry.

13. 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

²The basis for this recomputation and reduction of tax was an increase in the original purchase price allowable with respect to the 7,034 shares in question. This increase was allowed based on the transfer of shares to petitioners from The 330 Company having occurred on March 24, 1983 (prior to the effective date of the gains tax), thereby enabling petitioners to increase their original purchase price for the shares to their fair market value on the date of such transfer pursuant to 20 NYCRR 590.35(6).

the questionnaires were necessary that steps were taken to effect the filing of such questionnaires in March of 1985.

14. 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 Audit 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".

15. 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.

SUMMARY OF PETITIONERS' POSITION

16. Petitioners contest the imposition of penalty and penalty interest and assert that their failures in timely filing and payment herein were occasioned upon reasonable bases. More specifically, petitioners assert that there existed some initial confusion as to whether or not the shares in question, when transferred, were subject to tax. Petitioners note that only after such shares were transferred and upon questioning their counsel, did it become clear that questionnaires had to be filed and that tax was payable. Thereafter, petitioners attribute any delay in filing questionnaires, as well as the delay in payment of tax, to a difficulty in obtaining records to substantiate claimed original purchase price and to the press of other business, specifically as occasioned by the advent of tax season.

17. Petitioners also assert they had a reasonable basis for believing it was the practice in the industry not to pay gains tax until a Tentative Assessment and Return was received. Petitioners, specifically Mr. Charney, assert such belief was bolstered by conversations with other members of the law firm, to the effect that discussions with members of the Audit Division's gains tax staff confirmed said policy.

18. Petitioners maintain that their position in this latter regard is buttressed by the existence of a July 1985 Tax Department memorandum (TSB-M-85-[3]-R) pertaining to payment of gains tax and penalty imposition. Petitioners specifically place reliance upon paragraph five of said memorandum, which provides as follows:

"[t]he commission will consider all the facts in each case to determine if a good faith effort was made to comply with the law. For transfers which occurred before the date of this notice, although not conclusive, it will be relevant to establish good faith that payment of tax and accrued interest is made promptly after issuance of this notice."

Petitioners assert the purpose of the memorandum was to clarify acceptable practice as to payment of gains tax in cases where questionnaires are filed less than 20 days before a given transfer and a Tentative Assessment and Return is not issued before the transfer. Specifically,

petitioners maintain their decision to wait until a Tentative Assessment and Return was issued before making payment of gains tax, together with their prompt remittance of tax upon issuance of such tentative assessment, evidences reasonable reliance upon their belief as to the practice in the industry and further evidences their good faith in attempting to comply with the requirements of Article 31-B.

CONCLUSIONS OF LAW

A. That Tax Law § 1441, which became effective on March 28, 1983, imposes a tax at the rate of 10 percent upon gains derived from the transfer of real property within New York State.

B. That pursuant to Tax Law § 1447.1 the Commissioner of Taxation and Finance shall make available forms to be filed by both the transferor and transferee, on which forms said parties shall provide relevant information with respect to a given transfer of property including, inter alia, information as to the original purchase price for the property, the consideration paid for any capital improvements, the consideration for the transfer, the amount of brokerage fees, etc. Pursuant to Tax Law § 1447.2 these forms, known as transferor and transferee questionnaires, are used in the Department of Taxation and Finance's determination of a tentative assessment of the amount of gains tax due pursuant to the pre-transfer audit procedure called for under said section. Said section provides, specifically, as follows:

"[w]hen the transferor and the transferee shall have furnished pertinent affidavits and any other information necessary to determine such tentative assessment at least twenty days prior to the date of transfer, such department shall provide the transferor and transferee with a statement of tentative assessment of the amount of tax, or a statement that no tax is due, at or prior to the date of closing and, if such affidavits and information are furnished within such period, such department shall provide such statement as soon as practicable, but not later than twenty days from the date such affidavits and other information have been furnished to the tax commission." (Emphasis added.)

C. That Tax Law § 1442 provides, specifically in the case of transfers pursuant to a cooperative or condominium plan, that the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred. Said section also specifically provides that gains tax is to be paid by the transferor to the Tax Commission on the date of transfer.

D. That Tax Law § 1446.2(a) provides as follows:

"Any transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount for each month of delay or fraction thereof after the expiration of the first month after such return was required to be filed or such tax became due, such interest penalty shall not exceed twenty-five per centum in the aggregate. If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

E. That petitioners admit knowledge, at the time of the subject transfers, of the statutory provisions indicating that tax is due to be paid on the date of transfer and also knowledge of the pre-transfer audit procedure called for under Tax Law § 1447. Petitioners also admit that filings were not timely made and that remittance of tax was not timely made. In explanation of their tardiness in filing and payment, petitioners assert a lack of certainty with respect to the taxability of the units, specifically as to the first four transfers (the August and September 1983 and April 1984 transfers), and also assert, though less specifically, that in January 1985 they were still unsure as to whether the transfer of units was subject to tax. Petitioners maintain this lack of understanding was initially the cause of the late filing of transferor and transferee questionnaires. Thereafter, petitioners maintain that difficulty in obtaining records in substantiation of their original purchase price, in conjunction with delay occasioned by the press of other business, hindered the presentation of material to the Audit Division necessary under the pre-transfer audit procedures to calculate the amount of gains tax due. This delay in assembling necessary information in turn caused delay in the issuance of a Tentative Assessment and Return. Finally, petitioners assert that tax was not paid, either on an estimated basis or otherwise, prior to the issuance of the August 1985 Tentative Assessment and Return upon petitioners' understanding from others in the industry and from conversations with persons in the law firm to the effect that payment was not to be made until a Tentative Assessment and Return was issued. As noted, in this vein petitioners place reliance on the terms of TSB-M-85-(3)-R to the effect that petitioners' actions constituted good faith and should result in abatement of the penalty and penalty interest in question.

F. That the facts and circumstances existing in this matter do not warrant a conclusion that the late filing and late payment herein was occasioned as the result of reasonable cause such as to support abatement of the penalty and penalty interest. Initially, the question of misunderstanding or uncertainty as to whether or not the transfers in question were subject to the tax essentially is a question of ignorance or misunderstanding of the law. Such does not constitute reasonable cause in general or under the facts of this case. In this regard, there is no indication of specific requests for information from the Audit Division to clarify whether or not transfers of apartment units were taxable under circumstances involving a plan of cooperative conversion entered into and effective prior to the effective date of the gains tax. Moreover, the Audit Division's issuance of publications in August of 1983, nearly two years prior to the bulk transaction in question herein, provided information as to the methods of calculation and the filing requirements with respect (specifically) to cooperative conversions.³ Petitioners' uncertainty as to taxability existed at the time of the earlier four transfers and allegedly continued through the time of the bulk transfer of units in January 1985. It is not unreasonable to expect petitioners to have taken steps to resolve this uncertainty during the passage of time between August of 1983 and January of 1985.

G. That even after petitioners filed the necessary transferor and transferee questionnaires, some two months after they were due, additional delay ensued. It is clear from the record that said delay was occasioned as a result of petitioners' own inaction. More specifically, it appears that petitioners' original submission contained insufficient information for purposes of computing

³Specifically, Department of Taxation and Finance Publication 588, "Questions and Answers - Gains Tax on Real Property Transfers", was issued in August 1983. Question and answer number 20 in such publication, as well as Technical Services Bureau Memorandum 83-(2)-R, issued on August 22, 1983, discussed the taxability of and set forth the filing requirements for transferors of cooperative units.

a correct Tentative Assessment and Return. Thereafter, petitioners in each of two instances, took nearly two months to comply with Audit Division requests to submit information supplementing that contained on the transferor and transferee questionnaires. Petitioners' allegation of great difficulty in determining amounts and obtaining substantiation from its records is not a sufficient reason to excuse the delay that occurred herein. This is especially so in light of the admission that said delay was caused essentially due to the press of other business matters facing petitioners' attorneys and accountant. In sum, it is unquestioned that petitioners were late initially and were slow to furnish information thereafter. In each instance, this tardiness was occasioned by petitioners' own mode of action. Accordingly, the delay as caused by petitioners is not delay based on reasonable cause and does not warrant cancellation of penalty.

H. That, finally, petitioners' assertion that they did not pay, at least on an estimated basis, because of their understanding that payment was not to be made until after a tentative assessment was issued is at best questionable. Petitioners assert their belief was based on their understanding of customary practice within the industry, and upon conversation related through members of the law firm. It is clear that had petitioners complied with the pre-transfer audit procedures and timely filed their questionnaires, the Audit Division would have been required to issue to petitioners a tentative assessment within 20 days of such filing (Tax Law § 1447.2). Here, petitioners' failure to timely file and provide necessary information resulted in delay in the issuance of a Tentative Assessment and Return. The evidence produced by petitioners does not overcome the fact that the delay in issuance was occasioned by petitioners. Accordingly, petitioners cannot utilize such delay as a basis for establishing reasonable cause in waiting to make payment until the Tentative Assessment and Return was issued. It is noted in this context that petitioners' reliance on TSB-M-85-(3)-R is tempered by language contained in such memorandum at paragraphs 8 and 9 as follows:

"8. This notice (TSB-M-85-[3]-R) is intended to clarify the Department's policy on the imposition of penalty and interest penalty where the gains tax filing has been made but a tentative assessment has not been issued.

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 added.)

Since petitioners clearly failed to comply with the pre-transfer audit procedures, petitioners' reliance on the good faith language contained in the noted memorandum is unpersuasive.

I. That the petition of Baumstein, Borrok, et al. - Tenants-in-Common is hereby denied and the Audit Division's denial of petitioners' claim for abatement of penalty, as embodied in the Audit Division's letter of April 11, 1986 and as borne out by the reduction of petitioners' claim for refund in an amount equal to the penalty imposed (\$25,300.00), is sustained.

DATED: Albany, New York
June 30, 1988

_____/s/_____
ADMINISTRATIVE LAW JUDGE

APPENDIX
LIST OF TENANTS-IN-COMMON

Bobbie Baumstein
Charles Borrok
Wolfe R. Charney
Dorothy Chernuchin
Helen Danko
Esther Feldman
Arthur Gabriner
Sonia Halpern
Israel Hoffman
Jill P. Jackson
Nathaniel Katz
Leo Kornblath
George Mutterperl
Iris Schwartz
Arthur Seltzer
Herbert M. Seltzer
Harry Siegel
Archie Silver
Hyman Slutsky
Diane Steingart
Gertrude Steingart
Karen Steingart
Melvin Weiss
Nan Beals Weiss
Judith P. Young