

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
25 TUDOR ASSOCIATES	:	AMENDED ORDER DTA# 809350
for a Revision of a Determination or for Refund of Real Property Transfer Gains Tax under Article 31-B of the Tax Law for the Year 1989.	:	

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The Division of Taxation has moved for an order dismissing the petition, pursuant to 20 NYCRR 3000.5(b)(1)(v) and (vii), on the grounds that petitioner has failed to timely file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination. The motion is unopposed by petitioner.

FINDINGS OF FACT

1. On June 25, 1990, the Division of Taxation (hereinafter "Division") issued a Notice of Determination to petitioner, 25 Tudor Associates, for Real Property Gains Tax under Article 31-B of the Tax Law, in the amount \$31,040.00.

2. The notice specified, in part, that:

"Any disagreement previously submitted for the Statement of Proposed Audit Changes cannot be considered a disagreement with this notice. You must file A Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 09/23/90."

3. The Division submitted into evidence an affidavit of Mary K. Randolph, Head Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the New York State Department of Taxation and Finance. CARTS is the Department's computer system for generating, among other things, notices of determination to taxpayers with assessed gains tax delinquencies. Ms. Randolph's duties include supervising the mailing of notices of determination and maintaining certified mail records. Ms. Randolph explained the procedure by which notices are generated and issued. She indicated that "[a]fter reviewing [the Notice of

Determination and the certified mail record], I am certain that the Notice of Determination which is the subject of this case was issued and mailed on June 25, 1990."

4. Attached to the affidavit of Mary K. Randolph, as Exhibit "A", was a copy of a certified mail record which indicated that a Notice of Determination, notice number L 001667403, was sent by certified mail to 25 Tudor Associates, c/o Time Equities Inc. at 55 5th Avenue, New York, New York, with a U.S. Postal Service postmark of June 25, 1990. This address precisely matches the address and the notice number on the Notice of Determination issued to petitioner.

5. In response to the Notice of Determination, petitioner sent a Request for a Conciliation Conference to the Bureau of Conciliation and Mediation Services ("BCMS"). A copy of the envelope which contained this request was submitted with the Division's "Notice of Motion to Dismiss Petition". This envelope bears a machine metered postmark dated October 31, 1990. By an Order dated December 21, 1990, BCMS dismissed the request as late filed, since the time period between the issuance of the notice (June 25, 1990) and the date the request was received (November 5, 1990) was in excess of 90 days.

6. On March 18, 1991, the Division of Tax Appeals received from petitioner a petition for revision of the determination. Petitioner alleged that the request for a conciliation conference was timely filed. In addition the petition asserts, in part, that:

"Tax Law § 1444(3) provides that the statute of limitations with respect to transfers made pursuant to a cooperative plan does not begin to run until the date of the last transfer under such plan. ...Tax Law § 1444(3) indicates that the Legislature intended that there should be no final determination with respect to transfers pursuant to a cooperative plan until such time as all of the transfers made pursuant to such plan are completed."<sup>1</sup>

7. By Notice of Motion, dated May 23, 1991, the Division sought dismissal of the petition based upon petitioner's failure to file a request for conference or petition for hearing

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It is noted that Tax Law § 1444(3) relates to the statute of limitations for assessment of real property gains tax under Article 31-B of the Tax Law. However, this does not affect the 90-day time period for filing a petition with the Division of Tax Appeals since there can be no extension of that 90-day time limitation. (Tax Law § 170.3-a[b]).

within 90 days of the issuance of the Notice of Determination.

### CONCLUSIONS OF LAW

A. Section 1444(1) of the Tax Law requires that a petition challenging a notice of determination, issued under Article 31-B of the Tax Law, be filed with the Division of Tax Appeals within 90 days after the giving of such notice. Although "giving of notice" is not defined in the gains tax law, other sections of the Tax Law define the 90-day period as beginning to run from the date of the mailing of the notice of determination (see, e.g., Tax Law § 1147[a][1]).

Petitioners also have the option of requesting a conciliation conference with the Bureau of Conciliation and Mediation Services rather than filing a petition for a hearing (20 NYCRR 4000.3[a]). Such a request for conciliation conference must also be filed within the 90-day time period for filing a petition (20 NYCRR 4000.3[c]). Tax Law § 170.3-a(a) provides, in part, that:

"[the Bureau shall provide a conference at the request of the taxpayer where the taxpayer] has received any written notice of a determination of tax due...if the time to petition for such hearing has not elapsed" (emphasis added).

B. Section 1444-a(2) of the Tax Law requires that the notice be left at the taxpayer's home or business or mailed to his last known address. The Division has proven that the Notice of Determination was properly mailed to petitioner's last known address on June 25, 1990 (cf., Matter of Winifredo Malpica, Tax Appeals Tribunal, July 19, 1990; Tax Law § 1147[a][1]). The Division offered evidence, such as the certified mail record and evidence as to its course of business and office practices, that substantiates its claim that the stamped date of June 25, 1990 is in fact the date that mailing was effectuated (see, Findings of Fact "3" and "4"; cf., Matter of Malpica, supra).

C. The only issue, then, is whether petitioner's request for a conciliation conference was submitted within the 90-day time period (Tax Law §§ 1444(1); 170.3-a[a]; cf., Tax Law § 1147[a][1]). Although the regulations do not set forth the mailing rules for gains tax

documents, the sales tax regulations clearly outline the requirements (20 NYCRR 535.1). Where the request for conciliation conference is delivered by United States mail to the Bureau of Conciliation and Mediation Services, the date of the United States postmark as stamped on the envelope or other wrapper will be deemed to be the date of service or filing (cf., 20 NYCRR 535.1[b][ii]; Tax Law § 1147[a][1]). However, if the postmark on the envelope or wrapper is made by other than the United States Postal Service, then the date of the postmark must fall within the prescribed date for service or filing of the document (cf., 20 NYCRR 535.1[b][2][i]; Matter of Harron's Electric Service, Inc., Tax Appeals Tribunal, February 19, 1988). The envelope which contained petitioner's Request for a Conciliation Conference bore a machine-metered postmark dated October 31, 1990. This metered postmark is included in the meaning of a postmark made by other than the United States Postal Service contained in section 535.1(b)(2)(i) of the regulation (Matter of Harron's Electric Service, Inc., supra). However, petitioner does not satisfy the requirements of 20 NYCRR 535.1(b)(2)(i) because the date of the metered postmark, October 31, 1990, does not fall within the 90-day filing period which ended on September 23, 1990. Since the date of the metered postmark does not fall within the prescribed period, and since no extension of the statutory period for filing is permitted, petitioner failed to file a timely request and the dismissal of its request by the Bureau of Conciliation and Mediation Services was proper (Tax Law § 170.3-a[b]; 20 NYCRR 4000.3[c]). Without the timely filing of a request for a conciliation conference, petitioner's challenge to the Notice of Determination cannot be heard by the Division of Tax Appeals.

D. Accordingly, the Division's motion to dismiss the petition is granted.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE