

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HOWARD MICHAELS	:	DETERMINATION
	:	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 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.

Petitioner, by his representative, Howard M. Koff, Esq., brought a motion dated March 6, 1998 for an order of summary determination in the above-referenced matter. The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel) filed a response to the motion on March 16, 1998. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules of Practice and Procedure began on March 16, 1998. Based upon the motion and response papers, the affidavits and affirmation submitted therewith and all pleadings and documents submitted, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation possessed the statutory authority to assess personal liability against petitioner under Article 31-B of the Tax Law.

II. Whether petitioner is personally liable for the gains tax due from the transferor.

FINDINGS OF FACT

1. 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.

2. 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.

3. After audit, the Division of Taxation (“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.

CONCLUSIONS OF LAW

A. Petitioner contends that he cannot be held liable for the gains tax owed by Glen Cove Associates, L.P. It is submitted that the language of the statute does not provide a legal basis for asserting gains tax against any person other than Glen Cove Associates, L.P. Petitioner asserts

that the only persons on whom the statute imposes an affirmative duty to pay tax are either a transferor or transferee.

In its brief, the Division recites certain facts to establish that petitioner is liable for the gains tax due. The Division also argues that, contrary to petitioner's argument, a "person" as defined by Tax Law § 1440(8) may be held liable for the gains tax.

B. Tax Law former § 1441,¹ which became effective March 28, 1983, imposes a 10% tax upon gains derived from the transfer of real property located within New York State.

C. Tax Law former § 1440(9) defines "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)]."

D. Tax Law former § 1440(8) defines 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.

E. Tax Law former § 1442(a) provides in relevant part that the real property transfer gains tax "shall be paid by the person liable for the tax"

It is clear from the foregoing sections that a person liable for tax means a person as defined by Tax Law former § 1440(8) and is not limited to just a transferor or a transferee. Petitioner's proposed interpretation overlooks the express language of Tax Law former § 1440(8). The above-quoted provisions impose liability on officers, employees and members (who are under a

¹The real property transfer gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996. (*See*, sections 171 through 180 of chapter 309 of the Laws of 1996.)

duty to perform a required act) of corporations and partnerships which are liable for gains tax as transferors or transferees. 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. In addition, he executed the Sponsor's Affidavit and the Certificate of Sponsor and Sponsor's Principals which were both part of the cooperative offering plan. In view of the evidence pointing to petitioner's responsibility to act on behalf of the sponsor, the Division properly applied the provisions of Tax Law former § 1440(8), (a) and § 1442(a) and concluded that petitioner was liable for the gains tax due.

F. A successful motion for summary determination must show that there are no material issues of fact and that the only issues involve questions of law (*see*, 20 NYCRR 300.5[c]). Such showing can be made by "tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York University*, 64 NY2d 851, 853, 487 NYS2d 316, 318, citing *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary determination is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177).

G. The Rules and Regulations of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provide that "[w]here it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion." Here, the Division provided sufficient evidence in support of the assertion that petitioner was liable as a member of a partnership sponsor which is liable for gains

tax as a transferor. In addition, petitioner has conceded that he was a member of the partnership sponsor and that he was under a duty to perform the acts required by Article 31-B.

Thus, there are no material issues of fact in dispute with respect to whether petitioner, who as a member of the partnership sponsor, was under a duty to perform the required acts under Article 31-B on behalf of the sponsor and is therefore liable for the gains tax incurred by the sponsor.

Based upon the foregoing, petitioner's motion for summary determination is denied and the Division of Taxation is granted a summary determination.

H. The petition of Howard Michaels is denied.

DATED: Troy, New York
May 7, 1998

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE