

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

THE 345 COMPANY

DECISION

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, The 345 Company, c/o Goldschmidt, Oshatz & Saft, 825 3rd Avenue, 34th Floor, New York, New York **10022**, 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. 59903).

A hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 19, 1986 at 12:30 P.M. and was continued to conclusion before the same Hearing Officer at the same location on October **24**, 1986 at 9:30 A.M., with all briefs to be submitted by March 2, 1987. Petitioner appeared by Goldschmidt, Oshatz & Saft, Esqs. (Edward I. Sussman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the penalty asserted against petitioner for failure to timely file tax returns and pay tax due under Tax Law Article 31-B should be abated.

FINDINGS OF FACT

1. On January 23, 1985, the Audit Division issued to petitioner, The 345 Company (c/o Goldschmidt, Fredericks & Oshatz), a Notice of Determination **of**

Tax Due Under Tax Law Article 31-B ("gains tax"), indicating gains tax due in the amount of \$293,045.00, plus penalty and interest. This notice arose as the result of a field audit of the records of 81st Street Residence Corp. ("the corporation"), a cooperative housing corporation to which petitioner, as sponsor under a cooperative conversion plan, had transferred on July 28, 1983 certain premises located at 345 East 81st Street, New York, New York.

2. Requisite transferor and transferee questionnaires were filed such that the Audit Division issued to petitioner, at the request of its representative, a Statement of **No** Tax Due with respect to the above-described transfer of the premises from petitioner, as sponsor, to the cooperative housing corporation. This statement was issued to petitioner on July 22, 1983.

3. On or about September 24, 1984, Audit Division auditor Marcia Sorin commenced an audit of the books and records of the subject cooperative conversion. The audit was conducted at the office premises of petitioner's representative, Goldschmidt, Oshatz, Powsner & Saft, **Esqs.** (the "Goldschmidt firm", then known as Goldschmidt, Fredericks and Oshatz, **Esqs.**) where the relevant books and records were available. The audit of this petitioner was one of a number of gains tax audits of cooperative conversions conducted by **Ms.** Sorin at the premises of the Goldschmidt firm, which **firm** represented a relatively large number of cooperative conversion clients.

4. **Ms.** Sorin determined that a number of the individual cooperative apartment units transferred were not subject to gains tax in that they were "grandfathered"; that **is**, transferred pursuant to subscription agreements entered into before the March 28, 1983 effective date of the gains tax (Tax Law § 1443.6). However, **Ms.** Sorin also determined on audit that ninety individual apartment units were not **so** grandfathered and were subject to gains tax. With respect to

these ninety units transferred, gains tax returns had not been filed nor was tax due paid at the time of the closings on any **of** such individual apartment units.

5. **Ms.** Sorin calculated the amount of tax due on the ninety unit transfers as \$293,045.00 and, as noted, a notice of determination was issued to petitioner reflecting such amount plus interest. Penalty was also calculated and imposed on this notice based on petitioner's failure to timely file returns and pay tax due.

6. Petitioner has paid and does not contest the tax and interest as determined to be due on audit. However, petitioner has not paid and contests the imposition of the penalty. Accordingly, at issue herein is the penalty and any interest accrued thereon.

7. Each of the ninety transfers at issue herein occurred prior to the commencement of the audit, and petitioner admits that the returns required by Tax Law Article 31-B were not filed in connection with such transfers and that tax was not paid when due.

8. It **is** petitioner's position that the penalty should be abated. In this regard, petitioner points out that the gains tax was, at the time of the transfers in question, a relatively new tax and asserts there existed questions and uncertainties concerning the tax, particularly with respect **to** cooperative conversions. In particular, petitioner's representative in the cooperative closing expressed his then claimed uncertainties as to the treatment of mortgage indebtedness accompanying the property and as to whether it was the sponsor-to-corporation transfer or rather the individual apartment unit transfers which constituted the taxable event.

9. **Ms.** Sorin first contacted the Goldschmidt firm in early July 1984 to schedule audits for this petitioner and other cooperative conversions being handled by the Goldschmidt firm. The Firm provided all necessary records for the audit. **Also** supplied, at the auditor's request, was a list of the conversions handled by the Goldschmidt firm. The Firm's personnel were cooperative with and helpful to the auditor during the course of the audit of this petitioner and a number of other cooperative conversions being audited.

10. Petitioner asserts that the auditor had secured **from** her supervisors an agreement, based on her recommendation, that penalty would not be imposed against petitioner or any of the other petitioners being audited and represented by the Goldschmidt firm.

11. Notwithstanding the assertion of having had questions about the gains tax and its calculation relative to cooperative conversion situations, there **is** no evidence of written requests **by** petitioner to the Audit Division for guidance **or an** explanation of Audit's interpretation **of** the Tax Law, either at the time **of** the subject transfers or previously at the time of the transfer of the property to the corporation. Petitioner's representative maintains phone calls were made **to** the Audit Division but that "inconclusive results" were obtained.

12. It was admitted that each of petitioner's principals had a long term involvement in and was familiar with the real estate industry, in general, and cooperative conversions in particular.

CONCLUSIONS OF LAW

A. That Tax Law § 1446.2 provides, in part, that:

"[a]ny 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."

B. That it is not disputed that returns were not timely filed and tax was not timely remitted in connection with any of the ninety transfers in question. In defense of its tardiness, petitioner asserts the existence of uncertainties with respect to the calculation of the tax and as to its filing and payment requirements. However, the evidence does not support such assertions as constituting a reasonably held position warranting abatement of the penalty imposed. It **is** noted, contrary **to** the assertion **of** uncertainty as to whether the sponsor-to-cooperative transfer or the individual unit transfers were the taxable event(s), petitioner was aware of and took the steps necessary to file **for**, request and receive a Statement of **No** Tax Due on **its** transfer of the Property, as sponsor, to the cooperative corporation. Moreover, guidelines as **to** the taxability of cooperative conversions had been issued by the Audit Division and were available well before the subject audit occurred.¹ Given the availability of such guidelines, it is **a** reasonable expectation that petitioner should have been or become aware of the requirement of and liability for failure to timely file and pay. Petitioner's failure in this regard raises a question as to whether the tax would have ever been paid, absent an audit.

C. That notwithstanding any understanding that penalty would not be imposed, as communicated by the auditor to petitioner, the fact remains that

1 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, discuss the taxability **of** and set forth the filing requirements for transferors of cooperative units.

penalty was imposed. It thus is incumbent upon petitioner to establish that penalty is inappropriate and should be abated. Here, the facts do not support abatement. Petitioner's assertions, centered essentially on alleged ignorance and/or misunderstanding of the law and upon subsequent cooperation given to an auditor in the conduct of audits, does not explain or justify the failure to file and pay initially at the time of the transfers or, given petitioner's principals' involvement in and familiarity with the real estate industry, and co-oping in particular, at any time prior to the audit.

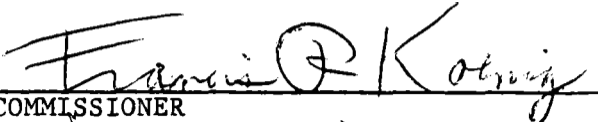
D. That the petition of The 345 Company is in all respects denied, and the Notice of Determination of Tax Due Under Tax Law Article 31-B, issued on January 23, 1985, is sustained.

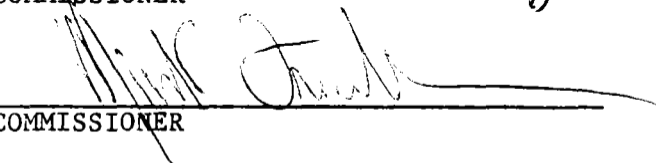
DATED: Albany, New York

STATE TAX COMMISSION

JUN 09 1987

PRESIDENT


COMMISSIONER


COMMISSIONER