

STATE ~~OF~~ NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
MANHATTAN ASSOCIATES JOINT VENTURE
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.

DECISION

Petitioner, Manhattan Associates Joint Venture, c/o Martin Sanders, 77
West 55th Street, New York, New York **10019**, 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. **66593**).

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 February **27**, **1987** at **9:30** A.M. Petitioner appeared by Reminick,
Aarons & Co., (Herbert **M.** Britton, CPA). 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 December **18**, **1985**, following an audit, the Audit Division issued to
petitioner, Manhattan Associates Joint Venture c/o Martin Sanders, a Notice of
determination of Tax Due under Tax Law Article **31-B** ("gains tax"), indicating
gains tax due in the amount of **\$34,155.00**, plus penalty and interest. This
notice pertained to an audit concerning **133-135** East 30th Street Corp., a

cooperative housing corporation to which petitioner, as sponsor under a cooperative conversion plan, had transferred certain real property located at 133-135 East 30th Street, New York, New York.

2. The cooperative closing between petitioner, as sponsor, and 133-135 East 30th Street Corp. occurred on November 30, 1983. In response to requisite transferor and transferee questionnaires previously filed, the Audit Division issued to petitioner, on October 31, 1983, a Tentative Assessment and Return indicating no tax due in connection with the transfer from petitioner to 133-135 East 30th Street Corp.

3. On August 16, 1983, the attorneys then representing petitioner made a written inquiry to the Department of Taxation and Finance seeking guidance as to the gains tax treatment of cooperative conversions and subsequent apartment unit sales under a number of differing circumstances. Reference was made in such letter to the penalties possible under the provisions of Tax Law Article 31-B.

4. By two different letters, each dated September 13, 1983, the Audit Division's position with respect to cooperative conversions in general, and in response to petitioner's attorneys' specifically described circumstances, was provided.

5. Petitioner's attorneys, by a letter dated September 20, 1983 and addressed "To Our Clients", indicated disagreement with the Audit Division's position with regard to, inter alia, the gains tax treatment of cooperative apartment conversions, and noted their intent to challenge the position in court. However, this letter also advised that, given the Audit Division's earlier stated position, the tax should be paid upon each transfer of an

individual cooperative apartment unit. Petitioner did not deny receipt of a copy of this September 20, 1983 letter.

6. A May 6, 1985 Audit Division audit of petitioner's business operations revealed that petitioner had transferred five individual apartment units,¹ and had neither filed returns nor paid tax in connection with any of these transfers. Accordingly, the auditor determined tax due on such transfers in the aggregate amount of \$34,155.00, plus interest. Penalty was also imposed for failure to file returns and pay tax due.

7. Petitioner does not contest the tax and interest as determined to be due on audit and, in fact, has paid such amounts. Likewise, petitioner admits that returns required by Tax Law Article 31-B were not timely filed in connection with any of the noted five individual apartment unit transfers.

8. Petitioner does contest the imposition of the penalty (and interest thereon) for late filing and payment, pointing to the fact that the gains tax was, at the time of these transfers, a relatively new tax about which there were many questions and uncertainties. Petitioner asserts that a good faith effort was made to comply with the requirements of Tax Law Article 31-B, and maintains the failure to timely file and pay was not occasioned by willful neglect.

9. The December 18, 1985 notice of determination reflects that payment of the tax and interest was made by petitioner on September 25, 1985, and that the amount of penalty then due was \$11,613.00 (exclusive of interest accruing thereon).

1 The transfer of three units occurred on November 30, 1983, while the remaining two units were transferred on October 2, 1984 and April 23,

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 the five transfers in question. Further, petitioner admits awareness of the tax, its filing requirements and of the penalties for failure to file and pay. There **is** evidence of a written request by petitioner's attorneys for guidance from the Audit Division regarding cooperative conversions and subsequent unit sales, in response to which the Audit Division's position was provided (see Findings of Fact "3" and "4"). Further, there is evidence that petitioner was specifically aware of the Audit Division's position (see Finding of Fact **"5"**)

C. That the failure to timely file and pay appears from the evidence to have been a choice made by petitioner, based apparently on personal and/or business considerations. Such choice ignores the requirement under Article

2 In addition, the correspondence noted above acknowledges Department of Taxation and Finance Publication 588 "questions and Answers - Gains Tax on Real Property Transfers", which 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 and, as noted, sent to petitioner's counsel by the Audit Division, discuss the taxability of and set forth the filing requirements for transferors of cooperative units.

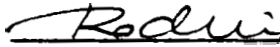
31-B to file and pay at the time of each unit transfer. In fact, if not for the audit, it is possible that filing and payment might never have occurred. Accordingly, in view of the facts and circumstances presented, it does not appear that petitioner's failure to file and pay was occasioned as the result of reasonable cause, and penalty was properly imposed.

D. That the petition of Manhattan Associates Joint Venture is hereby denied and the penalty imposed for failure to timely file returns and pay tax when due is sustained.

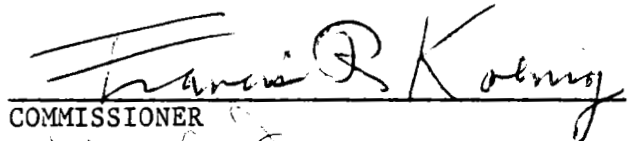
DATED: Albany, New York

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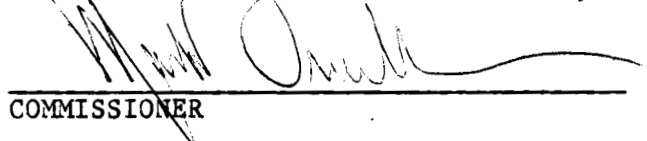
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PRESIDENT



COMMISSIONER



COMMISSIONER