STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LINDENWOOD REALTY 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, Lindenwood Realty Company, 82-17 153rd Avenue, Howard Beach, New York 11414, 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. 66759).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, Room 65-51, New York, New York on January 15, 1987 at 9:30 A.M., with all briefs to be submitted by February 19, 1987. Petitioner appeared by Lopez, Edwards, Frank & Company, C.P.A.'s (Bernard M. Perelman, C.P.A.). 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 pay tax due under Tax Law Article 31-B should be abated.

FINDINGS OF FACT

1. On December 18, 1985 the Audit Division issued to petitioner, Lindenwood Realty Co., a Notice of Determination of Tax Due under Tax Law Article 31-B ("Gains Tax"), indicating gains tax due in the amount of $47,949.00, plus penalty and interest. This notice arose as the result of a field audit of the

housing corporation to which petitioner, as sponsor under a cooperative conversion plan, had transferred on August 31, 1983 certain premises located in Long Island, New York.

2. Requisite transferor and transferee questionnaires were filed with respect to the above described transfer such that the Audit Division issued to petitioner a Statement of No Tax Due in connection therewith.

3. Petitioner subsequently (between August 1983 and October 1984) sold individual cooperative apartment units. Petitioner, however, did not apportion and include as part of the consideration upon sale of each such unit any part of the mortgage indebtedness which had been assumed by the cooperative corporatic at the time of the August 31, 1983 transfer (sponsor to corporation).

4. Petitioner has admitted that the mortgage indebtedness should have been apportioned and included, agrees with the amount of tax determined upon audit and has paid such amount. However, petitioner has not paid and contests the imposition of a penalty in this matter.

5. It is petitioner's position that petitioner's principals relied completely upon petitioner's accountant to correctly prepare the returns in connection with the cooperative conversion. Petitioners and their accountant note that the tax in question was, at the time of the transfers in question, a relatively new tax about which there existed many questions and uncertainties, particularly with respect to cooperative conversions. Petitioner's principals have relied upon the same accountant for a period of approximately 35 years and assert that they have no particular knowledge of or ability to calculate gains tax.

6. The Audit Division notes that the penalty in this matter was imposed not for failure to file returns, but for failure to pay the proper amount of

tax due. Petitioner's accountant inquired of the attorneys present at the sponsor-to-cooperative closing as to whether the mortgage indebtedness was to be apportioned to individual units upon subsequent sale and was assertively advised, informally, that apportionment was not necessary. There is however, no evidence of any written or oral request by petitioner or its accountant to the Audit Division for guidance or an explanation of the Audit Division's position with respect to the treatment of mortgage indebtedness relating to a cooperative conversion.

7. Petitioner is a partnership of two brothers with long-standing involvement in the real estate industry. At the time of the transfers in issue, one of the partners lived in Florida and did not participate actively in the partnership's management, while the other partner (since deceased) was ill but nonetheless participated actively in partnership management and affairs. Petitioner's representative presented the subject returns to the partners for signature and discussed "his viewpoint" with the partners prior to submission of the returns.

CONCLUSIONS OF LAW

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

> "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."

B. That it is unquestioned that the proper amount of tax was not remitted

cooperative conversion. In defense of this miscalculation petitioner's representative asserts the existence of uncertainties with respect to the tax and claims, essentially, that the underpayment occurred due to ignorance of the law. In particular petitioner's representative maintains there was no specific statement in Article 31-B nor in any of the official publications relating thereto which required apportionment and allocation of mortgage indebtedness to shares relating to individual apartment units.

C. That Tax Law § *1440.1* includes, inter alia, in the definition of "consideration" the "amount of any mortgage, lien or other encumbrance....". As noted, the specific question as to the apportionment and allocation of mortgage indebtedness was raised by petitioner's representative at closing. Yet, no request for information or clarification thereon was made either orally or in writing to the Audit Division at any time. Accordingly, petitioner's miscalculation of the amount of tax due, based on misunderstanding/ignorance of the law is not, in general, or in this specific matter, a basis supporting abatement of penalty. (Matter of Elmcor Management Corp., State Tax Commn., September 26, 1986. See also Matter of Aaron Ziegelman & William Langfan, State Tax Commn., July 3, 1986.) Based on the facts presented, penalty was properly imposed and abatement thereof is not warranted.

D. That the petition of Lindenwood Realty Company is hereby denied and the Notice of Determination of Tax Due under Tax Law Article 31-B issued on December 18, 1985 is sustained.

DATED: Albany, New York

JUL 0 1 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER