

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition

of

THE MARDa COMPANY

DETERMINATION

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.

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Petitioner, The Marda Company, 8 Haven Avenue, Port Washington, New York 11050, 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. 68159).

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 10047 on July 24, 1987 at 9:30 A.M. Petitioner appeared by Marc Katz. 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 March 17, 1986, following an audit, the Audit Division issued to petitioner, The Marda Co. ("Marda"), a Notice Of Determination Of Tax Due Under Tax Law Article 31-B ("Gains Tax") indicating gains tax due in the amount of \$76,945.00, plus penalty and interest. This Notice pertained to an audit concerning 324 West 83rd Street Owners Corp., a cooperative housing corporation to which petitioner, **as** sponsor under a cooperative conversion plan, had

transferred certain real property located at 324 West 83rd Street, New York, New York.

2. Closing of title on the real property between petitioner as sponsor and the cooperative corporation occurred on September 14, 1983. Prior thereto, on or about August 16, 1983, petitioner had filed requisite transferor and transferee questionnaires, and had requested the Audit Division to issue a Statement of No Tax Due in connection with the transfer of the property from petitioner (as sponsor) to the cooperative corporation. In due course and prior to the September 14, 1983 closing date, such Statement of No Tax Due was issued to petitioner.

3. On or about December 29, 1983 petitioner, by its then controller, submitted gains tax returns and a payment in the amount of \$17,244.00 with respect to ten individual apartment units which had been previously transferred to various individual purchasers. Seven of these transfers had occurred in mid-September of 1983, two occurred in October of 1983 and one occurred in mid-December of 1983. At some point after this initial filing, but prior to the audit by the Audit Division, petitioner's controller ceased working for petitioner.

4. On August 16, 1983 (prior to the above-noted closings), the attorneys representing the petitioner with respect to the conversion (Goldstick, Weinberger, Feldman, Alperstein and Taishoff, P.C.) 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. 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. Thereafter, on September 20, 1983, the attorneys, in a letter to their clients (including petitioner) advised, ~~inter alia~~, that returns must be filed and tax must be paid with respect to each individual apartment unit in a cooperative conversion at the time of closing on each such unit.

5. In November or December of 1984, subsequent to petitioner's controller having left petitioner's employ, a meeting was held at petitioner's request between petitioner's representative and representatives of the Audit Division. At this meeting petitioner requested and was allowed to change its method of filing with respect to the cooperative conversion from Option B to Option A (~~see~~ TSB-M-83-(2)R). Petitioner's representative noted that the request to make this change was in light of the belief that filing under Option A would be better suited to petitioner's needs with respect to computing and filing returns, given that petitioner at the time did not have in its employ a person trained in and familiar with the filing of gains tax returns.

6. In or about June of 1985 petitioner was notified by the Audit Division that an audit would be conducted of the cooperative conversion. Petitioner had, prior to such notice, closed on one more individual apartment unit (on January 28, 1985). In addition, two other closings took place just prior to the time of the audit, specifically one on June 28, 1985 and one on July 3, 1985. Petitioner did not file returns or pay any tax due in connection with any of these three closings.

7. In the latter part of July 1985, the Audit Division conducted its audit of petitioner's cooperative conversion. The auditor determined tax due with respect to each of the thirteen individual apartment units which had been

closed by petitioner as of the date of the audit,<sup>1</sup> and thereafter issued to petitioner the notice of determination referred to in Finding of Fact "1". Included as part of this notice was the imposition of penalty against petitioner for petitioner's failure to have timely filed and paid the tax due with respect to any of the apartment units closed by petitioner.

8. Petitioner did not and does not contest the tax and interest determined to be due upon audit and, in fact, has paid such amount. Likewise, petitioner admits that returns required by Tax Law Article 31-B were not timely filed in connection with any of the above-noted thirteen individual apartment unit transfers, and that the tax due was not timely paid in connection with such transfers.

9. Petitioner does, however, contest the imposition of the penalty for late filing and payment. Petitioner asserts with respect to the ten units first transferred that the filings and remittances were untimely due to the fact that the gains tax was at such time a relatively new tax about which there were many questions and uncertainties, specifically with respect to cooperative conversions. Petitioner notes and asserts its own confusion specifically with respect to the tax and the method of computing amounts thereunder. In addition, petitioner alluded to waiting to see if the tax would be repealed or overturned due to challenges thereto pending in court. With respect to the additional three units transferred, petitioner asserts that timely filing and remittance was not made because petitioner was waiting for the commencement of the Audit

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1 In fact, a total of fourteen units had been closed at such time. However, one such unit was closed pursuant to a subscription agreement entered into prior to the March 28, 1983 effective date of Article 31-B and hence was not subject to tax.

Division's audit of the conversion. In addition, petitioner asserts that the filings were made more difficult due to the fact that its controller had left its employ and that the person who assumed the duties of filing was overburdened, both in becoming familiar with the tax and its requirements and also due to continuing to deal with his other job responsibilities.

10. Petitioner is a partnership consisting of two general partners, specifically Hecate Corp. (wholly owned by one Mark Greenberg) and D.T.G. Real Estate, Inc. (wholly owned by David T. Golstick, a member of the firm of Goldstick, Weinberger, ~~et al~~).

11. The individuals noted above (petitioner's partner's owners) are heavily involved in the real estate industry in the New York City Metropolitan area, not only with respect to cooperative conversions but also (as to Mr. Greenberg) in managing a large number of other properties. More specifically, Mr. Greenberg is directly involved in the management of approximately 60 properties, and has participated in over thirty cooperative conversions. Petitioner asserts, in this vein, that the added time constraints relative to managing these overall business operations contributed to the untimely filing and payment with respect to the cooperative conversion in question.

#### CONCLUSIONS OF LAW

A. That Tax Law former § 1446.2 provided, 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 thirteen transfers in question. Further, it is clear that petitioner (through its principals) was aware of the tax, its filing requirements and the penalties for failure to file and pay in a timely fashion. Supporting this is the evidence of the 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.<sup>2</sup> The response given specifically discussed the taxability of and set forth the requirements for transferors of cooperative units, specifically referring to Option A and Option B with respect to the manner of computing and filing on a cooperative conversion. In this regard, it is noted further that petitioner specifically requested a meeting with the Audit Division in November or December of 1984 to review its filing option and to gain information regarding the specifics of the gains tax.

C. That the thrust of petitioner's argument in requesting penalty abatement appears to be that its failure to file and pay, as required, was the result of petitioner's uncertainties as to the manner of calculating its tax liability, its loss of and subsequent failure to secure personnel then competent to comply with the requirements of the gains tax, and by the press of other aspects of petitioner's business operation. However, none of such reasons advanced by petitioner warrants abatement of the penalty herein properly imposed by the Audit Division for untimely filing and payment. It is well settled that ignorance of the law is not an excuse warranting abatement of penalty. Further,

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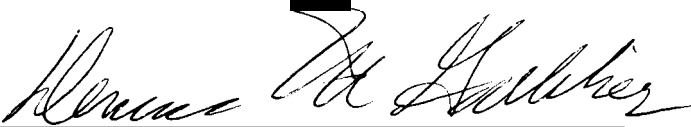
2 As part of this request a copy of TSB-M-83-(2)R, issued on August 22, 1983, was sent to petitioner's counsel by the Audit Division.

petitioner chose its method of business operation, specifically choosing not to retain additional personnel to comply with the filing requirements of the gains tax. Petitioner is free to choose to set its own scale of priorities, both as to the hiring of personnel and as to the amount of attention to be focused on any given area of its business operation. However, petitioner must bear the consequences of the choices made. In this case, the consequences of choosing to divert attention to other aspects of its business operation and to not hire additional personnel resulted in the gains tax filings and payments not being made in a timely fashion. Hence, the imposition of penalty was proper and abatement is not warranted.

D. That the petition of The Marda Company is hereby denied and the penalty imposed for failure to timely file returns and pay tax when due is sustained.

DATED: Albany, New York

SEP 11 1987

  
ADMINISTRATIVE LAW JUDGE