STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

BELMONT EAST CO. 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.

Petitioner, Belmont East Co., c/o Michael Rich, 70-04 Ingram Street, Forest Hills, New York 11375, 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. 68337).

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 June 12, 1987 at 9:15 A.M. Petitioner appeared by Milgrim, Thomajan, Jacobs & Lee, Esqs. (Daniel J. Barsky, 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 February 21, 1986, following an audit, the Audit Division issued to petitioner, Belmont East Co. ("Belmont"), a Notice of Determination of Tax Due under Tax Law Article 31-B ("gains tax"), indicating the assessment of a penalty under Tax Law Article 31-B in the amount of $106,756.93, plus interest accrued thereon to March 4, 1986 in the amount of $6,296.53, for a total amount assessed of $113,053.46.

2. Petitioner, a New York general partnership, is controlled and principally owned by one Michael A. Rich. The other Belmont partners are related family members and trusts. Mr. Rich is a self-employed real estate investor operating from an office in the basement of his home. In addition to Belmont, Mr. Rich is managing agent for a number of residential and commercial properties.

3. The property at issue in this proceeding is located at 230 East 79th Street, New York, New York. Petitioner acquired this property on May 22, 1964 and, in 1982, decided to convert the property to cooperative ownership.

4. Petitioner retained the law firm of Goldstick, Weinberger, Feldman, Alperstein & Taishoff, P.C. ("the Firm") to handle the legal aspects of converting the property to cooperative ownership. The retainer agreement, signed on May 20, 1982, indicated that the Firm was to provide, among other services, "[a]dvice as to tax considerations in structuring the plan of sale...." Petitioner also employed one Seymour Rosenbaum, C.P.A., who had been petitioner's accountant for a number of years, and who operates a one-man accounting office in Great Neck, New York, to prepare the financial statements for the conversion plan.

5. The plan of conversion to cooperative ownership was prepared, presented to the Attorney General's office, was amended a number of times and finally granted approval.

6. On September 20, 1983, the Firm sent petitioner a letter it had prepared for its clients concerning the imposition of gains tax with respect to cooperative conversions. This letter provided, in part, as follows:

> "[I]n light of the Commissioner's clear statement of his position, until the matter is finally determined by the courts, we feel that we must insist that on each sale of a cooperative apartment the Gains Tax must be paid if there is a reasonable likelihood that sales made after March 28, 1983 will exceed $1,000,000 in the aggregate since it is the Commissioner's position that it makes no difference when the

co-op acquired the property or when the plan was filed with the Attorney General.

Our firm is available to prepare and file the tax return required in each case."

7. Mr. Rich spoke with the attorneys for the Firm concerning the applicability of the gains tax to the property's conversion. Petitioner was advised of two cases then pending[1] which, if decided in appellants' favor would, in the opinion of petitioner's counsel, eliminate any gains tax on the property's conversion. Yr. Rich was also allegedly advised of the potential difficulty of obtaining a refund of any overpaid gains tax and that the attorneys were unaware of any situation where a penalty had been imposed for failing to timely file and pay gains tax.

8. The Firm prepared and filed transferor and transferee questionnaires to report the transfer from petitioner, as sponsor, to the apartment cooperative corporation, 230-79 Equity, Inc. On June 4, 1984, the Audit Division issued a tentative assessment and return indicating no gains tax due on the transfer of the premises from petitioner as sponsor to the cooperative corporation.

9. The closing from petitioner as sponsor to the cooperative corporation took place on June 21, 1984.

10. After the closing, petitioner waited for the Firm to prepare the gains tax filings covering the sales of the individual apartment units at the property. Petitioner was repeatedly assured that it was unlikely that penalties would be assessed for late filing and payment. However, the Firm did not prepare the returns for filing and, rather, on November 13, 1984, mailed the relevant

---

1 The cases were Trump v. Chu (65 NY2d 20) and Mayblum v. Chu (67 NY2d 1008).

transferee questionnaires to petitioner's accountant, Mr. Rosenbaum, with the directive that Mr. Rosenbaum was to prepare and file the returns. Also in November of 1984, the Firm prepared a draft closing statement that was furnished to Mr. Rosenbaum to be used in preparing the filings.

11. Mr. Rosenbaum was unfamiliar with the gains tax, but obtained transferor forms and instructions and began assembling the information to prepare the filings. Much of the information necessary had to be obtained by searching old records that were in storage. In addition, delay in the preparation and filing of the returns occurred due to Mr. Rosenbaum's involvement in preparing year end financial reports and income tax returns, thus postponing the work on petitioner's gains tax filings.

12. Mr. Rosenbaum had estimated that the gains tax owed by petitioner would be approximately $300,000.00. Petitioner maintained in its money market account a significant cash reserve. This reserve was allegedly maintained to pay the gains tax when the amount of such tax due was finally determined.

13. On June 10, 1985, Mr. Rosenbaum furnished petitioner with a completed gains tax filing, together with a cover letter directing petitioner to file the returns as soon as possible. On June 11, 1985, petitioner filed its gains tax returns together with a check in the amount of $341,342.00, which amount ultimately was approximately $20,000.00 in excess of the actual amount of gains tax due on the sales (without regard to penalty and interest).

14. Petitioner has paid under protest the amount of the penalty at issue herein, plus the amount of interest accrued until payment. Accordingly, this proceeding involves petitioner's request for abatement of the penalty and refund thereof, together with the interest paid, and interest accrued on the payment as made.

15. Petitioner asserts that the late filing and payment, upon which the penalty at issue herein is based, was a result of failures by petitioner's attorneys and accountant. In this regard, petitioner asserts that complete reliance was placed upon the advice given by the Firm and that it was the Firm's failure rather than petitioner's failure which resulted in late filing and payment, thus making it inappropriate to penalize petitioner. In line with this assertion, petitioner notes that this was petitioner's first experience in cooperative conversion, that the time commitment involved therein was extensive, and also that petitioner was not free from the daily problems associated with the management of other properties. Finally, petitioner maintains that notwithstanding the then-pending matters (Trump and Mayblum), it was nonetheless petitioner's intent to file and pay the gains tax rather than await the outcome of the two cases.

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 while petitioner alleges complete reliance upon counsel for the preparation and submission of gains tax returns, it is nonetheless clear that petitioner knew that returns were due to be filed and tax was due to be paid and that neither filing nor remittance was being fulfilled in a timely fashion. In addition, it is clear that petitioner was at least aware of the existence of the penalty provisions of Article 31-B, especially in light of the advice to

petitioner as detailed in Finding of Fact "7". Further, there is no detailing of the specific efforts, if any, undertaken by petitioner to press its representatives to complete the necessary paperwork and make the filings and remit the tax when due. Accordingly, based on the evidence presented, the penalty was properly imposed by the Audit Division and abatement thereof is not warranted.

C. That the petition of Belmont East Co. is hereby denied and petitioner's request for refund of penalty plus interest paid under protest is denied.

DATED: Albany, New York

SEP 11 1987

ADMINISTRATIVE LAW JUDGE