

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Robert H. & Richard B. Arnold : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Real Property :
Transfer Gains Tax under Article 31B of the Tax :
Law.

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 17th day of January, 1986, he served the within notice of Decision by certified mail upon Robert H. & Richard B. Arnold, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert H. & Richard B. Arnold
47 Glen Cove Road
Greenvale, NY 11548

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
17th day of January, 1986.

David Parchuck

James R. Thompson
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

Charles O. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

January 17, 1986

Robert H. & Richard B. Arnold
47 Glen Cove Road
Greenvale, NY 11548

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1444 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Patrick J. Shooltz
Coffey, McHale, McBride, Olsen & Shooltz
275 Broad Hollow Road
Melville, NY 11474
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT H. ARNOLD and RICHARD B. ARNOLD	:	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.	:	

Petitioners, Robert H. Arnold and Richard B. Arnold, 47 Glen Cove Road, Greenvale, New York 11548, filed a petition for revision of a determination or for refund of tax derived from certain real property tranfers under Article 31-B of the Tax Law (File No. 55723).

Petitioners, by their duly authorized representatives, Coffey, McHale, McBride, Olsen & Shooltz, Esqs. (Patrick J. Schooltz, Esq., of counsel) have waived a hearing and submit their case for decision based on the entire file. After due consideration of the file, the Commission renders the following decision.

ISSUE

Whether, for purposes of tax under Tax Law Article 31-B, a contractual right to purchase real property is an "interest in real property", the assignment of which constitutes a transfer of an interest in real property.

FINDINGS OF FACT

1. On September 9, 1985, the duly authorized representatives for petitioners, Robert H. Arnold and Richard B. Arnold, and for the Audit Division submitted an executed Stipulation of Facts together with an appendix of exhibits pertaining thereto. The Stipulation of Facts, modified herein from the original only in regard to the numbering of such facts and the omission of those facts solely

making reference to the inclusion of specific documents (the existence and authenticity of which documents is not in dispute), is set forth hereinafter. In conjunction with the Stipulation of Facts, petitioners, by their authorized representative, waived an oral hearing in this matter.

- STIPULATED FACTS -

2. On February 28, 1984, Benjamin Erlich and Henry Erlich were the owners in fee of a parcel of property known as 44 Sea Cliff Avenue, Glen Cove, New York ("The Property").

3. On February 28, 1984, the Erlichs signed a contract to sell the Property to Metes and Bounds Realty Co., Inc. for the sum of Eight Hundred Fifty Thousand Dollars (\$850,000.00).

4. On April 17, 1984, Metes and Bounds Realty Co., Inc. assigned the contract of sale to Richard B. Arnold and Robert H. Arnold ("the Arnolds").

5. The assignment by Metes and Bounds Realty Co., Inc. to the Arnolds was for no consideration.

6. The Arnolds were the sole stockholders and principals of Metes and Bounds Realty Co., Inc.

7. On May 2, 1984, the Arnolds entered into an Assignment Agreement with Mohring Enterprises, Inc.

8. On May 31, 1984, the Arnolds and Mohring Enterprises, Inc. entered into a Modification of Assignment Agreement.

9. Pursuant to the Assignment Agreement and Modification of Assignment Agreement, the Arnolds transferred all their rights to the contract to Mohring Enterprises, Inc. in consideration of the sum of Two Hundred Twenty-eight Thousand Two Hundred Fifty Dollars (\$228,250.00).

10. Necessary Transferor Questionnaires were filed by Erlich.
11. A Transferee Questionnaire was filed by Metes and Bounds Realty Co., Inc.
12. A Transferee Questionnaire in connection with the Assignment was filed by Metes and Bounds Realty Co., Inc.
13. A Transferor Questionnaire was filed by the Arnolds in connection with the transactions with Mohring Enterprises, Inc.
14. A Transferee Questionnaire was filed by Mohring Enterprises, Inc. in connection with the transaction with the Arnolds.
15. The Department of Taxation and Finance issued a Statement of No Tax Due, A-1105-1, dated 5/11/84 in connection with the transaction between Erlich and Mohring Enterprises, Inc.
16. The Department of Taxation and Finance issued a Tentative Assessment and Return, A-1105-2, dated 5/11/84 to the Arnolds in connection with the transaction with Mohring Enterprises, Inc.
17. The tentative tax due was Twenty-four Thousand Five Hundred Seventy-five Dollars (\$24,575.00).
18. A Supplemental Return was filed by the Arnolds on May 31, 1984.
19. On May 31, 1984, the Arnolds paid a tax of Twenty-two Thousand Seventy-five Dollars (\$22,075.00).
20. On May 31, 1984, the Arnolds filed a Claim for Refund of the tax paid by them.
21. On August 20, 1984, the Department of Taxation and Finance issued a letter in which it denied the application for a refund.

22. On September 12, 1984, the Arnolds filed a Petition to the Tax Appeals Bureau seeking to obtain a refund of the tax of Twenty-two Thousand Seventy-five Dollars (\$22,075.00).

23. On December 5, 1984, the Tax Appeals Bureau issued a letter indicating that the Petition had been accepted as a Perfected Petition.

24. On April 16, 1985, the Law Bureau filed an Answer to the Petition.

25. On April 11, 1985, the State Tax Commission issued a Notice of Hearing.

CONCLUSIONS OF LAW

A. That Tax Law section 1441, which became effective March 28, 1983, imposes a tax on gains derived from the transfer of real property within New York State. Tax Law section 1443(1) provides that no tax shall be imposed if the consideration is less than one million dollars.

B. That Tax Law Section 1440(7) defines "transfer of real property" to mean "the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment..." (emphasis added).

C. That Tax Law section 1440(4), as in effect at the time of the transfer at issue, provided as follows:

"'Interest' when used in connection with real property includes but is not limited to title in fee, a leasehold interest, a beneficial interest, an encumbrance, a transfer of development rights or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property." (emphasis added).

D. That Tax Law section 1440(4) was amended by L. 1984, Ch. 900, §2 (approved August 5, 1984 and effective 30 days thereafter), whereby the following sentence was added to section 1440(4):

"Interest shall also include an option or contract to purchase real property."

E. That petitioners' assignment, as contract vendee, of the contract to purchase real property herein was a transfer of an interest in real property properly subject to tax under Tax Law Article 31-B. Petitioners' assertion that the aforementioned 1984 amendment to Tax Law Section 1440(4) indicates that prior thereto a contract to purchase real property was not an "interest in real property" for purposes of Article 31-B is rejected. Not only does the language of Tax Law sections 1440(7) and 1440(4), as quoted herein with emphasis (see Conclusions of Law "B" and "C"), support such rejection, but also the State Executive Department Memorandum accompanying the passage of L. 1984, Ch. 900 (McKinney's 1984 Session Laws of New York, pp 3456 - 3463) reveals that such amendatory language was added for the purpose of clarifying existing law.

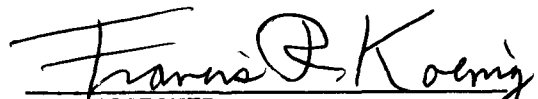
F. That the petition of Robert H. Arnold and Richard B. Arnold is hereby denied and the Audit Division's denial of refund is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER