

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harvey Auerbach : AFFIDAVIT OF MAILING
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. :
:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of September, 1986, he/she served the within notice of Decision by certified mail upon Harvey Auerbach the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harvey Auerbach
c/o Brookwood Communities
Brookwood Dr.
Coram, NY 11727

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
15th day of September, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE TAX COMMISSION

State of New York :
County of Albany : ss.:

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of September, 1986, he served the within notice of Decision by certified mail upon Donald E. Freedman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald E. Freedman
Berman & Freedman
1140 Franklin Ave.
Garden City, NY 11530

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
15th day of September, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

September 15, 1986

Harvey Auerbach
c/o Brookwood Communities
Brookwood Dr.
Coram, NY 11727

Dear Mr. Auerbach:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Donald E. Freedman
Berman & Freedman
1140 Franklin Ave.
Garden City, NY 11530

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HARVEY AUERBACH	:	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, Harvey Auerbach, c/o Brookwood Communities, Brookwood Drive, Coram, New York 11727, 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. 58146).

Petitioner, by his duly authorized representatives, Berman & Freedman, Esqs. (Elihu Berman and Donald E. Freedman, Esqs., of counsel), has waived a hearing and submitted his case for decision based on the entire file, with all briefs to be submitted by January 13, 1986. After due consideration, the Commission renders the following decision.

ISSUE

Whether petitioner's assignment of a contract to purchase real property was for a consideration equal to or exceeding one million dollars, thus subjecting said assignment to the imposition of gains tax pursuant to Tax Law Article 31-B.

FINDINGS OF FACT

1. On July 7, 1983 petitioner, Harvey Auerbach, entered into a contract to purchase from Salt Pond Associates certain property located at Center Moriches, Suffolk County, New York, at a purchase price of \$2,600,000.00.

2. On March 15, 1984, petitioner assigned the aforementioned contract to Steven Shulman and Mark Shulman, which assignment provided in part, with respect to consideration, the following:

"the total purchase price to be paid by the ASSIGNEES shall be that sum which when added to the sum paid or to be paid to the original Contract Vendor, shall result in a total price to be paid by the ASSIGNEES... of THREE MILLION NINE HUNDRED THOUSAND (\$3,900,000.00) DOLLARS." (emphasis added).

3. The assignment provided a breakdown of dollar amounts flowing from the Shulmans to the petitioner and to the contract vendor as follows:

<u>To Petitioner:</u>	<u>Amount</u>	
certified check or letter of credit	\$ 195,000.00	
certified check	35,000.00	
promissory note	<u>1,200,000.00</u>	\$1,420,000.00
<u>To Contract Vendor:</u>		
certified check	\$ 270,000.00	
purchase money first mortgage	<u>2,200,000.00</u>	2,470,000.00
		<u>\$3,900,000.00</u>
<u>TOTAL</u>		<u>\$3,900,000.00</u>

Notwithstanding this breakdown of amounts, under the terms of the assignment agreement the final dollar amount to be received by petitioner, as assignor, was dependant upon the actual dollar amount of the purchase money first mortgage given by the Shulmans to the contract vendor under the terms of the contract. Thus, while the Schulmans were bound to pay a total fixed price of \$3,900,000.00, the amount ultimately receivable by petitioner could increase or decrease according to the mortgage amount [see Assignment Agreement, Paragraph Third, (F)].

4. Transferor and transferee questionnaires (Forms TP-580 and TP-581) required under Tax Law Article 31-B ("gains tax") were filed with the Audit Division, with petitioner requesting a Statement of No Tax Due in Connection

with the transfer by assignment to the Shulmans. Petitioner's request was based upon the assertion that net consideration received for the assignment was less than one million dollars. The questionnaires indicated the consideration to petitioner as being \$1,300,000.00, and petitioner claimed a real estate brokerage commission of \$312,000.00 in connection with the assignment, thus asserting a net consideration received of \$988,000.00. The real estate brokerage commission of \$312,000.00 was paid at the rate of eight percent of the total sales price of \$3,900,000.00

5. On November 1, 1984, the Audit Division issued to petitioner a Notice of Determination of Tax Due asserting gains tax due in the amount of \$130,000.00 plus penalty and interest. This amount of tax was calculated based upon consideration received of \$1,300,000.00, with no allowance made for the brokerage commission of \$312,000.00, thus constituting a consideration in excess of the one million dollar gains tax exemption threshold.

6. Petitioner timely filed a petition contesting the asserted deficiency, maintaining that the net consideration received for the assignment ($1,300,000.00$ less $\$312,000.00 = \$988,000.00$) was less than one million dollars and thus the transfer was exempt from gains tax.

7. The Audit Division's position, however, is that consideration for an assignment of a contract to purchase real property equals: a.) the sum paid by the transferee/assignee for the contract right plus b.) the amount required to be paid for the real property pursuant to the terms of the contract being transferred/assigned. Accordingly, the Audit Division asserts that the consideration in the instant transaction was \$3,900,000.00, and that the transaction clearly is subject to gains tax. The amount of such tax asserted as due has

been reduced from \$130,000.00 to \$98,800.00, which reduction results from allowance of the previously noted brokerage fee, and is computed as follows:

Amount to be paid for property per contract	\$2,600,000.00
Amount paid for assignment of contract	<u>1,300,000.00</u>
Gross consideration	\$3,900,000.00
less: original purchase price	(2,600,000.00)
brokerage fees	<u>(312,000.00)</u>
Gain subject to tax	\$ 988,000.00
	x .10
<u>Gains Tax Asserted As Due</u>	<u>\$ 98,800.00</u>

8. By its brief, the Audit Division notes that petitioner claimed and was allowed credit for a brokerage fee of \$312,000.00, which amount was calculated by petitioner as a percentage (8%) of the entire transaction amount (\$3,900,000.00). It is asserted that by adopting petitioner's position, whereby the gross consideration would be \$1,300,000.00, the allowable brokerage fee would be reduced to \$104,000.00 ($\$1,300,000.00 \times .08$). The Audit Division maintains thus not only would the transfer be subject to gains tax as a transfer in excess of one million dollars ($\$1,300,000.00 - \$104,000.00 = \$1,196,000.00$), but the amount of tax due would actually be greater than the \$98,800.00 amount herein asserted by the Audit Division.

CONCLUSIONS OF LAW

A. That Tax Law section 1441, which became effective March 28, 1983, imposes a tax at the rate of ten percent upon gains derived from the transfer of real property within New York State. However, Tax Law section 1443.1 provides that no tax shall be imposed if the consideration is less than one million dollars.

B. That the assignment of a contract to purchase real property constitutes

the transfer of an interest in real property under Tax Law Article 31-B, which transfer may be subjected to the tax imposed by Article 31-B (Matter of Richard and Robert Arnold, State Tax Comm., January 17, 1986).

C. That Tax Law section 1440.1, as in effect on the March 15, 1984 date of the assignment at issue herein, provided, in relevant part, as follows:

"'Consideration' means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor... Consideration includes the cancellation or discharge of an indebtedness or obligation." (emphasis added).

D. That Tax Law section 1443.1, as in effect on the March 15, 1984 date of the assignment, provided, in relevant part, as follows:

"Exemptions. -- No tax shall be imposed in the following cases:

1. If the consideration is less than one million dollars."
(emphasis as in original).

E. That Tax Law section 1443.1 was subsequently amended by L. 1984, Ch. 900 (approved August 5, 1984 and effective September 4, 1984), to provide, in relevant part, as follows:

"Exemptions. -- A total or partial exemption shall be allowed in the following cases:

1. If the consideration is less than one million dollars; provided, however, for the purpose of the application of this exemption only, consideration shall be deemed to also include:

* * *

(b) In the case of an assignment of a contract to purchase real property, the amount required to be paid for the real property pursuant to the terms of the contract being transferred."

F. That upon entering into the original contract to purchase, petitioner not only gained an interest in real property, to wit an absolute right to purchase the subject premises, but he also incurred an obligation to pay the contract purchase price of \$2,600,000.00. Thereafter, when petitioner transferred

his interest in the real property by assigning the contract, he not only received \$1,300,000.00 for the transfer of such interest, but also was discharged and relieved of his contractual obligation to pay the underlying contract purchase price for the property. Thus, as defined, the consideration received for gains tax purposes totalled \$3,900,000.00 (Tax Law §1440.1). Accordingly, even after the allowance of brokerage fees (\$312,000.00), the transfer at issue did not qualify for the one million dollar threshold exemption provided by Tax Law section 1443.1.

G. That, finally, petitioner's assertion that the aforementioned September 4, 1984 amendment to Tax Law section 1443.1 (see Conclusion of Law "E") indicates that prior thereto consideration for an assignment did not include the underlying contract purchase price is rejected. Not only does the definition of consideration under section 1440.1 support such rejection, but also the State Executive Department Memorandum accompanying the passage of L. 1984, Ch. 900 (McKinney's 1984 Session of Laws of New York, pp. 3456-3463) reveals that such amendatory language was added for the purpose of clarifying existing law.

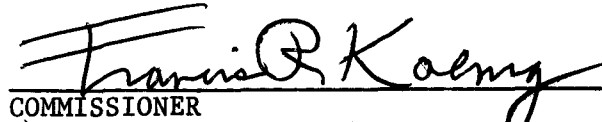
G. That the petition of Harvey Auerbach is hereby denied and the Notice of Determination dated November 1, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

