

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Estate of Philip L. Dworetz :

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 and to :  
Review a Determination under Article 31 of the Tax :  
Law with Reference to a Deed Delivered on :  
February 21, 1984. :

State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, 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 28th day of January, 1986, he/she served the within notice of Decision by certified mail upon Estate of Philip L. Dworetz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Philip L. Dworetz  
c/o Mildred Dworetz  
300 West 55th St.  
New York, NY 10019

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  
28th day of January, 1986.

David Parchuck

Connie A. Hagelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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for Revision of a Determination or for Refund of :  
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February 21, 1984. :  
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State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, 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 28th day of January, 1986, he served the within notice of Decision by certified mail upon Aaron L. Danzig, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Aaron L. Danzig  
Bloch, Graff, Danzig, Jelline & Mandel  
350 Fifth Ave., Suite 4805  
New York, NY 10118

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  
28th day of January, 1986.

David Parchuck

Connie A. Hagelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 28, 1986

Estate of Philip L. Dworetz  
c/o Mildred Dworetz  
300 West 55th St.  
New York, NY 10019

Dear Mrs. Dworetz:

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) 171 & 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  
Aaron L. Danzig  
Bloch, Graff, Danzig, Jelline & Mandel  
350 Fifth Ave., Suite 4805  
New York, NY 10118  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
THE ESTATE OF PHILIP DWORETZ	:	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 and to Review a Determination under	:	
Article 31 of the Tax Law with Reference to a	:	
Deed Delivered on February 21, 1984.	:	

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Petitioner, The Estate of Philip Dworetz, c/o Mildred Dworetz, 300 West 55th Street, New York, New York 10019, filed petitions for revision of a determination or for refund of tax derived from certain real property transfers under Article 31-B of the Tax Law and to review a determination under Article 31 of the Tax Law with reference to a deed delivered on February 21, 1984 (File Nos. 55213 and 52745).

Petitioner, by its duly authorized representative Bloch, Graff, Danzig, Jelline & Mandel, Esqs. (Aaron L. Danzig, Esq., of counsel), waived a hearing and submitted its case for decision based on the entire file, including a Stipulation of Facts dated July 3, 1985, and upon briefs to be submitted by September 20, 1985. After due consideration of the file, the Commission renders the following decision.

ISSUES

I. Whether a certain transfer of real property by petitioner was made pursuant to a contract entered into prior to the effective date of the imposition of tax under Tax Law Article 31-B and prior to the 1983 increase in the rate of tax imposed by Tax Law Article 31.

II. Whether Tax Law Article 31-B is unconstitutional as violative of the equal protection clauses of the United States and New York State constitutions.

FINDINGS OF FACT

1. On July 3, 1985, a Stipulation of Facts pertaining to the petitions of the Estate of Philip Dworetz, duly executed by authorized representatives for petitioner and for the Audit Division, was received. This Stipulation of Facts, which includes attached exhibits in support thereof, provides as follows:

a) On the 1st day of November, 1978 the Petitioners entered into a lease (the "Lease") of the Premises 141-145 West 43rd Street a/k/a 146-50 West 44th Street, New York, New York (the "Premises") with Meyers Parking System, Inc.

b) The term of the Lease was for a period of eighteen (18) years, commencing November 1, 1978 and expiring at midnight on October 31, 1996, subject to the Landlord's right of cancellation as provided in Article XXVIII. Article XXVIII provided as follows:

"ARTICLE XXVIII

RIGHT TO TERMINATE

In addition to any other right on the part of Landlord to terminate this lease, Landlord may, at its option terminate the term of this lease upon sixty days prior written notice to the Tenant only in the event that all of the following conditions precedent are fulfilled:

(i) The Landlord enters into a contract of sale in respect of the Premises with a bona fide third party purchaser at arms length and said purchaser refuses to accept this Lease;

(ii) the sums required to be paid to the Tenant under this paragraph are paid prior to the date of termination, and

(iii) The Tenant has failed to exercise its right of first refusal provided for below.

The effective date of any such termination hereunder shall be the actual date of closing of title under said contract of sale. If

the Landlord terminates this Lease hereunder at any time during the first five years of the term hereof, Landlord shall pay to Tenant (a) the sum of \$20,000 multiplied by the number of years (and any fraction of a year) from the commencement date of this Lease to the date of termination, plus (b) an amount equal to 50% of the cumulative losses sustained by the Tenant at the Premises up to a maximum cumulative loss by Tenant of \$75,000 (but not to exceed \$40,000 in any one year). The determination by the Tenant's independent certified public accountant, computed in accordance with generally accepted accounting principles, shall be conclusive in calculating the amount of any such cumulative losses. If such termination shall occur after the expiration of the first five years of the term hereof, no payment by the Landlord shall be required under this Article."

c) The procedure for termination of the lease as provided in Article XXVIII was contained in Article XXIX of the lease which provided as follows:

"ARTICLE XXIX

First Refusal

Notwithstanding anything contained to the contrary in this Lease, Landlord shall, prior to the execution of any contract of sale in respect of the Premises offer to the Tenant, by written notice, the right to purchase the Premises upon the same terms and conditions on which a bona fide third party dealing at arms length is then willing to enter into a contract of sale. Tenant shall have a period of twenty days after giving of Landlord's notice within which to elect to purchase the Premises upon the same terms and conditions set forth in the Landlord's offer. Time is of the essence in responding.

If Tenant shall fail to make its election within the time permitted above, then the Landlord shall be free to convey the Premises to said third party but if the Landlord does not do so then no future contract of sale may be executed by the Landlord without again first offering to the Tenant the opportunity to purchase the Premises in accordance with the foregoing right of first refusal. Tenant's rights under this paragraph may not be severed from this Lease or separately sold, assigned or otherwise transferred."

d) On November 4, 1983 the petitioners, by their attorneys, transmitted to the Tenant under the Lease a letter stating that a bona fide third party dealing at arms length was willing to enter into a Contract of Sale with reference to the Premises upon the terms and conditions set forth in a proposed contract a copy of which was enclosed therewith (the "Contract").

e) Responsive to the statement by the Tenant that it would be helpful to the Board of Directors and executives of the Tenant if they were provided with copies of the documents evidencing the offer by the bona fide third party referred to in petitioners' letter of November 4, 1983 together with a copy of the letter of credit supplied by said third party, Petitioners, by their attorneys, transmitted a letter dated November 8, 1983 enclosing photostats of: (i) the offer by said third party, Continental 43rd St. Garage Corp., with another copy of the Contract annexed and (ii) the letter of credit supplied by said third party.

f) On November 21, 1983 the Tenant transmitted to the attorneys for the petitioners its letter electing to purchase the Premises upon the same terms and conditions set forth in the bona fide offer referred to in paragraphs 4 (herein "d") and 5 (herein "e") of this Stipulation, transmitting with said letter four (4) copies of the Contract each of which had been executed by the Tenant together with an irrevocable letter of credit in the sum of \$540,000 required thereunder and requesting that the enclosures be held in escrow until two (2) fully executed counterparts of the Contract were delivered to the Tenant.

g) On November 25, 1983 the attorneys for the Petitioners transmitted to the Tenant two (2) executed counterparts of the Contract.

h) On December 7, 1983 the Petitioners transmitted to the Department of Taxation and Finance the Transferor and Transferee questionnaires pertaining to the proposed transfer of the premises, claiming exemption from the Real Property Transfer Gains Tax.

i) On or about December 22, 1983 the Department of Taxation and Finance transmitted to the Petitioners its tentative Assessment and Return relative to the Real Property Transfer Gains Tax on the proposed transfer.

j) On January 11, 1984 the Petitioners transmitted to the New York State Department of Taxation and Finance their letter dated January 11, 1984 for the purpose of correcting a mathematical error pertaining to the interests of Patricia Paley and Robert Paley in the "Schedule of Transferors".

k) On February 21, 1984 Petitioners transferred title to the Premises to Meyers Parking System, Inc. (the "Transfer").

l) On February 21, 1984 the Petitioners paid the sum of \$21,512.00 by check no. 2115182 of Bankers Trust Company to the order of N.Y.C. Register, which check was endorsed:

"PAYMENT APPROVED,  
UNDER PROTEST  
ESTATE OF PHILIP  
L. DWORETZ, ET AL  
by ESTATE OF PHILIP L. DWORETZ  
by S/MILDRED DWORETZ  
EXECUTRIX"

in payment of the New York State Real Estate Transfer Tax on the Transfer.

m) On February 21, 1984 the Petitioners paid the sum of \$270,420.80 by check no. 2115197 of Bankers Trust Company to the order of State Tax Commission in payment of the New York State Real Property Transfer Gains Tax on the Transfer endorsed as follows:

"PAYMENT APPROVED,  
UNDER PROTEST  
ESTATE OF PHILIP  
L. DWORETZ, ET AL  
by ESTATE OF PHILIP L. DWORETZ  
by S/MILDRED DWORETZ  
EXECUTRIX"



n) On March 6, 1984 the Petitioners filed a Claim for a Refund of \$15,596.20 of the Real Estate Transfer Tax paid by them.

o) On March 16, 1984 the Petitioners filed a Claim for a Refund of the entire \$270,420.80 in Real Property Transfer Gains Tax paid by them.

p) On April 9, 1984 the Department of Taxation and Finance issued a letter in which it denied the application for refund of Real Estate Transfer Tax.

q) On August 24, 1984 the Department of Taxation and Finance issued a letter in which it denied the application for refund of Real Property Transfer Gains Tax.

r) On May 4, 1984 the Petitioners filed a petition seeking a redetermination of their claim for refund of Real Estate Transfer Tax. This petition was accepted as a perfected petition on June 22, 1984 and assigned TAB number 52745.

s) On August 30, 1984 the Petitioners filed a petition seeking a redetermination of their claim for refund of Real Property Transfer Gains Tax. This petition was accepted as a perfected petition on November 13, 1984 and assigned TAB number 55213.

t) On September 12, 1984 the Law Bureau of the Department filed an answer to petition, TAB number 52745.

u) On February 20, 1985 the Law Bureau of the Department filed an answer to petition number 55213.

v) On February 1, 1985 the State Tax Commission issued Notices of Hearing for petitions numbers 52745 and 55213.

w) On February 26, 1985 the Petitioners waived an oral hearing before the State Tax Commission and agreed to have their petitions decided on the basis of documentation and legal memoranda.

#### CONCLUSIONS OF LAW

A. That section 1441 of Article 31-B of the Tax Law, 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 ("gains tax").

b. That subdivision (n) of section 184 of Chapter 15 of the Laws of 1983 provides that the tax imposed on the gains derived from the transfer of real property "...shall not apply to any transfer made on or before the effective date of [the act imposing the tax]."

C. That Tax Law section 1143, subdivision 6, provides that a tax shall not be imposed:

"Where a transfer of real property occurring after the effective date of this article is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts and circumstances as determined by the tax commission. A written agreement to purchase shares in a cooperative corporation shall be deemed a written contract for the transfer of real property for the purposes of this subdivision."

D. That Tax Law section 1402 was amended in 1983 (L. 1983, Ch. 15) such that the rate of the real estate transfer tax imposed by Tax Law Article 31 was increased from 55 cents to two dollars for each \$500 of consideration or value paid upon the transfer of realty ("real estate transfer tax").

E. That subdivision (g) of section 184 of L. 1983, Ch. 15, effective March 28, 1983, provided as follows:

"[t]he provisions of sections fifty-five and fifty-six (amending section 1401 and this section respectively) of this act (L. 1983 Ch.15) shall take effect May first, nineteen hundred and eighty-three but shall not apply to transfers of property made on or after such date pursuant to contracts entered into prior to such date."

F. That under the "grandfather" provisions cited above, the issue presented turns upon whether the instant real estate transfer was made pursuant to a written contract entered into on or before March 28, 1983 (for purposes of gains tax under Article 31-B) and a contract entered into before May 1, 1983 (for purposes of real estate transfer tax under Article 31).

G. That prior to the effective date of Article 31-B and the effective date of the rate increase under Article 31, there existed no contract of sale for the subject property. Furthermore, petitioner's lessee did not hold, as in the case of an option, an interest in real property whereby said lessee could require petitioner to transfer the real property regardless of whether petitioner desired to do so. Rather, petitioner's lessee held only a right, by matching any purchase offer made by a bona fide third party to whom petitioner was willing to sell, to supplant any such party and purchase the premises. Unlike an option holder, petitioner's lessee could not compel a transfer of the property but could become the purchaser only if petitioner chose to sell. Accordingly, since on or before such effective dates there existed neither a contract of sale nor any right in petitioner's lessee to compel a transfer of the real property, there existed no interest in real property rising to the level by which the transfer at issue would be "grandfathered" and thus exempt from tax under Article 31-B and from the increased rate of tax under Article 31.

H. That the constitutionality of the laws of the State of New York is presumed at the administrative level of the State Tax Commission.


I. That the petitions of the Estate of Philip Dworetz are hereby denied  
and the denial of refund claims is sustained.

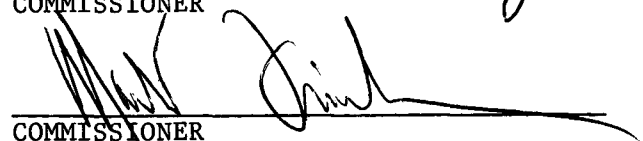
DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER