

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Elbin Realty Co. :

AFFIDAVIT OF MAILING

for Revision of a Determination or for Refund :
of Tax of Gains Derived from Certain Real
Property Transfers under Article(s) 31B 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 19th day of June, 1986, he/she served the within notice of Decision by certified mail upon Elbin Realty Co. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Elbin Realty Co.
c/o Herzfeld & Rubin
40 Wall St.
New York, New York 10005

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
19th day of June, 1986.

Janet M. Snay

Daniel J. Ranelli
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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of :
Elbin Realty Co. :

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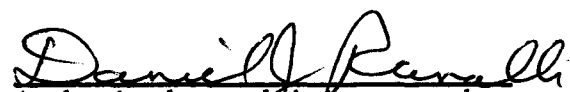
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 19th day of June, 1986, he served the within notice of Decision by certified mail upon Charles Nafman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

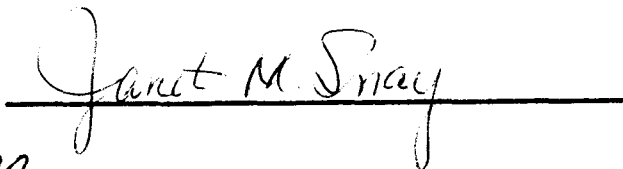
Charles Nafman
Herzfeld & Rubin
40 Wall Street
New York, NY 10005

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
19th day of June, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



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

June 19, 1986

Elbin Realty Co.
c/o Herzfeld & Rubin
40 Wall St.
New York, New York 10005

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
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:
Charles Nafman
Herzfeld & Rubin
40 Wall Street
New York, NY 10005

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ELBIN REALTY CO.	:	DECISION
for Revision of a Determination or for Refund	:	
of Tax of Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, Elbin Realty Co., c/o Herzfeld & Rubin, P.C., 40 Wall Street, New York, New York, 10005, 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. 60120).

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 February 6, 1986 at 9:15 a.m. Petitioner appeared by Herzfeld & Rubin, P.C., Esqs. (Charles Nafman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, of counsel).

ISSUE

Whether the penalty asserted against petitioner for failure to timely file tax returns and pay tax due under Tax Article 31-B should be abated.

FINDINGS OF FACT

1. On February 5, 1985, following an audit, the Audit Division issued to petitioner, Elbin Realty Co. ("Elbin"), a Notice of Determination of Tax Due under Tax Law Article 31-B ("Gains Tax"), indicating gains tax due in the amount of \$57,454.00, plus penalty and interest. This notice pertained to an audit concerning Caroline Gardens Tenants Corp., ("Caroline Gardens"), a cooperative housing corporation to which petitioner, as sponsor under a cooperative

conversion plan, had transferred certain real property located at 86-16 60th Avenue, Elmhurst (Queens County), New York.

2. The transfer of the real property from petitioner, as sponsor, to Caroline Gardens occurred on or about June 9, 1983. Prior thereto, on or about May 24, 1983, requisite transferor and transferee questionnaires had been submitted to the Audit Division in connection with this then-transfer pending.

3. In response to these questionnaires and to telephone inquiries by petitioner's counsel as to the taxability of the transfer under Tax Law Article 31-B, the Audit Division had issued to petitioner, on May 31, 1983, a Statement of No Tax Due in connection with the transfer of the real property to Caroline Gardens.

4. On or about July 20, 1984, an Audit Division audit revealed that 28 individual cooperative apartment units at Caroline Gardens had been transferred by petitioner to various individual purchasers. Petitioner had neither filed returns nor paid tax in connection with any of these 28 individual unit transfers. The Audit Division determined tax due on such transfers in the aggregate amount of \$57,454.00, plus interest. Penalty was also imposed for failure to file returns and pay tax due.

5. Petitioner does not contest the tax and interest determined to be due and, in fact, has paid such amounts. Likewise, petitioner admits that returns required by Tax Law Article 31-B were not timely filed in connection with the subject transfers. However, petitioner does contest the imposition of the penalty for late filing and payment, pointing to the fact that the gains tax was, at the time of these transfers, a relatively new tax about which there were many questions and uncertainties. Petitioner also notes that at the time of the audit, penalty was computed to be \$9,969.00, that the auditor advised petitioner to protest the audit results when such results were received by

petitioner and that no mention was made that interest would accrue on the penalty or that it would be more prudent to pay at the time of audit and seek a refund thereafter.

6. The February 5, 1985 Notice of Determination reflects that payment of the tax and interest was made by petitioner on September 20, 1984, and that the amount of penalty then due was \$14,938.04.

CONCLUSION OF LAW

A. That Tax Law section 1446.2 provides, 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 due was not timely paid in connection with the 28 transfers in question. There is no evidence of written requests by petitioner for guidance from the Audit Division regarding individual unit transfers. However, Audit Division written guidelines concerning the gains tax treatment of cooperative conversions had been issued and were available to the public.¹ Notwithstanding the issuance

1 For example, Department of Taxation and Finance Publication 588 "Questions and Answers - Gains Tax on Real Property Transfers" was issued in August 1983. Question and Answer number 20 in such publication as well as Technical Services Bureau Memorandum 83-2 (R), issued on August 22, 1983, discuss the taxability of and set forth the filing requirements for transferors of cooperative units.


of these guidelines there was still no filing by petitioner until the time of the audit, indicating that absent an audit, such failure to file would have continued indefinitely. Finally, an auditor's advice or lack thereof as to when to file a protest on an assessment is not relevant with respect to why petitioner failed to timely file and pay in the first instance. Accordingly, in view of all the facts and circumstances presented, it does not appear that petitioner's failure to file and pay was occasioned as the result of reasonable cause, and penalty was properly imposed.

C. That the petition of Elbin Realty Co. is hereby denied and the penalty imposed for failure to timely file returns and pay tax when due is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986


PRESIDENT


COMMISSIONER

COMMISSIONER

I abstain.

