

STATE OF NEW YORK

STATE TAX COMMISSION

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

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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 20th day of November, 1986, he/she served the within notice of Decision by certified mail upon Emery Realty Co. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Emery Realty Co.  
105 West 55th Street  
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  
20th day of November, 1986.

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

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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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 20th day of November, 1986, he served the within notice of Decision by certified mail upon Meyer Lieber, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

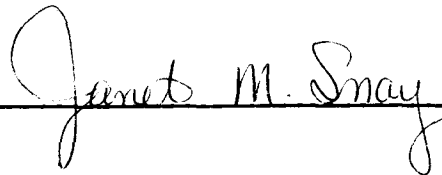
Meyer Lieber  
1241 44th Street  
Brooklyn, NY 11219

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  
20th day of November, 1986.

  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

November 20, 1986

Emery Realty Co.  
105 West 55th Street  
New York, NY 10019

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:  
Meyer Lieber  
1241 44th Street  
Brooklyn, NY 11219

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
EMERY REALTY CO.	:	DECISION
for Revision of a Determination or for Refund	:	
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Property Transfers under Article 31-B of the	:	
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Petitioner, Emery Realty Co., 105 West 55th Street, New York, New York 10019, 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. 63888).

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 19, 1986 at 9:15 A.M., with all briefs to be submitted by August 25, 1986. Petitioner appeared by Meyer Lieber, CPA. 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 June 12, 1985, the Audit Division issued to petitioner, Emery Realty Co., a partnership, a Notice of Determination of Tax Due Under Tax Law Article 31-B ("gains tax"), indicating gains tax due in the amount of \$607,969.00, plus penalty and interest. This notice arose as the result of a field audit of

the records of 400 East 77th Street Owners, Inc., a cooperative housing corporation, to which petitioner, as sponsor under a cooperative conversion plan, had transferred on October 4, 1984 certain premises located at 400 East 77th Street, Borough of Manhattan, New York City.

2. Requisite transferor and transferee questionnaires were filed such that the Audit Division issued to petitioner a Statement of No Tax Due with respect to the above-described transfer of the premises from petitioner, as sponsor, to the cooperative housing corporation.

3. Commencing on the same October 4, 1984 date as the above-described transfer, and continuing thereafter were closings wherein the individual cooperative apartment units at the premises were transferred to their various owners. Twenty-eight such apartment units were transferred on October 4, 1984, and twenty-seven units were transferred thereafter during October 1984. Subsequent transfers included four units in November 1984, two units in December 1984 and five units through May 9, 1985. Gains tax returns were not filed nor was tax due paid at the time of the closings on any of these 66 individual apartment unit transfers.

4. In late October or early November of 1984, petitioner contacted the Audit Division concerning the subject cooperative conversion. Petitioner admitted that a gains tax liability existed and requested an audit in order to determine the amount of such liability and pay the same. An auditor was assigned to the matter, with the audit commencing in late October or early November of 1984.

5. Due to the illness of petitioner's representative and to a broken leg suffered by the auditor, the audit work was not completed until late April or early May of 1985. During the pendency of the audit, petitioner was advised by

the auditor not to make any gains tax filings on ongoing apartment unit transfers, but rather was advised to report and account for such sales as part of the audit in order to avoid the possible confusion of multiple ongoing filings.

6. After completion of the audit petitioner paid, on May 9, 1985, the tax due on the noted 66 transfers of individual apartment units (\$607,969.00), plus interest accrued thereto (\$37,042.00). However, petitioner refused to pay the penalty imposed (\$140,921.00). Accordingly, at issue herein is this penalty amount, plus interest accruing thereon from May 10, 1985.

7. It is petitioner's position that the penalty should be abated. In this regard, petitioner points out that the gains tax was, at the time of the transfers in question, a relatively new tax and asserts, especially in the area of cooperative conversions, there existed questions and uncertainties concerning the tax. Petitioner also notes that it contacted the Audit Division within a relatively short time after the initial sales of individual apartment units took place, in order to schedule an audit and arrive at its gains tax liability, rather than waiting for the Audit Division to discover the nonfiling and nonpaying and commence an audit on its own. Further, petitioner asserts it relied upon its tax advisor's advice that it was not subject to gains tax on any of the transfers since the plan of cooperative conversion had been accepted for filing by the Attorney General's office prior to the March 28, 1983 effective date of the gains tax (Article 31-B). Finally, petitioner maintains that penalty should not be imposed with respect to those transfers made during the pendency of the audit, inasmuch as the auditor specifically advised petitioner not to file returns on such transfers, but rather to wait and file all at once upon conclusion of the audit.

8. The specifics of the advice given to petitioner by its representatives that it was not subject to tax were not detailed at the hearing. On August 16, 1983, over one year prior to the sponsor to cooperative closing and initial apartment unit transfers, the law firm of Goldstick, Weinberger, et al, had requested, in writing, clarification of the gains tax treatment of cooperative conversions under various factual circumstances. On September 13, 1983, in response to this request, letters and an Audit Division publication [TSB-M-83-(2)-R] setting forth the Division's position on cooperative conversions, in general and with respect to the specific questions raised, were sent to the firm. It is noted that Howard Grossman, a member of the law firm of Goldstick, Weinberger, et al, was at the October 4, 1984 sponsor to cooperative corporation closing in the capacity of vice-president of the corporation. Mr. Grossman was described as the family attorney to the individual member partners of petitioner and was at the closing as a vice-president of the cooperative corporation and in the role of a "consultant" to "keep an eye on things."

9. It was admitted that there was no financial inability to pay the tax due at the time of the transfers. It was also noted that petitioner has not filed returns and paid the tax due in a timely fashion on unit transfers occurring after the audit's conclusion.

#### CONCLUSIONS 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 was not timely remitted in connection with any of the 66 transfers in question. In defense of its tardiness, petitioner asserts the existence of uncertainty with the tax and its filing and payment requirements, and a belief in the possibility of a "grandfather" exemption based on the date of the Attorney General's acceptance of the cooperative conversion plan for filing. However, the evidence does not support such assertions as being reasonably held positions warranting abatement of the penalty imposed. It is noted, in this context, that petitioner was aware of the steps necessary to file for and receive a Statement of No Tax Due on its transfer of the property, as sponsor, to the cooperative corporation. Moreover, guidelines as to the taxability of cooperative conversions had been issued by the Audit Division and were available well before the subject transfers occurred.<sup>1</sup> In this vein, there is evidence that petitioner, through its members' family counsel, could reasonably be expected to have been aware of the liability for failure to timely file and pay. Yet petitioner did not even file and pay on an estimated basis.

C. That the fact that petitioner contacted the Audit Division to arrange determination of its liability neither explains nor excuses petitioner's failure to file and pay upon the transfers prior to such contact. However, specific direction by the auditor not to file gains tax returns on ongoing transfers during the pendency of the audit, as reasonably accepted and followed

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1 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.




by petitioner, is reasonable cause for nonfiling and nonpayment on such sales until conclusion of the audit. Accordingly, penalty imposed on those eleven transfers which occurred during the course of the audit (the November and December 1984 transfers and the 1985 transfers through May 9, 1985; refer Finding of Fact "3") is cancelled.

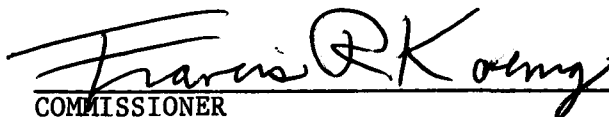
D. That the petition of Emery Realty Co. is granted to the extent indicated in Conclusion of Law "C", but is in all other respects denied, and the Notice of Determination of Tax Due Under Tax Law Article 31-B issued on June 12, 1985, as revised in accordance herewith, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER