

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of		
Housing Partners II	:	
		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, 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 13th day of September, 1985, he served the within notice of Decision by certified mail upon Housing Partners II, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Housing Partners II
c/o Choice Communities, Inc.
1427 Vine St.
Philadelphia, PA 19102

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
13th day of September, 1985.

David Parchuck

James A. Chapman

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Housing Partners II	:	
	:	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, 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 13th day of September, 1985, he served the within notice of Decision by certified mail upon David M. Gold, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David M. Gold
Israel Realty Associates, Inc.
19 W. 34th Street, Suite 1018
New York, NY 10001

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
13th day of September, 1985.

David Parchuck

David Archambault

Authorized to administer oaths
pursuant to Tax Law section 174

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

September 13, 1985

Housing Partners II
c/o Choice Communities, Inc.
1427 Vine St.
Philadelphia, PA 19102

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
David M. Gold
Israel Realty Associates, Inc.
19 W. 34th Street, Suite 1018
New York, NY 10001
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HOUSING PARTNERS II	:	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, Housing Partners II, c/o Choice Communities, Inc., 1427 Vine Street, Philadelphia, Pennsylvania 19102, filed a petition for revision of a determination or for refund of tax derived from certain real property transfers under Article 31-B of the Tax Law (File No. 51889).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1984 at 9:15 A.M., with all briefs to be submitted on or before April 16, 1985. Petitioner appeared by David M. Gold, Esq. The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner has established by independent evidence that a certain contract for the transfer of real property was entered into prior to the effective date of the tax imposed on the gains derived from the sale of real property.

FINDINGS OF FACT

1. Petitioner authorized Israel Realty Associates, Inc. ("Israel Realty") to place an advertisement in the New York Times on March 6, 1983 for the sale of an apartment building located at 1175-85 East Broadway, Hewlett, New York.

2. On March 7 and 8, 1983, a number of potential purchasers contacted Israel Realty requesting information on the property. On those dates, Israel Realty received at least four offers for the property.

3. On March 9, 1983, Steven Klein, on behalf of himself and his partners, Craig Swift and Jeffrey Zipes, submitted an offer for the purchase of the real estate. On March 10, 1983, following negotiations and an examination of the property, the parties agreed upon a purchase price.

4. From March 11, 1983 to March 13, 1983, Israel Realty advised other prospective purchasers that the property was not available because a tentative agreement had been reached.

5. On March 13, 1983, a meeting was held between individuals associated with Israel Realty and Mr. Klein and his two partners to discuss the terms of the transaction and to provide financial information.

6. From March 14, 1983 to March 18, 1983, Israel Realty provided information to Mr. Klein and his partners and arranged for inspections of the property. It was understood by all concerned that a contract was being prepared pursuant to the agreement reached on March 13, 1983.

7. On March 28, 1983, a document encaptioned "Memorandum of Contract" was prepared which set forth the basic terms of the sale between Housing Partners II as seller and JSC Properties, Inc. as buyer. The last paragraph of the contract provided:

"Both parties agree that either party shall have the absolute right to cancel the above mentioned agreement for any reason without any liability whatsoever provided written notice is given before April 30, 1983. In such event the seller shall immediately refund 1000 00/XX Dollars (One Thousand Dollars) here under (sic)."

8. In conjunction with the execution of the contract on March 28, 1983, Jeffrey Zipes drew a check on the account of Jeffrey Craig, Ltd. in the amount

of \$1,000.00 payable to the order of Mr. Leonard Lazarus, who was serving as petitioner's attorney. Thereafter, Mr. Lazarus held the amount of the check until the closing. A note on the check stated that it was to be held in escrow for the sale of the apartment building.

9. Jeffrey Craig, Ltd. is a firm operated by Jeffrey Zipes and Craig Swift which manufactures garments in New York City.

10. On the same day the memorandum of contract was prepared, David Gold, a broker for Israel Realty and an attorney, brought the contract to the office of the Clerk of Nassau County. Upon presenting the contract to the Nassau County Clerk's office, Mr. Gold was advised that a proper attestation clause was needed before the contract could be filed.

11. On March 29, 1983, David Gold prepared and presented a modified memorandum of contract to the office of the Nassau County Clerk. The contract provided that petitioner was the seller and that the purchaser was "Jeffrey Craig & Me, Ltd.". This contract contained a similar provision for cancellation as that of the previous day's contract and also contained the attestation clause required by the Nassau County Clerk's Office. The attestation clause provided:

"On the 28th day of March, 1983,¹ before me personally came CRAIG SWIFT to me known, who, being duly sworn, did depose and say that he resides at VANDERBILT DRIVE, SANDSPOINT, NEW YORK; that he is the PRESIDENT of JEFFRY CRAIG & ME, LTD., the corporation described in and which executed the foregoing instrument; ~~that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors~~ that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors" (The portion stricken as in original, the portion underlined was handwritten).

On March 30, 1983, the contract was recorded.

1 No information was provided as to why the attestation clause on this contract was dated March 28, 1983.

12. Although the nominal purchaser was different in each memorandum of contract, the same three principals were involved in both instances.

13. On June 20, 1983, petitioner, as seller, and Jeffrey Craig & Me, Ltd., as purchaser, executed a detailed modification of the purchase agreement. The basic terms with respect to the financing of the sale were unchanged from the contract dated March 28, 1983. Further, the \$1,000.00 that was exchanged on March 28, 1983 was applied to the purchase price.

14. On September 2, 1983, petitioner submitted a series of documents to the Audit Division and requested that the Audit Division provide a "Certificate of Exemption from the Gains Tax" with respect to a contract for a proposed transfer of real property.

15. The foregoing request was denied and, on September 14, 1983, the Audit Division issued a Tentative Assessment and Return showing a total tax due of \$83,352.70.

16. The closing was held on October 21, 1983. On the same date, petitioner paid the amount of tax shown due on the Tentative Assessment and Return.

17. On or about December 16, 1983, petitioner filed a Claim for Refund of Real Property Gains Tax. The request was denied and this proceeding for a refund ensued.

CONCLUSIONS OF LAW

A. That section 1441 of the Tax Law, which became effective March 28, 1983, imposes a tax on gains derived from the transfer of real property within New York State.

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 1443, 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." (emphasis added).

D. That notwithstanding the fact that two corporations may have the same stockholders, officers or directors, each corporation is generally considered a separate and distinct legal entity (13 N.Y. Jur. 2d, Business Relationships, §30). The use of the term "Ltd." by Jeffry Craig and Me, Ltd. as well as the phrasing of the attestation clause of the contract executed March 29, 1983 establishes that Jeffry Craig and Me, Ltd. was a corporate entity distinct from that of JCS Properties Inc. (see 13 N.Y. Jur. 2d, Business Relationships, §124). Since the party purchasing the property changed, it is concluded that the transfer of the property was pursuant to the written contract executed on March 29, 1983 and not the contract executed March 28, 1983. Consequently, the transfer was subject to the tax imposed on the gains derived from the transfer of real property.

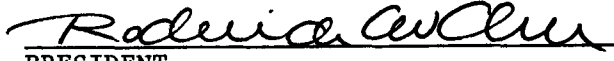
E. That in view of Conclusion of Law "C" it is unnecessary to determine whether the reservation of a right of cancellation rendered the contract void.

F. That the petition of Housing Partners II is denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER