

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J & M Realty Associates : 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 J & M Realty Associates the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J & M Realty Associates
c/o Goldstick, Weinberger, et al
261 Madison Ave., 16th Fl.
New York, NY 10016

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 OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J & M Realty Associates : AFFIDAVIT OF MAILING
for Revision of a Determination or for Refund :
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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 15th day of September, 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 St.
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
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

J & M Realty Associates
c/o Goldstick, Weinberger, et al
261 Madison Ave., 16th Fl.
New York, NY 10016

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 St.
Brooklyn, NY 11219

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
J & M REALTY ASSOCIATES	:	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.	:	

Petitioners, J & M Realty Associates, c/o Goldstick, Weinberger, et al, 261 Madison Avenue, 16th Floor, New York, New York 10016, 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. 61451).

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 March 6, 1986 at 1:15 P.M., with all briefs to be submitted by April 17, 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 March 5, 1985, following an audit, the Audit Division issued to petitioner, J & M Realty Associates, c/o Goldstick, Weinberger, et al, a Notice of Determination of Tax Due Under Tax Law Article 31-B ("gains tax"), indicating gains tax due in the amount of \$23,051.00, plus penalty and interest. This notice pertained to an audit concerning 11814 Homes Corp. ("Homes"), a cooperative

housing corporation to which petitioner, as sponsor under a cooperative conversion plan, had transferred certain real property located at 118-14 83rd Avenue, Kew Gardens, Queens County, New York. This transfer of the real property from petitioner, as sponsor, to Homes occurred on or about December 14, 1983.

2. Prior to the aforementioned transfer, requisite transferor and transferee questionnaires had been submitted to the Audit Division, in response to which the Audit Division had issued to petitioner, on December 9, 1983, a Tentative Assessment and Return indicating no gains tax due in connection with petitioner's transfer of the real property to Homes.

3. On March 5, 1985, the Audit Division issued to petitioner, J & M Realty Associates, c/o Goldstick, Weinberger, et al, a Notice of Determination of Tax Due under Tax Law Article 31-B, indicating gains tax due in the amount of \$56,489.00, plus penalty and interest. This notice pertained to an audit concerning 84 Equities, Inc. ("Equities"), a cooperative housing corporation to which petitioner, as sponsor under a cooperative conversion plan, had transferred certain real property located at 115-25 84th Avenue, Richmond Hill, Queens County, New York. This transfer to Equities occurred on or about January 31, 1984.

4. On January 30, 1984, prior to the above transfer from petitioner to Equities, the Audit Division had issued to petitioner a Tentative Assessment and Return indicating no gains tax due in connection with this transfer.

5. The cooperative conversion plans for both Homes and Equities had been accepted for filing by the Attorney General's office prior to the March 28, 1983 effective date of the gains tax. In the Homes conversion, numerous individual apartment units were subject to subscription agreements executed on or before such effective date and thus, when transferred by petitioner, such

units were properly exempt from gains tax pursuant to the "grandfather" provisions of Tax Law Article 31-B. However, an Audit Division audit revealed that several apartment units at Homes, which were not "grandfathered" as above, and several apartment units at Equities, had been transferred by petitioner without the filing of returns or payment of gains tax. Accordingly, the Audit Division determined the tax due on such transfers, plus interest, and also imposed penalty for failure to file returns and pay tax on such transfers, and issued its March 5, 1983 notices of determination to Homes and Equities.

6. Petitioner admits that returns required under Tax Law Article 31-B were not timely filed nor was gains tax timely paid in connection with the subject transfers. Petitioner does not contest the tax and interest determined to be due on audit and, in fact, has paid such amounts. However, petitioner does contest the imposition of 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. Further, petitioner asserts reliance upon the advice of its tax advisor, a certified public accountant, that the entire cooperative conversion plan, including all transfers of individual apartment units, were exempt from tax since the underlying real property was in both instances transferred by petitioner, as sponsor, to the cooperative housing corporations prior to the March 28, 1983 gains tax effective date. Finally, petitioner notes that upon learning its position was in error, petitioner contacted the Audit Division shortly thereafter to schedule the audits and determine its gains tax liability.

7. Petitioner's two principals earn their livelihood through real estate transactions in and around the New York City metropolitan area. At the hearing, it was admitted that gains tax returns and payments due in connection with

individual unit transfers subsequent to those at issue herein have not been made in a timely manner, allegedly due to an inability to expeditiously transfer to petitioner's accountant the information necessary to prepare such returns and calculate tax due.

CONCLUSIONS OF LAW

A. That Tax Law section 1446.2(a) 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 individual unit transfers in question. There is no evidence of written requests by petitioner or its tax advisor for guidance from the Audit Division regarding individual unit transfers pursuant to a cooperative conversion plan. However, Audit Division written guidelines concerning the gains tax treatment of cooperative conversions had been issued and were available to the public.¹ Given the issuance and availability of these guidelines, it is reasonable to expect that petitioner should have become aware of the responsibilities for filing and payment, and acted thereon sooner than was the case herein. Finally, there is evidence that even after learning

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 such responsibilities, subsequent transfers have not been reported and tax has not been paid in a timely manner. Accordingly, in view of all the facts and circumstances, 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.

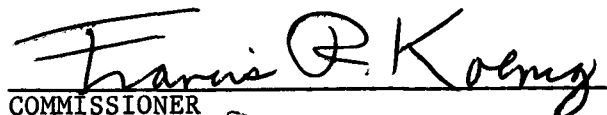
C. That the petition of J & M Realty Associates is hereby denied and the penalty imposed for failure to timely file returns and pay tax when due is sustained.

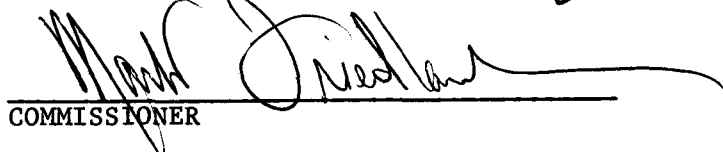
DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER