

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Norman C. Jen :
d/b/a Drake Properties

AFFIDAVIT OF MAILING

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

Norman C. Jen
d/b/a Drake Properties
53 Claremont Road
Scarsdale, NY 10583

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.

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

Janet M. Snay

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

June 19, 1986

Norman C. Jen
d/b/a Drake Properties
53 Claremont Road
Scarsdale, NY 10583

Dear Mr. Jen:

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
NORMAN C. JEN	:	DECISION
D/B/A DRAKE PROPERTIES	:	
	:	
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, Norman C. Jen d/b/a Drake Properties, 53 Claremont Road, Scarsdale, New York 10583, 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. 61269).

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 7, 1986 at 10:20 A.M. Petitioner appeared pro se. 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 April 3, 1985, following an audit, the Audit Division issued to petitioner, Norman C. Jen d/b/a Drake Properties, a Notice of Determination of Tax Due under Tax Law Article 31-B ("Gains Tax"), indicating gains tax due in the amount of \$70,618.00, plus penalty and interest. This notice pertained to an audit concerning Drake Lane Owners, Inc., a cooperative housing corporation to which petitioner, as sponsor under a cooperative conversion plan, had

transferred certain real property located at 179, 183, 189 Drake Avenue, New Rochelle, New York.

2. The transfer of the real property from petitioner, as sponsor, to Drake Lane Owners, Inc. occurred on or about June 29, 1983. Prior thereto, requisite transferor and transferee questionnaires had been submitted to the Audit Division in connection with this then-pending transfer.

3. In response to the aforementioned questionnaires, the Audit Division had issued to petitioner on June 29, 1983 a Statement of No Tax Due in connection with the transfer of the real property to Drake Lane Owners, Inc.

4. An Audit Division audit conducted during February, 1985 revealed that thirty-nine individual cooperative apartment units at Drake Lane Owners, Inc. had been transferred by petitioner to various individual purchasers. Petitioner had neither filed returns nor paid tax in connection with any of these thirty-nine individual unit transfers. The Audit Division determined that tax was due on twenty-seven of these transfers, in the aggregate amount of \$70,618.00, plus interest.¹ 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 any of the individual unit transfers. However, petitioner does contest the imposition of the penalty for late filing and payment, asserting that he believed the statement of no tax due meant that there was no tax due in any connection with

1 The balance of the thirty-nine individual units were transferred pursuant to contracts entered into prior to the effective date of Article 31-B, and thus were exempt from the tax imposed thereunder.

the entire subject cooperative conversion including individual apartment unit sales. Petitioner maintains he was totally unaware that filings were required or that tax could be due on individual unit transfers, and that the attorney and accountant hired and relied upon by petitioner to handle the transactions at issue never advised him of any potential for tax liability on the individual unit sales. Finally, petitioner notes that tax and interest were promptly paid when he was advised such amounts were due, and also notes that, at the time of the audit and at a post-audit meeting, the auditor indicated that penalties would not be imposed.

6. The April 3, 1985 Notice of Determination reflects that payment of the tax and interest was made by petitioner on February 20, 1985, and that the amount of penalty then due was \$24,716.00.

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 the transfers in question. There is no evidence of written requests by petitioner or his attorney or accountant for guidance from the Audit Division regarding individual unit transfers pursuant to a cooperative plan. However, Audit Division written guidelines concerning the gains tax treatment of cooperative conversions had been issued and were



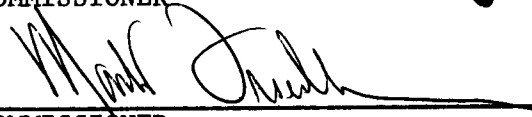
available to the public.² Given the availability of such written guidelines, it is a reasonable expectation that petitioner should have become aware of the responsibilities for filing and payment prior to the time of the audit herein. However, there was no filing, payment or other action by peititoner until an audit was undertaken, indicating that absent an audit, peititoner's failure to file and pay would have continued indefinitely. Ignorance of the law is not a basis supporting abatement of the penalties imposed. Finally, an auditor's advice or lack thereof as to whether or not penalty will be imposed or, subsequently, abated is not relevant as to why petitioner failed to timely file returns and pay tax 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 Norman C. Jen d/b/a Drake Properties 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

2 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.