

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Kesa Enterprises :  
for Revision of a Determination or for Refund of :  
Tax on Gains Derived from Certain Real Property :  
Transfers under Article 31B of the Tax Law. :

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, 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 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon Kesa Enterprises, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kesa Enterprises  
482 South Clinton Ave.  
Rochester, NY 14620

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  
18th day of February, 1986.

Doris E. Steinhardt

John Corry  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Kesa Enterprises :  
AFFIDAVIT OF MAILING  
for Revision of a Determination or for Refund of :  
Tax on Gains Derived from Certain Real Property :  
Transfers under Article 31B of the Tax Law. :

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State of New York :  
ss.:  
County of Albany :

Doris E. Steinhardt, 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 18th day of February, 1986, he served the within notice of Decision by certified mail upon Paul I. Snyder, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul I. Snyder  
5 S. Fitzhugh Street  
Rochester, NY 14614

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  
18th day of February, 1986.

Doris E. Steinhardt

Jean Corry  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

February 18, 1986

Kesa Enterprises  
482 South Clinton Ave.  
Rochester, NY 14620

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  
Paul I. Snyder  
5 S. Fitzhugh Street  
Rochester, NY 14614  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
KESA ENTERPRISES  
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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DECISION

Petitioner, Kesa Enterprises, 482 South Clinton Avenue, Rochester, New York 14620, 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. 57037).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on August 19, 1985 at 12:15 P.M., with all briefs to be submitted by November 7, 1985. Petitioner appeared by Snyder and Snyder (Paul I. Snyder, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether there is "independent evidence" within the meaning of section 1443(6) of the Tax Law that the parties entered into a written contract for the transfer of real property prior to the effective date of the tax imposed on the gains derived from the transfer of real property within New York State.

FINDINGS OF FACT

1. Petitioner, Kesa Enterprises, was a partnership formed for the purpose of operating the Chili-Hinchey Shopping Center in Gates, New York. Mr. Samuel A. Halaby, Jr. was petitioner's managing partner.

2. Mr. Mauri S. Saltzman was an accountant who represented a group of individuals who were interested in purchasing property in order to obtain certain tax benefits and earnings.

3. Mr. Saltzman approached Mr. Adolph R. Cuff, Sr., of Cuff Realty, and told him of the size of the property Mr. Saltzman's clients were interested in and asked Mr. Cuff if a piece of property suitable to Mr. Saltzman's needs could be located. In or about January, 1983, Mr. Cuff approached Mr. Halaby about selling the shopping plaza and the terms and conditions under which the plaza would be sold. Thereafter, Mr. Cuff introduced Mr. Halaby to Mr. Saltzman and negotiations began regarding the terms and conditions for the sale of the shopping plaza. One concern of Mr. Halaby was to avoid recognition of capital gains. He sought to do this by having the purchasers buy another parcel of property and then trade that parcel for the shopping plaza.

4. On March 7, 1983, Mr. Saltzman signed a "Letter of Intent to Purchase Real Property" ("letter"). The letter requested Mr. Cuff to inform Mr. Halaby that the purchasers had accepted Mr. Halaby's terms and conditions of the sale. The letter set forth the purchase price and how the purchase would be financed. The letter also provided for the inspection and approval of all leases and corporate tax returns for 1981 and 1982. The letter further stated that, upon approval of the leases, a bona fide purchase offer would be presented to the sellers.

5. On March 11, 1983, Mr. Halaby, on behalf of the sellers, accepted the terms and conditions of the letter of intent with two exceptions. One exception required the buyer to cooperate in effectuating an exchange of real property providing the seller bears all of the buyers' costs and expenses relating to such an exchange. On March 14, 1983, Mr. Saltzman, as agent for the purchasers, accepted Mr. Halaby's counter offer.

6. On April 13, 1983, Mr. Saltzman, as agent for the purchasers, and Mr. Halaby, as agent for the sellers, signed a "Memorandum made pursuant to Written contract dated March 7, 1983." The memorandum recognized that the parties entered into a written contract dated March 7, 1983 and executed March 14, 1983 and stated that each of the conditions precedent had been satisfied. The memorandum concluded by stating that the property would be transferred.

7. On April 13, 1983, Mr. Saltzman, as agent for the purchasers, signed a "Purchase Offer Made Pursuant to Contract Dated March 7, 1983." On April 15, 1983, Mr. Halaby, as agent for the sellers, signed the same document. The statement, "I hereby approve of the purchase offer and agree to sell pursuant to the terms of our contract dated March 7, 1983" was directly above Mr. Halaby's signature. The reason for the preparation of the purchase offer was because Mr. Saltzman's attorney did not think that the letter of intent dated March 7, 1983 was sufficient protection for Mr. Saltzman, who was representing nine people.

8. The purchase offer stated that it was not contingent upon a trade for another parcel of real property. However, the purchasers agreed to consider a proposal for the trade of property.

9. In March, 1983, the purchasers received an unofficial mortgage commitment from Marine Midland Bank in reliance on the letter of intent dated March 7, 1983. In July, 1983, the purchasers received an official commitment. In order to receive this commitment, the purchasers incurred commitment fees and bank fees.

10. A real estate closing was held on July 1, 1983 and all documents were held in escrow pending notification by the Department of Taxation and Finance that the transaction was exempt from the real property transfer gains tax. On the same day, Mr. Halaby mailed real property transfer gains tax transferor and transferee questionnaires to the Department of Taxation and Finance. In response thereto, the Audit Division issued a tentative Assessment and Return assessing tax due in the amount of \$84,113.10. The Schedule of Adjustments which was attached thereto stated that an exemption was disallowed since there was no independent evidence to substantiate that a contract of sale was entered into prior to March 29, 1983.

11. Upon learning that the Audit Division would not exempt the transaction from the real property transfer gains tax, Mr. Halaby sought to have the purchase price increased by the amount of the real property transfer gains tax assessment. The purchasers refused and advised Mr. Halaby that they would seek specific performance of the letter of intent dated March 7, 1983.

12. On August 25, 1983, Mr. Halaby paid, under protest, the \$84,113.10 determined to be due by the Department of Taxation and Finance. On or about the same time, the closing of the real estate transaction took place.

13. On September 20, 1983, the Department of Taxation and Finance issued a transferee's release of real property transfer gains tax.

14. On or about August 24, 1983, petitioner filed a Claim for Refund of Real Property Transfer Gains Tax. On October 29, 1984, petitioner's refund application was denied on the basis that there was insufficient independent evidence that the contract was entered into prior to the effective date of the real property transfer gains tax.

15. It is not a custom in Monroe County to record real estate contracts. Further, there are instances where deposits are given substantially after the date the contract is signed.

#### CONCLUSIONS OF LAW

A. That the letter of intent, as accepted, contained the essential requisites of a contract and constituted a contract for the sale of real property (see General Obligations Law, §5-703).

B. 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.

C. 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]."

D. 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).



E. That the testimony of the signatories to the contract and the real estate agent for one of the parties does not constitute "independent evidence" within the meaning of subdivision 6 of section 1443 of the Tax Law. Accordingly, the Audit Division properly denied petitioner's application for a refund of real property transfer gains tax.

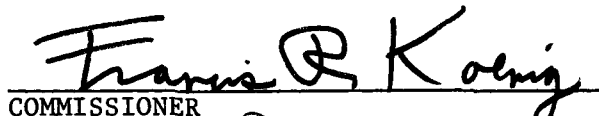
F. That the petition of Kesa Enterprises is denied.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER