

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Le Tam Realty Corp. : 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 30th day of June, 1986, he/she served the within notice of Decision by certified mail upon Le Tam Realty Corp. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Le Tam Realty Corp.  
159-00 Riverside Drive West  
New York, NY 10032

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  
30th day of June, 1986.

David Parchuck

Janet M. Snay  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Le Tam Realty Corp. : 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 30th day of June, 1986, he served the within notice of Decision by certified mail upon Herbert Schoenfeld, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Schoenfeld  
Schoenfeld & Mendelsohn  
550 Old Country Road  
Hicksville, NY 11801

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  
30th day of June, 1986.

David Parchuck

Janet M. Snay  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

June 30, 1986

Le Tam Realty Corp.  
159-00 Riverside Drive West  
New York, NY 10032

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:  
Herbert Schoenfeld  
Schoenfeld & Mendelsohn  
550 Old Country Road  
Hicksville, NY 11801

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
LE TAM REALTY CORP.	:	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, Le Tam Realty Corp., 159-00 Riverside Drive West, New York, New York 10032, 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. 59772).

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 6, 1986 at 10:45 A.M. Petitioner appeared by Schoenfeld & Mendelsohn, CPAs (Herbert Schoenfeld, 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 January 22, 1985, following an audit, the Audit Division issued to petitioner, Le Tam Realty Corp. ("Le Tam"), a Notice of Determination of Tax Due under Tax Law Article 31-B ("Gains Tax"), indicating gains tax due in the amount of \$115,447.85, plus penalty and interest. This notice pertained to an audit concerning 159-00 Riverside Drive West ("Riverside"), a cooperative

housing corporation to which petitioner, as sponsor under a cooperative conversion plan, had transferred certain real property located at 159-00 Riverside Drive West, New York, New York.

2. The deed to the subject real property was recorded on May 26, 1983. The cooperative closing between petitioner, as sponsor, and Riverside occurred subsequently on June 15, 1983. Thereafter, in response to requisite transfer and transferee questionnaires filed, the Audit Division issued to petitioner, on June 27, 1983, a Statement of No Tax Due in connection with the transfer from petitioner to Riverside.

3. The premises in question consist of three connected buildings, at one address, which are built in a series of "U's" and cover a two block area. A portion of the premises is elevated (due to the slope of the land) and rests upon concrete pillars. There are 243 individual apartment units at the premises.

4. On August 16, 1983, the attorneys then representing petitioner made a written inquiry seeking guidance as to the gains tax treatment of cooperative conversions and subsequent apartment unit sales under a number of differing circumstances. By two different letters, each dated September 13, 1983, the Audit Division's position with respect to cooperative conversions in general, and in response to petitioner's attorney's specifically described circumstances, was provided.

5. On December 26, 1983, a portion of the premises collapsed when some of the concrete pillars beneath the elevated section of the premises gave way. The premises were immediately evacuated and safety tests were conducted. Thereafter, the parts of the premises not affected by the collapse were reoccupied. However, the damaged parts were not reoccupied until repairs were made. Also, in the wake of the collapse, petitioner was prohibited by the Attorney General's

office from selling any apartment units until repairs were made. Apartment unit sales, which had commenced at or about the time of the cooperative closing between petitioner and Riverside, were suspended after collapse and did not resume until June, 1985.

6. A November 1984 Audit Division audit revealed that petitioner had transferred 82 apartment units prior to the December 1983 collapse. Forty-eight of such transfers were made pursuant to subscription agreements entered into prior to the March 28, 1983 gains tax effective date and thus were "grandfathered" and not subject to the tax. However, the remaining thirty-four transfers were not so grandfathered, and petitioner had neither filed returns nor paid tax in connection with any of these thirty-four individual unit transfers. Accordingly, the auditor determined tax due on such transfers in the aggregate amount of \$115,447.85, plus interest. Penalty was also imposed for failure to file returns and pay tax due.

7. Petitioner does not contest the tax and interest determined to be due on audit 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 noted thirty-four individual transfers.

8. Petitioner does contest the imposition of the penalty for late filing and payments, 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. In addition, petitioner maintains its attention and efforts after December 26, 1983 were almost totally devoted to the collapse problem and its associated difficulties, thus leaving little time to focus on obtaining the records necessary to calculate, file and pay gains tax. Finally, petitioner asserts that this was the first cooperative conversion to occur in the area

and, coupled with the unique design of the premises, it was difficult to determine proper valuations for the individual apartment units and to estimate the amount of ultimate gain anticipated. In this context, petitioner noted its reluctance to file upon each transfer for fear of using inaccurate estimates, hence overpaying the tax and encountering difficulty in obtaining a refund.

9. It was admitted that petitioner's filing and payment could have been made prior to the audit. Upon receiving notice of the audit, petitioner determined to wait until the end of the audit so its filing and payment would be correct as to amounts.

10. The January 22, 1985 Notice Notice of Determination reflects that payment of the tax and interest was made by petitioner on December 10, 1984, and that the amount of penalty then due was \$40,406.79.

#### 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 thirty-four transfers in question. Further, petitioner admits awareness of the tax, its filing requirements and of the penalties for failure to file and pay. In fact, there is evidence of a written request by petitioner's attorneys for guidance from the Audit Division regarding cooperative conversions and subsequent unit sales, in response to

which request the Audit Division's position was provided (see Finding of Fact "4").<sup>1</sup>


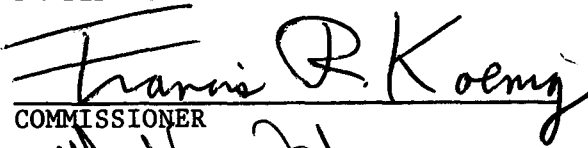

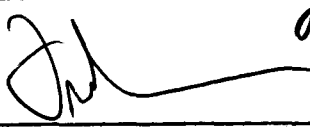
C. That the thrust of petitioner's argument appears to be that its failure to file and pay as required, prior to the time of the audit, was the result of petitioner's choice to wait in the alleged hope of gaining a clearer understanding of the gains tax as well as more certain dollar valuations, thus avoiding possible overpayment of tax and the trouble of seeking a refund. Such choice ignores the requirement under Article 31-B to file and pay at the time of each unit transfer. Finally, the collapse of part of the premises, and problems the attendant thereto, though unfortunate, does not support petitioner's failure to file and pay tax at the time of the unit transfers, especially since such transfers occurred prior to the collapse. 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.

D. That the petitioner of Le Tam Realty Corp. 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 30 1986

  
PRESIDENT  
  
COMMISSIONER  
  
  
COMMISSIONER

---

1 Petitioner was aware of Department of Taxation and Finance Publication 588 "Questions and Answers - Gains Tax on Real Property Transfers", which 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 and sent to petitioner's counsel by the Audit Division, discuss the taxability of and set forth the filing requirements for transferors of cooperative units.