

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Lawrence Lever, Estate of :

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 21st day of April, 1986, he/she served the within notice of decision by certified mail upon Lawrence Lever, Estate of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence Lever, Estate of
585 Stewart Avenue
Garden City, NY 11530

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
21st day of April, 1986.

David Parchuck

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

STATE OF NEW YORK

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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 21st day of April, 1986, he served the within notice of decision by certified mail upon Richard S. Pastore, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard S. Pastore
Albert, Pastore & Ward
125 Mason St., P.O. Box 1668
Greenwich, CT 06836

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
21st day of April, 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

April 21, 1986

Lawrence Lever, Estate of
585 Stewart Avenue
Garden City, NY 11530

To The Estate of L. Lever:

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:
Richard S. Pastore
Albert, Pastore & Ward
125 Mason St., P.O. Box 1668
Greenwich, CT 06836

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
THE ESTATE OF LAWRENCE LEVER
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, The Estate of Lawrence Lever, 585 Stewart Avenue, Garden City, New York 11530, 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. 51580).

Petitioner, by its duly authorized representative, Albert, Pastore & Ward, P.C., Esqs. (Richard S. Pastore and Scott R. Johnson, Esqs., of counsel), has waived a hearing and submitted its case for decision based on the entire file, including a Stipulation of Facts, together with briefs to be submitted by January 6, 1986. After due consideration, the Commission renders the following decision.

ISSUE

Whether a certain transfer of real property by petitioner was made pursuant to a written contract entered into on or before the March 28, 1983 effective date of the "gains tax" imposed under Tax Law Article 31-B, thus leaving petitioner exempt from tax on such transfer pursuant to Tax Law section 1443.6.

FINDINGS OF FACT

1. On November 6, 1985, a Stipulation of Facts pertaining to the petition of the Estate of Lawrence Lever, duly executed by authorized representatives

for petitioner (Richard S. Pastore, Esq.) and for the Audit Division (Paul A. Lefebvre, Esq.), was received. This Stipulation of Facts provides as follows:

- STIPULATED FACTS -

"Tax Payment:

a. On August 2, 1983, the Estate of Lawrence Lever (hereinafter "Transferor") acting through its Co-Executors and Co-Trustees, Jerrold I. Lupoff and Harold Lever, conveyed title to certain real property located in Nassau County, New York, to PRM - Garden City Associates and VKM&S - Garden City Associates, as tenants in common. PRM - Garden City Associates and VKM&S - Garden City Associates acquired the interest of VMS Realty Inc. in the purchase agreement for the property (as hereinafter discussed) by way of an Assignment dated July 20, 1983.

b. Simultaneously with the closing of title, a Real Property Transfer Gains Tax (Article 31-B of the Tax Law) in the amount of \$2,023,051.49 was paid by Transferor under protest to the New York State Department of Taxation and Finance (hereinafter the 'Department').

Background:

c. The Transferor and VMS Realty, Inc. signed a document bearing the date March 24, 1983 (hereinafter the 'March Letter'). Use of the term 'March Letter' is for purposes of reference only.

d. VMS Realty, Inc. paid \$50,000 to an Escrow Agent to be held in trust as a good faith deposit towards the purchase price of the property.

e. New York State Tax Law Article 31-B, Section 1443.6, established March 29, 1983 as the date by which a written contract must exist in order for an exemption to the Real Property Transfer Gains Tax to apply.

f. The date which appears on the March Letter pre-dated the Section 1443.6 March 29, 1983 exemption date by five days.

g. The April 7, 1983 Contract of Sale, entitled 'Addendum to Agreement dated March 24, 1983' (hereinafter the 'Addendum to the March Letter'), was executed and delivered by both parties on April 7, 1983.

h. On December 1, 1983, the Transferor filed a Claim for Refund of Real Property Transfer Gains Tax with the Department.

i. Said Claim for Refund was filed within the applicable time period established for same under the regulations of the Department.

j. On January 30, 1984, the Department filed a Notice of Disallowance for the Claim for Refund of the Estate of Lawrence Lever.

k. On April 12, 1984 the Transferor appealed said January 30, 1984 decision to the Tax Appeals Bureau.

l. Petitioner's appeal of the Notice of Disallowance was filed within the applicable time periods established therefor in the regulations of the Department.

m. The file regarding said petition has been accepted as a perfected petition under Section 601.5 of the Rules of Practice and Procedure of the State Tax Commission.

n. On August 1, 1984 the Audit Division filed its answer to the perfected petition.

o. A formal hearing was scheduled by the Tax Appeals Bureau for October 30, 1984.

p. On October 24, 1984, the petitioner waived its right to a formal hearing and requested that this matter be decided by submission of the file to the State Tax Commission under Section 601.8(d) of the Rules of Practice and Procedure of the Commission."

- ADDITIONAL FACTS -

2. The transferred premises consist of real estate upon which three office buildings are situated. There is no dispute between the parties as to the dollar amounts involved or the computation of the amount of gains tax alleged to be due which was paid under protest. Rather, at issue is whether the March 24, 1983 letter was, in fact, executed on or before the effective date of Tax Law Article 31-B and constituted a written contract pursuant to which the transfer of the premises in question was made, thus rendering the subject transaction exempt from tax under the "grandfather" provision of Tax Law section 1443.6.

3. The March 24, 1983 letter is signed by representatives for petitioner (as transferor) and by the purchaser's representative and is, on its face, dated March 24, 1983. Petitioner has also submitted, to establish March 24, 1983 as

the date of actual execution, a photocopy of the \$50,000.00 good faith deposit check dated March 23, 1983, the bank deposit slip relating thereto receipted and stamp dated March 28, 1983, affidavits from the transferor's representatives and from attorneys for the transferor and transferee, all indicating and/or referring to a March 24, 1983 execution date.

4. The first paragraph of the March 24, 1983 letter provides, in part, as follows: "[t]his constitutes our agreement with you to purchase (the premises)." Thereafter, six numbered items are listed, describing: 1.) the purchaser; 2.) purchase price; 3.) contract deposit; 4.) closing date; 5.) brokerage firm; 6.) other conditions and provisions (relating to a site development plan, power plant, title report, and ongoing leasing and tenant improvements at the premises). The "contract deposit" covered by item 3 refers to a \$750,000.00 letter of credit, as distinguished from the \$50,000.00 "good faith deposit" called for upon execution of the March 24, 1983 letter. Item 4 in the March 24, 1983 letter specifies a closing date of July 15, 1983 and further provides as follows: "[c]ontract to be executed prior to April 1, 1983." (Emphasis added).

5. The final two substantive paragraphs of the March 24, 1983 letter provide as follows:

"We enclose herewith \$50,000 made payable to Baer, Marks & Upham as a good faith deposit, which will be held in escrow and either refunded upon termination of our agreement pursuant to this letter of intent or delivered and credited against the contract deposit.

This letter is intended to set forth the intention of the parties to negotiate in good faith a Contract of Sale containing the terms set forth above, and such other reasonable and customary terms as they may agree upon, and you agree that you will not offer the Property for sale to any other party prior to April 1, 1983, and that the Property will be off the market until said date. However, if for any reason such Contract is not executed and delivered on or before March 31, 1983, then this letter shall be of no further force or effect and neither party hereto shall have any further liability

to the other. In any event, Harold Lever and Jerrold Lupoff shall have no personal liability hereunder or under the Contract, and we will look only to the Estate of Lawrence Lever for satisfaction of any liability you may have hereunder or under the Contract." (Emphasis added).

6. Executed on April 7, 1983 was a very detailed document entitled "Addendum to Agreement Dated March 24, 1983," exceeding fifty pages in length and setting forth in full detail the terms pursuant to which the transfer at issue was made. This document states, in its opening sentence, that it "...is made as of the 24th day of March, 1983...", and its first two clauses provide as follows:

"By agreement dated March 24, 1983 (the 'Original Agreement'), Seller agreed to sell, and Purchaser agreed to purchase, the Premises (as defined below). Pursuant to the Original Agreement, Purchaser made a down payment in the sum of \$50,000, which sum has been held in escrow by Messrs. Baer, Marks & Upham. The Original Agreement contemplated the execution and delivery of an Addendum to such Original Agreement, setting forth in greater detail the agreement between the parties set forth in the Original Agreement.

The parties now desire to execute and deliver such Addendum to the Original Agreement, setting forth in complete detail all of the agreements reached between them. Simultaneously with the execution and delivery herein, Purchaser is delivering to Seller the Down Payment LC (as hereinafter defined), in substitution for said cash deposit of \$50,000, which has been returned by Baer, Marks & Upham, as escrow agent, to Purchaser."

7. The March 24, 1983 letter speaks of a "contract of sale containing the terms set forth above, and such other reasonable and customary terms as [the parties] may agree upon,...". (see Finding of Fact "5"). However, the March 24, 1983 letter specifically made no mention of the following material terms which were included in the April 7, 1983 Addendum Agreement:

- a) A provision that the purchaser was subject to the terms of specific service contracts and employee agreements in connection with the property;
- b) a cancellation provision allowing cancellation of the contract if the estimated cost of curing all title violations which are the seller's obligation to cure exceeds \$300,000;

- c) provisions as to rent apportionment between the purchasers and sellers;
- d) agreement by purchaser to continue prosecuting "Certiorari Proceedings" pending with respect to a portion of the premises from and after the closing date;
- e) assignment and assumption of security deposits;
- f) assignment and assumption of service contracts;
- g) a provision requiring that all sums paid on account of this [April 7, 1983] agreement are made liens on the premises.

8. The April 7, 1983 Agreement itself expressly provides:

"It is agreed that all understandings between the parties hereto are merged in this Agreement which alone fully and completely sets forth the agreement between Seller and Purchaser." (Emphasis supplied.)

* * *

"This agreement modifies and amends, and is part of the agreement dated March 24, 1983 by and between the estate of Lawrence Lever and VMS Realty, Inc. (the Original Agreement) and the Original Agreement, as modified and amended by this Agreement, contains the entire agreement between the parties with regard to the subject matter thereof and hereof and supersedes all prior understanding, if any with regard thereto." (Emphasis supplied.)

9. There is no evidence of any extension, written or otherwise, of the April 1, 1983 termination date reflected in the March 24, 1983 letter, nor any evidence as to whether the property remained off the market between such date and the April 7, 1983 date of execution of the "addendum."

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 a comparison of the March 24, 1983 letter with the April 7, 1983 "addendum" leads to the conclusion that the transfer in question was made pursuant to the latter document, and that the former agreement was not a binding, enforceable contract pursuant to which the transfer in question could have been compelled by either party. The express terms of the March 24 agreement provided that if a contract was not executed by March 31, 1983, the March 24 letter would no longer have any effect. Since the "addendum" was not executed until April 7, 1983, with no evidence of any agreement extending the March 24 letter beyond its own expiration date, there was no agreement by which petitioner was bound to sell the property during the period April 1, 1983 through April 6, 1983. Treating the March 24 letter as an enforceable contract of sale for the premises would violate both the intent of the parties and the express terms of the March 24 letter.

E. That the March 24 letter indicates the parties' intent was to continue negotiations with regard to a future contract, rather than a then-present intent to form a binding contract of sale (see Finding of Fact "5"). In fact, the March 24 letter is insufficient in and of itself to constitute an enforceable

contract of sale with regard to the specific property at issue. At most, the terms of the March 24, 1983 agreement could be construed as an enforceable contract between the parties only to the extent that the Seller was bound not offer the specific real property for sale to any other party prior to April 1, 1983, and that such property must be kept off the market until such date. The March 24, 1983 agreement with respect to the actual sale of the property itself is merely an agreement to negotiate a contract for the sale of the real property or an agreement to agree.

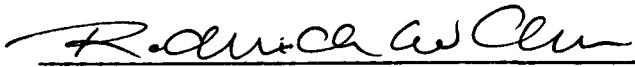
F. That, in sum, the parties did not manifest their mutual assent to all essential terms of a contract for the sale of this property, nor did a complete meeting of the minds with the execution of a written contract thereon as required by Tax Law section 1443.6 occur until the April 7, 1983 contract was executed. Thus, even assuming, arguendo, that petitioner has submitted sufficient independent evidence that the March 24, 1983 agreement was executed, in fact, on such date, such agreement was nonetheless not the binding written contract pursuant to which the transfer of the subject premises occurred. Accordingly, since the first enforceable contract for the sale of this real property was not entered into by the parties until April 7, 1983, the Real Property Gains Tax was applicable to the petitioner's transfer.

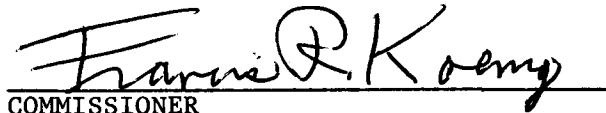
G. That the petition of The Estate of Lawrence Lever is hereby denied and the Audit Division's denial of petitioner's claim for refund is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 21 1986


PRESIDENT


COMMISSIONER


COMMISSIONER