

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Martha Melohn & Esther Oppenheimer : AFFIDAVIT OF MAILING
Trustees to Joseph Melohn :
:
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 20th day of November, 1986, he/she served the within notice of Decision by certified mail upon Martha Melohn & Esther Oppenheimer, Trustees to Joseph Melohn the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Martha Melohn & Esther Oppenheimer
Trustees to Joseph Melohn
105 West 55th Street
New York, NY 10019

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
20th day of November, 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	:	
Martha Malohn & Esther Oppenheimer	:	AFFIDAVIT OF MAILING
Trustees to Joseph Malohn	:	
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for Revision of a Determination or for Refund	:	
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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 20th day of November, 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 Street
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
20th day of November, 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

November 20, 1986

Martha Melohn & Esther Oppenheimer
Trustees to Joseph Melohn
105 West 55th Street
New York, NY 10019

Mss. Melohn & Oppenheimer:

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 Street
Brooklyn, NY 11219

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MARTHA MELOHN AND ESTHER OPPENHEIMER, : DECISION
TRUSTEES TO JOSEPH MELOHN :
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, Martha Melohn and Esther Oppenheimer, Trustees to Joseph Melohn, 105 West 55th Street, New York, New York 10019, 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. 63889).

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 June 19, 1986 at 11:00 A.M., with all briefs to be submitted by August 25, 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 June 12, 1985, the Audit Division issued to petitioner, Joseph Melohn (herein represented by Martha Melohn and Esther Oppenheimer, Trustees to Joseph Melohn), a Notice of Determination of Tax Due Under Tax Law Article 31-B ("gains tax"), indicating gains tax due in the amount of \$306,857.00, plus penalty and interest. This notice arose as the result of a field audit of the

records of 215 Equities Corp., a cooperative housing corporation, to which petitioner, as sponsor under a cooperative conversion plan, had transferred on August 14, 1984 certain premises located at 215 West 92nd Street, Borough of Manhattan, New York City.

2. Requisite transferor and transferee questionnaires were filed such that the Audit Division issued to petitioner a Statement of No Tax Due with respect to the above-described transfer of the premises from petitioner, as sponsor, to the cooperative housing corporation.

3. Commencing on or about the same August 14, 1984 date as the above-described transfer, and continuing thereafter were closings wherein the individual cooperative apartment units at the premises were transferred to their various owners. Gains tax returns were not filed nor was tax due paid at the time of the closings on any of the 52 individual apartment unit transfers occurring between August 14, 1984 and May 2, 1985.

4. In late October or early November of 1984, petitioner contacted the Audit Division concerning the subject cooperative conversion. Petitioner admitted that a gains tax liability existed and requested an audit in order to determine the amount of such liability and pay the same. An auditor was assigned to the matter, with the audit commencing in late October or early November of 1984.

5. Due to the illness of petitioner's representative and to a broken leg suffered by the auditor, the audit work was not completed until late April or early May of 1985. During the pendency of the audit, petitioner was advised by the auditor not to make any gains tax filings on ongoing apartment unit transfers, but rather was advised to report and account for such sales as part of the audit in order to avoid the possible confusion of multiple ongoing filings.

6. After completion of the audit petitioner paid, on May 2, 1985, the tax due on the noted fifty-two transfers of individual apartment units (\$306,857.00), plus interest accrued thereto (\$25,885.00). However, petitioner refused to pay the penalty imposed (\$85,920.00). Accordingly, at issue herein is this penalty amount, plus interest accruing thereon from May 3, 1985.

7. It is petitioner's position that the penalty should be abated. In this regard, petitioner points out that the gains tax was, at the time of the transfers in question, a relatively new tax and asserts, especially in the area of cooperative conversions, there existed questions and uncertainties concerning the tax. Petitioner also notes that it contacted the Audit Division within a relatively short time after the initial sales of individual apartment units began to take place in order to schedule an audit and arrive at its gains tax liability, rather than waiting for the Audit Division to discover the nonfiling and nonpaying and commence an audit on its own. Further, petitioner asserts it relied upon its tax advisor's advice that it was not subject to gains tax on any of the transfers since the plan of cooperative conversion had been accepted for filing by the Attorney General's office prior to the March 28, 1983 effective date of the gains tax (Article 31-B). Finally, petitioner maintains that penalty should not be imposed with respect to those transfers made during the pendency of the audit, inasmuch as the auditor specifically advised petitioner not to file returns on such transfers, but rather to wait and file all at once upon conclusion of the audit.

8. The specifics of the advice given to petitioner by its representatives that it was not subject to tax were not detailed at the hearing. On August 16, 1983, approximately one year prior to the sponsor to cooperative closing and subsequent unit transfers, the law firm of Goldstick, Weinberger, et al, had

requested, in writing, clarification of the gains tax treatment of cooperative conversions under various factual circumstances. On September 13, 1983, in response to this request, letters and an Audit Division publication [TSB-M-83-(2)-R] setting forth the Division's position on cooperative conversions, in general and with respect to the specific questions raised, were sent to the firm. It is noted that Howard Grossman, a member of the law firm of Goldstick, Weinberger, et al, was at the August 14, 1984 sponsor to cooperative corporation closing in the capacity of attorney for the cooperative corporation. Mr. Grossman was described as the family attorney to the Melohn family.

9. It was admitted that there was no financial inability to pay the tax due at the time of the unit transfers. It was also noted that petitioner has not filed returns and paid the tax due in a timely fashion on unit transfers occurring after the audit's conclusion. Finally, no information was presented either at or after the hearing specifying those individual unit transfers occurring during the course of the audit.

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 any of the 52 transfers in question. In defense of its tardiness, petitioner asserts the existence of uncertainty with the tax and its filing and payment requirements and a belief in the

possibility of a "grandfather" exemption based on the date of the Attorney General's acceptance of the cooperative conversion plan for filing. However, the evidence does not support such assertions as being reasonably held positions warranting abatement of the penalty imposed. It is noted, in this context, that petitioner was aware of the steps necessary to file for and receive a Statement of No Tax Due on its transfer of the property, as sponsor, to the cooperative corporation. Moreover, guidelines as to the taxability of cooperative conversions had been issued by the Audit Division and were available well before the subject transfers occurred.¹ In this vein, there is evidence that petitioner, through its family counsel, could reasonably be expected to have been aware of the liability for failure to timely file and pay. Yet petitioner did not even file and pay on an estimated basis. Finally, there is evidence that transfers occurring after those in question herein have not been reported nor has tax been paid in a timely fashion.

C. That the fact that petitioner contacted the Audit Division to arrange determination of its liability neither explains nor excuses petitioner's failure to file and pay upon the transfers prior to such contact. However, specific direction by the auditor not to file gains tax returns on ongoing transfers during the pendency of the audit may, if reasonably accepted and followed, constitute reasonable cause for nonfiling and nonpayment on such sales until conclusion of the audit. However, there has been no evidence

1 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.


presented from which it is possible to determine which and how many, if any, of the 52 units at issue were transferred during the pendency of the audit. Thus, it being possible that all individual units were transferred prior to commencement of the audit, and having no evidence reflecting transfers during the audit pendency, there is no basis upon which to allow even partial remission of penalty.

D. That the petition of Martha Melohn and Esther Oppenheimer, as Trustees to Joseph Melohn, is in all respects denied, and the Notice of Determination of Tax Due Under Tax Law Article 31-B issued on June 12, 1985 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION


NOV 20 1986



PRESIDENT



COMMISSIONER



COMMISSIONER