

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Bertram & Ann Moreida : AFFIDAVIT OF MAILING
d/b/a Amber Realty Co. :
:
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 7th day of October, 1986, he/she served the within notice of Decision by certified mail upon Bertram & Ann Moreida, d/b/a Amber Realty Co. the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bertram & Ann Moreida
d/b/a Amber Realty Co.
P.O. Box 353
Woodmere, NY 11598

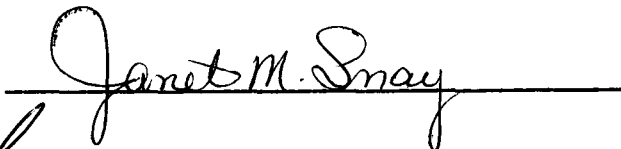
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
7th day of October, 1986.



Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

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Bertram & Ann Moreida	:	AFFIDAVIT OF MAILING
d/b/a Amber Realty Co.	:	
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for Revision of a Determination or for Refund	:	
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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 7th day of October, 1986, he served the within notice of Decision by certified mail upon Robert S. Taft, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

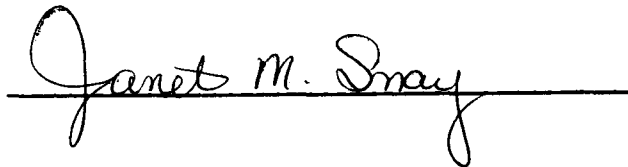
Robert S. Taft
Wofsey, Certilman, Haft, Lebow & Balin
805 Third Ave.
New York, NY 10022

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
7th day of October, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



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

October 7, 1986

Bertram & Ann Moreida
d/b/a Amber Realty Co.
P.O. Box 353
Woodmere, NY 11598

Dear Mr. & Mrs. Moreida:

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:
Robert S. Taft
Wofsey, Certilman, Haft, Lebow & Balin
805 Third Ave.
New York, NY 10022

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BERTRAM AND ANN MOREIDA	:	DECISION
D/B/A AMBER REALTY CO.	:	
	:	
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, Bertram and Ann Moreida d/b/a Amber Realty Co., P.O. Box 353, Woodmere, New York 11598, 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. 60904).

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 March 5, 1986 at 3:10 P.M., with all briefs to be submitted by June 30, 1986. Petitioners appeared by Wofsey, Certilman, Haft, Lebow & Balin, Esqs. (Robert S. Taft and David M. Brandes, Esqs., of counsel). 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 15, 1983, petitioner, as sponsor under a cooperative conversion plan, transferred certain real property located at 920 Broadway, Woodmere, Nassau County, New York, to 920 Broadway Owner's, Inc., a cooperative housing corporation.

2. On June 14, 1983, one day prior to this transfer, petitioner, by its attorneys, submitted requisite transferor and transferee questionnaires to the Audit Division seeking exemption from gains tax (Tax Law Article 31-B) on the above-noted transfer of the property to the cooperative housing corporation. The Audit Division, in turn, issued to petitioner, on June 22, 1983, a Statement of No Tax Due in connection with this transfer.

3. The petitioner's cooperative conversion plan ("Woodmere Mews") had been accepted for filing by the Attorney General's office prior to the March 28, 1983 effective date of the gains tax. Four individual apartment units at Woodmere Mews were subject to subscription agreements executed on or before such effective date and thus, when transferred by petitioner, these units were properly exempt from gains tax pursuant to the "grandfather" provisions of Tax Law Article 31-B. However, an Audit Division audit, conducted between November 15, 1984 and December 10, 1984, revealed that nine apartment units, which were not "grandfathered" as above, had been transferred by petitioner without the filing of returns or payment of gains tax at the times of their transfers. Accordingly, the Audit Division determined the tax due on such transfers (\$55,810.00), plus interest, and also imposed penalty for failure to timely file returns and pay tax and issued, on March 1, 1985, a Notice of Determination of Tax Due under Tax Law Article 31-B.

4. On or about September 26, 1984, prior to the audit, petitioner filed, at one time, transferor and transferee questionnaires with respect to the seven individual (non-grandfathered) apartment units which had, as of such date, been

transferred.¹ The information for this filing was prepared by petitioner's certified public accountant, one Seymour Weiss, at the request of petitioner's attorney, one Howard Stein. Mr. Weiss testified he was unaware of the gains tax and its requirements until advised of the same by Mr. Stein in connection with the request for information in order to make the September 26, 1984 filing. Mr. Stein also had made the June 14, 1983 original gains tax filings in connection with the transfer to the cooperative housing corporation and subsequent receipt of no the tax due statement (see Finding of Fact "2", supra).

5. With regard to the audit, the Audit Division's auditor made an initial calculation of gains tax due, plus interest, and thereafter made two comparatively small revisions to such calculations (on separate workpapers) to correct mathematical errors in his initial calculations, as follows:

<u>Source</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>	<u>Tax Change</u>	<u>Interest Charge</u>
Initial Calculation	\$54,129.30	\$4,601.01	\$58,730.31	\$ --	\$ --
First Revision	54,091.10	5,128.80	59,219.90	(38.20)	527.79
Second Revision	<u>55,810.00</u>	<u>5,297.08</u>	<u>61,107.08</u>	<u>1,718.90</u>	<u>168.28</u>
Net Change from Initial Calculation:				<u>\$1,680.70</u>	<u>\$696.07</u>

6. In the case of each of the above revisions, the auditor telephoned the petitioner's accountant to advise him of the nature of the corrections being made. Penalty was not included on either the initial computation or the first revision, but appears on the second revision. The auditor testified that the petitioner's accountant had adequate records, was courteous and cooperative during the audit, and that penalty was computed on the second revision at the

¹ The two additional units covered by the notice of determination herein were sold after this filing and were accounted for during the course of the Audit Division audit.

direction of the auditor's supervisor. Interest and penalty (on the second revision) were calculated on the workpapers up to the December 10, 1984 conclusion date of the audit.

7. Petitioner submitted in evidence three checks payable to the State Tax Commission, as follows:

<u>Check Number</u>	<u>Check Date</u>	<u>Amount</u>	<u>Representing</u>
1866	12/10/84	\$58,730.31	initial gains tax plus interest per auditor's calculations.
1869	12/16/84	489.59	net change caused by first revision.
1886	2/1/85	1,887.18	net change caused by second revision (excluding penalty).

8. Petitioner's accountant testified that these checks were written at the time of the initial computation and at the time of each of the revisions and were forwarded to petitioner's attorney for submission to the Audit Division. He could not state the date when such checks were forwarded to the Audit Division, but indicated the petitioner's attorney advised him that submission occurred shortly after receipt of the checks. Petitioner's attorney, who handled the cooperative conversion and the filings, did not appear or testify at the hearing.

9. By contrast, the auditor recalled receiving petitioner's first two checks and returning them to petitioner, but could give no specifics as to the time periods involved. Petitioner's accountant noted the first two checks were returned to petitioner's attorney and "held in limbo, at least a month or two" and then all checks were resubmitted together.

10. Petitioner submitted a letter to the Audit Division, dated February 1, 1985 but bearing a postmark of February 13, 1985, which provided as follows:

"Enclosed please find our three checks totaling \$61,107.08 consisting of our checks in the amount of \$58,730.3, \$489.59 and \$1887.18. We are submitting these checks in full payment of the Real Property Transfer Tax per your report total of \$55,810.00 and the interest of \$5,297.08.

We take exception to the penalties you indicated on your report and are planning to refute the assessment of these penalties."

11. The March 1, 1985 notice of determination reflects that payment of the tax and interest (such interest as calculated to December 10, 1984 per the second revision) was made on February 20, 1985, and that the amount of penalty unpaid and remaining at issue was \$14,598.57 (as calculated to December 10, 1984), plus interest on such penalty commencing on February 20, 1985.

12. Petitioner admits that returns were not filed nor was tax paid concurrently with any of the nine individual apartment unit transfers in question. As noted, petitioner has paid and does not contest the amount of tax due as finally determined upon audit. However, notwithstanding its February letter to the contrary, petitioner, at the hearing, raised questions as to undue interest charges between the dates of December 10, 1984 and February 20, 1985, asserting that its checks were held rather than accepted thus causing the imposition of extra interest charges.

13. In addition to the foregoing, petitioner also contests the imposition of the penalty for late filing and payment, 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. Petitioner notes its accountant was unfamiliar with the gains tax and its requirements, indicating by comparison that even the Audit Division's auditor made initial errors, as noted, in computing the tax and interest due. In addition, petitioner asserts that the Tax Law does not indicate when payment is due, thus maintaining its non-payment before the audit was not in error. Finally, petitioner notes that the auditor

did not see fit to recommend or calculate penalty until told to do so by his supervisor.

CONCLUSIONS OF LAW

A. That Tax Law section 1446.2(a) 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 petitioner has not set forth facts or circumstances evidencing reasonable cause for its delay in filing and payment sufficient to warrant abatement of the penalty imposed. Petitioner's assertion of the newness of the tax and the unfamiliarity of petitioner's accountant with its requirements is an argument in the nature of ignorance of the law, which is not a sufficient basis for waiver of the subject penalty. Noted in this context is the fact that there was sufficient knowledge to file, as required, and seek exemption, as granted, with respect to the transfer to the cooperative housing corporation (see Findings of Fact "2" and "4"). There is no evidence of written requests by petitioner or its advisors for guidance from the Audit Division regarding individual unit transfers pursuant to a cooperative conversion plan. However, Audit Division written guidelines concerning the gains tax treatment of coopera-

tive conversions had been issued and were available to the public.² Given the issuance and availability of these guidelines, it is reasonable to expect that petitioner should have become aware of the responsibilities for filing and payment, and acted thereon sooner than was the case herein. Finally, petitioner's assertion that its filing and payment was not untimely because the Tax Law does not specify any date for payment is rejected. Tax Law section 1442 clearly sets forth the manner and time for payment of tax under Article 31-B.

C. That petitioner's arguments regarding interest charges are rejected. The final interest figure (from the second workpaper), as calculated to December 10, 1984, is reflected on the March 1, 1985 notice of determination. No additional interest was calculated or imposed on the time span between the December 10, 1984 audit conclusion date and the February 20, 1985 payment date. The revisions in interest amounts on the various workpapers resulted from initial mathematical calculation errors made by the auditor, as described. Petitioner, in turn, has not shown any error in the final mathematical computations and, in fact, previously acquiesced to the same via its February letter (see Finding of Fact "10").

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.

D. that the petition of Bertram and Ann Moreida d/b/a Amber Realty Co. 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

OCT 07 1986

Rodrick W. Cline
PRESIDENT

Francis R. Koelmig
COMMISSIONER

Mark J. Jurek
COMMISSIONER



GAINS

MONT P. CORP.

WAIVER, MODIFICATION, OR CANCELLATION OF PENALTY AND INTEREST
REQUIRING APPROVAL OF THE STATE TAX COMMISSION

SS # OR ID # 13-3177519
TAXPAYER'S NAME Mont P Corp.

Assessment No.	Filing Period
A-4039-423	N/A

TAXING APPLICATION:

- ☐ Corporation Tax
☐ Personal Income Tax
☐ Sales Tax
☐ Withholding Tax
☒ Miscellaneous Tax: **Gains Tax**

	Penalty	Interest
Assessed	108,435.36	35,960.17
Paid		
Recommended Cancellation	108,435.36	35,960.17

In accordance with established policy, approval of the State Tax Commission (*more than one member*) is required where the proposed cancellation of interest and/or penalty is for an amount in excess of \$5,000.00 or for a situation not covered in policy memoranda.

REASON FOR WAIVER, MODIFICATION OR CANCELLATION: (*Additional pages may be attached*)

I recommend that penalty, interest penalty and interest be abated since the transferor took every reasonable step to insure payment was timely made. Since the taxpayer met the requirements to defer the Gains Tax liability and properly satisfied the gains tax filing requirements as evidenced by being able to record the deed, no gains tax was payable until January 24, 1987.

Accordingly, since on his own initiative the taxpayer forwarded full payment on January 28, 1987, all penalty, interest penalty was erroneously assessed and, therefore, should be cancelled.

Approval Recommended By:

NAME	TITLE	DATE
<i>John P. Degan</i>	Deputy Commissioner & Counsel	3/19/87
President, State Tax Commission		

<i>Richard A. ...</i>	DATE: 4/3/87	APPROVED <i>[Signature]</i>	DISAPPROVED _____
Commissioner			

<i>Francis D. Koening</i>	DATE: 4/1/87	APPROVED <i>[Signature]</i>	DISAPPROVED _____
Commissioner			

<i>[Signature]</i>	DATE: 3/30/87	APPROVED <i>[Signature]</i>	DISAPPROVED _____
Commissioner			