

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
The Old Nut Co., Inc.	:	
	:	AFFIDAVIT OF MAILING
for Revision of a Determination or 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, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 10th day of July, 1985, he served the within notice of Decision by certified mail upon The Old Nut Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Old Nut Co., Inc.
339 Greenwich St.
New York, NY 10013

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
10th day of July, 1985.

David Parchuck

Samuel O. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
The Old Nut Co., Inc. :
AFFIDAVIT OF MAILING
for Revision of a Determination or 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, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 10th day of July, 1985, he served the within notice of Decision by certified mail upon Lawrence B. Robertson, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence B. Robertson
21 East 40th St.
New York, NY 10016

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
10th day of July, 1985.

David Parchuck

David A. McLaughlin
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 10, 1985

The Old Nut Co., Inc.
339 Greenwich St.
New York, NY 10013

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
Lawrence B. Robertson
21 East 40th St.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
THE OLD NUT CO., INC.
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 Old Nut Co., Inc., 339 Greenwich Street, New York, New York 10013, 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. 49263).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 21, 1984 at 1:15 P.M., with all briefs to be submitted by December 26, 1984. Petitioner appeared by Lawrence B. Robertson, Esq. The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether testimony of the signatories to a contract for the sale of real property and the attorney for the seller together with a credit card receipt from a restaurant, constitute "independent evidence" within the meaning of section 1443(6) of the Tax Law.

FINDINGS OF FACT

1. In a contract dated as of March 28, 1983, a purchase agreement was executed between Carriage House Foods, Inc. ("Carriage House") and A. L.

Bazzini Co., Inc. ("Bazzini"), now known as The Old Nut Co., Inc. whereby, among other things, certain real property in New York City was to be conveyed by Bazzini to Carriage House.

2. The contract also provided that Theodore C. Bazzini, Jr., who was a signatory to the contract, would become a director and officer of Carriage House or a subsidiary of Carriage House.

3. In a letter dated August 8, 1983, petitioner requested that the Audit Division issue "a statement of no tax due under Article 31-B of the New York State Tax Law" pertaining to the conveyance described in Finding of Fact "1".

4. The request was denied and, on August 18, 1983, the Audit Division issued a Tentative Assessment and Return showing a total tax due of \$198,539.47.

5. The closing was held on September 16, 1983 and the deeds conveying the property were transferred to Carriage House. On the same date, petitioner's certified check in the amount of \$198,539.47 and the original Tentative Assessment and Return were delivered to a title company for filing.

6. On or about October 7, 1983, petitioner submitted a Claim for Refund of Real Property Gains Tax seeking a refund of the \$198,539.47. Petitioner attached to its application three affidavits which averred that the contract to convey the real property was executed on March 28, 1983.

7. On November 2, 1983, the Audit Division advised petitioner that its application for a refund was denied on the ground that it did not submit independent evidence that the contract was executed prior to the effective date of Article 31-B of the Tax Law.

8. At the hearing, Mr. Bazzini, Rocco Damato, who had executed the contract for the purchaser, and petitioner's attorney testified that the contract was executed by Mr. Bazzini for the seller on March 27, 1983 and by

Mr. Damato for the purchaser on March 28, 1983. Mr. Bazzini testified that he signed the contract at a restaurant. A Diner's Club receipt from the restaurant bearing the date of March 27, 1983 and also bearing Mr. Bazzini's signature was offered to support his testimony.

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 Black's Law Dictionary (Rev. 4th Ed.) defines independent as follows:

"Not dependent, not subject to control, restriction, modification, or limitation from a given outside source."

E. That the testimony of the signatories to the contract and the attorney for one of the parties together with the Diner's Club receipt, 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 gains tax.

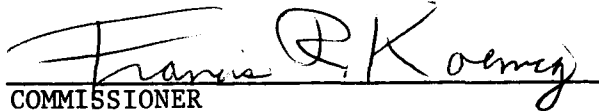
F. That the petition of The Old Nut Co., Inc. is denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 10 1985


PRESIDENT


COMMISSIONER


COMMISSIONER