

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Steven M. Olin : 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 :

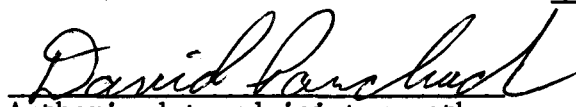
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 7th day of October, 1986, he/she served the within notice of Decision by certified mail upon Steven M. Olin the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

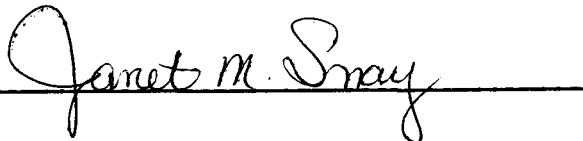
Steven M. Olin
1091 N. Purchase Road
Southbury, CT 06488

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

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of :
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_____ :

State of New York :

ss.:

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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 7th day of October, 1986, he served the within notice of Decision by certified mail upon Darren H. Goldstein, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

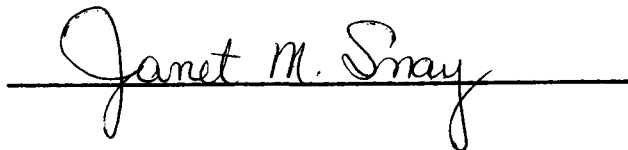
Darren H. Goldstein
Gelberg & Abrams
711 Third Ave.
New York, NY 100174059

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

Steven M. Olin
1091 N. Purchase Road
Southbury, CT 06488

Dear Mr. Olin:

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:
Darren H. Goldstein
Gelberg & Abrams
711 Third Ave.
New York, NY 100174059

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
STEVEN M. OLIN
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
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:
:

Petitioner, Steven M. Olin, 1091 N. Purchase Road, Southbury, CT 06488, 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. 61144).

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 April 16, 1986 at 2:00 P.M. Petitioner appeared by Gelberg & Abrams, Esqs. (Darren H. Goldstein & Michael Luskin, Esqs., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether certain property transferred by petitioner should be granted exemption from gains tax under Tax Law Article 31-B as a transfer of petitioner's residence.

FINDINGS OF FACT

1. On or about November 29, 1984 petitioner, Steven M. Olin, transferred certain real property located at 19 East 94th Street, Borough of Manhattan, New York, New York to the Churchill School, for a gross consideration of \$1,500,000.00. As part of this transfer, petitioner paid Real Property Transfer Gains Tax ("Gains Tax") under Tax Law article 31-B in the amount of \$41,503.38. However,

petitioner asserted, at such time, that the transfer was not subject to gains tax due to the residence exemption under Tax Law section 1443.2.

2. On December 17, 1984, petitioner filed a Claim for Refund of the gains tax he had paid, maintaining therein that the property transferred was exempt from gains tax as a residence.

3. By a letter dated February 19, 1985, the Audit Division denied petitioner's claim for refund, asserting that since petitioner never occupied the premises the residence exemption was not available.

4. The property in question consists of real estate upon which is situated a five-story townhouse. This property, located in a residential area of Manhattan, was purchased by petitioner on July 22, 1981. Title to the property was held by petitioner in his own name, individually, as opposed to the name of any business entity. During the period of petitioner's ownership, the premises were never used for any business purposes nor were any tax deductions based on business use of the property ever taken by petitioner.

5. When purchased by petitioner, the property was zoned for use as a community facility and, in fact, was a vacant school. As originally constructed in 1892, the property was used as a residence (a townhouse), with the conversion to community facility status and change of zoning classification from residential to community facility occurring in or about 1967.

6. Petitioner purchased the property with the intention of restoring the townhouse to its original residential condition and occupying it as his residence. In order to do so it was necessary that petitioner obtain a zoning variance reclassifying the premises from community facility to residential use, including a special permit concerning a noncomplying rear yard.

7. Shortly after acquiring the premises, petitioner engaged attorneys to commence proceedings to obtain the needed zoning reclassification, and architects to evaluate the necessary work, draw plans and obtain cost information relating to restoration of the premises to its original residential condition. Petitioner incurred, in these undertakings, legal fees of \$27,500.00 and architectural fees in excess of \$40,000.00. The cost of petitioner's planned renovation of the premises was estimated at approximately \$700,000.00, excluding furniture.

8. Petitioner encountered delays in obtaining the needed zoning reclassification. The requisite approval was not granted until June 28, 1983 at which time there was a downturn in petitioner's business with attendant financial difficulties. Petitioner determined that he was financially unable to proceed with the planned renovation of the premises and decided to sell. After several months, petitioner sold the premises on November 29, 1984.

9. It is not disputed that petitioner purchased the property with the intention of renovating the premises and taking up residence there. However, petitioner did not commence the intended renovations, never actually resided in the premises and, during the tenure of petitioner's ownership, the premises were not in a condition of repair such that petitioner (or anyone else) could have resided therein. Given the delay in obtaining the zoning reclassification and the ultimate decision to sell, petitioner did not actually receive either a building permit for the intended renovations or a residential certificate of occupancy.

10. During the period in question petitioner maintained an apartment at 300 East 56th Street, New York, New York, and listed his address on his New York State nonresident income tax returns and on other documents as 1091 West Purchase Road, Southbury, Connecticut.

CONCLUSIONS OF LAW

A. That Tax Law section 1441, which became effective March 28, 1983, imposes a tax at the rate of ten percent upon gains derived from the transfer of real property within New York State.

B. That Tax Law section 1443.2 affords an exemption from gains tax as follows:

"[i]f the real property consists of premises occupied by the transferor as his residence (but only with respect to that portion of the premises actually occupied and used for such purposes)" (emphasis added).

C. That petitioner was not entitled to exemption from gains tax on the subject transfer under Tax Law section 1443.2. Notwithstanding his undisputed intent, petitioner never converted the premises to a residence and he never occupied the premises as such. In fact, given the condition of the premises and the lack of a certificate of occupancy, petitioner could neither physically nor legally have occupied the premises. Those actions undertaken by petitioner are, at best, steps evidencing his intent to convert the premises to a residence and to occupy the premises as his residence in the future. However, prior to such conversions and occupancy the premises cannot be said to have been petitioner's residence. Accordingly, the Audit Division properly denied petitioner's claim for refund of gains tax paid.

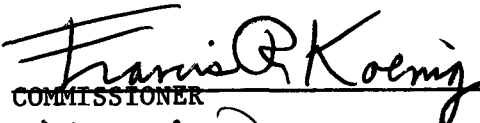
D. That the petition of Steven M. Olin is hereby denied and the Audit Division's denial of petitioner's claim for refund is sustained.

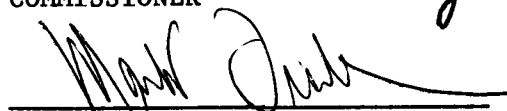
DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1986


PRESIDENT


COMMISSIONER


COMMISSIONER