STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Seminole Housing Corp.	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency 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 October, 1986, he/she served the within notice of Decision by certified mail upon Seminole Housing Corp. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Seminole Housing Corp.
111-15 Queens Blvd.
Forest Hills, NY 11375

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 October, 1986.

Janet M. Snay

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Seminole Housing Corp.	:	AFFIDAVIT OF MAILING
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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 20th day of October, 1986, he served the within notice of Decision by certified mail upon Alfred J. Swan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred J. Swan
Maggin & Swan
509 Madison 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
20th day of October, 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

October 20, 1986

Seminole Housing Corp.
111-15 Queens Blvd.
Forest Hills, NY 11375

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
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:
Alfred J. Swan
Maggin & Swan
509 Madison Ave.
New York, NY 10022

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of SEMINOLE HOUSING CORP. 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.	DECISION

Petitioner, Seminole Housing Corp., 111-15 Queens Boulevard, Forest Hills, New York 11375, 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. 58096).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 10, 1985 at 9:50 A.M., with all briefs to be submitted by January 27, 1986. Petitioner appeared by Maggin & Swan, Esqs. (Alfred J. Swan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether certain expenditures claimed by petitioner in reduction of the amount of gain subject to tax under Tax Law Article 31-B were properly disallowed by the Audit Division.

FINDINGS OF FACT

1. Petitioner, Seminole Housing Corp., was the owner of two apartment buildings located at 72-61 and 72-81 113th Street, Forest Hills, Queens County, New York.

2. In July of 1982, the New York State Department of Law accepted for filing petitioner's Plan to convert its two apartment buildings to cooperative ownership. This Plan, which was subsequently amended on several occasions, has always remained in full force and effect, but was not declared effective until November 9, 1984 (see Finding of Fact "6", infra).

3. On August 30, 1983, petitioner, having been theretofore unsuccessful in securing its tenants' cooperation in carrying out its cooperative conversion Plan, entered into a contract to sell the land and buildings which were the subject of such Plan, and also the Plan itself, to Lee Wallach. Lee Wallach thereafter assigned the contract to Meadow Glen Realty Co.

4. Closing of title on the premises and transfer of the Plan under the contract took place on November 21, 1983.

5. In connection with the petitioner's transfer of title to the premises on November 28, 1983, real property tranfer gains tax ("gains tax") was paid by petitioner in the aggregate amount of $149,696.20.

6. The Plan, as transferred and as subsequently amended, was thereafter declared effective by notice dated November 9, 1984. On February 28, 1985, title to the premises was conveyed by Meadow Glen Realty Co., as sponsor, to Seminole Owners Corp., a cooperative housing corporation.

7. On July 26, 1984, petitioner filed a Claim for Refund of Real Property Transfer Gains Tax in the amount of $26,975.18. This claim was premised upon petitioner's assertion of the existence of additional expenses, totalling $269,755.76, incurred in preparing and filing its Plan and in closing of title to transfer the premises. These claimed expenses, not previously included in computing the amount of gain subject to tax, are as follows:

ADDITIONAL EXPENSES
NOT PREVIOUSLY DEDUCTED FOR NEW YORK STATE
TRANSFER GAINS TAX

ACTUAL CLOSING EXPENSES:

a)	New York City Real Property Transfer Tax	$ 94,860.00	
b)	Prepayment Charge on Mortgage (New York Life at closing)	42,418.43	
c)	Legal Fees (Maggin & Swan) Closing only, excludes co-oping	23,713.97	
			$160,992.40

ADDITIONAL EXPENSES RELATED TO PROPOSED CO-OPING:

d)	Legal Fees (Maggin & Swan)	$ 21,153.19	
e)	Extension Fee - New York Life	10,000.00	
f)	Broker's Retainer Lost (Sulzberger-Rolfe)	10,000.00	
g)	Engineer (Charles B. Ferris)	5,350.00	
h)	Department of Law	10,120.00	
i)	Printing (Aztech Documents Systems)	21,656.47	
j)	Advertising (Newmark, Posner & Mitchell)	11,071.80	
k)	Title Survey (Haubenreich & McDaniel)	1,825.00	
l)	Appraisal Fee (Dorman & Wilson)	500.00	
m)	Accounting Fees (Alexander Grant & Marks Shron)	11,900.00	
n)	Gil Signs	405.94	
o)	Sales Office Expenses (Con Ed., Telephone, Sulzberger, etc.)	4,330.96	
p)	Miscellaneous Expenditures	450.00	
			$108,763.36
	TOTAL		$269,755.76

8. In response to the petitioner's claim for refund, the Audit Division issued two letters, dated September 7, 1984 and December 4, 1984, respectively. The September 7, 1984 letter allowed items "d", "g", "h", "k", "l" and "p", as set forth in Finding of Fact "7", totalling $39,398.00 as proposed co-oping costs expended to make the property marketable. However, the balance of the claimed co-oping costs, as well as the other claimed costs were rejected as costs incurred as a result of the sale of the property. The December 4, 1984 letter made further allowance for items "i" and "m", totalling $33,556.00, but disallowed the balance of the remaining claimed items. In turn, refund checks of $3,939.40 and $3,355.60 were authorized and issued to petitioner.

9. In this proceeding, petitioner has conceded the Audit Division's disallowance of items "j", "n" and "o", as set forth in Finding of Fact "7", and reduced its claim for refund to $18,099.14. Petitioner thus contests only the disallowance of the following items:

Item	Description	Amount
a	New York City Real Property Transfer Tax	$ 94,860.00
b	Prepayment Charge on Mortgage (N.Y. Life)	42,418.43
c	Legal Fees (closing only)	23,713.97
e	Extension Fee (N.Y. Life)	10,000.00
f	Broker's Retainer	10,000.00
	TOTAL	$180,992.40

10. There is no dispute as to the actual expenditure of the above-noted sums, and it is only the question of their allowability as an offset to gain which is in issue. Item "f" above is sought in the nature of an expense incurred for preparing the Plan, while items "a", "b", "c" and "e" are sought as reasonable and necessary expenses in connection with petitioner's transfer of the premises.

11. Petitioner raises the following points with respect to the disallowed items:

Items "b" and "e":

Prepayment Charge ($42,418.43) and Extension Fee ($10,000.00):

-- At the time petitioner originally promulgated its Plan, the land and buildings which were the subject matter thereof were subject to a first mortgage loan held by New York Life Insurance Company which mortgage contained a due-on-sale clause. In an effort to circumvent such clause and to provide for a mortgage subject to which title could be taken by the cooperative corporation (the Attorney General would not approve the Plan and mortgage unless the due-on-sale clause was eliminated), a fee of $10,000.00 was paid to New York Life for its consideration of a proposal

to eliminate the clause and allow petitioner to co-op with the existing mortgage. When time ran out on this possibility, however, the mortgage was paid upon petitioner's transfer of the premises, including a prepayment premium of $42,418.13. Petitioner maintains that without such payment, the transfer of title and of rights to proceed with the co-op Plan could not have been legally consummated.

Item "f" - Sales Agent's (Broker's) Fee ($10,000.00):

-- The co-op Plan which eventually was consummated, was developed by petitioner with the assistance of Sulzberger-Rolfe, Inc. as sales agents. Sulzberger-Rolfe, Inc. had contracted for a minimum agreed brokerage fee of $50,000.00 under a sales agent agreement which obligated petitioner to make a first payment thereunder of $10,000.00. In turn, Sulzberger-Rolfe was to prepare a financial plan of cooperative ownership relative to the property and carry out, in conjunction with the cooperative sponsor and the cooperative corporation, the steps necessary to consummate the transition to the cooperative form of ownership. When petitioner transferred such Plan to Meadow Glen Realty Co., the contract of sale provided that Meadow Glen would assume the balance of petitioner's obligations under such Plan. Petitioner was not reimbursed by Meadow Glen for such $10,000.00 expenditure.

Item "c" - Legal Fee ($23,713.97) to Transfer Title and Plan:

-- As noted previously (see Findings of Fact "7" and "8", supra), petitioner paid its attorneys an agreed sum for services in preparing the Plan, which expense was allowed in reduction of the gain on the subject transfer. However, the Audit Division disallowed the additional fee of

$23,713.97 paid by petitioner to its attorneys for handling the transfer of title to the premises and the Plan to Meadow Glen Realty Co.

Item "a" - New York City Real Property Transfer Tax ($94,860.00):

-- Petitioner argues that without payment of this tax, title to the property (and thus the ability to co-op the premises) could not have been legally acquired by Meadow Glen Realty Co.

12. Petitioner maintains that the instant transaction was unusual in that the transfer at issue was a transfer of the real property, accompanied by the transfer of a co-op plan set up by petitioner but made effective as to and consummated by petitioner's transferee. Petitioner asserts that similar expenses have been allowed in other situations handled by petitioner's attorneys, and urges, notwithstanding that petitioner was not, ultimately, the co-op sponsor, these expenditures fall within the spirit of Tax Law Article 31-B as originally enacted and should be allowed.

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 1440.1 provides, in part, that "'[c]onsideration' means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor" (emphasis added).

C. That Tax Law section 1440.5, as in effect on the November 21, 1983 date of the transfer in question, provided as follows:

> "'Original purchase price' means the consideration (i) paid by the transferor to acquire the interest in the real property or (ii) in the case of property acquired through gift or inheritance, the consideration paid by the last transferor who paid consideration to

> acquire the interest in the real property; plus in both cases the consideration by the transferor for any capital improvements made to such real property (including in the case of clause (ii) above, those by the last transferor who paid consideration) prior to the date of transfer. In the case of a transfer of a controlling interest in an entity with an interest in real property, there shall be an apportionment of the original purchase price of the interest in real property to the controlling interest for the purpose of ascertaining the original purchase price of such controlling interest."

D. That Tax Law section 1440.5 as above, was repealed by L. 1984, c. 900, § 3, with new subdivision 5 added in its place and providing, in relevant part, as follows:

> "(a) 'Original purchase price' means the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property, including solely those costs which are customary, reasonable, and necessary, as determined under rules and regulations prescribed by the tax commission, incurred for the construction of such improvements. Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property and those customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative or condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission."

E. That as the above-quoted sections reveal, it was the amendment to subdivision 5 of Tax Law section 1440 by which the meaning of original purchase price was expanded to allow inclusion therein of customary, reasonable and necessary expenses relating to:

a.) the construction of capital improvements;

b.) legal, architectural and engineering fees incurred to sell the property; and

c.) expenses incurred to create ownership interests in cooperative or condominium form.

This new subdivision 5 was made effective as of September 4, 1984 and was not, unlike certain other portions of L. 1984, c. 900, made retroactive to prior periods.

F. That none of the five disallowed items in question were, at the time of the transfer, properly includable either as part of petitioner's original purchase price reducing gain or, in the case of the sales agent's fee, as a reduction in the amount of consideration received.

G. That although petitioner initially developed the cooperative plan, petitioner was not the cooperative sponsor for the subject property. With respect to the sales agent's fee (see Finding of Fact "11", Item "f"), there has been no showing that this fee was for services rendered relative to petitioner's transfer of the property to Lee Wallach. Hence it is not allowable in reduction of consideration received pursuant to Tax Law § 1440.1. With respect to the balance of the disallowed items (see Finding of Fact "11"), none of such items of expense constituted part of the consideration paid by petitioner to acquire the property nor were they incurred for or attributable to capital improvements made to the property. Hence, such items did not fall within the terms of Tax Law § 1440.5 as originally enacted and as effective at the time of the subject transfer, and thus these expenses were properly disallowed as part of petitioner's claimed original purchase price for the premises. Finally, the petitioner's assertions that the Audit Division has allowed similar expenses in analogous situations neither establishes the propriety of such allowances nor binds the Commission to allow the expenses at issue herein.

H. That the petition of Seminole Housing Corp. is hereby denied and the Audit Division's denial of petitioner's claim for refund in the reduced amount of $18,099.14 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986

PRESIDENT

COMMISSIONER

COMMISSIONER