

STATE TAX COMMISSION

In the Matter of the Petition
of
3720 Independence Associates

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.

AFFIDAVIT OF MAILING

§§. :

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 15th day of September, 1986, he/she served the within notice of Decision by certified mail upon 3720 Independence Associates the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

3720 Independence Associates
c/o Howard Grossman
261 Madison Ave.
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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
15th day of September, 1986.

David Parachuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Smay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
3720 Independence Associates : 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 15th day of September, 1986, he served the within notice of Decision by certified mail upon Meyer M. 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 M. Lieber
1241 44th St.
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
15th day of September, 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

September 15, 1986

3720 Independence Associates
c/o Howard Grossman
261 Madison Ave.
New York, NY 10016

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:
Meyer M. Lieber
1241 44th St.
Brooklyn, NY 11219

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
3720 INDEPENDENCE ASSOCIATES
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

Petitioners, 3720 Independence Associates, c/o Howard Grossman, 261 Madison Avenue, New York, New York 10016, 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. 59870).

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 6, 1986 at 1:15 P.M., with all briefs to be submitted by April 17, 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 January 23, 1985, following an audit, the Audit Division issued to petitioner, via Howard L. Grossman, c/o Goldstick, Weinberger, et al, a Notice of Determination of Tax Due Under Tax Law Article 31-B ("gains tax"), indicating gains tax due in the amount of \$37,767.00, plus penalty and interest. This notice pertained to an audit concerning 3720 Homes, Inc. ("3720 Homes"), a

cooperative housing corporation to which petitioner, as sponsor under a cooperative conversion plan, had transferred certain real property located in Riverdale, New York. This transfer of the real property from petitioner, as sponsor, to 3720 Homes occurred on or about November 1, 1983.

2. The 3720 Homes cooperative conversion plan had been accepted for filing by the Attorney General's office prior to the March 28, 1983 effective date of the gains tax. In conjunction with its transfer of the real property, as sponsor, to 3720 Homes, petitioner received from the Audit Division a Statement of No Tax Due. Thereafter petitioner transferred a number of individual apartment units to various purchasers without the filing of gains tax returns or remittance of gains tax due. Upon audit, tax penalty and interest was determined to be due in connection with 22 such transfers.

3. Petitioner admits that returns required under Tax Law Article 31-B were not timely filed nor was gains tax timely paid in connection with the subject transfers. Petitioner does not contest the tax and interest determined to be due on audit and, in fact, has paid such amounts. However, petitioner does contest 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. Further, petitioner asserts reliance upon the advice of its tax advisor, a certified public accountant, that the entire cooperative conversion plan, including all transfers of individual apartment units, were exempt from tax since the underlying real property was transferred by petitioner, as sponsor, to 3720 Homes prior to the March 28, 1983 gains tax effective date. Finally, petitioner notes that upon learning its position was in error, petitioner contacted the Audit Division shortly thereafter to schedule the audit and determine its gains tax liability.

4. For the ten year period preceding the subject conversion, petitioner had employed Shefa Realty Corp. ("Shefa"), as the managing agent for the property. However, as of November 1, 1983, petitioner terminated its management agreement with Shefa. In turn, Shefa refused to release petitioner's records, including cash journals, paid bills, initial closing statement and prior years' workpapers to petitioner's certified public accountant. This refusal continued until February or March of 1984 when petitioner's accountant demanded the records in order to prepare the partnership and individual partner's income tax returns, at which time the records were released. Petitioner asserts that since the records were withheld, it was impossible in any event to timely file returns and pay gains tax when due.

5. Shefa's two principals earn their livelihood through real estate transactions in and around the New York City metropolitan area. Petitioner's accountant also serves as the accountant for Shefa. Although the records were withheld, as described, they were subsequently released when petitioner's accountant insisted upon receiving such records.

6. At the hearing, it was admitted that gains tax returns and payments due in connection with individual apartment unit transfers subsequent to those at issue herein have not been made in a timely manner, allegedly due to an inability to expeditiously transfer to petitioner's accountant the information necessary to prepare such returns and calculate tax due.

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 it is not disputed that returns were not timely filed and tax due was not timely paid in connection with the transfers in question. There is no evidence of written requests by petitioner or its tax advisor 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 cooperative conversions had been issued and were available to the public.¹ 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. Further, there is evidence that even after learning of such responsibilities, subsequent transfers have not been reported and tax has not been paid in a timely manner. Accordingly, in view of all the facts and circumstances, it does not appear that petitioner's failure to file and pay was occasioned as the result of reasonable cause, and penalty was properly imposed. Finally, regarding the withheld records, it appears that such records were made available when serious request for them was made, thus casting doubt on the assertion that the records were not available sooner.


1 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.


C. That the petition of 3720 Independence Associates is hereby denied and the penalty imposed for failure to timely file returns and pay tax when due is sustained.


DATED: Albany, New York

SEP 15 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER