

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Paul Yanowicz/Leon H. Charney Joint Venture : 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 17th day of June, 1986, he/she served the within notice of Decision by certified mail upon Paul Yanowicz/Leon H. Charney Joint Venture the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

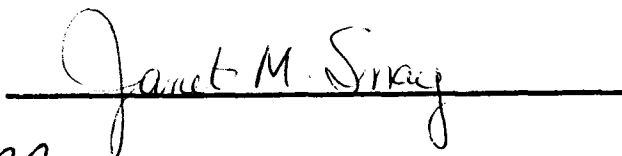
Paul Yanowicz/Leon H. Charney Joint Venture
c/o Law Office of Leon H. Charney
One State St. Plaza
New York, New York 10004

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
17th day of June, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

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In the Matter of the Petition :
of :
Paul Yanowicz/Leon H. Charney Joint Venture : AFFIDAVIT OF MAILING

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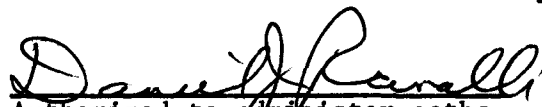
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 17th day of June, 1986, he served the within notice of Decision by certified mail upon Leon H. Charney, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

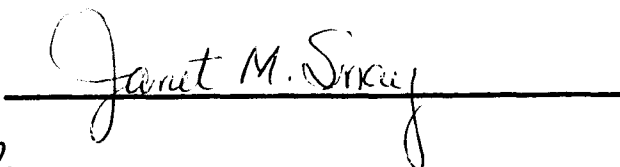
Leon H. Charney
One State St. Plaza
New York, NY 10004

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
17th day of June, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



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

June 17, 1986

Paul Yanowicz/Leon H. Charney Joint Venture
c/o Law Office of Leon H. Charney
One State St. Plaza
New York, New York 10004

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:
Leon H. Charney
One State St. Plaza
New York, NY 10004

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| PAUL YANOWICZ/LEON H. CHARNEY JOINT VENTURE | : | DECISION |
| | : | |
| 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. | : | |

Petitioner, Paul Yanowicz/Leon H. Charney Joint Venture, c/o Law Office of Leon H. Charney, One State Street Plaza, New York, New York 10004, 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. 60162).

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 February 6, 1986 at 1:15 P.M., with all documents to be submitted by February 28, 1986. Petitioner appeared by Leon H. Charney, Esq. (Robert A. Rubenfeld, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner has established, by "independent evidence" within the meaning of section 1443(6) of the Tax Law, that its conveyance of certain real property was made pursuant to a written contract entered into on or before the effective date of Tax Law Article 31-B.

FINDINGS OF FACT

1. On or about May 31, 1983, petitioner, Paul Yanowicz/Leon H. Charney Joint Venture, requested in writing that the Audit Division issue a Statement of No Tax Due (a zero tentative assessment) under Tax Law Article 31-B ("gains tax") in connection with a then-pending transfer of real property from petitioner to W.H.B. Properties, Inc. This real property, together with improvements thereon, was located at 148-150 Grand Street and 156 Grand Street in White Plains, New York ("the property").

2. Petitioner's request for a zero tentative assessment was based on the assertion that the contract pursuant to which the property was to be transferred was executed before the effective date of Tax Law Article 31-B. Included with and in support of petitioner's request were an affidavit from Paul Yanowicz, one of the transferors, and an affidavit from Howard P. Sturman, president of W.H.B. Properties, Inc., the transferee, each of whom attested that the subject contract was executed on March 25, 1983.

3. The Audit Division did not accept petitioner's assertion and issued, instead of a zero tentative assessment, a tentative assessment of gains tax due in the amount of \$75,150.00. Petitioner paid such amount on or about August 19, 1983 in connection with closing of title on the property.

4. On or about May 2, 1984, petitioner filed a claim for refund of gains tax paid in the amount of \$41,153.70, representing the balance of the tax originally paid (\$75,150.00) less the amount of a refund previously allowed to petitioner (\$33,966.30).¹ Petitioner's claim remains that the transfer in

1 Specifics concerning the \$33,966.30 refund, including the basis upon which it was requested and allowed, are not detailed in the record herein.

question was pursuant to a contract executed prior to the effective date of Article 31-B. Annexed to petitioner's refund claim, in addition to the two previously noted affidavits, was a copy of an escrow letter under the letterhead and signature of Robert A. Rubenfeld, bearing a date of March 25, 1983. Mr. Rubenfeld, is an attorney in the law offices of Leon H. Charney, (one of the transferors), and served as Mr. Charney's attorney-in-fact in the subject transaction due to Mr. Charney's illness. Mr. Rubenfeld also served as escrowee under the terms of the escrow letter.

5. The aforementioned escrow letter provides as follows:

"The undersigned (Robert A. Rubenfeld) is hereby holding two (2) original duplicate executed contracts of sale (effective April 4, 1983) pertaining to the above, and a check from Purchaser to Seller in the sum of \$50,000.00, in escrow, upon the following terms:

Purchaser is inspecting the subject property.

Purchaser shall have the option until 10:30 a.m., Monday, April 4, 1983, to deliver a signed statement to the undersigned stating that it does not want to complete the aforesaid transaction. The undersigned shall forthwith return the check to Purchaser and the contract of sale shall be deemed null and void.

In the event said written notice is not received by the undersigned on Monday, April 4, 1983, prior to 10:30 a.m. then the undersigned shall deliver the check and one (1) duplicate original contract to Seller and one (1) duplicate original contract to Purchaser."

6. By a letter dated April 19, 1985, the Audit Division denied petitioner's claim for refund of \$41,153.70, noting that the contract of sale bears a date subsequent to the effective date of Article 31-B.

7. The contract of sale, in its opening paragraph, states that it is "...dated this 4th day of April 1983...". The contract is not otherwise dated, and its final sentence provides as follows:

"IN WITNESS WHEREOF, Seller and Purchaser have caused this Agreement to be executed the day and year first above written."

8. At the hearing, petitioner provided, in addition to the aforementioned items, an affidavit from Sheldon Reiter, the attorney who represented W.H.B.

Properties, Inc. in the subject transaction, and the testimony of Howard P. Sturman and Robert A. Rubenfeld. The affidavit and the testimony by each of these individuals was that the contract was executed by the parties on March 25, 1983, that a fifty thousand dollar down payment check was tendered at the time of execution of the contracts and the executed contracts and the check were to be held in escrow until April 4, 1983, subject to only the purchaser's option to inspect the property and, if such property was unsatisfactory, give written notice of cancellation of the contract to the escrowee (see Finding of Fact "5").

9. Subsequent to the hearing, petitioner submitted an affidavit from Stephen M. Kiss, a construction and real estate consultant, stating that, at the request of the purchasers, Mr. Kiss inspected the property on March 28, 1983 and gave an oral report on its condition to the purchasers. Petitioner also submitted a photocopy of the front and back of the fifty thousand dollar deposit check. The check was dated on its face April 4, 1983, and carries on its back a machine stamped date (presumably the bank's deposit stamp) of April 8, 1983.

10. Petitioner asserts that the aforementioned items constitute independent evidence that the contract was, in fact, executed on March 25, 1983, that petitioner as the seller was bound to convey the property as of such date and that since the transfer at issue was made pursuant to this written contract entered into before the effective date of Article 31-B, there was no gains tax due.

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, affidavits and escrow letter from the signatories to the contract and from attorneys representing the seller and purchaser do not constitute "independent evidence" as required under and within the meaning of subdivision 6 of section 1443 of the Tax Law (see Matter of The Old Nut Company, Inc., State Tax Comm., July 10, 1985). The contract itself was not recorded and states an execution date of April 4, 1983, which is after the effective date of Article 31-B. While a contract deposit was made, the deposit check was also dated not on the alleged March 25, 1983 contract execution date, but rather was dated

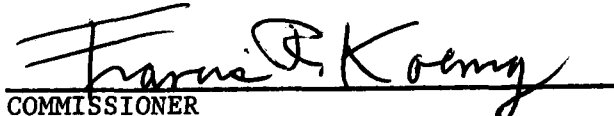
April 4, 1983. Furthermore, this check does not appear to have been promptly deposited on April 4, 1983, but rather was not deposited until four days later on April 8, 1983. In sum, petitioner has not provided evidence which independently verifies that the contract was, in fact, executed on or before the March 28, 1983 effective date of Article 31-B. Accordingly, the Audit Division's denial of petitioner's claim for a refund of real property gains tax is sustained.

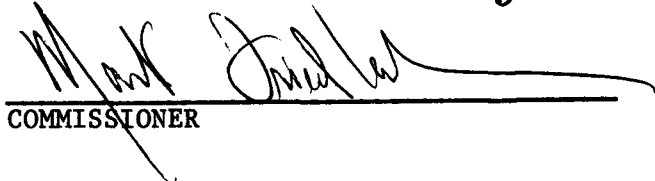
DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER