

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
COPLEY PLAZA COMPANY : 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, Copley Plaza Company, 105 Court Street, Brooklyn, New York 11201, filed an exception to the determination of the Administrative Law Judge issued on October 27, 1988 with respect to its 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. 802738). Petitioner appeared by Francis J. Voyticky, a general partner. The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

Neither party filed a brief on exception, nor requested oral argument.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner has established that its late filing of returns and late payment of tax due under Tax Law Article 31-B occurred as the result of reasonable cause thereby warranting waiver of penalties imposed pursuant to Tax Law section 1446.2(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

On September 4, 1985, the Division of Taxation issued to petitioner, Copley Plaza Company, a Notice of Determination of Tax Due under Tax Law Article 31-B ("gains tax") assessing a gains tax liability in the amount of \$575,374.60, plus penalty and interest. This

notice, as issued, reflected a calculation of tax due at the rate of ten percent upon the gross consideration involved in the transfer of certain cooperative apartment units by petitioner to various individual unit purchasers. Calculation of tax in this fashion resulted from petitioner's failure to supply information, as requested by the Division, whereby the Division could compute the amount of petitioner's original purchase price for each of the units transferred.

The liability in question arises out of a plan of cooperative conversion whereunder petitioner, as sponsor, transferred certain real property on March 9, 1984 to a cooperative housing corporation known as 41 Eastern Parkway Corp. (the "realty transfer"). On said date, and on various dates thereafter, shares pertaining to certain individual apartment units, together with proprietary leases appurtenant to the individual apartment units, were transferred by petitioner to various individual apartment unit purchasers. A total of 36 individual apartment units were transferred by petitioner on or subsequent to the March 9, 1984 realty transfer date. Returns were not filed at the time of any of such unit transfers nor was tax paid on any of such transfer dates. At various times subsequent to the unit transfers, petitioner filed returns and ultimately paid most of the tax due on such unit transfers. It is for the delay in filing and payment that the penalty at issue in this proceeding was imposed.

Subsequent to the issuance of the September 4, 1985 notice of determination and subsequent to commencement of the proceedings herein, petitioner supplied additional information to the Division such that the Division was able to determine petitioner's original purchase price for each of the units in question and thereby recompute and reduce petitioner's liability. Certain payments against the recalculated liability were made by petitioner leaving the remaining unpaid amount of tax determined to be due at \$17,883.00, plus interest. In addition to this amount of tax stipulated by the parties to be remaining as due, penalty in the amount of \$23,776.00 was calculated and imposed against petitioner by the Division. This assertion of penalty arises, as noted, from petitioner's late filing of returns and late payment of tax due. The penalty is calculated based upon the full amount of tax due (as reduced post-assessment), which

includes but is not limited to the \$17,883.00 amount remaining unpaid. Such calculation also takes into account the dates and amounts of the various payments made by petitioner.¹

Petitioner has conceded the accuracy of the foregoing figures as calculated. However, petitioner protests the imposition of penalty arguing, alternatively, that a) petitioner had reasonable cause for the delay in its filing of returns and payment of tax which should warrant abatement of the penalty, and b) should penalty be found appropriate petitioner maintains said penalty should be denominated interest or tax rather than penalty.

At the July 25, 1988 hearing, petitioner's representative appeared, requested and was allowed a period of time, specifically until August 8, 1988, within which to submit affidavit(s) from petitioner's principal(s) and/or from parties involved with the transactions, specifying the reason or reasons for which timely returns were not filed and for which payment was not timely made. On August 12, 1988, an affidavit made by one Francis J. Voyticky, a general partner in petitioner, was submitted. This affidavit states that at the time of the subject transfers, Article 31-B was a relatively new tax (having an effective date of March 28, 1983). The affiant asserts that petitioner and its accountants were unfamiliar with the gains tax and with statutory amendments thereto made in September 1984, thus making it difficult for petitioner to timely file correct returns and calculate and remit tax due. Said affidavit also alleges an improvement in petitioner's filing record for years after 1985. Petitioner offered no evidence or argument in support of its assertion that the amount calculated as penalty should, if upheld, nonetheless be denominated either as tax or interest.

OPINION

The Administrative Law Judge concluded that petitioner had presented no evidence or argument which supported an abatement of penalty for the late payment of gains tax.

On exception the petitioner repeats the same arguments made to the Administrative Law Judge that: petitioner at all times acted in good faith, its inability to file was based on the

¹Interest was calculated to April 30, 1988 in the total amount of \$6,604.00, thus leaving \$48,263.00 as the amount asserted to be due as of such date (with interest accruing thereafter on the unpaid balance of tax and penalty).

"newness" of the gains tax, it has now paid all tax due on the transactions and it has improved its filing record on the subsequent transfers pursuant to the cooperative conversion plan.

We affirm the determination of the Administrative Law Judge, agreeing that petitioner has demonstrated no grounds that establish that its failure to timely pay gains tax was due to reasonable cause, as required by section 1446.2(a) of the Tax Law.

Good faith does not, in itself, establish reasonable cause (see, Matter of Harvey Auerbach v. State Tax Commn., App. Div., 3d Dept, December 29, 1988, Kane, J.).

The "newness" of the gains tax argument fails when the March 9, 1984 date of the transfer into the cooperative housing corporation is viewed in terms of the administrative guidelines issued with respect to the gains tax by the Division of Taxation. Specifically, in August, 1983 the Division issued Publication 588 "Questions and Answers - Gains Tax on Real Property Transfers". Question and answer number 20 in the publication addresses in some detail the application of the tax to a cooperative conversion. Also in August 1983, the Division issued Technical Services Bureau Memorandum 83-2(R) which explained the filing procedures and tax calculation methods that cooperative conversions were to utilize. Given these policy explanations by the Division that predate petitioner's transfers by more than six months, petitioner's general complaint about the difficulty of complying with the "new" tax is not persuasive.

Finally, petitioner's point that it has now paid all the tax due on the transfers at issue and that it has timely filed on subsequent transfers does not explain why it previously failed to pay the tax when due. Accordingly, these acts do not establish reasonable cause for the failure to pay.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Copley Plaza Company is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Copley Plaza Company is denied; and

4. The Notice of Determination issued on September 4, 1985 as reduced by the parties' stipulation (finding of fact "3" of the Administrative Law Judge's determination) together with penalty and interest is sustained.

DATED: Troy, New York
June 8, 1989

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner