STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PLYMOUTH TOWER ASSOCIATES	:	DECISION DTA No. 804714
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 Plymouth Tower Associates, c/o Bay Colony Property Company, Inc., 125 Summer Street, Boston, Massachusetts 02110 filed an exception to the determination of the Administrative Law Judge issued on May 9, 1991 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. Petitioner appeared by Kronish, Lieb, Weiner & Hellman (Michael C. DeLisa and William Jay Lippman, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Neither party filed a brief on exception. Petitioner's request for oral argument was denied.

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

ISSUE

Whether the penalty asserted against petitioner for failure to timely file tax returns and pay tax due under Tax Law Article 31-B in connection with the conversion of certain premises to cooperative ownership should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

On July 8, 1987, following an audit, the Division of Taxation ("Division") issued to petitioner Plymouth Tower Associates, a Notice of Determination of Tax Due under Gains Tax Law Article 31-B ("gains tax") indicating tax, penalty and interest due of $1,515,751.00, a credit for payment of $1,422,192.00 and a balance due of $93,559.00. This notice pertained to an audit of 340 East 93rd Street Corporation, a cooperativehousing corporation to which petitioner MacArthur Towers Development Co., Inc., as sponsor under a cooperative conversion plan, had transferred certain real property located at 340 East 93rd Street, New York, New York.

Prior to the transfer of the real property to the cooperative housing corporation, Plymouth Tower Associates had transferred the building to MacArthur Towers Development Co., Inc. in exchange for other real property. MacArthur Towers Development Co., Inc. and the partners of Plymouth Tower Associates are subsidiaries of Bay Colony Property Company, Inc.

The aforementioned transfer of real property from petitioner, as sponsor, to the corporation (the "realty transfer") occurred on May 13, 1986 pursuant to an Agreement of Sale dated November 15, 1984 between Plymouth Tower Associates and 340 East 93rd Street Corporation. This realty transfer was made in connection with a plan of cooperative conversion accepted by the Attorney General's office.

On April 25, 1986, requisite transferor and transferee questionnaires were submitted to the Division by petitioner's attorneys in connection with the then-pending transfer. Petitioner requested by these filings a Statement of No Tax Due on the realty transfer. Accompanying the questionnaires were a Gains Tax Calculation Worksheet, an Original Purchase Price Schedule with a Schedule of Capitalized Costs, a Schedule of Sold Units which indicated that 317 units had been sold, representing 221,143 shares of stock in the cooperative housing corporation, and the Agreement of Sale dated November 15, 1984. The Gains Tax Calculation indicated that since the transfer was from a sponsor to a cooperative corporation, no gains tax was due. The calculation further stated that "Tax will be paid on transfers from Coop Corporation to individual unit purchasers."

On May 6, 1986 petitioner requested, through its attorneys, a tentative assessment of gains tax due. Included with the request was a transferor questionnaire and a transferee questionnaire

covering the units sold and a Calculation Worksheet which showed Anticipated Gain of $14,037,762.40, Anticipated Tax of $1,403,776.24 and Anticipated Tax Per Share of $5.5451.

On May 12, 1986, the Division requested that petitioner provide information on 13 different items. The letter stated that the Division's 20-day period for issuing a tentative assessment on the transaction would not commence until the information requested was received. The letter further stated that the tax was due on the date of transfer and, should any transfers occur prior to the payment of tax, the Division would assess penalty and interest.

On the same May 13, 1986 date as the realty transfer, petitioner transferred 96 individual apartment units to various purchasers. By letter dated May 14, 1986, petitioner forwarded to the Division a check in the amount of $466,065.66, representing payment of the gains tax due as computed by petitioner on the units transferred on May 13, 1986. The payment exceeded the amount of the gains tax due by $102,707.00, which represented tax paid on 28 units that were not transferred on May 13, 1986. It had been anticipated by petitioner that these units would be transferred on the date of the realty transfer but, in fact, they were transferred on a later date due to various circumstances.

Following the realty transfer, further correspondence passed between the Division and petitioner's attorneys in an attempt to clarify certain information contained in the documents filed by petitioner relating to the cooperative conversion. The letters are summarized as follows:

(a) On May 29, 1986, petitioner forwarded to the Division a revised gains tax calculation relating to the transfer between the sponsor and the cooperative corporation, a revised original purchase price schedule and a revised schedule of capitalized costs with the supporting documentation requested by the Division. It also addressed 4 of the 13 questions contained in the Division's letter of May 12, 1986.

(b) In a letter dated June 20, 1986, the Division requested information and documentation relating to five items; three of the requests related to information contained in petitioner's letter of May 29, 1986 and two of the requests were the same as two requests contained in the Division's May 12, 1986 letter but not answered by petitioner. The letter repeated the statements

that the 20-day period for issuing a tentative assessment would not commence until the information requested was supplied and that the tax was due on the date of transfer. The letter further stated that the Division had no record of any tax payments.

(c) On June 23, 1986, the Division requested transferee questionnaires for 11 units. The letter repeated the statement that the Division's 20-day period for issuing a tentative assessment would not commence until the information requested was received.

(d) On July 24, 1986, petitioner responded to the requests for information contained in the Division's letter of June 20, 1986. Petitioner's letter also contained a schedule of units sold, five transferee questionnaires and four subscription agreements.

(e) On August 7, 1986, the Division requested that petitioner provide transferee questionnaires and/or subscription agreements for approximately 40 units that had been sold between May 13, 1986 and July 17, 1986. This letter restated that the Division's 20-day period for issuing a tentative assessment would not commence until the information requested was provided and that the tax was due on the date of transfer. The letter further stated that petitioner's "method of unit submission is very confusing and time consuming" and requested that future unit submissions be completed by including the transferee and transferor questionnaires and the subscription agreements.

(f) On October 8, 1986, petitioner forwarded to the Division transferor and transferee questionnaires for five new units sold. The letter requested a tentative assessment for each unit.

(g) Petitioner forwarded to the Division, on October 8, 1986, some of the documentation requested in the Division's letter of August 7, 1986, and indicated that the remainder was being gathered and would be forwarded as soon as possible. Accompanying the letter was a check in the amount of $926,856.78, representing payment of the tax due on 216 units sold, with an allocation of 167,149 shares. In computing the tax due, petitioner used the same tax per share figure ($5.5451) as it used to compute the tax due on its earlier payment made May 14, 1986.

(h) On November 12, 1986, petitioner supplied additional information to the Division and requested that the individual tentative assessments be issued.

(i) On December 2, 1986, the Division notified petitioner that a field audit of the transfers involving the 340 East 93rd Street property would be conducted on December 29-31, 1986.

(j) On January 27, 1987 petitioner's attorneys requested that the Division waive the penalty and interest penalty asserted in the Statement of Proposed Audit dated December 31, 1986. In his letter, Mr. William Jay Lippman, Esq., of the law firm of Kronish, Lieb, Weiner & Hellman, made the following statements with regard to the issue of the crediting of the initial payment made in May 1986:

(i) "By letter dated June 20, 1986, Mr. Godfrey (Real Property Gains Tax Auditor) requested more information and stated that his office had no record of the May 14 payment. We immediately brought the May 14 payment to his attention."

(ii) "As previously stated, the May 14 payment was not properly credited until after we received Mr. Godfrey's June 20 letter stating that his office had no record of it."

Mr. Lippman was present at the hearing but did not testify.

During the period May 14, 1986 through October 8, 1986, petitioner transferred 244 individual apartment units. Transferor and transferee questionnaires were not filed or were late filed. However, petitioner did make the Division aware of the transfers through its correspondence.

The Notice of Determination of Tax Due under Gains Tax Law issued on July 8, 1987 was based upon the audit of the cooperative conversion involving the property located at 340 East 93rd Street. The auditor determined that of the 358 apartment units comprising the cooperative conversion, 340 units had been sold and were therefore subject to the gains tax. Accordingly, the Division determined tax due on such transfers in the aggregate amount of $1,403,199.00, plus interest. To arrive at the amount of gains tax due, the auditor computed a tax per share figure of $5.905. Petitioner was credited with $1,392.923.00 in gains tax paid, leaving additional tax due of $10,276.00. Penalty was also imposed based upon petitioner's failure to timely file returns and timely pay the tax due in connection with the transfers that occurred after the realty transfer. Penalty was computed to the date of the second payment, October 9, 1986.

Mr. Robert Meyer, vice-president, treasurer and chief financial officer of MacArthur Towers Development Co., Inc., testified at the hearing. During 1986, Mr. Meyer was the assistant treasurer of MacArthur responsible for the accounting functions relating to the 340 East 93rd Street project.

Mr. Meyer testified that the Division did not issue petitioner a tentative assessment and that the information requested by the Division could have significantly affected the tax calculations estimated by petitioner. Mr. Meyer further testified that the Division did not confirm receipt of the May 14, 1986 payment until December 1986 when the audit was being conducted. According to Mr. Meyer, petitioner notified the Division of the closings between May 13, 1986 and October 8, 1986 but did not pay any tax because it was not obligated to make payments until the Division issued the tentative assessments. In addition, payment was not made because petitioner was concerned about continuing to pay tax when it did not know whether its initial payment had been credited. The second gains tax payment was made in 1986 because, according to Mr. Meyer, petitioner was aware it owed some amount of tax and wished to stop the accrual of interest.

Petitioner does not contest the tax and interest due on audit. In fact, petitioner has paid the tax and interest as shown on the Notice of Determination of Tax Due. It is likewise uncontested that gains tax was not timely paid on the transfers that occurred between May 13, 1986 and October 8, 1986. Petitioner, however, does contest the imposition of the penalty for late payment concerning the unit transfers which occurred between May 1986 and October 1986. The amount of penalty at issue is $98,897.00.

In addition to the facts found by the Administrative Law Judge, we find the following:

> On December 27, 1991 the Tribunal issued a decision in the Matter of Plymouth Tower Assocs. and MacArthur Towers Dev. Co. which severed the matter into two cases: Matter of Plymouth Tower Assocs. and Matter of MacArthur Towers Dev. Co. Matter of MacArthur Towers Dev. Co. was remanded to the Administrative Law Judge for the issuance of an amended decision as to whether MacArthur Towers Development Company had properly been added by the Administrative Law Judge as a petitioner. At the same time, we stayed our decision in Plymouth Towers Assocs. pending the issuance of the Administrative Law

Judge's determination on remand. On January 30, 1992, the Administrative Law Judge issued an amended determination dropping MacArthur Towers Development Company as a party to this proceeding. No exception was filed by either party to the Administrative Law Judge's amended determination. Accordingly, the only petitioner remaining in this proceeding is Plymouth Towers Associates.

OPINION

In his determination of May 9, 1991, the Administrative Law Judge held that petitioner had not established that its failure to timely file returns and pay tax due was the result of reasonable cause. The Administrative Law Judge rejected petitioner's argument that its failure to file and pay was due to the Division's failure to issue tentative assessments, finding instead that the failure to issue tentative assessments resulted largely from petitioner's failure to have complied with the pre-transfer audit procedures, i.e., petitioner had not timely filed the pre-transfer forms and petitioner did not provide all of the information requested by the Division. The Administrative Law Judge also found unconvincing petitioner's excuse that it was hesitant to make further payments because the Division did not properly credit the first payment. The Administrative Law Judge noted that after bringing this problem to the Division's attention at some point around June 20, 1986, petitioner did not raise it again until the audit was conducted in December of 1986.

On exception, petitioner argues that Plymouth Tower Associates (hereinafter "Plymouth") was improperly named as the taxpayer. With respect to the penalty asserted, petitioner argues that it complied in all respects with the Division's pre-transfer audit procedures and that petitioner did not unreasonably delay in responding to any request for information. Petitioner also notes that the Division did not credit petitioner with its initial tax payment which, petitioner asserts, compounded the confusion.

In response, the Division argues that the request to delete Plymouth as a party should be rejected because the Notice of Determination was issued in that name, this proceeding was commenced in that name and when the Administrative Law Judge informed the parties at the

hearing that the determination would relate to both Plymouth Tower Associates and MacArthur Towers Development Company, no one objected.

We affirm the determination of the Administrative Law Judge.

First, we address the question of whether Plymouth was properly named as the taxpayer in this proceeding. Since the Notice of Determination was issued to Plymouth and since Plymouth filed a petition to this Notice, it is clear that Plymouth is properly the petitioner before us. The issue then becomes whether the Division properly issued the Notice of Determination to Plymouth.

The fundamental question raised by petitioner's challenge is whether the Division's assessment had a rational basis, i.e., whether the Division had a rational basis to conclude that petitioner was the taxpayer who owed the penalty asserted. As we noted in Matter of Atlantic & Hudson Ltd. Partnership (Tax Appeals Tribunal, January 30, 1992), a determination of tax must have a rational basis in order to be sustained upon review (see, Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219). However, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (Matter of Atlantic & Hudson Ltd. Partnership, supra, citing Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174 and Matter of Leogrande, Tax Appeals Tribunal, July 18, 1991).

In the instant case, Plymouth did not challenge its status as the taxpayer in its petition nor at the hearing. This challenge was raised for the first time in Plymouth's post-hearing brief. At the hearing, instead of contesting Plymouth's status as the taxpayer, the only comment made by petitioner's attorney about the name on the Notice of Determination was "Plymouth Towers transferred the building to MacArthur Towers Development Company before the closing of these individual sales, and just for whatever reason, it's been continued with problems on getting an administrator" (Tr., p. 7). Although we do not understand this comment, it does not seem susceptible to interpretation as a challenge to Plymouth as the taxpayer. Based on the record before us, we conclude that Plymouth failed to make any inquiry at the hearing as to whether the

Notice was issued to the proper party; therefore, the presumption of correctness raised by the issuance of the assessment provides the rational basis for the assessment (see, Matter of Atlantic & Hudson Ltd. Partnership, supra). To hold otherwise, and conclude that the Division had the burden to demonstrate that Plymouth was the proper taxpayer even though Plymouth did not contest this point at the hearing, would be in irreconcilable conflict with the principles that the Division does not have the burden to demonstrate the propriety of its assessment (see, Matter of A & J Gifts Shop v. Chu, 145 AD2d 877, 536 NYS2d 209, lv denied 74 NY2d 603, 542 NYS2d 518; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Scarpulla v. State Tax Commn., 120 AD2d 842, 502 NYS2d 113) and that petitioner has a heavy burden to prove the assessment erroneous (see, Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692). Therefore, we conclude that Plymouth did not sustain its burden of proving that the Notice was erroneously issued to it.

Turning to the penalty issue, we find that petitioner has raised the same arguments made before the Administrative Law Judge and that the Administrative Law Judge correctly and adequately dealt with these issues. Therefore, we affirm the determination of the Administrative Law Judge to sustain the penalty, based on the opinion of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Plymouth Towers Associates is denied;

2. The determination of the Administrative Law Judge issued on May 9, 1991 with respect to the petition of Plymouth Towers Associates is affirmed;

3. The petition of Plymouth Towers Associates is denied; and

4. The Notice of Determination dated July 8, 1987 is sustained.

DATED: Troy, New York
July 16, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner