

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>AIRE BON ASSOCIATES</b>	:	<b>DECISION</b>
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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Petitioner Aire Bon Associates, 17 Bon Aire Circle, Suffern, New York 10901 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. 806332). Petitioner appeared by Lapatin, Lewis & Kaplan, P.C. (Benjamin Lewis, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation did not file a brief in opposition. 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 petitioner has established that penalties asserted for failure to timely file certain returns and timely remit tax due should be abated.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner Aire Bon Associates was the sponsor of a plan to convert to cooperative ownership the premises known as Bon Aire Park Cooperative I. On or about July 13, 1982, petitioner filed the offering plan and began sales of the cooperative units. Petitioner sold

approximately 75 percent of the units prior to March 28, 1983 which was the effective date of the tax on the gains from the transfer of real property. All of the units were sold by the end of 1984 or the beginning of 1985.

In February 1987, the Division of Taxation ("Division") commenced a field audit which led to the conclusion that petitioner sold 10,615 shares, allocable to 42 cooperative apartment units, which were subject to real property gains tax. On June 30, 1988, on the basis of the audit, the Division issued a Statement of Proposed Audit Adjustment which stated that tax was due in the amount of \$238,231.00 plus penalty of \$83,381.00 and interest of \$128,622.85 for a total amount due of \$450,234.85. On or about August 11, 1988, petitioner remitted \$366,854.00 to the Division representing the tax and interest asserted to be due. However, petitioner objected to the imposition of penalty and interest penalty. In response, the Division issued a Notice of Determination of Tax Due under Gains Tax Law, dated October 20, 1988, which stated that penalty and interest penalty were due in the amount of \$83,381.00. This proceeding followed.

The offering plan and eight subsequent amendments to the plan were prepared by a law firm. The filing dates for these amendments ranged from March 31, 1982 through October 23, 1984.

Although petitioner's law firm remained active as its counsel after March 28, 1983, it never advised petitioner of its liability for gains tax on the transfers in issue. Petitioner became aware of the tax on gains from real property transfers in 1984. However, it did not file returns on the transfers in issue because it was under the impression that, since the offering plan was filed prior to the enactment of the Gains Tax Law, the transfers were exempt from tax. In reliance upon its law firm, petitioner did not make any effort to contact the Division to find out if its understanding was correct.

The conversion of Bon Aire Park Cooperative I was the first cooperative conversion petitioner engaged in.

Subsequent to the enactment of the Gains Tax Law, petitioner filed six additional offering plans for either cooperative conversions or condominiums. With the exception of one offering plan where there was a disallowance of some expenses, each of the returns was accepted as filed. Petitioner's law firm prepared two or three of the subsequent offering plans and advised petitioner with respect to the tax due on each of the subsequent offerings.

### ***OPINION***

The Administrative Law Judge determined that petitioner failed to demonstrate reasonable cause for its failure to timely pay its real property transfer gains tax (hereinafter "gains tax") and, therefore, he upheld the penalties that were imposed upon petitioner pursuant to Tax Law § 1446(2)(a).

On exception, petitioner argues that its failure to timely pay the gains tax was due to reasonable cause and was not willful. Furthermore, petitioner argues that the Administrative Law Judge erred in reaching the result in his determination by failing to give sufficient weight to the testimony which petitioner introduced at hearing. Specifically, petitioner contends that because the transaction in question straddled the effective date of the gains tax law, and since petitioner subsequently had six similar transactions in which the gains tax was owed and paid, that the Administrative Law Judge should have determined that petitioner had reasonably decided that no gains tax was owed with respect to the cooperative conversion in issue and, thus, should abate the penalties imposed upon petitioner for its failure to timely pay the tax.

In response to petitioner's exception, the Division of Taxation (hereinafter the "Division") argues that petitioner has not established reasonable cause for its failure to timely pay the gains tax and requests that the Administrative Law Judge's determination be sustained in full.

We uphold the determination made by the Administrative Law Judge.

Tax Law § 1446(2)(a) provides, in pertinent 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 . . . 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."

Petitioner begins its argument with the proposition that the phrase "reasonable cause," as stated above and in the gains tax regulations, should be given the same meaning as is given to the same phrase in sections of the sales tax, personal income tax and corporate franchise tax regulations. Petitioner argues that, because 20 NYCRR 590.71 is the only section of the gains tax regulations that addresses the issue of abatement of penalty and interest for a taxpayer's failure to timely pay tax if such failure was due to reasonable cause, the regulation section needs to be further defined by similar regulation sections of the other State taxes. We disagree.

There is absolutely no reason to look to the various other State taxes in this case. Any lack of specificity in the gains tax regulations has been clarified by the subsequent case law. For this reason, we conclude that it is not necessary to look at the other taxes for guidance on this issue and instead turn to the case law on the issues raised by petitioner.

Petitioner argues that, contrary to the determination of the Administrative Law Judge, the issuance of publications by the Division is not determinative and that:

" . . . no evidence was offered or suggested that any such publication was provided to the Petitioner. The mere fact that the Tax Division issues guidelines is not suggestive that the Petitioner was even aware of that fact. In fact, the Petitioner's accountant who testified at the hearing denied even receiving any such publication" (Petitioner's brief on exception, p. 4).

Furthermore, petitioner contends that it employed a competent law firm for the preparation of the offering plans both before and after the effective date of the gains tax law.

It is well settled law that reliance on the advice of counsel, in itself, has been held insufficient to warrant the setting aside of assessed penalties and interest because the reasonableness of the particular reliance must be evaluated (Matter of 1230 Park Assoc. v. Commissioner of Taxation & Fin. of State of New York, \_\_\_ AD2d \_\_\_ [Feb. 21, 1991]; Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121; Matter of Benacquista, Polsinelli & Serafini Mgt. Corp., Tax Appeals Tribunal, February 22, 1991). We have consistently held that the reasonableness of a taxpayer's position must be evaluated by a comparison to the Division's articulated policy (Matter of Benacquista, Polsinelli & Serafini

Mgt. Corp., supra; see also, Matter of Birchwood Assoc., Tax Appeals Tribunal, July 27, 1989; Matter of Copley Plaza Co., Tax Appeals Tribunal, June 8, 1989; Matter of Normandy Assoc., Tax Appeals Tribunal, March 23, 1989). Finally, it is well established that ignorance of the law is not reasonable cause for nonpayment of tax (Matter of 1230 Park Assoc. v. Commissioner of Taxation & Fin. of State of New York, supra).

In August 1983, the Division issued Publication 588, "Questions and Answers - Gains Tax on Real Property Transfers." Question and answer 20 provided a detailed explanation of the application of the gains tax to cooperative conversions. In November 1984, the Division issued a revised Publication 588 which, again, provided an explanation of the application of the gains tax to cooperative conversions. These guidelines were adopted as regulations on September 24, 1985 (20 NYCRR 590.33).

Furthermore, on May 11, 1984, the trial court's decision in Mayblum v. Chu was issued upholding the Division's position that the transfer of shares issued pursuant to a cooperative apartment conversion plan was a taxable event pursuant to Article 31-B of the Tax Law. On March 14, 1985, the Appellate Division affirmed the trial court's decision (Matter of Mayblum v. Chu, 109 AD2d 782, 486 NYS2d 89). On May 13, 1985, the Court of Appeals reached the same conclusion except with respect to the transfer of shares in a cooperative pursuant to a written subscription agreement entered into prior to the effective date of the Gains Tax Law (Matter of Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316).

Petitioner argues that by the time the Court of Appeals decided Mayblum, it was already actively engaged in filing other cooperative conversions or condominiums. Thus, petitioner states that "[t]he cooperative in issue was at this point in time history" (Petitioner's brief on exception, p. 4).

By May 13, 1985, the State's highest Court had held that the transfer of shares in a cooperative which straddled the effective date of the gains tax was subject to the gains tax. However, petitioner did not pay the taxes in question until August 11, 1988. Therefore, based on the Division's articulated policy, as well as petitioner's failure to remit tax until August 11,

1988, despite the clearest authority to the contrary, we conclude that petitioner has not established reasonable cause. Thus, we sustain the penalties imposed pursuant to Tax Law § 1446(2)(a).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Aire Bon Associates is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Aire Bon Associates is denied; and
4. The Notice of Determination of Tax Due under Gains Tax Law, dated October 20, 1988, is sustained.

DATED: Troy, New York  
April 18, 1991

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

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