

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>DUANE PARK DEVELOPMENT CORP.</b>	:	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.	:	

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Petitioner Duane Park Development Corp., 725 Fifth Avenue, 18th Floor, New York, New York 10022, filed an exception to the determination of the Administrative Law Judge issued on October 11, 1990 with respect 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. 806901). Petitioner appeared by Ira Postel, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Both parties filed briefs 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.

***ISSUES***

I. Whether the sale of certain cooperative units were exempt from gains tax under the "grandfather" exemption as provided in Tax Law § 1443(6).

II. Whether the Division of Taxation properly imposed penalties pursuant to Tax Law § 1446.

***FINDINGS OF FACT***

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

Following a field audit of Duane Park Development Corp. (hereinafter "petitioner") the Division of Taxation issued to petitioner a Notice of Determination of Tax Due under Gains Tax Law Section 1444 on January 14, 1988, which set forth the following explanation:

"Recently a field audit was conducted by our New York District Office. As a result of that audit, it was determined that RealProperty Transfer Gains Tax plus penalty and interest was due. Since the additional Gains Tax plus penalty and interest has not been paid this Notice of Determination has been issued for the following unpaid amounts.

Tax: \$208,781.00  
Penalty: \$73,073.00  
Interest: \$37,536.00  
Total: \$319,390.00  
Paid: \$0.00  
Balance: \$319,390.00  
Interest, 10/24/87 to 2/12/88: \$5,681.76"

The entire amount due pursuant to this notice of determination was \$325,071.76.

On September 28, 1982, the New York State Department of Law accepted the offering plan of Duane Park Development Corp., sponsor and selling agent, for a plan to convert to cooperative ownership premises at 88-01-09 and 88-02-10 35th Avenue, Jackson Heights, New York.

Subsequent to said acceptance and issuance, shares in said premises were sold beginning on June 26, 1984 through June 15, 1987.

Concededly, no gains tax was paid on the transfer of any of the shares during this period. Petitioner was represented by and relied upon counsel and an accountant with regard to the cooperative conversion and its filings with the Attorney General.

None of the shares was sold prior to March 28, 1983, which was the effective date of the tax on the gains on the transfer of real property including the transfer of shares in cooperatives.

### ***OPINION***

In the determination below, the Administrative Law Judge held that petitioner was liable for the tax on gains derived from the transfer of real property pursuant to Tax Law § 1441. He opined that because petitioner did not, in fact, enter into a written contract for sale of the

cooperative shares prior to the effective date of section 1443(6) of the Tax Law, it was not entitled to an exemption provided therein. The Administrative Law Judge also rejected petitioner's request to abate penalty and interest.

On exception, petitioner maintains that its sales of the cooperative shares were entitled to the "grandfather" exemption as set forth in Tax Law § 1443(6). Petitioner also contends that the penalty imposed was improper and should be abated. It was argued that petitioner had reasonable cause to believe that no tax was due and that its failure to pay was not the result of willful conduct.

The Division of Taxation (hereinafter the "Division") argues in response that since petitioner did not file a written agreement to transfer cooperative shares executed prior to the effective date of the gains tax, such transfers did not qualify for the "grandfather" exemption. Since the first cooperative unit transfer occurred on August 14, 1984, which was well over a year after the enactment of the gains tax, the Division asserts that a real property transfer gains tax was due. Moreover, the Division insists that petitioner is liable for the gains tax penalties and interest.

We affirm the determination of the Administrative Law Judge.

The statute imposes a ten percent tax on gains realized from the transfer of real property within this State for a consideration in excess of \$1,000,000.00 (Tax Law §§ 1441, 1443[1]). An exemption from this tax is allowed where the transfer of the real property occurred pursuant to a written contract executed before the effective date of the gains tax (Tax Law § 1443[6]). Although not relied on by the Administrative Law Judge, the decision in Mayblum v. Chu (Sup Ct, Queens County, May 11, 1984, Graci, J., affd 109 AD2d 782, 486 NYS2d 89, mod 67 NY2d 1008, 503 NYS2d 316) resolved the issues raised by petitioner. Mayblum held that the transfer of shares after March 28, 1983 pursuant to a cooperative plan is exempt under section 1443(6) of the Tax Law only if pursuant to a written contract entered into on or before that date (20 NYCRR 590.34). In this case, it is undisputed that all of the relevant shares were sold after the effective date of the gains tax, March 28, 1983. Although petitioner filed a cooperative

offering plan with the Attorney General's office in September 1982, the record clearly indicates that petitioner did not enter into a written contract to transfer the shares at any time prior to March 28, 1983. Hence, the transfer of the cooperative units under consideration are not exempt from gains tax under the "grandfather" exemption as stated in Tax Law § 1443(6).

Next, we address the issue of whether the penalties asserted against petitioner should be abated. Petitioner maintains that there was reasonable cause for his failure to pay the gains tax because he relied on the advice of someone in the Attorney General's office in deciding that no gains tax was due. We reject this argument. Tax Law § 1446(2)(a) provides, inter alia, as follows:

"Any 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."

It is well established that reliance upon the advice of professionals does not, per se, demonstrate reasonable cause (Matter of 1230 Park Assocs. v. Commr. of Taxation and Fin., \_\_ AD2d \_\_, 566 NYS2d 957, 959; 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, 123). The inquiry of whether a taxpayer's reliance on the advice of tax experts could form the basis of reasonable cause is to be undertaken in light of the particular facts of each case (see, Matter of LT & B Realty Corp. v. New York State Tax Commn., supra, 535 NYS2d 121, 123). Petitioner has not established that reliance on an unknown person in the Attorney General's office was reasonable.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Duane Park Development Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Duane Park Development Corp. is denied; and

4. The notice of determination dated January 14, 1988 is sustained.

DATED: Troy, New York  
July 3, 1991

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner

/s/Maria T. Jones

Maria T. Jones  
Commissioner