STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ARBOR HILL ASSOCIATES	:	DECISION DTA No. 812825
for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 14, 1995 with respect to the petition of Arbor Hill Associates, c/o Vulcan Investors, P.O. Box 4026, Albany, New York 12204-0026. Petitioner appeared by Segel, Goldman & Mazzotta, P.C. (Jeffrey A. Siegel, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Paul A. Lefebvre, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and a reply brief. Petitioner filed a brief in opposition. Oral argument was heard on June 13, 1996.

Commissioner Pinto delivered the decision of the Tax Appeals Tribunal. Commissioner Jenkins concurs. Commissioner DeWitt took no part in the consideration of this decision.

ISSUES

I. Whether the transfer of title to 27 commercial parcels from one grantor to one grantee, pursuant to a single deed, where the sole consideration was equal to the mortgage indebtedness on the property, pursuant to one agreement between the parties and reported on one real property transfer tax return constituted a single conveyance for purposes of the real property transfer tax imposed pursuant to Article 31 of the Tax Law.

II. If the transaction is determined to have been taxable, whether petitioner has established reasonable cause for failure to pay the tax thereby warranting abatement of penalties and penalty interest.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below. The facts are not in dispute and, on exception, have been expressly adopted by the Division of Taxation ("Division").[1] We have also made additional findings of fact.

On March 16, 1995 and March 22, 1995, respectively, Arbor Hill Associates ("petitioner") and the Division entered into a written stipulation of facts, the contents of which were substantially incorporated into the Findings of Fact.

On December 30, 1992, petitioner conveyed to AHFA Properties, Inc., 27 parcels of real property located in the City of Albany, New York (hereinafter "the conveyance").

The conveyance was made by one deed dated December 30, 1992 and recorded on December 31, 1992 in the Albany County Clerk's Office in Book 2475 of Deeds at page 184 thereof.

Each of the 27 parcels is either a four-unit residence, five-unit residence or commercial property; none of the 27 parcels is a one, two or three-family house, an individual residential condominium unit or an interest therein.

The 27 parcels of real property are separate, distinct, individual and different parcels, some of which are located at Hall Place, some at Ten Broeck Street and some on Clinton Avenue, all in the City of Albany, New York.

Each of the 27 separate and distinct parcels is separately assessed for real property tax purposes, each having a separate and distinct ward, page, line and parcel number.

A separate certificate of occupancy has been issued for each individual parcel of property.

The sole consideration paid by AHFA Properties, Inc. to petitioner for the transfer of the 27 individual parcels of real property was the assumption of the indebtedness encumbering the 27 parcels, consisting of a first mortgage then held by Chemical Bank, having an outstanding

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[1]Division's brief, pp. 3-4.

principal balance of $2,604,000.00 and a second mortgage then held by the Albany Local Development Corporation, having an outstanding principal balance of $1,385,142.00.

The combined total consideration received by petitioner for the 27 individual parcels was $3,989,142.00.

The allocation of the first and second mortgage principal amounts to each of the 27 individual parcels (annexed as a schedule to Form TP-584, New York State Combined Real Property Transfer Gains Tax Affidavit, Real Estate Transfer Tax Return, Credit Line Mortgage Certificate) by petitioner was acceptable to the Division. Such allocation was as follows:

Address	1st Mortgage	2nd Mortgage	Totals
4 Hall Place	$ 121,000	$ 59,576	$ 180,576
20 Ten Broeck St.	116,000	59,576	175,576
47 Ten Broeck St.	159,000	74,470	233,470
59 Ten Broeck St.	118,000	59,576	177,576
75 Ten Broeck St.	116,000	59,576	175,576
83 Ten Broeck St.	156,000	74,470	230,470
85 Ten Broeck St.	116,000	59,576	175,576
99 Clinton Ave.	103,000	44,682	147,682
101 Clinton Ave.	115,000	59,576	174,576
151 Clinton Ave.	103,000	44,682	147,682
179 Clinton Ave.	105,000	59,576	164,576
189 Clinton Ave.	96,000	59,576	155,576
197 Clinton Ave.	96,000	59,576	155,576
212 Clinton Ave.	108,000	59,576	167,576
241 Clinton Ave.	88,000	44,682	132,682
257 Clinton Ave.	73,000	44,682	117,682
259 Clinton Ave.	76,000	44,682	120,682
261 Clinton Ave.	79,000	44,682	123,682
269 Clinton Ave.	79,000	44,682	123,682
271 Clinton Ave.	51,000	29,788	80,788
273 Clinton Ave.	51,000	14,894	65,894
275 Clinton Ave.	73,000	44,682	117,682
277 Clinton Ave.	102,000	59,576	161,576
287 Clinton Ave.	88,000	59,576	147,576
289 Clinton Ave.	92,000	59,576	157,576
310 Clinton Ave.	51,000	14,894	65,894
317 Clinton Ave.	73,000	44,682	117,682
Totals	$2,604,000	$1,385,142	$3,989,142

Mark J. Simmons, President of Vulcan Arbor Hill Corp., the general partner of petitioner, was responsible for the above allocations. According to his affidavit (see, Division's Exhibit "F"), the method of allocation of the amount of the first mortgage to each parcel varied by a

number of factors including the size and location of the parcel. The allocation of the second mortgage to each of the parcels was based upon the number of units in each residential parcel and the size of each commercial parcel, without considering differences in value attributable to location. The affidavit of Mr. Simmons stated that the combined consideration allocable to each individual parcel was less than $500,000.00 and, in fact, the largest consideration for any parcel was $233,470.00.

If each of the 27 individual parcels was conveyed by separate deed, the consideration for each would be less than $500,000.00 and would, in fact, be the amounts set forth on the schedule to Form TP-584.

Subsequent to the conveyance, the liens of the first and second mortgages continued to encumber the property. The value of the lien of the first and second mortgages is $3,989,142.00 in the aggregate. The value of the lien allocated to each of the 27 parcels is the amount allocated to each parcel on the schedule to the Form TP-584.

The individual parcels were acquired by petitioner from the Albany Urban Renewal Agency and from Vulcan Development and Management Corporation (Vulcan had acquired title from the County of Albany in September 1985).

The deed from petitioner to AHFA Properties, Inc. provides a separate legal description for each parcel included therein.

If the conveyance of the 27 individual parcels by one deed is determined to be 27 conveyances for purposes of Article 31 of the Tax Law, it is agreed by the parties that the continuing lien deduction would be available to petitioner resulting in taxable consideration of zero and, therefore, no real estate transfer tax would be imposed on the transfer.

If the conveyance of the 27 individual parcels by one deed is determined to be one conveyance, the consideration for the conveyance is $3,989,142.00 and the continuing lien deduction is, therefore, not available to petitioner solely because the consideration is not less than $500,000.00.

Form TP-584 was filed on December 31, 1992. On schedule C thereof (the real estate transfer tax return), petitioner claimed (on line 2) a continuing lien deduction of $3,989,142.00, thereby resulting in taxable consideration of zero with no tax due.

A Statement of Proposed Audit Changes, dated June 25, 1993, was issued to petitioner asserting real estate transfer tax due in the amount of $15,958.00, plus penalty and interest, for a total amount due of $19,653.12.

On September 13, 1993, a Notice of Determination was issued by the Division to petitioner in the amount of $15,958.00, plus penalty and interest, for a total amount due of $20,545.92.

We make the following additional findings of fact.

> The mortgages mentioned above, which encumbered the property transferred herein, were not in evidence.
>
> It is not known from the record if the grantor and grantee on the deed executed a purchase contract for the property which might have indicated whether the parcels were intended to be sold individually for the values determined by Mark J. Simmons.
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> The affidavit of Mark J. Simmons, president of Vulcan Arbor Hill Corp., the general partner of Arbor Hill Associates, did not disclose when he assigned values to each of the 27 parcels, his qualifications for making said valuations, the specific criteria used to determine said valuations or whether the values were similar to those used by the financing institutions to justify their mortgage amounts.

OPINION

The Administrative Law Judge determined that if this transfer had arisen prior to the change in the law in 1989, when references to the word "deed" were used rather than the word "conveyance," the language imposing the tax on "each deed" would have been controlling and the Division would have prevailed. However, the Administrative Law Judge then determined that the Legislature's intention to replace the term "deed" with the term "conveyance" was not discernible and relied instead upon an example proffered by petitioner which was grounded in the reasoning that one could avoid the real property transfer tax in commercial real estate transfers by using enough deeds to bring the value below the continuing lien threshold of $500,000.00. The Administrative Law Judge then reasoned that, given the lack of an intent

from either the statutory language or legislative history, the changes were designed to permit a lien exclusion for properties with a consideration of less than $500,000.00. The Administrative Law Judge then determined that, for purposes of the lien exclusion, although there was only one deed, there were 27 separate conveyances each of which were transferred for less than the $500,000.00 lien exclusion threshold, resulting in the cancellation of the assessment in issue. Further, the Administrative Law Judge held that even if the transaction was taxable, the penalties and penalty interest should be abated because there was a lack of guidance from statute, regulation or case law on which to rely and petitioner's interpretation of Tax Law § 1402 and the other statutes in Article 31 was reasonable.

On exception, the Division argues that the imposition of tax by Tax Law § 1402, containing the continuing lien deduction, when read in conjunction with Tax Law § 1401(e), containing the definition of "conveyance," and applied to the facts of this case, leads to the conclusion that there was only one conveyance for purposes of the application of the real property transfer tax. The Division contends that the substance of the transaction supports its view that only one conveyance took place in the subject transaction and that there was but one consideration. The Division argues that the allocation of the mortgage values to the parcels by Mr. Simmons was not negotiated between the grantor and grantee but was done unilaterally and that, as between the grantor and grantee, there was only one consideration.

The Division rejected the example proffered by petitioner and adopted by the Administrative Law Judge which suggested that the tax could be avoided and the continuing lien deduction availed if taxpayers simply used several deeds to convey part interests in real property. The Division argues that four transfers of an interest in real property fall squarely within the definition of conveyance found in Tax Law § 1401(e). Further, the Division points out that the Administrative Law Judge did not cite to one fact in the record to support his conclusion that the conveyance at issue was 27 separate and independent conveyances.

In the alternative, the Division contends that petitioner voluntarily chose the form of the transaction for conveying its interest in the 27 parcels to take advantage of the economy it could

recognize. The Division cited the case of Sverdlow v. Bates (283 App Div 487, 129 NYS2d 88) in support of its position that if a transaction comes within the form which the statute has made taxable, it is no answer to say that it is indistinguishable in substance from a transaction in a different form which could have accomplished the same result in a nontaxable manner. Therefore, the Division concludes that petitioner is bound by the form of the transaction it chose herein.

With regard to the penalties and penalty interest issue, the Division argues that petitioner submitted no evidence of reasonable cause and same should not be abated.

In response, petitioner argues that this is a case of first impression and that it believes, even though the parcels were transferred by one deed, there were 27 conveyances which qualified for the continuing lien deduction. Petitioner urges that there is no basis in law for aggregating the consideration for the parcels. Petitioner believes that it makes no difference whether the parcels were transferred by 27 deeds or one, the result is the same.

Further, petitioner uses an example from the instructions to form TP-584 involving the imposition of tax pursuant to Tax Law § 1402-a on conveyances of residential real property where there was a distinction drawn between the tax imposed on each conveyance when the consideration was stated for the entire conveyance. It argues that this example dictates that each parcel must be looked at individually in order to determine consideration.

Petitioner argues that the Division's Notice of Determination was issued erroneously because it stated in the Statement of Proposed Audit Changes that the continuing lien deduction was not available because the conveyances were one transaction.

Petitioner answers the Division's argument regarding substance over form by saying the form chosen did not fall within the statute and, therefore, is not applicable. Petitioner believes that the Division confused the definition of "transaction" and "conveyance."

Petitioner also contends that the allocation of values to the various parcels was agreed to by AHFA in its signing of the TP-584 which set forth the values.

Petitioner also argues that its example of dividing one parcel into multiple interests which were then deeded separately to avoid the payment of tax is a valid example for demonstrating the weakness in what it perceives to be the Division's position that conveyances are measured on a per deed basis. Petitioner also disagrees with the Division's position that, even if the parcels had been transferred by 27 deeds, it would have been taxable because it would have been considered one conveyance. Petitioner contends that the Division had no statutory authority to aggregate these hypothetical transfers.

Petitioner raises the issue that the Division has changed its position and "completely reversed its position," now saying that it is the use of one deed which was determinative of petitioner's assessment.

With regard to the issue of penalty, petitioner argues that its interpretation of the statute was reasonable given the lack of guidance in the instructions, statutes, regulations and case law.

The Division herein determined that the return filed by petitioner was incorrect and determined that there was tax owing on the conveyance of the 27 parcels (Tax Law § 1411[a]). For purposes of the proper administration of Article 31 and prevention of evasion of the tax imposed, there is a presumption that all conveyances are taxable and that said presumption shall prevail until the contrary is proven by the person liable for the payment of the tax (Tax Law § 1404[b]).

Tax Law § 1402(a), provides as follows:

> "A tax is hereby imposed on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof; provided, however, that with respect to (A) a conveyance of a one, two or three-family house and an individual residential condominium unit, or interests therein; and (B) conveyances where the consideration is less than five hundred thousand dollars, the consideration for the interest conveyed shall exclude the value of any lien or encumbrance remaining thereon at the time of conveyance."

Tax Law § 1401(e) defines "conveyance," as pertains to the matter at issue, as follows:

> "'Conveyance' means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain,

> conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property."

Tax Law § 1401(c) defines "real property" as follows:

> "'Real property' means every estate or right, legal or equitable, present or future, vested or contingent, in lands, tenements or hereditaments, including buildings, structures and other improvements thereon, which are located in whole or in part within the state of New York. It shall not include rights to sepulture."

Tax Law § 1401(f) provides:

> "'Interest in the real property' includes title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air rights, or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. It shall also include an option or contract to purchase real property. It shall not include a right of first refusal to purchase real property."

Prior to May 1, 1983, Tax Law § 1402 read as follows:

> "A tax is hereby imposed on each deed at the time it is delivered by a grantor to a grantee when the consideration or value of the interest conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of sale) exceeds one hundred dollars, at the rate of fifty-five cents for each five hundred dollars or fractional part thereof."

From a reading of this statute, it is clear that the real estate transfer tax was imposed "on each deed"; however, the consideration was "exclusive of the value of any lien or encumbrance remaining thereon at the time of sale."

Effective May 1, 1983, Chapter 15 of the Laws of 1983, amended Tax Law § 1402 to read as follows:

> "A tax is hereby imposed on each deed at the time it is delivered by a grantor to a grantee when the consideration or value of the interest conveyed exceeds one hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof; provided, however, that with respect to (A) conveyances or transfers of one, two or three-family houses and individual residential condominium units, or interests therein; and (B) conveyances or transfers where the consideration or value is less than five hundred thousand dollars, the consideration or value of the interest conveyed shall exclude the value of any lien or encumbrance remaining thereon at the time of sale."

In addition to certain rate changes not relevant herein, this amendment to Tax Law § 1402, while it continued to impose the tax "on each deed," restricted the lien exclusion to

what has been referred to herein as the continuing lien deduction, i.e., the value of any lien or encumbrance is excluded from consideration only in "conveyances or transfers where the consideration or value is less than five hundred thousand dollars."

Chapter 61 of the Laws of 1989 contained the next (and most recent substantive) amendments to Tax Law § 1402.[2] In addition to certain technical amendments and rate changes not applicable to this matter, this amendment, effective July 1, 1989, changed the imposition of the tax from "each deed" to "each conveyance of real property or interest therein." Chapter 61 of the Laws of 1989 also amended Tax Law § 1401 by adding a new subdivision (e), supra, and, for the first time, defined "conveyance."

The definition of the term "conveyance" was added to Tax Law § 1401(e) by Chapter 61 of the Laws of 1989 which simultaneously repealed former subdivision (b) of the same section which contained the definition of the term "deed."

The section was amended for a very specific purpose, to wit: to broaden the base of the real estate transfer tax to capture the conveyance of an economic interest in real property, including when property is sold through other than a deed transfer. The legislative history contained in the bill jacket for Chapter 61 of the Laws of 1989 states:

> "There is little, if any, economic justification that allows non-deeded transfers to go untaxed. This proposal would 'level the playing field' since all property would be taxed upon transfer in the same manner and such transfers would be based on economic value rather than on tax considerations. It is inequitable that a homeowner selling his home for $50,000 must pay the real estate transfer tax, but a multi-billion dollar corporation can effect a transfer of title to its property for $100 million in a form so as to avoid taxation. The proposed expansion of the tax base would eliminate the preferential treatment now accorded the latter type of transaction" (Memorandum in Support, p. 37).

Thus, the change vis-a-vis the instant matter does not appear to be significant. The fact that a reference to the instrument which was used to convey the interest in real property was repealed did not change the fact that real property transfer tax was due on the value of the consideration for the interest conveyed (Tax Law § 1402[a]) including the amount of any

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[2]Chapter 170 of the Laws of 1994 relettered, as subdivision (a), what had previously been Tax Law § 1402 and added a new subdivision (b), the contents of which are not relevant herein.

mortgage, lien or other encumbrance (Tax Law § 1401[d]). In fact, as stated above in the Memorandum in Support, the purpose of the change was to broaden the base of the tax by reaching more transactions. Therefore, even though Tax Law § 1402, which provides for the imposition of the real property transfer tax, was amended by the Laws of 1989 to impose tax on conveyances of real property or interests therein rather than on the document, instrument or writing (i.e., deed) which evidenced the real property or interest therein being conveyed, the change was made to enable the tax to reach transfers accomplished without deeds. There was no stated or implied intent to change the fact that in conveyances of real property or interests in real property accomplished by the use of a deed, the real property transfer tax would not continue to be imposed on the consideration or value of the interest conveyed by a deed. The law is explicit that conveyance includes a transfer of an interest in real property by any method (Tax Law § 1401[e]) including a deed transfer.

Further support for the Legislature's use of this language is found in the common law, where "deed" and "conveyance" are often used interchangeably (1A Warren's Weed, New York Real Property, § 1.01 [4th ed]), but a deed does not necessarily import a conveyance (Farmers' Loan & Trust Co. v. Kip, 120 App Div 347, 104 NYS 1092, affd 192 NY 266). Thus, even at common law, a conveyance is defined more broadly than deed, consistent with the way the terms have been treated historically in the Tax Law. A deed was used as the document, instrument or writing conveying the fee to the real property herein. As with all valid deeds, it was intended to be a muniment of title (document transferring title) and met certain other requirements, to wit: named a specific grantor and grantee, contained a proper designation of the property, recited the consideration, contained the operative words of grant and was in writing (1A Warren's Weed, supra, § 1.02).

Although petitioner contends that the instrument it filed represented 27 separate conveyances, we cannot agree. The legislative history makes it clear that the intent of the deletion of the word "deed" was for the purpose of expanding the base of the tax and reaching

non-deed transactions such as the transfer of controlling interests in entities having an interest in real property. There is no support for an interpretation of the legislative changes made in 1989 which would diminish or limit the real estate transfer tax on deed transfers where the property transferred is constituted by more than one parcel. The Legislature was not limiting the imposition of the tax but broadening it and, therefore, it did not abolish the tax due on "each deed" (defined in Tax Law § 1401 former [b] as the document whereby any real property or interest therein is transferred or otherwise conveyed) when the consideration of the interest conveyed exceeded one hundred dollars (Tax Law former § 1402). In fact, the language in current Tax Law § 1402 imposes tax on each conveyance, defined in Tax Law § 1401(e) as the transfer of any interest in real property by any method, when the consideration given therefor exceeds five hundred dollars. Hence, petitioner gained no support for its position from the statutory change made in 1989.

The instant situation presents facts which establish one transfer of one undivided interest in real property accomplished by execution of a deed. The consideration for the undivided interest in the real property conveyed was established by the underlying agreement to convey the real property in lieu of foreclosure for the remaining balance on the two mortgages encumbering all of the parcels constituting the real property. The unity of title, interest in fee, the definition of real property and the indivisibility of the consideration as established by the mortgage balances all lead to the inescapable conclusion that there was but one conveyance. Although it allocated the mortgage balances among the parcels, that is irrelevant to the single transfer of title in fee to, or interest in, all of the property to one grantee for one consideration which was the price actually paid (Tax Law § 1401[d]) for the estate or right in lands and improvements thereon (Tax Law § 1401[c]).

Petitioner voluntarily chose to structure the transaction herein in this manner for the self-stated reason that it presented an opportunity for economy. It cannot now renounce the form chosen. "A taxpayer is bound by the form it invokes when structuring its transactions and may not later restructure them in order to avoid taxation" (Matter of Landmark Dining Sys. v. Tax

Appeals Tribunal, 224 AD2d 785, 637 NYS2d 524, 525; see also, Matter of Estate of Brockman v. Tax Appeals Tribunal, ___AD2d___, 656 NYS2d 429). Since it has been determined that the form chosen by petitioner falls within the statute, any attempt to redefine the structure of the transaction now must fail. "The choice of the form did not rest with the tax authorities but with the taxpayer. If he unfortunately chose a form which was taxable instead of an equally available form which was non-taxable, he must bear the consequences" (Sverdlow v. Bates, supra, 129 NYS2d, at 91-92).

The Administrative Law Judge held that penalties and interest penalties should be canceled even if the transaction was deemed taxable because petitioner's interpretation of Tax Law § 1402 and other statutes contained in Article 31 of the Tax Law was reasonable. We disagree. Petitioner's reliance on the example given in the instructions to form TP-584 with respect to additional tax imposed on conveyances of residential real property was misplaced and imprudent. The example clearly references Tax Law § 1402-a and is specifically addressed to residential real property. Further, the transfer in that example does not specify how many deeds were used, was not a transfer in lieu of foreclosure, did not specify how the consideration was paid or allocated and, other than the fact that more than one condominium was transferred, has nothing in common with the facts of the instant matter.

However, petitioner was comfortable relying on this example even after it concluded that the law and regulations were unclear. 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., Tax Appeals Tribunal, February 22, 1991, affd Matter of Benacquista, Polsinelli & Serafini Mgt. Corp. v. Commissioner of Taxation & Fin., 191 AD2d 80, 598 NYS2d 829; see also, Matter of Birchwood Assocs., Tax Appeals Tribunal, July 27, 1989; Matter of Copley Plaza Co., Tax Appeals Tribunal, June 8, 1989; Matter of Normandy Assocs., Tax Appeals Tribunal, March 23, 1989). Here, petitioner was comfortable relying on this inapposite example after it determined that the law and

regulations were unclear. It chose to take the risk that its interpretation was correct and structured its transaction accordingly.

The Division is correct in pointing out that petitioner bears the burden of proving that its failure to timely pay the tax at issue was due to reasonable cause and not willful neglect (Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121; Tax Law § 1411; 20 NYCRR 3000.15[d][5]). Petitioner has submitted no evidence on this issue and merely stating that its interpretation was reasonable fails to establish reasonable cause for the abatement of penalties or penalty interest. It has been held:

> "the failure to pay a tax due to a different legal interpretation of a statute need not be considered 'reasonable cause.' In fact, if it were so considered, [the Commissioner] would rarely if ever be entitled to levy such penalties" (Matter of Auerbach v. State Tax Commn., Sup Ct, Albany County, July 7, 1987, Williams, J., affd 142 AD2d 390, 536 NYS2d 557).

In light of the discussion above, we have given due consideration to the other contentions raised by petitioner and found them to be unpersuasive.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Arbor Hill Associates is denied; and

4. The Notice of Determination issued on September 13, 1993 is

sustained in full.

DATED: Troy, New York
June 26, 1997

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner