

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
M&M MANAGEMENT CO., INC.	:	DECISION
	:	DTA No. 813328
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 M&M Management Co., Inc., P.O. Box 234442, Great Neck, New York 11023, filed an exception to the determination of the Administrative Law Judge issued on November 7, 1996. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioner filed a brief on exception and a reply brief. The Division of Taxation filed 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 the time for the Division of Taxation to issue a notice of determination of tax due to this condominium developer began to run from the date of the last transfer of a condominium unit or from the date of filing the 100 percent project update.

FINDINGS OF FACT

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

Petitioner, M&M Management Co., Inc., and the Division of Taxation ("Division") entered into a stipulation of facts. The facts stipulated to have been incorporated into the findings of fact below. Additional facts have been found to create a more complete record.

The Division issued to petitioner a Notice of Determination, dated October 27, 1992, assessing tax due under Article 31-B of the Tax Law in the amount of \$339,670.00 plus penalty and interest. The computation section of the notice states that the tax is due for the period ended October 15, 1985. The Division issued a Conciliation Order, dated September 23, 1994, reducing the tax assessment to \$224,103.00 plus penalty and interest. The Conciliation Order states that the period covered by the assessment is September 15, 1985 through June 4, 1987. The parties did not explain or raise any issues regarding the assessment period.

The only issue in this proceeding is whether the Division's notice is barred by the three-year statute of limitations provided in Tax Law § 1444(3)(a)(1).

Petitioner was the sponsor of a condominium plan. "The date of the last condominium unit sale was June 4, 1987. The date of filing of the 100% project update was December 28, 1989." (Stipulation ¶ 2). "The required pre-transfer questionnaires (i.e., TP-702 and TP-581) were filed in advance of the June 4, 1987 transfer date" (Stipulation ¶ 3).¹

The parties agree that the assessment of tax is barred by the statute of limitations if the statutory period for assessment began to run from the date of the last unit sale (June 4, 1987). They also agree that the assessment is not barred by the statute of limitations if the statutory period for assessment began to run upon the filing of the project update (December 28, 1989).

¹Form TP-581 is a Transferee Questionnaire which must be filed with the Transferor Questionnaire before the date of transfer. There is no form TP-702. Presumably, the parties meant form DTF-702, Real Property Transfer Gains Tax Unit Submission Questionnaire for Cooperatives and Condominiums.

The questionnaires referred to in paragraph 3 of the stipulation were not made a part of the record by the parties; therefore, the number and the exact contents of those returns are not known.

By letter dated September 20, 1989, the Division advised petitioner that the condominium project which is the subject of the assessment was under audit. The Division asked petitioner to provide it with an "up to date status on the project totals"; a construction schedule for phase II of the project; and the construction management fees.

On December 28, 1989, petitioner filed forms DTF-700, DTF-701, DTF-703 and DTF-702 showing a 100% sellout of all condominium units. Those forms show anticipated gross consideration on the entire project of \$11,043,600.00 and actual consideration at sellout in the same amount. Petitioner reported anticipated and actual gain of \$1,730,213.00. Gains tax in the amount of \$173,021.00 had been paid as of the update.

Petitioner executed two consents extending the period of limitation for assessment of real property transfer gains tax. The first consent was signed on October 15, 1990 and extended the assessment period to October 27, 1991. The second consent was signed on October 1, 1991 and extended the final assessment date to October 27, 1992. If the statute of limitations began to run from June 4, 1987, the assessment period expired before the first consent was executed.

The Division performed an audit after the issuance of the notice of determination. A schedule in the workpapers shows that the Division verified transfers of 72 condominium units and 48 garage units in the period September 15, 1985 through June 4, 1987. Six units were transferred on June 4, 1987, and it appears from the amount of consideration received for each unit (less than \$10,000.00 each) that those six were garage units. According to the audit workpapers, the total number of units actually transferred is in agreement with the number listed in the condominium offering plan.

As a result of its audit, the Division concluded that actual consideration received on the entire project was \$10,463,000.00. The Division also determined that the gains tax on each unit transfer had been paid by the transferees in accordance with the offering plan and increased consideration by an additional \$146,482.00 based upon this provision. The Division adjusted petitioner's calculation of original purchase price, acquisition fees, conversion costs, selling expenses and brokerage fees. These adjustments account for the full amount of additional tax due, \$224,103.00, as determined after the notice was issued. The tax due was apportioned to each unit transferred and penalty and interest due on each transfer was calculated from the date of transfer of the individual unit. The parties agree that no units were transferred after June 4, 1987.

As of June 1985, the Division published real property gains tax questionnaires for cooperatives and condominiums and instructions for completing those questionnaires. A booklet entitled "Instructions for Completing The Real Property Transfer Gains Tax Questionnaires for Cooperatives and Condominiums Forms DTF-701 and DTF-702 " (DTF-701-I [6/85], hereinafter "Instructions") contains an explanation of all forms to be filed in connection with transfers pursuant to condominium and cooperative plans.

Form DTF-701 must be filed by the transferor as an initial filing, i.e., before the first transfer pursuant to the plan, and for project updates. Its purpose is to establish the anticipated gain pursuant to the plan.

Form DTF-700 must be attached to and filed with the form DTF-701. Its purpose is to establish the various costs and activities that comprise the original purchase price for transfers pursuant to a condominium or cooperative plan.

Form DTF-702 is the form used to report the amount of tax due per unit using an allocation formula determined by the Division. This form must be filed for each unit before the transfer of such unit.

Form TP-581 is used to report the actual consideration to be paid for each unit. It must be completed by the transferee and attached to and filed with the form DTF-702.

Petitioner's gains tax filing record cannot be determined from the documents in evidence. It is not known whether petitioner filed forms DTF-700 and DTF-701 before the transfer of the first condominium unit in September 1985. It can be surmised that gains tax was paid on individual unit transfers as they occurred. The auditor's letter of September 20, 1989 indicates that before the audit began she had information available to her which would most likely have come from the filing of forms DTF-700 and DTF-701 and supporting documentation. Based on these inferences from the record, it is concluded that petitioner filed forms DTF-700 and DTF-701 before June 4, 1987. Because of the nature of the issue, it is also concluded that petitioner filed forms DTF-702 and TP-581 for the six units transferred on June 4, 1987 but did not file forms DTF-700 and DTF-701 alerting the Division to the fact that the condominium project had been completely sold out.

OPINION

Tax Law former § 1444² provided, in relevant part, that in the case of transfers pursuant to a condominium plan, no assessment of additional tax under this article shall be made after the expiration of three years from the date of the last transfer made pursuant to such plan, unless the questionnaires required by Tax Law former § 1447 are filed after the date of transfer, in which case the tax may be assessed at any time within three years after the date on which such questionnaires are filed.

Tax Law former § 1447 provided, as relevant here, that the Commissioner of Taxation and Finance shall make available forms which he shall prescribe, to be completed by each transferor and transferee, and to be filed "in accordance with the pre-transfer audit procedure" established by the Commissioner pursuant to Tax Law former § 1447(2). Subdivision (2) of Tax Law former § 1447 provided that:

"[t]he department of taxation and finance shall make available as soon as practicable a pre-transfer audit procedure to be applicable to all transfers subject to tax under this article. Pursuant to such procedure, the

²The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

department shall determine a tentative assessment of the tax to be levied hereunder. . . . The tentative assessment of the amount of tax due shall not be deemed to be a determination of the actual amount of tax due" (Tax Law former § 1447[2]).

In her determination, the Administrative Law Judge concluded that the Division was authorized by Tax Law former § 1447 to establish a pre-transfer audit procedure and to require the filing of any forms it deemed necessary in accordance with that procedure. The Administrative Law Judge concluded that pursuant to its authority under Tax Law former § 1447, the Division required certain questionnaires to be filed to determine gain subject to tax on the overall project (forms DTF-700 and DTF-701) as well as to report the actual consideration paid and the tax due for an individual unit at the time of the transfer (forms DTF-581 and DTF-702). Forms DTF-700 and DTF-701 were to be filed before the first condominium unit was transferred and at certain update points, including the sale of 100% of the condominium units. Forms DTF-581 and DTF-702 were to be filed prior to the transfer of each individual unit. The Administrative Law Judge rejected petitioner's claim that update filings are not included as part of the questionnaires required to be filed under Tax Law former § 1447. Since these updates enable the Division to revise the original tentative assessment, the Administrative Law Judge concluded that it was "only logical . . . that forms DTF-700 and DTF-701 be updated at the point of sellout [as this] is also consistent with the overall scheme of the gains tax which imposes the tax on the overall condominium plan" (Determination, conclusion of law "B").

The Administrative Law Judge noted that since the statute of limitations is an affirmative defense, it was incumbent upon petitioner to establish that all questionnaires required by Tax Law former § 1447 were filed on or before the sale of the last condominium unit which occurred on June 4, 1987. Since updated forms DTF-700 and DTF-701, required to be filed at the point of 100% sellout of the transferor's interest in the real property, were not filed until December 28, 1989, the statute of limitations did not begin to run until that date.

On exception, petitioner argues that the gains tax treatment of condominium sales was a two-stage process: tentative assessments collected on a unit-by-unit basis and, at project sell-

out, an actual tax liability resulting in either a refund or a deficiency assessment. Petitioner argues that since Tax Law former § 1447 dealt exclusively with the pre-transfer, tentative assessment, the 100% project update questionnaire was not required by Tax Law former § 1447.

In opposition, the Division argues that although Tax Law former § 1447 referred to a "pre-transfer audit procedure," petitioner is not entitled to rely on this to engage in a scheme of delay in furnishing a final project update to the Division. The Division states that if petitioner's argument is accepted, a transferor could easily avoid the imposition of real property transfer gains tax by merely waiting more than three years from the date of the last transfer to file the 100% update questionnaire. Rather, the Division asserts that the transfer audit procedure of the Division has been clearly established to require an update on the final sale of condominium units to enable the Division to calculate the actual tax due on a project.

After reviewing the entire record in this matter, we conclude that the Administrative Law Judge adequately and completely addressed the issue presented to her and we affirm her determination based upon the reasoning contained therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of M&M Management Co., Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of M&M Management Co., Inc. is denied; and

4. The Notice of Determination dated October 27, 1992, as modified by the Conciliation Order dated September 23, 1994, is sustained.

DATED: Troy, New York
July 3, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

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

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