STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EATON ASSOCIATES	:	DETERMINATION
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, Eaton Associates, 306 East 18th Street, New York, New York 10003, 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. 804655).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 3, 1988 at 11:00 A.M., with all briefs to be submitted by May 1, 1988. Petitioner appeared by Philmont Goldstein, C.P.A. The Audit Division appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether penalty imposed against petitioner based upon its late payment of tax due under Tax Law Article 31-B should be abated.

FINDINGS OF FACT

1. On June 4, 1987, following an audit, the Audit Division issued to petitioner, Eaton Associates, a Notice of Determination of Tax Due under Tax Law Article 31-B ("gains tax"), indicating gains tax due in the amount of $224,783.00, plus penalty and interest. This notice pertained to an audit concerning 20721 Owners Corp., a cooperative housing corporation to which petitioner, as sponsor under a cooperative conversion plan, had transferred certain real property located at 207 East 21st Street, New York, New York.

2. The transfer of the real property from petitioner, as sponsor, to 20721 Owners Corp. (the "realty transfer") occurred on August 23, 1984. Shortly prior thereto, requisite transferor and transferee questionnaires had been submitted to the Audit Division in connection with this then-pending realty transfer. In response to the filing of the aforementioned questionnaires, and also at the request of petitioner's attorneys by their letter dated August 21, 1984, the Audit Division issued to petitioner on August 23, 1984 a Tentative Assessment and Return indicating no tax due in connection with the realty transfer.

3. On August 2, 1984 (prior to the above-noted filings and response), petitioner submitted a single transferor and a single transferee questionnaire in connection with the anticipated transfer of the forty individual cooperative apartment units at the premises to various individual purchasers. Included with the submission of these questionnaires was a twelve-column accountant's spread sheet, listing the names of the individual apartment unit transferees, their

addresses, social security numbers, number of shares allocated to each apartment unit, and the gross consideration to be paid for the shares/apartment units. This spread sheet also indicated the (original) purchase price petitioner paid for each unit (as allocated), cost of capital improvements thereto (as allocated), gain subject to tax on each unit and, ultimately, a computation of gains tax due in the amount of $240,783.00. This filing was made in accordance with the terms of Department of Taxation and Finance Publication 589 (Procedure A) as an acceptable filing procedure for transfers of multiple units in a cooperative or condominium which occur on the same date. This group filing on behalf of the various individual unit purchasers covered 31 such purchasers and a total of 27,771 shares of the cooperative housing corporation. These units/ shares were transferred on August 23, 1984.

4. As noted, by a letter dated August 21, 1984 from the attorneys representing petitioner in the cooperative conversion process, the Audit Division was requested to furnish a Statement of No Tax Due or a Zero Tentative Assessment and Return with respect to the August 23, 1984 realty transfer. The Audit Division, in turn, supplied such Zero Tentative Assessment and Return. This August 21, 1984 letter stated that "[t]he Sponsor believes that the [realty transfer] is exempt from [gains tax]. It is [the sponsor's] intention however to pay [gains tax] with respect to all units sold, soon after the closing...."

5. The Audit Division concedes that petitioner's manner of filing with respect to the individual unit transfers was an acceptable procedure in light of the policy contained in Department of Taxation and Finance Publication 589 (Procedure A).

6. As noted, the Notice of Determination of Tax Due (see___ Finding of Fact "1") was issued on June 4, 1987 as the result of a field audit. This notice indicates that on April 7, 1987 petitioner paid the amount of tax found as due per audit ($224,783.00) plus interest accrued to the date of such payment. This notice reflects the only remaining unpaid item as that representing the computation of penalty for late payment pursuant to Tax Law § 1446.2(a). In turn, the only issue presented in this proceeding is whether petitioner has established that the imposition of penalty for late payment was inappropriate and should be abated.

7. There is no evidence that petitioner made any inquiries subsequent to filing of the transferor and transferee questionnaires on behalf of the group of cooperative apartment unit purchasers, including any inquiry regarding or requesting the issuance of a Tentative Assessment and Return at any time after such filing. It is also clear that petitioner made no payment of gains tax on such unit transfers as computed to be due per the spread sheet attached to the noted questionnnaires, prior to the payment made in connection with the audit. It is also undisputed that a Tentative Assessment and Return was not issued by the Audit Division with respect to the individual apartment unit transfers in response to the same noted group filing.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner asserts that there was no intent to avoid or evade tax but rather that it was waiting for the Audit Division to issue a Tentative Assessment and Return in response to petitioner's group filing. Petitioner does not claim any lack of knowledge that tax was due, but does maintain a belief that the attorney representing petitioner would be providing for such tax (by escrow) at closing. Petitioner notes that its computation of tax due per its group filing was slightly higher than was the amount of tax ultimately computed as due by the Audit Division upon audit. Petitioner admits that its payment was late, but attributes said lateness to oversight on its part as well as to oversight on the Audit Division's part specifically for not issuing a Tentative Assessment and Return. In sum, petitioner asserts that it was waiting for such an

assessment before paying.

9. By contrast, the Audit Division notes that petitioner was well aware that tax was due. The Audit Division asserts that a lapse of 2½ years without any inquiries by petitioner leads to an inference that petitioner intended not to pay the tax and hoped for expiration of the three-year statute of limitations. With respect to petitioner's group filing, the Audit Division does not contest that petitioner's manner of filing was an available option for filing on multiple cooperative unit transfers occurring on the same date.

CONCLUSIONS OF LAW

A. Tax Law § 1446.2(a) provides 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 of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount for each month of delay or fraction thereof after the expiration of the first month after such return was required to be filed or such tax became due, such interest penalty shall not exceed twenty-five per centum in the aggregate. 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."

B. Pursuant to Tax Law § 1447.1, the Commissioner of Taxation and Finance is required to make available forms to be filed by both the transferor and transferee, on which forms said parties shall provide relevant information with respect to a given transfer of property including, inter alia, information as to the original purchase price for the property, the consideration paid for any capital improvements, the consideration for the transfer, the amount of any brokerage fees, etc. Pursuant to Tax Law § 1447.2 these forms, known as transferor and transferee questionnaires, are used in the Department of Taxation and Finance's determination of a tentative assessment of the amount of gains tax due pursuant to the pretransfer audit procedure called for under section 1447.2. Said section provides, specifically, as follows:

> "[w]hen the transferor and the transferee shall have furnished pertinent affidavits and any other information necessary to determine such tentative assessment at least twenty days prior to the date of transfer, such department shall provide the transferor and transferee with a statement of tentative assessment of the amount of tax, or a statement that no tax is due, at or prior to the date of closing and, if such affidavits and information are furnished within such period, such department shall provide such statement as soon as practicable, but not later than twenty days from the date such affidavits and other information have been furnished to the tax commission."

C. Tax Law § 1442 provides, specifically in the case of transfers pursuant to a cooperative or condominium plan, that the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred. Said section also specifically provides that gains tax is to be paid by the transferor on the date of transfer. Here the date of transfer of each unit was August 23, 1984. Since payment was not made until April 7, 1987, said payment was clearly late thus giving rise to the imposition of penalty waivable only if petitioner can establish that such late payment was the result of reasonable cause and not willful neglect.

D. Petitioner does not deny that its payment of gains tax was late, and that it was made only after the commencement of an audit approximately some 2½ years after the date of the transfers in question. It is likewise undisputed by the Audit Division that petitioner complied with the pretransfer audit provisions, specifically with respect to filing of transferee and transferor questionnaires and the attached spread sheet as described, which method of filing was allowable pursuant to Department of Taxation and Finance Publication 587 (Procedure A). Petitioner would assert that the late payment penalty imposed herein should be cancelled on the basis of the fact that the Audit Division did not issue to petitioner a Tentative Assessment and Return pursuant to Tax Law § 1447.2, and further upon the allegation that its failure to pay upon or soon after the August 23, 1984 transfer date was due to oversight. Petitioner does not deny its knowledge at the time of the transfers that tax was due. In fact, such knowledge is borne out by the letter of its attorneys dated August 21, 1984 indicating that tax would be paid soon after closing.

E. Tax Law § 1447.2 provides, with respect to the issuance of a Tentative Assessment and Return by the Audit Division, that such tentative assessment of the amount of tax due shall not be deemed to be a determination of the amount of actual tax due.[1] As relevant hereto, Tax Law § 1447.3(a) recites, in instances where the Audit Division fails to provide a Statement of Tentative Assessment, the following:

> "[w]henever the department shall fail to give such statement of a tentative assessment of such tax to the transferor and the transferee, within twenty days of receipt of such pertinent affidavits and such other information, such failure will release the transferee from any further obligation to withhold any sums of money, property or other consideration, which the transferee is required to transfer over to the transferor.... For the transferee's failure to comply with the provisions of this subdivision, the transferee...shall be personally liable for the payment to the state of any such taxes stated in such tentative assessment to be due to the state from the transferor...." (Emphasis added.)

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[1]Such provision is apparently included to make clear that notwithstanding the pretransfer filing procedures, the Audit Division may via audit (or other means) review the correctness of any such filings within the appropriate period of limitations (hence use of the term Tentative Assessment and Return). It should also be noted that a conveyance may not be recorded or accepted for recording unless accompanied by a statement of no tax due, or a statement of tentative assessment (with payment of tax shown thereon, if any) or an affidavit with respect to transfers falling under the circumstances described in Tax Law § 1447.1(f)(1)(ii) (Tax Law § 1447.1[f][1]). This restriction on recording would explain the interest in receiving the Tentative Assessment (as borne out by the August 21, 1984 attorney's letter) with respect to the realty transfer in connection with which transfer there is a deed to be recorded. By contrast, there are no deeds to record with respect to transfers of individual cooperative apartment units thus diminishing to a degree the immediate urgency in receiving the Tentative Assessment.

F. On balance, petitioner has not shown that its failure to timely pay tax it knew to be due was the result of reasonable cause such as would support abatement of the penalty imposed. It is unfortunate that the Audit Division did not issue to petitioner a Tentative Assessment and Return in response to petitioner's group filing with respect to the individual cooperative apartment unit transfers. However, such failure to file does not excuse petitioner from the responsibility of timely paying the tax due. Rather, pursuant to Tax Law § 1447.3(a), failure of the Audit Division to give such Tentative Assessment only serves to free a transferee to transfer monies to the transferor and preclude the Audit Division from holding a transferee liable therefor. The conclusion that penalty is appropriate in this matter is buttressed by the fact that petitioner, through its attorneys, admitted knowledge that tax was due and also admitted its intent to pay the same shortly after closing. The effect of the Audit Division's failure to issue a Tentative Assessment and Return on these facts would preclude the Audit Division from holding the transferee liable for taxes due from the transferor, but would not limit the liability of the transferor (including its liability for penalties imposed for late payment). With regard to petitioner's claim of "oversight", it at best strains credibility to accept that this petitioner "overlooked" an admitted liability of nearly one-quarter of a million dollars for a period of approximately 2½ years. Here, the fact that the transferor (petitioner) was aware that tax was due but did not pay said tax when due and did not even inquire as to the status of an admitted liability militates against a conclusion that penalty should be abated. Accordingly, said penalty is sustained.

G. The petition of Eaton Associates is hereby denied and the Notice of Determination of Tax Due under Tax Law Article 31-B issued on June 4, 1987 is sustained.

DATED: Albany, New York

September 29, 1988

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE