

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KAREN BROUNSTEIN	:	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, Karen Brounstein, H.C. 4, Box 109B, Gloversville, New York 12078, 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. 806846).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on November 1, 1990 at 10:45 A.M. Petitioner appeared by her husband, Samuel Brounstein. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUE

Whether petitioner has established that penalties asserted by the Division of Taxation for failure to timely file certain returns and failure to timely remit tax due pursuant to Article 31-B of the Tax Law should be abated.

FINDINGS OF FACT

On September 8, 1988, the Division of Taxation issued to Karen Brounstein, petitioner herein, a Notice of Determination of Tax Due under Gains Tax Law Article 31-B, section 1444, which set forth tax due of \$33,596.00, penalty and interest on said penalty of \$11,758.53 and interest of \$9,006.00, for a total amount due of \$54,360.53. Petitioner paid \$42,602.00 of this

amount on January 29, 1988¹, leaving only the penalty and interest on said penalty of \$11,758.53 in issue.

Petitioner held a 16.106% interest in 134-40 West 26th Street Owners Corporation.

After the cooperative conversion of the premises at 134-40 West 26th Street on October 14, 1983, as stated above, petitioner held 16.106% of the shares in the corporation and proprietary leases to the third and fourth floors in the premises. The third floor represented 79 shares and the fourth floor, which was divided into two units, "4N" and "4S", represented 39 shares and 40 shares, respectively.

On or about November 12, 1983, petitioner sold the unit designated as "4N" representing 39 shares in the corporation for a cash consideration of \$150,000.00. On July 8, 1986, petitioner sold the third floor, or what was designated as unit number "3", representing 79 shares in the corporation for a cash consideration of \$632,250.00. Petitioner did not file a gains tax return or questionnaire or pay any gains tax with regard to either of these transfers.²

The Division commenced an audit of the transferor/sponsor on October 9, 1987 and concluded the audit on December 30, 1987. Based upon the audit, petitioner was sent a Statement of Proposed Audit Adjustment on January 25, 1988 which set forth tax due of \$33,596.00, penalty of \$11,758.53 and interest of \$9,006.00, for a total amount due of \$54,360.53. Petitioner remitted \$42,602.00 representing the tax and interest due by check dated January 27, 1988. Said check was received on January 29, 1988 by the Division.

¹The notice of determination incorrectly stated that the payment was made on February 1, 1988.

²The cover page from the offering statement submitted in evidence as Division's Exhibit "G" and the annexed fifth amendment to the offering statement and attached schedule indicate that the consideration paid by the cooperative housing corporation for the real property was well in excess of \$1,000,000.00 and therefore beyond the threshold subjecting the transfer to real property gains tax. It is also noted that neither party disputed the fact that the transfer of the real property by the realty transferor to the cooperative housing corporation was in excess of \$1,000,000.00.

As stated above, the Division issued a notice of determination to petitioner setting forth the tax, penalty and interest due in the total sum of \$54,360.53 on September 8, 1988. The notice set forth the following explanation:

"Recently a field audit was conducted by our New York District Office. As a result of the audit, it was determined that Real Property Transfer Gains Tax, plus penalty, interest penalty and interest was due. By letter dated 01-11-88, it was requested that the penalty and interest penalty imposed be abated. We have reviewed this request, and do not find sufficient grounds to recommend abatement of the penalty and interest penalty. Since the penalty and interest penalty have not been paid, this Notice of Determination is being issued for the following amount."

SUMMARY OF PETITIONER'S POSITION

Petitioner contends that she was ignorant of the law at the time of the transfers, as was petitioner's attorney. Additionally, petitioner contends that the payment of \$9,006.00 in interest was punishment enough for her failure to comply with the real property gains tax law and that additional penalty and penalty interest should be abated.

CONCLUSIONS OF LAW

A. Tax Law § 1441, effective March 28, 1983, imposed a tax on gains derived from the transfer of real property within the State of New York. The tax is applied at a rate of 10% of the gain. Tax Law § 1443.1 provides that a total or partial exemption is allowed if the consideration is less than \$1,000,000.00. It is conceded that said exemption is not applicable herein.

The phrase "transfer of real property" is defined in Tax Law § 1440.7 as the transfer or transfers of any interest in real property by any method, including but not limited to a sale. The fourth sentence of Tax Law § 1440.7 states, in part, as follows:

"For purposes of this article, transfers pursuant to a cooperative plan shall include all transfers of stock in a cooperative corporation which owns real property."

The language of the fourth sentence of Tax Law § 1440.7 was clarified in the Court of Appeals opinion in Mayblum v. Chu (67 NY2d 1008) where it was provided that the gains tax "is imposed by the statute upon the overall cooperative plan except as the Article exempts transfers of shares in the cooperative pursuant to a written subscription agreement entered into prior to March 28, 1983...."

B. Tax Law § 1442 provides that the tax imposed by Article 31-B "shall be paid by the transferor to the tax commission...on the date of transfer." The section also specifies that in the case of a transfer pursuant to a cooperative or condominium plan, the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred.

Since it was determined that tax was due on the sale of each unit within the premises at 134-40 West 26th Street, tax was due upon the transfer of said shares on the date of transfer. As stated in the facts, petitioner failed to file a return or pay the tax due until notified by the Division on January 25, 1988 in the Statement of Proposed Audit Adjustment.

C. Tax Law § 1446.2(a) provides for the imposition of a 10% penalty, plus an interest penalty of 2% per month, against taxpayers who fail to either file a return or pay any tax due within the time required under Article 31-B of the Tax Law. Said section also provides for abatement of such penalty and interest penalty where it is shown that the delay or failure to file or pay in a timely manner was due to reasonable cause and not due to willful neglect.

Petitioner raises two defenses which she contends constitute reasonable cause. The first defense was reliance upon the advice of counsel who admittedly did not know the provisions of the Tax Law with regard to petitioner's tax liability or the tax consequences of cooperative conversions. However, it has been held that reliance on the advice of counsel does not itself establish reasonable cause (Matter of LT & B Realty v. State Tax Commission, 141 AD2d 185, 535 NYS2d 121; Matter of 1230 Park Associates v. Commissioner of Taxation and Finance, ___ AD2d ___, 566 NYS2d 957). Unfortunately, petitioner chose not to elaborate on her reliance on advice of counsel and it is therefore impossible to tell if such reliance was in good faith and that it was reasonable for petitioner to have relied upon such particular advice given (see, Auerbach v. State Tax Commission, 142 AD2d 390, 536 NYS2d 557). Therefore, that defense must fail.

The reasonableness of petitioner's position can only be evaluated as that position is compared to the Division of Taxation's articulated policy (see, Matter of Birchwood Associates, Tax Appeals Tribunal, July 27, 1989). Three months prior to petitioner's first sale, in August

1983, the Division issued Publication 588, "Questions and Answers - Gains Tax on Real Property Transfers". At Question and Answer number 20, the Division describes in some detail the application of the gains tax to cooperative conversions. The Division also issued a memorandum, TSB-M-83(2)R, which describes two options for calculating the tax due on each transfer of a cooperative conversion or condominium plan. The options are consistent with Publication 588, i.e., treatment of cooperative conversions as single transactions, and also the court decision in Mayblum, supra. Given the guidelines in place at the time of petitioner's first and second transfer, her contentions do not constitute a basis for reasonable cause and the abatement of penalty.

Petitioner's only other defense is that she has been penalized enough by her payment of interest on the tax due. However, petitioner is required by Tax Law § 1446.1 to pay interest to the Division on the amount of any tax not paid. The payment of said interest is mandatory. The provision for interest and penalties are contained in separate sections of Tax Law § 1446 because they were meant to be separate and distinct and, although petitioner believes that she has already been penalized in paying interest on tax she failed to pay when due, it is not a reasonable cause for abating penalties assessed against petitioner for failing to file a return or pay the gains taxes due within the time required by Article 31-B.

D. The petition of Karen Brounstein is denied and the notice of determination dated September 8, 1988 is sustained.

DATED: Troy, New York

5/17/91

ADMINISTRATIVE LAW JUDGE