

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS HUANG	:	DETERMINATION
	:	DTA NO. 812285
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, Thomas Huang, 39-15 234th Street, Douglaston, New York 11363, 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.

The Division of Taxation, by its representative, William F. Collins, Esq. (Christina Seifert, Esq., of counsel), brought a motion dated May 6, 1994 for an order directing the entry of summary determination in favor of the Division of Taxation on the ground that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination. On June 27, 1994, in response to the Division of Taxation's motion, petitioner filed an affidavit in opposition and his representative, Ettelman & Hochheiser (Gary Ettelman, Esq., of counsel), filed an affirmation.¹

Upon review of all the papers filed in connection with this motion, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a request for conciliation conference in response to a Notice of Determination of real property transfer gains tax.

¹Upon the request of Mr. Ettelman, the return date of the motion was moved to July 6, 1994, making petitioner's response due on June 27, 1994.

FINDINGS OF FACT

1. In support of its motion for summary determination, the Division of Taxation ("Division") submitted an affidavit of its representative along with attached exhibits. The Division asserts in its affidavit that, since petitioner did not file a request for conciliation conference or a petition with the Division of Tax Appeals within the 90-day time period prescribed by Tax Law §§ 170(3-a) and 1441(1), the late request for conciliation conference was properly denied and the petition before the Division of Tax Appeals should be dismissed, with prejudice, for lack of jurisdiction.

2. Attached to the Division's affidavit are the following exhibits: (1) a copy of petitioner's petition, received by the Division of Tax Appeals on September 30, 1993, which addresses petitioner's arguments on the merits (i.e., that the assessment is improper because a credit for real estate brokerage fees payable on the sale of the real property in question was disallowed, making the consideration received for the transfer artificially high and subject to the gains tax) and also contests the Conciliation Order dismissing as late filed petitioner's request for conciliation conference, claiming that (a) petitioner's wife, Alice Huang, previously filed a timely request for a conciliation conference with respect to the identical sales of real property and the identical assessment in issue, having been sent a separate (identical) assessment; (b) it was improper in any case for the State to issue separate assessments to a husband and wife, transferring a piece of property as tenants by the entirety; and (c) the previously timely filed request for conciliation conference by Alice Huang should be deemed to include the same request for petitioner, as the State's rejection of petitioner's individual request as untimely was improper; (2) a copy of a Request for Conciliation Conference dated March 15, 1993, signed by Alice Huang, regarding assessment number L-006900787-9, and referencing a Notice of Determination dated December 28, 1992 in the amount of \$166,188.98; (3) a copy of a Notice and Demand for Payment of Tax Due issued to Thomas Huang, dated April 8, 1993 regarding assessment number L-006900788-8, asserting tax in the amount of \$168,836.31, which includes the following statements:

"The original notice sent to you on 12/28/92 showed the detailed computation of the additional amount due. Please refer to the COMPUTATION SUMMARY SECTION for a computation of the current balance due.

* * *

"If we do not receive full payment of the total amount due or your disagreement by 04/18/93:

"We will take legal action to compel payment of the balance due.

"Interest and any applicable penalty will continue to be added to the balance due until full payment is received;"

(4) a copy of a Request for Conciliation Conference dated April 14, 1993, signed by Thomas Huang, regarding assessment number L-006900788-8, and referencing the April 8, 1993 notice and demand; (5) a copy of the envelope in which petitioner's Request for Conciliation Conference was mailed, bearing a U.S. postmark of April 14, 1993, with a Bureau of Conciliation and Mediation Services ("BCMS") "received" stamp dated April 20, 1993; (6) a copy of petitioner's Conciliation Order (CMS No. 130498), dated July 2, 1993, dismissing the conciliation conference request as late filed; and (7) an incomplete microfiche copy of a sheet in petitioner's file listing, inter alia, the following information: "Thomas Huang - taxpayer", "taxpayer ID - B 05 0562857 SS 3", "joint taxpayer ID - none", "assessment stage date - 04/19/93", "ASMT posted date - 12/17/92", and "Not [and] Demand date - 04/08/93", and with certain notations made on the copy in black marker, including: "Not. of det. 12.28.92", "L-006900788", "Amt. 20,424.85", "per. 2.2.88", "ART. 31B", "Request late", "rec'd 4.20.93", and "pet 4.14.93".

3. It should be noted that while no copy (either in microfiche or otherwise) of the Notice of Determination allegedly issued to Alice Huang is in evidence, reference to the assessment number of the notice is made on her conciliation conference request. The Division, in its February 24, 1994 answer to petitioner's petition did not deny that petitioner and his wife were issued separate, identical notices of determination regarding the assessment in question; however, the Division denied petitioner's allegations regarding the impropriety of issuing separate notices and further denied that petitioner's wife's request for conciliation conference in

response to the notice should be deemed to include petitioner.

4. In order to establish proof of mailing of the Notice of Determination to petitioner, the Division also submitted the affidavits of Donna Biondo, Daniel LaFar, and Carl Moeske, employees of the Division.

5. The affidavit of Donna Biondo, Head Clerk of the Case and Resource Tracking System Control Unit of the Division, sets forth the Division's general procedure for mailing notices of determination (and deficiency) to taxpayers, including the delivery of the notices to the post office and the Division's receipt of the postmarked documents following the mailing. In addition, the affidavit explains that the computerized preparation of notices of determination includes the simultaneous preparation of a certified mail record, the record listing those taxpayers to whom notices are being issued and the certified control number assigned to each notice. According to Ms. Biondo, the pages of the certified mail record remain fan-folded, or connected to each other, before the notices are accepted by the United States Postal Service and even after the mail record is returned to the Division. She states that it is only upon her request that the pages of the mail record are disconnected from one another.

6. Ms. Biondo attests to the truth and accuracy of the copy of the certified mail record attached to her affidavit (see, Exhibit "A") which contains a list of the notices allegedly issued by the Division on December 28, 1992, including one addressed to petitioner. This copy of the certified mail record consists of 21 pages, through which the certified control numbers run consecutively from P 911 206 272 on page 1 to P 911 206 496 on page 21, with 11 entries per page except for page 21, on which there are only five entries.

7. Page 11 contains certified mail control number P 911 206 383, Notice of Determination number L 006900788, addressed to petitioner, Thomas Huang, at 39 15 234 St., Douglaston, NY 11363-1536. The notice number listed matches that on the Notice of Determination issued to petitioner (see, microfiche copy of petitioner's Notice of Determination, Exhibit "B" attached to Biondo affidavit).

As Ms. Biondo attests, each of the 21 pages of the certified mail record submitted is date

stamped December 28, 1992 (a few of the postmarks are extremely light, but the date is recognizable nonetheless) by the Roessleville branch of the United States Postal Service in Albany, New York. The date stamp of December 28, 1992 is visible on page 11 of the mail record, the page on which petitioner's notice is listed, as well as on pages 1 and 21, the first and last pages of the record. Each of the pages of the certified mail record bears the print date of December 17, 1992, changed manually on the first page only to December 28, 1992, and the record print time of 21:06:45. Ms. Biondo explains in her affidavit that the print date for certified mail records is approximately 10 days prior to the mail date, in order to give sufficient time to review the notices by hand and to process the notices for postage. She notes that the print date here was changed by personnel in the Division's mail room to conform to the actual date of delivery of the notices to the United States Postal Service.

It is noted that while the certified mail record submitted contains, on the last page, a total for the number of pieces listed (i.e., "225"), it does not contain a total for the number of pieces received at the post office. Ms. Biondo mentions that there were no deletions from the list.

The two-page microfiche copy of the Notice of Determination sent to petitioner (see, Exhibit "B" attached to Biondo affidavit) is dated December 28, 1992 and is an assessment in the amount of \$166,168.98, including penalty and interest. On the first page is the following statement: "You must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 03/28/93."

8. The affidavit of Daniel B. LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the United States Postal Service. Mr. LaFar states that the certified mail record is the Division's record of receipt by the Roessleville Branch of the U.S. Postal Service for pieces of certified mail. Finally, Mr. LaFar asserts that the staff's regular procedures were followed in mailing the notice of determination in question to petitioner on December 28, 1992.

9. The affidavit of Carl Moeske, a Computer Programmer Analyst in the Information

Systems Management Bureau of the Division, discusses the Division's regular practice of retaining microfiche copies of statutory notices, rather than hard copies of the notices themselves. Mr. Moeske also attests to the fact that the microfiche copy of the notice sent to petitioner on December 28, 1992 and submitted with Mr. Moeske's affidavit is a true and accurate copy (see, Exhibit "A" attached to Moeske affidavit).

10. In response to the Division's motion, petitioner submitted an affidavit in opposition in which he restated the reasons for his challenge of the assessment on the merits and, as pertinent here, outlined his objections to the denial of his conciliation conference request. Specifically, petitioner claims the following in regard to the filing of a request for conciliation conference:

"5. Although at the present time I cannot state for certain, I do not believe that a Notice of Assessment was addressed and sent to me at that time [in or about the first week of January, 1993]. It is possible that my wife and I received separate Notice [sic] of Assessment, however, because of the fact that we sold the property, as husband and wife, I believed that there was only one such assessment. As a result, I only forwarded one copy to my attorney for the purpose of filing a request for a conciliation conference. Apparently, that copy was the assessment regarding my wife Alice Huang, because our attorney timely filed a request for a Conciliation Conference with respect to that assessment.

"6. It was not until in or about the second week of April, 1993 when I received a Notice and Demand for Payment of Tax Due regarding this very same matter, and upon discussion of same with my attorney, that I realized that there was a separate Notice of Determination and assessmnt [sic] applicable to me separately from my wife. My attorney, thereupon immediately filed a request for Conciliation Conference on my behalf."

In addition, petitioner asserts that it was improper and inequitable for the Commissioner to deny his conciliation conference request for the following reasons: (1) the transaction in issue was conducted by his wife and himself as tenants by the entirety; (2) it was unreasonable for the State to have sent out individual notices to petitioner and his wife and it was reasonable for petitioner to believe that there was only one notice covering both of them which had to be appealed; (3) when petitioner's attorney timely filed the conciliation conference request on behalf of petitioner's wife, petitioner, in good faith, believed that his interests were protected as well; and (4) there would be no logical reason for petitioner's wife to have contested the assessment of the tax if petitioner were not challenging the identical tax.

Petitioner claims further, that even if his wife is successful in her appeal of the assessment,

"such victory will be rendered meaningless" if he is not permitted a conciliation conference or some other means of appeal. In this same vein, petitioner insists that it would not only be "illogical, improper, and inequitable" for the same set of facts to result in two different determinations, it would "elevat[e] form over substance to an improper degree." Finally, petitioner argues that the case should be determined on its merits, especially where petitioner was "clearly justified in believing that [he] had acted in a timely and appropriate manner."

11. Petitioner's representative, in his affirmation of petitioner's affidavit, asserts that the Notice of Determination purportedly mailed to petitioner on December 28, 1992 was not in compliance with Tax Law § 171² and, as such, should be deemed a nullity. Among the reasons

petitioner's representative lists for noncompliance with Tax Law § 171 are that: (1) the notice sent petitioner did not advise him that it was separate, apart from, and in addition to the notice sent petitioner's wife with respect to the identical transaction; and (2) the notice did not advise petitioner that he was being assessed individually and would therefore have to file a separate request for conciliation conference or petition for appeal apart from his wife. Petitioner urges that it was particularly improper for the notice to have these deficiencies as only one of the multiple individuals comprising a transferor need sign the real property transfer gains tax affidavit and real estate transfer tax returns. Moreover, contends petitioner, these deficiencies were particularly egregious since the multiple individuals comprising the transferor in this case are husband and wife. Petitioner's representative maintains that:

"it was incumbent upon the Commissioner to have notified petitioner in clear, unequivocal and unambiguous fashion that each co-transferor, including husbands and wives, must separately file requests for Conciliation Hearings or petitions for appeal and failure to do so within the ninety day period would bar further review" (emphasis in original).

Because the Commissioner failed to so notify petitioner, avers petitioner's representative, and, in consideration of the facts of this case, petitioner acted reasonably in his belief that only one

²Tax Law § 171(1) requires, inter alia, that the Commissioner promulgate regulations advising the public of the legal force and effect of each of the Division's methods of communicating tax policy and interpretation.

request was necessary, and the motion for summary determination should therefore be denied.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c)(1) after issue has been joined. The regulation provides, in pertinent part, that:

"Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact." (Emphasis added.)

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316, 317, on remand 111 AD2d 138, 489 NYS2d 970, citing Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

B. Pursuant to Tax Law § 1444(1), a Notice of Determination:

"[s]hall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after the giving of notice of such determination, shall petition the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same" (emphasis added).

C. As pertinent here, a petitioner has the option of requesting a conciliation conference with

the Bureau of Conciliation and Mediation Services ("BCMS") upon receipt of the Notice of Determination, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition. (20 NYCRR 4000.3[c]. But see, 20 NYCRR 4000.6.)

Tax Law § 170(3-a)(a) provides, in part, that BCMS shall provide a conference at the request of the taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund . . . or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed." (Emphasis added.)

D. If a taxpayer fails to file a timely petition (or a request for a conciliation conference) protesting the Notice of Determination, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (see, Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

E. Where the taxpayer files a petition (or a request for a conciliation conference), but the timeliness of the petition (or request) is at issue, the Division has the burden of proving proper mailing of the notice in question (see, T. J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991), even where, as here, the petitioner does not contest the date of the mailing of the notice.

The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one(s) with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra).

F. Through the evidence it has submitted, the Division has established that the Notice of Determination in question was, in fact, mailed to petitioner on December 28, 1992.

First, the Division introduced adequate proof of its standard mailing procedures via

affidavits of three Division employees involved in the notice generation and issuance process. In particular, the Biondo, LaFar and Moeske affidavits generally describe the various stages of the issuance process and, in addition, attest to the veracity of the microfiche copy of the Notice of Determination sent to petitioner as certified number P 911 206 383, assessment number L 006900788.

Second, the Division established that the general issuance procedure was followed on December 28, 1992, in the generation and mailing of petitioner's notice. For, although the certified mail record submitted does not contain, on the final page, a total for the number of items received at the post office, the entire certified mail record is in evidence and the Biondo affidavit attests to the fact that there were no deletions from the list. As well, each of the 21 pages of the mail record submitted -- most notably, page 11 on which petitioner's notice is listed -- is date stamped December 28, 1992 by the Roessleville branch of the United States Postal Service in Albany, New York.

In short, these three affidavits, consistent in all respects with the information listed on the face of the notice in question, provide direct documentary evidence confirming the December 28, 1992 date and fact of mailing of the subject notice (see, Matter of Novar TV & Air Conditioner Sales & Serv., supra; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). Moreover, the presence of the Postal Service date stamp on page 11 of the certified mail record -- the page containing the information regarding the Notice of Determination issued to petitioner -- directly supports the conclusion that the mailing of said notice occurred as claimed by the Division (see, Matter of Katz, supra).

G. Thus, the Division has, in fact, introduced evidence in support of its motion for summary determination -- namely that it properly mailed the Notice of Determination in this matter to petitioner on December 28, 1992. H. Accordingly, the only reason to deny the Division's motion would be if petitioner can demonstrate that material facts are in dispute or if contrary inferences may be drawn from undisputed facts (see, Gerard v. Inglese, supra). Petitioner has apparently chosen the latter course, not disputing that the Notice of Determination was properly

mailed to him, but claiming that, under the circumstances, including the fact that there were (alleged) deficiencies in the notice (see, Finding of Fact "11"), his request for conciliation conference was timely because the request timely filed by his wife should be deemed to have been filed on his behalf as well. Petitioner's argument fails.

I. Petitioner and his wife, as tenants by the entirety, properly received separate notices of determination, issued under separate assessment numbers³ for the same amount,⁴ regarding the same transfer. 20 NYCRR 590.43(d), construing Tax Law § 1440(7), provides, in pertinent part, the following:

"Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of . . . (d) Several transferors, owning one parcel of land either as joint tenants, tenants in common, or as tenants by the entirety, one transferee?

"Answer: The statute specifically requires that the consideration paid to each such transferor be aggregated with the consideration paid to the other transferors in determining whether the consideration is \$1 million or more. Once the million-dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives, less his original purchase price for the property" (emphasis added).

Thus, in terms of personal liability for gains tax due, the law treats tenants by the entirety no differently than non-related business partners who own a piece of property as tenants in common.⁵

³Petitioner's assessment number is L-006900788-8, while his wife's assessment number is L-006900787-9.

⁴Although there appears to be a discrepancy in the amount of the assessments issued (i.e., the notice sent to petitioner [see, Exhibit "B" attached to the Biondo affidavit] lists the amount of tax due as \$166,168.98, while the conciliation conference request filed by Alice Huang lists the amount of tax due as \$166,188.98), the difference appears to be a result of a typographical error in the conciliation conference request (see, petition, attached rider, p. 1 [wherein petitioner states that the assessments were identical]).

⁵It is acknowledged that tenants in common and tenants by the entirety may incur different degrees of liability for the gains tax due on the transfer of a particular parcel, but in terms of the fact of liability alone, the two groups are treated the same.

J. As tenants by the entirety, petitioner and his wife each held an undivided interest in the whole property (see, 24 NY Jur 2d, Cotenancy and Partition, § 37; Reister v. Town Board of Fleming, 18 NY2d 92, 271 NYS2d

965, 967; Huber v. Huber, 26 Misc 2d 539, 209 NYS2d 637, 640-641). Therefore, the notices of determination separately issued to petitioner and his wife properly assessed each for the entire amount of the gains tax purportedly due. The Division was within its rights not to have to arbitrarily split the consideration between petitioner and his wife, assessing each for half of the amount of the assessment.

K. In addition, the fact that the notices were separate, were addressed to petitioner and his wife separately, and listed separate assessment numbers should have indicated to petitioner that the assessments were separate and that each assessment had to be responded to in its own right (see, Matter of Halperin v. Chu, 134 Misc 2d 105, 509 NYS2d 692, affd 138 AD2d 915, 526 NYS2d 660, appeal dismissed, lv denied 72 NY2d 938, 532 NYS2d 845).

Based, in part, on this reasoning, I must reject petitioner's argument that the notice issued to him did not fulfill the requirements of Tax Law § 171 in that it did not advise him of its legal force and effect, or of the fact that it had to be responded to separately. The notice, clearly addressed only to petitioner, contains, among others, the following sentences: "YOU MUST complete the enclosed Payment Document whether you AGREE or DISAGREE with this NOTICE OF DETERMINATION"; "You must file the Request for Conciliation Conference or a Petition For a Tax Appeals Hearing by 03/28/93" (emphasis added). These instructions were sufficient to apprise petitioner of his separate responsibility as the recipient of the notice. Further, a Notice of Taxpayer Rights was presumably enclosed with petitioner's notice⁶ informing petitioner of his options in terms of responding to the notice, and a telephone number

⁶The Notice of Determination states on its face that a Notice of Taxpayer Rights is enclosed (with the Notice of Determination). Petitioner does not allege that such a notice of taxpayer rights was not enclosed; therefore, one can assume that it was.

was listed on page two of the notice in case petitioner had any questions regarding the notice. In sum, all indications from the notice were that petitioner needed to respond to the notice separately and if petitioner had been unsure about his separate responsibility for the tax, all he had to do was call the number listed on the notice expressly set up for such inquiries.

L. While, as stated above, the Division has introduced evidence in support of its motion for summary determination, petitioner's assertions regarding the timeliness of and circumstances surrounding his request for a conciliation conference have proven meritless. Therefore, the Division, as the proponent of this motion for summary determination, has succeeded in carrying its burden of showing that it is entitled to judgment as a matter of law because there is no triable issue of fact in dispute in this case, nor can contrary inferences be drawn from undisputed facts.

M. Accordingly, the Division's motion for summary determination is granted and the petition of Thomas Huang is dismissed.⁷

DATED: Troy, New York
August 4, 1994

/s/ Daniel J. Ranalli
ASSISTANT CHIEF
ADMINISTRATIVE LAW JUDGE

⁷Notwithstanding the untimely request for conciliation conference filed by Mr. Huang, the issue of whether gains tax is due on the subject transfer will reach adjudication, as Mrs. Huang's request for conciliation conference was timely filed (cf., Matter of Halperin v. Chu, supra).