STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARY NEAREY	:	DETERMINATION DTA NO. 818792
for Redetermination of a Deficiency or for Refund of Gift Tax under Article 26-A of the Tax Law for the Year 1998.	:	
	:	

Petitioner, Mary Neary, 418 Applegate Court, Brooklyn, New York 11223, filed a petition for redetermination of a deficiency or for refund of gift tax under Article 26-A of the Tax Law for the year 1998.

On June 14, 2002 and July 11, 2002, respectively, petitioner, by her representative, Sean Grogan, Esq., and the Division of Taxation, appearing by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel), consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were submitted by November 20, 2002, which date began the six-month period for issuance of this determination. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation's assertion of gift tax on petitioner's transfer of a remainder interest in certain property to her daughter was proper.

FINDINGS OF FACT

1. On or about October 23, 1998, petitioner, Mary Nearey, filed a form TP-400, New York State Gift Tax Return, with the Division of Taxation ("Division") in which she reported a taxable gift of single family real estate with a stated value of $97,473.00. Petitioner indicated on the return that she retained a life estate in the property gifted.

2. The Gift Tax Return indicated a computed tax on the gift of $2,424.00 and a unified credit in the same amount which yielded a tax due of $0.00.

3. By letter dated November 16, 1999, the Division requested that petitioner provide a copy of the deed which effectuated the gift in issue and a uniform residential appraisal report substantiating the value of the gift. In addition, the letter contained the following language:

> Please be advised that NYS Tax Law, Article 26-A, Section 1004(e), conforms with the Zero Valuation Rule, as provided for in Internal Revenue Code Section 2702, and in Federal Regulations Sections 25.2702-1 and 25.2702-4. The value of the interest retained by the donor is valued at zero.

4. When no response was received, a second request was made by letter dated January 13, 2000.

5. By letter dated January 9, 2000, petitioner's daughter, Eileen Nearey, responded to the Division's request, enclosing a copy of the quitclaim deed, dated April 8, 1998, which transferred petitioner's interest in certain property known as 418 Applegate Court, Brooklyn, New York to Eileen Nearey, subject to a life estate of Mary Nearey and Anna Josephine Fox. Ms. Fox passed away on May 23, 1998.

6. Because Eileen Nearey's letter of January 9, 2000 did not include the appraisal report requested by the Division, two additional letters were sent to petitioner on January 24, 2000 and March 7, 2000, requesting the appraisal.

7. By letter dated April 28, 2000, Eileen Nearey sent the Division a letter enclosing the appraisal report for the property located at 418 Applegate Court, Brooklyn, New York which set forth a market value of the property of $190,000.00 as of April 8, 1998, and listed Eileen Nearey as the owner of the property.

8. Based on the quitclaim deed and appraisal report submitted by petitioner, the Division sent petitioner a letter, dated April 25, 2000, which explained, in advance of the issuance of a Statement of Audit Changes, the basis for its position that petitioner owed gift tax on her transfer of 418 Applegate Court, Brooklyn, New York. The salient portion of the letter stated:

> Regarding the gift of the donor's Retained Life Estate in real estate on April 8, 1998, please be advised that New York State Tax Law, Chapter 60, Article 26A, Section 1004(e), conforms with the Zero Valuation Rule, in accordance with Internal Revenue Code Section 2702.
>
> When real property is transferred by gift or [sic] a family member, and either a Life Estate or an interest for a term of years is retained by the donor, the transaction is treated as a Transfer in Trust. Federal Regulations, Section 25.2702-1, provides that the interest retained by the donor be valued at zero, unless the property is transferred to a Personal Residence Trust, Section 25.2702-5 of such regulations, sets forth the requirements of a Personal Residence Trust. Also, the $10,000.00 annual Exclusion is disallowed, as per IRC Section 2503, as the gift is a future interest.
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> Therefore, the 1998 corrected New York Taxable Gifts are $189,000.00, the corrected New York State Gift Tax is $5,060.00, and the Additional New York and Gift Tax Due is $5,060.00. Any change is [sic] the value of the real estate, must be supported by a Uniform Residential Appraisal Report from a New York State Certified Appraiser, including comparable sales, reflecting the market value of the property, as of April 8, 1998.

9. A Statement of Proposed Audit Changes, dated May 4, 2000, was issued to petitioner which asserted additional gift tax for the year 1998 in the sum of $5,060.00 plus interest of $390.55, for a total amount due of $5,450.55. Petitioner was referred to the Division's letter of April 25, 2000 for an explanation of the changes.

10. In response to the Statement of Proposed Audit Changes, petitioner's representative, Sean Grogan, Esq., sent a letter to the Division of Taxation, dated May 24, 2000, which explained that petitioner actually intended to have the transfer referred to in Finding of Fact "5" subject to a limited power of appointment executed by petitioner. A power of appointment was provided with the letter and was executed admittedly to give effect to petitioner's original intent that the property eventually be shared among petitioner's three children.

11. The power of appointment submitted by petitioner was executed on May 11, 2000, between Mary Nearey, as grantor, and Eileen Nearey, as grantee. The premises referred to in paragraph "1" of said power of appointment was "518 Applegate Court, Brooklyn, New York," which it averred had been transferred by the grantor to the grantee by deed, dated April 8, 1998, subject to the grantor's life estate. Paragraph "2" of the power of appointment granted a limited power of appointment to the grantor, giving her the right to change the remaindermen named in the deed from Eileen Nearey to one or more of grantor's descendants, but not to grantor, grantor's estate or grantor's creditors. In addition, the agreement provided that the power of appointment was effective *nunc pro tunc*, or April 8, 1998, the date of the original transfer.

12. Paragraph "3" of the power of appointment changed the remaindermen set forth in the deed from Eileen Nearey to Eileen Nearey, Joseph Nearey and Grace Marie Nearey, while paragraph "4" recited that petitioner could further exercise the power of appointment at a future time.

13. Petitioner submitted an affirmation from her attorney, Michael N. Conners, Esq., dated January 26, 2001, in support of her position that she intended to reserve a power of appointment in the deed. Mr. Conners averred that it was his "understanding" that petitioner might want to add others as remaindermen in the future and that he suggested petitioner execute

a deed which reserved a power of appointment. Mr. Conners affirmed that petitioner instructed him to draft the deed in this manner but the power was inadvertently omitted when the deed was prepared.

14. After considering petitioner's contentions, the Division of Taxation issued to Mary Neary a Notice of Deficiency, dated July 10, 2000, which asserted additional gift tax due of $5,060.00 and interest of $471.17 for a balance due of $5,531.17.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioner argues that it was her intent to reserve a life estate and a limited power of appointment and that the failure to execute a limited power of appointment was merely a clerical error. Petitioner argues that ***Delap v. Leonard*** (189 App Div 87, 178 NYS 102) supports her position that a mistake of a scrivener should be corrected. In ***Delap***, there was an omission of a reversionary interest and the Court allowed the correction to fulfill the grantor's true intent. Here, petitioner believes that the failure to execute the limited power of appointment was a mere oversight and it should be accepted *nunc pro tunc*, resulting in an incomplete transfer.

16. The Division of Taxation disputes petitioner's claim that she intended to gift a remainder interest in her home to her children subject to a limited power of appointment, the latter of which was omitted by her attorney. The Division argues that petitioner's act of filing the gift tax return conceding the taxability of the transfer contradicted her current argument.

17. The Division also argues that petitioner is merely trying to change the nature of the transfer after discovering that it was taxable as executed. The Division asserts that the declarations by petitioner's counsel were self-serving and not supported by any contemporaneous notes. Further, the Division notes that petitioner did not testify or submit a sworn affidavit as to her intent.

CONCLUSIONS OF LAW

A. Generally, in matters before the Division of Tax Appeals, the burden of proof is on the petitioner. (Tax Law § 689[e]; 20 NYCRR 3000.15[d][5].) Therefore, it is incumbent upon petitioner to prove that the Division's assertion of additional gift tax herein was erroneous.

The focus of petitioner's argument is her intent at the time of the transfer of her interest in the real property. She does not dispute the Division's valuation of the gift nor does she question the Division's statutory authority to impose the tax (***cf., Matter of Delese*****,** Tax Appeals Tribunal, August 8, 2002). For several reasons, petitioner has not established an intent to incorporate a power of appointment into the April 8, 1998 transfer of 418 Applegate Court, Brooklyn, New York (the "property") *nunc pro tunc*.

B. Petitioner has noted that if she can establish that she intended to contemporaneously reserve a power of appointment over the disposition of the remainder interest in the property, then the gift would be incomplete and not subject to gift tax. (***See, Estate of Sanford v. Commissioner***, 308 US 39, 42; 60 S Ct 51, 55.) The rationale underlying this position is that if a donor retains control over the disposition of the property by means of the power retained in the transfer, whether for the benefit of the donor or others (in this case for others), then the gift is rendered incomplete until the power is relinquished. (***Estate of Sanford v. Commissioner*****,** ***supra*****;** ***see also,*** Treas Reg § 25.2702-1[c][1].)

C. In this matter, petitioner transferred all of her interest in the property, reserving to herself a life estate, to her daughter Eileen Nearey by quitclaim deed on April 18, 1998. On October 23, 1998, petitioner filed a New York State Gift Tax Return, in which she set forth a taxable gift of single family real estate with the reservation of a life estate valued at $97,473.00.

Subsequently, at the request of the Division, petitioner submitted an appraisal of the property which indicated the principal owner as Eileen Nearey and valued the property at $190,000.00. Based upon the information provided by Eileen Nearey, the Division issued a statement of proposed audit changes on May 4, 2000, asserting additional gift tax of $5,060.00.

By letter, dated May 24, 2000, petitioner's representatives, Connors and Sullivan, P.C., informed the Division for the first time that there had been an error and that petitioner had actually intended to retain a power of appointment with her life estate in order to ultimately transfer the property to three of her children. If successful in demonstrating this intent, petitioner argues that the gift would be incomplete and, therefore, not subject to the gift tax.

To effectuate this intent, petitioner executed a power of appointment on May 11, 2000. However, the power recites a property only described as *518 Applegate Court*, Brooklyn, New York, not the property described in the deed or the appraisal submitted by Eileen Nearey in response to the Division's request (418 Applegate Court). The fact that petitioner submitted a power of appointment which references a different property severely diminishes the weight it can be accorded in substantiating her intent to have 418 Applegate Court transferred to her three children. Without more evidence, it is impossible to discern whether this power of appointment is associated with the instant matter or another transfer.[1]

Assuming aguendo that the address was yet another "scrivener's error," there remains insufficient evidence of the intent to reserve a power of appointment at the time of the transfer. First, the donor has not, to date, testified or submitted an affidavit stating such an intent on her part. Petitioner did submit the affirmation of her attorney, Michael N. Conners, Esq., in which

[1]Although the power of appointment may be in recordable form (Real Property Law § 290), the property to which it relates is incorrect and fails to convey a valid interest in 418 Applegate Court, Brooklyn, New York.

he averred that it was his "understanding" that petitioner might want to add others as remaindermen in the future and that he suggested petitioner execute a deed which reserved a power of appointment. Mr. Conners affirmed that petitioner instructed him to draft the deed in this manner but the power was inadvertently omitted. Although the affirmation is not entirely without weight, its probative value is suspect given its timing and concession of law office failure. Further, the affirmation never stated that petitioner clearly and directly articulated to him her intent to reserve or create a power of appointment. For this reason I must accord it very little weight with respect to proving petitioner's intent at the time the deed was executed.

Supporting a construction of the circumstances to the contrary, petitioner did file a gift tax return acknowledging a taxable gift and the appraisal indicated that Eileen Nearey was the "owner" of the property, confirming that the transfer to her on April 8, 1998 was intended to convey the remainder interest to her and no one else.

It was not until petitioner realized that she had incurred gift tax liability upon receipt of the letter from the Division of Taxation, dated April 25, 2000, wherein the Division explained in detail the statutory and regulatory basis for the liability (***see*** Finding of Fact "8"), that the issue of the donor's intent surfaced. Given the defect in the power of appointment submitted by petitioner and the strong evidence that there was no intent to reserve a power of appointment at the time of the transfer of 418 Applegate Court, it is concluded that the Division's assertion of additional gift tax was proper.

D. Petitioner's reliance on ***Delap v. Leonard (supra)*** is misplaced. Petitioner cited ***Delap*** for the proposition that when there is no mistake about the intent of a grantor, the mistake of a scrivener ought to be corrected. However, in ***Delap***, the grantor's intent was clear from "uncontroverted evidence" and, as discussed above, that was simply not the case herein, where

petitioner has never clearly expressed her intent, but relied on circumstantial evidence which falls well short of establishing it.

For much the same reason, petitioner's reliance on ***Vogel v. City Bank Farmers' Trust Company*** (152 Misc 18, 272 NYS 643) is in error. Unlike the case herein, the plaintiff in ***Vogel*** established his intent through clear and sworn testimony, prompting the judge to proclaim, "I credit the testimony offered on behalf of the plaintiff as persuasive and convincing." Given petitioner's failure to testify or submit an affidavit or other credible and substantive evidence of same, this forum is not moved to make such a proclamation.

E. The petition of Mary Nearey is denied and the Notice of Deficiency, dated July 10, 2000, is sustained.

DATED: Troy, New York
May 1, 2003

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE