

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MICHAEL CHERNOW FAMILY TRUST

DECISION

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York
City Personal Income Tax under Chapter 46,
Title T of the Administrative Code of the City :
of New York for the Fiscal Years Ending June 30,
1980 and June 30, 1981.

Petitioner, Michael Chernow Family Trust, c/o Schapiro, Wisan & Krassner,
P.C., 122 East 42nd Street, New York, New York 10168, filed a petition for
redetermination of a deficiency or for refund of New York State personal income
tax under Article 22 of the Tax Law and New York City personal income tax under
Chapter 46, Title T of the Administrative Code of the City of New York for the
the fiscal years ending June 30, 1980 and June 30, 1981 (File No. 51203).

A hearing was held before Allen Caplowaith, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New York
on October 28, 1986 at 10:45 A.M. Petitioner appeared by Gordon S. Oppenheimer,
Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass,
Esq., of counsel).

ISSUE

Whether the full amount of the annual commissions paid to the trustees of
an intervivos trust **is** subject **to** the modifications increasing Federal adjusted
gross income under Tax Law § 612(b)(5) and Administrative Code § T46-112.0(b)(5).

FINDINGS OF FACT

1. Petitioner, Michael Chernow Family Trust, is an intervivos trust which was created by Michael Chernow on October 27, 1977.

2. Petitioner filed New York State income tax fiduciary returns with City of New York personal income tax for the fiscal years ending June 30, 1980 and June 30, 1981.

3. For the fiscal year ending June 30, 1980, petitioner deducted \$8,235.32 in fiduciary fees. For the fiscal year ending June 30, 1981, petitioner deducted \$7,702.82 in fiduciary fees and \$5,261.02 in attorney fees.

4. On August 26, 1983, the Audit Division issued a Statement of Audit Changes to petitioner which contained the following explanation:

"Under the provisions of Section 612(b)(5), a plus modification is required for expenses paid or incurred during the taxable year for the production or collection of income which is exempt from New York tax.

Modification for Exempt Income - F/Y/E 6/30/80

\$61,166.04 U.S. Int. Obligation/\$90,411.08 Total Income x
\$8,235.32 Fiduciary Fees = \$5,571.46 Modification.

F/Y/E 6/30/81

\$ 81,888.87 U.S. Interest Obligation/\$125,769.20 Total
Income x \$12,963.84 Fiduciary & Other Fees = \$8,440.81
Modification.

Credit is given for an error in computing the 20% of
one-half of net long term capital gain modification (\$21,094.20
x 20% x 50% = \$2,109.42).

Allowance is made for Minimum Income Tax Reduction as a
result of Personal Income Tax Increase."

Additional New York State and New York City taxes totaling \$2,330.64 were asserted for the years at issue.

5. On October 5, 1983, the Audit Division issued a Notice of Deficiency to petitioner for \$2,330.64 in New York State and New York City income taxes for the years 1980 and 1981, plus \$650.33 in interest, for a total of \$2,980.97.

6. Based on additional documentary evidence submitted in connection with the hearing, the Audit Division conceded that the attorney fees of \$5,261.02 deducted in fiscal year 1981 should not have been included in the modification and also agreed that said attorney fees actually were \$6,900.00.¹ It also conceded that petitioner was entitled to a Tax Law § 612(c)(10) modification relating to expenses connected with Federally exempt income subject to New York taxation (e.g., out-of-state municipal bonds).

7. The Audit Division claims that the aforementioned fiduciary fees were subject to the modifications increasing adjusted gross income under Tax Law § 612(b)(5) and Administrative Code § T46-112.0(b)(5). Petitioner concedes that one-half of the fiduciary fees were subject to modification, as they were payable out of income, but that the other half was payable out of principal and thus not subject to modification. Petitioner cites Surrogate's Court Procedure Act § 2309.3 in support of its position.

CONCLUSIONS OF LAW

A. That CPLR § 8005 provides that the trustee of an express intervivos trust shall be entitled to commissions and allowance of expenses and compensation in the same manner and amount as set forth in Article 23 of the Surrogate's Court Procedure Act for testamentary trustees.

1 The reason for this appears to be that the legal expense was attributable to a Federal estate tax matter involving the estate of the settlor of the trust, for which expense petitioner was liable. It *is* noted that no issue as to the attorney fees *is* now before this Commission and we neither approve nor disapprove the concessions made by the Audit Division.

B. That during the years at issue, Surrogate's Court Procedure Act § 2309.2 provided, in pertinent part, that a trustee was entitled to annual commissions at the following rates:

- "(a) \$7.00 per \$1,000 or major fraction thereof on the first \$300,000 of principal.
- (b) \$3.75 per \$1,000 or major fraction thereof on the next \$500,000 of principal.
- (c) \$2.50 per \$1,000 or major fraction thereof on all additional principal."

C. That during the years at issue, Surrogate's Court Procedure Act § 2309.3 provided, in pertinent part, as follows:

- "3. Unless the will otherwise explicitly provides the annual commissions allowed by subdivision 2 shall be payable one-half from the income of the trust and one-half from the principal of the trust."

D. That Tax Law § 612(b)(5) provides that the following modification be made to Federal adjusted gross income:

"There shall be added to federal adjusted gross income:

* * *

- "(5) Expenses paid or incurred during the taxable year for (i) the production or collection of income which is exempt from tax under this article, or (ii) the management, conservation or maintenance of property held for the production of such income ... to the extent that such expenses ... are deductible in determining federal adjusted gross income,"

E. That charging one-half of the annual commissions to income and the other half to principal, as mandated by the Surrogate's Court Procedure Act, does not free the half which is charged to principal from modification under Tax Law § 612(b)(5). While subdivision (i) of section 612(b)(5) applies to expenses directly related to the production or collection of tax exempt income, subdivision (ii) requires modification with respect to expenses paid or incurred for the management, conservation, or maintenance of property held for the

production of such income. Here, the principal of the trust was property held for the production or collection of such income and one-half of the fiduciary fees constituted expenses paid for its management, conservation or maintenance. Accordingly, the full amount of annual commissions are includible in the modification.

F. That, as conceded by the Audit Division, the attorney fees of \$5,261.02 deducted for the fiscal year ending June 30, 1981 are to be increased to \$6,900.00 and will not be included in the section 612(b)(5) modification.

G. That with respect to said section 612(b)(5) modification, that portion of the fiduciary fees attributable to income exempt from New York State Tax is to be added in the New York Fiduciary adjustment as "other additions" in line 3 of Schedule 5 on each return.

H. That as conceded by the Audit Division, that portion of fiduciary fees attributable to interest on state and local bonds issued by governments and municipalities in states other than New York is to be subtracted in the New York fiduciary adjustment as "other subtractions" on line 6 of Schedule 5, pursuant to Tax law § 612(c)(10).


I. That Administrative Code §§ T46-112.0(b)(5) and T46-112.0(c)(10) are virtually identical to Tax Law §§ 612(b)(5) and 612(c)(10). Accordingly, the New York City modifications are to be adjusted to conform to the State modifications.

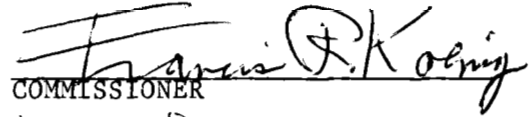
J. That except as granted in Conclusions of Law "F", "G", "H" and "I", the petition is denied and the Notice of Deficiency issued October 5, 1983, is otherwise sustained.

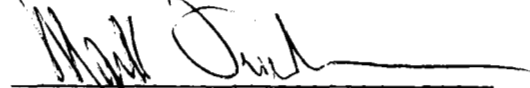
DATED: Albany, New York

STATE TAX COMMISSION

JUN 25 1987


PRESIDENT


COMMISSIONER


COMMISSIONER