

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
GEORGE LEIB (Deceased)

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Gift :
Taxes under Article(x) 26-A of the :
Tax Law for the Year(s) or Period(s) :
Quarter Ended March 31, 1972 :

State of New York
County of Albany

Marsina Donnini, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 15th day of July, 1977, she served the within
Notice of Decision by (certified) mail upon George Leib

(~~representative of~~) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
Mr. George Leib (Deceased)
as follows: c/o Sullivan & Cromwell
48 Wall Street
New York, NY 10005

and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the (~~representative~~
~~of the~~) petitioner herein and that the address set forth on said wrapper is the
last known address of the (~~representative of the~~) petitioner.

Sworn to before me this

15th day of July, 1977.

Marsina Donnini

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
GEORGE LEIB (Deceased)

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For a Redetermination of a Deficiency or :
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of Gift :
Taxes under Article (x) 26-A of the :
Tax Law for the Year (x) or ~~Period~~ (x) :
Quarter Ended March 31, 1972

State of New York
County of Albany

Marsina Donnini, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 15th day of July, 1977, she served the within
Notice of Decision by (certified) mail upon Henry Christensen III

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
Henry Christensen III, Esq.
as follows: Sullivan & Cromwell
48 Wall Street
New York, NY 10005

and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the (representative
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last known address of the (representative of the) petitioner.

Sworn to before me this
15th day of July, 1977

Marsina Donnini

Janet Mad



STATE OF NEW YORK
STATE TAX COMMISSION
TAX APPEALS BUREAU
ALBANY, NEW YORK 12227

July 15, 1977

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

**Mr. George Leib (Deceased)
c/o Sullivan & Cromwell
40 Wall Street
New York, NY 10005**

Please take notice of the **DECISION**
of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section (a) **1007 (b)** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within **4 months** from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


**Paul B. Coburn
Supervising Tax Hearing Officer**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
GEORGE LEIB (Deceased)	:	DECISION
	:	
for a Redetermination of a Deficiency	:	
or for Refund of Gift Tax under	:	
Article 26-A of the Tax Law for the	:	
Quarter Ended March 31, 1972.	:	

Petitioner, George Leib, Deceased, c/o Sullivan & Cromwell, 48 Wall Street, New York, New York 10005, has filed a Petition for Redetermination of a Deficiency or for Refund of a Tax on the Transfer of Property by Gift under Article 26-A of the Tax Law for calendar quarter ended March 31, 1972. A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 3, 1976, at 9:15 a.m. Petitioner appeared by Sullivan & Cromwell (Henry Christensen III, Esq. of counsel). The Miscellaneous Tax Bureau appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq. of counsel).

ISSUE

Whether for the purpose of computing his New York State gift tax liability within the meaning of Section 2513 of the Internal

Revenue Code of 1954, as amended, as incorporated for New York State tax purposes by section 1004 of the New York Tax Law, petitioner was eligible to treat a \$1.5 million gift as made one-half by him and one-half by his spouse.

FINDINGS OF FACT

1. On February 17, 1972, petitioner created a trust under an indenture between himself, as donor, and his sons, Gordon B. Leib, John H. Leib and George Bruce Leib, as trustees. Section "FIRST: (A)" of the indenture provides, in applicable part, as follows:

"The Trustees shall manage, invest and reinvest the trust estate and collect the income thereof, and shall pay to ISABEL HALDEMAN LEIB, wife of the Donor, for her life (or apply for her benefit) so much of the net income (including the whole thereof) as the Trustees shall deem advisable for any purpose whatsoever, other than the discharge of the Donor's legal obligation for her support, without regard to any other income or resources of hers, and shall accumulate and add to the principal of the trust any balance of said net income not so paid or applied. During the continuance of the trust, the Trustees are also authorized to pay to the Donor's wife (or to apply for her benefit) such amounts from the principal of the trust estate (including the whole thereof) as the Trustees shall deem advisable for any reason or purpose whatsoever, other than the discharge of the Donor's legal obligation for her support, without regard to any other income or resources of hers. The determination of the Trustees as to the advisability of making any such discretionary payments (or application) from

income or principal shall be final and binding upon all persons then or thereafter interested in the trust estate."

The corpus of the trust comprised three promissory notes dated February 17, 1972, one note from each of petitioner's sons. Each note acknowledges an indebtedness of \$500,000 to petitioner. Petitioner assigned the three notes, totaling \$1.5 million, by three assignments dated February 17, 1972, to John H. Leib, Gordon B. Leib and George Bruce Leib, as trustees under the indenture.

2. On May 12, 1972, petitioner and Isabel H. Leib (herein, "Mrs. Leib"), each filed a New York State resident quarterly gift tax return for the calendar quarter ending March, 1972. Petitioner and Mrs. Leib elected, under Section 2513 of the Code, to each report one-half of the \$1.5 million gift to the trust as a taxable gift made to third parties for Federal gift tax purposes and for New York gift tax purposes.

3. On May 12, 1975, the Miscellaneous Tax Bureau issued a Notice of Deficiency to petitioner, George Leib, indicating a deficiency of \$59,830.46. The deficiency was based on the Bureau's contention that petitioner's spouse was not eligible to split his gift of \$1.5 million to the trust, as explained in the Bureau's Statement of Audit Changes dated September 28, 1973.

The Bureau's explanation in its Statement of Audit Changes was as follows:

"According to paragraph 1-A of the trust agreement F/B/O Isabel Leib, the trustees may accumulate the income and add it to the principal of the trust. Also, the trustees are authorized to pay to the donor's wife such amounts from the principal of the trust estate (including the whole thereof) as the trustees deem advisable, therefore, the wife is not eligible to split the principal of the trust, Item No. 11, nor is she allowed a marital deduction. A refund will be issued on Isabel Leib's return when this remittance is received."

4. At the formal hearing, both the Bureau and petitioner's representative agreed that the correct amount in dispute is \$20,250.00 plus interest, not \$59,830.46, as stated in the May 12, 1975 Notice of Deficiency.

5. These events led up to the February 17, 1972 indenture.

In 1970, petitioner, George Leib, loaned to John H. Leib, one of his three sons, the sum of \$570,000.00. This loan was made in connection with a number of business ventures of petitioner's son, most of which developed adversely subsequent to 1970. Petitioner later agreed to the restructuring of his son's indebtedness. Petitioner's son repaid petitioner the sum of \$70,000.00, and delivered to petitioner a promissory note dated February 17, 1976, for \$500,000.00. ,

Because he wished to treat each of his three sons equally, petitioner loaned the sum of \$500,000.00 to each of his other two sons, George Bruce Leib and Gordon B. Leib. Each of these two sons executed and delivered to petitioner on February 17, 1972, promissory notes identical with the note delivered to petitioner by his third son, John H. Leib.

Each of the three promissory notes delivered to petitioner by his sons provides that the borrower is to begin repaying his principal indebtedness in 1978. Principal payments of \$37,500.00 are to be made annually on February 1st in each year from 1978 through 1986 and the balance of the principal due, of \$162,500.00, is to be paid on February 1, 1987. Interest on the unpaid principal is payable at the rate of 5% per annum, and is to be paid in quarterly installments beginning on July 1, 1972. The notes are not demand notes and provide that if the borrowers do not default in any of their obligations under the notes, the obligee cannot demand payment of any part of the principal prior to February 1, 1978.

The indenture itself provides that upon the death of Mrs. Leib, one-third of the trust corpus will be held in further trust for each of petitioner's three sons. Upon the death of each son, his one-third interest will be distributed to his children.

6. John H. Leib, the son responsible for supervising the family finances, testified at the formal hearing that Section "FIRST: (A)" of the indenture relating to Mrs. Leib had been placed in the indenture by petitioner as a precaution in case the large sum he was planning to leave Mrs. Leib under his will should lose its value as the result of an economic upheaval. A financier, petitioner had seen fortunes dissipated in the money panic of 1912 and during the 1929 Depression.

7. Mrs. Leib was born on July 11, 1893. On the date the trust was created, she was over 78 years of age.

8. Petitioner, George Leib, died on June 20, 1974. Under the terms of his will dated May 14, 1959, he left one-half of his adjusted gross estate to Mrs. Leib. This bequest had a value for Federal estate tax purposes of \$1,152,245.73. In addition, he bequeathed to Mrs. Leib his cooperative apartment at 71 East 71st Street, where they lived.

9. No income or principal has been distributed to Mrs. Leib under the indenture.

10. The Internal Revenue Service accepted the Federal gift tax returns as filed by petitioner and by Mrs. Leib. (No closing letter was received, however.) The statute of limitations on assessment and collection has expired.

CONCLUSIONS OF LAW

A. That section 2513 of the Internal Revenue Code of 1954, as amended, allows gifts made by a taxpayer to any person other than his spouse to be considered as made one-half by him and one-half by his spouse. Section 2513 is incorporated for New York tax purposes by section 1004 of the New York Tax Law.

B. That where the gift is by one spouse in part to his spouse and in part to third parties, the gift-splitting provisions are only available to the part going to the third party and only if that part of the gift is ascertainable at the time of the gift, and hence severable from the gift made to the spouse. Section 25.2513-1(b)(4), Federal Gift Tax Regulations.

C. That the question which arises is whether the power to invade the income and/or principal was absolute or was limited by certain ascertainable standards by which the possibility or prohibition of invasion could be measured or stated in definite terms of money. Ithaca Trust Co. v. United States, 279 U.S. 151 (1929). Cases on this point have arisen mainly where it was necessary to determine whether a power given to a trustee to invade the principal of a trust for the benefit of a life tenant made the bequest of the remainder to a charity so indefinite as to render it impossible to ascertain the value of such bequest

for purposes of a charitable deduction. The Tax Court, however, stated in Andrew Geller, 9 T.C. 487 (1947), that "There appears no logical distinction between cases involving deduction of charitable bequests, and one, as here, involving gifts, for the question is whether values can be ascertained."

D. That section "FIRST: (A)" of the indenture dated February 17, 1972, authorizes the trustees, during Mrs. Leib's life, to pay net income to her, or apply net income for her benefit, "for any purpose whatsoever ... without regard to any other income or resources of hers" The trustees are also authorized, during Mrs. Leib's life, to pay principal to her, or apply principal for her benefit, "for any reason or purpose whatsoever ... without regard to any other income or resources of hers." As to both net income and principal, the trustees' authority is limited by these words of the indenture: Payments may be made for any purpose whatsoever, "other than the discharge of the Donor's legal obligation for her support" Under New York law, a husband has an obligation to support his wife in a manner fully commensurate with his status in life and the style to which she has become accustomed, Grishaven v. Grishaven, 225 N.Y.S. 2d 924 (1962). Given petitioner's considerable wealth, his legal obligation for Mrs. Leib's support extends well beyond

the necessities of life to things most people would consider luxuries. Trust funds not being available for the discharge of petitioner's legal obligation to support Mrs. Leib, a standard exists for ascertaining that part of the \$1.5 million gift going to third parties.

E. That if the possibility of a distribution being made to the spouse is so remote as to be negligible, then the entire gift in question is to third parties. Sands G. Falk, 24 TCM 86, Dec. 27, 235(M), T.C. Memo 1965-22. This is the situation in the present case. Mrs. Leib was over 78 years of age at the time the trust was created. The bequest to her under petitioner's will had a value for Federal estate tax purposes of \$1.1 million. There is testimony that petitioner included her in the indenture only as a precaution against national economic upheaval.

F. The petition of George Leib, Deceased, is granted. The Notice of Deficiency dated May 12, 1975, is cancelled.

DATED: Albany, New York
July 15, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER