

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Melvin J. Berg :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Gift Tax under :
Article 26A of the Tax Law for the Period Ending :
March, 1973. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Melvin J. Berg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Melvin J. Berg
15 Roosevelt St.
Tappan, NY 10983

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
21st day of October, 1983.

Connie A. Hagelund

Patricia Kupcheni

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 21, 1983

Melvin J. Berg
15 Roosevelt St.
Tappan, NY 10983

Dear Mr. Berg:

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(s) 690 & 1007 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 Law 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:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MELVIN J. BERG	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Gift Tax under Article 26-A of the	:	
Tax Law for the Period Ending March, 1973.	:	

Petitioner, Melvin J. Berg, 15 Roosevelt Street, Tappan, New York 10983, filed a petition for redetermination of a deficiency or for refund of gift tax under Article 26-A of the Tax Law for the period ending March, 1973 (File No. 28070).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 20, 1983 at 1:15 P.M. Petitioner, Melvin J. Berg, appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitioner's transfer of real property to his wife was a gift for New York gift tax purposes.

FINDINGS OF FACT

1. On September 20, 1978, the Audit Division issued a Notice of Deficiency against petitioner alleging a gift tax deficiency for the taxable quarter ending March, 1973 of \$1,000.00 plus penalty and interest.
2. On October 24, 1979, the Audit Division issued a Statement of Audit Changes against petitioner alleging a gift tax deficiency for the taxable

quarter ending March, 1973 of \$1,337.25 plus penalty and interest. The following explanation was provided:

"Our files indicate you made a gift to Ceil Gloria Berg on January 5, 1973.

We have computed the tax liability on the basis of the assessed value and the New York State equalization rate. Unless you submit proof which would allow us to adjust the taxable gift, this assessment is due. Penalty and interest have been added due to late filing."

3. In its answer to the petition herein, the Audit Division reduced the alleged gift tax deficiency to \$279.86 based on the following recalculation:

Gross valuation		\$76,100.00
Less mortgage		<u>32,785.00</u>
Net Valuation		\$43,315.00
Less: marital deduction	\$21,657.50	
exclusion	<u>3,000.00</u>	<u>-24,657.50</u>
Taxable Balance		\$18,657.50
Gift Tax (.015)		\$ 279.86
Interest to Nov. 15, 1982		<u>221.26</u>
		\$ 501.12

4. Petitioner and his wife, Ceil Gloria Berg, owned their home at 15 Roosevelt Street as tenants by the entirety prior to petitioner's transfer of his interest in the property on January 5, 1973 to his wife. At the time of the hearing, petitioner's wife was still the sole owner of record of the house.

5. Petitioner entered into a business deal in which he incurred personal liability on bonds and notes. Petitioner testified, "I conveyed my share of the property at Roosevelt Street to my wife for the sole purpose of protecting it against what might happen in this business transaction." Petitioner argued that since the reason for the transfer was to protect his property from creditors, it was not a gift.

CONCLUSIONS OF LAW

A. That Tax Law §1009 conforms New York State gift tax provisions to the gift tax provisions of the United States Internal Revenue Code of 1954, as amended.

B. That Treas. Reg. §25.2511-1(g)(1) provides as follows:

"Donative intent on the part of the transferor is not an essential element in the application of the gift tax to the transfer. The application of the tax is based on the objective facts of the transfer and the circumstances under which it is made, rather than on the subjective motives of the donor..."

C. That donative intent is not required to make a transfer taxable under the federal gift tax laws.

"Congress chose not to require an ascertainment of what too often is an elusive state of mind. For purposes of the gift tax it not only dispensed with the test of 'donative intent'. It formulated a much more workable external test, that where 'property is transferred for less than an adequate and full consideration in money or money's worth,' the excess in such money value 'shall, for the purpose of the tax imposed by this title, be deemed a gift...'.
Commissioner v. Wemyss, 324 U.S. 303, 306 (1945).

Therefore, it is of no matter that petitioner's purpose for transferring his interest in the real property was to protect the house from claims of creditors. Matter of Joseph Curcio, State Tax Commission, March 26, 1982. Rather, it is of consequence that petitioner transferred his ownership interest in the house to his wife for no consideration in money or money's worth.

D. That the transfer of petitioner's interest in the real property was subject to gift tax within the meaning and intent of Tax Law §1001.

E. That the Audit Division is directed to amend the Notice of Deficiency to conform to Finding of Fact "3", supra, and the penalty for late filing is cancelled.

F. That the petition of Melvin J. Berg is granted to the extent noted in Conclusion of Law "E", supra; and that, except as so granted, the petition is in in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 21 1983

Rodolph W. Cline
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. J. J.
COMMISSIONER