

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Joseph Curcio :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Gift Tax under
Article 26-A of the Tax Law for the Quarter Ending :
3/31/73.

State of New York
County of Albany

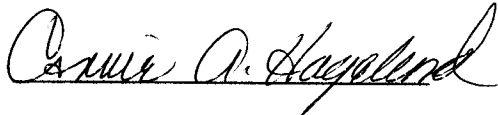
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of March, 1982, he served the within notice of Decision by certified mail upon Joseph Curcio, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

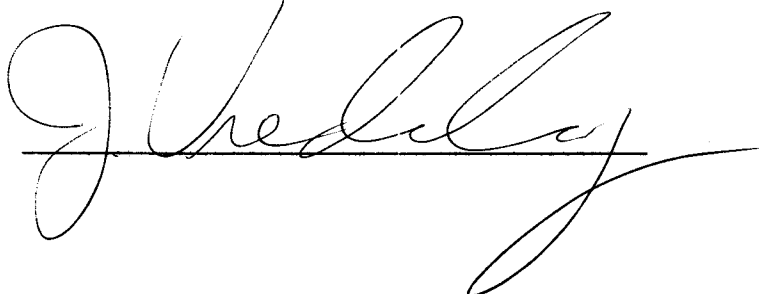
Joseph Curcio
c/o Herman E. Dworkind
177 Main St.
Huntington, NY 11743

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
26th day of March, 1982.


Edwin A. Hagelund


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Joseph Curcio :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Article 26-A of the Tax Law for the Quarter Ending:
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State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of March, 1982, he served the within notice of Decision by certified mail upon Herman E. Devorkind the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herman E. Devorkind
177 Main St.
Huntington, NY 11743

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
26th day of March, 1982.

Annie A. Hagelund

J. Vredenburg

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

March 26, 1982

Joseph Curcio
c/o Herman E. Dworkind
177 Main St.
Huntington, NY 11743

Dear Mr. Curcio:

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) 1007b 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:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Herman E. Devorkind
177 Main St.
Huntington, NY 11743
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOSEPH CURCIO
for Redetermination of a Deficiency or for
Refund of Gift Taxes under Article 26-A of
the Tax Law for the Quarter Ending March 31,
1973.

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DECISION
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Petitioner, Joseph Curcio, c/o Herman E. Dworkind, 177 Main Street, Huntington, New York 11743, filed a petition for redetermination of a deficiency or for refund of gift tax under Article 26-A of the Tax Law for the calendar quarter March 31, 1973 (File No. 10421).

A formal hearing was held before Harry Issler, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 27, 1977 at 9:15 A.M. Petitioner appeared by Herman E. Dworkind. The Audit Division appeared by Peter J. Crotty, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the transfer, without consideration, of title to the home owned jointly by petitioner and his wife, to his wife individually, constitutes a gift subject to the imposition of New York gift tax.

FINDINGS OF FACT

1. On July 16, 1975 the Audit Division issued a Statement of Audit Changes to petitioner, Joseph Curcio, for the quarter ended March 31, 1973. Said Statement provided, in part, as follows: "Intention is not a prerequisite to the making of a gift. A gift was made to the extent of the full value of

the property. The property value has been computed to be \$66,100.00".

Thereafter, the Audit Division issued a Notice of Deficiency against petitioner on September 30, 1975 for \$450.75 in gift tax, plus penalty and accrued interest, for a total of \$606.27 due as of the date of the Notice.

2. A deed dated March 15, 1973 between Joseph Curcio, as grantor, and Florence C. Curcio, as grantee, recorded in the Office of the Clerk of the County of Suffolk on April 9, 1973, in liber 7375, page 338, reflected the conveyance of the house at 30 St. Andrews Drive, Huntington, New York, without consideration. Prior to this transfer to petitioner's wife, petitioner and his wife held title by a joint deed to the said real property in question.

3. Petitioner was the president (and one-third owner) of a printing business, known as Grio Press, Inc. ("Grio"), located at 270 Lafayette Street, New York City.

4. Petitioner contends that at the time he delivered the deed to his wife, he never intended to make a gift. Petitioner maintains that he transferred title to his wife so as to protect the house from claims of creditors of Grio.

5. Petitioner alleges that both he and his wife had orally agreed that once Grio's financial problems were settled, the wife would transfer said property to both their names. At the time of the hearing, petitioner's wife was still the sole owner of record of the house.

6. Petitioner asserted that the house was purchased with moneys belonging to both his wife and himself; and that his wife worked part-time.

7. Petitioner failed to put into the record any clarification or proof establishing how much money had been contributed by his wife toward the purchase price of the house.

8. The Audit Division issued a Statement of Deficiency and a Notice of Deficiency (IT-90) on May 23, 1977 to petitioner for \$1,814.50 - the penalty imposed against petitioner as an officer of Grio. The amount of the penalty was measured by the withholding tax of \$1,814.50 Grio had collected but not paid over to the State of New York for the period January 1 through June 30, 1973. Mr. Curcio asserted at the hearing that as far as he knew these withholding taxes had been paid.

CONCLUSIONS OF LAW

A. That the requisites necessary to constitute a valid gift for purposes of Federal taxation have been defined as follows:

"...a gift is an irrevocable complete transfer, without adequate or full consideration, by a donor, competent to make a gift, and clearly and unmistakably intended to divest the donor of title, dominion and control over property subject to being transferred, to a donee capable of accepting a gift or to someone acting as a trustee or agent for the donee capable of accepting it." Talge v. United States, 229 F. Supp. 836 (W.D. Mo. 1964) at 848.

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

C. That Treas. Reg. section 25.2511-1(g)(1) provides, in pertinent part:

"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..."

Therefore, the contention of the petitioner that subjectively he had not intended to make a gift when he transferred the said real property to his wife is not persuasive.

"When one intends the facts to which the law attaches consequences, he must abide the consequences whether intended or not." (Texas v. Fla. (1939) 306 U.S. at 425).

D. That donative intent is not required to make a transfer taxable under the Federal gift tax laws. In Commissioner v. Wemyss, 324 U.S. 303 (1945), the Supreme Court stated:

"For purposes of the gift tax it (Congress) 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..." (324 U.S. at 306).

E. That the gift tax is imposed on the transfer of property by gift, and there is a completed gift only when the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit, or for the benefit of another. (Treas. Reg. 25.2511-2(b)).

Petitioner's wife acquired the real property without consideration on March 15, 1973. This is a completed gift since Joseph Curcio parted with dominion and control of the said real property; and, thus, the transfer is subject to gift tax within the meaning and intent of section 2501 of the United States Internal Revenue Code of 1954, Treas. Reg. 25.2511-2 and section 1001 of the Tax Law of New York.

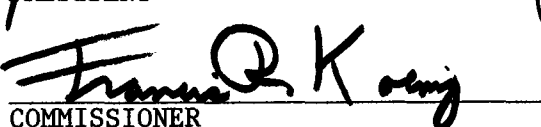
F. That the petition of Joseph Curcio is denied and the Notice of Deficiency issued September 30, 1975 is sustained.

DATED: Albany, New York

MAR 26 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER