

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Tempa E. Dyruff : AFFIDAVIT OF MAILING
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 Ended :
12/72.

State of New York
County of Albany

David Parchuck, 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Tempa E. Dyruff, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Tempa E. Dyruff
14 Winnebago Rd.
Yonkers, NY 10710

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
11th day of February, 1983.

David Parchuck

James A. Highland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Tempa E. Dyruff : AFFIDAVIT OF MAILING
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 Ended :
12/72.

State of New York
County of Albany

David Parchuck, 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Nicholas F. Dyruff the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicholas F. Dyruff
14 Winnebago Rd.
Yonkers, NY 10710

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
11th day of February, 1983.

David Parchuck

Conrad A. Sklar

**AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174**

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

February 11, 1983

Tempa E. Dyruff
14 Winnebago Rd.
Yonkers, NY 10710

Dear Ms. Dyruff:

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) 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:

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
Nicholas F. Dyruff
14 Winnebago Rd.
Yonkers, NY 10710
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
TEMPA E. DYRUFF
for Redetermination of a Deficiency or for
Refund of Gift Tax under Article 26-A of the
Tax Law for the Quarterly Period Ended
December, 1972.

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DECISION

Petitioner, Tempa E. Dyruff, 14 Winnebago Road, Yonkers, New York 10710, filed a petition for redetermination of a deficiency or for refund of gift tax under Article 26-A of the Tax Law for the quarterly period ended December, 1972 (File No. 28072).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 23, 1982 at 9:15 A.M. Petitioner appeared by her spouse, Nicholas F. Dyruff, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna D. Colello, Esq., of counsel).

ISSUES

I. Whether petitioner made gifts on November 4, 1972 of two parcels of real property.

II. If so, what the proper amount of the gifts was.

FINDINGS OF FACT

1. On March 27, 1978, the Audit Division issued to petitioner, Tempa E. Dyruff, a Notice of Deficiency asserting gift tax due under Article 26-A of the Tax Law for the quarterly period ended December, 1972, in the amount of \$1,000.00, plus penalties of \$250.00 and interest.

On June 22, 1977, the Audit Division had issued to petitioner a Statement of Audit Changes, proposing tax, penalties and interest in the same amounts and offering the following explanation therefor:

"Our files indicate you made a gift to Rita Teal and Raymond Maggi on 11/4/72. We have not received an answer to our letter advising you of possible gift tax liability. Unless you submit proof which would allow us to adjust the taxable gift, this estimated assessment is due."

The Audit Division estimated the tax based upon adjusted taxable gifts in the amount \$61,111.00.

2. The subject of the alleged gifts upon which tax was asserted consisted of two parcels of real property in the city of Yonkers: 1275 Saw Mill River Road (block 2404, lots 19 and 20) and 351 Saw Mill River Road (block 3313, lots 1 through 15).

3. Prior to April, 1968, Mr. Morris Maggi owned the two parcels, which were encumbered by mortgages held by the First National Bank in Yonkers. Due to Maggi's precarious financial condition, the bank threatened foreclosure. However, a bank officer suggested that if Maggi conveyed to someone more credit-worthy, the bank would consider renewing the loan.

4. Maggi enlisted the help of Nicholas Dyruff, spouse of petitioner herein. Mr. Dyruff testified, "My assistance [to Maggi] was only because he was a valued employee...". Mr. Dyruff proposed to the bank that petitioner, who had a "golden eagle" passbook account with the bank, take title to the properties and sign the bond and mortgage. The bank accepted this arrangement but insisted that in addition, Mr. Dyruff sign a collateral bond.

5. In April, 1968, Maggi conveyed title to the parcels to petitioner; petitioner paid no consideration therefor. Mrs. Dyruff signed the mortgage and bond in the face amount of approximately \$60,000.00; Mr. Dyruff signed a

collateral bond as demanded by the bank. And petitioner agreed, in writing, to reconvey the parcels after Maggi completed payment on the mortgage. (Petitioner was unable to produce the agreement; apparently all copies had been destroyed or mislaid.) Maggi made such payments directly to the bank.

6. Petitioner maintains that she had nothing whatsoever to do with the properties but functioned merely as a "stakeholder".

7. Mr. Maggi died on August 17, 1972. The attorney representing his estate asked petitioner to return the deeds in accordance with her agreement. On November 4, 1972, petitioner conveyed the parcels to Raymond Maggi and Rita (Maggi) Teal, Morris Maggi's children. The Audit Division alleges that no consideration was paid. The balance owed on the First National Bank mortgage at the time of the reconveyance was approximately \$42,000.00.

8. The Audit Division estimated the amount of adjusted taxable gifts because of petitioner's failure to respond to two requests, dated September 24, 1974 and March 6, 1975, to file a gift tax return and pay the gift tax due. The estimate was founded upon an assessment of an apartment building located at 14 Winnebago Road, Yonkers, owned by petitioner and her spouse.

On or about June 28, 1977, Mr. Dyruff sent a letter to the Audit Division, via certified mail, explaining the circumstances of the alleged gifts. The Audit Division never received the letter.

9. Petitioner introduced the following evidence regarding the value of the two parcels:

(a) a contract for the sale of the 1275 Saw Mill River Road property by Raymond Maggi and Rita Teal on March 23, 1973 for \$30,000.00;

(b) Mr. Dyruff's testimony that the 351 Saw Mill River Road property was sold for \$50,000.00, with \$30,000.00 allocated to the real estate and \$20,000.00 allocated to the furniture, fixtures, equipment, etc.

10. In preparation for the hearing, a tax auditor employed by the Audit Division examined the real estate records relating to the two parcels, and found a purchase money mortgage to petitioner on the 351 Saw Mill River Road parcel in the amount of \$19,770.00, given at the time of her conveyance of said parcel to Raymond Maggi and Rita Teal.

CONCLUSIONS OF LAW

A. That section 1001 of Article 26-A of the Tax Law imposes gift tax upon the transfer of property by gift during each calendar quarter (commencing with the first calendar quarter of 1972) by any individual, resident or nonresident. The New York gifts of a resident donor are "the total amount of gifts made in any calendar quarter within the meaning of section two thousand five hundred three of the internal revenue code...", less any gifts of real or tangible personal property having an actual situs outside this state. Section 1003(a)(1).

B. That the requisite elements of a valid inter vivos gift are donative intent, delivery of the subject matter and acceptance by the donee. E.g., Matter of Estate of Cristo, 86 A.D.2d 700 (3d Dept.). With regard to the first element, the donor must intend to part absolutely with the ownership of what is given. 25 N.Y. JUR. Gifts §13 (1962). Accord Treas. Reg. §25.2511-1(g). In the matter at hand, petitioner was merely the transferee in 1968 of bare legal title, as a trustee, stakeholder or straw man. When she reconveyed the two parcels to Morris Maggi's children in 1972, in accordance with her agreement (see Finding of Fact "5"), the transfer was not a gift and thus, no gift tax is due.

C. That the petition of Tempa E. Dyruuff is granted, and the Notice of Deficiency issued on March 27, 1978 is cancelled.

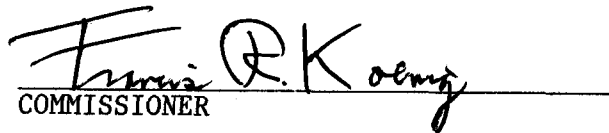
DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION

ACTING PRESIDENT




COMMISSIONER

COMMISSIONER