

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

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

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

May 6, 1983

D. Stewart Gardner
RD 2
Hudson, NY 12534

Dear Mr. Gardner:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
D. STEWART GARDNER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Gift Tax under Article 26-A of the	:	
Tax Law for the Quarter Ending June 30, 1973.	:	

Petitioner, D. Stewart Gardner, RD2, Hudson, New York 12534, filed a petition for redetermination of a deficiency or for refund of gift tax under Article 26-A of the Tax Law for the quarter ending June 30, 1973 (File No. 29400).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York on August 9, 1982 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

- I. Whether a conveyance of realty by petitioner to his brother constituted a taxable gift.
- II. Whether the assessment of gift tax is barred by the statute of limitations.

FINDINGS OF FACT

1. On January 21, 1980, the Audit Division issued to petitioner, D. Stewart Gardner, a Notice of Determination asserting a deficiency in gift tax for the quarter ended June 30, 1973 in the amount of \$906.38, plus penalty and interest.
2. On January 21, 1980, the Audit Division also issued to petitioner a Statement of Audit Changes explaining the above-asserted deficiency as follows:

"[t]his is to revise the statement of audit changes dated October 11, 1979. Transfer of one-half interest in real property to Clarence M. Gardner on April 20, 1973. The market value is \$119,900.00 based on the appraisal by Samuel T. Wheeler dated September 25, 1973 and submitted for the estate of Clarence M. Gardner. One annual exclusion allowed. Penalty and interest are for late filing."

The tax asserted as due was computed upon an adjusted taxable gift of \$56,950.00 (one-half of the value of the property less the annual exclusion of \$3,000.00).

3. The subject matter of the asserted gift is real property, specifically a farm located in the town of Greenport, Columbia County, New York, consisting of 146 acres of land with a residence as well as several other buildings situated thereon. This property was devised to petitioner and to his brother, Clarence Gardner, in equal shares upon the death of their father, Andrew M. Gardner, in 1961. The appraisal of the farm, based on an affidavit in Surrogate's Court, Columbia County, dated May, 1963, stated that the fair market value of the property in 1961 was \$26,000.00.

4. Petitioner stated that he and his brother attempted to farm the land for approximately two years, but were unsuccessful and "...barely reaped a living therefrom". Thereafter, in or about 1963, petitioner and his brother agreed that petitioner would convey his one-half interest in the property to his brother in return for \$10,000.00 and his brother's assumption of the debts of the farm.

5. The above agreement was not consummated for approximately ten years, assertedly because of petitioner's brother's inability to accumulate the necessary \$10,000.00 sum.

6. On April 20, 1973, petitioner conveyed his one-half interest in the property to his brother, with the deed being recorded on July 3, 1973. Also on April 20, 1973, petitioner's brother (and petitioner's brother's wife Dorothy)

conveyed back to petitioner twelve acres of the property having an estimated fair market value of \$3,300.00.

7. Petitioner's brother died on August 31, 1973, and according to the Order of the Surrogate's Court, Columbia County, in the Matter of the Estate of Clarence Gardner, the appraisal of the entire property (including the twelve acres previously conveyed back to petitioner) by Samuel T. Wheeler, a licensed real estate broker, placed the fair market value of the property at \$119,900.00.

8. Following petitioner's brother's death, petitioner commenced a lawsuit against his brother's surviving spouse and son in order to collect the \$10,000.00 sum owed to petitioner in connection with the above transfer of his one-half interest in the property. This lawsuit was settled when petitioner was paid \$3,000.00 in cash, and agreed to take the remaining balance due of \$7,000.00 in the form of a promissory note payable over a period of years.

9. In addition to the \$10,000.00 sum, petitioner's brother had also agreed to assume (upon transfer of petitioner's interest) all debts of the property, including a mortgage held by the Farm Credit Bureau of Springfield as well as certain debts owed for dairy feed and for machinery.

10. Testimony at the hearing by Mr. Hans R. Scheyer of the Audit Division detailed adjustments to the amount of the asserted taxable gift, made in cognizance of the foregoing facts, as follows:

One-half of appraised fair market value of property as the taxable gift	\$59,950.00
Less: estimated fair market value of 12 acres conveyed back	(3,300.00)
Less: agreed sum payable upon petitioner's conveyance	(10,000.00)
Less: petitioner's ($\frac{1}{2}$) share of debts assumed upon conveyance	(2,900.00)
Equals: Adjusted Taxable Gift	<u>\$43,750.00</u>
Tax Due	\$ 656.25
Interest (8/15/73 - 8/9/82)	509.24
Revised Total Due	<u>\$ 1,165.49</u>

These calculations did not reflect the annual exclusion of \$3,000.00 as allowed originally in the Statement of Audit Changes (see Finding of Fact "2"), nor any revised computation of the penalty asserted as due.

11. Petitioner filed no gift tax return nor did he otherwise report any gift in conjunction with the transactions described herein. Petitioner asserts that the transaction was a business deal, that no gift was intended and that the valuation of the property (and thus of the asserted gift) was overstated. Petitioner offered no evidence at the hearing to establish a different fair market value for the property.

CONCLUSIONS OF LAW

A. That since no gift tax return was filed the tax may be assessed at any time, and thus the deficiency asserted herein is not barred by operation of the statute of limitations [Tax Law section 683(c)(1)(A); made applicable pursuant to Tax Law section 1007(b)].

B. That pursuant to section 1009 of the Tax Law, sections 2512(a) and 2512(b) of the Internal Revenue Code of 1954 (as amended) are among those sections of the Code specified as applicable in the determination of New York gift tax under Article 26-A of the Tax Law. Sections 2512(a) and 2512(b) of the Internal Revenue Code provide:

"If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift".

"Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift,...".

C. That the facts presented indicate petitioner received less than full consideration in money or money's worth in return for the conveyance of his interest in the property at issue. Since petitioner has produced no evidence

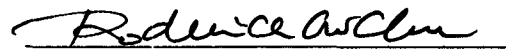
indicating any fair market valuation for the property different from that shown on the appraisal made at the time of petitioner's brother's death, said value must be accepted. However, the amount of the adjusted taxable gift is to be reduced to \$40,750.00, in accordance with the calculations specified in Finding of Fact "10" and to reflect (in addition to these calculations) an allowance for the \$3,000.00 annual exclusion.

D. That the petition of D. Stewart Gardner is granted to the extent specified by Conclusion of Law "C". That the Audit Division is hereby directed to recompute the Notice of Determination dated January 21, 1980 in accordance with this decision, and said Notice, as recomputed, together with such minimum statutory interest and penalty as may be owing, is sustained.

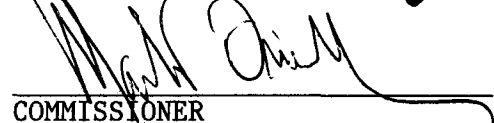
DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER