

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Evelyn Rubenstein : 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 :
December, 1977. :

State of New York
County of Albany

Kathy Pfaffenbach, 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 24th day of January, 1983, she served the within notice of Decision by certified mail upon Evelyn Rubenstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Evelyn Rubenstein
10000 Brunswick Ave.
Silver Spring, MD 20910

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
24th day of January, 1983.

Janice Q. Haglund

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
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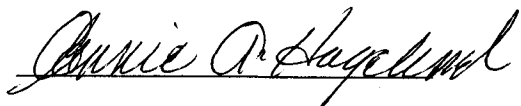
Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Theodore Harris the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

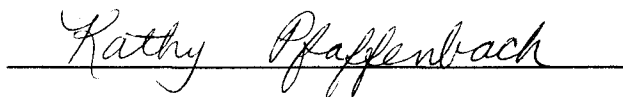
Theodore Harris
51 Madison Ave.
New York, NY 10010

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
24th day of January, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

January 24, 1983

Evelyn Rubenstein
10000 Brunswick Ave.
Silver Spring, MD 20910

Dear Ms. Rubenstein:

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
Theodore Harris
51 Madison Ave.
New York, NY 10010
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
EVELYN RUBENSTEIN
for Redetermination of a Deficiency or for
Refund of Gift Tax under Article 26-A of the
Tax Law for the Quarter Ending December, 1977.

DECISION

Petitioner, Evelyn Rubenstein, 1000 Brunswick Avenue, Silver Spring, Maryland 20910, 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 December, 1977 (File No. 29399).

Petitioner filed a waiver of formal hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether the entire corpus of a trust was subject to gift tax where the trust income was payable toward the education of petitioner's grandchildren with the excess payable to petitioner at the sole discretion of the trustee.

FINDINGS OF FACT

1. Petitioner, Evelyn Rubenstein, filed a New York State Resident Quarterly Gift Tax Return for the quarter ending December, 1977.
2. On January 7, 1980, the Audit Division issued a Notice of Determination of Gift Tax Due against petitioner in the amount of \$1,628.26, plus interest of \$263.53, for a total of \$1,891.79. A Statement of Audit Changes issued November 28, 1979 indicated that the reason was the disallowance of the

exclusion of the life interest of the petitioner from the taxable corpus of a trust created by her.

3. On November 18, 1977, petitioner (a New York resident at the time) created an inter vivos trust naming her son, Martin Rubenstein, as trustee. The trust provided that during petitioner's lifetime, the net income from the trust was to be used to pay education expenses of the issue of petitioner's son in amounts to be determined at the sole discretion of the trustee. Any trust income in excess of said education expenses was to be paid to petitioner at least annually. Upon petitioner's death, the principal of the trust was to be paid to petitioner's son, if living, otherwise to the son's issue per stirpes.

4. The trust was irrevocable; petitioner could not change the beneficiaries, nor did she have any control over the amount of trust income to be paid to her. The trust instrument did not specify nor did petitioner have authority to designate the level of education to which the income was to be applied.

5. Petitioner maintained that because she was 68 years old and her grandchildren were all pre-teenagers at the time the trust was created, the possibility of incurring educational expense on behalf of the grandchildren would not arise for ten years. As a result, petitioner asserted, she would have sole use of the income for a substantial portion of her remaining life. The trust, however, did not provide that the income for education could only be paid out when the grandchildren reached a certain age or level of education. The trustee was given the power to immediately begin using trust income for educational purposes.

CONCLUSIONS OF LAW

A. That if a trust agreement specifies that income distributions are to be made to the grantor in amounts to be decided at the sole discretion of the

trustee with no enforceable standard provided and the donor of the trust 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, there has been a gift of the entire property and not merely of the remainder interest (Herzog v. Commissioner of Internal Revenue, 116 F.2d 591 [2d. Cir. 1941]; Outwin v. Commissioner of Internal Revenue, 76 T.C. 153, 162; Treas. Reg. section 25.2511-2(b)).

B. That inasmuch as petitioner gave the trustee absolute discretion as to amounts of trust income to be used for the grandchildren's educational expenses, petitioner so parted with dominion and control over the trust as to make a complete gift of the entire property. The ages of petitioner and her grandchildren are immaterial in that the power to distribute income for education arose immediately with the creation of the trust and was not dependent on age or educational level.

C. That the petition of Evelyn Rubenstein is denied and the Notice of Determination of Gift Tax Due issued January 7, 1980 is sustained.

DATED: Albany, New York

JAN 24 1983

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER