

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Henry Schwartz :
and Pari Schwartz : 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 Quarter Ending :
12/31/76.

State of New York
County of Albany

Connie Hagelund, 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 29th day of June, 1983, she served the within notice of Decision by certified mail upon Henry Schwartz, and Pari Schwartz the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Henry Schwartz
and Pari Schwartz
158 W. Shore Rd.
Kings Point, NY 11024

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
29th day of June, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Henry Schwartz :
and Pari Schwartz :

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 Quarter Ending :
12/31/76.

State of New York
County of Albany

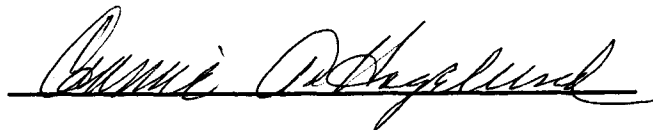
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of June, 1983, she served the within notice of Decision by certified mail upon Stephen J. Schwartz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen J. Schwartz
Alfred Sperber & Co.
3000 Marcus Ave.
Lake Success, NY 11042

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
29th day of June, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

June 29, 1983

Henry Schwartz
and Pari Schwartz
158 W. Shore Rd.
Kings Point, NY 11024

Dear Mr. & Mrs. Schwartz:

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: Petitioner's Representative
Stephen J. Schwartz
Alfred Sperber & Co.
3000 Marcus Ave.
Lake Success, NY 11042
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HENRY SCHWARTZ and PARI SCHWARTZ	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Gift Tax under Article 26-A of the Tax	:	
Law for the Quarter Ending December 31, 1976.	:	

Petitioners, Henry Schwartz and Pari Schwartz, 158 W. Shore Road, Kings Point, New York 11024, 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 31, 1976 (File Nos. 28459 and 31847).

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 January 18, 1983 at 9:30 A.M. Petitioners appeared by Alfred Sperber & Co., C.P.A.'s (Stephen J. Schwartz, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly valued gifts of stock in a closely-held milk distribution company for gift tax purposes.

FINDINGS OF FACT

1. Petitioners, Henry Schwartz and Pari Schwartz, each timely filed a separate Form MT-730, New York State Resident Quarterly Gift Tax Return, for the calendar quarter ending December, 1976 showing no New York taxable gifts. They reported gifts of twenty-two shares of common stock of Nassau-Suffolk Milk Corporation to each of their children, Darius Schwartz and Cyrus Schwartz. Petitioners valued each share of common stock in the company at \$251.82 based

upon its book value less 32.49 percent and reported a total gift of \$5,540.00 to each of their children. Since petitioners chose to have their gifts considered as having been made one-half by each of them, they applied a \$6,000.00 annual exclusion against each gift which resulted in no New York taxable gift.

2. On April 24, 1979, the Audit Division issued a Statement of Audit Changes against petitioner Henry Schwartz showing an alleged gift tax deficiency of \$345.34 plus interest. The following explanation was provided:

"The market value of Nassau-Suffolk Milk Corp. is adjusted to \$1,465.80 per share based on average earnings for five years capitalized at 10 percent. Gifts of 44 shares is adjusted to \$64,495.20. Gift splitting, two annual exclusions and a discount of 10 percent due to lack of marketability have been allowed..."

On the same day, a similar Statement of Audit Changes was issued against petitioner Pari Schwartz.

3. On September 24, 1979, the Audit Division issued a Notice of Deficiency against petitioner Henry Schwartz showing a gift tax deficiency of \$345.34 plus interest for the taxable quarter ending December 1976. On the same day, a similar Notice of Deficiency was issued against petitioner Pari Schwartz.

4. Petitioners contend that the capitalization of earnings valuation method used by the Audit Division does not result in a true value for the stock of Nassau-Suffolk Milk Corporation which is a closely held family corporation engaged in a highly specialized business.

5. Nassau-Suffolk Milk Corporation's sole business is the distribution of milk to school districts. Its business is highly competitive, and the company must submit annual bids to various school districts. One of its major customers is the Sachem Central School District in Holbrook, New York. In the year following the quarter at issue, the company lost its contract with this customer which according to petitioners demonstrates the riskiness of the business.

6. For its fiscal years ending August 31, 1972, August 31, 1973, August 31, 1974, August 31, 1975 and August 31, 1976, Nassau-Suffolk Milk Corporation had net income [loss] of \$15,527.00, \$30,827.00, [\$2,407.00], \$20,770.00 and \$48,150.00, respectively. The average net income for the five years was \$22,573.40 with average net income per share of \$146.58.¹

7. At the hearing herein, petitioners submitted comparative financial information concerning certain publicly traded corporations in the milk industry including Sunnydale Corporation, Inc.; Crowley Foods, Inc.; Dellwood Foods, Inc.; and Penn Daries, Inc. These companies had net income per share of \$36.24, \$.52, \$1.59 and \$1.14; market value per share of \$35.00, \$4.50, \$7.375 and \$4.50; multiples of earnings of .97, 8.65, 4.64 and 3.95; book value per share of \$174.82, \$7.81, \$19.87 and \$16.36; and percentage of market value to book value of 20 percent, 58 percent, 37 percent and 27.5 percent, respectively.

CONCLUSIONS OF LAW

A. That Tax Law §1009 provides that the gift tax provisions of the Internal Revenue Code shall apply to the determination of New York gift tax to the extent specified in Article 26-A of the Tax Law. I.R.C §2512(a) provides that if a gift is made in property, the value thereof on the date of the gift shall be considered the amount of the gift.

B. That, in general, the value of "property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under a compulsion to buy or to sell, and both having reasonable

¹ During the quarter at issue, there were 154 shares of common stock outstanding.

knowledge of relevant facts." Treas. Reg. §25.2512-1. "The value of stocks... is the fair market value per share on the date of the gift." Treas. Reg. §25.2512-2. Since the fair market value of Nassau-Suffolk Milk Corporation stock cannot be determined from market transactions, reference to "intrinsic factors" is required.

In Revenue Ruling 59-60, 1959-1 C.B. 237, the following factors, though not exclusive, were deemed fundamental:

- "(a) The nature of the business and the history of the enterprise from its inception.
- (b) The economic outlook in general and the condition and outlook of the specific industry in particular.
- (c) The book value of the stock and the financial condition of the business.
- (d) The earning capacity of the company.
- (e) The dividend-paying capacity.
- (f) Whether or not the enterprise has goodwill or other intangible value.
- (g) Sales of the stock and the size of the block of stock to be valued.
- (h) The market price of stocks or corporations engaged in the same or a similar line of business having their stock actively traded in a full and open market either on an exchange or over-the-counter."

C. That under Tax Law §689(e), which is made applicable to Article 26-A of the Tax Law by Tax Law §1007(b), the burden of proving that the Audit Division improperly imposed gift tax is upon the petitioners. Therefore, in effect, the burden of proving the value of the shares in Nassau-Suffolk Milk Corporation is upon petitioners.

D. That pursuant to §5(a) of Rev. Rul. 59-60, supra, "in general, the appraiser will accord primary consideration to earnings when valuing stocks of

companies which sell products or securities to the public." Therefore, it was proper for the Audit Division to value the shares based upon an average of the company's prior earnings. However, §6 of Rev. Rul. 59-60 further provides as follows:

"A determination of the proper capitalization rate presents one of the most difficult problems in valuation. That there is no ready or simple solution will become apparent by a cursory check of the rates of return and dividend yields in terms of the selling prices of corporate shares listed on the major exchanges of the country. Wide variations will be found even for companies in the same industry. Moreover, the ratio will fluctuate from year to year depending upon economic conditions. Thus, no standard tables of capitalization rates applicable to closely-held corporations can be formulated. Among the more important factors to be taken into consideration in deciding upon a capitalization rate in a particular case are: (1) the nature of the business; (2) the risk involved; and (3) the stability or irregularity of earnings."


E. That in view of the facts that Nassau-Suffolk Milk Corporation operated in a competitive and specialized business and that earnings multipliers of publicly traded corporations in the milk industry are substantially lower than the price-earnings multiplier of ten used by the Audit Division which capitalized the company's earnings at a rate of ten percent, we conclude that capitalizing the company's stock at a rate of 22.22 percent or a price earnings multiplier of four and one-half is appropriate. Furthermore, a discount of ten percent should be allowed due to the lack of marketability of the stock of this closely held family business. The Audit Division is therefore directed to recalculate petitioner's gift tax liability.


F. That the petition of Henry Schwartz and Pari Schwartz is granted to the extent noted in Conclusion of Law "E", supra; and that, in all other respects, it is denied.


DATED: Albany, New York

JUN 29 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER