

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John F. Gates :
and Louise M. Gates :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1974 _____

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 5th day of June, 1981, he served the within notice of Decision by certified mail upon John F. Gates, and Louise M. Gates the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John F. Gates
and Louise M. Gates
1400 Mony Plaza
Syracuse, NY 13202

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
5th day of June, 1981.

Cornie A. Haglund

J. Vredenburg

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

June 5, 1981

John F. Gates
and Louise M. Gates
1400 Mony Plaza
Syracuse, NY 13202

Dear Mr. & Mrs. Gates:

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 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

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	:	
	:	
JOHN F. GATES and LOUISE M. GATES	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1974.	:	

Petitioners, John F. Gates and Louise M. Gates, 1400 Mony Plaza, Syracuse, New York 13202, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974 (File No. 17322).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on June 11, 1980 at 9:15 A.M. Petitioner John F. Gates appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether alimony payments are deductible by the husband petitioner John F. Gates and includible as income to the wife, petitioner Louise M. Gates, where they filed a joint Federal return and a New York State combined income tax return for 1974.

FINDINGS OF FACT

1. Petitioners filed a joint Federal income tax return for 1974 and paid the Federal income tax due thereon.

2. Petitioners chose to file separate New York State income tax returns for 1974 using Form IT-208 which is entitled:

"New York State Combined Income Tax Return for Resident Married Persons Filing a Joint Federal Return who Elect to File Separate New York State Returns."

On said return, petitioner Louise M. Gates reported \$15,000.00 in alimony income and petitioner John F. Gates reported a deduction of \$15,000.00 for alimony payments.

3. On December 20, 1976, the Audit Division issued a Notice of Deficiency against the petitioners asserting additional personal income tax of \$1,306.22, plus interest of \$186.78, for a total due of \$1,493.00. The deficiency was issued with a Statement of Audit Changes which stated "since you filed a joint Federal return, alimony payments are not deductible by the husband nor includible as income to the wife, See IRS Reg. 1.171-1-(2)."

4. Petitioners were married in Onondaga County, State of New York on June 22, 1942 and were divorced by a decree of the Supreme Court, State of New York entered in Oswego County Clerk's Office on September 18, 1975.

5. Petitioners were living separate and apart during the entire calendar year 1974 pursuant to the terms of a written separation agreement executed on June 1, 1973 under which the husband paid to the wife the sum of \$15,000.00 in periodic alimony payments during the year 1974.

6. The petitioners' arguments of law were the following: That IRS Regulation 1.171-1-(2) has no application to alimony payments. That IRS Regulation 1.71-1-(2) does refer to alimony income. Petitioners contended that this regulation does not prohibit the filing of joint Federal income tax returns for married people living apart with the husband paying alimony to wife pursuant to a written separation agreement. It merely requires that if husband and wife file separate returns, the wife must include the alimony payments in her income.

7. The petitioners further contended that their research of the law has revealed no Federal or State regulation or decision prohibiting the alimony income to wife and the alimony expense to the husband be treated differently than any other income and/or expense. In fact, they contended that New York State Tax Law section 359(8) requires that such payments be included in the wife's gross income, the only exception being if the spouses file a single return jointly, and section 360(17) of the Tax Law permits the husband to deduct such payments "regardless of whether such payments are includable in the gross income of the wife". In fact, New York Law goes so far as to hold that it would be unlawful for the husband to agree to pay the tax on the wife's alimony income (Tax Law section 385, Kraunz v. Kraunz, 293 N.Y. 152).

Furthermore, they argued that section 612(f) of the Tax Law provides that "if husband and wife determine their Federal income tax on a joint return, but determine their New York income taxes separately, they shall determine their New York adjusted gross incomes separately as if their Federal adjusted gross incomes had been determined separately". (See also Income Tax Reg. 116.6.)

CONCLUSIONS OF LAW

A. That sections 359(8), 360(17) and 385 are under Article 16 of the Tax Law and Kraunz vs. Kraunz, 293 N.Y. 152 was decided under the tax provisions in Article 16 of the Tax Law. That the New York State income tax return filed by petitioners in 1974 is under the tax provisions in Article 22 of the Tax Law. Generally, the provisions of one article of the Tax Law must be read independently from provisions of other articles. To hold the petitioners have misapplied the Tax Law, however, does not resolve the problem. An important element in the petitioners' case has been weakened, but the question remains.

B. That section 71(a)(2) of the Internal Revenue Code provides:

"(2) Written Separation Agreement -- If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly. (Emphasis supplied.)

This section of the Internal Revenue Code clearly establishes that the wife may not include in her gross income the periodic payments made by the husband if they file a single return jointly in the year at issue. It, therefore, follows that the husband may not take a deduction in the year that they file a single return jointly.

C. That the petitioners could have filed separately, but chose to file jointly for Federal tax purposes, does nullify the provisions for alimony and separate maintenance payments within the Internal Revenue Code. Therefore, the petitioners may not deduct the maintenance payments by the husband and include it as income of wife on their New York State combined income tax return for 1974.

D. That the petition of John F. Gates and Louise M. Gates is denied and the Notice of Deficiency issued December 20, 1976 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Estate of Harry Gaver :
Robert Gaver, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1973.

State of New York
County of Albany

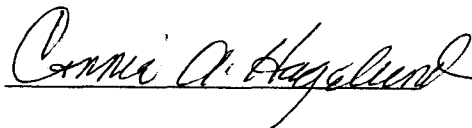
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of November, 1981, he served the within notice of Decision by certified mail upon Estate of Harry Gaver, Robert Gaver, Executor the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

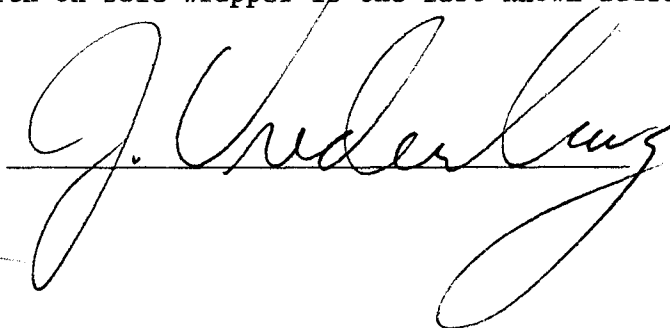
Estate of Harry Gaver
Robert Gaver, Executor
4 Hazel Pl.
Woodmere, NY 11598

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
6th day of November, 1981.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Estate of Harry Gaver
Robert Gaver, Executor

:

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1973

:

State of New York
County of Albany

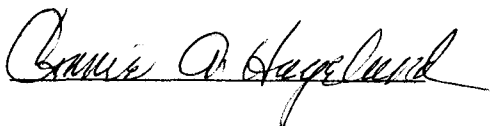
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of November, 1981, he served the within notice of Decision by certified mail upon L. Michael Rudolph the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

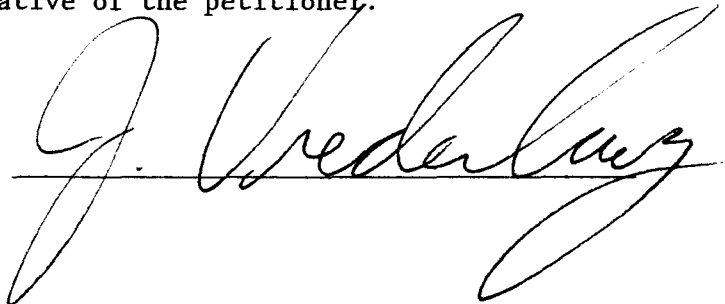
L. Michael Rudolph
Schonbrun & Rudolf
60 E. 42nd St.
New York, NY 10017

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
6th day of November, 1981.





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

November 6, 1981

Estate of Harry Gaver
Robert Gaver, Executor
4 Hazel Pl.
Woodmere, NY 11598

Dear Mr. Gaver:

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 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
L. Michael Rudolph
Schonbrun & Rudolf
60 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ESTATE OF HARRY GAVER	:	DECISION
ROBERT GAVER, EXECUTOR	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1973.	:	

Petitioner, Robert Gaver, as Executor of the Estate of Harry Gaver, 4 Hazel Place, Woodmere, New York 11598, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1973 (File No. 18425).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 21, 1981 at 9:30 A.M. Petitioner appeared by Schonbrun & Rudolph, Esqs. (L. Michael Rudolph, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether a condemnation award, received by the Estate upon appropriation of a parcel of land owned by a partnership in which decedent had a fifty percent interest, constituted income in respect of a decedent pursuant to section 691 of the Internal Revenue Code.

FINDINGS OF FACT

1. On April 11, 1977, the Audit Division issued to Robert Gaver, as Executor of the Estate of Harry Gaver, a Notice of Deficiency asserting additional personal income taxes due under Article 22 of the Tax Law for the year 1973 in

the amount \$7,380.52, plus interest thereon. The accompanying statement of audit changes explained that petitioner had failed to provide information previously requested by the Audit Division regarding proceeds of a condemnation award.

2. Decedent owned fifty percent of the shares of common stock of D. Gaver & Sons, Inc. In 1967 or 1968, but in any event prior to decedent's date of death, a building owned by the corporation and used as its principal place of business was condemned by the City of New York and taken for a project known as the North East Brooklyn High School.

3. Decedent had a fifty percent interest in a partnership, the real property of which was also condemned by the City of New York as part of its Marcus Garvey Urban Renewal Project.

4. Advances on the condemnation award in the amount \$50,925.00 were received by the corporation from the City prior to decedent's death, but the final determination as to the precise amount of the awards and receipt of the proceeds thereof did not occur until 1973.

5. In 1969, the corporation, in anticipation of receipt of the award and in need of a new place of business, borrowed funds and purchased 267 Douglass Street in Brooklyn.

6. Harry Gaver died on April 25, 1972. On or about March 20, 1973, Robert Gaver, as Executor, filed a Federal Estate Tax Return, on Schedule C of which the condemnation awards were valued as follows:

VALUE AT DATE OF DEATH

Interest of 50% of decedent in condemnation award proceedings project known as "Marcus Garvey Urban Renewal Project, Block 3499, Lot 27, Stage 2", pending in Supreme Court, Kings County:

Estimated award	\$101,500.00	
Less: mortgage	23,071.00	
loan	25,000.00	
fees	6,500.00	
	<u>\$ 46,929.00</u>	\$23,464.50

Interest of 50% of decedent in condemnation award proceedings project known as "North East Brooklyn High School, Block 3016, Lot 6", pending in Supreme Court, Kings County:

Estimated award	\$138,500.00	
Less: advance	50,925.00	
mortgage	27,663.00	
fees	8,900.00	
	<u>\$ 51,012.00</u>	\$25,506.00

7. On May 9, 1973, the Honorable John D. Bennett, Surrogate of Nassau County, signed an order fixing the New York net estate tax of the Estate of Harry Gaver at \$2,988.47.

8. On or about April 9, 1974, Robert Gaver filed a New York State Income Tax Fiduciary Return for 1973 which indicated Federal taxable income of \$6,733.00 and tax due (and remitted) in the sum \$247.00. The condemnation award to the partnership was not reflected on said return.

9. The amount of the award with regard to the Marcus Garvey project as ultimately determined and paid was \$55,383.42.

10. As a result of conferences and correspondence between petitioner's representative and representatives of the Audit Division, it was agreed that additional estate tax was due in the amount \$139.01, plus interest, based upon the final amount of the award as abovementioned. By letter dated August 20, 1979, petitioner's counsel sent a check for such additional estate taxes to the Division. Petitioner maintains that this was the final determination and settlement of the matter and that the assertion by the Division of additional personal income taxes for 1973 is a repudiation of the settlement.

CONCLUSIONS OF LAW

A. That the New York taxable income of a resident estate is defined by section 618 of the Tax Law as the estate's Federal taxable income for the taxable year, with certain New York modifications.

B. That section 691 of the Internal Revenue Code sets forth the general rule for inclusion in gross income of items of income in respect of a decedent, as follows:

"(a)(1) The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period...shall be included in the gross income, for the taxable year when received, of:

(A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;..."

C. That upon the filing of the acquisition map in the office of the appropriate county clerk, the clerk of Kings County in this instance, title to the property vested in the City of New York (Eminent Domain Procedure Law, Section 402). Title to the property for the Marcus Garvey project therefore passed prior to decedent's death.

D. That insofar as the decedent's right to compensation for the appropriation of the partnership's real estate came into being prior to his death, his share of the award constituted income in respect of a decedent and was taxable as such. Matter of Estate of Gladys F. Aries, State Tax Commission, December 12, 1980; Matter of Fannie R. Zeamon, State Tax Commission, December 12, 1980.

E. That the agreement reached between petitioner and the Audit Division with regard to New York estate taxes under Article 26 did not settle nor dispose of the instant case.

F. That petitioner is entitled to deduct estate taxes which are attributable to the condemnation award, in accordance with section 691(c)(1) of the Internal

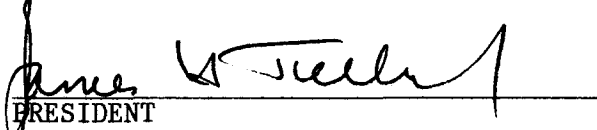
Revenue Code, and such other expenses as are permitted by section 691(b) of the Code.

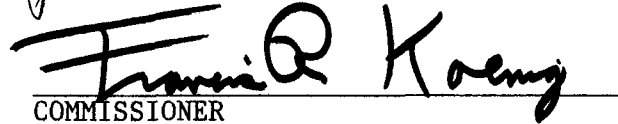
G. That the petition of the Estate of Harry Gaver, Robert Gaver, Executor, is granted to the extent indicated in Conclusion of Law "F"; that the Notice of Deficiency issued April 11, 1977 is to be modified accordingly; and that except as so modified, the deficiency is in all other respects sustained.


DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER