

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Carmelo Gugino, Jr.

:

:

: 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 3rd day of July, 1981, he served the within notice of Decision by certified mail upon Carmelo Gugino, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carmelo Gugino, Jr.
7526 E. Quaker Rd.
Orchard Park, NY 14127

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
3rd day of July, 1981.

Carmelo A. Gugino

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Carmelo Gugino, Jr. :

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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 :
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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 3rd day of July, 1981, he served the within notice of Decision by certified mail upon Edward J. Schunk the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward J. Schunk
3871 Harlem Rd.
Buffalo, NY 14215

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
3rd day of July, 1981.

Emmie P. Hagelund

J. Vredenburg

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

July 3, 1981

Carmelo Gugino, Jr.
7526 E. Quaker Rd.
Orchard Park, NY 14127

Dear Mr. Gugino:

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
Edward J. Schunk
3871 Harlem Rd.
Buffalo, NY 14215
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CARMELO GUGINO, JR. and ELIZABETH GUGINO	:	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 Camelo Gugino, Jr. and Elizabeth Gugino, 7526 East Quaker Road, Orchard Park, New York 14127, 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. 20229).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, One West Genesee Street, Buffalo, New York, on July 8, 1980 at 2:45 P.M. Petitioners appeared by Edward J. Schunk. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the petitioners sustained the burden of proof regarding a casualty loss deduction on their 1974 New York State income tax return.

II. Whether the petitioners had properly divided equally the rental income on their combined income tax return for 1974.

FINDINGS OF FACT

1. Petitioners, Carmelo Gugino, Jr. and Elizabeth Gugino, timely filed a New York State Combined Income Tax Return for 1974. On said return they deducted a net casualty loss of \$1,400.00 and each reported rental income of \$11,866.11.

2. On June 27, 1977 the Audit Division issued a Notice of Deficiency for 1974 against the petitioner Carmelo Gugino, Jr. imposing additional personal income tax of \$1,944.92 , plus interest of \$363.71, less overpayment of \$968.39 and interest of \$181.09 (due petitioner Elizabeth Gugino), leaving a balance due of \$1,159.15. The Notice was issued with the explanation that, " a casualty loss on property not used in a trade or business is measured by the difference between its fair market value immediately before and immediately after the casualty, reduced by any insurance received. The amount of the loss from each casualty must be further reduced by \$100.00. The casualty loss claimed on your return does not warrant a deduction for more than the cost of removal of the damaged tree. Therefore, the deduction taken has been adjusted as shown. When filing form IT-208 and income is divided equally between husband and wife, the income that is divided must be jointly earned. Since the rental income was on property owned by the husband, an adjustment has been made to correct the husband's and wife's New York income."

3. On July 29, 1974, petitioners suffered a casualty loss caused by lightning striking a white birch tree located on the front lawn area of the petitioners' home.

On July 30, 1974 petitioner requested that a representative of Davey Tree Expert Company inspect the damage and render his opinion as to the possibility of restoration. It was Davey Tree Expert Company's opinion that the lightning had destroyed the white birch and that it would cost \$1,500.00 to replace the tree.

4. The Audit Division requested, and petitioner secured an appraisal of the property. Petitioner submitted a letter dated September 30, 1976 from a

representative of Caine Real Estate, Inc. who was familiar with the property and the general area, which stated, in part, the following:

" . . . After reviewing the pictures of this specimen birch tree on the above mentioned property, and the \$1,500.00 estimate from Davey Tree Company as to the value of this tree; I feel that the property has been diminished by \$1,500.00.

Please be assured that the above appraisal is rendered by me based on my knowledge of the real estate market in Orchard Park, ..."

5. Petitioners testified that the property was approximately five acres, with approximately one hundred to two hundred trees on said property, along with a house valued at over one hundred fifty thousand dollars.

6. On or about December 11, 1961, petitioners, Carmelo Gugino, Jr. and Elizabeth Gugino, purchased certain industrial real estate located at 601 Ohio Street, Buffalo, New York. This real estate has been rented to a local manufacturing company from the time of its purchase. The petitioners at the time of purchase and still do consider this to be jointly owned property. The only reason for having the deed recorded in the name of Carmelo Gugino, Jr. was for the convenience of the joint owners in negotiating leases, financing, improvements, etc. During the period of ownership, petitioners have filed form IT-208 for New York State tax purposes and have consistently reflected the income from rental of this real estate as joint income. Petitioners have been examined in the past by the Department of Taxation and Finance and no adjustment was made regarding this splitting of income.

During the period of ownership of this building, the local manufacturing company which occupies it has expanded its operations significantly. Employment increased from approximately 20 in 1962 to the current level of approximately 135. In order to secure financing for this expansion, both Carmelo Gugino, Jr.

and Elizabeth Gugino were required to sign unlimited guarantees for these loans.

7. The initial deposit of \$4,000.00 for the purchase of the real property came from joint funds accumulated by both Carmelo Gugino, Jr. and Elizabeth W. Gugino. Prior to the closing Carmelo Gugino, Jr. and Elizabeth W. Gugino jointly borrowed \$18,000.00 from Manufacturers and Traders Trust Company. These funds were used as an additional down payment on the purchase of real estate in question. The \$18,000.00 loan was paid back to Manufacturers and Traders Trust Company over a period of years from funds earned by both Carmelo Gugino, Jr. and Elizabeth W. Gugino with final payment made in October 1968.

Prior to closing Carmelo Gugino, Jr. and Elizabeth W. Gugino jointly borrowed an additional \$10,000.00 from Manufacturers and Traders Trust Company. This \$10,000.00 loan was made because the mortgagor, Erie County Savings Bank, required an escrow of \$10,000.00 until a heating plant was installed on the premises. The above mentioned \$10,000.00 loan was repaid to Manufacturers and Traders Trust Company in February 1962 when Erie County Savings Bank released the funds held in escrow.

8. The attorney who advised and represented the petitioners in their negotiations and purchases of the rental property stated, in part, in a sworn affidavit the following:

"That during the period of negotiations for and purchase of this property by Carmelo Jr. and Elizabeth W. Gugino it would have been extremely difficult for Elizabeth W. Gugino to be in attendance for the signing of documents such as mortgages, leases, etc., inherent in this type of transaction.

That it was at my suggestion that, as a matter of convenience, the Deed and Mortgage documents were recorded in the name of Carmelo Gugino, Jr. alone and that at some later date that a "Correcting Deed" could be executed and recorded to reflect the true ownership of the property.

That it was an oversight that the "Correcting Deed" was not prepared, executed and recorded.

That it is my opinion that the real estate located at 601 Ohio Street, Buffalo, New York, is owned jointly by Carmelo Jr. and Elizabeth W. Gugino.

9. On July 3, 1980 a correcting deed was filed reflecting that the title to real estate located at 601 Ohio Street Buffalo, New York be held by Carmelo Gugino, Jr. and his wife as tenants by the entirety and not by Carmelo Gugino, Jr. individually.

CONCLUSIONS OF LAW

A. That the appraisal of the Davey Tree Expert Company is invalid, since it only appraised the value of the individual tree and not the actual loss in fair market value of the entire real property. That the statement by Caine Real Estate, Inc. is based upon the appraisal of Davey Tree Expert Company and does not recognize the effects of any general market decline affecting undamaged as well as damaged property which may occur simultaneously with the casualty. Rev. Rul 68-29. Accordingly, petitioners have failed to sustain the burden of proof which is imposed by section 689(e) of the Tax Law to show they are entitled to a greater amount than allowed by the Audit Division.

B. That petitioners do actually own property together, (whether the ownership was acquired by gift or purchase) the mere fact that it is held in the name of only one of the spouses doesn't make it the property of that spouse. Income and capital gains from the property should be divided and reported for income tax purposes in accordance with the share of property beneficially owned by each spouse even though for convenience or other reasons the property is technically held or recorded in the name of only one spouse. Dunham, (1933) 27 BTA 1068; First National Bank of Duluth, Admr. (1928) 13 BTA 1096 (NA); Graeper, (1933) 27 BTA 632(A); Hinckley, (1927) 6 BTA 312(a); Flach, (1928) 13 BTA 383(A); Allen v. Beazley, (1946, CA5) 157 F2d 970.

C. That in determining income tax liability the courts have stated that the taxing authorities should look at the actualities, the substance, the realities and not the form of the transaction, in determining such tax liabilities. Generally, where parties have a bona fide understanding, written or oral, to divide profits in specified proportions and their actions support said understanding they are taxable only with respect to their proportionate share (Allen v. Beazley, supra.) Therefore, the petitioners properly divided equally the rental income on their combined income tax return for 1974.

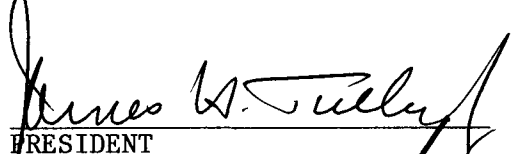
D. That the petition of Carmelo Gugino, Jr. and Elizabeth Gugino is granted to the extent provided in Conclusion of Law "C"; and that, except as so granted, the petition is in all other respects denied.

E. That the Audit Division is hereby directed to modify the Notice of Deficiency dated June 27, 1977 to be consistent with the decision rendered herein.

DATED: Albany, New York

JUL 03 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER