

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Estate of William G. O'Connor :  
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 :  
1976. :

AFFIDAVIT OF MAILING

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 January, 1983, he served the within notice of Decision by certified mail upon Estate of William G. O'Connor, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of William G. O'Connor  
c/o Milo J. Shepard, Executor  
401 Chapel Dr.  
Syracuse, NY 13219

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 January, 1983.

Kathy Pfaffenbach

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
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for Redetermination of a Deficiency or a Revision :  
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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 January, 1983, he served the within notice of Decision by certified mail upon Milo Shepard the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

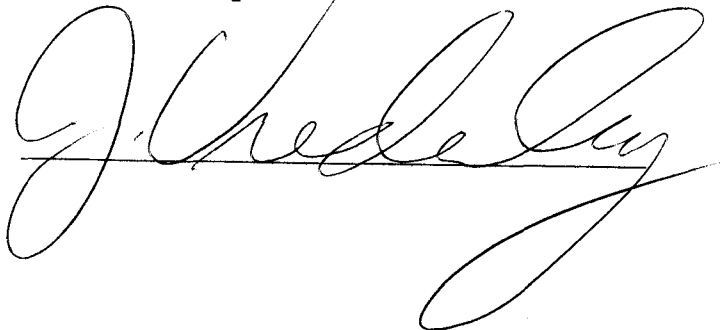
Milo Shepard  
401 Chapel Dr.  
Syracuse, NY 13219

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 January, 1983.

*Kathy Pfaffenbach*



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

January 3, 1983

Estate of William G. O'Connor  
c/o Milo J. Shepard, Executor  
401 Chapel Dr.  
Syracuse, NY 13219

Dear Mr. Shepard:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Milo Shepard  
401 Chapel Dr.  
Syracuse, NY 13219  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
ESTATE OF WILLIAM G. O'CONNOR  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1976.

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DECISION

Petitioner, Estate of William G. O'Connor, c/o Milo J. Shepard, Executor, 401 Chapel Drive, Syracuse, New York 13219, 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 1976 (File No. 30530).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 333 East Washington Street, Syracuse, New York, on January 14, 1982 at 10:45 A.M. Petitioner appeared by Milo J. Shepard, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the condemnation award by the Court of Claims to the estate of the decedent was taxable as income in respect of a decedent pursuant to section 691 of the Internal Revenue Code when the award had already been included on the decedent's estate tax return under section 2031 of the Internal Revenue Code.

FINDINGS OF FACT

1. On April 4, 1980, the Audit Division issued a Notice of Deficiency to petitioner, the Estate of William G. O'Connor, asserting additional personal income taxes due under Article 22 of the Tax Law for the year 1976 in the amount of \$5,818.95, plus interest in the amount of \$1,468.83, for a total of

\$7,287.78. The accompanying Statement of Audit Changes explained that the additional tax due was based on failure to include the balance of a condemnation award (\$73,675.00) plus interest (\$23,965.32) on petitioner's New York State Income Tax Fiduciary Return.

2. William G. O'Connor (the "decedent") owned real property located in the Town of Camillus, New York which was appropriated by New York State pursuant to the laws of eminent domain prior to the decedent's date of death. On July 21, 1971, pursuant to an Agreement of Partial Payment, the decedent received the sum of \$31,500.00 which amount exceeded his cost basis of the property.

3. Prior to his death, the decedent brought an action in the Court of Claims against New York State for a greater amount of compensation for the State's appropriation of his property.

4. William G. O'Connor died on December 18, 1974, naming William E. O'Connor and Milo J. Shepard as co-executors of his estate.

5. On July 14, 1976, the Court of Claims awarded decedent's estate additional compensation for the condemnation in the amount of \$73,675.00 and interest of \$23,965.32.

6. Petitioner originally estimated and reported the additional condemnation award at \$13,200.00 on decedent's Federal estate tax return under section 2031 of the Internal Revenue Code. After the award by the Court of Claims, the Federal return was adjusted to reflect the actual amount with the agreement of the Federal Estate Tax Examiner. The award was also included in the New York State estate tax application. On June 14, 1977, the Surrogate of Onondaga County issued an order fixing the New York net estate tax of the Estate of William G. O'Connor at \$65,733.79.

7. On or about January 13, 1977, petitioner filed a New York State Income Tax Fiduciary Return for 1976 which indicated Federal taxable income of \$25,300.00 and tax due and remitted in the amount of \$957.63. The condemnation award was not reflected on this return.

8. Petitioner's position is that, because the condemnation award was included in estate taxes under section 2031 of the Internal Revenue Code, it cannot be included as income in respect of a decedent under section 691 of the Internal Revenue Code. Petitioner further states that, since the Federal determination as to inclusion under section 2031 was final, this determination is binding on New York under section 961 of Article 26 of the Tax Law. Moreover, petitioner asserts that there is a two-year statute of limitations under section 249-x of Article 10 of the Tax Law during which the State Tax Commission may appeal erroneous decisions of the Surrogate. Petitioner claims, therefore, as a result of the statute, the Notice of Deficiency was not timely.

#### 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 as defined in the laws of the United States for the taxable year, with certain New York modifications.

B. That section 691 of the Internal Revenue Code provides, in pertinent part, that:

"(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 County Clerk of Onondaga County, title to the property vested in the State of New York (Eminent Domain Procedure Law, Section 402). Title to the property, therefore, passed prior to decedent's death.

D. That, inasmuch as the decedent's right to compensation for the appropriation of his property came into being prior to his death, the condemnation award constituted income in respect of a decedent and was taxable as such (see 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 right to income in respect of a decedent is frequently included in a decedent's gross estate for Federal estate tax purposes. The fact that the income tax on such income is shifted to the estate does not affect the inclusion of the income in the gross estate. The condemnation award is, therefore, includible both in the gross estate under section 2031 of the Internal Revenue Code and as income in respect of a decedent under section 691 of the Internal Revenue Code.

F. That, in recognition of the double taxation resulting from inclusion as part of the gross estate and as income, section 691(c)(1) of the Internal Revenue Code allows the petitioner to deduct on the income tax return estate taxes which are attributable to the condemnation award and such other expenses as are permitted by section 691(b) of the Code.

G. That, because the condemnation award is includible in both the estate tax return and the fiduciary income tax return, petitioner's reliance on the binding Federal determination under section 961 of Article 26 of the Tax Law and the statute of limitations under section 249-x of Article 10 of the Tax Law is immaterial. The Audit Division was not contesting the award's inclusion

in the estate tax return; rather the Division correctly argued that the award should be included as income in respect of a decedent on the income tax return.

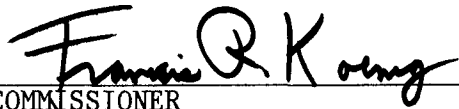
H. That the petition of the Estate of William G. O'Connor is granted to the extent indicated in Conclusion of Law "F"; that the Audit Division is hereby directed to modify the Notice of Deficiency issued April 4, 1980; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 3 1983

ACTING   
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER