

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Virgil B. & Eugenia B. Day :
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. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 22nd day of November, 1983, she served the within notice of Decision by certified mail upon Virgil B. & Eugenia B. Day, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Virgil B. & Eugenia B. Day
45 Cowdin Lane
Chappaqua, NY 10514

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
22nd day of November, 1983.

Maucha L. Smalley

Connie Hagelund

ADMINISTRATOR
OFFICE OF THE STATE TAX COMMISSION
SECTION 174

STATE TAX COMMISSION

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 22nd day of November, 1983, she served the within notice of Decision by certified mail upon Paul Silberberg the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul Silberberg
Hays, St. John, Abramson & Heilbron
120 Broadway
New York, NY 10005

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
22nd day of November, 1983.

Marcha L. Snuelle

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

November 22, 1983

Virgil B. & Eugenia B. Day
45 Cowdin Lane
Chappaqua, NY 10514

Dear Mr. & Mrs. Day:

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 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
Paul Silberberg
Hays, St. John, Abramson & Heilbron
120 Broadway
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
VIRGIL B. DAY and EUGENIA B. DAY	:	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, Virgil B. Day and Eugenia B. Day, 45 Cowdin Lane, Chappaqua, New York 10514, 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. 20892).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1981 at 9:15 A.M. Petitioners appeared by Paul Silberberg, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether dividends from certain corporate stock were properly reported by the petitioners as trust income or are the dividends income to the petitioners.

FINDINGS OF FACT

1. Petitioner Virgil B. Day created inter vivos trusts on July 23, 1958 for the benefit of his children John Baldwin Day and Peter Fairfield Day and assigned himself as trustee. Petitioner did not retain prohibited powers over the corpus or the income which would result. On February 11, 1963, two thousand two hundred ten shares of General Electric and fifty two shares of Phillip Morris were assigned to the trusts; however, the name or names on the certificates

were not changed from that of petitioners. Federal and New York State fiduciary income tax returns were filed for each year from 1963 and through the year at issue reporting General Electric Co. and Phillip Morris Co. dividends as trust income. Separate bank accounts were maintained for the trusts and all trust income, including the General Electric Co. and Phillip Morris Co. dividends, were deposited in the trust accounts.

2. Petitioners, Virgil B. Day and Eugenia B. Day, filed a New York State Income Tax Resident Return for 1974. On this return they did not report the dividend income from 2,210 shares of General Electric Co. and 52 shares of Phillip Morris Co.

3. On September 26, 1977, the Audit Division issued a Statement of Audit Changes for 1974 on the grounds that \$10,918.64 which consisted of \$6,868.34 in dividend income and \$4,050.30 in interest income, was earned by petitioners and erroneously reported on trust returns, and a depletion allowance in excess of the cost deduction modification was not made in the amount of \$7,599.20. In accordance with the aforesaid statement, a Notice of Deficiency was issued against petitioners on September 26, 1977 imposing tax due of \$2,777.76 plus interest.

4. The petitioners are not contesting the modification relating to the depletion allowance, therefore this adjustment is not at issue. At the hearing, the petitioners presented no argument as to the interest income adjustment.

5. During 1974, petitioners received dividend checks from General Electric Co. and Phillip Morris Co. Petitioners then issued checks to the trusts in amounts equal to those dividends on 2,210 shares of General Electric Co. stock and 52 shares of Phillip Morris Co. stock. Petitioners deposited the checks in

separate trust bank accounts. Other dividends payable to the trusts are not at issue.

6. The trust agreements conformed with the "Clifford Rule" as codified by section 673 of the Internal Revenue Code. The trusts were to terminate on August 17, 1968 unless additional property was added to the corpus of the trusts. If property was added, it would terminate ten years from the last day of the month in which such addition was made. Upon termination of the trusts, the property in the trusts would be delivered to Mr. Day.

7. Based on the terms of the trusts, the trusts terminated as of February 28, 1973 (see Finding of Fact "1" supra). Petitioners argued that a parol trust existed with respect to the General Electric and Philip Morris stocks. However, no Federal or New York fiduciary returns were filed for a parol trust. Federal and New York fiduciary returns for 1974 were filed for the trust agreements dated July 23, 1958.

CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law imposes the burden of proof upon petitioners except in three instances which are not present herein.

B. That petitioners have failed to sustain their burden of proof to show that a valid parol trust existed in 1974. The evidence in the file indicated that only valid written trusts existed and that these trusts were terminated as of February 28, 1973. There is no evidence in the file to show that an parol trust was created after February 28, 1973. No fiduciary returns were filed for any parol trusts. Accordingly, the dividend income in question constituted petitioners' dividend income rather than income of a trust.


C. That petitioners have failed to sustain their burden of proof required pursuant to section 689(e) of the Tax Law to show that the interest income was properly excluded from their 1974 personal income tax return.


D. That the petition of Virgil B. Day and Eugenia B. Day is denied and the Notice of Deficiency dated September 26, 1977 sustained.

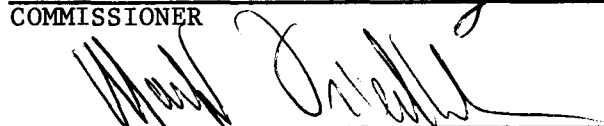
DATED: Albany, New York

STATE TAX COMMISSION

NOV 22 1983


PRESIDENT


COMMISSIONER


COMMISSIONER