

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Christina G. Salgo (Trust) :
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 Years :
1971 & 1972. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 May, 1983, he served the within notice of Decision by certified mail upon Christina G. Salgo (Trust), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Christina G. Salgo (Trust)
c/o Nicolas M. Salgo
4 E. 72nd St.
New York, NY 10021

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 May, 1983.

David Parchuck

James P. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Christina G. Salgo (Trust) :
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 Years :
1971 & 1972. :

State of New York
County of Albany

David Parchuck, 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 May, 1983, he served the within notice of Decision by certified mail upon H. E. Bevan, Jr. the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

H. E. Bevan, Jr.
Suite 900, R.H. Garvey Bldg.
Wichita, KS 67202

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 May, 1983.

David Parchuck

Annice C. Hagellum

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 6, 1983

Christina G. Salgo (Trust)
c/o Nicolas M. Salgo
4 E. 72nd St.
New York, NY 10021

Dear Ms. Salgo:

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
H. E. Bevan, Jr.
Suite 900, R.H. Garvey Bldg.
Wichita, KS 67202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CHRISTINA G. SALGO TRUST	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1971 and 1972.	:	

Petitioner, Christina G. Salgo Trust, c/o Nicholas M. Salgo, 4 East 72nd Street, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1971 and 1972 (File No. 10833).

A formal hearing was held before Harvey Baum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on January 12, 1977 at 1:15 P.M. Petitioner appeared by H.E. Bevan, Jr., Esq. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether capital gains realized by petitioner were includible in its "distributable net income", and whether the distribution of securities, in kind, to its beneficiary may be deducted from petitioner's taxable income.

FINDINGS OF FACT

1. Petitioner, Christina G. Salgo Trust, through its trustee, timely filed New York State income tax fiduciary returns for the years 1971 and 1972.

2. On December 13, 1974, petitioner executed a Consent Fixing the Period of Limitation Upon Assessment of Personal Income Taxes, extending the period by

which the Audit Division could assess any personal income taxes due from petitioner for the taxable year ended December 31, 1971 to April 15, 1976.

3. On October 27, 1975, the Audit Division issued to petitioner a Notice of Deficiency, together with an explanatory Statement of Audit Changes, for the years 1971 and 1972 asserting personal income tax due of \$10,546.04 and \$119.84, respectively, plus interest. The Statement of Audit Changes treated certain capital gains as taxable to the trust on the basis that under the Internal Revenue Code, they were not includible in the trust's distributable net income.

4. Petitioner-trust was established on March 24, 1950. Prior to and during the years in question, capital gains were considered additions to trust corpus. Ordinary taxable income was accumulated until the beneficiary reached age 21 and thereafter distributed to the beneficiary annually in accordance with the trust indenture. During the years at issue, the trustees had the authority to distribute, at their discretion, trust corpus to the beneficiary.

5. During the years 1971 and 1972, petitioner realized capital gains of \$152,100.18 and \$7,541.85, respectively, on the disposition of investments. The co-trustees determined to distribute these capital gains to the beneficiaries under the specific authorization of the trust indenture in addition to distributing the ordinary taxable income.

6. In January and February of 1972, the trustees, exercising their discretionary authority to distribute corpus, distributed securities, in kind, to the beneficiary. Such securities were owned by the trust and, at the date of distribution, had a fair market value in excess of the capital gains realized in 1971 and 1972.

7. The trustees elected to treat the distribution of the securities in January 1972 in accordance with Internal Revenue Code section 663(b). The

Audit Division conceded that pursuant to section 663(b), distributions made by petitioner in January 1972 were properly considered paid as of the last day of 1971 since the fiduciary of the trust properly elected such treatment.

8. The trustees allocated the capital gains described in Finding of Fact "5" to the beneficiary and included such gains in the trust's distributable net income. The trustees then deducted from the trust's taxable income the fair market value of the securities distributed to the beneficiary as described in Finding of Fact "6".

CONCLUSIONS OF LAW

A. That pursuant to Tax Law section 618, the starting point for determining the New York taxable income of a resident estate or trust is "its federal taxable income as defined in the laws of the United States for the taxable year...".

B. That Internal Revenue Code section 661(a) provides as follows:

"Deduction. -- In any taxable year there shall be allowed as a deduction in computing the taxable income of an estate or trust (other than a trust to which subpart B applies), the sum of --

(1) any amount of income for such taxable year required to be distributed currently (including any amount required to be distributed which may be paid out of income for such taxable year); and

(2) any other amounts properly paid or credited or required to be distributed for such taxable year; but such deduction shall not exceed the distributable net income of the estate or trust."

C. That Internal Revenue Code section 643(a)(3) provides as follows:

"Capital Gains and Losses. -- Gains from the sale or exchange of capital assets shall be excluded (from "distributable net income") to the extent that such gains are allocated to corpus and are not (A) paid, credited, or required to be distributed to any beneficiary during the taxable year, or (B) paid, permanently set aside, or to be used for the purposes specified in section 642(c) (charitable purposes)...".

Pursuant to this section, capital gains which are allocated to trust corpus may qualify for inclusion in "distributable net income" if they are

"paid, credited or required to be distributed to any beneficiary..." during the taxable year [or in the first sixty-five days of the following taxable year pursuant to the election allowed under I.R.C. section 663(b)]. Consequently, the precise meaning of the term, "paid or credited or required to be distributed," is of key importance in resolving this matter.

D. That Treas. Reg. Sec. 1.643(a)-3(a) provides:

"Except as provided in §1.643(a)-6, gains from the sale or exchange of capital assets are ordinarily excluded from distributable net income and are not ordinarily considered as paid, credited, or required to be distributed to any beneficiary unless they are:

(1) Allocated to income under the terms of the governing instrument or local law by the fiduciary on its books or by notice to the beneficiary,

(2) Allocated to corpus and actually distributed to beneficiaries during the taxable year, or

(3) Utilized pursuant to the terms of the governing instrument or the practice followed by the fiduciary in determining the amount which is distributed or required to be distributed..."

At first glance, it might seem that the second instance in which capital gains are includible in the "distributable net income" of a trust is applicable. However, Revenue Ruling 68-392, 168-2 C.B. 284, at 285, which analyzes this provision provides that:

"As illustrated by Examples (3), (4), and (5) of section 1.643(a)-3(d) of the regulations, this provision regarding the inclusion of capital gains in distributable net income applies only where there is a distribution required by the terms of the governing instrument upon the happening of a specified event..."

Therefore, provision (2) is not applicable.

Consequently, since provisions (1) and (3) are clearly inapplicable herein, petitioner's gains from the sale or exchange of the capital assets are excluded from "distributable net income".

E. That even if the distribution was required by the terms of the governing instrument upon the happening of a specified event, the petitioner has not established that the securities distributed to the beneficiary were acquired with the proceeds from the disposition of investments described in Finding of Fact "5". Therefore, the gains recognized by the trust were properly excluded from distributable net income since the net proceeds were not actually distributed to the beneficiary. See Treas. Reg. Sec. 1.643(a)-3(d).

F. That since the deduction for distributions to the beneficiary may not exceed the trust's distributable net income, the fair market value of the securities distributed in kind to the beneficiary may not be deducted in computing petitioner's taxable income. The proper deduction was allowed by the Audit Division in the computation of the petitioner's taxable income.

G. That the petition of Christina G. Salgo Trust is denied and the Notice of Deficiency issued on October 27, 1975 is sustained.

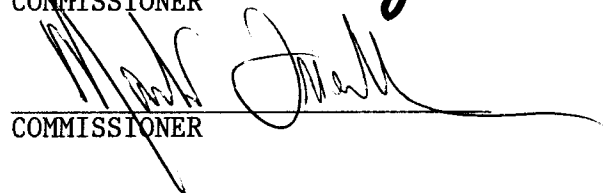
DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER