

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CAROL MARIE KERLER : DETERMINATION
 : DTA NO. 826115
for Revision of a Determination or for Refund of Estate :
Tax under Article 26 of the Tax Law for the Year 2007. :
:

Petitioner, Carol Marie Kerler, filed a petition for revision of a determination or for refund of estate tax under Article 26 of the Tax Law for the year 2007.

On April 4, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the Division of Tax Appeals does not have jurisdiction to hear the matter. Petitioner, appearing pro se, filed her response to the notice on April 11, 2014. The Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), submitted its response to the notice by its due date of May 5, 2014, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3000.9[a][4]). After due consideration of the arguments submitted by the parties and the documents submitted herein, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether this matter, which involves a claim for refund of an overpayment of estate tax, is within the exclusive jurisdiction of the surrogate's court, and, as such, cannot be determined by the Division of Tax Appeals for lack of subject matter jurisdiction.

FINDINGS OF FACT

1. Petitioner's mother, Mary O'Leary Kerler, died May 8, 2007, having previously executed two trusts, dated May 12, 1994 and August 21, 1997, respectively. According to correspondence from petitioner to the Division of Taxation (Division) dated October 12, 2009, the trusts were prepared by Charles S. Butin, an attorney, with the goal of excluding Mary Kerler's home from her gross estate. Petitioner asserts that Mr. Butin was disbarred in 2002.

2. Mary Kerler's home was included as part of her gross estate for New York State estate tax purposes, and petitioner sought an advisory opinion from the Division concerning the right to exclude the home from the estate.

3. The Division's Office of Counsel, Advisory Opinion Unit, issued an advisory opinion concerning the estate tax matter (*see* TSB-A-10[2]M), dated May 4, 2010, concluding that the decedent's personal residence was properly included in her gross estate for New York estate tax purposes since she had retained an income interest in the trust property pursuant to the instruments at the time of her death. The opinion further concluded that there was no basis in the Tax Law to exclude the value of the trust property based upon the subsequent disbarment or alleged misconduct of the decedent's attorney.

4. Petitioner requested a review and reversal of the advisory opinion by the Commissioner of Taxation and Finance in correspondence dated July 24, 2013.

5. By correspondence dated August 20, 2013, the director of the Bankruptcy, Collection and Estate section of the Division's office of counsel confirmed that the trust property, Mary Kerler's home, was properly included in her estate, that the Division is not in a position to ensure the quality of legal representation relative to estate planning goals, and the fact that the trusts did not accomplish the decedent's intended goal was not a basis to nullify the legal operation of the

trusts. Further, the letter reiterated the Division's position that the subsequent discipline or disbarment (for reasons unrelated to this matter) of the drafting attorney does not have any bearing on the tax consequences of the trust instruments.

6. Petitioner continued to pursue relief and filed a request for a conciliation conference. The Bureau of Conciliation and Mediation Services corresponded with petitioner on January 3, 2014, refusing to consider her request since neither a statutory notice nor a refund denial giving rise to formal protest rights had been issued.

7. Petitioner thereafter pursued assistance from the Division's Office of the Taxpayer Rights Advocate, and received correspondence from the case advocate on January 21, 2014. Handwritten notes on the letter, presumably those of petitioner, indicated that on February 5, 2014, petitioner was advised to file a petition.

8. On February 10, 2014, petitioner filed a petition with the Division of Tax Appeals, seeking relief from the estate tax imposed upon her mother's estate due to the inclusion of the family home in the estate.

9. On April 4, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The notice of intent stated, in pertinent part, that:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to Tax Law § 998(c), the surrogate's court that has jurisdiction over the estate of a decedent shall also have jurisdiction of that estate's tax proceedings.

In this case, the petitioner filed a petition in protest of an estate tax for which the Tax Law grants jurisdiction to the surrogate's court and not to the Division of Tax Appeals. Therefore, the Division of Tax Appeals does not have jurisdiction to address petitioner's petition.

10. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner submitted a letter to the Division of Tax Appeals on April 11, 2014, requesting that Mr. Butin's long-term malpractice and years-overdue disbarment should prompt the exercise of discretion and direct a different tax result in this case.

11. In correspondence submitted April 22, 2014, the Division expressed its agreement with the proposed dismissal on the basis of lack of jurisdiction.

CONCLUSIONS OF LAW

A. Tax Law § 2006(4) sets forth the functions, powers and duties of the Tax Appeals Tribunal including, in relevant part, as follows:

To provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, *unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter* (emphasis added).

B. A right to such a hearing is specifically provided for in an alternate section, section 201 of the Surrogate's Court Procedure Act (SCPA), which confers upon the surrogate's court:

full and complete general [subject matter] jurisdiction in law and in equity to administer justice in all matters relating to the affairs of decedents . . . to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding . . . as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter. . . (SCPA § 201[3]).

The jurisdiction of the surrogate's court is grounded in Article VI, section 12(d) of the New York State Constitution, which provides that:

The surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents * * * administration of estates and actions and proceedings arising thereunder * * * and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law (*Matter of Estate of Piccione*, 57 NY2d 278, 456 NYS2d 669, 672-673 [1982], *rearg denied* 58 NY2d 824, 459 NYS2d 1030 [1983]).

In fact, the court in *Estate of Piccione* went on to say that “for the Surrogates’ court to decline jurisdiction, it should be abundantly clear that the matter in controversy in no way affects the affairs of a decedent or the administration of his estate” (citing *Matter of Young*, 80 Misc2d 937, 365 NYS2d 695 [1975]).

C. Tax Law § 998 provides taxpayers with both the right and the means to protest a notice of deficiency or a notice of disallowance of a claim for refund issued by the Division with respect to estate taxes. The surrogate’s court is granted jurisdiction over proceedings under this section. Since Tax Law § 2006(4), governing the Tax Appeals Tribunal, yields jurisdiction to another forum when such forum is specifically referenced by another provision of the Tax Law, the Division of Appeals is effectively disqualified from serving as the proper forum for a claim, as is the case here, and makes the jurisdiction of the surrogate’s court exclusive.

D. The petition of Carol Marie Kerler is hereby dismissed.

DATED: Albany, New York
July 10, 2014

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE