STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. M830125A

On January 25, 1983, a Petition for Advisory Opinion was received from Barbara O. Marvin of R.D. #3, Ballston Lake, New York 12019.

The issues raised concern the method of computing the value of a transfer for New York State gift tax purposes; the method of computing the value of the consideration received; a determination of whether a transfer was for full and adequate consideration; a determination as to whether the annual exclusion applies; and, assuming gift tax is due, a determination as to whether penalties should be waived.

Petitioner states that she and John Buell Marvin owned a farm as joint tenants. On March 25, 1980, Petitioner sold her one half interest in the property to John Buell Marvin in consideration of $3,000 plus the right to occupy the premises rent free for the rest of her life.

Initially, it should be noted that Section 1009 of the New York Tax Law applies the gift tax provisions of the Internal Revenue Code of 1954 to the gift tax imposed under Article 26-A of the Tax Law. Regulations promulgated pursuant to those provisions of the Internal Revenue Code are similarly applicable.

Petitioner contends that the transfer of her one half interest in the property was a sale for adequate consideration and that no gift was intended. If Petitioner's premise were accepted, New York State gift tax would not be applicable. However, Treasury Regulation 25.2511-1(g)(1) states that "donative intent on the part of the transferor is not an essential element in the application of the gift tax to the transfer. The application of the tax is based on the objective facts of the transfer and the circumstances under which it was made, rather than the subjective motive of the donor. . . ." Treasury Regulation 25.2511-1(e) further provides, "If a donor transfers by gift less than his entire interest in the property, the gift tax is applicable to the interest transferred. The tax is applicable, for example, to the transfer of an undivided half interest in the property or to the transfer of a life estate when the grantor retains a remainder interest or visa versa." In the case at hand, Petitioner relinquished her one-half interest in the property in exchange for $3,000 plus the right to remain on the property rent free for the rest of her life. She, in effect, retained a rent free lease to terminate upon her death and her grantee had an expectancy of full and absolute ownership and control of the property at some point in the future. In short, the grantee obtained a future interest in the property effective upon the Petitioner's death. Thus, the intention of the parties is not controlling where the consideration transferred in exchange for the property does not adequately reflect the value of the grantee's future interest. A review of the method of valuing the grantee's future interest indicates that the gift tax was properly imposed.

Treasury Regulation 25.2512-9)a)(1)(i) states, in part, "where the donor transfers property in trust or otherwise and retains an interest therein, the value of the gift is the value of the property transferred less the value of the donor's retained interest." As a starting point, it is necessary to determine the value of the Petitioner's half of the property transferred and from there to calculate the value of the Petitioner's retained interest. The fair market value of the property transferred was $44,000 and Petitioner's one half interest therein was $22,000. The value of Petitioner's retained interest may be found by referring to Treasury Regulation 25.2512-9(c) which states:

> If the interest to be valued is the right of a person for his life, or for the life of another person, to receive the income of property or to use non-income-producing property, the value of the interest is the value of the property multiplied by the figure in column 3 of Table A(1) or A(2), whichever is appropriate, opposite the number of years nearest the actual age of the measuring life.

The Petitioner's age closest to the date of the gift is 67, based upon her birth date of April 4, 1913. Table A(2) is applicable to gifts made after December 31, 1970 and before December 1, 1983 and provides a life estate factor for a single female, age 67, of .52583. The value of Petitioner's life interest is .52583 multiplied by $22,000 which is $11,568.26. The value of the grantee's future interest is found in accordance with Treasury Regulation 25.2512-9(1))(i) by subtracting $11,568.26 from $22,000 which equals $10,431.74. The proper amount of the net gift is then computed by subtracting the $3000 of consideration tendered for the property from the value of the grantee's future interest, $10,431.74, which equals $7,431.74. Therefore, gift tax is due and owing on the amount of the net gift or $7,431.74.

Petitioner contends that even if the transaction is subject to gift tax, the annual exclusion is applicable. The annual exclusion, however, does not apply to gifts of future interests. Section 2503(b) of the Internal Revenue Code provides a $3000 annual exclusion for gifts made during the 1980 taxable year, but specifically denies this exclusion to gifts of future interests. Since Petitioner's grantee has received a future interest worth $7431.74, the annual exclusion does not apply and gift tax is due on the full amount.

Lastly, Petitioner asserts that penalties should not be assessed in the case at hand. Section 1007(b) of Article 26-A of the New York gift tax law, applies the procedural provisions of Article 22 of the New York personal income tax law, with respect to penalties for failure to file a return or to pay tax. The New York State personal income tax regulations, in turn, provide specific information on the waiver of tax penalties. Section 102.7(a) of the New York personal income tax regulations indicates that a taxpayer may obtain the cancellation, modification or waiver of a penalty if the taxpayer affirmatively establishes that failure to comply with the Tax Law was due to reasonable cause. Reasonable cause is elaborated upon by Section 102.7(b) which provides specific examples of reasonable cause.

Petitioner has failed to assert any facts or circumstances which would constitute reasonable cause for her failure to file a return or to pay tax. Thus, it must be concluded that Petitioner's failure to file a return or to pay tax was due to other than reasonable cause. Hence, penalties were properly assessed.

DATED: May 20, 1985

FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth herein.