STATE OF NORTH CAROLINA **BEFORE THE SECRETARY OF REVENUE**

COUNTY OF WAKE

IN THE MATTER OF:

The Proposed Assessment of Additional Gift Tax for the Taxable Year 2000 by the Secretary of Revenue of North Carolina	)	
vs.	)	**FINAL DECISION**
	)	Docket No. 2003-381
[Taxpayer]	)	

This matter was heard before the Assistant Secretary for Administrative Tax Hearings, Eugene J. Cella, in the city of Raleigh on October 30, 2003, upon an application for hearing by the [Taxpayer], wherein the estate protested the proposed assessment of additional gift tax for the taxable year 2000. The hearing was held by the Assistant Secretary under the provisions of G.S. 105-260.1 and was attended by [Taxpayer's Attorney], and W. Edward Finch, Jr., Assistant Director of the Personal Taxes Division.

On October 25, 2000, [Donor] deeded three properties to [Donees, Son and Daughter-In-Law]. No excise stamp tax was paid on the transfers. Donor died on January 14, 2001, and Son, as Executor of Donor's estate, timely filed Donor's 2000 gift tax return listing the three transfers and reflecting Son as the only donee. Upon examination, the Department determined that Donor had gifted the three properties to both Son and Daughter-In-Law, as evidenced by the warranty deeds executed on October 25, 2000. Donor's taxable gifts for 2000 were recalculated to allocate one-half of the fair market value of the properties to Daughter-In-Law. These adjustments increased Donor's 2000 gift tax liability from $4,300.00 to $10,995.00. Pursuant to G.S. 105-241.1, a Notice of Gift Tax Assessment reflecting additional tax and interest of $7,694.16 for the tax year 2000 was mailed to Taxpayer on June 19, 2003. Taxpayer objected to the proposed assessment and timely requested a hearing before the Secretary of Revenue.

ISSUE

The issues to be decided in this matter are as follows:

1. Are the gifts of the three properties properly divided between Son and Daughter-In-Law?

2. Is the assessment of gift tax and interest proposed against Taxpayer for the taxable year 2000 lawful and proper?

EVIDENCE

The evidence presented by W. Edward Finch, Jr., Assistant Director of the Personal Taxes Division, consisted of the following:

1. Memorandum from E. Norris Tolson, Secretary of Revenue, to Eugene J. Cella, Assistant Secretary for Administrative Tax Hearings, dated May 16, 2001, a copy of which is designated as Exhibit PT-1.

2. Donor's North Carolina gift tax return for the taxable year 2000, a copy of which is designated as Exhibit PT-2.

3. Notice of Gift Tax Assessment for the taxable year 2000 dated June 19, 2003, a copy of which is designated as Exhibit PT-3.

4. Warranty Deed reflecting [a Parcel Identifier Number] made on October 25, 2000, by and between Donor and Donees, recorded October 25, 2000, with [a North Carolina County Register of Deeds office], a copy of which is designated as Exhibit PT-4.

5. Warranty Deed reflecting [a Parcel Identifier Number] made on October 25, 2000, by and between Donor and Donees, recorded October 25, 2000, with [a North Carolina County Register of Deeds office], a copy of which is designated as Exhibit PT-5.

6. Warranty Deed reflecting [a Parcel Identifier Number] made on October 25, 2000, by and between Donor and Donees, recorded October 25, 2000, with [a North Carolina County Register of Deeds office], a copy of which is designated as Exhibit PT-6.

7. Letter from Attorney to the Department of Revenue dated April 5, 2001, a copy of which is designated as Exhibit PT-7.

8. Letter from [Attorney's Associate] to the Department of Revenue dated July 2, 2003, a copy of which is designated as Exhibit PT-8.

9. Letter from Patrick G. Penny, Administrative Officer in the Personal Taxes Division, to [Attorney's Associate] dated July 29, 2003, a copy of which is designated as Exhibit PT-9.

10. Letter from [Attorney's Associate] to the Department of Revenue dated August 11, 2003, a copy of which is designated as Exhibit PT-10.

11. Letter from Eugene J. Cella to [Attorney's Associate] dated August 29, 2003, a copy of which is designated as Exhibit PT-11.

At the hearing, Attorney presented a document entitled Brief for Tax Hearing, a copy of which is designated as Exhibit TP-1.

FINDINGS OF FACT

Based on the foregoing evidence of record, the Assistant Secretary makes the following findings of fact:

1. Donor and Donees at all material times were natural persons, sui juris, and citizens and residents of North Carolina.

2. On October 25, 2000, Donor executed a warranty deed transferring real property located [in North Carolina]. The deed listed both Son and Daughter-In-Law as the grantees. No excise stamp tax was paid on the transfer. An October 2000 appraisal estimated the market value of the property to be $124,000.00

3. On October 25, 2000, Donor executed a warranty deed transferring real property located [in North Carolina]. The deed listed both Son and Daughter-In-Law as the grantees. No excise stamp tax was paid on the transfer. An October 2000 appraisal estimated the market value of the property to be $85,000.00

4. On October 25, 2000, Donor executed a warranty deed transferring real property located [in North Carolina]. The deed listed both Son and Daughter-In-Law as the grantees. No excise stamp tax was paid on the transfer. An October 2000 appraisal estimated the market value of the property to be $118,000.00

5. Donor died on January 14, 2001.

6. Son, as Executor of Donor's estate, timely filed Donor's 2000 gift tax return listing the three transfers and reflecting Son as the only donee. The return reflected gift tax due of $4,300.00, which was remitted with return.

7. The value of the gift of the property located [in North Carolina] is listed on the gift tax return as $30,000.00, the market value of the lot only. The difference between the appraised value of $124,000.00 and the reported gift value of $30,000.00 is the value of the 1,607 square foot home of Donees, which is situated on the property. Attorney contends that the home was constructed or paid for by funds from Son. The values of the other two gifts of property were listed on the gift tax return at their October 2000 appraised values.

8. Attorney contends that it was Donor's intention to make the gifts of the three properties solely to Son and that Daughter-In-Law was included as a grantee on the deeds as a result of an error made during the preparation of the deeds. Attorney further contends that this error created a "resulting trust" in which Daughter-In-Law is holding any beneficial interest in the properties attributable to her in trust for Son. Therefore, Attorney argues, no gift tax would apply to the transfers of bare legal title to Daughter-In-Law as trustee.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Assistant Secretary makes the following conclusions of law:

1. North Carolina law imposes a gift tax on the transfer by gift of real property located in North Carolina or personal property that has acquired a taxing situs in North Carolina. The gift tax applies whether the gift is in trust or otherwise and whether the gift is direct or indirect.

2. If a gift is made in property, the fair market value of the property at the date of the gift is considered the amount of the gift. Where property is transferred for less than adequate and full consideration in money or money's worth, the amount by which the value of the property exceeds the value of the consideration shall be deemed a gift.

3. Gifts, other than gifts of future interests, are subject to an exclusion of $10,000.00 for tax year 2000.

4. A donor is entitled to a lifetime exclusion of $100,000.00 for gifts to "Class A" donees.

5. "Class A" donees include the lineal issue, lineal ancestor, adopted child, or stepchild of the donor. A daughter-in-law is a "Class C" donee.

6. The gift tax rates are based on the relationship between the donor and the donee. Where the donee is the lineal issue of the donor ("Class A"), the gift tax rate is provided in G.S. 105-188(f)(1). Where the donee is the daughter-in-law of the donor ("Class C"), the gift tax rate is provided in G.S. 105-188(f)(3).

7. Nothing else appearing, a conveyance of real property to a husband and wife creates an estate by the entirety. The value of the conveyance is equally divided between husband and wife.

8. To be a gift, a transfer must include the basic property law gift elements, which are: (i) a donor competent to make the gift; (ii) clear and unmistakable intention by the donor to make it; (iii) a conveyance, assignment, or transfer sufficient to vest legal title in the donee without power of revocation at the donor's will; (iv) relinquishment of "dominion and control" over the gift property by delivery; and (v) acceptance by the donee.

9. Although donative intent is one of the basic property law gift elements, donative intent is not an essential element in the application of the gift tax to a transfer. The application of the tax is based on the objective facts of the transfer and the circumstances under which it is made, rather than on the subjective motives of the donor. However, there are certain types of transfers to which the tax is not applicable. It is applicable only to a transfer of a beneficial interest in property. It is not applicable to a transfer of bare legal title to a trustee.

10. A resulting trust can arise where a person makes or causes a disposition of property under circumstances which raise an inference that he does not intend for the grantee to have a beneficial interest in the property; e.g., one person pays money for the property but title goes into the name of another. But the resulting trust is created by operation of

law and arises from the character of the transaction and not necessarily from a declaration of intention.

11. Nothing on the warranty deeds executed by Donor suggests that Donor did not intend for Daughter-In-Law to constitute a grantee upon such deeds, or that Donor did not intend for Son and Daughter-In-Law to take title to the real property as tenants by the entirety.

12. Establishment of a resulting trust requires clear, cogent, and convincing evidence.

13. Donor's evidence was insufficient as a matter of law to establish the existence of a resulting trust in which Daughter-In-Law held legal title to the conveyed properties as trustee for the benefit of Son.

14. The conveyances in Exhibits PT-4, PT-5, and PT-6 constitute fully taxable gifts under G.S. 105-188 to Son and Daughter-In-Law.

DECISION

Based on the foregoing evidence of record, findings of fact, and conclusions of law, the Assistant Secretary finds the proposed gift tax assessment for the tax year 2000 to be lawful and proper and is hereby affirmed.

At issue is whether the transfers of the three properties in October 2000 were gifts to both Son and Daughter-In-Law or to Son only. There is no dispute that the warranty deeds executed at the time of transfer in 2000 reflect both Son and Daughter-In-Law as the grantees. Attorney argues that Donor intended to give the properties solely to Son and that Donor's daughter-in-law's name was added to the deeds in error. Attorney further contends that since Donor did not intend to give Daughter-In-Law any interest in the properties, the transfers created resulting trusts in which Daughter-In-Law is holding the beneficial interests in her share of the properties in trust for Son. Therefore, since Daughter-In-Law had no beneficial interest in the properties and bare legal title was transferred to her as trustee, Attorney argues that no gift tax is applicable to the transfers to Daughter-In-Law.

In order to determine whether a gift has been made for North Carolina gift tax purposes, the facts and circumstances of the transaction must be examined. Treasury Regulation 26 CFR § 25.2511-1(g)(1) denotes that donative intent is not an essential element in the application of

the gift tax to a transfer and that the application of the tax is based on the objective facts of the transfer and the circumstances under which it is made, rather than on the subjective motives of the donor.

In support of his contentions, Attorney submitted as evidence a 20-point sworn affidavit of himself. The affidavit states that Donor never expressed an intent to transfer the properties to Daughter-In-Law. However, the warranty deeds executed by Donor to transfer the properties listed Daughter-In-Law as one of the grantees. The deeds do not mention any trust agreement and there is nothing in the deeds to indicate that Daughter-In-Law should not receive a beneficial interest in the properties. After execution of the deeds, any third party, upon review of the deeds, would have recognized Daughter-In-Law as an owner of the properties. If the properties were sold, Daughter-In-Law would have been entitled to share in the proceeds. Furthermore, there is evidence that would indicate that Daughter-In-Law had very good reason to be listed as a grantee on the deed transferring the property [located in North Carolina]. Daughter-In-Law's residence was located on this particular property and, by Attorney's own admission and as reflected on the gift tax return, Donor had absolutely no investment or interest in the home located at that address.

The evidence also reveals some contradiction regarding the reason Daughter-In-Law appears as a grantee on the deeds. Attorney states that Daughter-In-Law was included in error and that the mistake was not discovered until after the death of Donor. However, in a letter from Attorney's associate dated July 2, 2003, the associate states that the deeds included Daughter-In-Law merely for administrative convenience since Son intended to transfer interest in the properties to Daughter-In-Law. This explanation indicates that Daughter-In-Law's inclusion on the deeds was not by mistake, thereby contradicting Attorney's sworn statements.

While Attorney cites several cases in support of his argument that a resulting trust was created when Donor transferred the three properties, none of them are on point. In each of the cases, the plaintiffs presented substantive evidence, both tangible and factual, to support the

creation of a resulting trust. The courts have repeatedly ruled that in order to establish a resulting trust, the proof must be clear, cogent, and convincing. In *Avery v. Stewart* 136 N.C. 426, 48 S.E. 775, the Court found that "the deed itself, which is absolute in form, raises a strong presumption against the existence of a trust, which should be overcome by a greater weight of evidence than a mere preponderance. He who must take the burden of establishing the trust cannot succeed except upon evidence which is clear and of the most persuasive character." In the absence of any evidence other than his statements, Attorney has failed to meet the burden of proof.

It is the opinion of the Assistant Secretary that the facts and arguments presented by Attorney do not clearly and convincingly establish that Donor did not intend to give Daughter-In-Law beneficial interests in the three properties in question. Furthermore, when all of the facts and circumstances of the transfers are reviewed, the Assistant Secretary reasonably concludes that Donor made the gifts of property equally to Son and Daughter-In-Law, as evidenced by inspection of the warranty deeds. The Assistant Secretary also finds no evidence to support the creation of a resulting trust, as argued by Attorney. Thus, having made the choice of making gifts to both Son and Daughter-In-Law, Donor must accept the tax consequences of that decision, whether contemplated by Donor or not, and may not change the transactions at a later date in order to obtain the tax advantages which would have been afforded by some other choice that could have been made by Donor but was not. *Commissioner of Internal Revenue v. National Alfalfa Dehydrating & Milling Company*, 417 U.S. 134 (1974).

The Assistant Secretary finds that the three gifts of property were properly divided between Son and Daughter-In-Law and that the proposed assessment of additional gift tax against Taxpayer for the tax year 2000 is hereby sustained in its entirety and is determined to be finally due and collectible, together with interest as allowed by law.

Made and entered this 30th day of January, 2004.

Signature _____

Eugene J. Cella

Assistant Secretary for Administrative Tax Hearings
North Carolina Department of Revenue