NOT FOR PUBLICATION WITHOUT APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

ESTATE OF MARY VAN RIPER Plaintiff, vs. DIRECTOR, DIVISION OF TAXATION, Defendant.	:	TAX COURT OF NEW JERSEY DOCKET NO: 008198-2016

Approved for Publication
In the New Jersey
Tax Court Reports

Decided: February 23, 2017

James J. Curry for plaintiff.

Heather Lynn Anderson for defendant
(Christopher S. Porrino, Attorney General
of New Jersey, attorney).

CIMINO, J.T.C.

I. Introduction and Factual Findings

Under the New Jersey Transfer Inheritance Tax, a tax is imposed for the transfer of property in three general categories. First, there is a tax for the transfer of property by will. N.J.S.A. 54:34-1(a), (b). Second, there is tax on any transfer of property by operation of law if the decedent does not have a will. Id. This is referred to as an intestate transfer. Third, there is a tax on a transfer of property by way of deed, grant, bargain,

sale or gift made either: 1) in contemplation of death, or 2) intended to take effect at or after death. N.J.S.A. 54:34-1(c).

The third type of transfer described above is meant to reach certain transfers made during one's lifetime in lieu of a transfer by will or by operation of law under the intestacy laws. In re Estate of Lichtenstein, 52 N.J. 533, 575 (1968). This type of lifetime transfer is commonly referred to as an inter vivos transfer. Many times, inter vivos transfers are effectuated through a trust.

In this case, the husband and wife transferors, Mr. and Ms. Van Riper, established an irrevocable trust in 2007. The marital home was transferred to the trust for one dollar. The express purpose of the trust was "to provide a residence" for "the lifetime" of the transferors. Pl.'s Stmt. of Material Facts, Ex. A. The trust provided that each transferor could live out their respective lives in the marital home.[1] Id. Three months later,

[1] Although the home was not sold, technically the Trust documents provided that the Trustee could sell the home. Generally, "[a]ny funds realized as a result of the sale shall be utilized to provide shelter and housing for the [transferors]." Id. at 2, ¶ Fourth. Specifically, "[i]n the event that the premises are sold, the Trustee shall utilize the proceeds of any such sale for the following purposes: (A) A residence shall be established for the [transferors]. [Transferor wife] may require custodial care. In the event that that can be provided for in a residential setting, then the proceeds of the sale shall be utilized in order to acquire the premises. Any funds remaining shall be utilized to pay the carrying charges on behalf of [transferor wife]. Any surplus funds

husband died and six years later, in 2013, the wife died. Upon the death of both transferors, the trust provided that the marital home would go to their niece. Under New Jersey law, a niece is considered a Class D beneficiary subjecting the transfer to a 15-16% tax. N.J.S.A. 54:34-2(d).[2]

At issue here is a seldom discussed 1955 provision which limits the taxation of at or after death transfers. See L. 1955, c. 135, § 1 (codified at N.J.S.A. 54:34-1.1). The 1955 provision provides that some transfers intended to take effect at or after death are exempt if a complete disposition occurs more than three years prior to death. Id. The question here is whether the structure of the transfer created six years prior to death here satisfies the 1955 exception, thus placing the transfer outside the reach of the at or after death provision.

---

shall then be utilized for the carrying charges for any such residence, including taxes, insurance and utilities. (B) Any remaining funds shall be held in trust for the benefit of the [transferors] herein. The Trustee may, in his sole and absolute discretion, pay either the interest or principal or both for the benefit of the [transferors]. (C) Upon the death of the [transferors], any funds remaining in this Trust together with the proceeds of any substitute residence purchased for the [transferors], shall be distributed by the Trustee to [niece]. . .” Id. Thus, the trust would still “provide a residence” for “the lifetime” of the transferors in accordance with the express purpose of the trust.

[2] The tax is 15% up to $700,000 and 16% above $700,000.

This matter comes before this court on cross-motions for summary judgment. Our Supreme Court has indicated that summary judgment provides a prompt, business-like and appropriate method of disposing of litigation in which material facts are not in dispute. Brill v. Guardian Life Ins. Co. of Am., 14 N.J. 520, 530 (1994). Additionally, cross motions for summary judgment demonstrate to the court the ripeness of the matter for adjudication. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 177 (App. Div. 2008).

The estate filed transfer inheritance tax returns excluding the home. After review, the Division included the transfer of the home to the niece as a transfer subject to the tax. The estate paid the additional tax based upon the home's value of $935,000 and filed the instant appeal. The estate now seeks a refund of the tax paid. The court has jurisdiction over this appeal pursuant of N.J.S.A. 54:33-2.

II. History and Purpose of the "At or After Death" Provision.

New Jersey imposed an inheritance tax starting in 1892. L. 1892, c. 122. The law taxed the property of the decedent transferred at death whether by will, intestate law or otherwise. The tax specifically included a transfer of assets "made or

intended to take effect in possession or enjoyment after the death of the [decedent]." Id. at § 1. In 1906, the law was amended to tax the transfer of the property of the decedent instead of the property itself. L. 1906, c. 228.

The current legislation has its roots in the 1909 iteration of this legislation. L. 1909, c. 228. The 1909 version of the law also provided that a transfer intended to take effect, in possession or enjoyment, at or after death is subject to the tax. Id. at § 1.

The modern provisions of the law at issue here are now codified at N.J.S.A. 54:34-1. In particular, the law now provides that a "transfer of property, real or personal" or "any interest therein or income therefrom, in trust or otherwise" "intended to take effect in possession or enjoyment at or after such death" is taxable.[3,4] Id. This provision applies to the real or tangible personal property situated within the state and intangible personal property wherever situated of residents, and the in-state real or tangible personal property of non-residents. Id.

[3] Also included are transfers "in contemplation of death of the transferor." Id. The "contemplation of death" and "at or after death" provisions are two separate and independent bases for taxation. In re Estate of Lichtenstein, supra, 52 N.J. at 560.

[4] The transfer also must be in excess of $500. N.J.S.A. 54:34-1.

As discussed, the "at or after death" proviso has been a mainstay of New Jersey law since the institution of an inheritance tax in 1892. In fact, "[t]he 'at or after death' provision is a common feature of inheritance tax statutes." In re Estate of Lingle, 72 N.J. 87, 93 (1976). The purpose of the provision is to close avenues of tax avoidance. Id. at 94. The provision is "quite broad." Id.

In interpreting the transfer inheritance tax, the courts are to look "to the substance rather than the form of the scheme, . . . such as reciprocal trusts and agreements, annuities and the like." In re Estate of Lichtenstein, supra, 52 N.J. at 577. To that end, "highly technical concepts of property law have no proper place in the very practical field of taxation." Id. at 581.

III. N.J.S.A. 54:34-1.1 Exemption

Despite the broad reach of section N.J.S.A. 54:34-1, the estate here argues that the specific statutory language found in N.J.S.A. 54:34-1.1 (section 1.1) adopted in 1955 exempts the transfer from taxation since the trust was created more than three years prior to the death of the decedent.

In particular, section 1.1 provides:

> A transfer of property by deed, grant, bargain, sale or gift wherein the transferor is entitled to some income, right, interest or power, either expressly or by operation of law, shall not be deemed a transfer intended to take effect at or after transferor's death if the transferor, more than 3 years prior to death, shall have executed an irrevocable and complete disposition of all reserved income, rights, interests and powers in and over the property transferred.
>
> [Id.]

There are a scarcity of decisions explicitly dealing with section 1.1. Of the reported decisions, the Supreme Court has mentioned section 1.1 twice and the tax court once.

In In re Estate of Lichtenstein, supra, the Supreme Court only mentions section 1.1 in passing. Id. at 585. The Court had to decide whether the "at or after death" provision applied to transfers in which a transferor granted a life estate to another based upon the life of an individual other than the transferor. Id. at 562. Since the transfer was neither at nor after the death of the transferor, nor did the transferor hold any "strings," the transfer was determined to not be taxable. Id. at 578.

In In re Estate of Lambert, 63 N.J. 448 (1972) the Supreme Court considered a transferor who held an annuity which paid him for life. Id. at 450. The annuity was purchased in conjunction with a life insurance policy. The life insurance policy would not have been issued but for the purchase of the annuity. Id.

Generally, life insurance policy proceeds payable to named beneficiaries other than the decedent's estate, the executor or the administrator are exempt from taxation. See N.J.S.A. 54:34-4(f). However, the exception does not apply if the policy is an integrated asset with an annuity. See Tilney v. Kingsley, 43 N.J. 289, 298 (1964). Some years after purchasing the annuities and long before his death, Lambert irrevocably assigned the annuity proceeds to charity. In re Estate of Lambert, supra, 63 N.J. at 451. Upon Lambert's death, the Division wanted to tax the life insurance proceeds as a transfer at or after death. Id. The Court specifically reviewed section 1.1 and its statutory history and determined that even though the transfer was at or after death, the transferor completely and irrevocably disposed of the annuity to charity more than three years prior to death in accordance with section 1.1. Id. at 459. The Court held that "by reason of the 1955 act, transfers, as to which either the transferor retained no interest at inception or, if he did, completely and irrevocably disposed of the same more than three years before death, are not subject to transfer inheritance tax as a transfer 'intended to take effect in possession or enjoyment at or after' the death of the transferor." Id.

In Gray v. Director, Div. of Taxation, 28 N.J. Tax 28 (Tax 2014), a transferor's home and other assets were transferred to

trusts in which the decedent held an income interest for a period of six years. Almost seven years after the creation of the trusts, the transferor died. The transfer did not occur at or after death, but one year prior to death. Id. at 40-48. This court looked to section 1.1 in reaching the decision.

However, none of the decisions have squarely dealt with the applicability of section 1.1 to real property transferred more than three years prior to death, in which the transferor has the right to live until death.

IV. Elements of Section 1.1

The estate here now urges the court to expand section 1.1 to transfers of real property in which the transferors have the right to live until death. The estate alleges that the transferors here relinquished all power and control more than three years prior by transferring the home to an irrevocable trust which provided that the transferors could reside in the home until death. The estate argues that the "at or after death" provision of N.J.S.A. 54:34-1(c) is trumped by the transfer provisions of section 1.1 since the irrevocable transfer to trust was more than 3 years prior to the death of the transferors.

Section 1.1 consists of a number of elements that must be satisfied to overcome the at or after death provision of N.J.S.A. 54:34-1(c). These elements are as follows:

> First, there must be a transfer of property by deed, grant, bargain, sale, or gift;
>
> Second, the transferor is entitled to some income, right, interest or power in the property transferred; and
>
> Third, the transferor must three years prior to death execute an irrevocable and complete disposition of all reserved income, rights, interest and powers in and over the property transferred.

A. Transfer of property

First, there is not any dispute that there was a transfer of property consisting of the transferors' residence to the trust.

B. Transferors' entitlement to some income, right, interest or power.

The second issue is despite the transfer, did the transferors' ability to remain in the home until death constitute an entitlement to some income, right, interest or power in the property transferred.

It must be remembered that the "fundamental purpose [of the at or after death provision in N.J.S.A. 54:34-1(c)] is to preclude avoidance of the transfer inheritance tax by a lifetime transfer which is, in effect, a substitute for a substantial equivalent of

a testate or intestate distribution." In re Estate of Lingle, supra, 72 N.J. at 93; Estate of Berg v. Director, Div. of Taxation, 17 N.J. Tax 256, 262 (Tax 1998).

"It is a well-established rule, venerable with age, that a transfer inter vivos by which the donor retains a life estate in the subject matter is a transfer intended to take effect in possession or enjoyment at or after death." Darr v. Kervick, 31 N.J. 476, 483 (1960). "A transfer is, of course, taxable under the statute even though it be in form absolute, complete, immediately effective, and direct to the donee, if in substance and effect the donor retains or gets back for his life, the income or enjoyment (or the equivalent thereof)". Id. at 484. "It is substance, rather than form, which controls, and the transfer is subject to the transfer inheritance tax even if stated by its terms to be absolute, if it appears that the donor in actuality retains a life interest in the property or its income". Id. "[I]n the case of transfers in trust, taxability has been found where [] the settlor retained income or some benefit for his life with remainder over on his death." In re Estate of Lichtenstein, supra, 52 N.J. at 576.

"A careful review of the case law suggests that the following factors must usually be found in order to bring any inter vivos transaction within the reach of the statute: (1) the grantor or

settlor must transfer some property, or interest therein, while retaining for his lifetime some or all of the economic benefits therefrom; (2) there must be a consequent postponement of enjoyment on the part of the grantee, promisee or other beneficiary; and (3) both the grantor's retention and the grantee's postponement of enjoyment must be for a period determinable by reference to the grantor's death." In re Estate of Lingle, supra, 72 N.J. at 94-95.

Here, the transferors retained life interests in the property and the transferors did indeed live in the property until their deaths. This retention of life interests by both transferors postponed the niece's enjoyment of the property until the death of both transferors. Moreover, both the transferors' retention and the niece's postponement were determined by the death of the transferors.

"So taxability in this state under the 'at or after death' provision has required that the settlor retain in himself some realistic interest, power or control or some other 'string' during his lifetime, or his death must be the determinative and indispensable event in the shifting of economic benefits and burdens." In re Estate of Lichtenstein, supra, 52 N.J. at 578.

By holding the "string" of being able to reside in the property until death, the transferors retained for themselves and did indeed exercise the right and power to enjoy the property. Thus, the transfer is clearly contemplated by the at or after death provision of N.J.S.A. 54:4-1(c) as well as the second prong of section 1.1 since the transferors here are entitled to some right and power through possession and use of the marital home until death.

C. Irrevocable and complete disposition three years prior.

The estate argues that the exemption criteria set forth in section 1.1 is satisfied since the transfer of the marital home upon creation of the trust included an irrevocable and complete disposition of the reserved life interest. Thus, the only issue remaining is whether transferors' "transfer" of property to the trust three years prior to death included an executed irrevocable and complete "disposition" of the life estate. Both terms "transfer" and "disposition" appear in section 1.1 and the estate urges the court to read the terms synonymously. However, the statutory language, the interpretation of the language by the Director of the Division of Taxation, and the legislative history militate against reading the terms synonymously.

1. Statutory language.

"Ordinarily, a comparative analysis of the language of contemporaneous statutes may, because of contrasting language applicable to similar subject matter, be indicative of an intent or purpose on the part of the Legislature to provide different treatment." Malone v. Fender, 80 N.J. 129, 136 (1979), See also, Great Adventure, Inc. v. Director, Div. of Taxation, 7 N.J. Tax 58, 65 (Tax 1984). If the Legislature intended that a mere transfer of the life interest be enough, it would have so stated rather than utilizing the term "disposition." By using the term "disposition," the Legislature signaled that something different has to be done with the reserved income, rights, interests and powers for the transfer to not be taxable. That something different is an irrevocable and complete disposition of the property.

A court "begin[s] by reading the words chosen by the Legislature in accordance with their ordinary meaning, unless the Legislature has used technical terms, or terms of art, which are construed in accordance with those meanings." Praxair Technology, Inc. v. Director, Div. of Taxation, 201 N.J. 126, 136 (2009). According to West's Tax Law Dictionary, 1096 (2016 Ed.), a transfer is the "[a]ct of conveying the title to property from one person to another." However, for tax purposes, a disposition is something

more. [T]he term refers to any transaction which terminates an interest in property." Id. at 289. Thus, a disposition is more than a transfer of legal title, it is the termination of an interest in the property.

Additionally, courts give words in a statute their "common acceptance and usage, but particular words may be enlarged or restricted in meaning by their associates and the evident spirit of the whole expression." Sinclair v. Merck & Co., Inc., 195 N.J. 51, 64 (1998). Here, the statute indicates not merely a disposition, but a complete disposition which signals that the Legislature meant something more than just a mere transfer of title.

2. Director's interpretation.

In interpreting section 1.1, the Director of the Division of Taxation has adopted regulations. See N.J.A.C. 18:26-5.10. There are three general principles that must be applied in interpreting what the Director has done in this case. First is that the Director's determinations are entitled to a presumption of validity. Atlantic City Trans. Co. v. Director, Div. of Taxation, 12 N.J. 130, 146 (1953). The presumption in favor of the taxing authority can be rebutted only by cogent evidence that is definite, positive and certain in quality and quantity to overcome the

presumption. Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985). See also Yilmaz v. Director, Div. of Taxation, 390 N.J. Super. 435, 440, 23 N.J. Tax 361, 366 (App. Div.), certif. denied, 192 N.J. 69 (2007). No such evidence has been provided.

The second general legal principal is that the Director's regulations are presumptively valid and should receive deference from the court unless they are inconsistent with the provisions of the statute they interpret. Koch v. Director, Div. of Taxation, 157 N.J. 1, 8 (1999). The regulation here is consistent with the statutory language and provides further clarity as to the statute's breadth.

Third, regulations are promulgated by the Director in order to clarify and interpret a statutory enactment. Prestia Realty Inc. v. Hartz Mountain Indus., Inc., 303 N.J. Super. 140, 144 (App. Div. 1997). The regulation provides that a transfer is not at nor after death if a transferor "completely and irrevocably disposes of all of his reserved income, rights, interests and powers in and over the transferred property including any right to possession, use and enjoyment of the property." N.J.A.C. 18:26-5.10. In conformity with the statute, the regulation explains the necessity for something more than a mere transfer of an interest and instead requires that the transferor "disposes" of his or her "possession,

use and enjoyment of the property" in order for the transaction to not be considered occurring at or after death. This interpretation and explanation of the statute is in full conformance with the statutory purpose and is entitled to deference. In this case, the transferors did not dispose of their possession, use and enjoyment until vacating the property upon death. Thus, under the regulation, the section 1.1 exemption does not apply.

3. Legislative history of section 1.1.

"[I]f the text [of a statute] is susceptible to different interpretations, the court considers extrinsic factors, such as the statute's purpose, legislative history, and statutory context to ascertain the Legislature's intent." Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 323 (2000). "The judicial goal [when interpreting a statute] is to carry out fairly the legislative purpose and plan, and history and contemporaneous construction may well furnish important light as to that purpose and plan." Bernhardt v. Alden Café, 374 N.J. Super. 271, 279 (App. Div. 2005). "Statutes cannot be read in a vacuum void of relevant historical and policy considerations and related legislation." Borough of Matawan v. Monmouth Cnty. Bd. of Tax., 51 N.J. 291, 299 (1960). Helfrich v. Township of Hamilton, 182 N.J. Super. 365, 370 (App. Div. 1981).

The legislative history of section 1.1 confirms that the purpose of the law is not to take transfers three years prior to death in which the transferor retains a life interest outside the realm of taxability. Rather, the purpose of the section 1.1 is to except from taxability at or after death transfers in which the transferor has relinquished all benefit of the property including a life interest or life estate at least three years prior to death.

Prior to 1955, any transfer occurring at or after death, even one in which the transferor had no interest, was subject to the transfer tax. As then expressed by the New Jersey Supreme Court in 1950, "[t]he test for determining when the transfer takes effect in order to fall within the [at or after death] theory for taxing purposes is whether possession or enjoyment of the property is intended to take effect at or after the transferor's death, irrespective of the time when title is to vest. The important question is whether the shifting of the possession and enjoyment of the subject matter of the succession is dependent upon the settlor's death. Is his death a determining factor in the devolution of the possession and enjoyment of the estates granted? The thing taxed under our transfer inheritance tax statute is the transfer of the interest or property withheld from possession and enjoyment until the transferor's death." Schroeder v. Zink, 4 N.J. 1, 5-6 (1950).

The law prior to 1955 further provided that "a separately and specifically expressed remainder interest, where such remainder interest is expressed to commence at a time at or after the death of the donor, is taxable under our statute; notwithstanding that by the very same act or instrument of transfer the donor simultaneously transfers all other interests in the same property and thereby completely and presently divests himself of all interest or possibility of interest in the property as a whole." In re Estate of Hollander, 123 N.J. Eq. 55, 56 (Prerog. Ct. 1938).

In Hollander, supra, a trust was created by a husband which paid the income to the wife for the husband's lifetime, and then the principal to the wife upon the husband's passing. Id. at 53-54. There the court held the transfer of the principal which was tied to the husband's death was a taxable transfer despite the fact that the husband previously divested himself of all interest in the property. Id. at 56.

In other words, the law prior to 1955 provided that "[t]he criterion of taxability . . . is whether there is an estate passing at or after the death of the donor." Hartford v. Martin, 122 N.J.L. 283, 286 (E. & A. 1939). In Hartford, the decedent owned shares of stock he conveyed to a trust to pay the income to him for life and after death to his children. Hartford v. Martin, 122 N.J. Eq. 489, 490 (Prerog. Ct. 1937), aff'd, 120 N.J.L. 564 (Sup.

Ct. 1938), aff'd, 122 N.J.L. 283 (E. & A. 1939). Two years later, he assigned the income to his children. Id. The prerogative court determined that the separately stated remainder interest which passed at the death of the decedent would come within the express terms of the statute as being a transfer taking effect in possession or enjoyment after the death of the decedent. Id. at 493-94.

That is where the law stood on the eve of the 1955 amendment which became section 1.1. In the early 1950's, a wealthy New Jersey family had five inter vivos trusts. In re Estate of Lambert, supra, 63 N.J. at 456. In four of the trusts, the grantors retained an income or other interest. Id. Later, the grantors of the four trusts assigned their retained income or other interest to either charities or to a person not otherwise entitled to the remainder. Id. With the fifth trust, the grantor retained no interest with the income payable to one person until death of the grantor and then the remainder would pass to another person. Id.

Thus, the wealthy family with five trusts not only wanted to avoid federal estate taxation, which at that time was recently amended to preclude taxation in such circumstances, but also wanted to avoid the New Jersey Transfer Inheritance Tax as well. Id. at 454-456. After some hand-wringing, the Director of the Division of

Taxation supported the measure which was to become Section 1.1. Id. at 457.

The statement annexed to the bill indicated:

> This bill is designed to cure a discrepancy between the New Jersey Transfer Inheritance Tax Law and the Federal Estate Tax Law and the Estate Tax Laws of many of our sister states; notably New York and Pennsylvania. New Jersey now taxes trusts merely because the death of a grantor causes a shift in beneficial interest from one person to another. The tax is asserted even though the grantor has retained no beneficial interest in, and no power over, the property. Such trusts are exempt under Federal and New York statutes and under the Pennsylvania Statute as construed by the cases. The proposed act eliminates this unfairness to residents of New Jersey in comparison to residents of neighboring states.
>
> [Id. at 452.]

The Legislature's intent in adopting this provision was to exempt transfers occurring at or after the transferor's death in which the transferor had given up any and all interest at least three years prior to death. In other words, the only involvement of the transferor was that his or her death served as a trigger as to when an interest would transfer. The Legislature certainly was not considering by any stretch of the imagination that it was exempting at or after death transfers in which the transferor retained a life interest. Transfers in which a transferor kept a life interest had long been subject to taxation. See e.g., Carter

v. Bugbee, 92 N.J.L. 390 (E. &. A. 1919). The Legislature merely sought to fix the situation in which the transferor had actually given all interest away and had not retained any "strings". In re Estate of Lichtenstein, supra, 52 N.J. at 578. The Legislature was of the opinion that once the strings were cut by the transferor with a complete and irrevocable disposition of retained interests, that taxation would not occur.

Overall, based upon the plain language, the Director's regulation and the legislative history, the death of the transferors here resulted in an at or after death taxable transfer that was not exempted by section 1.1.

V. Transfer of Husband's Interest.

The estate in the alternative argues only half the interest in the home is taxable. The trust was created in 2007. With the creation of the trust, there were three interests. The remainder interest which the niece received at or after the death of both husband and wife, the life interest of husband and the life interest of wife. Husband passed in 2007 and his interest extinguished. Wife passed in 2013 and her interest extinguished. Thus, per the express terms of the trust, the niece did not take

the property until after the death of husband and at the death of wife.

Thus the transfer to the niece is fully taxable under the at or after death provision of N.J.S.A. 54:34-1(c). As to the section 1.1 exemption, the trust was established only a few months prior to husband's death. Without looking any further, section 1.1's requirement that any disposition must be three years prior to death results in section 1.1 not being applicable. Moreover, even though wife created the trust more than three years prior to death, the transfer to the niece is not exempt for the reasons stated elsewhere in this opinion.

VI. Conclusion.

In conclusion, for the foregoing reasons, this court determines that the transfer of the marital home which was placed in trust is subject to the New Jersey Transfer Inheritance Tax.

The motion for summary judgment of the estate is denied and the motion for summary judgment of the director is granted. An order will follow.