TAX COURT OF NEW JERSEY

TAX COURT MANAGEMENT OFFICE
(609) 815-2922

P.O. Box 972
TRENTON, NJ 08625-0972

Corrected Opinion Notice

Date: July 16, 2019

Stephen L. Klein, Esq.
Law Office of Stephen L. Klein

Miles Eckardt, Deputy Attorney General
Office of the Attorney General

From: Lynne E. Allsop

Re: VALERIE SHEDLOCK, ET AL, ETC. V. DIRECTOR, DIVISION OF TAXATION
Docket number: 008644-2018

The attached amended opinion replaces the version released on April 26, 2019 The Opinion has been amended as noted below:

Pgs. 14-15 - paragraph amended.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

Corrected July 16, 2019 – Pgs. 14-15 paragraph amended

VALERIE SHEDLOCK AND JUDITH SOLAN, COEXECUTORS OF THE ESTATE OF ANTHONY CALLEO Plaintiffs, v. DIRECTOR, DIVISION OF TAXATION Defendant.	:	TAX COURT OF NEW JERSEY DOCKET NO.: 008644-2018 **Approved for Publication In the New Jersey Tax Court Reports**

Decided: April 26, 2019

Stephen L. Klein for plaintiffs (Law Office of Stephen L. Klein, attorney).

Miles Eckardt for defendant (Gurbir S. Grewal, Attorney General of New Jersey, attorney).

BIANCO, J.T.C.

This opinion shall serve as the court's determination of cross-motions for summary judgment concerning the appeal by plaintiffs, Valerie Shedlock and Judith Solan ("Heirs"), of the assessment by defendant, the Director of the Division of Taxation ("Director") with regard to the Heirs' New Jersey inheritance tax liability for tax year 2016. The Heirs move to invalidate the Director's assessment, which included a two family home, located at 270 Farnham Avenue, Lodi, New Jersey ("Subject Property") as a taxable asset of the estate of the Anthony Calleo ("Decedent"), and seek a refund of taxes, interest paid, and costs of suit. In opposition, the Director moves to dismiss the complaint with prejudice claiming that, the transfer of the Subject Property

*

was made in contemplation of death and was intended to take effect at the Decedent's death, and is therefore subject to the inheritance tax.

For the reasons set forth herein, the Heirs' motion is granted in part and denied in part; the Director's motion dismissing the complaint is denied.

BACKGROUND, FACTS, AND PROCEDURAL HISTORY

The following facts are not disputed. On July 24, 2013, the Decedent, then age eighty-seven, executed a deed transferring his interest in the Subject Property to the Heirs for a sum of less than $100. The deed was recorded in the Bergen County Clerk's office on August 2, 2013. The deed does not contain any provision providing the Decedent with any right, title, interest, control, or power in the Subject Property. On the same date, the Decedent executed a will devising all of his estate, real, personal or mixed, to the Heirs.

Despite his transfer of the Subject Property to the Heirs, the Decedent continuously remained in the Subject Property until his death on August 29, 2016, which was three years and thirty-six days after the date of the execution of the deed, and three years and twenty-seven days after the deed was recorded. While the Decedent was living at the Subject Property with a tenant, the Heirs managed the Subject Property. There was a joint bank account between the Decedent and one of the Heirs, Ms. Valerie Shedlock, which was used to deposit the monthly rental income of $600 from the tenant and pay the maintenance expenses. Any additional maintenance expenses, as well as real estate taxes, were paid from funds of the Decedent. The Decedent reported the rental income and maintenance expenses for the Subject Property in his 2015 Federal income tax return. He also listed the Subject Property as a principal residence.

On June 29, 2017, the Heirs filed a New Jersey Inheritance Tax Return for the Decedent's estate ("inheritance tax return"). The Subject Property was not included in the inheritance tax

return. The Division of Taxation ("Taxation") audited the inheritance tax return and issued a notice of assessment on May 7, 2018 that included as part of the estate, the Subject Property, valued at $425,000 on the date of the Decedent's death. This was based on Taxation's legal conclusion that the transfer of the Subject Property was intended to take effect at the death of the Decedent.

The Heirs paid the taxes and interest due under the notice of assessment to Taxation and timely filed a complaint in the Tax Court on June 11, 2018, seeking a refund and cost of suit.

SUMMARY JUDGMENT

Summary judgment should be granted when there is no genuine issue as to any material fact. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995); R. 4:46-2. A genuine issue of material fact exists "only if, considering the burden of persuasion at trial, the evidence submitted by the parties, on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). Here, the only issue is whether Taxation's deficiency notice of assessment with regard to the Heirs' 2016 inheritance tax is invalid. The court finds that there is no genuine issue as to a material fact in the matter; therefore, a decision by summary judgment is appropriate.

APPLICABLE LAW

A. Inheritance Tax

N.J.S.A. 54:34-1 imposes tax upon "the transfer of property, real or personal, of the value of $500.00 or over, or of any interest therein or income therefrom, in trust or otherwise, to or for the use of any transferee, distributee or beneficiary" by will or by "deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death." N.J.S.A. 54:34-1.

The second paragraph of N.J.S.A. 54:34-1(c) provides a presumption that a transfer which was made more than three years prior to the death of the grantor shall not be deemed to have been made in contemplation of death.

> A transfer by deed, grant, bargain, sale or gift made without adequate valuable consideration and within three years prior to the death of the grantor, vendor or donor of a material part of his estate or in the nature of a final disposition or distribution thereof, shall, in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of subsection c. of this section; but no such transfer made prior to such three-year period shall be deemed or held to have been made in contemplation of death.
>
> [N.J.S.A. 54:34-1(c) (emphasis added).]

Similarly, N.J.S.A. 54:34-1.1 extends a presumption that a transfer made more than three years prior to the death of the grantor shall not be deemed to be intended to take effect at death. However, this provision requires an additional condition for the grantor to meet: "irrevocable and complete disposition of all reserved income, rights, interests and powers in and over the property transferred."

> 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.
>
> [Ibid. (emphasis added).]

B. The Presumption of Correctness

A presumption of correctness is attached to the Director's assessment. See Meadowlands Basketball Assocs. v. Dir., Div. of Taxation, 19 N.J. Tax 85, 90 (Tax 2000), aff'd, 340 N.J. Super. 76 (App. Div. 2001). Furthermore, "the Director's construction of the operative law, which is not plainly unreasonable and with which the Legislature has not interfered, is entitled to prevail."

Aetna Burglar & Fire Alarm Co. v. Dir., Div. of Taxation, 16 N.J. Tax 584, 589 (Tax 1997) (citing Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 327 (1984)). However, "courts remain the final authority with respect to statutory construction and have no obligation to summarily approve of the Director's administrative interpretations." Gray v. Dir., Div. of Taxation, 28 N.J. Tax 28, 35 (Tax 2014). See N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 575 (1978). "An administrative agency may not under the guise of interpretation extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows." Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 521, 528 (1964).

C. The Standard for Interpreting a Statute

When determining the meaning of a statute, the court must first consider the plain language. See GE Solid State v. Dir. Div. of Taxation, 132 N.J. 298, 306 (1993). "If the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the act's literal terms to divine the Legislature's intent." State v. Butler, 89 N.J. 220, 226 (1982). See Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 128 (1987). Nonetheless, "if the plain language of a statute creates uncertainties or ambiguities, a reviewing court must examine the legislative intent underlying the statute and 'construe the statute in a way that will best effectuate that intent.'" Musikoff v. Jay Parrino's the Mint, L.L.C., 172 N.J. 133, 140 (2002) (quoting N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 224 (1999)). "In undertaking that task, courts may ascertain the intent of the drafters by looking to extrinsic sources such as the statute's underlying purpose and history." Ibid. (citing Clymer v. Summit Bancorp., 171 N.J. 57, 66 (2002)). "Above all, [a court] must seek to effectuate the 'fundamental purpose for which the legislation was enacted.'" Ibid. (quoting Twp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999)).

ANALYSIS

A. N.J.S.A. 54:34-1(c): Transfer Made in Contemplation of Death

Although the Director did not specifically use the words "made in contemplation of death" in the motion papers, the Director raised arguments that relate to the "made in contemplation of death" provision.[1] Accordingly, the court finds that a brief discussion of the "made in contemplation of death" provision, and the motive of the Decedent when making the transfer, is appropriate here.

To that end, this court is satisfied that the legislative intent underlying the statute clearly supports the principle that the court need not address the motives of a decedent where the transfer of a property was made more than three years prior to the death of a decedent. Before amending N.J.S.A. 54:34-1 in 1951, the court was required to examine the motives of the donor making the gift, even after the court had concluded that the transfer was made more than three years prior to death and the transfer was not presumptively made in contemplation of death. See Provident Trust Co. v. Margetts, 5 N.J. Super. 420 (App. Div. 1949).

> Our attention is directed only to the two irrevocable trusts, which the respondent claims were established in contemplation of death. At the outset, it is pertinent to point out, that since the transfers under review were completed by the testatrix more than five years before her death, the statutory presumption, under R.S. 54:34-1c, does not arise. Therefore, the burden is upon the respondent to prove that the transfers were made in contemplation of death. Lee v. Walsh, 141 N.J. Eq. 418 (Prerog. Ct. 1948); Squier v. Martin, 131 N.J. Eq. 263 (Prerog. Ct. 1942); MacGregor v. Martin, 126 N.J.L. 492 (Sup. Ct. 1941).
>
> It is quite clear that the impelling or determinative motive of the donor in making the gift is the test as to whether or not such gift was made in contemplation of death.

[1] The Director argued that the Decedent "transferred the Subject Property with the subject of his death on his mind" in the brief and during oral argument.

[Id. at 424.]

However, pursuant to the 1951 amendment, this burden shifting and other considerations are no longer applicable, especially when the transfer has occurred more than three years prior to the death of a decedent.[2] Our State's Supreme Court in In re Estate of Lichtenstein, 52 N.J. 553 (1968) discussed the legislative history of the 1951 amendment. Before the amendment, there was no time limitation on transfers which could be considered as made in contemplation of death. Id. at 566. Therefore, it was necessary for the court to examine the motives of the donor even when the transfer was made more than three years before the death of a decedent. The three-year presumptive period provision was added through the amendment, in order to conform to the federal estate tax law, 26 U.S.C.A. 2035(b), which had been amended in 1950. The Supreme Court looked to the Senate Finance Committee report (S. Rept. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B.

[2] Although motive is no longer applicable when, as here, a transfer is made more than 3 years before death, the court is satisfied, arguendo, that the result would be the same. The Director would not meet the burden of showing that the Decedent was motivated to transfer the Subject Property in contemplation of his death. In Provident Trust Co., the Appellate Division provided the test for determining whether a gift was made in contemplation of death: "'the test . . . is whether the determinative motive was "of the sort which leads to testamentary disposition." The inquiry, therefore, is whether the gift was essentially testamentary in character. Was it made as a substitute for a testamentary disposition? Was the generating thought of death as distinguished from purposes associated with life?'" Provident Trust Co., 5 N.J. Super. at 424 (quoting Central Hanover Bank & Trust Co. v. Martin, 129 N.J.L. 127 (E. & A. 1942)). At the same time, the Appellate Division cautioned that "care [should] be taken that the things relied upon as a revelation of motive are not distorted beyond their real significance," and "[t]he law will not pronounce a definitive judgment as to what lies in the mind and breast of the donor upon outward tokens that are equivocal. Ibid. (citing Moore v. Martin, 125 N.J.L. 189 (Sup. Ct. 1940)). In applying the aforementioned standard, the Appellate Division considered the age and health condition of the donor at the time of the transfer, a desire to evade inheritance tax, and the fact that the will, and other documents were executed on the same day. The court noted that, "[a]ge alone . . . is not decisive. It is a circumstance which must be considered along with all other evidence . . . The fact that [several] instruments were all signed on the same day is [also] not decisive of the donor's motive, but again is a circumstance to be considered." Ibid. Similar to the decedent in Provident Trust Co., the Decedent in the present matter transferred the Subject Property more than three years prior to his death, and did not have a prior Will. Furthermore, and there is no proof that the Decedent's health at the time of the transfer was severely deteriorated, nor that the transfer of the Subject Property was merely a ploy to evade inheritance tax.

524-5) to see the purpose of the federal amendment, "which is equally applicable to the New Jersey amendment." Id. at 567.

> Undoubtedly many gifts in contemplation of death have escaped the estate tax because of the difficulty which the Government encounters in reconstructing the motives of the deceased. On the other hand, complaints have been received that the Bureau of Internal Revenue has in some cases asserted that gifts made many years before death were in contemplation of death without having much basis for the assertion. As a result executors of estates are confronted with an unpleasant choice between compromising the asserted tax liability or engaging in expensive and difficult litigation. At the present time this problem hangs over any person who makes a gift, even though he expects to live for many years, unless he can prepare evidence demonstrating that the gift was made primarily for nontax reasons.
>
> [Ibid. (quoting S. Rept. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B. 524-5) (emphasis added).]
>
> Section 2035(b) removes from the scope of the contemplation of death clause all transfers made more than 3 years prior to the date of death. On the other hand, the burden of showing that the transfer was not in contemplation of death will be borne by the estate in all cases where the transfer was made within a period of 3 years ending with the date of death. This will strengthen the position of the Government in cases where the transfer occurred between 2 and 3 years prior to the date of death.
>
> [Ibid. (quoting S. Rept. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B. 524-5) (emphasis added).]

In re Estate of Lichtenstein, the Court was satisfied that the Legislature did not only intend to shift the burden from the taxpayer to the government, but it was the intent of the Legislature to impose a de facto three-year statute of limitation by adding a clause: "but no such transfer made prior to such three-year period shall be deemed or held to have been made in contemplation of death." N.J.S.A. 54:34-1(c). The Legislature clearly intended to limit the scope of the government's investigation in order to protect the public from "an unpleasant choice between

compromising the asserted tax liability [and] engaging in expensive and difficult litigation." In re Estate of Lichtenstein, 52 N.J. at 567 (citation omitted). Accordingly, as the transfer of the Subject Property here was executed more than three years prior to the death of the Decedent, the court finds that the transfer was not deemed to have been made in contemplation of death under N.J.S.A. 54:34-1.

B. N.J.S.A. 54:34-1.1: Transfer Intended to Take Effect at Death or after Death

The Director mainly argues that the transfer of the Subject Property had the effect of a transfer at death because (1) the Decedent received rental income from the tenant and (2) the Heirs postponed the enjoyment of the Subject Property as the Decedent remained in possession until his death. The court finds, however, that the legislative purpose and history of N.J.S.A. 54:34-1.1, and relevant case law, render the Director's argument without merit.

In In re Lambert, 63 N.J. 448 (1973), our State's Supreme Court analyzed the purpose and history of the N.J.S.A. 54:34-1.1. The Court looked into the statement annexed to the bill which states that:

> 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. The proposed bill does not affect the present rules of taxation of gifts "in contemplation of death."
>
> [Id. at 452.]

The statement indicates that in adopting N.J.S.A. 54:34-1.1 to harmonize federal estate tax law with the laws of neighboring states, the Legislature did not intend to tax when the grantor does not retain any beneficial interest and power over the transferred property.

The Court in In re Lambert examined earlier judicial history, which was also discussed in In re Estate of Lichtenstein. See In re Estate of Lichtenstein, 52 N.J. at 576. The Court discussed In re Brockett, 111 N.J. Eq. 183, 186-190 (Prerog. Ct. 1932), which analyzed the intended scope of the "intended to take effect at death or after death" provision. In In re Brockett, the trial judge concluded that the "intended to take effect at death or after death" provision does not intend to tax an immediately effective gift of the absolute title to a property even when the remainderman might not possess or enjoy the property until after the death of the donor, because "in practical effect and substance, there is a complete, present gift of the entire estate whereby the donor is immediately divested of all interest and enjoyment." Id. at 189; In re Lambert, 63 N.J. at 453. This conclusion was once reversed by the Supreme Court in Koch v. McCutcheon, 111 N.J.L. 154 (Sup. Ct. 1933), where the Court made a similar conclusion to the Director's arguments in the instant matter. However, the conclusion in In re Brockett was later revived by the enactment of the current statute (codified at N.J.S.A. 54:34-1.1).

The Court in In re Lambert examined the history of the enactment of N.J.S.A. 54:34-1.1, which was preceded by litigation brought by a New York attorney representing a wealthy family. In that matter, the New York attorney argued not only that the decisions like Koch had become unfair to New Jersey residents, but also that the State of New Jersey would lose inheritance tax revenue considering that New York and Pennsylvania have more favorable inheritance tax law. In re Lambert, 63 N.J. at 456-57. The Director in In re Lambert agreed to the position taken by the

New York attorney and "it was approved and recommended by the State Treasurer and the Attorney General and it became L. 1955, c. 135." Id. at 457.

Considering the clear legislative history, the Court in In re Lambert concluded that where the transferor retained no interest in the property or completely and irrevocably disposed an interest in the property more than three years before death, the transfer is deemed not intended to take effect at the transferor's death. Id. at 458-59.

A similar result was reached in previous decisions. In Nazzaro v. Neeld, 18 N.J. Super. 56 (App. Div. 1952), for example, the Appellate Division addressed whether the transfer was intended to take effect at the transferor's death. The Appellate Division looked into the test proposed by the Supreme Court in Schroeder v. Zink, 4 N.J. 1 (1950). The Supreme Court stated that "[t]he 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 determinative factor in the devolution of the possession and enjoyment of the estates granted?'" Id. at 9 (citing Hartford v. Martin, 122 N.J.L. 283, 287 (E. & A. 1938). In view of this test proposed by the Supreme Court, the Appellate Division concluded that the transfer was "complete, unqualified, and consummate" because the transferor or decedent reserved no right to revoke or amend. Nazzaro, 18 N.J. Super. at 62.

Similarly, the Supreme Court in In re Estate of Lichtenstein concluded that:

> 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. Otherwise the transfer is not taxable under this provision. See e.g., In re Kellogg, 123 N.J. Eq. 322 (Prerog. 1938); Nazzaro v. Neeld, 18 N.J. Super. 56 (App. Div. 1952).

> The settlor retained no realistic beneficial interest or power whatever. The divestment was complete at inception without any possibility of reverter in fact. Every possible contingency is covered. A final remainder to intestate takers precludes any failure of ultimate disposition.
>
> [In re Estate of Lichtenstein, 52 N.J. at 578.]

With the legislative history and our higher courts' precedent in mind, this court finds that the Director's position contradicts Taxation's position in 1955 as described in In re Lambert and merely mirrors previous directors' and Taxation's approach prior to the amendment.

In Newberry v. Walsh, 20 N.J. 484, 490 (1956), our State's Supreme Court examined whether the transfers to a trust were intended to take effect at death of the decedent, given the decedent's power to "alter, amend, or revoke" the transfers and change beneficiaries. By reserving this power to the decedent, the Court concluded that the ultimate beneficiaries of the trust were not confirmed until death of the decedent. Accordingly, the Court found the transfers were intended to take effect at death of the decedent and were taxable. Unlike the decedent in Newberry, the Decedent in the present matter had no power to modify the transfer. Simply because the Decedent reported the rental income from the tenant as income in his tax return, and continued to reside at the Subject Property, does not mean that the Decedent retained control over said property. See Gray, 28 N.J. Tax at 35 ("Although [the decedent] retained income and beneficial enjoyment of her residence for the trust period, decedent abandoned control over the property . . . [thus,] the transfers shall not be deemed intended to take effect at or after her death."). It is undisputed by the very terms of the deed of transfer that the Decedent retained no interest, right to possession or income in, of, and from the Subject Property. There is no statement in the deed of transfer that establishes the Decedent's exclusive right to receive rental income from the tenant or to remain in the Subject Property until his death. At all times, the Heirs had full control over, and the right to the rental income. The Decedent only had a right to use the funds in the joint bank account. The

Decedent merely handled the fund in the joint bank account to maintain the Subject Property. It is undisputed that the Heirs allowed the Decedent to handle the fund of joint bank account because the Decedent did not use the rental income for the benefit of himself, but rather, he used the income for the benefit of the Subject Property, which was owned by the Heirs.

The Director further relies on the Tax Court's decision in Estate of Riper v. Dir., Div. of Taxation, 31 N.J. Tax 1 (Tax 2017) to argue that the Decedent retained a de facto life estate in the Subject Property. This court, however, finds Estate of Riper factually distinguishable. In Estate of Riper, "the express purpose of the trust was 'to provide a residence' for 'the lifetime' of the transferors." Id. at 2. Also, in Estate of Riper the trustee was required to use the proceeds of the sale of the property to provide shelter and housing for the transferors. Ibid. n.1. Therefore, clear and convincing evidence was presented that the transferors retained an interest in the property. Here, by contrast, the Decedent did not have any interest in the Subject Property. The court could not find any statement entrusting a life estate or any interest to the Decedent in the deed. Therefore, the court concludes that all of the Decedent's right and interest in the Subject Property was transferred on July 24, 2013.

Our State's Supreme Court in In re Estate of Lingle, 72 N.J. 87 (1976) concluded that three factors must usually exist in the inter vivos transactions to determine that the transfer was intended to take effect at or after death:

> (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.
>
> [Id. at 95.]

Immediately after the above statement, the Court rephrased the above factors and concluded that:

> Conversely, lifetime transfers will be held not to come within the "at or after death" clause where (1) the retention of benefits by the grantor is not determined by reference to the duration of his life; (2) the grantor has completely divested himself of his entire interest in the transferred property; or (3) there was full and adequate consideration for the property transferred.
>
> [Ibid. (emphasis added).]

The Director argues that the transfer by the Decedent meets the factors in Lingle as the Decedent received rental income and the Heirs postponed enjoyment of the Subject Property until the death of the Decedent. The Director's argument fails, however, because the Decedent only received the rental income and remained in the Subject property at the discretion of the Heirs; the transfer of the Subject Property was complete and the Decedent's title was conveyed without any reference to a right to receive rental income or retain a life estate. Accordingly, the court finds that "the grantor has completely divested himself of his entire interest in the transferred property," ibid., and therefore has met one of the three elements delineated by the Court in In re Estate of Lingle. The Subject Property should therefore, not be included in the Decedent's estate for inheritance tax purposes.

Finally, the Director argues that the transfer of the Subject Property meets N.J.A.C. 18:26-5.8(b), which states that "[t]he transfer is taxable if by any means whatsoever the transferor has in form transferred property but has deferred the actual possession, use, or enjoyment of the property until a time which can only be measured by reference to the transferor's death," id., because the Decedent remained on the Subject Property which postponed the Heirs' enjoyment of the Subject Property until the Decedent's death. However, the court has rejected the applicability of N.J.A.C. 18:26-5.8(b) to the present matter through the analysis of In re Estate of Lingle, 72 N.J. at 95 ("[L]ifetime transfers will be held not to come within the 'at or after death' clause where . . . the

grantor has completely divested himself of his entire interest in the transferred property"). The Decedent was able to remain on the Subject Property only at the discretion of the Heirs. The Decedent had completely divested himself of any interest in the Subject Property, he did not have any right or power to defer the actual possession, use, or enjoyment of the Subject Property. The transfer, in both form and effect, was complete and the title was conveyed without any reference to a reservation of right, ability to sell, or the retaining of a life estate. Accordingly, N.J.A.C. 18:26-5.8(b) does not apply to the transfer of the Subject Property.

C. Cost of Suit

The Heirs request refund of litigation costs. However, under R. 8:9-2, cost of suit is not allowed. The general rule is that "each litigant bears his, her or its litigation costs even where there is litigation which is of marginal merit." Venner v. Allstate, 306 N.J. Super. 106, 113 (App. Div. 1997).

CONCLUSION

For all of the foregoing reasons, the court concludes that the value of the Subject Property shall not be included in the estate of the Decedent for New Jersey inheritance tax liability purposes. The court is satisfied that the transfer of the Subject Property was not made in contemplation of death, nor was it intended to take effect at or after death under N.J.S.A. 54:34-1(c) and N.J.S.A. 54:34-1.1. Accordingly, the Heirs' motion to invalidate the Director's notice of assessment and refund the taxes and interest paid is granted; however, their demand for costs of suit is denied. The Director's cross-motions for summary judgment is denied.

The parties shall submit computations pursuant to R. 8:9-3 within 30 days of the date of this opinion, establishing the refund amount with interest computed in accordance with this opinion and through the date hereof. The court's order and final judgment will thereafter be

uploaded on eCourts. The court retains jurisdiction in the event the amount of the refund and interest cannot be agreed to by the parties pursuant to computations.