

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
JEROME AND RUTH KAMERMAN : DETERMINATION
for Redetermination of Deficiencies or for Refund of : DTA NOS. 820553 AND
New York State Personal Income Tax under Article 22 : 820636
of the Tax Law for the Years 2000 and 2001. :

Petitioners, Jerome and Ruth Kamerman, 470 Park Avenue South, 12th Floor South, New York, New York 10016, filed petitions for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2000 and 2001.

On February 18, 2006 and March 6, 2006, respectively, petitioners, appearing *pro se*, and the Division of Taxation, appearing by Mark F. Volk, Esq. (Barbara J. Russo, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs submitted by June 14, 2006, which date commenced the six-month period for issuance of this determination. After review of the evidence and the arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation's inclusion of non-New York State and local bond interest income, earned by petitioner Jerome Kamerman from three Fidelity Municipal Money Market mutual fund accounts, in petitioners' taxable income for the years 2000 and 2001 was proper.

FINDINGS OF FACT

1. On August 6, 2001, petitioners, Jerome and Ruth Kamerman, filed their New York State Resident Income Tax Return for the 2000 tax year. On that return, petitioners subtracted a total of \$52,097.00, consisting of taxable refunds of State and local taxes of \$2,458.00, taxable amount of social security benefits of \$15,249.00, interest income on U.S. government bonds of \$4,390.00, pension and annuity income exclusion of \$20,000.00 and a college tuition savings deduction of \$10,000.00, from their Federal adjusted gross income of \$380,400.00 and determined their New York adjusted gross income to be \$328,303.00. After claiming itemized deductions of \$52,793.00, they determined their taxable income to be \$275,510.00 and their New York State tax to be \$18,872.00.

2. On September 18, 2002, petitioners filed their New York State Resident Income Tax Return (Form IT-201) for the 2001 tax year. On that return, petitioners reported Federal adjusted gross income in the amount of \$359,726.00, added other income (line 22 on Form IT-201) in the amount of \$1,677.00 and then subtracted a total of \$54,896.00, consisting of taxable refunds of State and local income taxes of \$2,697.00, taxable amount of social security benefits of \$15,830.00, interest income on U.S. government bonds of \$4,637.00, pension and annuity income exclusion of \$20,000.00, college choice tuition savings deductions of \$10,000.00 and other deduction of \$1,732.00 and determined their New York adjusted gross income to be \$306,507.00. After claiming itemized deductions of \$32,476.00, they determined their taxable income to be \$274,031.00 and their New York State tax to be \$18,771.00.

3. The Division of Taxation (the "Division") receives information concerning taxable interest income earned by New York State account holders from investment brokers and payers and maintains an electronic database of tax exempt bond and mutual fund interest income

reported by the payers pursuant to Tax Law § 658. This database shows the name, address and social security number of the taxpayer receiving the interest income, the source of the income, account number, fund cusip number or description, total distribution, percentage taxable to New York, and the tax amount.

3. The Division received information from petitioners' broker, Fidelity Investments ("Fidelity"), regarding the amount of non-New York State and local bond interest earned by petitioners in the year 2000. Specifically, Fidelity reported taxable interest income paid to Jerome Kamerman for the year 2000 from Fidelity Municipal Money Market mutual fund account numbers 1, 2 and 3¹ in the amounts of \$694.00, \$2,050.00 and \$1,884.00, respectively, and taxable interest income in the amount \$35.00 paid to Ruth Kamerman for the year 2000 from a Spartan Intermediate Municipal Income mutual fund account. The Division also received the following information from petitioners' brokers regarding the amount of non-New York State and local bond interest earned by petitioners in the year 2001: taxable interest income paid to Jerome Kamerman from Fidelity Municipal Money Market mutual fund account numbers 1, 2 and 3 in the amounts of \$505.00, \$959.00 and \$1,300.00, respectively, and taxable interest income in the amount of \$62.00 paid to Ruth Kamerman from a Dreyfus Municipal Money Market mutual fund account.

4. Based upon the information the Division received from the brokers regarding the taxable interest income received by petitioners from the above-named mutual funds, the Division performed an audit of petitioners' New York State resident income tax returns for the years 2000 and 2001. The Division determined that petitioners had failed to report any interest income on obligations from any state other than New York State or any political subdivision of another

¹ For purposes of this proceeding, the Fidelity Municipal Money Market accounts are numbered 1, 2 and 3.

state which they received in the years 2000 and 2001 as income on line 19 of their New York State income tax returns for both years and recomputed their New York State tax liability accordingly.

5. On May 17, 2004, the Division issued to petitioners a Notice of Deficiency for the year 2000 which asserted additional New York State personal income tax due in the amount of \$319.41, plus interest. The Notice of Deficiency was based upon a Statement of Proposed Audit Changes, dated February 20, 2004, in which the Division determined that a portion of the interest income, i.e., \$4,663.00, which petitioners received from Fidelity Municipal Money Market and Spartan Intermediate Municipal Income mutual fund accounts should be included in petitioners' New York State taxable income for the year 2000. The statement showed a corrected tax liability for New York State in the amount of \$19,191.85 less tax previously stated of \$18,872.44 for additional New York State tax due in the amount of \$319.41, plus interest.

6. Petitioners filed a Request for Conciliation Conference challenging the Division's inclusion of the municipal interest income listed as being received by Jerome Kamerman from Fidelity Municipal Money Market mutual fund account numbers 1, 2 and 3 in the amounts of \$694.00, \$2,050.00 and \$1,884.00, respectively, in their taxable income for the year 2000. In this request, petitioners claimed that the three Fidelity Municipal Money Market mutual fund accounts belonged to three other taxpayers and Mr. Kamerman's name and social security number were merely listed on these accounts as a matter of convenience. Following a conciliation conference held on February 16, 2005, the Division issued a Conciliation Order (CMS No. 203318), dated April 8, 2005, sustaining the Notice of Deficiency.

7. On May 31, 2005, petitioners filed a petition challenging the Notice of Deficiency with the Division of Tax Appeals. In their petition, petitioners asserted that Jerome Kamerman was

not the beneficial owner of the three Fidelity Municipal Money Market mutual fund accounts but was acting as the agent for the beneficial owners of these accounts, all of whom were nonresidents of New York State during 2000. Petitioners further asserted that since the interest income earned in these Fidelity accounts does not belong to Mr. Kamerman, they should not be subject to New York State income tax on such income.

8. On June 27, 2005, the Division issued to petitioners a Notice of Deficiency for the year 2001 which asserted additional New York State personal income tax due in the amount of \$193.58, plus interest. The Notice of Deficiency was based upon a Statement of Proposed Audit Changes, dated April 11, 2005, in which the Division determined that a portion of the interest income, i.e., \$2,826.00, which petitioners received from Fidelity Municipal Money Market and Dreyfus Municipal Money Market mutual fund accounts should be included in petitioners' New York State taxable income for the year 2001. The statement showed a corrected tax liability for New York State in the amount of \$18,964.64 less tax previously stated of \$18,771.06 for additional New York State tax due in the amount of \$193.58, plus interest.

9. On July 25, 2005, petitioners filed a petition challenging the Notice of Deficiency with the Division of Tax Appeals. In their petition, petitioners asserted that Jerome Kamerman was not the beneficial owner of the three Fidelity Municipal Money Market mutual fund accounts but was acting as the agent for the beneficial owners of these accounts, all of whom were nonresidents of New York State during 2001. Petitioners further asserted that the interest income earned on these three accounts should not be included in their taxable income for the year 2001.

10. On or about January 23, 1985, Dan Chill, a resident of Israel, gave \$10,000.00 to petitioner Jerome Kamerman, his cousin, to hold in trust for the benefit of Mr. Chill's three

minor children, Jordan, Caleb and Henry and to be disbursed from time to time at the direction of Mr. Chill or his children. Mr. Chill requested that Mr. Kamerman invest the money in a Fidelity Group tax-exempt money market mutual fund account to be carried in Mr. Kamerman's name, but for the benefit of the three Chill children, residents of Israel.

11. No written trust document was executed.

12. On or about January 23, 1985, Mr. Kamerman opened a new account at Fidelity Group, entitled "Jerome J. Kamerman," into which he deposited the \$10,000.00 which he received from Mr. Chill to be held in trust. This account, bearing account number 1, was invested in the Fidelity Tax-Exempt Money Market Trust mutual fund.

13. During March 1985, Mr. Chill instructed Mr. Kamerman to open two additional accounts at Fidelity Group, so there would be a separate account for the benefit of each of the Chill children. He further instructed Mr. Kamerman to transfer from the existing Fidelity Group account the sum of \$3,500.00 to one of the new accounts for the benefit of Caleb, also known as Caley or Cali, and \$2,500.00 to one of the new accounts for the benefit of Henry. Mr. Kamerman made a notation of the instruction regarding the new accounts on the "1985 Month of Feb." Fidelity Group statement and sent a copy to Mr. Chill.

14. Subsequently, Mr. Kamerman opened two additional accounts at Fidelity Group entitled "Jerome C. Kamerman" and "Jerome H. Kamerman," bearing account numbers 2 and 3, respectively. These two accounts were funded in accordance with Mr. Chill's instructions by transfers from the Fidelity Group Jerome J. Kamerman account number 1 and were invested in Fidelity Tax-Exempt Money Market Trust mutual funds. In order to identify which Fidelity Group account was held in trust for each of the Chill children, Mr. Kamerman used the first

letter of each child's first name, to wit, "J" for Jordan, "C" for Caleb and "H" for Henry as his middle initial when he opened the three accounts.

15. By note dated March 28, 1986, Mr. Chill advised Mr. Kamerman that he would soon transfer \$1,500.00 to Mr. Kamerman, to be divided equally among the three Fidelity Group accounts, account number 1 for "Jordy", account number 2 for "Cali" and account number 3 for "Henry."

16. In a note dated May 4, 1986, Mr. Chill advised Mr. Kamerman that his wife Abby would soon transfer \$1,500.00 to Mr. Kamerman to be divided equally among the three accounts, account numbers 1, 2 and 3.

17. By a letter dated January 29, 1987, Mr. Chill sent checks totaling \$4,315.00 which Caleb had received as gifts in honor of his Bar Mitzvah to Mr. Kamerman, with instructions to transfer the funds into the Fidelity Group account titled Jerome C. Kamerman, the trust account for Caleb at Fidelity Group. In a letter dated February 18, 1987, Mr. Chill sent additional checks totaling \$1,653.19 to Mr. Kamerman, with instructions to transfer these funds into the "C" account, the trust account for Caleb at Fidelity Group. In a second letter dated February 18, 1987, Mr. Chill sent a check for \$326.67 to Mr. Kamerman, with instructions to transfer these funds into the "J" account, the trust account for Jordan at Fidelity Group.

18. By a note dated May 8, 2000, Mr. Chill sent checks totaling \$1,161.00, received by Caleb and Aviya Chill as wedding gifts, to Mr. Kamerman, with instructions to transfer same into the trust account for Caleb at Fidelity Investments. In a letter dated May 17, 2000, Mr. Kamerman advised Cali and Aviya Chill that he had received the wedding gift checks totaling \$1,161.00 from Cali's father and he had deposited them into his account and then had sent his check for that amount plus an additional \$1,000.00, as a gift from Mr. Kamerman and his wife

Ruth, to Cali's account at Fidelity, i.e., the Fidelity Tax Exempt (Municipal) Money Market Trust mutual fund account number 2.

19. In a letter dated June 2, 2000, Mr. Chill sent additional checks totaling \$660.00 received by Cali and Aviya Chill as wedding gifts, with instructions to transfer the funds into the Fidelity account held for Caleb. Mr. Kamerman transferred the funds into the Fidelity Tax Exempt (Municipal) Money Market Trust mutual fund account number 2 on June 8, 2000.

20. By note dated October 23, 2000, Mr. Chill sent Mr. Kamerman a check payable to Henry Chill in the amount of \$100.00 together with a deposit slip for Fidelity Tax Exempt (Municipal) Money Market Trust mutual fund account number 3, the account held in trust for Henry. This check, along with another check was sent to Fidelity for deposit in account number 3 and was deposited into that account on November 14, 2000.

21. By facsimile dated October 23, 2000, Mr. Chill instructed Mr. Kamerman to withdraw \$9,500.00 from Fidelity Tax Exempt (Municipal) Money Market Trust mutual fund account number 2, the account held in trust for Caleb, and transmit the funds by wire to Mr. Chill. Mr. Kamerman withdrew the sum of \$9,500.00 from Fidelity Tax Exempt (Municipal) Money Market Trust mutual fund account number 2 on October 26, 2000 and transmitted same.

22. It was Mr. Kamerman's custom to send Mr. Chill a copy of the year end investment report of the three mutual fund accounts held in trust for the Chill children. On February 5, 2001, Mr. Kamerman sent the year 2000 year end report for the three Fidelity mutual fund accounts held in trust for the Chill children to Mr. Chill.

23. From time to time, in addition to the foregoing items, Mr. Chill sent funds to Mr. Kamerman with instructions to transfer the funds among the three Fidelity mutual fund accounts

held for the benefit of the three Chill children and to withdraw funds from the accounts and transmit the withdrawn funds to Mr. Chill.

24. Mr. Kamerman has always held the Fidelity Tax Exempt (Municipal) Money Market Trust mutual fund account numbers 1, 2 and 3 in trust for the benefit of the three Chill children, in accordance with Mr. Chill's instructions, and made deposits and withdrawals only as instructed by Mr. Chill.

25. Petitioners admit that Ruth Kamerman received interest income for the year 2000 from a Spartan Intermediate Municipal Income mutual fund account and that \$35.00 of the interest income paid to her should be included in their taxable income for the 2000 tax year. Petitioners also admit that Ruth Kamerman received interest income for the year 2001 from a Dreyfus Municipal Money Market mutual fund account and that \$62.00 of the interest income paid to her should be included in their taxable income for the 2001 tax year.

CONCLUSIONS OF LAW

A. At issue in this matter is the Division's determination that non-New York State and local bond interest income earned on three Fidelity Municipal Money Market mutual fund accounts titled in petitioner Jerome Kamerman's name was part of petitioners' taxable income and subject to tax in the 2000 and 2001 tax years. While petitioners admit that the three Fidelity mutual fund accounts were titled in Mr. Kamerman's name, they maintain that he held these accounts in trust for Jordan, Caleb and Henry Chill pursuant to instructions he received from their father, Dan Chill. They assert that, since the three trusts were established with the funds of Jordan, Caleb and Henry Chill, and they, or their parents, had the exclusive right to the income and principal, these trusts are grantor trusts. They further assert that, with respect to each trust account, Mr. Kamerman, without any beneficial interest of his own, invested the funds as

directed and withdrew funds only at the grantor's instruction for transmission to him. Petitioners point out that under Federal law, income earned by a grantor trust is taxable to the grantor and not to the trustee or the trust. Therefore, petitioners argue that inasmuch as the three Fidelity Municipal Money Market mutual fund accounts at issue were held in grantor trusts by Mr. Kamerman, in his capacity as trustee, he is not subject to tax on the interest income earned by the trusts.

B. The Division asserts that the three Fidelity mutual fund accounts at issue are clearly not trust accounts because trusts are legal entities which must be properly created to be valid. It points out that EPTL 7-1.17 requires, among other things, that every lifetime trust be in writing. The Division further points out that EPTL 11-1.6(a) requires that all trust property be kept separate from the trustee's individual property and separate from all other property and that all transactions affecting trust property must be executed by the trustee in his name as trustee and not in his individual name. It claims that the three Fidelity mutual fund accounts at issue do not comply with the provisions of EPTL 7-1.17 and EPTL 11-1.6(a) because no written trust document was executed, they are in the name Jerome Kamerman-Individual and the income was reported under Mr. Kamerman's social security number. Therefore, since petitioners have failed to prove that the Fidelity mutual fund accounts are valid trust accounts, the Division claims that its determination that the interest income earned on the three Fidelity mutual fund accounts was taxable to petitioners in the 2000 and 2001 tax years was proper.

C. The first question to be addressed is whether a written document executed by the grantor and trustee is necessary for the creation of an express trust in money or personal property. The Division contends that the provisions of EPTL 7-1.17 require all lifetime trusts, to wit, express trusts created by the grantor during his lifetime, to be in writing. The Division's

reliance upon EPTL 7-1.17 is misplaced. Enacted as part of chapter 139 of the Laws of 1997, this statute became effective on December 25, 1997 and applies only to lifetime trusts created on or after such date. Until the passage of this statute, New York did not have any rules mandating formal requirements for lifetime trusts except for the pour-over trust of EPTL 3-3.7. Express trusts may be created in personal property by parol or in writing, and no particular form of words or conduct is necessary for the manifestation of intention to create a trust (*In Re Estate of Fontanella*, 33 AD2d 29, 304 NYS2d 829, 831). In the case of money or personal property, a trust may be created by an oral agreement accompanied by a transfer or delivery of the property, and such delivery will pass the title to the property and as a trust its validity is to be tested by the same rules whether it is created by will or by instrument *inter vivos* (*Gilman v. McArdle*, 99 NY 451, 459).

D. The next question to be addressed is whether a valid trust of personal property was created in the instant matter. There are four essential elements of a valid trust of personal property: a designated beneficiary; a designated trustee not the beneficiary; a fund or other identifiable property; and the actual delivery of the fund or other property to the trustee with the intention of passing legal title thereto to him as trustee (*In re Estate of Fontanella, supra*, 304 NYS2d, at 831). The evidence clearly establishes that a valid trust was created in 1985. At that time, Dan Chill, a resident of Israel, transferred the sum of \$10,000.00 to his cousin, Jerome Kamerman, to hold in trust for the benefit of Mr. Chill's minor children, Jordan, Caleb and Henry. He further requested that Mr. Kamerman invest the funds in a Fidelity Group tax-exempt money market mutual fund account to be carried in Mr. Kamerman's name but for the benefit of the three Chill children. Upon receipt of the funds, Mr. Kamerman opened the Fidelity Group tax-exempt mutual fund account in the name Jerome J. Kamerman, account number 1.

Subsequently, in order to have a separate trust account for each Chill child, at Mr. Chill's request, Mr. Kamerman transferred some funds from Fidelity mutual fund account number 1 into two additional Fidelity Group tax-exempt money market mutual fund accounts, to wit, an account carried in the name Jerome C. Kamerman, account number 2, and an account carried in the name Jerome H. Kamerman, account number 3. The evidence further indicates that, over time, Mr. Chill transferred additional funds to Mr. Kamerman with instructions to hold the funds in trust for one or more of the Chill children. Indeed, in the year 2000, one of the years at issue, Mr. Chill transferred numerous checks received by Caleb and Aviya Chill as wedding gifts to Mr. Kamerman and instructed him to put an equivalent amount in Fidelity Tax Exempt Money Market Trust mutual fund account number 2, the account held by Mr. Kamerman in trust for Caleb at Fidelity Investments. During the same year, Mr. Chill also transferred a check payable to Henry Chill to Mr. Kamerman, with instructions to transfer same into Fidelity Tax Exempt Money Market Trust mutual fund account number 3, the account held by Mr. Kamerman in trust for Henry Chill. A review of the year 2000 year end report for the three Fidelity mutual fund accounts at issue confirms that Mr. Kamerman deposited funds into Fidelity Tax Exempt Money Market Trust account numbers 2 and 3 in accordance with Mr. Chill's instructions. The agreement between Mr. Chill and Mr. Kamerman and the transfer of funds to Mr. Kamerman to hold in trust for the Chill children created a valid trust which continued during the years at issue. Therefore, Mr. Kamerman held the funds in the three Fidelity Municipal Money Market mutual fund accounts in issue in trust for Jordan, Caleb and Henry Chill, all nonresidents of New York.

E. Petitioners contend that the three Fidelity mutual fund accounts which Mr. Kamerman held in trust for Jordan, Caleb and Henry Chill were grantor trusts because they were established with the funds of the three named Chill children, and they, or their parents, had the exclusive

right to the income and principal. They further contend that Mr. Kamerman, who had no beneficial interest in the three accounts, invested the funds as directed in each trust account and withdrew funds only at the grantor's instruction for transmission to him. Therefore, petitioners maintain that the income earned on each of those Fidelity mutual fund grantor trust accounts in the years 2000 and 2001 was taxable to each grantor and not to the trustee, Mr. Kamerman, or the trust.

F. Provisions of the Internal Revenue Code ("IRC") provide guidance in determining whether the Fidelity Municipal Money Market mutual fund accounts held by Mr. Kamerman in trust for Jordan, Caleb and Henry Chill were indeed grantor trusts as petitioners contend. Under IRC § 671, a grantor or another person is required to include in computing his taxable income and credits those items of income, deduction, and credit against tax which are attributable to or included in any portion of a trust of which he is treated as the owner. IRC § 674(a) treats the grantor as the owner of any portion of a trust "in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party." IRC § 677(a) provides, in relevant part, as follows:

The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under section 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be

(1) distributed to the grantor or the grantor's spouse;

(2) held or accumulated for future distribution to the grantor or the grantor's spouse

The record clearly establishes that, in addition to transferring either his funds or those of his children to Mr. Kamerman to be held in trust for the benefit of Jordan, Caleb and Henry

Chill, Mr. Chill instructed Mr. Kamerman as to the manner in which those funds were to be invested and directed any withdrawals of principal and interest and the transmission of same by Mr. Kamerman in his capacity as trustee. Given the substantial dominion and control exercised by Mr. Chill over the Fidelity Municipal Money Market mutual fund accounts held by Mr. Kamerman in trust for Jordan, Caleb and Henry Chill, each of these Fidelity mutual fund accounts were grantor trusts and the interest income earned by each of these mutual fund accounts should be taxed to the grantor of same in accordance with IRC § 671.

G. In sum, petitioners have proven that the three Fidelity Municipal Money Market mutual fund accounts, titled in Jerome Kamerman's name, were held by Mr. Kamerman in trust for the benefit of Jordan, Caleb and Henry Chill in the years 2000 and 2001. They have also proven that the three Fidelity mutual fund accounts were grantor trusts, held by Mr. Kamerman as trustee for the benefit of Jordan, Caleb and Henry Chill in the years 2000 and 2001. Since Mr. Kamerman was acting solely in his capacity as trustee with respect to the three Fidelity Municipal Money Market mutual fund accounts, the non-New York State and local bond interest income earned on these three Fidelity mutual fund accounts cannot be included in petitioners' taxable income for the years 2000 and 2001. Therefore, the Division is directed to recompute petitioners' personal income tax liability for the years 2000 and 2001 accordingly.

H. The petitions of Jerome and Ruth Kamerman are granted to the extent indicated in Conclusion of Law "G"; the Division is directed to recompute the two notices of deficiency, dated May 17, 2004 and June 27, 2005 accordingly, and except as so granted, the petitions are in all other respects denied.

DATED: Troy, New York
December 14, 2006

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE