

STATE OF NEW YORK  
STATE TAX COMMISSION

*Estate of Rose Adelman*  
*Personal Income*  
*A*  
*1971*

In the Matter of the Petition

of

ESTATE OF ROSE ADELMAN

For a Redetermination of a Deficiency or  
a Refund of Personal Income  
Taxes under Article(s) 22 of the  
Tax Law for the (Year(s) 1964, 1965  
and 1966

AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

State of New York  
County of Albany

Linda Wilson, being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 9th day of March, 1971, she served the within  
Notice of Decision (or Determination) by (certified) mail upon SAMUEL I.

RUBIN (representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Samuel I. Rubin  
161-10 Jamaica Avenue  
Jamaica, New York 11432

and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative  
of) petitioner herein and that the address set forth on said wrapper is the last  
known address of the (representative of the) petitioner.

Sworn to before me this

9th day of March, 1971.

Martha Lunaro

Linda Wilson

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

ESTATE OF ROSE ADELMAN

For a Redetermination of a Deficiency or  
a Refund of Personal Income  
Taxes under Article(s) 22 of the  
Tax Law for the (Year(s) 1964, 1965  
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State of New York  
County of Albany

Linda Wilson, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of March, 1971, she served the within Notice of Decision (or Determination) by (certified) mail upon ESTATE OF ROSE ADELMAN (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Estate of Rose Adelman  
88-11 63rd Drive  
Rego Park, New York 11374  
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) petitioner herein and that the address set forth on said wrapper is the last known address of the (representative of the) petitioner.

Sworn to before me this

9th day of March, 19 71

James H. Funnaro

Linda Wilson

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

WILLIAM ADELMAN

For a Redetermination of a Deficiency or  
a Refund of Personal Income  
Taxes under Article(s) 22 of the  
Tax Law for the (Year(s) 1964, 1965  
and 1966.

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OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

State of New York  
County of Albany

Linda Wilson, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of March, 1971, she served the within Notice of Decision (or Determination) by (certified) mail upon WILLIAM ADELMAN (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: William Adelman  
88-11 63rd Drive  
Rego Park, New York 11374  
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) petitioner herein and that the address set forth on said wrapper is the last known address of the (representative of the) petitioner.

Sworn to before me this

9th day of March, 1971

Shirley Funnaro

Linda Wilson

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

WILLIAM ADELMAN

For a Redetermination of a Deficiency or  
a Refund of Personal Income  
Taxes under Article(s) 22 of the  
Tax Law for the (Year(s) 1964, 1965  
and 1966

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State of New York  
County of Albany

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wrapper addressed as follows: Samuel I. Rubin  
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Jamaica, New York 11432

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known address of the (representative of the) petitioner.

Sworn to before me this

9th day of March, 1971.

Martha J. Juncos

Linda Wilson

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

RUTH BRAUNSCHWEIG

For a Redetermination of a Deficiency or  
a Refund of Personal Income  
Taxes under Article(s) 22 of the  
Tax Law for the (Year(s) 1964, 1965  
and 1966

AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

State of New York  
County of Albany

Linda Wilson, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of March, 1971, she served the within Notice of Decision (or Determination) by (certified) mail upon RUTH BRAUNSCHWEIG (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Ruth Braunschweig  
30-96 35th Street  
Long Island City, New York 11103  
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) petitioner herein and that the address set forth on said wrapper is the last known address of the (representative of the) petitioner.

Sworn to before me this

9th day of March, 1971

Paula J. Funnaro

Linda Wilson

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

RUTH BRAUNSCHWEIG

For a Redetermination of a Deficiency or  
a Refund of Personal Income  
Taxes under Article(s) 22 of the  
Tax Law for the (Year(s) 1964, 1965  
and 1966

AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
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State of New York  
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Linda Wilson, being duly sworn, deposes and says that  
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known address of the (representative of the) petitioner.

Sworn to before me this

9th day of March, 1971

Martha J. ...

Linda Wilson

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
The Estate of Rose Adelman :  
for the Redetermination of a Deficiency :  
or for Refund of Personal Income Taxes :  
due under Article 22 of the Tax Law :  
for the years 1964, 1965 and 1966 :  
:

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In the Matter of the Petition :  
of :  
WILLIAM ADELMAN :  
for the Redetermination of a Deficiency :  
or for Refund of Personal Income Taxes :  
due under Article 22 of the Tax Law for :  
the years 1964, 1965 and 1966 :  
:

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DECISION

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In the Matter of the Petition :  
of :  
RUTH BRAUNSCHWEIG :  
for the Redetermination of a Deficiency :  
or for Refund of Personal Income Taxes :  
due under Article 22 of the Tax Law for :  
the years 1964, 1965 and 1966 :  
:

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The estate of Rose Adelman and Ruth Braunschweig having each filed petitions for a redetermination of deficiencies determined under date of April 1, 1968, and William Adelman having filed a petition for the redetermination of an overpayment determined under date of April 1, 1968, each for personal income taxes imposed under

Article 22 of the Tax Law and a hearing having been held before Nigel G. Wright, Hearing Officer, on May 5, 1970, and the record having been duly examined and considered,

The State Tax Commission hereby

FINDS:

1. The issue in this case is whether the capital gains of the trust are "paid, credited or required to be distributed to any beneficiary during the taxable year" within the meaning of Internal Revenue Code Section 643(a) (3) and as interpreted by U. S. Treasury Regulation 1.643(a)-3 (a) so as to be taxable to the beneficiaries rather than the trust.

2. The deficiencies are, as follows:

	<u>Estate</u>	<u>William Adelman</u>	<u>Ruth Braunschweig</u>
1964	(\$152.77)	\$302.34	\$ 31.14
1965	109.07	( 323.09)	93.48
1966	<u>686.06</u>	<u>( 229.48)</u>	<u>( 114.77)</u>
Total	\$643.16	(\$250.23)	\$ 9.82

3. Rose Adelman died on November 28, 1948, leaving a will dated November 25, 1948. After small bequests, the remainder of her estate was left in trust. The decedent's husband, Philip Adelman, then about 66 years old, was to receive one-third of the net income or an annuity of \$5,000.00, whichever was greater. The remainder of the income was divided equally between the children, William Adelman and Ruth Adelman Braunschweig. Upon the death of Philip Adelman, the trust is to terminate, \$2500.00 is to be distributed to named charities and individuals, and the remainder divided between William Adelman and Ruth Adelman Braunschweig if living, but if not living, then to their children. William Adelman was appointed executor and trustee.



4. On December 20, 1948, an agreement was entered into whereby Philip Adelman waived any objection he had to the will and, in return, the two children William Adelman and Ruth Adelman agreed that if the net income of the trust exceeded \$5,000.00 per year, then the excess up to \$2,500.00 should be paid to Philip Adelman though charged to the shares due to the children. William Adelman signed this agreement, both individually and as executor.

5. On June 12, 1968, an agreement was entered into on the part of those interested in the estate. This agreement recited that the executor has paid to Philip Adelman, each year \$7,500.00 and the remainder of the income has been either distributed to the two children or had been left in the estate to accumulate. It further recited that the trustee has treated long and short-term capital gains realized from the sale of stock as income and had been distributing such gains as income and that this has not in any way reduced the corpus of the trust estate. The parties then agreed that the previous distributions were ratified and approved and that long and short-term gains should continue to be treated as income. This agreement was signed by the remaindermen William Adelman and Ruth Adelman Braunschweig and four others represented to be the only living issue of the remaindermen.

6. The three charitable bequests were paid in 1970 even though the trust had not terminated. Another bequest of \$500.00 to an individual has not been made.

7. The assets of the estate at time of death consisted of a one-half interest in real estate known as Berkshire Hall and securities valued at about \$20,000.00 for a total value estimated at \$55,000.00.

8. The real estate, Berkshire Hall, was sold in 1960 for \$500,000.00, the estate taking back a \$350,000.00 mortgage.

9. The trust made actual distributions of \$22,500.00 a year (\$7,500 to each beneficiary).

10. The trust's income (distributable net income without capital gains) and gains were, as follows:

	<u>1964</u>	<u>1965</u>	<u>1966</u>
Income	\$16,557.11	\$12,828.64	\$ 8,139.48
Gains	30,097.10	7,707.32	155,759.23

11. On the tax returns in each year the \$7,500.00 distributed to the husband was deemed to be ordinary income. In 1964 and 1966 the amounts distributed to the children were deemed to be entirely capital gain, although there was ordinary income available in each year for distribution.

In 1965 the capital gain of \$7,707.32 was allocated \$6,517.98 to William Adelman and \$1,189.34 to Ruth Braunschweig. The ordinary income left after distributions to the husband amounted to \$5,328.64 and was allocated \$207.32 to Ruth Braunschweig and the rest (\$5,121.32) to the estate. This resulted in tax exempt income to William Adelman of \$982.02 and to Ruth Braunschweig of \$6,203.34.

12. The deficiency notice asserts a distribution of income, as follows: to Philip Adelman, no change, the entire distributions are deemed ordinary income; to the children, all income is deemed to be in equal shares ordinary income to the extent not distributed to Philip Adelman and the remainder is deemed not taxable - no capital gains are deemed to be distributed.

13. The books of account of the beneficiary were not offered in evidence. No tax returns for years prior to the years here in question were offered into evidence.

14. The agreement to deem capital gains allocable to income can be given no effect. Even assuming the interested parties to an estate may sometimes adopt a "practical construction" of a will when the will is ambiguous it has not been shown here how the agreement actually affected the rights of the parties especially when income, including any capital gains, was to be added back to the estate for accumulation. Furthermore, the written agreement herein occurred after the tax years here in question; no contemporaneous evidence was offered.

Upon the foregoing findings and all the evidence in the case,  
The State Tax Commission hereby

DECIDES:

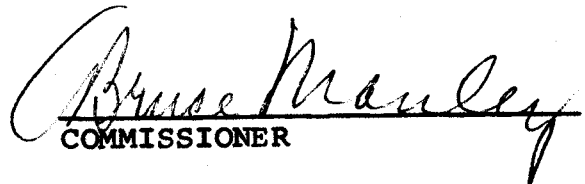
A. The capital gains in question have not been "Paid, credited or required to be distributed to any beneficiary during the taxable year" within the meaning of Internal Revenue Code Section 643(a) (3) as interpreted by Treasury Regulation 1.643(a)-3(a). It has not been adequately shown that they were, 1. allocated to income under the will or by the beneficiary on its books or by notice to the beneficiary, 2. actually distributed to beneficiaries, or 3. utilized in determining the amount distributed or required to be distributed to beneficiaries (See Treasury Regulation 1.643(a)-3(d) Example 2).


B. The petition is denied and the deficiencies (with related credits) are affirmed together with such interest, if any, as may be lawfully due under Tax Law Section 684.

DATED: Albany, New York  
*March 8, 1971.*

STATE TAX COMMISSION

  
COMMISSIONER

  
COMMISSIONER

  
COMMISSIONER