

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SHY LURIE AND MICHAEL SMITH as )  
Co-Trustees of the ELIZABETH )  
IRENE PUHN IRREVOCABLE TRUST, )  
 )  
Petitioners, )  
 ) Case No. 97-0949  
vs. )  
 )  
THE FLORIDA DEPARTMENT OF REVENUE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to the request of the parties, no formal hearing was held in this case.

APPEARANCES

For Petitioners: Nicholas M. Daniels, Esquire  
Therrel Baisden, P.A.  
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For Respondent: Charles Catanzaro  
Assistant Attorney General  
Office of the Attorney General  
The Capitol, Tax Section  
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether the Elizabeth Puhn Irrevocable Trust is entitled to a refund of intangible personal property taxes paid to the State of Florida for the tax years 1993, 1994, and 1995.

PRELIMINARY STATEMENT

In a Notice of Decision of Refund Denial dated January 7, 1996,<sup>1</sup> the Department of Revenue ("Department") indicated its intent to deny in part and grant in part the request of the Elizabeth I. Puhn Irrevocable Trust ("Trust") for a refund of intangible personal property taxes paid by the Trust for the 1993, 1994, and 1995 tax years. The Department found that the Trust was entitled to a refund of fifty percent of the intangible property taxes paid for the tax years in question on the grounds that one of the two co-trustees of the Trust was a resident of Florida and shared equally with a nonresident co-trustee the management and control of the Trust. The co-trustees timely filed a written protest in which they seek a refund of the remaining fifty percent of the intangible property taxes paid for the 1993, 1994, and 1995 tax years. The Department forwarded the case to the Division of Administrative Hearings for assignment of an administrative law judge.

In a status report filed January 9, 1998, the parties requested that the affidavits of Shy Lurie and Nicholas M. Daniels, co-trustees of the Trust, be accepted into evidence and form the factual predicate for the recommended order to be issued in this case. The request was granted in an order dated January 15, 1998, and the parties submitted proposed recommended orders, which have been duly considered.

## FINDINGS OF FACT

Pursuant to the affidavits submitted into evidence in this case and on the entire record of this proceeding, the following findings of fact are made:

1. The Department of Revenue ("Department") is the state agency responsible for administering and enforcing the collection of the intangible personal property tax in Florida. Section 199.202, Florida Statutes (1997).

2. Shy Lurie is a co-trustee of the Elizabeth Irene Puhn Irrevocable Trust dated December 16, 1981 (hereinafter the "Trust").

3. Nicholas M. Daniels was a co-trustee of the Trust for the 1993, 1994, and 1995 tax years.

4. Shy Lurie was a resident of North Carolina for the tax years in question.

5. Nicholas M. Daniels was a resident of Miami, Florida, for the tax years in question.

### Trustees and Domicile

6. The settlor of the Trust is Elizabeth B. Lurie.

7. The co-trustees of the Trust at the inception of the Trust were Shy Lurie and Nicholas M. Daniels.

8. The settlor, the co-trustees, and the beneficiary, Elizabeth Irene Puhn, were all residents of Miami, Florida, at the inception of the Trust.

9. Nicholas M. Daniels was and continues to be an attorney licensed to practice law in the State of Florida for the tax years in question and thereafter.

10. On December 20, 1996, Mr. Daniels resigned as a co-trustee effective as of such date, and Mr. Michael Smith, a resident of North Carolina, was appointed as a co-trustee effective as of December 20, 1996.

#### Terms of the Trust

11. The Trust provides for the income to be accumulated until the beneficiary, Elizabeth Irene Puhn, attains the age of thirty and during that period the income may be disbursed to the beneficiary in the co-trustees' discretion for certain specified expenses of the beneficiary.

12. After the beneficiary attains the age of thirty, she is entitled to all net income from the Trust.

13. The Trust shall terminate when the beneficiary reaches the age of forty, at which time the Trust's assets will be distributed to Elizabeth Irene Puhn or, if she is then deceased, then pursuant to the alternate dispositive provisions set forth in the Trust.

14. The beneficiary currently resides in Durham, North Carolina.

15. The beneficiary has been a resident of Durham, North Carolina, for approximately five (5) years, which included the tax years in question.

16. Article VI of the Trust instrument provides that the trustees are granted the power and authority to do any of the enumerated powers specified in the Trust in the trustee's unrestricted judgment and discretion which the trustees deem advisable for the better management and preservation of the trust estate.

Books, Records, and Custody of Assets

17. All Trust books and records for the tax years in question were located at and all business was transacted at Shy Lurie's office in North Carolina.

18. For the tax years in question, neither the Trust assets nor the Trust's books and records were located in the State of Florida.

19. On February 5, 1985, Shy Lurie and Nicholas M. Daniels entered into an investment management agreement with Montag & Caldwell, Inc., an Atlanta, Georgia, management company.

20. Such agreement provided that supervision and management of the marketable securities portion of the trust estate is vested with Montag & Caldwell, Inc., and that the agreement may be terminated upon thirty (30) days notice by either party.

21. The balance of the trust estate consists of stock in a closely held family business which has been under the sole control and custody of Shy Lurie for the taxable years in question.

22. On January 17, 1985, Shy Lurie and Nicholas M. Daniels, as co-trustees, entered into a Custodial Agreement (hereinafter "Custodial Agreement") with the National Bank of Georgia (hereinafter the "Bank"), a national bank with its office and principal place of business in Atlanta, Georgia.

23. In April 1986, the Custodial Agreement was taken over by NationsBank of Asheville, North Carolina.

24. Such Custodial Agreement provides, in pertinent part, that the operation of the said account will involve instructions directed to or from time to time by Montag & Caldwell, Inc.

25. The Custodial Agreement provides in paragraph 14, section 4, that the Bank is authorized to furnish the State of Georgia intangible tax section with a statement of the securities.

26. The Custodial Agreement in paragraph 7 provides that where permissible all securities shall be registered in the name of the Bank's nominee and the custodian has the authority to make information returns and otherwise to furnish any information regarding this account to any local, state, or federal governmental authority upon the valid demand therefor.

27. The Custodial Agreement cannot be assigned without the unanimous consent of the co-trustees and the investment advisor, Montag & Caldwell, Inc.

Payment of Intangible Tax

28. Shy Lurie, as a co-trustee, paid the State of Florida intangible tax in the amount of \$12,457.00 for the 1993 tax year.

29. Shy Lurie, as a co-trustee, paid the State of Florida intangible tax in the amount of \$14,404.00 for the 1994 tax year.

30. Shy Lurie, as a co-trustee, paid the State of Florida intangible tax in the amount \$16,128.00 for the 1995 tax year.

31. Shy Lurie, as a co-trustee, filed an Application for Refund from the State of Florida Department of Revenue (form DR-26) on or about February 29, 1996.

32. On April 18, 1996, the Florida Department of Revenue responded with a Notice of Intent (form DR-1200R) indicating a proposed denial for all three claims.

33. After additional information was submitted to the Department, the refund claims were granted in part and denied in part.

34. On or about May 13, 1996, the Department notified Shy Lurie and the other co-trustee that a partial refund of fifty percent (50%) was granted for each tax year.

35. Shy Lurie, through his attorney, on or about June 18, 1996, submitted a Memorandum of Law and additional documents to the Department.

36. On or about July 19, 1996, after reviewing the Memorandum of Law and accompanying documents the Department issued a Notice of the Proposed Denial of Refund for the following tax years and for the following amounts:

a. For tax year 1993 (DTA Number 9601056A and Source Number 96064010) in the amount of \$6,228.50;

b. For tax year 1994 (DTA Number 9601056B and source Number 96064011) in the amount of \$7,202.00; and

c. For tax year 1995 (DTA Number 9601056C and Source Number 96064012) in amount of \$8,064.00.

37. Shy Lurie, through his attorney, contested the denial of the refund and on or about August 5, 1996, Shy Lurie, through his attorney, filed a written protest with both the Bureau of Hearings and Appeals and the Bureau of Audit Standards.

38. On December 16, 1996, Mr. Nicholas M. Daniels, attorney for the Trust, attended an informal conference with members of the Department, in an effort to settle this matter.

39. The Department issued a Notice of Decision of Refund Denial for all three claims by a letter inadvertently dated January 7, 1996 (the year should have been 1997).

40. Shy Lurie, through his attorney, filed a Petition for Formal Hearing pursuant to Chapter 120, Florida Statutes, on or about February 24, 1997.

#### CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.57(1), Florida Statutes (1997).



42. Section 199.032, Florida Statutes (1995),<sup>2</sup> is the source of the Department's authority to levy a tax on intangible personal property with a taxable situs in Florida:

An annual tax of 2 mills is hereby imposed on each dollar of the just valuation of all intangible personal property which has a taxable situs in this state, except for notes and other obligations for the payment of money, other than bonds, which are secured by mortgage, deed of trust, or other lien upon real property situated in the state. This tax shall be assessed and collected as provided in this chapter.

43. Section 199.052, Florida Statutes (1995), describes the manner in which the tax shall be paid and provides in pertinent part:

(1) An annual intangible tax return must be filed with the department by every corporation authorized to do business in this state or doing business in this state and by every person, regardless of domicile, who on January 1 owns, controls, or manages intangible personal property which has a taxable situs in this state. For purposes of this chapter, "control" or "manage" does not include any ministerial function or any processing activity. . . .

44. Section 199.175, Florida Statutes (1995), defines the taxable situs of intangible personal property and provides in pertinent part:

(1) Intangible personal property shall have a taxable situs in this state when it is owned, managed, or controlled by any person domiciled in this state on January 1 of the tax year. Such intangibles shall be subject to annual taxation under this chapter, unless the person who owns, manages, or controls them is specifically exempt or unless the property is specifically exempt. This

provision shall apply regardless of where the evidence of the intangible property is kept; where the intangible is created, approved, or paid; or where business may be conducted from which the intangible arises. . . .

(a) For the purposes of this chapter, "any person domiciled in this state" means:

1. Any natural person who is a legal resident of this state.

45. At issue in this case is the taxable situs of the intangible personal property in the trust estate. At first blush, Section 199.052(1) and Section 199.175(1) seem not to be reconcilable with one another regarding the meaning of "taxable situs"; the focus of Section 199.052(1) is on the location of the property rather than on the domicile of the person who owns, controls, or manages it, while the focus of Section 199.175(1) is on the domicile of the person who owns, controls, or manages the property rather than on the location of the property. In fact, Section 199.052(1) and Section 199.175(1), read together, literally require that an intangible tax return be filed by "every person, regardless of domicile, who on January 1 owns, controls, or manages intangible personal property which . . . ["is owned, managed, or controlled by any person domiciled in this state on January 1 of the tax year"]." The legislative intent regarding the definition of "taxable situs" is, however, made clear in Section 199.175(1), which further provides that the taxable situs of intangible personal property is not dependent on the location of the property or the location of the business "from which the intangible arises."

46. Because Section 199.175(1) specifically defines the "taxable situs" of intangible personal property, the provisions of that section must be used to give meaning to the term as it is used both in Section 199.032 and in Section 199.052(1). See Nicholson v. State, 600 So. 2d 1101, 1103 (Fla. 1992), cert. denied 506 U.S. 1008, 113 S.Ct 625, 121 L.Ed.2d 557 (1992) ("When a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless a contrary intent clearly appears."). Therefore, as a co-trustee of the Trust and a natural person domiciled in Florida on January 1 of the 1993, 1994, and 1995 tax years, Mr. Daniels was required to file an intangible tax return in Florida and the intangible personal property in the trust estate was subject to Florida's intangible property tax if Mr. Daniels "own[ed], control[led], or manage[d]" the intangible personal property which comprised the trust estate.<sup>3</sup>

47. Article VII, section 1(c) of the Trust Agreement provides in pertinent part that "[t]wo trustees shall always act hereunder." Accordingly, Mr. Daniels and Mr. Lurie, as the two co-trustees, both had to approve all decisions respecting the administration of the Trust.

48. On the basis of the facts found herein, Mr. Daniels and Mr. Lurie equally shared the responsibility for controlling and managing the trust estate in the 1993, 1994, and 1995 tax years.

This is so regardless of the fact that they entered into custodial and investment management agreements by which they delegated to others the management and control of the intangible personal property in the trust estate. Mr. Daniels and Mr. Lurie, as co-trustees, entered into the agreements, and, during the tax years in question, Mr. Daniels and Mr. Lurie, as co-trustees, could have terminated the agreements. Mr. Daniels and Mr. Lurie did not relinquish the ultimate power to control and manage the intangible personal property in the trust estate. Furthermore, the fact that some of the intangible personal property in the trust estate is stock of a closely-held corporation which has been in the actual control of Mr. Lurie, who was a resident of North Carolina during the tax years in question, has no effect on the taxable situs of the property.

49. The Petitioners' reliance on the rule of law stated in Florida National Bank of Jacksonville v. Simpson, 59 So. 2d 751 (Fla. 1952) is misplaced. The rule stated by the court, quoting Bogert on Trusts and Trustees, is as follows:

"Where there are two or more trustees residing in different states, the courts are in fairly general agreement, where a different rule is not established by statute, that the property will be taxable in the state of residence of the trustee who has actual custody or control of it." (Italics supplied.)

Id. At 767. In Simpson, the corporate trustee, which had its principal place of business in Florida, not only had actual

custody of the intangible personal property, it also had actual control of the property pursuant to a provision of the will creating the trust which provided that the corporate trustee's ruling would be final in any case in which there was no majority decision of the four trustees. In the instant case, the Trust Agreement specifically provides that the two co-trustees must act together, and Section 199.175(1) specifically provides that the physical location of the "evidence of the intangible property" is not relevant to a determination of the taxable situs of the property.

50. The Department has provided in Rule 12C-2.006(3)(e), Florida Administrative Code, that, with regard to liability for payment of Florida's intangible personal property tax, "[w]hen there are two trustees, one is a resident and one a nonresident and they share equally in the management and control of the trust, the assessment of property shall be apportioned between them." Applying this rule, the Trust must pay to the State of Florida the intangible personal property tax on fifty percent of the assessed value of the intangible personal property in the trust estate.

51. The Department has refunded fifty percent of the intangible personal property tax paid to Florida by the Trust in the 1993, 1994, and 1995 tax years. Consequently, the Petitioners are not entitled to a further refund.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue issue a final order dismissing the Petition for Formal Hearing filed by the Petitioners in this case and denying all relief requested by the Petitioners therein.

DONE AND ENTERED this 18th day of September, 1998, in Tallahassee, Leon County, Florida.

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PATRICIA HART MALONO  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of September, 1998.

ENDNOTES

<sup>1/</sup> The date was actually 1997.

<sup>2/</sup> The pertinent portions in Chapter 199, Florida Statutes (1993), are identical to those in Chapter 199, Florida Statutes (1995).

<sup>3/</sup> The Petitioners do not claim that either Mr. Daniels or the Trust property were exempt from the intangible property tax.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

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<sup>1</sup> The date was actually 1997.

<sup>2</sup> The pertinent portions of Chapter 199, Florida Statutes (1993) are identical to those in Chapter 199, Florida Statutes (1995).

<sup>3</sup> The Petitioners do not claim that either Mr. Daniels or the Trust property were exempt from the intangible property tax.