

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Rupert Keil

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Gift Tax under :
Article 26A of the Tax Law for the Year 1974. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of November, 1982, he served the within notice of Decision by certified mail upon Rupert Keil, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rupert Keil
R.F.D. #2
Greenville, NY 12083

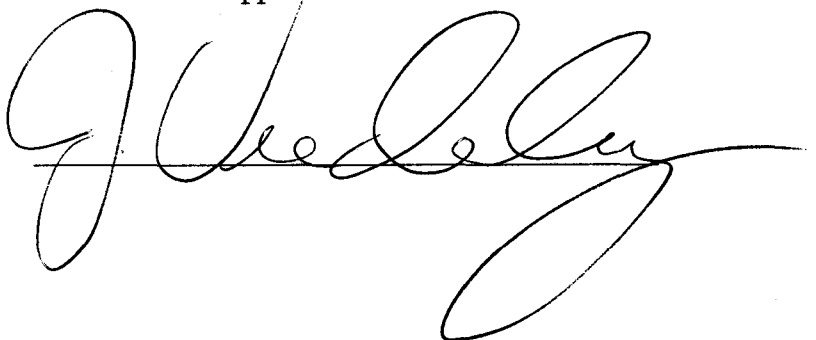
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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

Sworn to before me this
26th day of November, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Rupert Keil : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Gift Tax under
Article 26A of the Tax Law for the Year 1974. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of November, 1982, he served the within notice of Decision by certified mail upon Joseph W. DiGiacinto the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

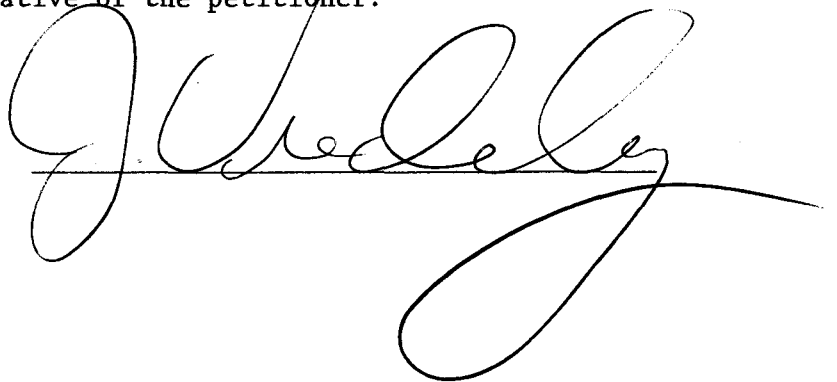
Joseph W. DiGiacinto
235 Main St.
White Plains, NY 10601

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 Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the 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
26th day of November, 1982.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 26, 1982

Rupert Keil
R.F.D. #2
Greenville, NY 12083

Dear Mr. Keil:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1007(b) of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Joseph W. DiGiacinto
235 Main St.
White Plains, NY 10601
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
RUPERT KEIL
for Redetermination of a Deficiency or for
Refund of Gift Tax under Article 26-A of the
Tax Law for the Year 1974.

DECISION

Petitioner, Rupert Keil, R.F.D. #2, Greenville, New York 12083, filed a petition for redetermination of a deficiency or for refund of gift tax under Article 26-A of the Tax Law for the year 1974 (File No. 27926).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 29, 1981 at 10:45 A.M. Petitioner appeared by Joseph W. DiGiacinto, Esq. and Frank A. Bulla, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner's transfer on September 5, 1974 of certain real property in Greenville, New York, to Robert and Ethel Keil, was a gift or a sale.

FINDINGS OF FACT

1. On September 5, 1974, petitioner, Rupert Keil, transferred to his son, Robert Keil and his daughter-in-law, Ethel Keil, title to real property located on Schlegel Road, Greenville, New York. The premises consisted of four acres and a residence.

2. On April 5, 1979 the Audit Division issued a Statement of Audit Changes against petitioner with the following explanation:

"Audit change is based on transfer of real property to Robert E. & Ethel Keil on September 5, 1974. Fair market value of the property is \$50,000.00 based on information on file in this office. Mortgage in the amount of \$45,000.00 is disallowed as documentation has not been submitted to support the fact that the mortgage repayment schedule has been met. Therefore, the position of this office is that the transfer is a taxable gift. After allowance of 2 annual exclusions totalling \$6,000.00, net taxable gifts are \$44,000.00. Penalty and Interest are charged for late filing.

| | | | | |
|---------------------------|--------------|--------------------|-------------------|-------------|
| Taxable Gifts as Reported | (return not) | Total Tax Due | | \$ 660.00 |
| Tax Due as Reported | (filed) | Previous Payment | | -0- |
| Adjusted Taxable Gifts | \$44,000.00 | | Add'l Tax Due | \$ 660.00 |
| Adjusted Tax Due | \$ 660.00 | | | |
| | | Total Interest Due | | \$ 246.68 |
| | | Previous Payment | | -0- |
| | | | Add'l Int. Due | \$ 246.68 |
| | | Total Penalty Due | | \$ 165.00 |
| | | Previous Payment | | -0- |
| | | | Add'l Penalty Due | \$ 165.00 |
| | | | Balance Due | \$1,071.68" |

3. On August 2, 1979, the Audit Division issued a Notice of Deficiency for nonpayment of gift tax showing a deficiency in the amount of \$660.00 plus penalty and interest.

4. No revenue stamps were affixed to the deed which transferred title to the premises.¹

5. The consideration for the property in issue was a purchase money mortgage securing a bond, dated September 5, 1974, for \$45,000.00 "with interest thereon to be computed from September 5, 1974 at the rate of 7½% per annum and to be paid on October 1, 1974, next ensuing and monthly thereafter at the rate of \$417.16 per month." The mortgage was recorded on September 9, 1974.

¹ Tax Law §1402 imposes a real estate transfer tax on the sale of real property. The petitioner's failure to pay such tax is not at issue in this proceeding.

6. The Audit Division discredited the transaction as being a bona fide sale on the grounds that petitioner could not establish the existence of real consideration and that in fact it was not a sale but instead a gift.

7. During the hearing, the mortgagor, Robert Keil, testified that he did not make any payments on the mortgage in issue until 1975, and that the prior payments due had been forgiven by the mortgagee. He stated that the payments that originated in 1976 were in cash and that commencing in 1979 the payments were by check. Robert Keil asserted that the payments were in cash form as a convenience to the petitioner and that he only switched to paying by check because "the State said that [he] couldn't pay him in cash...". The mortgagor could not offer any documentary proof of making the cash payments.

8. There is no evidence that the State ever took a position as to the form in which the mortgage had to be paid. However, in a letter dated July 10, 1979, the Audit Division, in an effort to establish an "arms length" sale, did ask the mortgagee to furnish copies of cancelled checks [or other receipts] in support of the fact that the monthly mortgage payments had or were being made.

9. The mortgagors took a deduction on their federal income tax returns for interest paid on the mortgage in issue in the sums of \$3,152.00 for 1976, \$3,008.00 for 1977 and \$2,853.00 for 1978. Petitioner declared the same sums as income on his federal income tax returns for the respective years.

10. The Real Property Taxes for the years 1976, 1977 and 1978 were all paid by the mortgagors.

11. The record is void of any satisfactory proof of payments on the purchase money mortgage prior to the date of the Statement of Audit Changes.

12. The petitioner never filed a Schedule D, Capital Gains and Losses as pertaining to the sale of the property in issue.

13. At the time of the hearing herein, pursuant to a will dated August 10, 1974, it appears that mortgagor Robert Keil is petitioner's sole legatee.

CONCLUSIONS OF LAW

A. That a gift is a voluntary transfer of property by one to another without consideration or compensation therefor. The basic elements of a gift under New York law for property law purposes are:

1. A donor competent to make the gift;
2. Clear and unmistakable intention by the donor to make it. A corollary of this element is an absence of adequate consideration;
3. A conveyance, assignment, or transfer sufficient to vest legal title in the donee without power of revocation at the will of the donor;
4. Relinquishment of dominion and control over the gift property by delivery to the donee;
5. Acceptance by the donee.

See 20 N.Y. Jur. Gifts §§ 1-28.

B. That consideration is generally defined as a legal detriment to one contracting party that results in a corresponding legal benefit to the other. Cronk v. State, 420 NYS 2d 113, at 117. The purchase money mortgage of \$45,000.00 was adequate consideration in exchange for the property transferred which has a fair market value of \$50,000.00². The mortgage was properly executed and recorded, and the petitioner and/or his creditors could enforce the mortgage against the mortgagors, petitioner's son and daughter-in-law. Therefore, the transfer of property herein was a sale and not a gift.

² The difference of \$5,000.00 between the fair market value of the property transferred and the purchase money mortgage is not a taxable gift since such amount is less than two annual exclusions from gift tax or \$6,000.00 which petitioner would be entitled to utilize as noted in Finding of Fact "2".

C. That the petition is granted, and the Notice of Deficiency dated August 2, 1979 is cancelled.

DATED: Albany, New York

NOV 26 1982

STATE TAX COMMISSION

Acting Robert W. Burdand
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER