

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Edward B. & Ruth G. Gotthelf :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Gift Tax
under Article(s) 26A of the Tax Law :
for the Periods Ending 9/30/78 & 9/30/79.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of June, 1986, he/she served the within notice of Decision by certified mail upon Edward B. & Ruth G. Gotthelf the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward B. & Ruth G. Gotthelf
120 E. 81st Street
New York, NY 10024

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
12th day of June, 1986.

Janet M. Snay

Daniel J. Ravallo
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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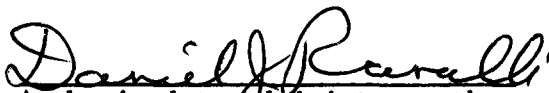
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of June, 1986, he served the within notice of Decision by certified mail upon J. Martin Obten, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

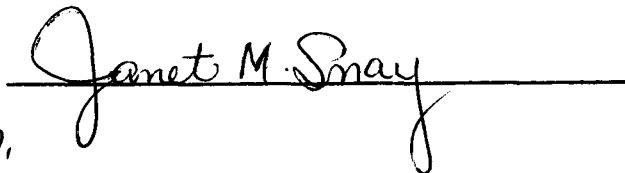
J. Martin Obten
551 Fifth Ave.
New York, NY 10176

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
12th day of June, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



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

June 12, 1986

Edward B. & Ruth G. Gotthelf
120 E. 81st Street
New York, NY 10024

Dear Mr. & Mrs. Gotthelf:

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) 690 & 1007 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
J. Martin Obten
551 Fifth Ave.
New York, NY 10176

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
EDWARD B. AND RUTH G. GOTTHELF	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Gift Tax under Article 26A of the Tax	:	
Law for the Periods Ending September 30, 1978	:	
and September 30, 1979.	:	

Petitioners, Edward B. and Ruth G. Gotthelf, 120 East 81st Street, New York, New York 10024, filed a petition for redetermination of a deficiency or for refund of gift taxes under Article 26A of the Tax Law for the periods ending September 30, 1978 and September 30, 1979 (File No. 42388).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 10, 1985 at 9:30 A.M., with all briefs to be submitted by December 20, 1985. Petitioners appeared by J. Martin Obten, Esq. The Audit Division appeared by John P. Dugan, Esq. (Joseph W. Pinto, Jr., Esq., of counsel).

ISSUE

Whether the New York gifts of a New York resident include personal property physically present in New Jersey at the time the gift was made.

FINDINGS OF FACT

1. During the periods in issue, petitioners, husband and wife, were New York residents. In 1978 they made a gift to their son, Philip Gotthelf, of several commercial trademarks valued at \$7,500.00. On separately filed federal gift tax returns, each spouse consented to have the gift considered as one-half made by each. The adjusted amount of federal taxable gifts reported by each

for the calendar quarter ending September 30, 1978 was \$750.00. In 1980 petitioners filed federal gift tax returns for the calendar quarter ending September 30, 1979 reporting a gift made to the same son of a lady's diamond solitaire ring valued at \$50,000.00; at the same time, they reported a gift to Paula Goodis, their son's friend, of a lady's diamond solitaire ring valued at \$15,000.00. Each petitioner reported federal adjusted taxable gifts of \$26,500.00. The petitioners did not file New York State gift tax returns for either of the periods in issue.

2. Upon receipt of information from the Internal Revenue Service indicating that petitioners had filed federal gift tax returns, the Audit Division informed petitioners by mail that "[E]very resident of New York State who files a Federal Gift Tax Return is generally required to file a New York State return...". Consequently, petitioners filed separate New York State gift tax returns reporting federal adjusted taxable gifts as described above, but reporting the amount of New York taxable gifts as zero.

3. On October 22, 1982, the Audit Division issued to petitioner, Edward B. Gotthelf, a Notice of Deficiency asserting taxes due as follows:

<u>Taxable Quarter Ending</u>	<u>Deficiency</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
9/79	\$397.50	\$99.38	\$125.01	\$621.89
9/78	11.25	2.81	4.49	18.55

On the same date, an identical notice was issued to Ruth G. Gotthelf.

4. In 1976, petitioners transferred possession of the two diamond rings in issue to their son, Philip, living in New Jersey. This transfer was motivated by a number of concerns. First, Mrs. Gotthelf had suffered a heart attack, and this caused petitioners to begin thinking and acting in terms of their long-range estate planning goals. Second, Philip and his friend,

Paula, were living together in 1976, but were not married. Petitioners believed an outright gift of the jewelry would be inappropriate under the circumstances and hoped that a loan of the rings might serve as an inducement to marriage. Finally, these particular rings were selected by Mrs. Gotthelf from her jewelry because she no longer wore them. At the time of the transfer, petitioners placed no restrictions on Philip's use of the rings nor any limitation upon the duration of his possession. Paula wore the smaller ring almost constantly and the larger one on occasion. The rings were kept in New Jersey with Philip and Paula but were worn into New York occasionally.

5. In the summer of 1979, Philip returned the rings to petitioners in New York where they had the rings appraised for gift tax purposes. Following the appraisal, the rings were returned to Philip in New Jersey.

6. In 1980, petitioners filed federal gift tax returns reporting gifts of the rings as described above (Finding of Fact "2", supra).

7. The record is devoid of additional evidence concerning the gift of intangible personalty made to Philip in 1978.

CONCLUSIONS OF LAW

A. That gift tax is not imposed upon the receipt of property by a donee; the tax is an excise upon the donor upon his or her act of making the transfer and attaches only when the donor has so parted with dominion and control of the property as to leave the donor with no power to change its disposition [Treas. Reg. §25.2511-2(a) and (b)]. Although petitioners transferred possession of the two ladies' diamond solitaire rings to their son in 1976, they retained dominion and control over the rings until September 30, 1979 when a true gift was made.

B. That section 1003, subdivision (a)(1) provides that New York gifts of a New York resident are the total amount of gifts made in any calendar year in

accordance with federal gift tax provisions but excluding gifts of real or tangible property "having an actual situs outside New York State."

C. That in determining actual situs with respect to personal property, the location of the property at the time the right to impose the tax arises is the determinative factor (Matter of Burden, 91 Misc. 2d 368; Matter of Brown, 274 NY 10). However, actual situs means a little more than simply the place where the property is on tax day. It excludes the idea of mobile personalty which happens to be in the course of transit through a state or property which has come to rest within the boundaries of a state for a brief and limited time. The concept of situs involves some degree of permanence in a particular place and is analogous to the notion of domicile as applied to persons (Delaney v. Murchie, 177 F.2d 444; City Bank Farmers' Trust Co. v. Schnader, 8 F. Supp. 815). In 1976, when petitioners transferred the jewelry in question to their son, they placed no time limitation upon the duration of his possession and no restrictions upon his use of it. The transfer constituted a permanent loan of the jewelry to their son in New Jersey. The location of the jewelry was not transient but fixed in an abiding location for a period of approximately three years when the actual gift was made. In this manner, the jewelry acquired an actual situs outside of New York State. The fact that the jewelry was worn into New York on occasion and that it was temporarily present in New York for appraisal is not sufficient to destroy actual situs outside of New York.

D. That the gifts of tangible personal property made by petitioners in calendar year 1979 were not New York gifts as defined in section 1003, subdivision (a)(1) of the Tax Law and, consequently, not subject to New York gift tax.

E. That intangible personal property has a situs and is taxable at the domicile of the owner unless the facts establish actual presence and control


elsewhere (Matter of Brown, 274 NY 10). Accordingly, the gifts of intangible property made by petitioners in calendar year 1978 are subject to New York gift tax.

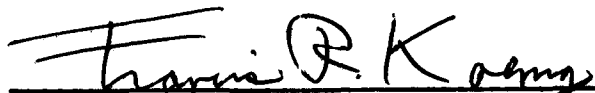
F. That the petition of Edward B. and Ruth G. Gotthelf is granted to the extent indicated in Conclusion of Law "D"; and that, except as so granted, the petition in all other respects is denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER