

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Barnet & Evelyn Kaprow

:

:

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 Quarter Ended :
March 1975.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 22nd day of November, 1983, she served the within notice of Decision by certified mail upon Barnet & Evelyn Kaprow, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Barnet & Evelyn Kaprow
122 East 42nd St.
New York, NY 10017

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
22nd day of November, 1983.



ADMINISTRATOR
COMMISSIONER OF TAX LAW
SECTION 174

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

November 22, 1983

Barnet & Evelyn Kaprow
122 East 42nd St.
New York, NY 10017

Dear Mr. & Mrs. Barnet:

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, 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 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
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
BARNET AND EVELYN KAPROW	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Gift Tax under Article 26-A of the	:	
Tax Law for the Quarter Ending March 31, 1975.	:	

Petitioners, Barnet & Evelyn Kaprow, 122 East 42nd Street, New York, New York 10017, filed petitions for redetermination of a deficiency or for refund of gift tax under Article 26-A of the Tax Law for the quarter ending March 31, 1975 (File Nos. 21615 and 21616).

A formal hearing was held before Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 25, 1981 at 1:15 P.M. Petitioners appeared by Barnet Kaprow, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the gift at issue was a gift of an interest in real estate located in Maryland or a gift of income from a partnership taxable as intangible personal property.

II. Whether, in the event it is determined that the gift is taxable, it has been properly evaluated.

FINDINGS OF FACT

1. (a) Petitioner Barnet Kaprow and his wife, petitioner Evelyn Kaprow, each filed a separate New York State Resident Quarterly Gift Tax Return for the

calendar quarter ending March 31, 1975. Each return was dated October 14, 1975 and was received by the Department of Taxation and Finance on October 15, 1975.

(b) Both of said Gift Tax Returns reported a gift to Miriam Kaprow on January 2, 1975 of an "Undivided Partnership Interest in Real Property located in Baltimore, Maryland", the value of which at the date of gift was stated by each donor to be \$22,000.00 (44.2 percent of \$50,000 value of 10 Year Trust).

(c) Each of said Gift Tax Returns reported that no tax was due with respect to said gift.

2. On May 24, 1977, the Audit Division issued a Statement of Audit Changes against petitioner Barnet Kaprow and an identical Statement of Audit Changes against petitioner Evelyn Kaprow for the quarter ended March, 1975 in the sum of \$1,853.09 as to each petitioner together with interest thereon in the sum of \$322.79 and penalty in the sum of \$463.27, for a total of \$2,639.15 as to each petitioner on the ground that "an interest in a partnership which holds real property located outside New York State would be considered an interest in intangible property and cannot be deducted as gifts of real or tangible personal property having actual situs outside New York State".

Said Statements of Audit Changes also stated that "penalty and interest are being assessed for late filing".

Thereafter on January 3, 1978, the Audit Division issued a Notice of Deficiency against petitioner Barnet Kaprow and an identical Notice of Deficiency against petitioner Evelyn Kaprow for the taxable quarter ending March 1975, asserting a deficiency of \$1,853.09 as to each petitioner, together with interest thereon of \$421.19 and penalty of \$463.27, for a total of \$2,737.55 as to each petitioner.

3. The petitioners timely filed a petition for redetermination of gift tax liability.

4. On March 15, 1979, the Audit Division issued a Statement of Audit Changes against petitioner, Barnet Kaprow and an identical Statement of Audit Changes against petitioner Evelyn Kaprow, correcting the Statements of Audit Changes dated March 24, 1977 by reducing the total tax due for the quarter ended March, 1975 to \$622.50 as to each petitioner together with interest thereon of \$202.80 and penalty of \$155.63, for a total of \$980.93 as to each petitioner "based on additional information submitted and based on an 'Analysis of Values' report...".

On March 15, 1979, the Audit Division issued a Notice of Deficiency to petitioner Barnet Kaprow and an identical Notice of Deficiency to petitioner Evelyn Kaprow, for the taxable quarter ending March, 1975 asserting a deficiency of \$622.50 as to each petitioner, together with interest thereon of \$202.80 and penalty of \$155.63, for a total of \$980.93 as to each petitioner.

5. The petitioners timely filed a petition for redetermination of tax liability as set forth in said notices of deficiency issued March 15, 1979.

6. (a) By deed dated November 20, 1943, Eastern States Homes, Inc. granted and conveyed to Middle River Manor, Inc. title to certain real property therein more particularly described, containing 15.623 acres of land, more or less, located in the Fifteenth Election District of Baltimore County, Maryland.

(b) By deed dated November 20, 1943, Eastern States Homes, Inc. granted and conveyed to Second Middle River Manor, Inc. title to certain real property therein more particularly described containing 22.932 acres of land, more or less, located in the Fifteenth Election District of Baltimore County, Maryland.

7. Pursuant to a merger agreement, dated June 13, 1945 and recorded in the office of the State Tax Commission for Maryland on September 24, 1945, Second Middle River Manor, Inc. merged with Middle River Manor, Inc., a Maryland corporation.

Under the terms of said merger agreement, Middle River Manor, Inc. remained the surviving corporation of said merger and thereby acquired title to the real property conveyed as aforesaid by Eastern States Homes, Inc. to Second Middle River Manor, Inc.

8. (a) Pursuant to resolutions duly adopted on January 2, 1964 by the Board of Directors of Middle River Manor, Inc. and duly approved by resolution of the stockholders of said corporations on January 2, 1964, Middle River Manor, Inc. was voluntarily dissolved and liquidated.

(b) Pursuant to resolution unanimously adopted by the stockholders of Middle River Manor, Inc. on January 2, 1964, a plan of complete liquidation of Middle River Manor, Inc. was adopted, which provided in part that the said corporation was to transfer to its stockholders as a liquidating dividend all of the real and personal property owned by Middle River Manor, Inc., subject to a mortgage held by the Equitable Life Insurance Society, according to the percentage and fractional interest that the shares of stock owned by the stockholders bore to the total amount of outstanding capital stock of the said corporation.

9. In or about the month of July 1969, a Maryland attorney, William Adelson, now deceased, prepared a deed, based upon the resolutions and plan of liquidation aforesaid, providing pursuant thereto that said Middle River Manor, Inc. granted and conveyed all of the real property aforesaid located in the Fifteenth Election District of Baltimore County, Maryland, to its stockholders

"as tenants in common and not as joint tenants, among the respective fractional interests hereinafter set forth, an undivided interest" to each of said stockholders, "their respective heirs, successors and assigns in fee simple," including "an undivided 31.25% unto Samuel Kramer", one of the said stockholders. It does not appear that said deed was executed or recorded.

10. The said Samuel Kramer, one of the said stockholders, held the said 31.25 percent interest as trustee for himself to the extent of 15 percent thereof, for one David L. Weissman to the extent of 6.875 percent thereof and for petitioner, Barnet Kaprow, to the extent of 9.375 percent thereof.

11. In addition to the said Samuel Kramer, the said David L. Weissman and the petitioner, Barnet Kaprow, twelve stockholders were participants in the aforesaid liquidating dividend pursuant to the aforesaid resolutions and plan of liquidation.

12. On or about September 18, 1978, the said Samuel Kramer and one Leo H. Seitelman, as surviving directors of said Middle River Manor, Inc. "for the purpose of carrying out the Articles of Dissolution of Middle River Manor, Inc. as of March 12, 1964," which said "Articles of Dissolution of the Corporation were duly filed with and accepted by the State Department of Assessments and Taxation of the State of Maryland, on March 12, 1964," executed a deed which was recorded on October 17, 1978, granting and conveying to the aforesaid fifteen stockholders, their respective heirs, personal representatives and assigns, title in fee simple to the aforesaid real property "as tenants in common and not as joint tenants".¹

¹ No explanation was offered for the elapse of 14 years between the adoption of the plan of liquidation and the execution of the deed.

13. In or about the month of November, 1980, the aforesaid real property was sold for the gross price of \$2,100,000, \$500,000, of which said gross price was payable in November, 1980 and the balance thereof was payable "over the period of the year 1981".

14. On January 2, 1975, petitioner, Barnet Kaprow, by Trust Indenture dated that day, established a trust under the terms of which the said Barnet Kaprow was named both the Settlor and the Trustee; the Settlor conveyed, and the Trustee acknowledged receipt of, "his undivided partnership interest in Riverdale Apartments Company, a Maryland (Baltimore County) partnership, having its principal place of business c/o Leo H. Seitelman & Co., 855 Avenue of the Americas, New York, New York"; and his daughter, Miriam L. Kaprow, was designated as the income beneficiary for a term of ten years and one day with respect to the net income received by the Trustee in Riverdale Apartments Company.

15. Riverdale Apartments Company is the name by which the property conveyed by Middle River Manor, Inc. to its stockholders as a liquidating dividend or aforesaid is known; and said Leo H. Seitelman is a certified public accountant and licensed real estate broker whose office is located at 855 Avenue of the Americas, New York, New York, and who, for 25 years prior to June 8, 1977, was the accountant for and the manager of said property, whose street address is 2 Fenway South, Baltimore, Maryland 21221.

16. It is petitioners' claim that Riverdale Apartments Company is not a partnership and that it "is a trade name that was adopted from a title employed by a former managing agent of the property and which has been used as a matter of convenience".

17. In an affidavit sworn to June 8, 1977, the said Leo H. Seitelman states as follows with respect to said Riverdale Apartments Company:

"The transfers of the common ownership interests of Riverdale Apartments Company are made freely by the participant owners thereof without permission or consent of the other participant owners and there have been a number of such transfers over the years. There is no partnership agreement or partnership understanding in this case."

18. Riverdale Apartments Company was treated as a partnership for accounting purposes for the years 1970 through 1975. The 1975 financial report shows year end partners' capital of \$450,206.00. It also shows the land and building carried as fixed assets. In addition to income from unfurnished apartments, the company had income from furnished apartments (\$13,818.00), washing machines (\$5,708.00), air conditioners (\$24,185.00), and other miscellaneous income.

19. For each of the years 1970, 1971, 1972, 1973 and 1974 a Maryland Form 501, entitled "Partnership Return of Income" of "Riverdale Apartments Company c/o Leo H. Seitelman, 855 Avenue of the Americas, New York, New York" was prepared and filed by said Leo H. Seitelman as attorney in fact with the Comptroller of the Treasury, Income Tax Division, Maryland.

Said returns stated that the "business or profession" of Riverdale Apartments Company was "Real Estate" and set forth for each of said years its "ordinary income" and a "Partners Schedule", listing as to each of them, among other things, their "Maryland Net Income" for each of said years.

Maryland Partnership Returns were also filed for the years 1968 and 1969.

The "Instructions For Form 501" aforesaid for the year 1974 stated in part that "A partnership includes all co-partners, whether general or special, and whether limited or unlimited, and also includes joint enterprises."

20. The Audit Division's evaluation of the gifts was based on an appraisal of "income flow" for two periods of time, namely January 1, 1975 to January 1, 1982 and from January 1, 1982 to January 1, 1985. The division in time was

predicated on the fact that the mortgage covering the property was scheduled to mature on December 1, 1981, and that a new mortgage would be required sufficient to satisfy the original mortgage. The appraiser's analysis of values, therefore, dated January 24, 1979, projected income flow for two different periods of time.

The projected income for the second period of time, from January 1, 1982 to January 1, 1985, is based on the appraiser's estimate of income flow on the theory that "the income will increase since a new mortgage, sufficient to satisfy the original mortgage, will be less than the original and payable at a higher rate of interest."

Total income, per annum from January 1, 1974 to January 1, 1982	\$783,025	
Operating Expenses, taxes & fixed charges (exclusive of depreciation)	\$572,542	
Annual net income to January 1, 1982	\$210,483	
Less: amortization of first mortgage and other disbursements	\$ 81,926	
Annual cash flow	\$128,557	
Gift: 9.375%	\$ 12,052	
Present worth of \$12,052 annually @ 8% for 7 years - factor 5.206		\$62,742
Total income, per annum, from January 1, 1982 to January 1, 1985	783,205	
Operating expenses (exclusive of depreciation & interest on mortgage)	\$519,139	
Annual income to January 1, 1985	\$264,066	
Less:	\$ 76,000 *	
Annual cash flow	\$188,066	
Gift: 9.375%	\$ 17,631	
Present worth of \$17,631 annually at 8% for 3 years, deferred 7 years - factor 1.504		\$26,517
TOTAL VALUE OF GIFT		\$89,000

* New mortgage of \$380,000 to satisfy the original mortgage, to be obtained at 10% interest and 10% amortization on \$76,000 per annum, if constant payments are made.

CONCLUSIONS OF LAW

A. That petitioners have failed to demonstrate that the subject matter of the gift was an interest in Maryland real property owned by Mr. Kaprow as a tenant in common, and not an interest in a partnership. The deed actually creating the tenancy in common was not executed until September, 1978, more than three years subsequent to the establishment of the trust; moreover, the trust indenture granted Mr. Kaprow's "undivided partnership interest" in Riverdale Apartments Company, and the entity was treated as a partnership for accounting purposes. Accordingly, the gift was properly taxable by New York.

B. That the Audit Division is hereby directed to recompute the deficiencies asserted against petitioners, by reference to the actual selling price of the property (Finding of Fact "13").

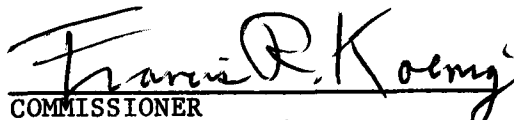
C. That the petition of Barnet and Evelyn Kaprow is granted to the extent indicated in Conclusion of Law "B"; the notices of deficiency issued on March 15, 1979 are to be modified accordingly; and except as so modified, the deficiencies are in all other respects sustained.

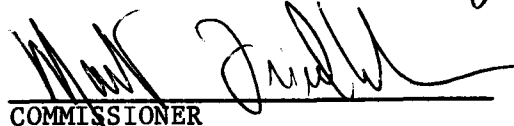
DATED: Albany, New York

STATE TAX COMMISSION

NOV 22 1983


PRESIDENT


COMMISSIONER


COMMISSIONER