

HERITANCE TAX: Real property located in Missouri under executory contract of sale by non-resident not subject to inheritance tax upon death of the non-resident.

November 2, 1934.



Hon. Vivian S. Smith,  
Judge of Probate Court,  
Pike County,  
Bowling Green, Mo.

Dear Judge:

This department is in receipt of your request for an opinion as to the following state of facts:

\* \* \* \* \* The administrator takes the position that the State of Missouri is not entitled to inheritance tax and the court entertains the same opinion, but would like your advice in the matter. The facts are:

Adelia Keller, for at least 30 years prior to her death on February 29, 1932, had been a continuous resident of the city of Ottumwa, Wapello County, Iowa, and died in said city, county and state a resident and citizen thereof. During her lifetime, to-wit, November 14, 1931, she entered into a contract for the sale of certain real estate situated in Pike County, Missouri with one W.E. Lovell and wife, for the sum and consideration of \$3,000.00 payable over a period of years, and at the time of her death said contract was in full force and effect. Soon after the execution of the contract the purchasers entered upon and assumed possession of the ownership of the premises and have remained in continuous use, occupation and ownership of the premises, the only interest of Adelia Keller or Adelia Keller estate being the retention of the bare naked legal title as security for the indebtedness.

At the present time there is an unpaid balance on said contract in the sum of \$2650.00, and

under an order entered by the district court of Wapello County, Iowa, the administrator of the estate of Adelia Keller has been authorized to accept the sum of \$2413.25 as full and complete payment and discharge of the balance on the contract and to accept as payment of said sum of \$2413.25 Federal Land Bank Corporation bonds.

Counsel of the Federal Land Bank of St. Louis, Missouri, have required the administration of an ancillary estate at Pike County, Missouri, and the institution of an action for specific performance; and in compliance with their title requirement ancillary administration has been obtained with Judge R.L. Motley as administrator thereof."

The question before us in this opinion is whether or not the real estate located in Missouri is subject to inheritance tax by reason of the death of the holder of the legal title to said property, said person being at the time of his death a resident of the State of Iowa. The general principle is stated by Gleason & Otis in their work on "Inheritance Taxation", as follows:

"Where the deceased had contracted to sell real estate which was thereafter conveyed by his executors, sums due on the contract are personalty and not realty."

Tiffany on "Real Property", Vol. I, Sec. 125, says:

"It is frequently said that on the making of an executory contract for the sale of land of which specific performance would be decreed, a court of equity, regarding as done that which ought to be done, will consider the purchaser as the owner of the land."

The Canadian Supreme Court in the case of *Re Muir*, 51 Can. S.C. 428 held that under an agreement for the sale of land, a covenant to pay should be implied, and consequently that it was a specialty debt which as such constituted property within the province of Manitoba and was liable for succession duty there, and not at the situs of the real property itself.

In the case of Mahan v. Home Insurance Company, 205 Mo. App. 592, the Kansas City Court of Appeals touched on this question wherein Judge Ellison said:

"If one sells his property so that the title passes to his vendee, although it be a title in equity without deed, its destruction, total or partial, is the loss of the vendee."

The leading case on this point is the case of In Re Boshart's Estate, 177 N.Y.S. 567, wherein the court held that where a contract for the sale of a farm provided for payment of the purchase price in installments and that vendor should give a deed when the whole purchase price was paid, possession to be in the purchasers. Upon execution of the contract, vendor's interest was changed from real to personal property, she becoming the owner of the unpaid purchase price and holding the legal title merely as security, being to all practical purposes a mortgage. The court in applying this rule of law, said:

"\*\*\*\*Briefly stated, appellant contends that the legal rule which regards the vendor's interest as real property, and not the equity rule which regards the vendor's interest as personal property, should be applied in determining whether the property in question is subject to a transfer tax. I cannot assent to this contention. From the moment of the execution of the contract, the property rights and interests of the parties, and those claiming under them, are fixed and determined by this equity rule whenever the same comes in question, and on the death of the party this same rule determines whether his interest under the contract is real or personal, and, therefore, to whom it shall pass; and there seems to be no reason why the same rule should not be applied in determining whether the transfer of the property in question is subject to a transfer tax.

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In view of the authorities above cited, and especially in view of section 2672 of the Code of Civil Procedure, I have reached the conclusion that Mrs. Boshart's property at the time of her death was in the contract and amount owing thereon and

not in the farm; that said property is intangible and not tangible property; and, since she was not a resident of this state, the transfer of said property is not subject to a transfer tax."

This decision of the court was in all respects affirmed in the case of *Persico v. Guernsey*, 220 N.Y.S. 689 wherein the court said:

"The vendors hold title as trustees for the vendees and as security for the payment of the balance of the agreed purchase price. \* \* \* The interest of the vendors in the property is deemed in equity personalty, not realty."

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that the interest of a non-resident vendor in real property within the State of Missouri which at the time of his death was the subject of an executory contract for the sale of certain property, represents intangible property rather than tangible property, and it is therefore not subject to inheritance taxation in the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

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