

TAXATION: Taxpayer who converts assets into tax
TAX EXEMPTION: exempt securities with fraudulent intent
FRAUDULENT EVASION: to evade taxes does not relieve himself
of the liability to pay the taxes.

August 19, 1941

State Tax Commission
of Missouri
Jefferson City, Missouri



Gentlemen:

This is in reply to yours of recent date wherein you submit the following request for an official opinion from this department:

"We are writing you for an opinion concerning the proper assessment of the estate of Sarah L. G. Wilson as of June 1, 1940. The executors take the position that \$31,000 of United States Treasury Bills should not be included, for the reason that they are tax exempt securities. The taxing authorities take the position that same are not legally deductible for the reason that said securities were purchased without an order of the Probate Court of St. Louis County."

Since the answer to this request depends upon the facts in the case, we will set out the facts which were included with your file in this assessment, which are as follows:

"Petitioners are executors of the Estate of Sarah L. G. Wilson, deceased, under appointment of the Probate Court of the County of St. Louis, Missouri. Decedent died on

November 19th, 1938, a resident of St. Louis County, Mo., Clayton School District.

"Petitioners filed a list with the Assessor of St. Louis County, showing that they had in their possession on June 1st, 1940, taxable personal property, consisting solely of one \$5.00 gold piece, having a value of \$5.00.

"That on May 24th, 1940 petitioners purchased from Mississippi Valley Trust Company \$31,000.00 par-value United States Treasury Bills, due June 5th, 1940, being bills Nos. 444164, 322198, 322199 and 322203, at par and one-sixteenth, for a total cost of \$31,019.37, which amount was paid to the Mississippi Valley Trust Company by check drawn by the executors on said date and which cleared on May 25th, 1940.

"That these U. S. Treasury Bills were delivered by the Mississippi Valley Trust Co. to the petitioners on May 24th, 1940 and were immediately placed by them in their safe deposit box in the Mississippi Valley Trust Co. in St. Louis, Mo.

"That these U. S. Treasury Bills were from May 24th, 1940 until June 5th, 1940 at all times in their possession and in said safe deposit box.

"That these bills matured on June 5th, 1940 and at that time were deposited for collection with the Mississippi Valley Trust Company and on the same date were credited to the petitioner's account.

"That at the close of business on May 31, 1940 the petitioners had in their

bank account in the Mississippi Valley Trust Company an overdraft of \$66.42 and that no deposit was made in said account on June 1st, 1940.

"That the petitioners had no other bank account and that the petitioners had no money on hand on June 1st, 1940, except the \$5.00 gold piece above mentioned.

"That on June 1st, 1940 in addition to the \$5.00 gold piece above-mentioned, petitioners had in their possession the following property:

"\$210,000.00 par-value Federal Land Bank Bonds

"\$115,000.00 par-value Territory of Hawaii Bonds

"\$50,000.00 par-value Phoenix Joint Stock Land Bank Bonds

"\$83,000.00 par-value Puerto Rico Bonds

"\$52,000.00 par-value Certificates of Deposit, representing St. Louis Joint Stock Land Bank Bonds.

"\$7,500.00 Face-value U.S. Savings Bonds.

"\$200,000.00 par-value U.S. Treasury Notes.

"That the purchase by the petitioners on May 24th, 1940 of \$31,000.00 U.S. Treasury Bills was made by them because they knew that if the same amount in cash were on hand on June 1st, 1940, such cash would be taxable for general personal property taxes.

"That the purchase of the U.S. Treasury bills on May 24th, 1940 was made by the petitioners without an order of the Probate Court of St. Louis County."

The tax under consideration here is one which the St. Louis County taxing authorities contend should be imposed upon the properties of an estate which is in the process of administration in that county.

The agreed statement of facts show that among other assets on hand in the estate there was on May 24th, 1940, cash in the sum of \$31,000.00. On that date the executors of this estate, without an order of the Probate Court, invested this sum in U.S. Treasury bills due June 5th, 1940. These Treasury bills are tax exempt securities. They were held by the executors of the estate until June 5th, 1940, when they were paid off by the government and the proceeds from same were credited to the account of the estate. It will be noted that the executors, by the agreed statement of facts, stated that they made the purchase of these U.S. Treasury bills because "they knew that if the same amount in cash were on hand June 1st, 1940, such cash would be taxable for general personal property taxes."

The settlement of the executors showing the above transaction was approved by the Probate Court of said County on June 29th, 1940. The record does not indicate whether or not this was a final settlement.

There is no controversy as to the procedure by the taxpayers or the taxing authorities. The Tax Commission sustained the taxpayer who petitioned for reassessment and the matter is now before the State Board of Equalization.

On the question of the authority of the executors to invest estate funds, we find that Section 104, R. S. Mo. 1939, provides as follows:

"If, on the return of the inventory, or at any other time, it shall appear to the satisfaction of the court that there is a surplus of money in the

hands of the executor or administrator that will not shortly be required for the expenses of administration, or payment of debts, it shall have discretionary power to order him to lend out the money on such terms and for such time as may be deemed best."

Section 116, R. S. Mo. 1939, also provides as follows:

"If any executor or administrator apply to the court, or to the judge thereof in vacation, for permission to sell the personal estate of the deceased, or any part thereof, at private sale, for reinvestment or other purposes, and the court, or the judge thereof in vacation, be satisfied that such sale would not be prejudicial to the persons interested in the estate, the court, or the judge thereof in vacation, may order such sale and prescribe the terms thereof."

By Section 104, supra, it will be seen that the Probate Court has a superintending control over the acts of the executors in handling an estate. By Section 116, supra, it will be seen that the executor or administrator must obtain permission to sell or reinvest the personal estate on which he is administering.

In the case of State ex rel. Lefholz v. McCracken, 95 S.W. (2d) 1239, 1. c. 1244, in speaking of the relationship existing between executors and the Probate Court, the court said:

"* * * The probate court has superintending control over the acts and doings of all persons handling estates in the court. * * *"

The record here reveals that the executors purchased these government securities without an order of the Probate Court. However, this record does show that the settlement following this transaction was filed and approved by the court.

In the case of Orchard v. Store Co., 225 Mo. 414, one of the questions before the court was the validity of the sale of personal property made by an administrator. The administrator had asked for permission to make a sale of personal property. He obtained the order of court, but sold the property at private sale. The court held that the sale was void and, in discussing the question, said at l. c. 460:

"* * * But there is no statute directing that an administrator make a report to the court of a sale of personal property at private sale, and none empowering the probate court to approve or confirm such a sale, and hence the court's approval and confirmation of this sale added nothing to its validity, and did not cure any inefficiency in the order authorizing it."

By the same reasoning, if the executors in this estate purchased the government securities and sold them without an order of the Probate Court such transaction is void and cannot be validated by the court order approving the settlement. The Orchard case, supra, is authority for the rule that if an executor or administrator fails to follow the provisions of the statute in the handling of personal property of an estate his acts are unlawful and void and the approval by the court of such acts does not validate them.

In the case of Koelling v. Citizens Bank of Warrenton, 237 S. W. 176, l. c. 180, the St. Louis Court of Appeals in speaking of sales made by executors without an order of court, said:

"Sales of property at private sale held without complying with the terms of the statute are void, and a sale held without complying with the mandatory provisions of the statute conveys nothing to the purchaser. Orchard v. Store Co., supra.

"And the fact that the will in the present case gave to the executrix power to sell the property of the estate after having bequeathed and devised it to her could not dispense with the necessity of complying with the statutes when it came to making sales of the personal property belonging to the estate. A testator has no power to dispense with the necessity of complying with the method of sale prescribed by the law, which was enacted for the benefit of the creditors, the distributees and legatees."

The agreed statement of facts do not state whether or not the will in the Wilson estate authorized the executors to make purchases and sell personal property, but whether it did or not it seems that by the rule announced in the Koelling case, supra, the executors were required to obtain an order of court in the handling of the personal property of the estate.

CONCLUSION.

Since the executors in the Wilson estate, supra, without an order of the Probate Court, attempted to invest in government securities estate funds, and such transactions are

void, and since the approval of the Probate Court of the settlement showing such investments cannot breathe life into this transaction, it is the opinion of this department that the funds of said estate were not legally invested in government securities on June 1, 1940.

On the question of whether or not the transaction, if legal, relieves the estate of liability for taxes we make the following observations:

If the investment was made for the purpose of, and with a fraudulent intent to evade payment of taxes, then the estate is liable for the taxes on the \$31,000 invested in government securities which it held on June 1st, 1940.

In the case of *Stifel v. Brown*, 24 Mo. App. 102, the court held void a conveyance made to avoid payment of a special tax. The record in that case showed that the avowed purpose of the conveyance was to defeat the collection of an assessment of a special tax against a tract of land in the city against which special assessments were levied.

In Vol. 61 C. J. p. 173, Sec. 130, the rule on contracts and agreements evading taxes is stated as follows:

"Transactions are not invalid merely because undertaken for the purpose of escaping taxation, and where the transaction is bona fide and free from fraud, one may escape taxation by converting taxable property into forms which are not taxable, or by transferring his property to another, or by incorporation to avoid future taxes. But liability for taxes cannot be evaded by a transaction constituting a colorable subterfuge, as where there is a temporary change or concealment of property made just before the time for assessment and with the intention of restoring the property to its original form immediately thereafter, as in the case of a colorable conversion of taxable money or property into nontaxable securities, * * *."

In the case of Highland Park Independent School District v. Republic Ins. Co., 80 S. W. (2d) 1053, the Civil Court of Appeals of the State of Texas in considering a question similar to the one here, said at 1, c. 1061:

"Another item in the assessor's corrected rendition is in the sum of \$402,671.87. This item, appellee claims, was an investment in tax free government bonds, made prior to the taxing date of January 1, 1933, and therefore is not subject to taxation, and hence not rendered as taxable property. On the other hand, appellant claims that this amount of money was converted into such bonds, on December 28, 1932, for the fraudulent purpose of escaping the payment of taxes on such sum, with no intention of subsequently keeping and owning said bonds, and was again converted into money, on or about January 28, 1933. If such bonds were purchased with the sole intent of evading taxation, then such an action would be fraudulent and render said sum subject to taxes. This rendition by the assessor made an issue of fact, to be first determined from evidence by the board of equalization. The fact that the bonds were bought about three days before the taxing date of January 1, 1933, and sold within a month after such taxing date, is such a circumstance as calls for an explanation from appellee as to its intent in making the purchase."

The parties, by the statement of facts, agreed that the purchase was made to avoid payment of taxes. Under the ruling in the Highland Park Independent School District case, supra, the taxpayer must explain his intent in making the purchase.

In the case of Tazewell Electric Light & Power Co. v. Strother, 84 F. (2d) 327, the Circuit Court of Appeals for the Fourth Circuit, in stating the rule of construction by the court of transactions similar to the one in your request, said at l. c. 329:

"The Street Railway Company, that originally owned the stock of the plaintiff, first transferred the stock to its stockholders; the property of the plaintiff was then transferred to the trustee. These two transactions were evidently and admittedly made for the purpose of escaping taxation, and while it is true that such transactions are not vitiated for tax purposes because of that fact, (Chisholm v. Commissioner (C.C.A.) 79 F. (2d) 14, 101 A.L.R. 200, and cases there cited), they are, nevertheless, in our opinion, to be construed jealously against the taxpayer. The Supreme Court has spoken disparagingly of such efforts. Shotwell v. Moore, 129 U.S. 590, 9 S. Ct. 362, L. Ed. 827."

In Shotwell v. Moore, 129 U.S. 590, 32 Law Ed. 827, the Supreme Court had before it a question very similar in facts to your request. In order that this case may be fully understood by you we quote as follows at l. c. 828 and 829:

"It is conclusively shown by the finding of facts that prior to the day to which the assessment of property for taxation relates by the Laws of Ohio, Shotwell had in his bank, on general deposit, subject to his order at the Town of Cadiz, in the County of Harrison, in the previous years of 1881, 1882, 1883, 1884,

and 1885, the sums of money on which the taxes here in controversy were assessed; but it is claimed by him that, a day or two previous to that fixed by statute, he had, in each of those years, drawn out the balance of his general deposit account on a check, and, in each case receiving the amount of it in legal-tender notes, had put them into a package, which he inclosed in an envelope, and placed with the bank as a special deposit, writing his name thereon, and requesting the bank to put it in its safe for him, which was done.

"Arguing from the proposition that the assessment for an entire year, under the Laws of Ohio, must be made on the particular day mentioned in the statute, and that these greenbacks were his property on that day, it is insisted, with great earnestness by counsel, that the amount of the package thus on special deposit on that day could not be taxed by the state authorities. To this general proposition there does not appear to be any valid objection if the thing done had been in the ordinary course of business, and the conversion of his general deposit in the bank into a private package of greenbacks, exempt from taxation, were free from illegal purpose or fraudulent motive. But since it is found as a matter of fact that the whole transaction was made for the purpose of evading taxation on the amount of his general deposit on the day it was exchanged for greenbacks, and that there was no purpose of permanently changing the amount of the deposit in the bank subject to his order, and, as such, liable to taxation, it is argued by counsel that it

was a fraud upon the Revenue Laws of the State of Ohio.

"For all of the years mentioned the same process was gone through with, and in every instance, within a week after the assessment, the plaintiff in error took the same greenbacks which he had placed on special deposit and immediately restored them to the bank as a general deposit, subject to his order; in other words, he remanded the amount to the condition in which it would have been liable to taxation if the period of assessment were not limited to the particular day mentioned in the statute.

"It does not need the finding of the court below as a fact to show that this was an evasion, and a discreditable one, of the taxing laws of the State, if it could be made successful. It is, therefore, urged that on this ground alone--the illegal purpose for which the transactions were made in the bank--the court should hold the plaintiff in error liable to taxation for the amount thus converted. Several decisions on this subject by state courts, holding this view, are cited in the brief of counsel. They are directly in point, and relate to attempts of precisely the same character to effect a similar evasion of taxation on property otherwise liable thereto. * * * * *

" * * * * *

"And this court in Mitchell v. Leavenworth County, 91 U.S. 206 (23:302), denounces conduct precisely similar to that of the plaintiff in error in this case, in the following language:

"United States notes are exempt from taxation by or under state or municipal

authority; but a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a court of law.'

" * * * * *

"All these decisions show that the courts look upon this transaction as indefensible, and consider it an improper evasion of the duty of the citizen to pay his share of the taxes necessary to support the Government which is justly due on his property."

Since it is a question of fact for the taxing authorities to determine whether or not the purchase of the tax exempt securities was made for the fraudulent purpose of evading taxes, this department will not pass on that question. We are herewith submitting cases which are as similar in facts as we are able to find.

Respectfully submitted,

TYRE W. BUXTON
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

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