

INHERITANCE TAX: When a testamentary trust is created giving the beneficiary the income for life and the general testamentary power of appointment over the remainder, then the beneficiary is only subject to an inheritance tax valued upon the life estate created. The assessment of tax against the remainder is postponed until the exercise or non-exercise of the power of appointment.

OPINION REQUEST NO. 332
(Bushmann)

December 13, 1962



Honorable Norman H. Anderson,
Prosecuting Attorney
St. Louis County,
Clayton, Missouri

Dear Mr. Anderson:

We are in receipt of your request for an official opinion from this office. In your letter you pose the following question:

"The basic issue involved is whether or not under Section 145.030, MRS 1959, the State is entitled to assess an inheritance tax to a beneficiary of a will based upon the entire corpus of a trust of which the beneficiary is to receive the income for life and over which the beneficiary has a general, testamentary power of appointment."

We have reviewed the information enclosed with your letter. We assume that the question asked by you is limited in scope and does not involve the problem of a trustee having the authority to invade the corpus of the trust for the benefit of the life beneficiary.

It is the opinion of this office that Section 145.030, RSMo 1959, VAMS, postpones the assessment of inheritance tax on the transfer of the property subject to the power of appointment, until such appointment is exercised or until someone becomes entitled to the possession of this property upon the failure to exercise this power. Such postponement is provided for in Section 145.110, RSMo 1959, VAMS, wherein it says that all taxes imposed under Chapter 145 are due and payable at the death of the decedent "unless otherwise herein provided for." Section 145.030, supra, reads as follows:

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"Whenever any person or corporation shall exercise the power of appointment derived from any disposition of property made either before or after the passage of this law, such appointment when made shall be deemed a transfer taxable under the provisions of this law in the same manner as though the property to which said appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by the donor by will; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this law shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power relates had succeeded thereto by a will of the donee of the power failing to exercise such power taking effect at the time of such omission or failure. The tax so imposed shall be determined by the clear market value of such property at the rate herein prescribed and only upon the excess over the exemptions herein made." (Emphasis ours).

The underlined portion of this statute should be so construed that the word "donor" means the "donor of the appointive property under the power of appointment." Thus the word "donor" should be read as "donee". In re Tompkins Estate, Mo. Sup., 341 SW 2d 866.

With this change having been made, Section 145.030, supra, can be compared with similar statutes of other states. The decisional law of other states can aid us in resolving the problem at hand.

By way of background it should be pointed out that the Tompkins case recognizes the well-established common law rule that appointive property should be treated as though it passed under the will of the donor of the power. However, the Court said, at page 872, that by enacting Section 145.030 the Legislature clearly intended to tax the "exercise" of the power of

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appointment as though the "exercise" were the transfer of property. The statute then has changed the common law rule.

Prior to 1930 New York had an Inheritance Tax Law similar to ours, rather than their present Estate Tax Law. It was from the New York law that Missouri copied its original Inheritance Tax Law. Section 145.030 appeared in the first Inheritance Tax Act of 1917. Laws 1917, page 115, Section 2. Based upon the Tompkins case construction of this statute it is identical to Vol. I, Laws New York 1897, Chapter 284, Section 220(5), page 150.

The New York Court of Appeals construed Section 220(5) of the New York Transfer Tax Act in the case of In re Delano Estate, 176 New York 486, 68 NE 871. In that case one William Astor had made conveyances in 1848 and 1849 of certain real and personal property to his daughter for life, giving her a power of appointment as to the corpus. Her power was to be exercised by will. The daughter, Mrs. Delano, died in 1902. She exercised her power of appointment in favor of her nephew, Mr. Carey. The state assessed taxes on the appointive property in the estate of Mrs. Delano. This assessment was made under the 1897 statute and Mr. Carey contested the assessment, claiming that he took title to the property under the Astor conveyances. Carey further claimed that the New York statute which postponed the taxes against appointive property did not apply because it was not enacted until after the date of the conveyances from Astor to his daughter. In holding that the tax was properly assessed in the estate of the donee, Mrs. Delano, the Court said at page 491:

"The statute, as we read it, does not attempt to impose a tax upon property, but upon the exercise of a power of appointment."

And later at page 493 the opinion stated:

"* * *As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin."

And finally at page 494:

"* * *As we said through Judge Cullen in the Dows case (167 New York 227): 'Whatever be the technical source of title of a grantee

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under the power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it.' * ** No tax is laid on the power, or on the property or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act.* * *

"It is quite immaterial that there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made and the power was created. That transfer is not taxed and the statute makes no effort to reach it. It is the practical transfer through the exercise of the power by will that is taxed and nothing else. * * *" (Emphasis ours).

Several years later this same court affirmed the Delano case in In re Vanderbilt Estate, 281 New York 297, 22 NE 2d 379. With reference to Section 220(5), the Court said at 281 New York 1. c. 309:

"The statutory rule treating the execution of the power as the real source of title is, therefore, not arbitrary; at least, so long as the tax is not measured by the size of the estate of the person who makes the transfer. Mere postponement of the assessment of the tax is not a ground for complaint to the court. That is true even though the rate of taxation might be changed in the interval between the death of the donor of the power and the death of the donee or even though in the interval the tax laws were so amended that transfers previously not taxable were subjected to a tax."

We are not unmindful of the fact that in the Tompkins case, cited earlier in this opinion, an inheritance tax was assessed and paid by the executor of the donor's estate. The court assumed that the tax previously paid was in relation to the same property

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which the state was then seeking to tax against the appointees of the donee. A comparable situation was present In re Morgan's Will, Wisc. Sup., 277 NW 650. However, as we view these cases the problem before the Wisconsin and Missouri Supreme Courts was whether the state had the power to tax the transfer of the appointive property when it passed to the appointees upon the death of the donee. The validity of the tax previously paid upon the transfer from the donor to the life beneficiary with power of appointment, was not an issue. Notwithstanding the fact that taxes had been paid upon the same appointive property, these cases held that the statute (145.030, supra and an almost identical Wisconsin statute 72.01(5) Wisc. Statutes 1933) clearly made the transfer upon the exercise of the power a taxable event. The Missouri Court said no illegal double taxation existed (1. c. 875) and the Wisconsin Court said, "If the appointees are involved here in the matter of a double taxation it seems to be a plight of their own creation." 277 NW 1. c. 652.

There may appear to be some conflict between 145.030, supra and 145.2402, RSMo 1959, VAMS. The latter section imposes a tax upon the transfer of remainders subject to certain contingencies and conditions. It reads as follows:

"When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the lowest rate which, on the happening of any of said contingencies or conditions transferring property to a natural person, would be possible under the provisions of this chapter, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred; provided, however, that on the happening of any contingency or condition whereby the said property or any part thereof is transferred to a person or corporation, which under the provisions of this chapter is required to pay a tax at a higher rate than the tax imposed, then such transferee shall pay the difference between the tax imposed and the tax at the higher rate, and the amount of such increased tax shall be enforced and collected as provided in this chapter; provided

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further, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this chapter, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this chapter. Such return of overpayment shall be made in the manner provided by section 145.250, upon the order of the court having jurisdiction."

The Supreme Court of Minnesota in the case of In re Robinson's Estate, 192 Minn. 39, 255 NW 486, was called upon to construe two Minnesota inheritance tax statutes. One was virtually identical to 145.030, supra, and the other was similar to 145.240.2, supra. In that case, the decedent established a testamentary trust. She gave her daughter a life estate in the property coupled with the power of appointing by will those who were to receive the corpus upon her death. Inheritance taxes were originally assessed and paid by the life beneficiary upon the value of her life estate. A tax was also paid upon the contingent remainder, using as a basis a fictitious surviving child of the life beneficiary. When the life beneficiary eventually exercised her power of appointment in favor of her husband, the state sought an inheritance tax upon the husband's succession to the property. In deciding the question of whether the husband was liable for taxes under the appointive statute, the Court said at 255 NW 1. c. 487:

"We assume that section 2294 (similar to 145.240.2) relating to transfers 'in trust or otherwise' would cover the matter if it stood alone. But it is general in terms and must be construed with section 2292 (similar to 145.030). The latter is special and carves out of the general subject of transfers upon 'contingencies and conditions,' the one of transfers resulting from either the exercise or non-exercise of powers.

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Hence it is controlling within its limited field as against the general terms of section 2294. Section 2292 declares expressly that an estate taken upon and by reason of the exercise of a power of appointment shall be taxable 'in the same manner as though the property * * * belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.'

The Supreme Court of Illinois has on two occasions held that their statute relating to remainders subject to certain contingencies (similar to our 145.240.2) was limited by their statute (identical to our 145.030) which postponed the taxes when the remainder interest is subject to the power of appointment. People v. Linn, 357 Ill. 220, 191 NE 450; People v. Cavanaugh, 368 Ill. 399, 14 NE 2d 232.

CONCLUSION

It is the opinion of this office that when a testamentary trust is created giving the beneficiary the income for life and the general testamentary power of appointment over the remainder, then the beneficiary is only subject to an inheritance tax valued upon the life estate created. The assessment of tax against the remainder is postponed until the exercise or non-exercise of the power of appointment.

The foregoing opinion which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

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