INHERITANCE TAX: Inheritance tax should be determined and assessed in accordance with terms of will, rather than on basis of disposition provided by assignment of part of legatee's interest to others.

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Mr. C. L. Gillilan, Supervisor
Inheritance Tax Division
Department of Revenue
Jefferson City, Missouri

Dear Mr. Gillilan:

We have your recent letter requesting an opinion from this office. Your letter is as follows:

> "In this estate, Deceased was survived by a sister, Marge Garey of New York, a brother, Fred F. Kashner of Indianapolis, Indiana, and a brother, Alonzo R. Kashner of Indianapolis, Indiana. In her will, Deceased devised and bequeathed $1.00 to her sister, Marge Garey, $1.00 to her brother, Fred F. Kashner, and the entire remainder of her estate amounting to approximately $30,000.00 to her brother, Alonzo R. Kashner.
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> "Deceased died on April 18, 1949, at Kansas City, Missouri, and letters of administration were issued on the estate to Zula Chase, as executrix, on April 22, 1949. Although the entire estate except $2.00 passed under Deceased's will to the brother, Alonzo R. Kashner, under an instrument dated May 2, 1949, copy of which is attached, Alonzo R. Kashner 'conveyed, assigned, transferred and delivered and set over' one-third of the total value of the estate to his sister, Margaret K. Garey, and recited that the other one-third interest should be held by Alonzo R. Kashner as Trustee for the benefit of his brother, Fred F. Kashner.
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> "You will note that the instrument by which Alonzo Richard Kashner, the principal beneficiary, divides the estate equally among his sister, his brother,

and himself, is a unilateral instrument executed solely by Alonzo Richard Kashner, and it is not an instrument in which the three parties have sought to settle a bona fide dispute as to the disposition which should be made of the estate. In the instrument dated May 2, 1949, Alonzo R. Kashner recites only that among the purposes of the instrument he intends to avoid 'any controversy or dispute or unhappy differences with his brother and sister aforesaid.'

"If the Missouri inheritance tax is assessed in accordance with the distribution made by the will, only one $500 deduction would be allowed to the principal beneficiary and the balance of the estate would be subjected to a tax of 3% on the first $20,000 of net estate and 6% on the remainder. If, however, the tax on the respective interests is assessed on the basis of the distribution made under the terms of the instrument dated May 2, 1949, the net estate would be divided equally, a $500 deduction would be allowed each beneficiary, and the remaining interest in each one-third would be taxed at only 3%. Although the difference is not great, confusion arises when the Supreme Court opinion in the case of In Re Gartside's Estate, 207 S. W. 2(d) 273 (357 Mo. 181) is considered. In the Gartside's case, a bona fide difference among possible beneficiaries resulted in a will contest. The Court in that case noted that there had been a will contest and directed that the respective interests should be taxed in accordance with the distribution which resulted from the agreement settling the will contest. The Court noted in that case, however, at S. W. l.c. 275.

> "'Logically, it would seem to follow that if a beneficiary may renounce the whole legacy, he may renounce a part and the part so renounced is not subject to the tax as property transferred to him by the will.'

"In this situation should the tax be assessed in accordance with the terms of the will or in accordance with the distribution made in the attached instrument?"

Mr. C. L. Gillilan
Supervisor
Inheritance Tax

A thorough consideration of the facts you set out above leads us to believe the fundamental question here is whether or not there has been a compromise agreement and renunciation to which the language in the Gartside case would apply.

Your letter refers to an accompanying instrument by which certain property which Alonzo Kashner inherited under the will of his sister is transferred and set over to his living brother and sister. Pertinent portions of that instrument are as follows:

> "NOW, THEREFORE, in pursuance of my desires and intention aforesaid, and for the purpose of effectuating the same, I, Alonzo Richard Kashner, of Indianapolis, Indiana, sole residuary legatee and distributee in the Last Will and Testament of Ruby Kashner Loring, deceased, formerly of Kansas City, Missouri, subject to and upon all of the terms and conditions herein expressed, do hereby convey, assign, transfer and deliver and set over unto
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> "(1) my sister Mrs. Margaret K. Garey, of Mount Kisco, New York, an equal one-third of all my right, title and interest, both legal and equitable, in and to all of the estate of Ruby Kashner Loring, deceased, whether real (and as to such only to the extent and in the manner hereinafter provided), personal or mixed, of which the said Ruby Kashner Loring died seized or possessed or to which she may in any manner be or become entitled, that I may now or hereafter claim, demand, own or be or become vested with, or entitled to, under or by virtue of any of the terms and provisions contained in the Last Will and Testament of Ruby Kashner Loring, deceased, * * *
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> "(2) myself, Alonzo Richard Kashner, as Trustee, an equal one-third of all my right, title and interest both legal and equitable, in and to all of the estate

of Ruby Kashner Loring, deceased, whether real (and as to such only to the extent and in the manner hereinafter provided), personal or mixed, of which the said Ruby Kashner Loring died seized or possessed or to which she may in any manner be or become entitled, that I may now or hereafter claim, demand, own, or be or become vested with, or entitled to, under or by virtue of any of the terms and provisions contained in the Last Will and Testament of Ruby Kashner Loring, deceased, which has been duly admitted to probate in the Probate Court of the County and State aforesaid and an equal one-third interest in the proceeds of all life insurance policies on the life of Ruby Kashner Loring in which I am named as beneficiary; to hold the same, however, IN TRUST, for the following uses and purposes:

* *

"* * * for the use and benefit of my brother Fred R. Kashner during the term of his life or until the exhaustion of the corpus of such trust or the termination thereof as hereinafter provided.

* *

"The other one-third share not otherwise conveyed, transferred or assigned pursuant to the provisions hereof is reserved to my own sole and express use and benefit.

"Notwithstanding the tenor or effect of the foregoing provisions, this document is executed upon the condition precedent that no legal or beneficial interest is conveyed or intended to be conveyed in and to any of the real property devised to me in and under the provisions of the will aforesaid of my sister, it being my intention with respect to the real property (and this document shall always be so construed) to transfer and assign only a share in the proceeds arising upon the sale of any such real property when, and as, the same is sold by me upon terms and conditions satisfactory to and approved by me. I agree to take such steps immediately as may be necessary and proper to effectuate and consumate a sale of such real property so that the proceeds arising therefrom

may be promptly distributed as I have provided herein. * * *"

Relevant quotations from the Gartside case, 207 S. W. (2d) 273, 357 Mo. 181 are as follows:

> "We are not impressed with the reasoning that under a compromise agreement to settle a will contest the contester receives the property as an assignee of the legatee. The right to contest a will is given only to those who have a right under the law to participate in the estate. Therefore, an heir who brings a will contest is claiming the property in his own right under the statute of decent and distribution. When such an heir takes property under a compromise agreement, the legatee renounces so much of the legacy and the contestee takes the property as heir, and not as an assignee. * * *
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> "* * *'So far as the will became effective under the agreement it was because of the heirs' contest and release and in consideration of the distribution they received by reason of their being heirs.'
>
> (Underscoring ours.)
> *
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> "** * *'When a will contest has been amicably settled between the beneficiaries named in the will and the heirs at law and they have in good faith stipulated for a decree of distribution in accordance with the settlement and there is no intent thereby to evade or reduce the inheritance tax, the tax should be computed upon the portion received by each beneficiary under the decree.'"

It appears from the quoted portion of the Gartside case (above), that the basis of assessing the tax according to the agreement rather than by the terms of the will, is that when a compromise results from a bona fide will contest, that the legatee

is renouncing part of his share under the will, and the contestees are taking, "not as assignees, but as heirs."

In the instant situation it is manifest that the brother and sister are not taking as heirs, as a result of a contest and compromise, but only as assignees.

The instrument states most clearly that Alonzo "conveys, assigns, transferrs and delivers" his legacy. This is no "stipulation for a decree of distribution" such as is required to bring it under the rule of the Gartside case, but is actually and realistically an acceptance of the terms of the will by Alonzo and a subsequent gift, by him, of parts of his legacy.

To sum up to this point, then, the court in the Gartside case states that where a bona fide will contest develops, and a compromise agreement is entered into, the legatee thereby renounces a portion of his legacy, and the contestants take the property as heirs, and not as assignees, of the legatee.

It follows then, that if there is no contest, and no compromise agreement, there is no renunciation, and if the other heirs take at all, they must take, not as heirs, but as assignees.

It is too clear for discussion that the facts before us do not indicate any compromise agreement, as a result of a bona fide will contest. The instrument is an unilateral gift or grant of part of his legacy. It should be noted, although it is not decisive here, that the instrument gives away only a very small part of Alonzo's legacy. First, he reserves all realty to himself, to dispose of when and as he sees fit, and second, although he places one-third of his legacy in trust for his brother, he reserves the right to revoke said trust and pay over the corpus to himself, individually, free of trust.

It is equally clear that whatever interest in the $30,000 Alonzo's brother and sister are taking, they cannot be taking by will, for it provides otherwise, nor as heirs, for there has been no will contest nor a resulting compromise agreement. As you suggest in your letter, the instrument of assignment creates no binding compromise agreement based on a valuable consideration, but is merely a unilateral instrument executed "to avoid any controversy * * *."

Mr. C. L. Gillilan
Supervisor
Inheritance Tax

In Priedeman v. Jamison, 202 S.W. (2d) 900, l.c. 903, the Supreme Court of Missouri said (in referring to inheritance tax):

> "Such a tax is an excise on the privilege of taking property by will or by inheritance or by succession in other form upon death of the owner."

Inasmuch as Alonzo's brother and sister are not taking by will, nor as heirs, there is no conceivable basis for assessing an inheritance tax based on their interests.

It is, however, apparent that Alonzo is taking $30,000 by will, and thus the inheritance tax must be based on his interest.

The tax, therefore, should be assessed on the basis of one legacy of $30,000, rather than three of $10,000 each, or one of $20,000 and one of $10,000, or any other combination.

CONCLUSION

It is therefore, the opinion of this office that the inheritance tax should be determined and assessed on the basis of a disposition as made by will, rather than on the basis of a disposition as provided for by an assignment of part of legatee's interest to other.

Respectfully submitted,

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APPROVED:

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