INHERITANCE TAX: Contingent remainder taxable though original bequest made before inheritance tax passed.

September 27, 1933

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Mississippi Valley Trust Company
St. Louis, Missouri

Attention: C. A. Tolin, Associate
Trust Officer.

Dear Sir:

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

"We are acting as successor trustee under will of George Lich. This trust terminated on August 12, 1933, date of death of Mary A. Weidner, the last surviving child of the testator. Mr. George Lich died in 1891, and the will provides that on the death of the last surviving child, the trust shall terminate and the corpus divided among descendants of the testator's four children. The surviving descendants are as follows:

Angela Lich, daughter of George Lich, Jr.
Charles A. Lich and Florenz Elizabeth Abbott, children of Charles Lich.
Amy Stansbury, daughter and
Adele Hays, grand-daughter of Mary Weidner.

Elizabeth Lich, daughter of testator died in 1932 without issue.

We are enclosing a copy of the will of George Lich for your information. This will has been in litigation and we refer you to the case of Lich vs. Lich, 158 Mo. App. 400. In view of the fact this trust was created prior to the Missouri Inheritance Tax Law, we ask your opinion as to the liability for inheritance tax of the descendants of George Lich, to whom distribution will be made. The estate consists of one piece of real estate valued at $20,000.00 and $30,000.00 personal property."

It is well recognized that remainders that vested prior to the statute providing for an inheritance tax are not taxable at the death of the life tenant, and any such statute declaring them taxable is unconstitutional. Matter of Pell 171 N.Y. 48; 63 N.E. 789.

However, a different rule prevails where the remainder is contingent. Section 597 R. S. Mo. 1929, provides in part as follows:

> "* * *Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited.*****"

In view of this provision of the statute, if the descendants of George Lich are contingent remaindermen under the will then an inheritance tax is due to the State of Missouri.

> "A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event." 21 Corpus Juris 981.

In the case of "In Re Cupple's Estate"(Sup.Ct.) 199 S. W. 556, the Court in defining the word descendants, said:

> "In fact, the word "descendant," when applied to inheritance, includes those, and those only, who take by the law of descents in the descending line."

In view of this definition, it may be seen that at the testator's death, there was no assurance that there would be "descendants" capable of taking the property at the death of the last surviving life tenant. In other words, there was a contingency upon which the passing of the remainder interest was based. The Court, in the case of "In Re Hoadley" 101 Fed. 233, said:

> "* * * Besides the above considerations, the cases quoted by the referee, confirmed also by the still later cases of In re Brown, 154 N.Y. 313, 48 N.E. 537, Paget v. Melcher, 156 N.Y. 399, 51 N. E. 24, and Clark v. Cammann, 160 N.Y. 315, 54 N.E. 709, show that where, as under these wills, the testator directs a division of the estate into shares upon the termination of the life tenancy, and a gift to his children then living, or in the case of the death of either them to the lawful issue of any deceased child, the intent of the testator, if nothing else indicates the contrary, will be construed to be to convey to the future beneficiaries no estate or interest of any kind until the termination of the life estate; or as stated by Earl, J., in Delafield v. Shipman, 103 N.Y. 463, 9 N.E. 184;
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> > 'He (the testator) vested the whole estate in the trustee during the life of his widow, and during that time evidently intended that it should remain there, and not be subject to the disposal of his children, or to be seized by their creditors; and after the death of his widow he gave it not to the children living at his death, but to the children and descendants of children deceased, living at her death.' Page 468, 103 N.Y., and page 185, 9 N.E.
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> And again in Campbell v. Stokes, 142 N.Y. 23, 36 N.E. 811, Andrews, C.J., explaining the case of Townshend v. Frommer, 125 N.Y. 446, 26 N.E. 805, observes:
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> > 'That case arose under a trust deed, whereby the grantor retained the beneficial use of the property for life, and which contained directions for the disposition of

> the fee after her death, to persons who were not ascertainable until the happening of that event. The intention of the grantor, deduced by the court from the transaction, was to postpone the accruing of any future interests until that event happened.'
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> In such cases, therefore, it is held that there is no alienable or descendible interest while the precedent life estate is outstanding.* * **

Fortunately for the solution of the problem before us, the will here under consideration has been construed by the St.Louis Court of Appeals. In the case of Lich v. Lich, 158 Mo. App. 400, the Court said (l.c. 430):

> "* * *The duration of the trust is 'so long as any of my children are alive, and upon the death of the last survivor it shall cease.' When this will undertakes to dispose of the estate at the end of the trust, it provides for its distribution on the death of the last of the four children, and the language used is 'the estate shall then be divided among the descendants of my said four children, said descendants taking per stirpes and not per capita.' It is to be observed of this clause that it does not provide for distribution on the death of the last of the four children among the grandchildren, as seems to have been thought by counsel and by the learned trial court, but it is then to be divided among 'the descendants of the four children.' The word grandchildren does not occur in the will at all. It cannot therefore be claimed that a vested remainder was lodged in the grandchildren or any one else by these terms. No one can now say who will be the descendants capable of taking. The taker might not be a grandchild. Hence there is no vested remainder even in the grandchildren.
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> 'Descendants is a good term of description in a will and includes all who proceed from the body of the person named; as (children) grandchildren and great grandchildren.'(Black Law Dict.) As no one can say who will be the descendants of the children when all of the four die, the remainder is a contingent remainder."

There has therefore been a determination by the Court that the remainder interests passing to the descendants of the four children of the testator are contingent remainders. This being so, it is the opinion of this department that the estate passing to the said descendants is subject to an inheritance tax under the laws of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General.

APPROVED:

Attorney General.

JWH:MM