INHERITANCE TAXATION: Transfer by will subject to tax regardless of motive or consideration.

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Mr. Wm. J. Baggerman
1110-1112-1114 Washington Avenue
St. Louis, Missouri

Dear Sir:

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

> "I have been informed by the Appraiser for inheritance tax purposes in an Estate of which I am Executor that your office has ruled that a 5% Inheritance Tax is payable on an inheritance where a sum was bequeathed for services actually rendered over a ten year period and so stated in the will.
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> Will you kindly give me such citation as you can so that I may determine whether the statement is correct or not."

Under the facts as contained in your letter we are not dealing with a transfer of proper inter vivos but with a transfer of property accomplished by will. Transfers actually accomplished by will have almost always been held taxable, even when the will was made in pursuance of an antenuptial agreement for the consideration of marriage or other consideration. The theory of the law is that the tax runs against transfers by will and that the motive for the transfer cannot affect its character, and that if the beneficiary takes under the will he cannot avoid tax on the theory that he might have elected to take under the agreement, if one there be, and present his claim as a debt against the estate. Pinkerton - Inheritance and Estate Taxes; Gleason & Otis - Inheritance Taxation, (4th Edition).

In the case of Clarke v. Treasurer, 226 Mass. 301,115 N.E.416, the testator made a will containing this clause:

> "If my housekeeper,Sarah Elizabeth Willgoose, continues to discharge her duties to my satisfaction and I retain her in my employ until my death, I give her two thousand ($2,000) dollars, with the additional sum of five hundred ($500) for each year after I am eighty years old, and a proportionate part of five hundred ($500) dollars for the fraction of a year. The said legacies to the said Sarah Elizabeth Willgoose to depend entirely upon my retaining her in my employ until my decease, and I am to be sole judge of whether her services continue efficient and satisfactory."

In holding the transfer subject to tax, the Court said:

> "The question is whether this legacy is subject to the excise tax imposed by St.1912,c.678,Sec.1,which must be levied on 'All property within the jurisdiction of the Commonwealth, corporeal or incorporeal,.....which shall pass by will, or by the laws regulating intestate succession, or by deed,grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor. ******
>
> It is plain that the will gives a legacy. The property passes to the housekeeper by reason of the will. The antecedent contract between the parties required the testator to make a will and therein 'bequeath' a definite sum with a rule for its increase by lapse of time. This contract was executed exactly according to its terms. The promise of this contract, if kept, does not give rise to a debt. It is in this respect

> distinguishable from that before the court in Krell v. Codman, 154 Mass. 454. It simply creates an obligation to give a legacy by will. It is a contract not unusual in its substance. Contracts to make a legacy not infrequently come before the courts. Howe v. Watson, 179 Mass. 30. Wellington v. Apthorp, 145 Mass. 69.**********
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> There are no words of exception or limitation in the statute which indicate any legislative purpose to exempt from its sweeping provisions a legatee standing as does the one at bar."

In the case of Richardson v. Lane, 126 N. E. 44, 234 Mass. 403, decedent, in consideration of an agreement to provide her suitable maintenance for life, agreed to pay the petitioners $300 in cash, and to make a will devising her house to them in fee simple, both of which she did. In holding the transfer subject to tax, the Court said:

> "For the reasons stated in a similar case of Clarke v. Treasurer, 226 Mass. 301, 115 N. E. 416, it is plain that the property passed to the Richardsons by reason of the will and that the devise is subject to an inheritance tax under St. 1909, c. 490, Pt. 4, Sec. 1, as amended by St. 1912, Chapter 678, Sec. 1."

The case of the Matter of Gould, 156 N. Y. 423, 51 N. E. 287, is illuminating on this point so far as the courts of Missouri are concerned, for the reason that their inheritance tax law finds its origin in the inheritance tax laws of New York and Illinois. In that case, Jay Gould, shortly before his death, agreed with his son that the value of the latter's services in his father's business for twelve years amounted to $5,000,000, and that the father was indebted to his son to that extent. He thereupon made a will, reciting the facts respecting the services the son had rendered him, and fixed their value at the agreed amount. The court in holding that this bequest was subject to a legacy tax, said (l.c.288):

> "It is certainly within the constitutional power of the legislature to tax all property transferred by will, whether the motive of the testator be to make a gift or pay a debt, and the language, absolutely unambiguous and

> free from saving clauses, which the legislature employed to accomplish that result, affords the best indication that the word 'transfer' in the statute is used advisedly and according to its ordinary legal signification, which is that the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter. Bouv. Law Dict. Indeed, it can easily be imagined that the legislature aimed to prevent parties from avoiding payment of the tax by changing intended beneficiaries into testamentary creditors. It matters not what the motive of a transfer by will may be-- whether to pay a debt, discharge some moral obligation, or to benefit a relative for whom the testator entertains a strong affection -- if the devise or bequest be accepted by the beneficiary, the transfer is made by will, and the state, by the statute in question, makes a tax to impinge upon that performance."

In State v. Mollier (Sup. Ct. Kan.) 152 P. 771, a will was executed bequeathing all the property of the testator to his niece in pursuance of a contract entered into between them many years before, by which she agreed to live with and care for him as long as he lived. The Court held that the property passed by will and was liable to the succession tax imposed by the Inheritance Tax Law, and that the provision exempting from the operation of the Act the case of a bona fide purchase for full consideration in money or money's worth was intended to apply solely to transfers by deed or grant made in contemplation of death, and that it had no application to the transmission of property by will. The court said (l. c. 772-773):

> "The Legislature, however, recognized the force of 'the ruling passion strong in death', and also the fact that the experience of other states was demonstrated that various shifts and devices would naturally be resorted to by the owners of large estates for the very purpose of avoiding taxes upon successions and inheritances, and that actual transfers of property would frequently be made in

> contemplation of death with the intent that the property transferred should escape the tax. This is what the Legislature had in mind by the provision that the succession should be taxed in all cases, except where the transfer, made by deed or grant in contemplation of death, was supported by a 'full consideration' either in money or in money's worth."

The case of Carter v. Craig, (Sup. Ct.N.H.)90 Atl. 598 is a case similar in point of fact to the Mollier Case, supra; however, the wording of the Court is illuminating on this point:

> "It can make no difference that there was a valid consideration for the contract to transfer the property by will. The imposition of the tax is not limited to property passing gratuitously by will, but extends to 'all property ' so passing. If the Legislature had intended to limit the imposition of the tax to property passing gratuitously, it could easily have said so; but, by providing that all property passing by will should be subject to the tax, it manifested an intention not to limit it. Matter of Gould, 156 N. Y. 423, 51 N. E. 287; State Street Trust Co. v. Friebe, 209 Mass. 375; 95 N. E. 851."

Therefore in view of the cases cited herein, it is the opinion of this office that where there is a transfer of property accomplished by will that the transfer is subject to an inheritance tax in the State of Missouri, regardless of the consideration and motive for the transfer.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK
Attorney General.

JWH:LC