, INHE .E TAX: (a) Where property passes by will by virtue of power of appointment contained in earlier will, the transfer is taxed as part of the estate of the decedent who died last.

(b) The relationship of the grantee to the donee of the power determines the rate of tax.

11-23

November 13, 1933.

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FILED

Mr. Henry A. Baker,
1018-22 Federal Commerce Trust Bldg.,
St. Louis, Missouri.

Dear Sir:

This department is in receipt of your letter of October 26, 1933 in which you request an opinion as to the following state of facts:

> "In the above estate the decedent exercised a power to dispose of property by her last will, which power was given her by the last will of A.P. Ghio, deceased.
>
> I, myself, have always held in cases like this that the property disposed of by the exercise of the power passes under the will of the decedent who created the power, and that the relationship which controls and by which the inheritance tax was determined, was the relationship of the beneficiary to the decedent creating the power. In the above estate, however, the attorney for the executor has advanced the theory that it is the relationship of the beneficiary to the person who exercised the power that controls. This theory does not seem right or reasonable to me; however, I shall be guided by your opinion in the matter.
>
> I am all ready to tax the estate, so I would very much appreciate a prompt ruling from you. The two propositions of law to be determined are as follows:
>
> 1. Where the power is exercised in transferring property, does the property pass under the will of the testator creating the power, or under the will of the testator exercising the power?
>
> 2. In determining the inheritance tax,

must the relationship of the beneficiary to the person exercising the power, or to the person who created the power, be taken into consideration? Which controls?

I.

Where property passes by will by virtue of power of appointment contained in earlier will, the transfer is taxed as part of the estate of the decedent who died last.

Section 571, R.S. Mo. 1929 provides in part as follows:

"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; ****"

The Missouri Inheritance Tax Law was taken either from the State of New York or the State of Illinois.

"Our statute covering this particular subject **** was either borrowed from New York or Illinois."

In Re Kinsella's Estate,
293 Mo. 545.

In construing the Missouri law, therefore, we may have recourse as pursuasive to the construction put upon the law in cases which construe the New York Law. In the case of the Matter of Dows, 167 N.Y. 227, affirmed by the Supreme Court of the United States in 183 U.S. 228, the Court held:

"****But whatever be the technical source of title of a grantee under a 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. The will of Dows, Sr., gave his son a power of appointment to be exercised only in a particular manner, to-wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a

> privilege accorded by the state which it may tax or charge for, it follows that the right of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the state. When David Dows, Sr. devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will. ****"

CONCLUSION

Therefore, in view of the foregoing, transfers occasioned by the exercise of a power of appointment are taxable to the same extent as though the donee of the power were the absolute owner of the property transferred, and the property passes under the will of the testator exercising the power.

II.

The relationship of the grantee to the donee of the power determines the rate of tax.

Under the common law rule relationship to the donor of the power of appointment and not the donee determined the rate of tax. Gallard v. Winans, 111 Md. 434, 74 Atl. 26. However, under the statutory rule the common law rule is reversed.

It will be noticed that Section 571, R.S. Mo. 1929, as set out, supra, provides that the transfer shall be taxable 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.

In the case of Matter of Rogers, 71 App. Div. (N.Y.) 461, the Court had before it this identical problem in connection with the New York Statute, which is substantially similar to the Missouri law. In that case a testator who died in 1869, by his will gave his wife a life estate in certain real and personal property together with the power to dispose of such property by will. The widow died in 1900 leaving a will, by which she exercised the power of appointment as to the bulk of the real and personal property in favor of her brother, who was a stranger in blood to her husband. It was held that under the provisions of subdivision 5 of section 220 of the tax law (Laws of 1896, Chap. 908, as amd. by Laws of 1897, chap. 284)

the property should, for the purposes of the transfer tax, be regarded as passing directly from the widow to her brother, and that under the provisions of section 221 of the Tax Law the transfer was taxable at the rate of one per cent upon the personal property alone, and that it was not taxable at the rate prescribed in section 220 of the Tax Law, to-wit, five per centum upon both the real and personal property. The Court said:

> "'Subdivision 5, section 220, of article 10, chaptor 908 of the Laws of 1896, as amended by chapter 284 of the Laws of 1897, provides: 'Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will.' This provision of law was before this court in Matter of Seaver (63 App. Div. 283), and it was there held that section 220 expressly declares that it is the exercise and not the creation of the power of appointment which effects the transfer upon which the tax is enforced; hence the fund must, for taxing purposes, be regarded as having passed from mother to son, and the case is governed by section 221 and not by section 220. (Citing authorities at p. 286.)
>
> Wilmer S. Wood is a brother of Virginia B. Rogers, deceased, and, under the appraisal and order as it now stands, is made subject to a tax of five per centum upon both the real and personal property coming to him under the will. If the provision of the statute above cited means anything, it is that, for the purposes of this tax, the property is to be regarded as coming directly from Virginia B. Rogers to her brother; and, under the provisions of section 221 the tax is fixed at one per centum upon the personal property alone.'"

CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that in determining the inheritance tax rate under a power of appointment, the relationship of the beneficiary to the person exercising the power of appointment controls.

Respectfully submitted,

APPROVED:

ROY McKITTRICK
Attorney General

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Assistant Attorney General.