INHERITANCE TAXATION: Where property is devised to a legatee and said legatee dies before distribution two taxable transfers take place, one from the testator to the legatee and one from the legatee to the heirs.

10-19

October 18, 1934

FILED
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Mr. Martin E. Lawson
Attorney at Law
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Dear Sir:

This Department is in receipt of your letter of September 28, 1934 requesting an opinion from this department as to the following state of facts:

> "I am one of the executors of that estate. The other executor is Mr. William J. Kelley, of Liberty, Mo. The will in the estate gives certain property to other uses, and after the payment of debts provides that practically one half of the estate goes to a sister, Miss Nellis Costello, and the other half to a sister, Mrs. Katie F. Robison. Mrs. Robison survived James Costello by something like six or eight months, and then died, leaving two daughters. Mr. Leedy represents the daughters.
>
> The inheritance tax return has been made out on the basis that Mrs. Robison inherited the share of the estate going to her, and that that share is liable for inheritance tax under the laws of the State of Missouri, as of the value and conditions existing at the date of the death of Mr. Costello, on December 27th, 1933.
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> * * * *
>
> We are not opposing any action that will be fair and just, and we think any diminution of the tax that is possible would be

> proper, under the circumstances. However, Mr. Kelley and I, as executors, want a ruling and a judgment that will protect us in our statutory liability for the taxes properly assessable against the estate."

The problem here before us has never been before the courts of the State of Missouri. In the absence of any such rulings we may have recourse as persuasive to the rulings of the courts of other states regarding similar problems.

Section 603 Revised Statutes Missouri 1929, provides as follows:

> "When property or any interest therein or income therefrom shall pass to or for the use of any person, institution, association or corporation by the death of another by deed, instrument or memoranda or by any transfer or passage whatsoever, such transfer shall be deemed a transfer within the meaning of this article and taxable at the same rates and be appraised in the same manner and subject to the same duties and liabilities as any other form of transfer provided in this article."

It is clear that the daughters of Mrs. Robison are not the heirs of Mr. Costello, nor are they devisees or legatees of his estate, but the property devised by Mr. Costello goes directly to the estate of Mrs. Robison. The children of Mrs. Robison inherit from Mrs. Robison and not from Mr. Costello, and their succession to this property is only by reason of the death of Mrs. Robison.

A similar question was before the Supreme Court, Appellate Division, of New York, in the case of In re Clinch 90 N. Y. S. 923, wherein the court held that under the New York Inheritance Tax Law, which was at that time substantially similar to the Missouri Inheritance Tax Law, providing that a transfer shall be taxable when any person becomes

beneficially entitled, in possession or expectancy, to any property,or to the income thereof, property which passed under a father's will to his son, who in turn dies before a settlement of the father's estate, which property is afterwards delivered to the son's executors, is, when so delivered, subject to a transfer tax.

The court said:

"The statute provides that 'when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property, or the income therefrom by any such transfer,' the transfer shall be taxable. Subdivision 4, Sec.220, Transfer Tax Law (Laws 1896, p. 868, c. 908, as amended by Laws 1897, p. 150, c. 284). Of course, until there had been a settlement of the father's estate, it could not be definitely known there would be any transfer to tax; and, until a distribution had been made, nothing had been transferred, and for that reason no tax could be imposed. Up to that time there was a mere claim on the part of Robert or his executors against his father's executors for a share or interest in his estate, which passed by his will. Such claim was at most a mere chose in action, which followed the residence of the claimant; and, as indicated, it would be impossible to determine as to what property, if any, would be ultimately transferred by reason of it. But when an actual distribution had taken place, that which theretofore was uncertain became certain, and that moment a tax attached to the transfer. Matter of Huber's Estate, 86 App. Div. 458, 83 N. Y. Supp. 769."

The Supreme Court of Idaho, in the case of In re Rothchild's Estate 283 Pac. 598, also passed on a similar question. The facts, while more involved, present practically the same question as is here before us.

The Supreme Court said:

"To reach the present heirs the property had to pass through the possession and ownership of each ancestor, because

Anne Falk Rothchild died after Samuel Marx Rothchild;hence its will by its terms could not operate to vest his estate in his children.

* * * *

In Re Kohan-Chabot's Estate,167 N.Y. 280, 60 N. E. 598,599,Henry Hayward died leaving by will one-third of his estate to his wife,the balance to his son and daughter, referred to as the countess. The son died before his mother and sister,leaving his share to his mother for her life,then to his sister. The mother exercised her power of appointment in favor of the daughter. The mother's will was offered for probate the same day the daughter died. The court held that a tax was payable on the transfer from the mother when the amount of property so inherited should be ascertained and likewise on the property passing from the daughter's estate to her heir,Miss McClean. The mother had received the full inheritance to which she was entitled from her husband. The daughter, of course,had not, because she died the day probate was started of her mother's estate.

* * * *

Counsel for appellants argue that this was only one transfer, while here we have two. If the principle, however,be sound,that an interest in an undistributed estate is the basis for a transfer tax,it matters not how many transfers there be.Each one is a distinct taxable transaction,the only uncertain question being the value of such interest,an entirely different and distinct question to be determined when the amount of the interest should be ascertained. See also in re Hazard's Estate,188 App.Div. 869, 177 N. Y. S. 369; In re Hubbard's Estate, 234 N. Y. 175, 137 N. E. 17.

* * * *

From a consideration of the above authorities and our statutes, we conclude that Sam-

uel M. Rothchild at his death possessed,in the interest in his father's estate,intangible property,and the transfer thereof from his estate to his widow, Anne Falk Rothchild, was taxable under sections 3371,3378,3387. Likewise as to the interest possessed by Anne Falk Rothchild and passing to her children."

CONCLUSION

In view of the foregoing it is therefore the opinion of this Department,that a taxable transfer took place with respect to the property passing from the estate of James Costello to the estate of Mrs. Katie F. Robison, and that upon her death another taxable transfer took place with respect to the property passing from her estate to her two daughters.

While this may appear at first glance to be a ruling severe in its application to the facts here under consideration, and to have the effect of double taxation with respect to the property transferred, it should be remembered that an inheritance tax is neither a property nor a personal tax but is in the nature of an excise or duty,exacted by the State,for the privilege granted by its laws of inheriting or succeeding to property on the death of the owner.

Respectfully submitted,

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APPROVED:

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Attorney General.

JWH:LC