



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

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ATTORNEY GENERAL

Honorable George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. C-2246

Re: Are transfers made prior to the date of the passage of the amendment to the Texas Inheritance Tax Act subject to taxation under the provisions of such amendment because the deceased died subsequent to the date of amendment?

We are in receipt of your letter in which you request an opinion of this department on the following question contained therein:

"Mrs. Marie Eva Davidson died a resident of Bexar County on or about December 24, 1939. Prior to her death, on the 27 of April, 1938, she made certain real estate transfers to her two sons without adequate consideration. Said transfers represented a material part of her real estate holdings, in fact, all except her home. These transfers were made prior to the date of passing of the Amendment to Art. 7117, (effective date, September 20, 1939), by the Legislature, making such transfers subject to the payment of an inheritance tax.

"The death of Mrs. Davidson occurred after the law became effective. Which date should be used in applying the law, the date of the transfers or the date of her death?

"If the date of the transfers governs, these transfers are not subject to a tax, but, if the date of death governs, then it would

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come under the provisions of the new law and be taxable."

Your letter clearly states the facts and question in this case. Under the facts stated we assume that the transfers passed full legal title to the transferees as of the time of such transfers. The question then is whether or not such transfers are subject to the Texas Inheritance Tax even though made prior to the amendment to the Texas Inheritance Tax Statute in question which allows the taxation of such transfers. The deceased died subsequent to the effective date of such amendment. Article 7117 of the Revised Civil Statutes, as amended by House Bill 990, Section 1, Acts of the 46th Legislature, 1939, reads as follows:

"All property within the jurisdiction of this State, real or personal, corporate or incorporate, and any interest therein, including property passing under a general power of appointment exercised by the decedent by will, including the proceeds of life insurance to the extent of the amount receivable by the executor or administrator as insurance under policies taken out by the decedent upon his own life, and to the extent of the excess over Forty Thousand Dollars (\$40,000) of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life, whether belonging to inhabitants of this State or to persons who are not inhabitants, regardless of whether such property is located within or without this State, which shall pass absolutely or in trust by will or by the laws of descent or distribution of this or any other State, or by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor, shall, upon passing to or for the use of any person, corporation, or association, be subject to a tax for the benefit of the State's General Revenue Fund, in accordance with the following classification. Any transfer made by a grantor, vendor, or donor, whether by deed, grant, sale, or gift, shall, unless shown to the contrary, be deemed to have been made in

contemplation of death and subject to the same tax as herein provided, if such transfer is made within two (2) years prior to the death of the grantor, vendor, or donor, of a material part of his estate, or if the transfer made within such period is in the nature of a final distribution of property and without adequate valuable consideration. Acts 1923, 2nd C. S., p. 63; Acts 1929, 41st Leg., 1st C. S., p. 109, ch. 50, § 1; Acts 1939, 46th Leg., H. B. #990. § 1."

Under the facts submitted the transfers in question were made within two years prior to the death of the grantor and were made without adequate valuable consideration. Prior to the amendment by the Legislature in 1939, such transfers were not taxable.

Nowhere in the wording of the amendment is there any language to evidence an intention of the Legislature that the amendment should operate retroactively so as to tax transfers that were fully consummated prior to the effective date of said amendment. While we have no Texas decisions on this question, the great weight of authority throughout the United States is to the effect that such an act imposing a tax upon transfers which fully vest title in the transferees is not retroactive unless the specific language of the statute so makes the same.

The Supreme Court of Montana in the case of State vs. District Court of 8th Judicial District in and for Chouteau County, 98 Pac. (2d) 936, decided November 29, 1939, was faced with a similar situation. The facts in that case disclose that the deceased made certain transfers by deed in 1934. In 1935 the Montana statute was amended so that instead of it providing that "every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of grantor . . . and without a fair consideration in money or moneys shall unless shown to the contrary be deemed to have been made in contemplation of death," it was changed to read: "every transfer by deed . . . made within three years prior to the death of the grantor . . ." The deceased died in 1938 which was subsequent to the amendment of the statute in 1935. The court held that the two year period applied and that the law prior

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to the amendment in 1935 was applicable to the transfers in question. The court stated as follows:

"It is elementary that it would have been competent for the Legislature to have made this statute retroactive if it saw fit to do so."

"There is nothing in Chapter 186 to suggest that the Legislature intended that it should apply to deeds theretofore made. It is a general rule that statutes are intended to operate prospectively only unless otherwise expressly stated or clearly and necessarily implied and the presumption is against retrospective operation."

The Supreme Court of California in the case of Hunt vs. Wicht, 182 Pac. 639, was confronted with a similar situation and in that case the transfers in question were made in 1905. The California statute was amended in 1911 so as to tax such transfers. The deceased died in 1913. The court concluded that the transfers were not taxable and stated as follows:

"It is the vesting in interest that constitutes the succession, and the question of liability to such a tax must be determined by the law in force at that time. . . .

"It is immaterial so far as the question we have discussed is concerned, that it is alleged that the transfer was made 'in contemplation of his death and without valuable consideration.' The estate conveyed fully vested at the time of the delivery of the deed in escrow, entirely regardless of the motives of the grantor for the conveyance, and without regard to whether the transfer was without valuable consideration, and there was then no law imposing a tax on any such transfer."

The Supreme Court of California reaffirmed this rule of law in construing a similar fact situation in the case of In Re Drix's Estate, 186 Pac. 135. The court stated as follows:

"As already stated, this transfer was made May 26, 1913. The deed appears to have been fully delivered and effective at the time it bears date. The taxability of the transfer must therefore be determined by the law in effect at that time. *Hunt v. Wight*, 174 Cal. 209, 132 Pac. 639, L. R. A., 1917C, 961; *Estate of Felton*, 178 Cal. 669, 169 Pac. 362. The law in force at that time was the act of 1911. Stats. 1911, p. 713. . . ."

The same rule of law was announced by the Supreme Court of Louisiana in the case of *Succession of Williams*, 129 So. 801. The court stated as follows:

"Statutes levying taxes on donations or transfers made in contemplation of death are never construed as applying to transactions that were completed before the law was enacted. It was so decided in *Shwab v. Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454, with reference to the Act of Congress of September 8, 1916 (39 Stat. 777), the first estate tax act. And it has since been held that to give such a statute the retroactive effect of taxing transfers made previous to the enactment of the law would amount to confiscation and be violative of the Fourteenth Amendment of the Constitution of the United States. *Nichols v. Coolidge*, 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1185, 52 A. L. R. 1031; *Blodgett v. Holden*, 275 U. S. 144, 48 S. Ct. 108, 72 L. Ed. 206; *Untermeyer v. Anderson*, 278 U. S. 439, 48 S. Ct. 353, 72 L. Ed. 645. . . ."

A similar question was decided by the Superior Court of Delaware in the case of *Brown vs. Pennsylvania Company for Insurance on Lives and Granting Annuities*, 126 Atl. 715. In that case an attempt was made to tax certain transfers which had been made in 1913 because such transfers were made taxable by an amendment to the Delaware law effective March 24, 1917, and the deceased did not die until April 27, 1917. The court concluded that the law in effect at the time of the transfer controlled and that such transfers were not taxable. The court stated as follows:

"The plaintiff argues that the statute in question was intended to be retroactive because it contains these words: 'Any transfer . . . within two years prior to his death without full consideration in money or money's worth shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this chapter.' Inasmuch as the law provides that gifts made in contemplation of death shall be subject to the tax, and further provides that gifts made within two years prior to the death of the donor shall be deemed to have been made in contemplation of death, it is insisted the gift in the present case is liable to the tax. It is not claimed there is any other language in the statute that indicates an intention that it should be retroactive."

". . . The transfers, therefore, could not be taxable unless the taxing act is retroactive, and we have held it is not."

The same rule of law was announced by the Supreme Court of Pennsylvania in the case of *In Re Denniston's Estate*, 191 Atl. 39. The court stated as follows:

"The act of 1919 imposes a tax upon 'the right of succession or the privilege of receiving at death the property possessed by a decedent.' *Dolan's Estate*, 279 Pa. 532, 536, 124 A. 176, 178, 49 A. L. R. 258; *Kirkpatrick's Estate*, 278 Pa. 271, 273, 119 A. 289. It has been repeatedly held that this act only applies to transfers occurring after its enactment and not to those prior thereto. . . ."

The Supreme Court of Pennsylvania also considered a problem similar to that which confronts us in this case in the case of *In Re Oliver's Estate*, 117 Atl. 31. In that case the transfers in question took place in 1918. On June 20, 1919, the Pennsylvania law was amended so as to tax such transfers. The deceased died July, 1919. The court held that the transfers were not taxable and stated as follows:

"The decree must be affirmed. The act provides:

"That a tax shall be, and is hereby, imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise . . . by deed, grant, bargain, sale, or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession of enjoyment at or after such death."

"Neither these words, nor any other parts of the act, show an intention to impose the tax on any 'transfer' which was fully accomplished prior to its passage; and hence the decree is correct, for the reason stated by the court below in its opinion, unless there is something in the statute which compels a different conclusion."

The Court of Appeals in New York in the case of City Bank Farmers Trust Company vs. New York Central Railway Company, 170 N. E. 489, considered a similar problem. That court in an opinion written by Chief Justice Cardozo held that an inheritance tax statute was not retroactive and stated as follows:

"Whatever immunity existed when the transfer became effective, continued to exist thereafter, untouched in its integrity by anything that the Legislature could do."

The Supreme Court of Iowa in the case of Lewis vs. Brown, 166 N. E. 99, announced the same rule of law and stated as follows:

". . . In the case before us the rights of plaintiff and the Litters with respect to this property were fixed and made irrevocable, except by mutual consent, on the date when the papers were executed and plaintiff acquired possession thereunder, and if we may assume that it was competent for the state to thereafter enact or amend a statute to impose a tax upon such transfers of

title, the retrospective character effect of such enactment must clearly appear, and in the absence of anything showing such intent the courts will give it prospective effect only. There is nothing in this amendment indicating any legislative intent to give it retrospective application, and it follows that even if we were to construe it as being otherwise applicable to such a transfer as is here being considered, it would not govern the result of this appeal."

The same rule of law was announced by the Supreme Court of Errors of Connecticut in the case of Blodgett vs. Union and New Haven Trust Company, 116 Atl. 208. The court stated the issue and concluded as follows:

"The question first to be considered in logical sequence is whether the taxing statute applicable to the trust fund is the act of 1913, which was in force when the deed and the securities were delivered to the trustee or the statute of 1915, which came into effect after the establishment of the trust, but before the settlor's death. . . .

"On the other hand, an irrevocable grant of a remainder interest is a present transfer of it to the remainderman, and, since a succession tax is a tax on the transfer, and not on the property, the question whether any particular transfer is or is not taxable should logically depend on the terms of the statute in force at the time when the transfer takes place.

"Whether the Legislature might constitutionally lay a succession tax upon a transfer of a remainder interest which had already vested in right before the statute was passed, is a question which we need not discuss any further than to observe that the intent to lay a retroactive tax ought to be manifested by very plain and explicit words, and that we find no expression of that intent in the act of 1915. Our conclusion that the applicable taxing statute is that which was in force when the irrevocable trust deed was delivered agreed with the decisions in other jurisdictions. . . ."

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While there are some cases which tend to indicate contrary to the rule of law announced previously in this opinion, as previously stated, it is the overwhelming weight of authority that as to transfers which take place and vest title in the transferees prior to the amendment of the tax statute which taxes such transfers the same are not taxable under such amendment despite the fact that the deceased died subsequent to the amendment. We are of the opinion that this is the correct rule of law to be applied in this case and that the transfers in question are not taxable under the amendment to the Inheritance Tax Statute by the 46th Legislature in 1933.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED MAY 31, 1940

Brook Allen

By

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