



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

3-4312
GERALD C. MANN
ATTORNEY GENERAL

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

Dear Sir:

Opinion No. O-4312

Re: Where the owner of one thousand shares of stock of domestic corporation, as a part of his separate estate, causes a new stock certificate to issue in the name of his wife and himself "for the use and benefit of the community estate," is the transaction subject to the Texas Stock Transfer Tax levied by Art. XV, H.B. 8, Acts, Regular Session, 47th Legislature (Art. 7047a, Vernon's Texas Civil Statutes)?

Your letter of March 23, 1942, submits for our opinion the following question which we quote therefrom:

"A is the separate owner of 1,000 shares of stock in X company, a domestic corporation. He has X company issue a new certificate to 'Mr. A and Mrs. A for the use and benefit of the community estate.'

"Is this transaction subject to the Texas Stock Transfer Tax levied under Article XV of House Bill 8 of the Regular Session of the Forty-seventh Legislature?

"If taxable, is the tax payable on the entire transaction or on one-half?"

Section 1 of the above-cited Stock Transfer Tax law levies and imposes a stated tax on "all sales, agreements to sell, or memoranda of sales, and all deliveries or transfers of shares, or certificates of stock, or certificates for rights to stock, or certificates of deposit representing an interest in or representing certificates made taxable under this Section in any domestic or foreign

Honorable George H. Sheppard, Page 2

association, company or corporation * * * whether made upon or shown by the books of the association, company, corporation or trustee, or by any assignment in blank or by any delivery of any papers or agreement or memorandum or other evidence of sale or transfer or order for or agreement to buy, whether intermediate or final, and whether investing the holder with the beneficial interest in or legal title to such stock or other certificate taxable hereunder, * * *

This department has held, in our Opinions Nos. O-3520, O-3713 and O-4029, that the intent of this Act and the above section thereof was to levy or impose an excise or privilege tax upon the transfer, by sale or gift, of shares or certificates of stock, vesting in the vendee, transferee or donee, either the legal or equitable title therein and thereto. Although your opinion request is silent upon the question, the legal or equitable title to the shares of stock involved may have been transferred, or attempted to be transferred, in two possible ways, viz, (1) by an attempted gift of the husband's separate estate in the stock to the community estate of husband and wife, or, (2) by the transfer of stock from the separate estate of the husband to the community estate of husband and wife, not as a gift, but in consideration of the payment to the husband of community funds or the conveyance of community property.

If, as it presumptively appears, the husband attempted, by gift, to transfer and assign his admittedly separate estate in this stock to the community estate of himself and wife, his purpose and effort to this end was unavailing, and neither legal nor equitable title in the society vested in the wife so as to constitute a taxable transaction under the opinions adverted to. The nature of the community property system in Texas is such that one spouse cannot donate or give property of any kind or character from his or her separate estate in an attempt to constitute the same the community property of both. However, if community funds or property are advanced or exchanged in consideration for the sale of separate property to the community estate, it appears that such transaction is recognized as accomplishing this purpose.

As stated at 23 Tex. Jur., page 104:

"The community estate is a creature of law and not of contract or convention. It can exist

Honorable George H. Sheppard, Page 3

only as the creature of statute. Not only can the estate as such exist only by law, but the parties are not permitted by agreement between themselves to change the character of acquisitions from separate to community, or vice versa, from community to separate property. Such agreements, if permitted, might destroy the statute and, through uncertainty, work untold mischief to the rights of purchasers or creditors dealing with the husband or the property * * *

Again, in sustaining our conclusion that separate property of either spouse may not, by gift, become community property of both, although, community property may, by gift, become separate property of each spouse, we point to the following well-stated distinction between separate and community property:

* * * The separate estate is a distinct estate of statutory origin and definition, wholly apart from the estate of the spouse in the common property. The moiety owned by each spouse in the community is not a separate estate; it is community until in some lawful way there has been a dissolution of the marriage or devolution of the title. Thus where the husband and wife acquire a given piece of property in such way as to make it community property, each owns a one-half interest therein, but such title is in no sense the separate property of the owner. If one of the spouses should donate to the other his one-half interest in the community, such donation would undoubtedly then become the separate property of the donee. But the nature of the community estate is such--that is its legal definition is such-- that in no event can the separate property be donated to the community. Separate property may become community however by purchase or exchange and the like, precisely as any other property may be acquired in such way as to make it part of the community estate." 23 Tex. Jur., pp. 57-58.

From the foregoing, we conclude that if the attempted transfer of the stock in question out of the separate

Honorable George H. Sheppard, Page 4

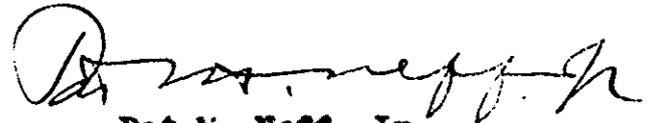
estate of the husband into the community estate of husband and wife, was by way of gift or donation, same was of no force and effect to transfer either the legal or equitable title contemplated by the Stock Transfer Tax Act, and therefore no tax accrues. If, on the other hand, the transfer of the stock from the separate to the community estate was in consideration of community funds or community property, then a tax would accrue on the transfer to the wife of the moiety. Although the wife would not presently own or have the legal or equitable title to 500 shares of this stock as would be the case if the transfer was for her separate estate and interest, but would hold the equitable title in one half of each share of the total 1,000 shares during coverture, we conclude that the tax should be computed on the quantum of shares or value which she actually and ultimately receives, to-wit, 500 shares, rather than on the estate which exists in the total 1000 shares under the community property system during marriage.

Trusting the foregoing fully satisfies your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By



Pat W. Neff, Jr.
Assistant

FVN:LM

APPROVED MAY 21, 1948



ATTORNEY GENERAL OF TEXAS



OK
8/28