



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WAGGONER CARR
ATTORNEY GENERAL**

January 13, 1964

Honorable Robert S. Calvert
Comptroller of Public Accounts
Capitol Station
Austin, Texas

Opinion No. C-204

Re: Taxability for inheritance tax purposes of trust accounts which under New York law are described as Totten Trusts.

Dear Mr. Calvert:

We quote the following excerpt from your letter requesting the opinion of this office on the above captioned matter.

"Emil Andrew Edwards died testate a resident of Brazos County, Texas, on January 29, 1962, and the proper report has been made to this Department as required by the law.

"Schedule B-1 of the inheritance tax report discloses the following information:

"Three separate trusts were established as of April, 1958, by deposits of \$10,000 in each of the three accounts listed below. Each account was in the name of Emil A. Edwards in trust for Teresa Vivian Graham, a niece. The motive was love and affection for one who had lived with him for 21 years. The donor was judged mentally incompetent on May 15, 1961, and remained so until his death thus losing all power to revoke the trusts.

"The accounts had balances as of January 29, 1962 as follows:

Emigrant Industrial Savings Bank of New York	- 10,379.92
Dime Savings Bank, Brooklyn, New York	- 10,379.92
Seamans Bank for Savings, New York	- 10,379.92
	<u>31,139.76</u>

"We understand that the above accounts under the laws of New York are described as Totten Trusts.

"The attorney for the estate . . . feels that by reason of incompetency, the grantor lost power to revoke, and for this reason, the value of these accounts is no part of the taxable estate."

Prior to the decision by the New York Court of Appeals in the famous case of Matter of Totten, 179 N.Y. 112, 125, 71 N.E. 748 (1904), the law with respect to the effect of a deposit in a savings bank in the name of the depositor "in trust" for another had gone through a considerable evolution. See 1 Scott on Trusts (2nd Ed.) 481, 482, Sec. 58.2, and particularly see the decision in Beaver v. Beaver, 117 N.Y. 421, 22 N.E. 940 (1889), 137 N.Y. 59, 32 N.E. 998 (1893), in which the court was assuming that either an irrevocable trust or no trust at all was created. The Totten case recognized that there was a third possibility, namely a revocable trust, and that in the absence of evidence that an irrevocable trust was intended or that no trust at all was intended, the inference arising from the form of the deposit was that the depositor intended to create a trust reserving a power during his lifetime to deal with the deposit as he saw fit.

A long line of authorities is cited in 1 Scott on Trusts (2nd Ed.) 494, Sec. 58.4, in which the New York courts have held that where the depositor of a Totten trust becomes insane, his guardian or committee cannot revoke the trust unless he can show that the use of the deposit was necessary for the welfare of the depositor. Thus, the courts consider the trusts as arising immediately and not merely on the death of the depositor. The foregoing authorities support the conclusion that the value of the trust accounts were no part of the decedent's testamentary estate. However, whether said accounts were part of the decedent's taxable estate presents a different question.

Article 14.01, Chapter 14, Title 122A, 20A, Vernon's Annotated Texas Statutes, expressly taxes successions to property other than that owned by the decedent at the time of his death. The tax to such successions includes (1) property passing under a general power of appointment exercised by the decedent by will; (2) certain life insurance proceeds; (3) transfers made or intended to take effect in possession or enjoyment after death of grantor or donor; and (4) transfers in contemplation of death. The validity of succession taxes upon transfers of this nature is well settled. The latest expression of the Supreme Court recognizing the imposition of inheritance taxes upon such types of transfers is Calvert v. Fort Worth National Bank, 163 Tex. 405, 356 S.W.2d 918 (1962).

The leading case in Texas dealing with transfers made or intended to take effect in possession or enjoyment after the death of the grantor or donor is succinctly summarized at page 922 of the opinion in the Fort Worth National Bank case.

"In Bethea v. Sheppard, Tex. Civ. App., 143 S.W.2d 997 (wr. ref.); Henry Henke and his wife, Catherine Henke, executed a joint will and trust agreement which provided that the entire community estate should pass to a named trustee in the event the husband died first. Mrs. Henke and a daughter were to receive specified annual payments from the trust during the lifetime of the former, and the payments to the daughter were to be increased and continued for eight years after Mrs. Henke's death. At the end of such period the corpus of the trust was to be distributed to the daughter if living; but if the daughter was not living at that time, the property was to be held in trust for an additional five years and then delivered to the daughter's children. The husband died first, and inheritance tax was paid only on his half of the community estate. Upon the subsequent death of Mrs. Henke it was held that the right of the daughter to succeed to her mother's community interest was taxable as a transfer by Mrs. Henke made or intended to take effect in possession or enjoyment after death."

In the Bethea case, the interest of the daughter in the trust corpus was contingent upon (1) her surviving both the mother and the father, and (2) that she survive the mother for a period of eight years. In the case presently under consideration, the beneficiary's interest in the Totten trusts were contingent upon (1) the depositor's failure to revoke during the period such bank trust accounts were subject to revocation, and (2) that she survive him. This she did; and therefore at his death, the deposits in these trust accounts ripened into full possession and enjoyment and are subject to inheritance taxes under the provisions of the statute.

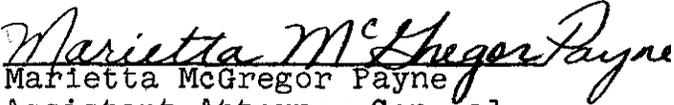
S U M M A R Y

Funds deposited in "Totten trusts" under the laws of New York are subject to Texas inheritance taxes

upon the death of the donor, a Texas resident, despite the fact that the donor had lost the power of revocation by reason of insanity prior to his death.

Yours very truly,

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Attorney General of Texas

By 
Marietta McGregor Payne
Assistant Attorney General

MMP/jp

APPROVED:

OPINION COMMITTEE,
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W. E. Allen
James Strock
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APPROVED FOR THE ATTORNEY GENERAL
By: Stanton Stone