TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

46

December 9, 1942

OPINION NO. 1831

TAXATION; INHERITANCE TAX:

Section 2063-B, R.L. 1935, providing that property shall not be subject to inheritance tax when it previously has been subject to inheritance tax within a five year period, applies although no tax was due upon the previous transfer because of the relationship of the decedent (then the transferee) to the previous decedent.

WORDS AND PHRASES:

The expression "when property has been subject to a tax" as used in the inheritance tax law, Section 2063-B, R.L. 1935, implies that the property has been within the scope of the taxing provisions but does not necessarily imply that a tax has been levied against the particular transferee.

Honorable H. H. Adams
Acting Treasurer
Territory of Hawaii
Honolulu, T. H.

Dear Sir:

This will acknowledge receipt of your letter of December 3, requesting an interpretation of Section 2063-B, R.L. 1935,

enacted by Act 152, L. 1937, which reads as follows:

> "Sec. 2063-B. Property previously taxed exempt. When property has been subject to a tax under the provisions of this chapter, such property or other property acquired in exchange therefor, shall not again be subject to a tax under the provisions of this chapter within five years from the data of the death of the former decedent where the property can be identified as having been received by the later decedent from the former decedent or as having been acquired in exchange for property so received, unless the value thereof shall have appreciated, in which case the tax shall apply only to the amount of such appreciation."

An exemption has been claimed for property of a decedent which within the five year period passed through a previous decedent's estate under the following circumstances: The property was valued at approximately $9,000.00 and after the deduction of expenses and other allowable deduction there remained a net balance of less than $5,000.00. The property went to a daughter and hence was entirely exempt from taxation.

In my opinion the exemption allowed by Section 2063-B for property which previously "has been subject to a tax under the provision of this chapter" is applicable in this case even though no tax resulted in connection with the previous decedent's estate. The case of Re Taxes H. M. von Holt, 28 Haw. 246, is controlling. That case involved a provision of the income tax law that there should be exempted "the amount received from my corporation as dividends upon the stock of such corporation if

the tax of 2 per centum has been assessed upon the net profits of such corporation as required by this chapter." The corporation paying the dividends had a net loss during the years in question and furthermore, during one of said years the corporation had made no net income tax return and the tax office had made no examination into the taxability of the corporation. The court interpreted the provision as applicable if the income of the corporation "was assessable", whether or not actually assessed, and furthermore held that the provision applied, whether or not the corporation had any taxable income. I cannot distinguish the statutory provision involved in that case in which, under the court's interpretation, the exemption applied to the dividends "if the tax has been assessable upon the net profits of the corporation" and the provision here involved that the exemption applies to a second transfer within five years "when property has been subject to a tax." Both provisions imply that the property has once before been subjected to the tax administrator's authority and both fail to dearly and definitely state that a tax payment shall have resulted from the previous tax proceeding.

Somewhat similar provisions exist in other states and under the federal estate tax law. See Pinkerton and Millsaps on Inheritance and Estate Taxes, Sec. 351, and Section 812 (c), I.R.C. In each of the statutes there set forth there is a specific provision that a tax shall actually have been paid upon the previous occasion; such a provision of course eliminates recourse to the exemption where the previous transfer was exempt because of relationship of the decedent to the previous decedent. Estate of Annis, 192 N.W. 245 (Iowa). The provision that a tax must actually have been paid upon the previous occasion is not contained in the local statute.

The words "property subject to tax" clearly imply more than that the legislature had territorial jurisdiction to impose a tax. The property must fall within the scope of the taxing provisions. American Manufacturing Co. v. Cromwell, 146 N. E. 801 (Mass. 1925). For example, intangibles exempt under the reciproccal provision (Section 2061, R.L. 1935) have not been "subject to tax." However, if there has been taxable property and a taxable event, then by express provision of Section 2060, R.L. 1935, where the words in question already appeared when Section 2063-B was enacted, the property has been "subject to tax." Compare the language of Section 2060, R. L. 1935, as fo11ow:

> "Sec. 2060. Imposed when, rate. All property which shall pass by will or by the intestate laws of the Territory * * * shall be and is subject to a tax hereinafter provided for * * * The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemption hereinafter granted." (Underscoring added.)

The words "subject to" imply that the property is "available for" payment of a particular financial burden (here a tax) but do not imply that such burden has been actually levied against the property. Bretzfelder v. Commissioner, 86 F. (2d) 713, C.C.A. 2, 1936. It is also significant that Section 2063-B uses the language "property * * * subject to a tax." The test laid down is the taxability of the property, not the incidence of the tax against a particular transferee.

This is not a case where the previous transfer was of so low a value as not to come within the taxing schedules. Under our statute all transfers over $500 in value are taxed, except that the existence of certain relationships is good for an additional $4500 of tax exemption. In order to make clear that the enjoyment of this exemption should not prejudice the transferee in connection with other taxes the legislature enacted that: "All property so passing for which such exemption of five thousand dollars can be maintained shall not be taxable as income under the provisions of any other law." (Act 147, L. 1909, Sec. 2060, R.L. 1935.)

One of the problems which must be considered is the treatment of property which upon transfer from the previous decedent was valued at an amount in excess of the exemption, as compared with property previously valued at less than the exemption. For example, a decedent might leave one daughter property of the net value of $4900, resulting in no tax, and another daughter property of the net value of $5100, resulting in a tax of $1.50. If Section 2063-B were interpreted as applicable only when the previous transfer resulted in some tax due, the death of the first daughter within the five year period, leaving her property to a brother, would not entitle the brother to an exemption under Section 2063-B. If the second daughter were to die within the five year period leaving her property to the same brother, would the more payment of $1.50 tax exempt the whole $5100? This question was answered in the cases of In re Wilson's Estate, 204 N.W. 244 (Iowa 1925), and In re Letchworth's Estate, 255 Pac. 195 (Calif. 1927). Both courts held that only the portion of the property which was taxed, to wit, $100, was exempt. The California court pointed out that otherwise the result would be unequal and unjust. In the example above put the transfer of $4900 to and from the first daughter, would carry a total tax of $132, while the transfer of $5100 to and from the second daughter would have carried a total tax of only $1.50 had the court not ruled that only the

$100 excess was exempt from the second tax. Said the California court:

> "* * * Of course, if the intention of the Legislature were clearly apparent from the language of this section, it should be given its true meaning as indicated by such language, even though the result might be unjust or even absurd. But where no such clear intent is to be found in the section, but on the other hand the statute as a whole can be reasonable construed in favor of just and equal results, it is the duty of the court to adopt such construction. * * *"
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> p. 198.

Our own court had a somewhat similar situation before it in Campbell v. Shaw, 11 Haw. 112, 1897, involving an income tax law which exempted $2000 of income if the income did not exceed $4000, but if it exceeded $4000 allowed no exemption. The court held this so unjust as to be unconstitutional.*

The solution reached in the Iowa and California cases (interpretation of the statute as exempting only the value actually taxed, or $100 in the example above put) could not be reached under the local statute, which provides that the

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*The case was decided before annexation and now would be governed by the decisions of the Supreme Court of the United States, which in Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283 (1898) upheld the constitutionality of such a provision without commenting upon the justice of it.

property previously has been subject to tax within the five year period, only the appreciation in value shall again be taxed. This provision eliminates the possibility of taxing the value which previously was exempt, as was done by the Iowa and California courts. Hence we either must assume that the legislature intended a result which has been characterized by the courts as unjust and which is not in harmony with the rest of Chapter 66, or else conclude, as we do, that the legislature intended to treat the value exempted because of relationship the same as if taxed, whether or not there was taxable value in excess of the exemption.

The Federal provision, Section 812 (c) I.R.C. is not comparable. The federal tax is on the estate itself, not on each transfer made; the amount of the exemption is the same for each estate; and the statute requires a proportionate amount of the exemption of the second estate to be set off against the previously taxed property.

The heading of said section 2063-B, "Property previously taxed exempt" has been considered (see Crawford on Statutory Construction, Sec. 207, p. 359), also the committee reports on Senate Bill No. 216, 1937 Session, which became Act 152, L. 1937, enacting Section 2063-B. (Senate Journal, 1937, p. 520; House Journal, 1937, p. 2138.) These references emphasize that the main purpose was to avoid too frequent taxation

of the same property, but do not disclose that the legislature had this particular problem in mind. The other considerations above set forth outweigh the significance of this material.

Respectfully,

(Signed) Rhoda V. Lewis
Rhoda V. Lewis
Deputy Attorney General

APPROVED:

(Signed) C. Nils Taveres
Acting Attorney General