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**TERRITORY OF HAWAII**
DEPARTMENT OF THIS ATTORNEY GENERAL
HONOLULU

September 24, 1946

OPINION NO. 1858

TAXATION, INHERITANCE

Life Estate, Retention of

The creations of an inter vivos trust, reserving to the settlor the enjoyment of the income for his life, is a transfer "intended to take effect in possession or enjoyment" after the death of the grantor, and accordingly is subject to inheritance tax.

STATUTES

Construction and Operation

The interpretation generally put by state courts on succession tax laws similar to the Hawaii law, and which had been announced prior to the adoption of the Hawaii law, has the weight usually given to such decisions, irrespective of a contrary view of the federal courts concerning a different type of tax law.

COURTS

Stare decisis

In matters of local concern territorial courts are not bound to follow federal judicial precedents which are inappropriate to the local situation.

Honorable W. D. Ackerman, Jr.
Territorial Treasurer
Territory of Hawaii
Honolulu, T. H.

Dear Sir:

Reference is made to your letter of September 5, enclosing a copy of the trust indenture involved in the estate of James T. Wayson, Jr., deceased, and submitting for our determination the question whether the property contributed by the decedent to the trust should be included in computing the inheritance tax due upon his death. I am of the opinion that it should be included.

Section 5552, R. L. 1945, provides:

> "Sec. 5552. Tax imposed when, generally. All property * * * which or any interest in or income from which, shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor, vendor, or bargainer, or intended to take effect in possession or enjoyment after such death * * * shall be and is subject to a tax * * *."

Dr. Wayson and his wife, in 1928 created an irrevocable trust. Dr. Wayson predeceased his wife. The trust instrument reserved to Dr. Wayson the following benefits:

> "(a) To pay the sum of Five Hundred Dollars ($500.00) per month so far as possible from income

> and the balance from principal unto the said James Thomas Wayson, Jr. so long as he shall live * * *."

No one else was to receive any income so long as Dr. Wayson lived. In effect, the whole income was reserved to his benefit, to assure him a regular stated income. While the principal of the trust res also was charged with the payment of the annuity I do not consider this material, since I am of the opinion that the mere reservation of the income for life would be sufficient to make the transfer taxable. This is the general rule among state courts having similar tax laws, the opinions being practically unanimous on this point. See notes in 49 A.L.R. 874, 67 A.L.R. 1250, 100 A.L.R, 1246, 121 A.L.R. 364 and 155 A.L.R. 858.

The point has not been decided in Hawaii. The only case bearing on the point is Brown v. Conkling, 20 Haw. 41, 1910, which sustained the tax in a case of a trust deed reserving both a life estate and also power of revocation. The court's language is inconclusive as to what would be the result if there had been no power of revocation, although the implications are that the tax would apply, the court saying:

> "* * * The transfer made by the owner in this case, which scoured to him the enjoyment of the property

> until his death, is strictly within the plain meaning of the act. It cannot be said that one who has the income of property does not enjoy it, although in order to dispose of it he would have to revoke its transfer and repossess himself of the muniments of title, as the stock certificates may be termed."
>
> 20 Haw. 41, 44

It is true that the federal courts construed the federal estate tax law as not imposing the tax on property in which a life estate was reserved. At that time the federal law provided for inclusion in the value of the gross estate of the value of property "to the extent of any interest therein of which the decedent has at any the made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death." These federal cases are founded on May v. Heiner, 281 U.S. 238, 1930, although the life estate in that ease was for the decedent's husband, and the point was not squarely raised.

The state courts have not applied the federal cases in construing their own succession tax laws. Such state courts have distinguished the doctrine of May v. Heiner as applicable only to an estate tax. Thus, in Blodgett v. Guaranty Trust Co., 158 Atl. 245, 248 (Conn.),

1942, the court said of the federal decisions:

> "* * * It is obvious from the quotation from the opinion in the Reinecke Case, which we have given above, that the decision, upon which the succeeding cases relied, was motivated by the nature of the federal estate tax, which is upon the transfer of, rather than the succession to, property of the decedent. * * * On the other hand, with a few exceptions, the state inheritance tax statutes levy a duty or excise upon the beneficiary for the privilege or right of succession to property. * * * The federal cases above mentioned, which are relied upon in support of the claim that the transfers here in question are not taxable, since they 'deal with the construction of federal statutes imposing estate taxes and * * * are distinguishable because of the terms of those statutes, if not on other grounds.' Worcester County National Bank v. Commissioner of Corporations and Taxation (Mass.) 175 N. E. 726, 729. We have been able to discover no relevant subsequent case which has given these decisions an effect adverse to the taxability of such gifts under state succession tax statutes. See In re Barber's Estate (April 13, 1931) 304 Pa. 235, 155 A. 565; City Bank Farmers' Trust Co. v. McCutcheon, 15l A. 78, 8 N. J. Misc. R. 547; Id. (N.J.Err. & App. April 24, 1931) 154 A. 626; In re Best's Estate (April 3Oth, 1931) 140 Misc. Rep. 31, 249 N.Y.S. 784; Matter of Barstow (May 22, 1931) 256 N.Y. 647, 177 N.E. 177. Therefore, we feel that we are not constrained to place a similar construction upon our own statute, and are still at liberty to adhere to the views as to its meaning and scope, which usually have been held as to state statutes of similar nature and terms * * *."

And in Rising's Estate v. State, 242 N.W. 459, 461 (Minn. 1932), the court said of the federal cases:

> "* * * Of course, such decisions end debate as to the construction of the act of Congress which they interpret. But, however, persuasive, they are not

> binding upon us in the construction of our own statute, as to which it is our privilege to err, if that be the result of our deliberate judgment. That aside, our state tax is so far different, in incidence, from the federal excise that the cases are easily distinguishable. 'In its plan and scope' the latter is 'on transfers at death or made in contemplation of death.' 'It is not a gift tax.' Our law, on the contrary, does tax gifts. The federal 'exaction is not a succession tax. * * * The right to become beneficially entitled is not the occasion for it.' Nichols v. Coolidge, 274 U.S. 531, 541, 47 S. Ct. 710, 713, 71 L. Ed. 1184, 52 A.L.R. 1081. Our law imposes, not alone a transfer tax, but a succession tax also. State v. Brooks, 181 Minn. 262, 232 N.W. 331. 'The thing burdened is the right to receive.' Leach v. Nichols, 52 S.Ct. 338, 76 L. Ed.--(opinion filed March 14, 1932). With reference to the federal tax, a transfer and not a succession tax was the language used in Reinecke v. Northern Trust Co. and repeated in May v. Heinier, to the effect that one may freely give away his property without subjecting his estate to a tax, and that otherwise the result would be 'incongruous.'
>
> Incongruous or not, our state tax is expressly put on succession of the kind now involved. Doubt, if any, left by subdivision 3 of section 1 is removed by subivision 4, explicitly taxing the receipt of 'any property or the income thereof' when the donee becomes 'beneficially entitled, in possession or expectancy. '* * * There was in the federal statute, before that amendment, no counterpart of our subdivision 4 of section 1. For that reason alone, May v. Heiner is easily distinguishable, and no obstacle to our holding the successions here involved subject to tax. * * *"

It will be noted that the Minnesota Court referred to the fact that the state statute specifically taxed the shifting of the enjoyment of income, whereas

the federal law considered in May v. Heiner did not specifically refer to income. The territorial law resembles the Minnesota Law. Section 5552, R. L. 1945, provides that all property the income from which shall be transferred by a gift "to take effect in enjoyment" after the death of the donor, "by reason whereof any person shall become beneficially entitled, in possession or expectancy" to the income of any property, shall be taxed.

The statute read the same, so far as pertinent here, in 1905 when it was enacted. The state courts already had construed similar laws as imposing the tax when a life estate was reserved. See In re Green's Estate, 155 N.Y. 223, 47 N.E. 292, 1897. New York is considered the source of inheritance tax legislation, and accordingly the construction which theretofore had been placed on the New York law is of great importance. Gleason and Otis on Inheritance Taxation, 3d ed., pp. 62, 695; Crawford on Statutory Construction, sec. 234, p. 440.

In view or the unanimity of state courts as to the construction of similar provisions, and the fact that this construction antedates the enactment of the local law, the territorial status of Hawaii does not require us to follow the federal courts in their construc-

tion of a different type of tax law. The duty of the Hawaiian courts to follow Supreme Court decisions is based on the principles of stare decisis; where the Supreme Court exercises the reviewing authority usual in a court of last resort its rulings establish the law for the Hawaiian courts, as lower courts. Kapiolani Estate v. Atcherly, 21 Haw. 441, rev'd 238 U. S. 119; Territory v. Ho Me, 26 Haw. 331; Mejea v. Whitehouse, 19 Haw. 159; cf. Rubinstein v. Hackfeld & Co, 18 Haw. 126 and Lau Yin v. Pang Lum Mow, 28 Haw. 476, in which Hawaiian decisions adopted at a time when there was no general appeal to the Supreme Court of the United States, were considered controlling. Recent decisions make it clear that in matters of local concern, of which statutory construction is one, the Supreme Court does not exercise the reviewing authority usual in a court of last resort but concerns itself only as to whether the decision appealed from is insupportable under local law; and that a territorial court is free to select and apply any reasonable rule of law which in its opinion best suits the situation, even though such rule may not conform to federal judicial precedent. De Castro v. Board of Commissioners of San Juan, 322 U.S. 451, 88 L.Ed. 1384, 1944;

Waialua Agricultural Co. v. Christina, 305 U. S. 91, 83 L. Ed. 60; Hawaii Consolidated Ry., Ltd. v. Borthwick, 105 F. 2d. 286. The federal courts are to defer to the territorial courts in such local matters, the same as to state courts, De Castro v. Board, supra. The tax law, construed in accordance with the state court decisions, is constitutional, Central Hanover Bank v. Kelly, 319 U.S. 94; hence the matter is purely on of local concern.

Respectfully,

RHODA V. LEWIS
Assistant Attorney General

APPROVED:

Attorney General