OPINION
53-38

May 14, 1953 (OPINION)

ESTATE TAX

RE: Exemption - Foreign and North Dakota

We have yours of May 2, 1953 requesting and opinion from this office as to the proper interpretation and application of Subsection 4, section 57-3712 of the N.D.R.C. of 1943, which reads as follows:

> "If a part only of the property of the estate is taxable within this state, there shall be allowed and deducted as exemptions only such percentage of the amounts of exemptions herein specified as the property taxable within this state, above liens, is of all the property of the estate above liens:"

The facts which you present are as follows: A resident of North Dakota died leaving an estate in North Dakota of $59,343.06 which was disposed of by will to his wife, son and daughters, all of whom were of age and each of whom received over $2,000 under the will. In addition there was $5,000 of real estate in the State of California held in joint tenancy with his wife. The question you propound is: How shall the exemptions to which the heirs and legatees are entitled be computed under the above provisions of the North Dakota statute?

Subsection 1 of section 57-3711 of the N.D.R.C. of 1943, as amended, provides an exemption to the estate of $2,000 for each child of legal age, but limits the exemption to the value of the property received by each child if less than $2,000. The first question which presented itself is as to whether or not the property held in joint tenancy in the State of California may be included in determining the valuation of the whole estate of said decedent. In other words, does property held in joint tenancy become part of the estate? Section 57-3706 of the N.D.R.C. of 1943 provides that the gross estate of a decedent shall include the value of interest held as joint tenant in proportion to the number of co-tenants and shall be taxed in proportion thereto. In the State of California, we find no provision in the inheritance tax of that state which includes joint tenancy or an interest therein as part of the gross estate. The Supreme Court of the State of California, in the case of In Re Taitmeyer's Estate, 141 Pac. 504-510, have this to say:

> "The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property. The surviving joint tenant does not secure the right from the deceased joint tenant, but from the device or conveyance by which the joint tenancy was first created."
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> "It is therefore a mistake to say of joint tenants that the title vests in the survivor upon the death of the co-tenant, or that it descends to him from his co-tenant, for it had already vested in him by an act at the time of the original grant."

From this it would seem that the joint tenancy is not that kind of an interest which is considered as part of a decedent's estate. Nevertheless in the inheritance tax act of the State of California, Act 8442, subsection 5, the whole value of the property involved in joint tenancy is subject to a transfer tax.

> In 28 American Jurisprudence, page 35, section 45, we find this comment: "A statute may constitutionally make the acquisition of property held in joint tenancy by the survivorship of one of the joint tenants taxable although the joint tenancy was created by contract before the statute went into effect, since the estate acquired by the survivor does not vest until the death of the co-tenant."

In the case of In Re Black, the Supreme Court of the State of North Dakota, 75 N.D. 446 has this to say on page 450:

> "Obviously the word 'estate' is used above in its common and ordinary sense as meaning the aggregate property of all kinds which a person may leave to be divided at his death. On the other hand, the word 'estate' as used in the act is used not only in that sense, but is enlarged and made more comprehensive by succeeding provisions of this Act."

From this comment by our Supreme Court, it is indicated that the estate tax law of the State of North Dakota may make subject to a tax property which is not part either of the gross or the net estate. It is under this reasoning that section 57-3706 permits the application of an estate tax to the joint interest of the parties upon the death of one in proportion to the number of co-tenants involved.

In the case of Adlers Estate, 271 NY Supp. 373, the New York Court has this to say:

> "The estate referred to in the tax law is a purely artificial creation. It is not the true estate of the deceased. It is a convenient term which is inclusive of property rights which pass by reason of the fact of death. An estate for tax purposes may have no relationship to property passing by will or by intestacy because the word would be equally applicable to a fund subject to tax which is derived wholly from a voluntary or inter vivos trust."

Considering all the above, it is the opinion of this office that in determining the percentage of exemption to which the heirs or legatees in North Dakota are entitled the value of the property passing by virtue of the joint tenancy relationship in California must be included as part of the total estate. Therefore, the exemptions to which the heirs or legatees in North Dakota must be computed upon a percentage arrived at by determining the value of the property in the State of California passing by virtue of joint tenancy as compared to the total value of the estate including the value of tenancy as compared to the total value of the estate including the value of the rights passing by virtue of the joint tenancy in the State of California. While the State of California makes the joint tenancy transfer subject to a transfer tax upon the full value of the joint tenancy property, in North Dakota, that

portion of the joint tenancy is subject to taxation in proportion to the number of co-owners. In this particular instance, that would be fifty percent, for the reason that the joint tenancy of the property in California included only the husband and wife.

ELMO T. CHRISTIANSON

Attorney General