

OPINION
59-260

December 10, 1959 (OPINION)

TAXATION

RE: Gross Estate - Inclusion of Value of Certain Property

This is in reply to your letter of December 1, 1959, requesting the opinion of this office with regard to the question of whether or not the value of property transferred by a decedent during his lifetime, in which he reserved to himself a life estate and for which transfer he received no monetary consideration, is includable in the decedent's gross estate for North Dakota estate tax purposes.

The statute which is applicable to this situation is section 57-3704 of the N.D.R.C. of 1943. This statute provides:

OTHER ITEMS TO BE INCLUDED IN GROSS ESTATE OF ALL DECEDENTS.
The following items also shall be included in the gross estate:

1. All property transferred prior to and in contemplation of death. Any transfer of any part of the estate made by the decedent within two years prior to death without an equivalent monetary consideration, unless shown to the contrary, shall be deemed to have been made in contemplation of death within the meaning of this section;
2. All property transferred by the decedent prior to death by grant or gift without an equivalent monetary consideration, intended to take effect either at or after the death of the decedent."

Since we are not concerned with a transfer in contemplation of death, we shall concern ourselves with the application of subsection 2 of the above quoted statute.

The statute appears to be ambiguous in that it speaks of property "transferred prior to death , but intended to take effect either at or after the death of the decedent." If the property is transferred prior to death, such transfer must take effect at that time, not at or after the death of the decedent. If the transfer is not effective until at or after the death of the decedent, there is no transfer by him prior to death. It appears therefore that the Legislature intended the word "transfer" to refer to a transfer of legal title and the word "effect" to mean "take effect in possession and enjoyment." If the statute is not given this meaning, its enactment would appear to have been useless. It is presumed however that the Legislature acted with deliberation and with a purpose in view. (82 C.J.S. STATUTES Section 316.) The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention or purpose of the Legislature as expressed in the state. (82 C.J.S. STATUTES Section 321.) It is our opinion that the above construction gives effect to the intention and purpose of the Legislature.

The question now arises as to whether a transfer without an equivalent monetary consideration and which reserves a life estate to the grantor falls within the provisions of section 57-3704(2) of the N.D.R.C. of 1943.

In 85 C.J.S. 933, TAXATION Section 1147(3) we find this statement made with supporting citations.

RESERVATION OF LIFE ESTATE. Within the terms of a statute taxing transfers intended to take effect in possession or enjoyment after death of the transferor are transfers wherein the grantor reserves a life estate to himself, or the right to the use, profits, or income from the property, or a portion thereof for life; but, where the transfer is to another for life with remainder to others in fee, the transfer is not one intended to take effect in possession after the death of the grantor within the meaning of such a statute."

Among the several cases cited in support of the above statement is Utt v. State Tax Commission of Iowa, 60 N.W. 2d. 120 (Iowa 1953) in which the court discusses extensively the purpose and construction of the statute in question. The court said at page 121:

The obvious purpose of . . . including in the estate to be taxed, property transferred by decedent with provision for retention of life possession and enjoyment in the transferor, is to reach substitutes for testamentary disposition and thus prevent evasion of inheritance tax. Some similar provision will probably be found in the inheritance or estate tax law of all states and much the same provision is in the federal estate tax law."

The court said, however, that whether parties to the transfer intended thereby to evade inheritance tax is immaterial in determining whether transfer is subject to tax under the statute.

The court also cited the early Pennsylvania case of Reish v. Comm., 106 Pa. 521 wherein the court, at page 526, said:

One certainly cannot be considered, as in the actual enjoyment of an estate, who has no right to the profits or incomes arising or accruing therefrom."

In view of the purpose of section 57-3704(2) of the N.D.R.C. of 1943 and the above cited authorities construing such a statute, it is our opinion that the value of property transferred by a decedent during his lifetime, in which he reserved to himself a life estate and for which transfer he received no monetary consideration, is includable in the decedent's gross estate for North Dakota estate tax purposes.

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