Opinion No. 40-3531

May 23, 1940

BY: FILO M. SEDILLO, Attorney General

TO: Hon. J. O. Gallegos, Commissioner, Bureau of Revenue, Santa Fe, New Mexico. Attention: Mr. H. L. Andrews, Auditor, Succession Tax Division.

*{*145}* We have your letter of May 16 requesting an opinion as to the taxability and proper method of computing the tax under our succession tax law of an estate of a decedent who was at the time of her death a resident of New Mexico, and who died leaving a vested remaining interest in a testamentary trust in the State of New York. At his death the creator of the trust left his property in trust for the use and benefit of his wife during her life, and bequeathed the same property to his sister subject to the life estate created by the trust in his widow, thereby, as stated in Judge Simms' letter which you enclose, giving to the sister a vested right in remainder. At the death of the sister, the widow, owner of the life estate, was 65 years of age, and was a resident of New York and a co-trustee of the trust. The trust is in New York, established and kept there under a will probated there, and is of the value of approximately $ 150,000.00. These, I understand, are the facts briefly stated. The problems raised will be treated in their order.

We agree with you that this was property of an intangible nature pertaining to the New Mexico resident, and owned by her in her own right when she died. As such it is taxable, in my opinion, under our statutes at her domicile here in New Mexico, even though it may also have for such tax purposes a situs where the trust is located. Curry v. McCanless, 83 L. ed. 1339, 398 U.S. 357. Since the trust is being administered in New York, this interest, it is to be observed, is not taxable there because of the provisions of Article XVI, Section 3 of the Constitution of New York, adopted November 8, 1938, to the effect that intangible personal property within that state when not employed in carrying on any business by the owner shall be deemed to be located at the domicile of the owner, and, if held in trust, shall not be held to be located there for purposes of taxation because the trustees are domiciled there, unless no other state has jurisdiction to subject such property held in trust to death taxes. The will of the New York testator, copy of which you enclose, provides that this trust property "may be invested and reinvested" by the trustees, and I take it from all that is said about it that it is intangible personal property such as stocks, bonds and other such investments.

The next question is the method of ascertaining the value of the estate's interest in that trust estate. There is no method prescribed by our statutes for the valuation of such interests. The tax is levied on the appraised value of the estate, and I would say that the appraisers provided for by Section 5 of Chapter 181, Laws of 1937, (47-205, 1938 Supplement), have the right to value such intangible property as a part of the estate inventoried at the domicile of the decedent, and that that value is final for this purpose unless reviewed by the district court on appeal. The method of calculating such

valuation adopted by the Federal Government and referred to in Judge Simms' letter is based on Actuaries', or Combined Experience Table of Mortality and on established actuarial principles, and I see no reason why the same rule and tables should not be used in valuing such interests for this purpose here. This rule and table may be found in your Prentice-Hall, 1940 Federal Tax Service, vol. 3, pages 23,151 and 23,153 (Regulations No. 80, Article 10). The use of this rule in *{*146}* this instance would result in a value of 66c on the dollar, as stated by Judge Simms.

This would be the present valuation of the interest which passed to the heirs or executors by reason of the death of the owner of that remaining interest. The interest passes now, and though the property may not be enjoyed by its possession until the termination of the life estate therein, the interest as of its present value may be enjoyed and made use of by hypothecation, sale or otherwise. As stated by Judge Simms, Section 141-1112 of the Code, does not, in terms, apply to such an interest, and without specific legislative authority, I do not believe the Bureau would have the right to postpone the payment of the tax on that interest at its present value. The Federal law does make provision for such extension, I.R.C., Sections 925 and 926, upon the giving of bond and payment of interest. 1940 Federal Tax Service, Prentice-Hall, vol. 3, page 23,448. It is my opinion that without such legislative provision, the Bureau has no authority to extend the payment of the tax due on the remainder interest in the New York trust property.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.