Opinion No. 44-4567

August 28, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mr. J. Leon Miller, Auditor, Succession Tax Division, Bureau of Revenue, Santa Fe, New Mexico

You have handed this office a file of an estate, the assets of which are comprised in part by government bonds payable to the deceased, or another person not the wife of the deceased. In view of this situation, you have requested an opinion of this office concerning whether or not such bonds may be considered as part of the assets of the estate and, therefore, subject to succession tax under the provisions of Sections 34-102 or 34-105 of the New Mexico 1941 Compilation. Section 34-102 provides, in part, as follows:

"All estates which shall pass by will or inheritance or by other statutes * * * shall be liable to, and there is hereby imposed thereon a tax * * *"

Section 34-105 provides, in part, as follows:

"The tax levied by Section * * * (34-102) * * * shall also apply to any property to the extent of the interest held therein as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited with any person carrying on the banking business in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth; * * *."

The question immediately presents itself concerning what type of estate is created by an instrument such as a government bond, payable to one person or another person, without any further words defining the estate created.

An attorney who represents the particular estate involved has called our attention to the holding in the case of Rice et al v. Bennington Cty. Sav. Bk. et al, 108 Atl. 708, which holds that a joint tenancy may never be created by the use of the word "or". It is further submitted by this attorney that the interest in the government bond payable to one person or another person passes by operation of the instrument itself, and does not pass by will or inheritance, or by other statutes, and therefore is not taxed under Section 34-102. It is further submitted, in view of the above cited case, that under the provisions of Section 34-105, which is the only other levying section, that such property is not subject to our succession taxes for the reason that it is contended that this is not a joint tenancy under the above cited case, and since a husband and wife situation is not

involved, it cannot be a tenancy by the entirety and, of course, the further provision concerning bank deposits is not applicable.

We will, therefore, in determining this question, first consider whether this is a joint tenancy and, if not, what type of an estate is created, and in what manner it passes upon the death of one of the parties who paid the full consideration for the bond to the other named person.

It is our opinion that the word "or" as used in the bond should be construed as "and". This position is supported by the following cases which considered either stocks, bonds, notes, bank accounts or statutes. Parker v. Carson, 64 N. C. 563, 564; Willoughby v. Willoughby, 5 N. H. 244, 245; Quinby v. Merritt, 30 Tenn. (11 Humph.) 439, 440; Brittin v. Mitchell, 4 Ark., (4 Pike) 92, 94; In re Kimballs Estate, 207 N. Y. S. 757, 760, 124 Misc. 181; Smith v. Haire, 133 Tenn. 343, 181 S. W. 161, 163, Ann. Cas. 1916 D. 529; Robinson v. Brinson, 20 Tex. 438, 439; In re Kennedy's Estate, 271 N. Y. S. 469, 151 Misc. 292.

In view of the above cases, for the purpose of considering the estate created, we feel compelled to construe the word "or" as meaning "and," and therefore feel that the case of Rice et al v. Bennington City Sav. Bk. et al, supra, is not controlling.

In re Kimball's Estate, supra, considered a case involving liberty bonds which were payable to the decedent or another person. In this case the word "or" was construed as being equivalent to "and" and it was held that the bond was held in common. In this case the Court considered a statute which provided:

"Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy. * * *"

It is noted that our Section 75-111 is similar to the New York Statute, but is limited solely to realty, and therefore, under the reasoning of the New York Court, the bonds herein involved created a joint tenancy, and not a tenancy in common. A tenancy by the entirety is created by conveyance to a husband and wife, the survivor taking the whole estate. See Oliver v. Wright, 47 Ore. 322, 83 P. 870; In re Loesch's Estate, 322 Penn. 105, 185 Atl. 191; O'Boyle v. Home Life Insurance Co. of America, 20 F. Supp. 33, 37; Schumann v. Curry, 121 N. J. Equity 439, 190 Atl. 628; Davis v. Bass, 188 N. C. 200, 124 S. E. 566.

Tenancies by the entirety and joint tenancies are distinguished in the following cases as follows:

Parrish v. Parrish, 151 Ark. 161, 235 S. W. 792, where it was held that a tenancy by the entirety is a joint tenancy modified by the common law doctrine that husband and wife are one person in law, and cannot take by moieties. The case of Winchester Simmons Co. v. Cutler, 199 N. C. 709, 199 S. E. 611, 612 held that a joint tenancy is

distinguished by the four unities of time, title, interest and possession, and, in tenancy by the entirety, a fifth unity is added, that of unity of person.

In view of the above cases, it would appear that if you merely have the first four elements, you have a joint tenancy, while if the fifth unity is added, you have a tenancy by the entirety. It is, therefore, submitted that whenever you have the five elements present and, therefore, a tenancy by the entirety, that if the fifth named unity, that of person, is not present, you would then have a joint tenancy. Therefore, the following cases, which have considered bank accounts, and have held that they were tenancies by the entirety when the fifth unity was present, will in this instance, where the fifth unity is not present, be authority for holding that a joint tenancy is created. Therefore the following cases, as cited, are relied upon in sustaining that a joint tenancy is created in the present instance.

Werle v. Werle, 1 Atl. 2d 244, 246, held that a bank checking account payable to either husband or wife was tenancy by entirety, though funds therein were originally husband's, and either spouse could withdraw them. Madden v. Gosztonyi Savings & Trust Co., 331 Pa. 476, 200 Atl. 624, 117 A.L.R. 904, held that bank deposits and similar choses in action, payable to husband and wife, or to husband or wife, are tenancies by the entirety with all incidents relating thereto.

In view of the above authorities, it would appear that if all five unities are present in a bank account or other chose in action payable to one or the other, when such persons are husband and wife, that the only unity missing in a chose in action payable to one or the other who are not husband or wife is the unity of person, and therefore, under the above authorities, a joint tenancy is created which is subject to taxation under the provisions of Section 34-105 of the New Mexico 1941 Compilation.

By HARRY L. BIGBEE,

Asst. Atty. General