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DEATH TAXES ON IRREVOCABLE LIFE INSURANCE

By STEPHEN H. HART, of the Denver Bar

ON SEPTEMBER 21, 1936, there was published by the Treasury Department a short ruling, apparently unassuming but really important—GCM 16932, reversing GCM 1164. This ruling indicates that the Treasury Department, changing its policy established for ten years, may attempt to tax as part of a man's estate, life insurance which he has irrevocably assigned to a trust or the beneficiary of which he has irrevocably designated. If the treasury can do so, and there is considerable authority to support the power, it will upset the plans of many tax lawyers.

The Federal Estate Tax law for many years has contained a provision specifically taxing the proceeds of life insurance. If the insurance is payable to the estate of the decedent the proceeds are taxable in their entirety. If, however, they are payable to another beneficiary only, the excess over \$40,000 is taxable. The Federal law, by its terms, would cover all insurance, whether revocable or irrevocable, but the Supreme Court, in *Chase National Bank vs. United States*, 278 U. S. 327, indicated that if the insured, at the time of his death, possessed none of the incidents of ownership, then nothing passed from him on his death, and there was no transfer upon which to levy a death tax. The regulations have adopted the implication of this case, and have completely exempted life insurance, of which the decedent possessed none of the incidents of ownership. (Article 25, Regulations 80.)

There is, however, another set of provisions in the Federal Estate Tax law which might be used to tax irrevocable insurance, for the Federal Estate Tax law attempts to reach not only transfers upon death, but transfers in contemplation of death, and to take effect in enjoyment and possession at death. The irrevocable designation of the beneficiary of a policy, or the irrevocable assignment of a policy to a trust, could very logically be considered as taxable under either one

of these provisions. In fact, in the case of *Gaither vs. Miles*, 268 Fed. 692, a life insurance policy was held taxable as a gift in contemplation of death under the Act of 1918. Similarly, in *Iglehart vs. The Commissioner*, 28 B. T. A. 888, an endowment policy was held under a most recent Act to have been transferred in contemplation of death. In *Fagan vs. Bugby*, 143 Atl. 807, moreover, the Supreme Court of New Jersey held that the assignment of an insurance policy to a trustee was a transfer to take effect in enjoyment and possession at or after death within the meaning of the New Jersey inheritance tax law.

Until September, 1936, however, most tax lawyers felt free to disregard these cases, for the Treasury Department had announced, by GCM 1164, that it did not intend to attempt to tax insurance policies under these provisions. Their new ruling, however, reversing this has opened the way for new attempts to tax insurance. It may find taxpayers with irrevocable insurance trusts helpless and subject to taxation.

THE WISDOM OF GEORGE WASHINGTON

A few months after the close of the Constitutional Convention in 1787 and while the new Constitution was being debated by the people of this country, George Washington wrote a letter to Lafayette, who was then in France, in which letter Washington looked far into the future. The following paragraph is contained in the letter:

"I would not be understood, my dear Marquis, to speak of consequences which may be produced in the revolution of ages, by corruption of morals, profligacy of manners, and listlessness in the preservation of the natural and unalienable rights of mankind, nor of the successful usurpations that may be established at such an unpropitious juncture upon the ruins of liberty, however providentially guarded and secured, as these are contingencies against which no human prudence can effectually provide. It will at least be a recommendation to the proposed Constitution that it is provided with more checks and barriers against the introduction of tyranny and those of a nature less liable to be surmounted than any government hitherto instituted among mortals. We are not to expect perfection in this world: but mankind, in modern times, have apparently made some progress in the science of government.