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AVOIDANCE OF DOUBLE DEATH TAXATION OF ESTATES AND TRUSTS *

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The term "double taxation" has been commonly used to refer to the imposition of the same type of tax on the same property by more than one taxing jurisdiction. It expresses, perhaps with subtlety, the fond hope that not more than two jurisdictions will assert such right to tax, and the problem generally does arise with respect to the claims of two competing jurisdictions. However, one need only refer to one of the most famous cases dealing with this problem—*The Green Estate*¹ to recognize that the problem is one of multiple taxation in which the number of states claiming a tax will vary with the peregrinations of an individual and the geographical distribution of his wealth.

Although many states have enacted various forms of legislation to alleviate the impact of multiple death taxation, there continue to be broad areas in which the possibility of such taxation continues in full force. Within the ambit of these areas, a thorough understanding of the legal aspects of the problems involved and the practical steps which a wise foresight may counsel, may help to avoid or at least mitigate the seriousness of the financial penalties involved.²

The problem of multiple death taxation arises in two ways. There may be a claim that a person was domiciled in two or more states, in which case more than one state claims the right to tax the decedent's estate generally. It may arise in a more limited way with

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1. *Texas v. Florida*, 306 U. S. 398 (1939) discussed *infra*, p. 702.

2. A complete discussion of the legal aspects of multiple state death taxation will be found in Guterman, *Revitalization of Multiple State Death Taxation*, 42 Col. L. Rev. 1249 (1942).

respect to the situs of particular property where the decedent's domicile is not in controversy. Most of the important cases in the U. S. Supreme Court on this subject have involved the jurisdiction of a state to tax particular property where the decedent was concededly domiciled elsewhere.³ The presence or absence of jurisdiction to tax has presented the occasion for decision by the U. S. Supreme Court as to whether a particular exercise of power contravened the Fourteenth Amendment. But conflicting determinations by the states as to the domicile of a decedent have been held not to present a Constitutional question.⁴ Thus judicial determination by more than one state that a decedent was domiciled within its borders will not ordinarily be subject to review by the Supreme Court.⁵

Generally speaking a state has jurisdiction to impose a death tax on the property of a non-domiciliary where the property involved has received protection and benefit from the state of location or where a transfer of the property depends upon and involves the law of the particular state.⁶ For all practical purposes this means that all intangible personal property, located in a state, may be subjected to death tax in that state. The question of location depends on the nature of the intangible. A debt may be taxed at the debtor's or creditor's domicile as well as by the state where the physical evidence thereof is located. The state of incorporation may tax the transfer of stock by death even though the decedent was domiciled elsewhere and the certificate of stock was not within that state.⁷ However, tangible personal property may be taxed only in the state of its permanent location even to the exclusion of the right to tax of the domiciliary state,⁸ and the same rule applies to real property. As a practical matter most states either do not tax intangible property of non-residents or have reciprocal exemption statutes whereby the same result is accomplished.⁹ Except for the administrative burdens relating to obtaining waivers, etc., in non-domiciliary states, this presents few problems in the ordinary case.

Far more serious is the problem of multiple domicile, where each state claiming decedent as a domiciliary asserts the right to tax the

3. *E. g.* *Blackstone v. Miller*, 188 U. S. 189 (1903); *Frick v. Pennsylvania*, 268 U. S. 473 (1925); *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930); *Baldwin v. Missouri*, 281 U. S. 586 (1930); *Beidler v. South Carolina*, 282 U. S. 1 (1930); *First National Bank of Boston v. Maine*, 284 U. S. 312 (1932), *overruled*, *Utah v. Aldrich*, 316 U. S. 174 (1942).

4. *Worcester County Trust Co. v. Riley*, 302 U. S. 292 (1937).

5. See *Guterman*, *supra* note 2 at 1277-8.

6. See *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1940).

7. *Utah v. Aldrich*, 316 U. S. 174 (1942).

8. *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

9. Thirty-one states have reciprocal exemption of intangibles of non-residents. Many states do not tax intangibles of non-residents. Some states tax intangibles only when used in a business in the state. Many states make their exemption inapplicable to non-residents of the United States.

entire succession on death. This may result in a crushing burden, as in *The Green Estate* where the states of Texas, Florida, New York and Massachusetts each claimed the decedent as domiciliary, and where the combined Federal estate tax and death taxes of each of the states would have wiped out the entire estate; in fact, the estate assets would have been insufficient to pay all four of the state taxes. This latter fact was held by the Supreme Court to make the proceeding before them a controversy between the states over which the Supreme Court has exclusive and original jurisdiction.¹⁰ Except in such a case, the Supreme Court has refused to review conflicting state determinations of domicile, and the only relief lies in state cooperation in the interests of fair play.

A number of states, which have faced this problem frequently, have enacted statutes authorizing the compromise between claimant states of the death tax.¹¹ Some of these statutes provide for arbitration of the dispute if compromise cannot otherwise be effected.¹² At times claimant states have been willing to submit to a court of one of them the final determination of the decedent's domicile. The leading case of this type is *Matter of Trowbridge*¹³ where Connecticut submitted its controversy as to domicile to the New York courts and where the Court of Appeals of New York held that decedent was domiciled in Connecticut.¹⁴

DOMICILE

Domicile refers to the "technically preeminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."¹⁵ A man's domicile enters into many of his rights and obligations other than the disposition of his property on death. The law recognizes that a man may have but one domicile at any one time. But courts may differ as to where that domicile is to be fixed. The criteria for decision have been declared to be fact plus intention. If a man intends to make a particular place his home, he does not thereby become domiciled there.

10. *Texas v. Florida*, 306 U. S. 398 (1939).

11. The following state statutes have been enacted for the compromise of death tax claims based on conflicting claims of domicile: DEL. LAWS c. 5 (1941); MD. LAWS cc. 982-3 (1945); MASS. ACTS c. 428 (1943); N. H. LAWS c. 139 (1941); N. J. LAWS c. 220 (1944); N. Y. TAX LAW § 249-0; Act of 1919 June 20, P. L. 521, art. IV, § 43, added 1941, Aug. 5, P. L. 521, § 1, PA. STAT. ANNOT. tit. 72, § 2451 (Purdon, Supp. 1946).

12. The statutes of Delaware, Maryland and Massachusetts provide for arbitration.

13. 266 N. Y. 283, 194 N. E. 756 (1935).

14. See *Matter of Stone*, 135 N. Y. Misc. 736, 240 N. Y. Supp. 398 (Surr. Ct. 1929); *Matter of Lydig*, 191 App. Div. 117, 180 N. Y. Supp. 843 (1st Dep't 1920); *Estate of Benjamin*, 176 N. Y. Misc. 518, 27 N. Y. S. 2d 948 (Surr. Ct. 1941), *aff'd.*, 289 N. Y. 554, 43 N. E. 2d 531 (1942).

15. *Williamson v. Osenton*, 232 U. S. 619, 625 (1914).

He must couple that intention with the fact of actual residence there. Even the factor of intention has been the subject of progressive modification. The more recent cases have indicated that the kind of intention required to establish a domicile is an intention to make a home and not an intention to create a domicile.¹⁶ A man may declare his intention to be domiciled in a place in numerous ways, by registering for voting, by filing tax returns on the basis of domicile, etc. But unless these public acts and formal declarations are consistent with an intention to make his home there, he will not be held to be domiciled there. The final determinant of domicile is the general pattern of his life. A man's home is the place with which he is more intimately associated than any other place. The usual factors in deciding this question are, a dwelling place appropriate to his needs and position, a fair amount of time spent there, carrying on his principal activities there, his intimates and things close to him kept there, and an intention when away to return there; in other words, domicile is the place away from which a man may be said to be wandering.

The question of where a man is domiciled has become increasingly important because of the multiplication of instances of people maintaining winter and summer residences in different states and spending substantial amounts of time in both residences. Attempts at change of domicile are sometimes made consciously. They are frequently motivated by tax considerations. Such attempts often leave a man dangling between his original domicile around which his life revolves, and his own affirmative statements of one kind or another that he is domiciled elsewhere. In most cases, unless he is willing to really change his home, a formal and publicized change of domicile will only cause difficulties and expense in the form of litigation and taxes. A hypothetical case, being a composite of the facts of several of the leading cases, will illustrate the dangers to be avoided in this type of situation and the affirmative steps to be taken to forestall possible difficulties.

Let us suppose that Mr. Smith, a man of wealth, has a home in New York City and a summer home in Connecticut. Mr. Smith is now in his sixties, his children are grown up and he has begun to spend more and more time in his Connecticut home. Both his home in New York and in Connecticut are substantial and either is of a type that could be his permanent home. Mr. Smith has collected a considerable number of valuable objects of art, paintings, bric-a-brac, and statuary, some of which he keeps in New York and some in Connecticut.

16. See RESTATEMENT, CONFLICT OF LAWS § 19 (1934): "The intention required for the acquisition of a domicile of choice is an intention to make a home in fact, and not an intention to acquire a domicile." See also *Matter of Trowbridge*, 266 N. Y. 283, 291, 194 N. E. 756, 759-60 (1935); *Dorrance's Estate*, 309 Pa. 151, 165-66, 163 Atl. 303, 308 (1932).

Since he has lived most of his life in New York, all of Mr. Smith's associations, friends and activities are centered in New York. At various times in years past Mr. Smith has created trusts in favor of his children which of course have their locus in New York, where the property in trust and the trustees are located. Mr. Smith visits his lawyer one day and inquires as to the relative advantages death-taxwise of New York and Connecticut.

Now it is an easy thing to obtain a list of a man's assets, charts of the death tax rates of both states and make an arithmetical computation. If this procedure is followed and Mr. Smith takes steps to change his domicile on the basis thereof, it may be a sad day for Mr. Smith and his estate. For in considering whether Mr. Smith shall take steps to change his domicile, there are certain vital considerations that cannot be overlooked. The first and foremost is whether Mr. Smith in the nature of things is in a position to really change the pattern of his existence and accomplish a change of domicile that will stick. Mere registration for voting, and change of address on all documents and other formal indications of change may only create a new claim of domicile by the Connecticut authorities without shaking off the claim of the New York authorities. Even though change of domicile is not regarded as complete, so that Mr. Smith's domicile of origin is still in New York, the claim of domicile in Connecticut may be made regardless. In other words, if change of domicile is contemplated it must be capable of being carried out, and be carried out so as to accomplish the purpose intended.

The second consideration is to arrive at a clear and accurate determination of the supposed tax advantages. This demands careful study of several factors. It may be that certain of the trusts created by Mr. Smith will be free of death tax in New York but might be taxable in Connecticut.¹⁷ This possibility might not only destroy any tax advantage but might impose a serious tax burden. Furthermore, in any computation, real property and tangible personalty which will continue to be located in New York must be considered as taxable by New York in any event, even if change of domicile is successfully accomplished. And vice versa, in computing the New York tax burden such items of property in Connecticut must be excluded from the New York computation.

The third consideration is to weigh carefully the impact of taxes other than death taxes and exactly what burden they would impose under the particular circumstances. A man with a large portfolio of bonds or certificates of indebtedness might find some concern in the

17. See the discussion under "Inter vivos Trusts" *infra*, p. 712.

Connecticut annual tax on this type of property, and particularly on the penalty tax on an estate for five years before death if full declaration and payment of this tax was not made.¹⁸ The New York State income tax is imposed on anyone who spends more than seven months in New York regardless of where domiciled.¹⁹ The length of time spent in New York must be carefully measured and a careful record kept if any advantage is to be preserved. Other states would present analogous questions of collateral tax advantages and disadvantages.

Having considered carefully all of these factors, Mr. Smith concludes that he will change his domicile from New York to Connecticut. From that point forward every step should be taken to emphasize the definitive change of domicile. It is interesting that New York State in investigating questions of domicile has an extensive check list of items, some seemingly insignificant, *e. g.*, hospital admission statements, biographical records in *Who's Who* or similar publications and corrected proofs in publication offices, obituaries, gun permit applications, yacht registrations, patent or copyright applications, interests in other estates and other items listed below.²⁰ The kind of items investigated indicates sufficiently the detail required in making various formal matters consistent with the newly chosen domicile. The first change should be in Mr. Smith's will which should be redrawn so that the new residence is set forth, and also any limitations or provisions should be consistent with the laws of the new domicile, *e. g.*, the rule against perpetuities, exoneration of fiduciaries from liability, the designation of an out of state corporate fiduciary, etc. A check should be made as to whether under the new domicile's state law a residuary legatee may exercise powers of appointment unless excepted, and similar questions.²¹ Steps should be taken to be excused from state and federal jury duty in New York on grounds of non-residence. All home addresses on all documents should be made to conform to the change. Mr. Smith should cancel his voting registration in New York and register for voting in Connecticut. He could even notify the Town Clerk, or other appropriate functionary, that he is now a permanent resident

18. GEN. STAT. OF CONN. §§ 1402-3 (Revision, 1930).

19. N. Y. TAX LAW, § 350, ¶ 7.

20. Club applications, church affiliations, social register association records, contributions, voting records, automobile records, federal income tax returns and state returns, hotel registers, leases, business and residential addresses, insurance company records, bank and safe deposit company records, prior wills, powers of attorney, etc., garage records, County Clerk's office (judgments, lawsuits, corporate records, certificates of doing business, limited partnerships), deeds, mortgages, social security records, marriage and birth records, securities address records, newspaper files, telephone, electric, gas and heat records, schedules of contents in respective premises, friends and relatives in respective states, year around heating, plumbing and sanitary facilities and equipment of respective premises, whereabouts of lares and penates such as heirlooms, photographs, paintings, mementoes, etc.

21. See discussion *infra* under "Powers of Appointment" at p. 715.

of the township or city and inquire whether any local laws require or permit any other action to be taken.

If at all feasible Mr. Smith should sell the old homestead in New York, and his stays in New York should not be of too long duration. If the time spent in Connecticut remains the same before and after the change, even if absence from New York is accomplished by trips to other places, it will tend to negative a change of domicile.²² Since Connecticut was formerly the summer home, it is important to be in Connecticut for part of the winter to emphasize the permanence of the change. In this connection a careful diary of time spent in various places should be kept as a record. Furthermore, insofar as New York income tax is concerned, it is important to file a non-resident return, and, if possible, to have the entire question of change of domicile determined in Mr. Smith's lifetime for income tax purposes. Although the income tax determination will not finally settle the ultimate question of death tax, it may be very important in the resolution of that question. Since Mr. Smith has presumably been filing resident New York income tax returns up to the time of the change, it is quite likely that an investigation or inquiry will follow his filing of a non-resident return.

To the extent possible Mr. Smith should keep as much of his property as he can in Connecticut. Of course, as between New York and Connecticut it may not be practical to remove banking and brokerage accounts. Although New York does not tax the intangible property of a non-resident, nevertheless, New York or any other State of original domicile might be in a better position to assert a claim of domicile when substantial property is in the state. The question of possible enforcement of death tax claims in other states is hereinafter discussed,^{22a} but as a practical matter the question of how vigorously a state may claim domicile of a decedent will in many cases be affected by what property of the decedent may be reached within the state.

If Mr. Smith's art collection happens to be loaned to a museum, let us say in Pennsylvania, its permanent location should be clarified. If tangibles are only temporarily in a state they are still taxable by the state of domicile. If permanently located in a non-domiciliary state, that state alone may impose a tax to the exclusion of the state of domicile.²³ Although the question of permanent location will be finally de-

22. See *Matter of Lydig*, 191 App. Div. 117, 121, 180 N. Y. Supp. 843 (1st Dep't 1920) where the court stated: "There was no change in the mode of life of the decedent. He continued to reside in the house which he owned and in which he had stayed for years for the same period of time during each year. He spent no more time at Lenox (Mass.) than he formerly did."

22a. Pp. 710-712 *infra*.

23. *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

terminated by the Supreme Court so that there is final review of the question, with only one tax imposed,²⁴ nevertheless, that is an expensive and arduous way of avoiding a double tax. It would be preferable to have the situation of the paintings clarified so that the question is avoided.

Upon Mr. Smith's death it is of the utmost importance that a careful study of the facts be made to determine whether Mr. Smith really succeeded in changing his original domicile. Do not proceed with original probate until you are satisfied where Mr. Smith was finally domiciled. Gather all the facts from members of the family, from all papers, documents, etc. Do not permit any papers of decedent, however insignificant, to be thrown out. Once original probate is issued in one state, it will be difficult to escape a full pledged claim of domicile by that state. When the original probate is obtained the proceeding for ancillary probate will probably result in the claim by the tax authorities in that state that decedent was domiciled there, and consequently original probate belonged in that state. It is at this point that steps should be taken to work out a compromise between the two competing states.

COMPROMISE BETWEEN THE STATES

The theory upon which a compromise should be approached is that Mr. Smith's estate should be subjected to the death tax of only one state and that the purpose of the compromise is to determine the basis of division between the two competing states. The very nature of compromise is such that it is entirely possible that the states will be unable to reach agreement. Some of the compromise statutes make specific provision for arbitration in such a contingency.²⁵ New York has a specific compromise statute in case of conflict as to domicile, with no provision for arbitration, and Connecticut deals with this type of case on the basis of the general power under Connecticut statutes of a compromise by the State tax authorities upon authorization by the Attorney General of the state.²⁶ In such a situation it is essential that the facts be marshaled in a way to lead to compromise. If the facts are such that either of the states feels that the other state's claim is not

24. *City Bank Farmers Trust Co. v. Schnader*, 293 U. S. 112 (1934). In that case one Clarke, a resident of New York, loaned to a museum in Pennsylvania paintings which remained there until his death two years later. Both states claimed the rights to impose a death tax. The court found the paintings permanently located in Pennsylvania and was influenced strongly by the absence of a definite intention ever to return them to New York.

25. See note 11 *supra*.

26. GEN. STAT. OF CONN. § 1391 (Revision, 1930). Cf. *Cooley v. South Carolina*, 204 S. C. 10, 28 S. E. 2d 445 (1943) where the Supreme Court of South Carolina held that it was within the general powers of the Attorney General of the state to compromise a death tax claim with the State of New Jersey.

substantial, it will insist upon a higher proportion of the total state death tax paid with the consequence that a stalemate between the states may result.²⁷ Both states would then assert a claim for death taxes on the basis of being the domiciliary state.

This problem is tied in with the original decision as to where original probate should be attempted. The state chosen for original probate would consider itself entitled to the lion's share of the total tax on the ground that the executors of the estate have indicated as their opinion that that state was the decedent's last domicile. Despite the necessity of making the choice as to original probate, a case for compromise can usually be made out. The more even the balances on the respective claims of the states, the greater the possibility of compromise. Generally one or the other of the states will have a higher tax and the problem then arises as to whether the compromise is to be on the basis of the lower or the higher of the two taxes. The policy of the states generally tends toward adjustment between them on the basis of the higher of the two taxes. The mechanics for effectuating such a division are as follows: Using Mr. Smith's case as an example and assuming that the State of New York and the State of Connecticut are to divide up the estate tax equally between them, a compromise agreement will be entered into between the two states through their respective tax authorities whereby the tax payable to the State of New York (assuming New York is the place of original probate) would be determined, and 50% thereof would be payable, and the tax payable to Connecticut would be determined as if the decedent were a domiciliary of Connecticut and 50% of that tax would be payable. In the event that the tax of one or the other of the states is higher in the particular case, there would be added to the tax paid to each state 50% of the excess tax which would have been payable if the decedent had been domiciled in the state having the higher tax.

In determining the basis for the compromise, real property and tangible personal property permanently located in a particular state, which would in any event have been taxable only by the state of location, will ordinarily be excluded from the scope of the compromise. On the other hand, the terms of the compromise may be so worked out that in effect the compromise will cover all of the decedent's property. In addition, the compromise will likewise afford both states the agreed participation in any excess that may be payable by the estate for state estate or inheritance taxes by reason of the 80% federal credit under

27. The compromise statutes generally empower the state taxing officials to compromise death tax claims only if the tax of other claimant jurisdictions is fixed as part of the compromise.

the basic estate tax of the Revenue Act of 1926.^{27a} Generally, the states provide by law for a catch-all tax whereby if the particular state estate tax does not equal the 80% credit, then an additional tax is imposed up to the amount of the 80% credit.

The procedure for compromise is started by the submission to both state taxing authorities of a statement of facts which may then be the subject of an inquiry or investigation by each of the states. Customarily a joint hearing will then be arranged before the taxing authorities of both states for the presentation of points of argument, and the determination of whether a compromise shall be effected, and the method of division of the total tax between the states involved. If agreement is reached, a formal written agreement will then be prepared embodying the basis of division between the states and the undertaking by each of the states that the tax so divided between them shall constitute the total tax levied on the particular estate. It may be desirable in New York State to have the matter taken up with the Surrogate with a view to his indicating his approval of the reasonableness of the agreement since the power of fixing of the ultimate estate tax liability in New York is vested in the Surrogates.

An important question that may run through the entire problem here under discussion is the value of the property located in or subject to the control of each state, and the extent to which the liability for tax asserted by one state can be enforced against property in the other state. It had formerly been held that the revenue laws and the judgments based thereon of one state would not be given full faith and credit in another state.²⁸ In other words, a judgment obtained in one state for taxes could not be enforced in another state in the same way as a judgment obtained for any other civil liability.²⁹ More recently, the Supreme Court of the United States held in *Milwaukee County v. M. E. White Co.*³⁰ that a judgment in one state for taxes must be given full faith and credit if suit is brought thereon in another state. The question, of course, still remains whether such a judgment was obtained under circumstances constituting due process of law.³¹ For example, if a judgment were obtainable in a particular state for taxes upon a mere notice to the taxpayer without adequate opportunity for a hearing and a right to defend, such a judgment might be denied full faith and credit on the ground that it violated the due process clause.

27a. 44 STAT. 9 (1926); 26 U. S. C. § 301 (b) (1940).

28. *Colorado v. Harbeck*, 232 N. Y. 71, 133 N. E. 357 (1921).

29. *But see* *People v. Coe Mfg. Co.*, 112 N. J. L. 536, 176 A. 198 (1934), *cert. denied*, 293 U. S. 576 (1934).

30. 296 U. S. 268 (1936).

31. *Milliken v. Meyer*, 311 U. S. 457 (1940); *McDonald v. Mabee*, 243 U. S. 90 (1917); *Pennoyer v. Neff*, 95 U. S. 714 (1877).

The methods of obtaining judgments on tax claims of many states may be attacked on this ground because of the frequent absence of any judicial action prior to the actual entry of the judgment.³²

In connection with death taxes where competing jurisdictions claim domicile, this latter feature may affect the applicability of the *White* case. If New York claims that Mr. Smith is domiciled there and Connecticut has obtained a judgment under the death tax laws of Connecticut which it attempts to enforce in New York, the courts of New York might reopen the question of domicile upon which the jurisdiction for the Connecticut judgment was based, on the ground that that question was a jurisdictional fact, the presence or absence of which would determine the validity of the judgment. It is true that the Supreme Court of the United States has refused to review conflicting determinations of domicile by two or more states on the ground that such conflicting determinations as such do not constitute a denial of due process of law.³³ However, it does not follow that a state court might not reopen the question of domicile where a judgment is sought to be enforced whose validity rests upon the finding of domicile by another state court.

Many of the states have enacted statutes permitting the reciprocal enforcement of state inheritance taxes.³⁴ Section 249-t (2) of the New York Tax Law is typical of this type of statute and the text is noted below.³⁵ It will be seen that it applies when the New York Tax

32. See *Colorado v. Harbeck*, 232 N. Y. 71, 133 N. E. 357 (1921) where the New York court in rejecting the enforcement of a death tax by Colorado emphasized that under the Colorado statutes the only judgment obtainable was *in rem* against property located there, which was not done due to the absence of any property in Colorado. Even under *Milwaukee County v. M. C. White Co.*, state statutes may not authorize the kind of judgment entitled to full faith and credit in another state.

33. See note 4 *supra*.

34. States having such statutes are California, Colorado, Connecticut, Delaware, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Virginia and Washington.

35. § 249-t. (2) "Whenever the tax commission is cited on the issuance of original letters testamentary or of administration in the estate of a decedent not domiciled in this state, as in the preceding subdivision provided, it shall immediately notify the proper taxing authorities of the state in which such decedent was domiciled of the fact of the filing of the petition and of the decedent's property and the value thereof, as set forth in the petition. No executor or administrator of the estate of such a decedent to whom original letters have been issued pursuant to a petition filed subsequently to the time this subdivision takes effect shall be entitled to a final accounting or discharge unless he shall have filed with the surrogate proof that all death taxes, together with interest or penalties thereon, due to the state of domicile of such decedent, or to any political subdivision thereof, have been paid or secured, or a consent by the proper taxing authorities of the state of domicile to such final accounting or discharge. It shall be the duty of the tax commission to co-operate with the domiciliary taxing authorities and to furnish them with such information as may be requested with respect to any such estate. The official or body charged with the administration of the death tax laws of the domiciliary state shall be deemed a party interested in such estate to the extent that he or it may petition for an accounting therein if the death taxes, interest and penalties due such domiciliary state, or a political subdivision thereof, are not paid or secured, and upon such petition the surrogate may decree such accounting and may

Commission is cited on the issuance of original letters testamentary or of administration in the estate of a decedent not domiciled in that state. In which event, the Tax Commission is required to notify the taxing authorities of the state of domicile, and no executor or administrator of such an estate to whom original letters have been issued shall be entitled to a final accounting or a discharge unless he shows he has paid all taxes due to the state of domicile, or obtains consent by the state of domicile to a final accounting or discharge. The Tax Commission is enjoined to co-operate with the domiciliary taxing authorities, and the domiciliary authorities are given a right to come into the New York courts to require an accounting and payment of the tax. The law gives this privilege only to those states which give the same privilege to New York.

But it seems clear from the foregoing that in a case where a state itself claims the domicile of a decedent, the taxing authorities of another state would not be accorded the privileges extended by this section. In other words, this section would apparently have no application where there is a conflict between states on the question of domicile. New York State, for example, which by its courts has asserted that a decedent is domiciled within that state, would obviously not order an executor or administrator to pay the death taxes of another state based upon that state's claim of domicile which is in conflict with the New York claim. For this reason careful consideration should be given to the value of property within the particular states; and the possibility of enforcement of the death taxes should not be lost sight of in working out a compromise.

INTER VIVOS TRUSTS

Multiple death taxation affects inter vivos trusts in two types of situations. The first involves the death of the settlor of a trust where there has been retained such an interest in the trust as brings into play the death tax statutes of the claimant states. The second involves

decree the remission to a fiduciary appointed by the domiciliary probate court of so much of the personal property of such estate as may be necessary to insure the payment to the state of domicile, or political subdivision thereof, of the amount of death taxes, interest and penalties due to such state or political subdivision. The provisions of this subdivision shall apply to the estate of a decedent not domiciled in this state only if the laws of the state of his domicile contain a provision, of any nature or however expressed, whereby this state is given reasonable assurance of the collection of its death taxes, interest and penalties, from the estates of decedents dying domiciled in this state in cases where the estates of such decedents are being administered by the probate court of such other state by virtue of original letters testamentary or of administration or if the state in which such decedent was domiciled does not grant letters testamentary or of administration in estates of nonresidents until after letters have been issued by the state of domicile. The provisions of this subdivision shall be liberally construed in order to insure that the state of domicile of a decedent shall receive any death taxes, together with interest and penalties thereon, due to it from such decedent's estate. For the purposes of this subdivision the word 'state' shall be construed to include only the states of the United States, any territory of the United States, the District of Columbia, and the Dominion of Canada or any province thereof."

the transmission by death of an interest in trust of one not the settlor which interest is descendible and passes on death.

In canvassing the possible burden of multiple death taxation, a study must be made of the anticipated death tax treatment of possible competing states, of trusts already created. An existing trust which may have been created on the assumption of freedom from tax in the then domiciliary state may be found subject to death tax under the law of the newly acquired domicile. This may destroy all tax advantage expected from the change of domicile and perhaps impose an increased tax burden. Assume for example that our friend Mr. Smith created a trust in New York in 1930 with a life estate reserved. Under New York law this trust would be free of New York estate tax since it was created before this type of trust was included within the New York estate tax law.³⁶ Upon change of domicile to Connecticut, the same trust would be subject to Connecticut estate tax since such trusts are taxable in Connecticut if created after 1915. This result has been reached in Connecticut even though, at the date of the creation of the trust, Connecticut had no connection with the trust in any way, and under New York law which governed, the trust was considered completed in every respect to come without the scope of the New York estate tax law.³⁷

Where a settlor creates a trust and reserves some control such as a power of revocation, amendment, modification or appointment, a change of domicile after the creation of the trust, but prior to the settlor's death, would simply substitute the new domicile in the position of the old. Where, however, a life estate has been reserved or some other interest deemed to be retention of possession or enjoyment until death, it may be argued that the state of new domicile has no connection with the trust located in another state, and the old domicile is out of the picture at the date of death. This type of trust is usually subjected to estate tax to prevent avoidance of tax on interests which would ordinarily pass by death and be subjected to tax. The new domicile had no standing to assert the right to prevent such avoidance at the date of the creation of the trust, and it is questionable whether any jurisdiction to tax may properly be asserted under these conditions. The courts of New Jersey have refused to impose any tax on these facts,³⁸ while as indicated above, the Connecticut courts have upheld the right to tax.³⁹ The Supreme Court of the United States has never directly passed upon this question.

36. NEW YORK TAX LAW § 249-v(3).

37. *Hackett v. Bankers Trust Co.*, 122 Conn. 107, 186 Atl. 484 (1936).

38. *Maclurkan v. Bugbee*, 106 N. J. L. 192, 150 Atl. 443 (1930).

39. See note 37 *supra*.

In *Curry v. McCannless*,⁴⁰ the Supreme Court allowed death taxation by both Alabama and Tennessee when a decedent domiciled in Tennessee created an inter vivos trust with a trustee in Alabama, and exercised by will a reserved power of appointment over the trust property. In *Graves v. Elliott*,⁴¹ the Supreme Court held that New York could tax the relinquishment at death by a domiciliary of the state, of a power to revoke a trust of intangibles held by a trustee in another state. These cases dealt with powers of appointment or revocation which in effect suspended final disposition of the property subject to some controlling action of the settlor.

Although the scope of jurisdiction to impose death taxes has been extended to a point where very few constitutional restraints persist, this question is not entirely free from doubt. The point may be emphasized in a case involving an alleged transfer in contemplation of death where even the theoretical continuance of the settlor's interest in the property until death is completely absent, and the basis of jurisdiction is limited to a transfer and a state of mind at a point in time to which the state of the new domicile is entirely unrelated. On the other hand a contemplation of death case may be treated as unique in this particular, while the reservation of a life estate may be assimilated to the case of a power of appointment or revocation.

Assuming that the new domicile may tax a trust previously created, it may be important to remove a trust previously created to a new domicile to avoid a claim of tax by the state of locus of the trust. Statutes and tax policy may change, and when a trust is created, as much flexibility as possible of movement of the trust should be provided for. It is desirable to insert a clause in the trust instrument permitting the trustees to remove the trust to any state of their choice, thereby rendering free the movement of the trust at a time when statutory or other changes might make removal desirable.⁴²

As pointed out above, multiple death taxation may arise with respect to the ownership by a decedent of a descendible interest in trust created by someone other than the decedent. Such an interest may be an estate for the life of another, or for a definite period of years, or a vested remainder. In the light of the present liberal approach of the Supreme Court it is likely that the state wherein the trust property is

40. 307 U. S. 357 (1939).

41. 307 U. S. 383 (1939).

42. Statutes expressly permitting removal of trust property to another state with court permission would appear impliedly to prohibit removal without such consent. See *e. g.* ALA. CODE, tit. 58, §§ 60-62 (1940); N. J. REV. STAT. tit. 3, c. 24 (1937); N. C. CODE ANN. §§ 4020-4022 (Michie, 1939); Act of 1917, June 7, P. L. 447 § 58(g), PA. STAT. ANNOT. tit. 20, §§ 999-1001, 3174 (Purdon, 1936); VA. CODE ANN. §§ 5349, 5351-5356 (Michie & Sublett, 1936); W. VA. CODE ANN. §§ 4266-4271 (Michie & Sublett, 1936); WIS. STAT. § 231.29 (1939).

located will be permitted to levy a death tax on such an interest. Probably the exemption of intangibles of non-residents from death taxation would exclude such an interest in a trust of intangibles. If the trust consists of real property or tangible property permanently located in a state, it would seem that only the state of location of the property may impose a death tax, even to the exclusion of the state of domicile. The beneficiary of a trust of real property in another state is, in substance, no different from an owner of such property as regards its taxation. However, under the theory that the right of the beneficiary of a trust is *in personam* rather than *in rem*,⁴³ such right may be treated as an intangible for purposes of empowering the state of domicile to tax the interest on death.

POWERS OF APPOINTMENT

The state of domicile of a donee of a power of appointment over property held in trust may impose a death tax upon its exercise by will, although the donor or creator of the power was domiciled in another state where the trust was located.⁴⁴ If such a power is exercisable by deed or will, it may be wise to consider exercising the power by deed *inter vivos* to avoid taxability by the donee's state of domicile. Of course any action with reference to powers of appointment must be checked against possible federal tax liability. Apart from federal estate or gift tax liability, the exercise of the power *inter vivos* will be irrevocable as distinguished from the revocable or ambulatory character of the exercise of a power by will. Despite these considerations, it may at times be an important tax saving to exercise such a power by a deed *inter vivos*.

Where multiple death tax questions may arise, it is frequently important to know whether a power of appointment is in fact being exercised. Most states tax the exercise of a power of appointment. The non-exercise of a power is generally not taxed.⁴⁵ Under the law of a good many states, however, an unconscious exercise of powers of appointment may result from an unqualified residuary bequest.⁴⁶ This is further complicated by the fact that if a residuary bequest were a proper exercise of a power by the law of the donor's domicile, a valid

43. This view was supported by then Dean (later Chief Justice) Stone. *The Nature of the Rights of the Cestui Que Trust*, 17 COL. L. REV. 467 (1917). The more generally accepted view that the beneficial interest in a trust is a right *in rem* was advocated by Professor Scott in *The Nature of the Rights of the Cestui Que Trust*, 17 COL. L. REV. 269 (1917).

44. *Graves v. Schmidlapp*, 315 U. S. 657 (1942).

45. *But see Saltonstall v. Saltonstall*, 276 U. S. 260 (1928), where the taxation of the non-exercise of a power of appointment was upheld as constitutional.

46. See *e. g.* N. Y. PERS. PROP. LAW § 18.

appointment would be effected by such bequest even if the law of the donee's domicile were contrary.⁴⁷ Thus, whether a power has been exercised by a residuary bequest depends upon the law of the donor's domicile.⁴⁸ The safest method in this situation is to declare specifically in the donee's will that it is not intended to exercise any powers, thus indicating the necessary contrary intent needed to negative the presumption of exercise from an unqualified residuary bequest. Check the law of both the states of domicile of donor and donee before drawing a donee's will so that there will be compliance with any variations in this rule that either state may have adopted.

INTERNATIONAL DOUBLE TAXATION

The widespread ownership of foreign securities in the United States has given rise to serious burdens of double death taxation. In the field of estate planning, the ownership of assets which may be subjected to foreign death taxes requires careful attention. The first step is to obtain competent advice not only on the foreign death tax statutes and their incidence, but also on any foreign law which may vary tax benefits expected to flow from particular forms of transfer by will or inter vivos disposition. Where the foreign property is located for purposes of the imposition of foreign death tax will be based on foreign law which may be founded on theories of tax jurisdiction entirely different from our own.

More recently international conventions for remedying the double taxation evil have been in the process of negotiation. The Canadian Death Tax Convention has already gone into effect and the British Death Tax Convention has likewise received final approval.⁴⁹ These treaties will, within their scope, eliminate to a great extent double death taxation with respect to these countries. Treaties with other countries are in process of negotiation.⁵⁰

47. *Old Colony Trust Co. v. Comm'r*, 73 F. 2d 970 (C. C. A. 1st 1934); *Matter of Burling*, 148 Misc. 835, 266 N. Y. Supp. 482 (Surr. Ct., 1933); *Matter of New York Life Ins. & Tr. Co.*, 209 N. Y. 585, 103 N. E. 315 (1913); *Sewall v. Wilmer*, 132 Mass. 131 (1882).

48. See RESTATEMENT, CONFLICT OF LAWS, § 288 (1934).

49. The Canadian Convention was proclaimed by President Roosevelt on March 6, 1945, effective as of June 14, 1941. For the text see 3 P-H FED. TAX SERV. ¶ 24858-A (1947). The British Convention was proclaimed by President Truman on July 30, 1946, effective as of January 1, 1945. For the text see 3 P-H FED. TAX SERV. ¶ 24860 (1947). The Tax Convention with France is now awaiting ratification by the Senate. For text see 5 P-H FED. TAX SERV. ¶ 7608I (1947).

50. An estate tax convention is in process of negotiation with the Netherlands, DEPT. OF STATE PRESS RELEASE No. 684, Sept. 30, 1946, 5 P-H FED. TAX SERV. ¶ 70829 (1946); with Denmark, DEPT. OF STATE PRESS RELEASE No. III, Feb. II, 1947, 5 P-H FED. TAX SERV. ¶ 70390 (1947). Negotiations on an estate tax convention are also pending with the Philippines. DEPT. OF STATE PRESS RELEASE No. 845, Nov. 27, 1945, 5 P-H FED. TAX SERV. ¶ 7091I (1946).

The Canadian Convention which is now in operation has application only to the Dominion Succession Tax but does not apply to the death taxes of the Provinces of Canada. Holdings of Canadian securities by American investors total many billions of dollars and Provincial taxes continue to present a double death tax problem necessitating some understanding of what limitations the Canadian courts have imposed on the taxation of American-held Canadian securities. Where a security in a Canadian corporation can be transferred only at a transfer office or registry in one of the provinces, that province may impose its death tax.⁵¹ Where a company has more than one transfer registry, one of which is located in one of the states of the United States, it has been recently held that no Canadian Provincial tax can be levied on the transfer of such a security even where the decedent died domiciled in a state other than where the transfer registry is located and where the certificate of stock was located. This is the effect of a series of recent cases⁵² which departed from an earlier viewpoint that such shares have their situs for taxation in the province where the principal registry office is located unless the shares were located in the state of the branch registry office.⁵³ The Judicial Committee of the Privy Council has finally settled this question by affirming the principle of the most recent cases.⁵⁴

It is important to note that the situs of bearer bonds and securities under Canadian law is determined by the location of the instruments at death,⁵⁵ and shares held in a broker's name and endorsed in blank are considered bearer securities and free of tax unless located in the Province.⁵⁶ Thus keeping Canadian securities located in the United States in the name of a nominee, endorsed in blank, would seem to be a means of avoiding provincial death taxes, since jurisdiction of the Province to tax would be lacking.

51. *Brassard v. Smith*, [1925] 1 D. L. R. 528. Cf. *Bliss v. Bliss*, 221 Mass. 201, 109 N. E. 148 (1915).

52. *The King v. Globe Indemnity Co.*, [1945] 2 D. L. R. 25; *Maxwell v. The King*, [1945] 2 D. L. R. 35; *Re Aberdeen*, [1945] 2 D. L. R. 37; *Re Blonde*, Ct. of App. for Ont., Can. Succession Duties Rep. ¶ 5041. The *Aberdeen* and *Blonde* cases were affirmed by the Judicial Committee of the Privy Council on Oct. 10, 1946, Can. Succession Duties Rep. ¶ 5106. Each of these cases dealt with an Ontario company or one having a head office in Ontario. Under date of April 24, 1946, the Treasurer of Ontario announced that where there is a registry in the United States, shares in Canadian companies are not taxable if the owner is a United States resident and the certificates are in the United States.

53. *E. g. Rice v. The King*, [1939] 4 D. L. R. 701; *Ivey v. The King*, [1939] 1 D. L. R. 631. Cf. *Williams v. The King*, [1944] 3 D. L. R. 225.

54. See note 52 *supra*.

55. *Winans v. Attorney General*, [1910] A. C. 27.

56. *Stern v. The Queen*, L. R. 1896 Q. B. 211. See Fairbanks, *Shares of a Non-Resident Decedent—A Canadian View*, 22 TAX MAG. 103 (1944), to the effect that the *Stern* case is generally followed in Canada. The special treatment accorded "street certificates" is referred to in *Re Blonde* and *Re Aberdeen*, decided by the Judicial Committee of the Privy Council on Oct. 10, 1946, Can. Succession Duties Rep. ¶ 5106.

CONCLUSION

The problems of multiple state death taxation may some day be solved by more effective means than those evolved up to this time by the governmental authorities involved. Federal intervention has been proposed by grants-in-aid to states which do not impose death taxes,⁵⁷ or by allowing the 80% state death tax credit under the Federal Estate Tax Law only to estates of taxpayers in states imposing death taxes on intangibles in accordance with Federal stipulations specifying the scope of such taxation.⁵⁸ Expansion of the scope of compromise statutes and arbitration procedures between the states may help to solve the double domicile problem.⁵⁹ Pending some more effective solution, an alertness to the points outlined in this article may help to overcome some of the serious burdens of multiple state death taxation.

57. See Hellerstein and Hennefeld, *State Taxation in a National Economy*, 54 HARV. L. REV. 949, 973-975 (1941). This would in effect mean that the Federal Government would collect higher taxes and share with the states on the basis of factors such as population, wealth, collections within a state, etc. See also Rodell, *A Primer on Interstate Taxation*, 44 YALE L. J. 1166, 1181-1185 (1935). Cf. TWENTIETH CENTURY FUND, INC., FACING THE TAX-PROBLEM 371-373 (1937).

58. See Hellerstein and Hennefeld, *supra* note 51, at 971. See also Oakes, *Development of American State Death Taxes*, 26 IOWA L. REV. 451, 452 (1940); Note, *Removal of Due Process Prohibitions against Multiple State Taxation of Intangibles*, 51 YALE L. J. 1398, 1405 (1942).

59. See notes 11 and 12 *supra* and the discussion under *Compromise Between the States*, *supra* pp. 708 *et seq.* Other suggestions with respect to intangibles of non-residents have been flat rates on the intangibles of non-residents (see Brady, *Death Taxes—Flat Rates and Reciprocity*, 14 A. B. A. J. 309 (1928)), uniform reciprocal exemption statutes (see UNIFORM RECIPROCAL TRANSFER TAX ACT, 9 UNIFORM LAWS ANNOTATED 619 (1942)), and credits by the state of domicile for taxes paid to other states (see former N. Y. TAX LAW § 249-0 which was repealed by N. Y. Laws 1940, c. 138).