

## OPINION NO. 75-052

## Syllabus:

A transfer of real property pursuant to a revocable inter vivos trust reserving to the settlor a life interest would be exempt from taxation pursuant to R.C. 319.54(F)(3) when the beneficiary is a charitable or public purpose organization under subsection (f); when the beneficiary is the child, spouse, or parent of the settlor under subsection (d); or when the beneficiary is the trustee for a minor child under subsection (o).

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio  
By: William J. Brown, Attorney General, August 5, 1975

I have before me your request for my opinion on the following questions concerning the County Auditor's duty to collect conveyance and transfer fees pursuant to R.C. 319.54(F):

"(1) If real property were used to establish or fund a revocable inter vivos trust reserving to the settlor a life interest and naming as beneficiaries charitable or public purpose organizations, would the transfer be exempt from taxation under R.C. 319.54(F)(3)?

"(2) If real property were transferred in trust reserving a life interest in the settlor and naming as beneficiaries the children, spouse, or parent of the settlor, or to a trustee for minor children, would the transfer be exempt from taxation under the provisions of R.C. 319.54(F)(3)(d) or (o)?

"(3) If your answer to the above is no, how would a taxable value be determined in each case?

"(4) If OAG 70-124 established the taxability because the gift is a vested interest subject to defeasance, how is the value of such interest determined?

Your first two questions ask whether certain transfers of real property made under revocable inter vivos trust agreements which reserve a life interest to the settlor are exempt from taxation under R.C. 319.54(F)(3).

As pointed out in the second branch of the syllabus in National Tube Co. v. Glander, 157 Ohio St. 407 (1952):

"2. Statutes relating to exemption or exception from taxation are to be strictly construed, and one claiming such exemption or exception must affirmatively establish his right thereto."

Thus, the statutory exemptions under R.C. 319.54(F)(3) must be strictly, but reasonably, construed in favor of the tax and against exemption. See 1968 Op. Att'y Gen. No. 68-165.

R.C. 319.54(F), as it pertains to your questions, reads as follows:

"(F) The county auditor shall charge and receive fees as follows:

". . .

"(3) For receiving statements of value and administering section 319.202 of the Revised Code, one dollar, or ten cents per hundred dollars for each one hundred dollars of fraction thereof of the value of real property transferred, whichever is greater, except no fee shall be charged when the transfer is made:

". . .

"(d) To evidence a gift between husband and wife, or parent and child or the spouse of either:

". . .

"(m) To or from a person when no consideration is paid or to be paid for the real estate and the transaction is not a gift.

". . .

"(o) To a trustee acting on behalf of minor children of the deceased:

". . .

"(r) To or from an organization exempt from federal income taxation under section 501(c)(3) of the 'Internal Revenue Code of 1954,' 68A State. 3, 26 U.S.C. 1, as now or hereafter amended, provided such transfer is without consideration and is in furtherance of the charitable or public purposes of such organization."

In order to ascertain the nature of the transfers described in your questions, it is necessary to determine whether taxability under R.C. 319.54(F)(3) arises when the legal interest is transferred to the trustee or when the equitable interest is established in the beneficiary.

In 1970 Op. Att'y Gen. No. 70-124, my predecessor was asked whether a conveyance from a settlor to a trustee under a revocable inter vivos trust was exempt from the conveyance fee or transfer tax under R.C. 319.54(F)(3)(m). In making his determination, my predecessor relied in part on Smyth v. Cleveland Trust Co., 172 Ohio St. 489 (1961), where the court stated at 502:

"[T]here is created, at the instant of creation of the trust a vested equitable interest in the remaindermen subject to defeasance in whole or in part by the exercise of the power to revoke or modify. First National Bank of Cincinnati, Exr., v. Tenney, 165 Ohio St. 513, 138 U.S. (2d), 15.

He also referred to the First National Bank of Cincinnati, et al.,

v. Tenney, 165 Ohio St. 513 (1956), wherein the second paragraph of the syllabus reads:

"2. An inter vivos trust which reserves to the trustee the income for life and an absolute power to revoke during his lifetime, with a remainder over at his death, creates in the remainderman a vested interest subject to defeasance by the exercise of the power to revoke."

Since it was established that a vested equitable interest is created in the remainderman at the instant of the creation of the trust, no affirmative showing could be made that a transaction in which real estate is transferred from a settlor to a trustee under a revocable trust is other than a gift to the remainderman. Thus, it was found in Op. No. 70-124, supra, that there was no exemption from the conveyance fee or transfer tax under R.C. 319.54(F)(3)(m).

In Op. No. 68-165, supra, my predecessor found in the third branch of the syllabus:

"3. A transfer of real estate by a settlor to a trustee which, upon termination of the trust, is to be distributed to the settlor's lineal descendants per stirpes would not be exempt from the transfer fee and transfer tax under either subparagraph (D), (m) or (o) of division (F)(3) of Section 319.54, Revised Code."

As the trust was to be distributed, upon termination thereof, to the settlor's living descendants and not limited to the settlor's children or their spouses, the gift was not exempt from subparagraph (d). Again, however, my predecessor looked to the interest of the beneficiaries of the trust rather than the trustee to ascertain whether the transfer was exempt under R.C. 319.54(F)(3).

The determination of whether particular transfers made under revocable trust agreements were exempt pursuant to R.C. 319.54(F)(3) in Opinion No. 70-124, supra, and Opinion No. 68-165, supra, was made based upon an examination of the vested equitable interest in the remainderman rather than the legal interest in the trustee. The legal interest has no value; thus, the actual transfer for taxing purposes occurs when the equitable interest vests in the remainderman. In the instant case, this is when the inter vivos trust, which reserves to the settlor the income for life and an absolute power to revoke during his lifetime, is established. Otherwise the transfer for taxing purposes is based on the legal interest which would mean that every transfer made under a revocable trust agreement would be exempt under R.C. 319.54(F)(3)(m) because the transfer of the legal title to the trustee would be for no consideration and would not be a gift.

Thus, a transfer of real property pursuant to a revocable inter vivos trust reserving to the settlor a life interest would be exempt from taxation pursuant to R.C. 319.54(F)(3) when the beneficiary is a charitable or public purpose organization under subsection (r); is the child, spouse, or parent of the settlor under subsection (d); or is the trustee for a minor child under subsection (o).

In light of my affirmative response to your first two questions, it is unnecessary to consider questions three and four.

Therefore, it is my opinion and you are so advised that:

A transfer of real property pursuant to a revocable inter vivos trust reserving to the settlor a life interest would be exempt from taxation pursuant to R.C. 319.51(F)(3) when the beneficiary is a charitable or public purpose organization under subsection (f); when the beneficiary is the child, spouse, or parent of the settlor under subsection (g); or when the beneficiary is the trustee for a minor child under subsection (o).