

**OPINION NO. 70-124****Syllabus:**

1. A transfer of real estate from a settlor to a trustee under a revocable inter vivos trust is not exempt from the conveyance fee or transfer tax under Section 319.54 (F) (3) (m), Revised Code.

2. A county auditor has the inherent authority to inquire into the facts and circumstances surrounding any and all transfers or conveyances claimed to be exempt under division (F) (3) of Section 319.54, Revised Code, in order to determine if the one claiming the exemption has affirmatively established his right to the exemption.

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**To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio**  
**By: Paul W. Brown, Attorney General, September 9, 1970**

I have before me your request for my opinion, raising two questions regarding Section 319.54 (F), Revised Code:

"1. Is a conveyance from a Settlor to a Trustee under a revocable inter vivos trust exempt from the conveyance fee or transfer tax under Revised Code, §319.54 (F) (3) (m)?

"2. Does the County Auditor have the duty to inspect any and all documents in connection with the submission of a conveyance for determination of whether the transaction is subject to the conveyance fee?"

In connection with your first question, you also submitted a portion of a typical trust instrument set forth below:

"RIGHTS RESERVED BY THE CREATOR OF THE TRUST

A. I reserve the right at any time during my lifetime, by a writing signed by me and delivered to the Trustees, to withdraw from the operation of this Agreement any part or all of the trust property; to change the beneficiaries hereunder, their shares and the plan of distribution to each; to bring additional property under the terms hereof by my Last Will and Testament or otherwise; and to revoke this Agreement.

B. I also reserve the right during my lifetime to amend or modify this Agreement in any manner by an Agreement in writing executed by me and the Trustees.'"

You pointed out that no consideration was paid or to be paid for the transfer of the real estate and you indicated that your main concern was whether there was a gift arising from the transactions as per Section 319.54 (F) (3) (m), Revised Code, quoted below:

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

"\* \* \* \* \*

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

"\* \* \* \* \*

"(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;

"\* \* \* \* \*

Opinion No. 165, Opinions of the Attorney General for 1968, dealing with a transfer of real estate by a settlor to a trustee, pointed out in paragraph 3 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."

The question is whether this policy of nonexemption extends to cover transfers made under revocable trust agreements.

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

"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."

It does not appear to me that such an affirmative showing can be made in this case.

I refer you 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 trustor 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."

The court again treated this subject in Adams v. Fleck, 171 Ohio St. 451 (1961), when it said at page 456:

"\* \* \* there may in effect be a gift to a donee if a valid trust for the benefit of that donee is established, even if the donor who is the settlor of such trust, retains a life interest in and almost complete dominion and control over the property given. See annotations, 32 A. L. R. (2d), 1270, and 164 A. L. R., 881."

Therefore, it appears that a gift does arise from a revocable inter vivos trust and the court reaffirmed that this is the case in Smyth v. Cleveland Trust Co., 172 Ohio St. 489 (1961), at page 502:

"\* \* \* there 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 N.E. (2d), 15."

Therefore, no affirmative showing can be made that a transaction in which real estate is transferred from a settlor to a trustee under a revocable trust is not a gift and consequently exempt from the conveyance fee or transfer tax by virtue of Section 319.54 (F) (3) (m), supra.

Regarding your second question concerning the duties of the county auditor, I again refer you to Opinion No. 165, supra.

"In regard to the collection or exemption of the fee and the tax, the county auditor and his deputies have the inherent authority, in administering the fee and tax, to inquire into the facts and circumstances surrounding any and all transfers or conveyances of real estate which are claimed to be exempt so as to determine if the one claiming the exemption has af-

firmatively established his right to the exemption claimed. \* \* \*

I still regard this as the proper approach and, accordingly, conclude that a county auditor may inspect any and all documents in connection with the submission of a conveyance to determine whether or not the transfer is entitled to exemption by virtue of Section 319.54 (F) (3) (m), supra.

Therefore, it is my opinion and you are hereby advised:

1. A transfer of real estate from a settlor to a trustee under a revocable inter vivos trust is not exempt from the conveyance fee or transfer tax under Section 319.54 (F) (3) (m), Revised Code.

2. A county auditor has the inherent authority to inquire into the facts and circumstances surrounding any and all transfers or conveyances claimed to be exempt under division (F) (3) of Section 319.54, Revised Code, in order to determine if the one claiming the exemption has affirmatively established his right to the exemption.