1675.

TAX AND TAXATION—INHERITANCE TAXATION OF INSURANCE TRUSTS DISCUSSED.

SYLLABUS:

Where by the terms of a life insurance policy the proceeds thereof are payable on the death of the insured to a designated person as trustee who, under the terms of a trust agreement between said trustee and the insured, or on written instructions from the insured, is required to collect the proceeds of the insurance policy and pay over the same to a designated beneficiary, the transfer of the proceeds of the insurance policy by such trustee to the beneficiary designated in the trust agreement or instructions, is taxable under the inheritance tax laws of this state as a transfer intended to take effect in possession or enjoyment at or after the death of such insured person, within the provisions of Section 5332, General Code.

COLUMBUS, OHIO, March 26, 1930.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of a communication from you which reads as follows:

> "The Attorney General of Ohio in 1921 rendered an opinion to the effect that proceeds of an insurance policy are exempt from taxes when the same are payable to a trust company under instructions to such company to pay any inheritance taxes that may be assessed against the estate, any balance over to be paid to certain distributees. See 1921 Attorney General's Opinions, Vol. 1, 564.
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> The tax commission has had its attention called to several cases involving the inheritance taxation of insurance trusts. The usual arrangement is for the insured to deposit insurance policies on his life with a trustee pursuant to a trust agreement providing that the trust company shall collect the proceeds of the policies at death, and said trust company is charged to administer the funds so collected in accordance with the trust agreement usually by paying the income and principal of said funds to certain beneficiaries. It has come to our attention that the taxability of insurance trusts has been passed squarely upon by the Supreme Court of New Jersey in the case of *Fagan* vs. *Bugbee,* decided December 6, 1928, in which case it is held that such a transfer is taxable as one intended to take effect in possession or enjoyment at or after death. The Attorney General of Michigan has reached a like conclusion in several opinions. See Opinions of Attorney General, State of Michigan, March 20, 1925, May 7, 1924, and June 18, 1924. A reference to said opinions may be found in Commerce Clearing House, Vol. 2, page 7927-7928.
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> In view of the changing authorities the Commission requests your advice as to whether or not we should continue to follow the opinion of the Attorney General, Vol. I, 564, 1921."

The question here presented calls for a consideration of the pertinent provisions of Section 5332, General Code, which provides in part as follows:

> "A tax is hereby levied upon the succession to any property passing,

in trust or otherwise, to or for the use of a person, institution or corporation, in the following cases:

1. When the succession is by will or by the intestate laws of this state from a person who was a resident of this state at the time of his death.

2. When the succession is by will or by the intestate laws of this state or another state or country, to property within this state, from a person who was not a resident of this state at the time of his death.

3. When the succession is to property from a resident, or to property within this state from a non-resident, by deed, grant, sale, assignment or gift, made without a valuable consideration substantially equivalent in money or money's worth to the full value of such property:

(a) In contemplation of the death of the grantor, vendor, assignor, or donor, or

(b) Intended to take effect in possession or enjoyment at or after such death.

* * * * * * * * * * * ."

In the former opinion of this office referred to in your communication, which was rendered after the enactment of the above quoted statutory provisions, it was held as set out in the syllabus of said opinion that:

"Where a decedent takes out an insurance policy payable to a trustee, with written instructions to pay any inheritance taxes that may be assessed against her estate so as to leave the several successions undiminished for her beneficiaries and to pay any balance to the beneficiaries themselves, no taxable succession under the inheritance tax law arises in respect to the proceeds of such policy."

Addressing himself to the question to which the above quoted ruling was responsive, the then Attorney General in the opinion above referred to said:

"In the case stated by the commission the beneficial interests in the proceeds of the policy vest on the death of the decedent in designated persons. They do not become a part of the estate of the decedent in any sense. To be sure, those who are the beneficiaries of the testatrix's bounty, or who are to profit under the intestate laws by her death, are the identical persons who are to reap the benefits of the insurance policy; and moreover, these benefits have direct relation to the imposition of the inheritance tax. Nevertheless, the persons in whom these interests arise acquire them by contract, and not as distributees of the estate of the decedent in any sense. The property rights which they enjoy under the insurance policy do not pass to them from her by will, by intestacy or by gift."

In the consideration of the question presented in your communication to me, which question was likewise presented to my predecessor as the subject of the former opinion of this office above noted, it may be conceded that under statutory provisions such as are here under consideration, the proceeds of a life insurance policy payable to a person therein designated as beneficiary on the death of the insured, are not subject to an inheritance tax. *Tayler* vs. *Hitchcock,* 226 Mass. 306; *Tax Commissioners* vs. *Halliday,* 150 Ind. 216; In re Bullen's Estate, 143 Wis. 512. The reason for this rule is that in such case the proceeds of the

insurance policy do not form any part of the estate of the decedent, and the insurance policy is a contract and not a gift within the meaning of the statute providing for the imposition of inheritance taxes. On the other hand, it is equally clear that bequests of distributive shares of the estate of a deceased person which are otherwise subject to taxation under the inheritance tax laws of the state, are not exempt because they consist in whole or in part of the proceeds of a life insurance policy taken out by the decedent upon his own life and made payable to his estate. In such case, the property comes to the beneficiary by will or by the intestate laws of the state, and the transfer to the beneficiary is within the provisions of the inheritance tax law.

In the case presented by your communication, the transfer of the proceeds of the insurance policy is vested in some particular person through the medium of a trust created by the insured, and the proceeds of the insurance policy pass to such person not by reason of the fact that he is designated as the beneficiary in the insurance policy, but by reason of his designation as beneficiary in a separate trust agreement which provides that the transfer to such beneficiary shall be effective on the death of the insured. If in this case the person referred to as the insured, instead of taking out a policy of insurance on his own life payable to the trustee, had delivered money or other property to the trustee with instructions to pay the same over to a designated beneficiary upon the death of the donor of the trust, there could be no question but that the transfer of such money or property to the designated beneficiary on the death of the donor would be taxable as a gift intended to take effect in possession or enjoyment at or after the death of such donor, as provided for in the inheritance statute above quoted. *Keeney* vs. *New York,* 222 U. S. 525; In the matter of Keeney, 194 N. Y. 281; *New England Trust Co.* vs. *Abbott,* 205 Mass. 279. It is submitted that upon principle the rule is the same where the subject of the trust is the proceeds of a policy of insurance on the life of the donor of the trust, and which is payable by the trustee on the death of the donor and insured to a person designated as the beneficiary in the trust agreement. In the case of *Eagan* vs. *Bugbee,* decided by the Supreme Court of the State of New Jersey and reported in 143 Atl. 807, it was held that a transfer of property, formerly consisting of the proceeds of a life insurance policy, by a trust agreement intended to take effect at or after the death of the donor, constituted a taxable transfer within the meaning of a statute of that state which, among other things, imposed a tax upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations "when the transfer is of property made by a resident by deed, grant, bargain, sale or gift, intended to take effect in possession or enjoyment at or after such death". The court in its opinion in this case said:

> "In the first place, the tax is imposed, not upon the transfer from the decedent to his trustee, but to his ultimate beneficiary. *Carter* vs. *Bugbee,* 91 N. J. Law, 438, 103 A. 818, affirmed 92 N. J. Law, 390, 392, 100 A. 412. The only interest which the Ironbound Trust Company had in the policies of insurance was as a trustee. This company acquired the bare legal title. The beneficial title is in the decedent's widow and his three children. It is the transfers to them which have been made the subject of a tax in the present case.
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> It is important, before proceeding further, to set at rest any claim that the state has impaired the obligations of the contracts of insurance, between the company and the decedent or his trustee. The state has laid no tax whatever upon the transfer of the proceeds of the policies, from the in-

surance company to the Ironbound Trust Company, as trustee. The trust company is not complaining of the assessment. The comptroller has not in fact resorted to any of the contracts of insurance for the purpose of levying the tax. There could be no transfer from the insurance company to the trustee such as would come within the provisions of the statute, as under no circumstances could the trust company acquire benefits from such a transfer. It is the trust agreement and not the contracts of insurance that we must look to, in order to determine in what proportions and to whom the beneficial interests in this property pass. And it is this instrument under which the taxes were levied and not the contract of insurance. The proceeds of these policies were acquired by the trust company, as trustee, without any imposition of a tax on the transfer thereof. Under these circumstances, how can it be urged, that the tax in any way has impaired the vested rights of the parties to the insurance contract?

Admittedly, if the proceeds of insurance pass to a beneficiary specifically designated in the policy and the beneficiary takes exclusively under the terms thereof, the transfer is not taxable. *Tyler* vs. *Treasurer,* 226 Mass. 306, 115 N. E. 300, L. R. A. 1917D, 633; In re Parsons, 117 App. Div. 321, 102 N. Y. S. 168.

Where, however, the insurance is payable under the terms of the policy to the estate of the insured, or to the insured's executor, administrator, or legal representative, and then passes under his last will and testament or the intestate laws, the cases are equally clear that the transfer is taxable. Matter of Knoedler, 140 N. Y. 377, 35 N. E. 601; In re Reed, 243 N. Y. 199, 153 N. E. 47, 47 A. L. R. 522; 26 R. C. L. p. 22; Gleason & Otis on Inheritance Taxation (4th Ed.) p. 417.

Under the first class of cases, where the beneficiary is designated in the policy and takes under the terms thereof, the reason for the exemption is obvious. In such cases, the transfer is by contract. The conveyance, in order to be within the act, must be by 'will,' the 'intestate laws,' or by 'deed, grant, bargain, sale or gift' made in contemplation of death or intended to take effect in possession or enjoyment at or after death. The act does not include within the taxable class transfers by 'contract' wherein adequate, valuable consideration is found.

Where, however, as in the second class of cases, the beneficiary acquires title not under a contract of insurance, but by 'will' or the 'intestate laws' the transfer is specifically within the terms of the act, and, since the decision of the New York Court of Appeals in the Matter of Knoedler, 140 N. Y. 377, 35 N. E. 601, there has never been any question of the right of the state to levy a tax under such circumstances.

The beneficiaries in the present case take by deed of trust and not by contract of insurance. It is the nature of the vehicle which conveys the right of the property and not the nature of the property itself which determines the taxability of the transfer; hence we conclude the tax was properly levied."

The decision in the case of *Fagan* vs. *Bugbee,* supra, and the reasoning of the court in its opinion in this case above quoted seem to be conclusive with respect to the question presented in your communication; and by way of specific answer to your communication and the question therein stated, I am of the opinion that under the facts stated by you the transfer of the proceeds of the life insurance policy by the trustee under the trust agreement created by the insured to the

person designated as the beneficiary in the trust agreement, is taxable under the provisions of Section 5332, General Code, as a gift intended to take effect in possession and enjoyment at or after the death of such insured person.

In reaching this conclusion I am not unmindful of the fact that a contrary decision on this question was rendered in the case of in re Haedrich's Estate, 236 N. Y. S., 395, recently decided by the surrogate's Court of Kings County, New York. It may be further conceded that the question is one of some doubt. However, I have no hesitation in advising that the conclusion reached by me on this question and above stated in this opinion should be followed by the taxing officers of the state, until the question is authoritatively decided by the courts of this state; for otherwise no opportunity would be afforded to present the question to the courts for decision.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1676.

APPROVAL, AGREEMENT WITH SOUTHERN OHIO PUBLIC SERVICE COMPANY FOR RELOCATION OF POWER TRANSMISSION LINE WITHIN GRADE ELIMINATION IMPROVEMENT WITH NEW YORK CENTRAL RAILROAD IN LICKING COUNTY, OHIO.

COLUMBUS, OHIO, March 26, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a proposed agreement between the Director of Highways, the Superintendent of Public Works and the Southern Ohio Public Service Company which provides for the relocation of an existing power transmission line of the Southern Ohio Public Service Company within the bounds of an improvement known as the Grade Elimination Project S. H. (I. C. H.) 359 with the New York Central Railroad Company, Licking County, Ohio.

Upon examination of said proposed agreement, I find it to be proper and legal in form, and have endorsed thereon my approval and return it herewith to you.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1677.

APPROVAL, LEASE TO OFFICE ROOMS FOR USE OF THE DEPARTMENT OF INDUSTRIAL RELATIONS AT 240 NORTH HIGH STREET, COLUMBUS, OHIO.

COLUMBUS, OHIO, March 26, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a certain lease, as hereinafter set forth, granting to you, as Superintendent of Public Works, for the use