2831.

TAXES AND TAXATION—WHERE A RESIDENT OF CHICAGO, ILLINOIS, DIED LEAVING LARGE AMOUNT OF INTANGIBLE PERSONAL PROPERTY TO CERTAIN LEGATEE IN HIGHLAND COUNTY, OHIO—WHEN DISTRIBUTION MADE, ASSETS DELIVERED TO AGENT OF SUCH LEGATEE RESIDING IN CHICAGO—LEGATEE RESIDENT IN OHIO DIED AND EXECUTORS IN OHIO SECURED ASSETS IN HANDS OF AGENT AND LISTED SAME FOR TAXATION—QUESTION WHETHER ASSETS SHOULD HAVE BEEN LISTED FOR TAXATION IN OHIO—ALSO WHETHER FIFTY PER CENT PENALTY MAY BE ADDED UNDER SECTION 5398 G. C.

A resident of Chicago, Illinois, died in 1911 *leaving a large amount of intangible personal property to and among certain legatees, one of whom was a resident of Highland county, Ohio. In* 1913 *distribution in kind was made of assets in the hands of the executor in Chicago, consisting of intangibles, namely, stocks, bonds, notes, etc., and cash. Such distribution, however, was not made directly to the legatee in Ohio, but delivery of the securities, cash, etc., was made to an agent of such legatee residing in Chicago. This agent received the securities, etc., with power to collect, invest and reinvest as he might think best and pay the income to the legatee. Subsequently the legatee resident in Ohio died and his executors appointed in Ohio secured the assets from the hands of the agent, and included them in their inventory of the assets of the estate of their testator:*
HELD:

1. *The question as to whether such assets should have been listed for taxation in Ohio by the testator is doubtful; but the county auditor in view of the state of the law is justified in raising the question by proceeding to place the property on the duplicate for the five years preceding for omitted taxes.*

2. *Whether or not the fifty per cent penalty may be added under section* 5398, *General Code, depends upon the good faith of the testator.*

COLUMBUS, OHIO, January 28, 1922.

HON. ROBERT B. MCMULLEN, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—This department acknowledges the receipt of your letter of recent date setting forth in considerable detail facts of which the following statement is an abstract:

> A resident of Chicago, Illinois, died in 1911 leaving a large amount of intangible personal property to and among certain legatees, one of whom was a resident of Highland county, Ohio. In 1913 distribution in kind was made of the assets in the hands of the executor in Chicago, consisting of intangibles, namely, stocks, bonds, notes, etc., and cash. Such distribution, however, was not made directly to the legatee in Ohio, but delivery of the securities, cash, etc., was made to an agent of such legatee residing in Chicago. This agent received the securities, etc., with power to collect, invest and reinvest as he might think best and pay the income to the legatee.
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> Subsequently the legatee resident in Ohio died and his executors appointed in Ohio secured the assets from the hands of the agent, and included them in their inventory of the assets of the estate of their testator. The amount turned over seems to be somewhat less than the amount

originally distributed to the agent, and is in different form, though some of the original securities have apparently been retained intact.

The county auditor now claims authority to assess the assets turned over to the executors in Ohio against the estate of the Ohio decedent for the five years preceding and to charge thereon omitted taxes and penalty, etc.

You ask the following questions:

"(1) Are the assets named in the foregoing statement of facts taxable in Ohio?

(2) If said assets are taxable in Ohio, does the county auditor have the right under section 5398 of the General Code or any other section of the General Code to add the fifty per cent penalty?"

As bearing upon the first question the following statutes of the state should be quoted:

"Sec. 5328. All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. * * *"

The line of demarcation between tangibles and intangibles is very clearly drawn in this section: the tangibles are to be taxed because of their situs in this state; the intangibles are to be taxed because their owners reside in this state. Putting it in another way: the situs of the tangible is that which they naturally have independent of their ownership; while the situs of the intangibles is to be determined by that of the owner, on the maxim that movable things follow the person, which maxim is very clearly declared in section 5328.

However, the same section goes on to provide that:

"Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

It must follow, therefore, that if there is any inconsistency between the detailed provisions of "this title" and the declaratory provisions of the first part of the section as just quoted, the detailed provisions must govern.

This statement brings us to some of these detailed provisions, which may be quoted as follows:

"Sec. 5370. Each person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation, and all moneys deposited subject to his order, check, or draft; all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; and all money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for it, if between the parties, it is considered as security merely. The property of a ward shall be listed by his guardian, of a minor child, idiot, or lunatic having no guardian, by his father, if living, if not, by his mother, if living, and if neither father nor mother is living, by the person having

such property in charge; of a person for whose benefit property is held in trust, by the trustees; of an estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers; of a company, firm, or corporation, by the president or principal accounting officer, partner or agent thereof; and all surplus or undivided profits held by a society for savings or bank having no capital stock, by the president or principal accounting officer."

Observe in this section the separate mention of different representative capacities. The first sentence seems to be limited to "moneys," and imposes upon a representative coming within the category of "agent or attorney" the duty to list such "moneys" controlled by him for another as such agent or attorney. The last sentence provides for guardians, parents of minor children, trustees, executors, administrators, receivers and officers of corporations; it does not mention agents or attorneys generally; so that while this sentence makes it the duty of a guardian, trustee, receiver, etc., to list all the property of his beneficiary, it cannot be extended, in view of the first sentence of the section, so as to impose upon a mere agent the duty of listing any property owned by his principal. There is, of course, a real basis for this distinction between agents and other fiduciaries; an agent possesses authority delegated in fact; some of the other fiduciaries, as guardians, executors, etc., exercise an authority delegated by law. Moreover, an agent does not have title, though he may have possession and control; he is therefore not the owner; while the trustee, for example, has possession, title and legal ownership.

The very first declaration of the section which has been quoted is that

"Each person of full age and sound mind shall list the personal property of which he is the owner,"

and the context makes it clear that he must list this personal property, and indeed all of his intangibles with the possible exception of moneys in the possession of an agent (a special case which must be considered in connection with your question), even though the control and management of the intangibles has been delegated by him to an agent. For example, if both owner and agent resided in Ohio, and bonds, stocks, etc., of the owner were in the possession of the agent for investment and reinvestment, this section would impose the duty of listing upon the owner, and not upon the agent. Sections 5371 and 5372-3 state where "a person required to list property on behalf of others" shall list such property and how it shall be listed. But so far as these sections depend upon section 5370, it is clear that they have no application to an agent, with the possible exception of an agent having moneys "invested, loaned, or otherwise controlled by him."

Section 5372-1 provides as follows:

"Personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise in the possession or control of a person as parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney, or otherwise, on the day preceding the second Monday of April in any year, on account of any person or persons, company, firm, partnership, association or corporation, shall be listed by the person having the possession or control thereof and be entered upon the tax lists and duplicate in the name of such parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney or other person, adding to such name words briefly indicating the capacity in

which such person has possession of or otherwise controls said property, and the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs; but the failure to indicate the capacity of the person in whose name such property is listed or the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs shall not affect the validity of any assessment thereof."

This section seems to extend, and perhaps to modify, section 5370 of the General Code, in that it groups together the "factor, agent, or attorney" with the other kinds of fiduciaries mentioned in section 5370 and to require the same sort of listing of all. The question submitted by you will therefore have to be considered in the light of this section as well as of section 5370. For the purpose of argument it will be assumed for the time that it has the effect of requiring a resident agent of a non-resident principal to list the intangible assets of the principal which are in his possession and subject to his control. In fact, that proposition is supported by abundant authority both in Ohio and elsewhere under statutes of similar import.

Take it, then, that if both agent and principal were residents of Ohio, the duty to list would be regarded as imposed by section 5372-1, and possibly even by another possible interpretation of section 5370 of the General Code, upon the agent. The question still remains as to whether, where the agent is not amenable to the statutes of the state so that sections 5372-1 and 5370 cannot apply to him because he is a non-resident, the first provision of section 5370 applies to the principal and requires him to list property of which he is the owner, even though it be in the possession of a non-resident agent.

In approaching the discussion of this question the distinction above noted as existing between executors, administrators and trustees, on the one hand, and mere agents, on the other, ought to be observed. Therefore, the conclusions arrived at in opinion No. 2500 addressed to the Tax Commission of Ohio, (a copy of which is enclosed herewith) do not necessarily control the present question. That opinion dealt with the question of the taxability of the interest of a beneficiary of a trust, the trustee of which was a non-resident, and it was held that the statutes of this state did not reach such interest.

At least one case in this state can be found which seems to be in point on the question thus raised—Connor vs. Wilson, 9 Am. Law Record, 752; 6 Ohio Dec. Rep. 941. That case was an action brought by the county treasurer to collect taxes from the defendant on account of notes secured by mortgage which were owned by him, but which were at the time they were assessed for taxes actually in the state of Indiana under the control and management of an agent of the defendant, who was authorized to invest and reinvest. It was also distinctly alleged that the agent had paid taxes on the said notes in Indiana. The court held that the tax was properly assessed. To be sure, the opinion does not discuss some of the questions which seem to be involved, the argument being devoted to the question of jurisdiction of the state to tax intangibles owned by a resident. Nevertheless, some of the statutes which have been quoted herein were in force at the time this case was considered and decided, and it is at least a precedent.

In *Lee* vs. *Dawson,* 8 C. C., 365, the following appear in the head-note:

"1. Owners of intangible property, residents of Ohio, must list the same for taxation, even though the same is under the control and management of a non-resident agent for investment and collection.

2. A non-resident of Ohio is not required to list his intangible property for taxation, notwithstanding it is under the control of a resident agent, for investment and collection."

It is believed that the second proposition laid down in the head-note is not sustained by the authorities.

See Grant vs. Jones, 39 O. S. 506;
Meyers vs. Seaberger, 45 O. S., 232.

The court seems to struggle to make the statutes of the state consistent and just and to adhere to the single principle that movable things follow the person, regardless of whether the question is as to the taxation of the intangible property of a non-resident in the hands of a local agent having authority to invest and reinvest or the converse of that proposition.

We may, however, add the case to the other one cited as a precedent on the point that where the owner resides in the state and the agent has the evidences of the intangibles outside of the state, with power over the fund, the owner is subject to taxation in the state.

Turning to the authorities from outside of Ohio, we find an interesting interpretation by the court of appeals of the state of New York of statutes something like those which have been considered, in *Boardman* vs. *Supervisors,* 85 N. Y., 359. The New York statute therein construed provided, in substance, that

> "Every person shall be assessed in the town where he resides for all personal estate owned by him, including all such personal estate as is in his possession, or under his control, as *agent,* trustee, guardian, executor or administrator."

The court held that so far as the word "agent" (which had been incorporated in the statute by amendment) was concerned, the object of the amendment was merely to reach property of a non-resident in the hands of a resident agent; so that where the owner resided in the state the statute had no application.

If this principle be applied to our own statutes, it would result in requiring an agent to list only when his principal is a non-resident, and in all other cases requiring the owner to list.

On the other hand, however, the same court, shortly afterward, in *People* vs. *Smith,* 88 N. Y., 576, held that intangibles owned by a resident but in the possession of a non-resident agent with authority to invest and reinvest, etc., were not taxable in New York. This case is squarely in point, and is apposed to those previously cited. The reasoning of the court appears in the following quotation:

> "It cannot be supposed that the legislature intended that our citizens should be subject to taxation here and in other states also upon the same property, or that it would tax in the hands of agents here securities belonging to non-resident owners, while it denied the right of other states to tax the securities of our citizens in the hands of agents there."

Boardman vs. *Supervisors, supra,* was distinguished on the ground that the principal and agent were both residents of New York in that case. The court admitted that New York had the *power* to apply the principle of business situs to intangibles controlled by resident agents of non-resident principals, and to deny it as to intangibles controlled by non-resident agents of resident principals, but on a construction of the whole law of the state decided that this was not the legislative intention, and that, the intention to require the resident agent of a non-resident principal to list the intangibles controlled by him being clear, the converse of the proposition which would be necessary to avoid double taxation was also a part of the legislative intent.

It must be admitted that if we say that the owner in the case about which you inquire should have returned the property in question for taxation in Ohio, the property itself is subject to double taxation if the statutes of Illinois are like those of Ohio; for the Illinois agent could have been taxed upon the securities and money in Illinois, and, if the location of the parties had been reversed, would have been so taxed in Ohio. It must be further admitted that there is much reason in presuming against such a legislative policy; yet the Ohio lower court cases which have been cited make it impossible to dismiss the question on any such presumption.

Another decision to the same effect is *Poppleton* vs. *Yamhill County*, 18 Ore., 377. This case follows *People* vs. *Smith, supra,* and, like it, is based upon a construction of the statutes of the taxing state.

See also: Fisher vs. Commissioners, 19 Kas., 414.

There are decisions the other way, some of them depending upon particular construction of the local statutes, as

Selden vs. Brooke, 104 Va., 832;
Hunt vs. Perry, 165 Mass., 287.
(express provision of statute)

However, it is rather clear from these and other cases which might be cited, and which are referred to in the note in 36 L. R. A. (N. S.), 295-298, that, as the annotator states:

> "Whether or not the rule of immunity at the owner's domicil, as to personal property which has acquired a situs for taxation in another jurisdiction, will eventually be extended, as a principle of constitutional law, to intangible as well as tangible personalty, it is apparent from the cases * * * that the tendency of the courts is to extend such rule, at least as a rule of statutory construction, to intangible personalty, where the terms of the statute * * * are not explicit, but are susceptible of construction on the point."

The answer to the annotator's question of constitutional law is apparently furnished by *Trust Co.* vs. *Louisville,* 245 U. S., 54, wherein it was held, in the language of the head-note, that:

> "Deposits in a bank in the city in which the depositor carried on a business from which such deposits are derived, but belonging absolutely to him, and not used in the business, are subject to a tax upon the person against him in the city of his residence, in another state, whether or not they are subject to tax in the state where the business is carried on."

In other words, the supreme court in this case reaffirmed its oft-declared proposition that duplicate taxation by different states is not in conflict with the constitution of the United States. This proposition, of course, has nothing to do with the question of statutory construction, which lies at the bottom of the main question now under consideration. An elaborate collection of the authorities directly and remotely bearing upon the question is found in a note to *Insurance Co.* vs. *Board of Assessors,* 221 U. S., 346, L. R. A. 1915C, 903; see, particularly, pages 914 et seq.

It must be concluded that, taking the country at large, the weight and trend of

the authorities is against the lower court Ohio decisions, and in favor of interpreting statutes that are not absolutely clear on their face as embodying some consistent and definite policy with respect to the adoption or rejection of the principle of business situs as a limitation upon the broader principle that movable things follow the person. But, as repeatedly asserted herein, the question is ultimately one of statutory construction, for that the state has the *power* to apply the principle of business situs where the owner is a non-resident and the agent in whom the proper degree of control is vested is a resident, and at the same time to reject that principle and apply the unmitigated principle that movable things follow the person when the situation is reversed and the owner is a resident while the controlling agent is a non-resident, can scarcely be denied in spite of some decisions to the contrary. At least one of the Ohio cases loses its force because it denies the whole principle of business situs, which cannot be denied successfully in Ohio or elsewhere at the present time. The other case cited is weakened by the fact that the whole question of the acquisition of a taxable business situs by intangibles in the possession of an agent having authority to invest and reinvest was ignored or overlooked.

As a result of all the foregoing, this department feels that the question submitted cannot be regarded as settled in the sense that if it were litigated to a finish the outcome could be predicted with certainty. Whether the assets named in your statement are taxable in Ohio or not depends upon the interpretation which should be given to the Ohio statutes. These statutes are in a state of some confusion, some of them, as, for example, section 5328 standing alone, return an unequivocal affirmative answer to the question, and doubt is raised by considering others. On the whole, however, it is the better judgment of this department that the assets should be regarded as taxable in this state, in the sense that the administrative officer who has to act, namely, the county auditor, would hardly be warranted in withholding the exercise of his powers. This conclusion is supported by such decisions as there are in Ohio, however open to criticism those decisions may be.

The second question submitted involves consideration of section 5398 of the General Code, which provides as follows:

> "If a person required to list property or make a return thereof for taxation, either to the assessor or the county auditor, in the year 1911 or in any year thereafter makes a *false* return or statement, or *evades* making a return or statement, the county auditor for each year shall ascertain as near as practicable, the true amount of personal property, moneys, credits, and investments that such person ought to have returned or listed for the year 1911 or for any year thereafter for which the inquiries and corrections provided for in this chapter are made. To the amount so ascertained as omitted for each year he shall add fifty per cent, multiply the omitted sum or sums, as increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the amount on the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect it as other taxes."

This section must be contrasted with section 5399, which provides for the listing of omitted personal property in the event the person required to list it "fails to make a return or statement;" it does not provide for the addition of any penalty. In other words, the statutes of the state draw a line between mere failure to list property that should have been listed and evasion or the making of false returns; so that we cannot say that every failure to list is in law to be treated as an evasion or the making of a false return.

The test of distinction which the cases have drawn from these statutes is predi-

cated upon fraud. Fraud may consist of a design to mislead and deceive, and possibly of such culpable negligence in the making of a return as carries with it the consequences of intention to defraud, i. e., the fraud may be actual or constructive.

See Ratterman vs. Ingalls, 48 O. S., 468;
Probasco vs. Raine, 50 O. S., 378.

The decedent who failed to list this property cannot, of course, be examined. It will be for the county auditor in the first instance, and ultimately for a court, to decide whether the course of the decedent was based upon a bona fide belief that the property so held was not taxable. If it should appear that he had been advised by counsel or taxing officials that that was the case, such circumstances would go far to show good faith on his part. The facts seem to negative any idea of culpable negligence, and the choice would seem to lie between a deliberate intention to evade and a bona fide belief in a right to omit the assets in question from the tax return of the decedent. This department cannot say, without more facts than seem to be at present available, what conclusion of law should be reached. Care must be taken, however, to distinguish between two things which have not the same legal effect, viz., a device to escape taxation, and the willful evasion of the duty to list taxable property. The facts stated raise a very strong inference that the testator was seeking to avoid taxation of the assets which he left in Illinois; yet, he may have been advised, and it may have been his bona fide belief that by following this course of conduct he escaped the duty to list this property for taxation. If that should prove to be the actual state of affairs, it would be the opinion of this department that the fifty per cent penalty could not be added. The case would be comparable to that of a person sending valuable tangible property out of the state so as to escape its taxation in this state, or actually removing his domicile from this state with no other motive than to escape the payment of taxes on his intangibles therein; in either event, the motive to evade would be immaterial, and in fact the evasion would be perfect. In the case put, were the facts as assumed, the only difference would be that the testator might have been mistaken as to the legal effect of what he did.

But if on the other hand, the testator had not been advised that the property held by his Illinois agent was exempt from taxation in Ohio, or did not in good faith believe that such was the case, then it might follow that the kind of willful evasion about which the statute speaks could be predicated of his failure to list the property.

Finally, inasmuch as the fifty per cent penalty involves a forfeiture, the burden rests upon the taxing officials to establish facts from which a legal conclusion of willful evasion can be effected.

Respectfully,
JOHN G. PRICE,
Attorney-General.