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Effect of the Uniform Partnership Act on Death Taxation of a Non-Resident Partner's Interest

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Such piecemeal diffusion of administrative authority and responsibility over a common resource is unrealistic, antiquated and wasteful. The scope and severity of the problem require a comprehensive study of the entire legislative framework within which our water resources are now administered, with a view toward long range reforms. It is a task worthy of the most careful attention of the Kentucky Department of Conservation in performing its function of designing governmental policy in this area.*

* *(Editor's Note: Since this note was prepared the Kentucky legislature established a watershed development program by enacting Senate Bill 95. The act, which became effective in July, 1956, provides that the program be administered by formation of watershed sub-districts. The extent to which provisions of this act satisfy the needs identified by this note will be treated supplementally in a subsequent issue of the Kentucky Law Journal.)*

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EFFECT OF THE UNIFORM PARTNERSHIP ACT ON DEATH TAXATION OF A NON-RESIDENT PARTNER'S INTEREST

When Kentucky adopted the Uniform Partnership Act in 1954, it became the 34th state[1] to get on the bandwagon and provide a comprehensive and studied statutory framework under which partnerships might be formed and conduct business. For the most part the Act simply codified common law concepts. But when jurisdictions applied a different rule to solve a particular problem, the drafters, in order to achieve the desired uniformity, were forced to choose the best reasoned of the views and incorporate that view into the Act.[2]

This paper will explore one such choice of divergent state rules, and its possible effect upon the Kentucky inheritance tax laws. Specifically the problem to be dealt with is whether Kentucky can tax, under Kentucky Revised Statutes, sec. 141.010,[3] the passage at death of a nonresident decedent's interest in a Kentucky partnership.

[1] See Table of States Wherein Act Has Been Adopted, 7 U.L.A., 1955 Cumulative Annual Pocket Part. 6. Since Kentucky adopted the Act, Arizona (1954) and Oklahoma (1955) have adopted the Act with modifications. A total of 36 states now have the Act.

[2] Ham, Kentucky Adopts Uniform Partnership Act. 43 Ky. L.J. 5 (1954); Lictinbergen, The Uniform Partnership Act, 63 U. Pa. L. Rev. 639 (1915).

[3] Ky. Rev. Stat., sec. 140.010 reads in part as follows:

All real and personal property within the jurisdiction of this state . . ., *all intangible property* belonging to nonresidents that has acquired a *business situs* in this state, . . . which shall pass by will or by the laws regulating intestate succession, . . . to any person . . . is subject to a tax. . . . (emphasis added)

I

UNIFORM PARTNERSHIP ACT—NATURE OF DECEASED PARTNER'S INTEREST

In order to define the applicability of the Kentucky death tax on the passage of the nonresident decedent's interest in the partnership, it will first be necessary to examine the nature of that interest, both at the common law and under the Uniform Partnership Act. At common law, personal property, both tangible and intangible, passed to the surviving partners in order that they might satisfy claims against the partnership.[4] Real property presented a more difficult problem, however. Historical concepts applicable to interests in land negated any simplified procedure whereby the remaining partnership debts might be directly satisfied out of the realty, and it was necessary to invoke the fiction of equitable conversion to "do justice" to the partnership. The rationalization was as follows: The legal title of the deceased partner's share of the real property descended to his heirs, (subject to dower rights in the widow, of course). However, the surviving partners retained their equity for partnership purposes. Therefore Equity treated the realty as personalty in order for the partners to dispose of it, and apply the proceeds to partnership debts.[5] Even then, the partners could not themselves convey the title, but could only ask the court, in exercise of its equity powers, to require the heirs to do so.

A difference of opinion developed as to the extent of the conversion. The English courts and a minority of American jurisdictions[6] treated the conversion as effective for all purposes. This "out-and-out" conversion theory resulted in the proceeds of the sale of the realty, after the partnership debts were settled, being turned over to the personal representative of the deceased.[7]

However, most of the American jurisdictions were unwilling to follow the lead of the English courts, and a more limited effect was given to the conversion.[8] Under this, the pro-tanto view, only so much of the realty as was required to satisfy the partnership debts was converted. By this rationalization, once the partnership debts were satisfied the interest which passed to the heirs (or devisees) of the deceased partner again assumed its character as realty.[9]

[4] Crane, Partnership 218 (2d ed. 1945).
[5] Ibid.
[6] Ham, supra note 2 at 26.
[7] Ibid.
[8] Crane, op. cit. supra, at 220 states:
The weight of authority has been to the effect that conversion is operative only to the extent necessary for liquidation, and thereafter, as to anything due the deceased partner's estate, there is reconversion.
[9] 2 American Law of Property 43 (1952).

It is readily apparent that the impact of the Kentucky inheritance tax statute upon the passage of the interest at death will be affected, if not in result, at least in rationalization, by whether the "out-and-out" conversion theory, or the pro-tanto theory is applied in Kentucky. If the pro-tanto theory is in use, the interest which passes to the survivors of the deceased partner is real estate and tangible personal property, and is subject to tax under the first clause of Kentucky Revised Statutes, sec. 140.010, which reads: "All real and personal property within the jurisdiction of this state . . . is subject to a tax. . . ." However, if out-and-out conversion is applied, the interest which passes is intangible property,[10] and must be taxed, if at all, under a later clause of the same subsection of the statute: ". . . All intangible property belonging to nonresidents that has acquired a business situs in this state . . . is subject to a tax. . . ."

Kentucky, prior to the adoption of the Uniform Partnership Act, accepted the pro-tanto theory of conversion.[11] The Uniform Act, however, appears to adopt the out-and-out theory.[12] Therefore, as developed above, the interest which passes at the partner's death is an intangible property interest. It is conceded that under authority of *Blodgett* v. *Silberman*[13] the domiciliary state of the deceased partner may constitutionally levy a death tax upon the passage of the intangible partnership interest; when Kentucky attempts to tax the passage of that same partnership interest, the hurdle that must be overcome is a possible constitutional barrier against Kentucky's also taxing the passage of the same interest. The Court in the *Blodgett* case left this question open, stating:[14]

[10] See Blodgett v. Silberman, 277 U.S. 1 (1928), where the Court held that since the partner's interest was merely in the nature of a *chose in action* (consisting of a right to share in whatever remained after the partnership liabilities were satisfied) it was intangible personal property. This case arose in New York, which adopted the Uniform Partnership Act in 1919; see comment in 25 Mich. L. Rev. 815 (1928).

[11] Strode v. Kramer, 293 Ky. 354, 169 S.W. 2d. 29 (1943); Carter v. Flexner, 92 Ky. 400, 17 S.W. 851 (1891). Prior to the Carter case the court vacillated between the theories.

[12] Ham, supra note 2 at 27 states:

While the situation under the Uniform Partnership Act is not as clear as it might be, the sum total of the pertinent provisions point rather strongly in the direction of the English rule of out-and-out conversion. The Act provides that on the death of a partner his right in specific property vests in the surviving partner or partners and that a partner's right in specific partnership property is not subject to dower, curtesy, or allowance to widows, heirs, or next of kin. It is stated that on dissolution each partner may have the partnership property applied to discharge its liabilities and the surplus applied to pay *in cash* the net amount owing to him.

See The Uniform Partnership Act, sec. 38 (1); Ky. Rev. Stat. 362.335(1).

[13] 277 U.S. 1 (1928); see supra note 10.

[14] Id. at 10.

> Further, this principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, . . . is subject to taxation in another jurisdiction. As to that we need not inquire. It is not the issue in this case.

II

DEFERENCE TO STATE COURT DETERMINATION OF NATURE OF INTEREST

Before facing directly the constitutional limitations on more than one state taxing intangibles, it may be appropriate to consider a possible out which a state court may have when faced with the problem of taxing the passage of a nonresident decedent's interest in a partnership.

As previously stated, the Uniform Partnership Act has the effect of converting a deceased partner's interest in the *specific* partnership assets (realty, tangible personalty, etc.) into a right against the partnership. This right, a chose in action, is by nature an intangible property interest. It is possible that Kentucky could constitutionally disregard the effect of the conversion when recognition of it would limit the taxing jurisdiction[15] of the state of partnership (Kentucky). If this be allowed, then Kentucky could tax the deceased partner's share of the particular tangible partnership assets physically located within Kentucky. *Frick* v. *Pennsylvania*[16] held that the state where tangibles are permanently located may impose a tax upon their transfer.

While ordinarily the question of whether property is tangible or intangible is determined by the law of the forum,[17] the Supreme Court apparently ruled in the *Blodgett* case that the states' determination is not conclusive for tax jurisdictional purposes. However, in a subsequent case, *Pearson* v. *McGraw*,[18] Justice Stone cast doubt upon this inference when he stated:[19]

> As I am of opinion that there is nothing in the Constitution to compel a state to treat federal reserve notes *for tax purposes* as chattels were treated in *Frick* v. *Pennsylvania*, 268 U.S. 473, and as no reason has been advanced, even in *Blodgett* v. *Silberman*, 277 U.S. 1, 18, for a different view . . . the judgment should, I think, be reversed upon that ground. . . . (emphasis added).

[15] It is now generally recognized that the power of the state to tax is not affected by the doctrine of equitable conversion by will. Frick v. Pennsylvania, 268 U.S. 473 (1925); also see Guterman, Revitalization of Multiple State Death Taxation, 42 Col. L.R. 1249, 1255 (1942); likewise, the power to tax is not affected by equitable conversion as a result of a bilateral contract to convey land in another jurisdiction, In Paul's Estate, 303 Pa. 330, 154 A. 503 (1931), cert. denied, 284 U.S. 630 (1930).

[16] 268 U.S. 473 (1925).

[17] Restatement, Conflicts of Laws, sec. 7, comment b (1934).

[18] 308 U.S. 313 (1939).

[19] Id. at 320.

Thus there is some support for the idea that the Supreme Court might defer to a determination by the state of partnership that the deceased partner's interest in the tangible assets is not converted into a chose, just as it has deferred to a state's determination that a person is domiciled therein, even when more than one state has so found.[20]

It should be realized that this rationalization results in a redefinition of the conversion effected by the Act. It is at least arguable, however, that such an interpretation by the state should not be struck down by the Supreme Court as unconstitutional. It is doubtful whether either the drafters of the Act or the Kentucky legislature intended that the Act should have the possible effect of limiting the taxing jurisdiction of the state of the partnership.

However, if out-and-out conversion is not limited so as to deny its effect upon the state's jurisdiction to tax, then the basic problem already suggested is that an intangible interest in the nature of a chose in action is the res, and another state is admittedly able to tax its passage. Does this preclude the state of the partnership from also taxing it?

III

MULTI-STATE DEATH TAXATION—SUPREME COURT DECISIONS

The states' power to tax intangibles has been expanded and contracted like a bellows during the past three decades. Prior to 1930, the Supreme Court had interpreted the 14th Amendment in such a way that it did not prohibit multi-state death taxation upon the transfer of intangibles.[21] Then in 1930 *Farmers Loan and Trust Co.* v. *Minnesota*[22] was decided, which was clearly aimed at putting an end to multi-state inheritance taxation. Minnesota attempted to levy a death tax on the transfer of bonds which were physically outside the state and owned by a nonresident, solely on the basis of the fact that the debtor corporation was domiciled in Minnesota. The Supreme Court held that this was beyond the jurisdiction of the state, and specifically overruled earlier cases allowing this. Two years later in *First National Bank of Boston* v. *Maine*[23] the Court extended the prohibition to prevent the

[20] The Court has generally deferred to a state's determination that a person is domiciled therein, even when one or more states has so found. See Worcester Trust Co. v. Riley, 302 U.S. 292 (1927); Texas v. Florida, 306 U.S. 398 (1939).

[21] Blackstone v. Miller, 188 U.S. 189 (1903); Justice Holmes said at 206:

> The fact that two states, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds.

[22] 280 U.S. 204 (1930).

[23] 284 U.S. 312 (1932).

domiciliary state of a corporation from levying a death tax on the passage of shares of the corporate stock upon death of a nonresident owner of such shares. Other cases exhibit this policy.[24]

To interpret the Constitution so as to deny to the states the power to levy a death tax on intangibles owned by a nonresident, it was necessary for the Court: (1) to postulate that the Due Process Clause implied a policy to protect persons against unreasonable exercise of the taxing power by a state; and (2) to conclude that the taxing of the transfer at death of property of a nonresident was unreasonable, when the sole peg of jurisdiction was the fact that the stock was evidence of ownership in a corporation domiciled within and protected under the laws of the taxing state. Undoubtedly the Court was influenced by the desire to avoid the unpleasant political, social and economic consequences of a multi-state grab against the taxpayer who had interstate interests.[25]

Even during this era of single death taxation, there was a meaningful exception to the rule allowing only the state of domicile to tax intangibles. This exception has generally been referred to as the *business situs* rule.[26] As might have been expected, this exception gave exclusive jurisdiction to tax to the state where the intangible had its business situs.

Then in 1939 the Supreme Court decided *Curry* v. *McCanless*.[27] Without specifically overruling the line of cases beginning with *Farmers Loan*,[28] the Court held that the 14th Amendment *does not* prohibit multiple death taxation of trusts. A resident of Tennessee had created a trust in Alabama, retaining in herself a life estate. The trustee and the trust corpus were located in Alabama, and both states attempted to tax the transfer of her interest at her death. Both were allowed to. Justice Stone stated:[29]

> . . . In effecting her purpose, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other states by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both.

Since the single death tax cases had not been specifically overruled, some uncertainty remained. In 1942, with the decision in *Utah* v.

[24] Beidler v. South Carolina, 282 U.S. 1 (1930); Baldwin v. Missouri, 281 U.S. 586 (1930).

[25] Rottschaefer, The Constitution and Socio Economic Change 140 (1948).

[26] Wheeling Steel Corporation v. Fox, 298 U.S. 193 at 210 (1936).

[27] 307 U.S. 357 (1939).

[28] Farmers Loan and Trust Co. v. Minnesota, supra note 22.

[29] Curry v. McCanless, supra note 27 at 372.

Aldrich[30] the trend away from single death taxation became clear. Aldrich, a New York resident, died owning shares of stock in the Union Pacific Co., a Utah corporation. Utah levied a death tax upon the transfer of these shares of stock. The Supreme Court upheld Utah's right to assess this tax, even though the domiciliary state of the decedent had already taxed the transfer at death of the same property. Justice Douglas, writing for the Court, said:[31]

> . . . We do not think that *First National Bank* v. *Maine* should survive. We overrule it. . . . [W]e repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State. In case of shares of stock, "jurisdiction to tax" is not restricted to the domiciliary State. Another State which has extended benefits or protection, or which can demonstrate "the practical fact of its power" or sovereignty as respects the shares . . . may likewise constitutionally make its exaction. . . .

Although only the *Maine* case was specifically retired, its companions were by implication relegated to the same status.

State jurisdiction to tax is now said to depend upon whether the exercise of the power to tax relates to a legal relationship which the State has benefited and protected. Justice Douglas, in the *Aldrich* case, stated the test as follows:[32]

> A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

Thus, under *Aldrich,* a state may subject intangibles to a death tax so long as it can spell out a legal relationship within the State to which benefits and protection have been afforded, regardless of whether the state of the decedent also taxes the passage of that same interest.

Therefore, it appears that Kentucky has the power, even in view of the change in the nature of the partner's interest wrought by the Uniform Partnership Act, to levy a death tax on the passage of a nonresident partner's interest *if a legal relationship within the benefit and protection theory can be established.* There should be no difficulty in showing that a partnership which exists within this state and carries on business within this state is enjoying the benefit and protection afforded by the laws of this state. Likewise, the *interest* in the partnership, if it is possible to consider it apart from the partnership, is also defined and protected by Kentucky law. The partnership interest is

[30] 316 U.S. 174 (1942).
[31] Id. at 181.
[32] Id. at 178, where Justice Douglas is quoting from Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940).

meaningless except in terms of the partnership, and although the legal title of the property may undergo no change by reason of the death of the partner, a transfer of the right to his monetary equity has occurred. Logical consistency would compel recognition of the right of the state of location of the partnership to tax.[33]

IV

KENTUCKY'S LIMITED EXERCISE OF TAXING POWER—BUSINESS SITUS

Assuming that Kentucky has the *power* to tax, the question becomes whether or not it has exercised that power. Kentucky Revised Statutes, sec. 140.010 makes taxable ". . . all intangible property belonging to nonresidents that has acquired a *business situs* in this state. . . ." (emphasis added). By adopting *business situs* as the peg of jurisdiction for intangibles, Kentucky has confined the scope of its inheritance tax law so as not to reach all property which it constitutionally may tax under the later decisions of the Supreme Court. The decisive factor then, in the problem at hand, is whether the partnership interest has a business situs in Kentucky.

Business situs is analytically a legal conclusion rather than a criterion. When a court determines, for jurisdiction, that a property interest has a business situs within the state, it is only concluding that because of the existence of certain factual criteria, the interest has come within the sphere of interests which the state benefits and protects (and therefore, on a *quid pro quo* theory, should be able to tax).

Trying to pin down just what factual criteria are considered by the courts to be decisive is an elusive undertaking.

In *Commonwealth ex rel. Luckett* v. *Radio Corporation of America*,[34] a 1944 case, the Kentucky Court of Appeals was faced with the question of whether R.C.A., a New York corporation, should pay income tax on accounts receivable due from a corporation doing business in Kentucky resulting from the use of certain patent rights granted by R.C.A. The Court considered the question as one turning on whether the debt due under the patent contract had acquired a *business situs* in Kentucky, and concluded it had not. The debt did not arise from *sources within the state.* Since ". . . R.C.A. had neither

[33] Cases generally standing for the proposition that the interest of a nonresident decedent may be taxed by the state where the partnership does business are: In re Bijur, 127 Misc. 206, 216 N.Y.S. 523 (1926); In re Henry, 203 App. Div. 456, 197 N.Y.S. 63 (1922); In re Du Bois' Estate, 163 N.Y.S. 668 (1917); *contra*, In re Arbuckle's Estate, 252 Pa. 161, 97 A. 186 (1916).

[34] 299 Ky. 44, 184 S.W. 2d 250 (1944).

had its patent nor its capital 'in motion' in Kentucky . . ." the source had not become localized here.[35]

While the Court reached the correct result here, the discussion of "business situs" and "source" is unnecessary to the decision. The applicable statute, Kentucky Revised Statutes, sec. 141.010, first defines persons liable for income taxes as corporations domiciled within or doing business within the state; statutory provisions as to "source" apply only to the apportionment of income once the recipient *has become a taxpayer*. Therefore the Court, in holding R.C.A. not liable, should have based the decision not on the business situs of the intangible but on the fact that R.C.A. was not doing business within Kentucky. The superfluous analysis of business situs based on "source," therefore, is of little help in trying to arrive at a workable definition to apply to the partnership interest.

In *Board of Tax Supervisors of Jefferson County* v. *Baldwin Piano Co.*,[36] Justice Sims, for the Court, commented on the business situs rule as follows:[37]

> The rule in this jurisdiction is that intangibles such as notes, accounts receivable, bonds and other like securities owned by a nonresident, which are not just temporarily brought into the State but are being held here by a fiduciary or other agent, who controls, manages and invests them *in the owners' business in Kentucky* so that they become an integral part thereof, acquired a location or situs in this State for business purposes and are taxable (citations omitted). But if such intangibles are only temporarily in this State in the agent's or fiduciary's possession and he does not use them in the owners' business in Kentucky and has no control over them except to forward the intangibles to the owner within a reasonable time . . . then such intangibles do not become an integral part of the owners' business and are not localized in Kentucky and are not taxable (citations omitted). (emphasis supplied).

In this case the intangibles were accounts receivable which arose from the sale of musical instruments by a Kentucky corporation. These accounts were immediately sold to Baldwin and applied to pay for goods purchased by the Kentucky Corporation. Since the intangibles were only temporarily in Kentucky, they did not have a local situs, and therefore were not subject to ad valorem property taxation.

In 1936 the Kentucky Court decided *Commonwealth* v. *Madden*.[38] John Madden, a Fayette County resident, and a member of a New York brokerage partnership, died. Kentucky sought to impose an ad valorem intangible property tax for several back years on Madden's

[35] Id. at 184 S.W. 2d 253.
[36] 296 Ky. 673, 178 S.W. 2d 212 (1944).
[37] Id. at 178 S.W. 2d 213.
[38] 265 Ky. 684, 97 S.W. 2d 561 (1936).

interest in the intangibles (partnership securities) owned by the New York partnership. The Court denied Kentucky's claim, and held that the intangibles owned by the partnership had acquired a business situs in New York. The Court said:[39] "They had become integral parts of some local business. . . . All the partnership accounts were carried with brokers there, the securities purchased and sold were carried in the names of New York brokers, and the trading was carried on by Mr. Madden at the brokerage offices [in New York]."

Little help can be drawn from a closely analogous situation, *viz.* the taxation of stock held by nonresidents in Kentucky corporations. Kentucky Revised Statutes, sec. 140.150 (1936) subjects the transfer of stock of domestic corporations out of the name of a deceased nonresident *of the United States* to a 5% tax on its actual value. However, Kentucky does not tax the transfer of stock in a domestic corporation owned by a resident of another state. In the middle thirties Kentucky did levy a tax on the transfer at death of stock in Kentucky corporations owned by all nonresidents. This practice was declared unconstitutional as to residents of other states in *Zahn's Ex'r.* v. *State Tax Commission,*[40] and *Havemeyer* v. *Coleman,*[41] the Court relying on the Supreme Court decision in *First National Bank of Boston* v. *Maine.*[42] Then in 1936 the legislature codified the existing doctrine and passed the statute mentioned above limiting the transfer tax to nonresidents of the United States.

Due to the change in the Supreme Court's attitude on multiple death taxation, Kentucky now undoubtedly has the power to tax the transfer of stock in a domestic corporation at the death of *any* nonresident; any successful attempt, however, would require under Kentucky Revised Statutes sec. 141.010 a finding that the stock has a business situs here, since the legislature has not re-enacted a specific statute on stock transfer.

In Kentucky the question of business situs seems to be decided by a determination of whether the owner of the intangible is doing business within the state. Or, stated another way, the factual criterion which establishes the business situs of a particular intangible asset such as stocks, bonds, etc., is the use of it *as an asset in a business within this state.* While this test is useful when dealing with intangibles capable of being used within a business, it is unsatisfactory when applied to the partnership interest.

[39] Id. at 97 S.W. 2d 563.
[40] 243 Ky. 167, 47 S.W. 2d 925 (1932).
[41] 243 Ky. 194, 47 S.W. 2d 1050 (1932).
[42] Supra note 23.

The partnership interest (and the person who succeeds to the interest) benefits from the protection Kentucky law gives to the partnership assets and the partnership entity. The partnership interest arose because of an agreement in Kentucky with respect to the use of assets in Kentucky. The nature of the partnership interest is defined by Kentucky law. Therefore any test of business situs which does not reach an intangible so factually connected with Kentucky should be examined closely and expanded, if a workable doctrine can be arrived at without running afoul of the Constitution and without unreasonably distorting the statutory language "business situs."

This could be accomplished by adding to the existing category (use of intangible as an *asset* in a business located in Kentucky) another one: if the intangible in question is one which normally would not be used as an asset in a business, and it is an intangible right *which represents property in Kentucky,* it has its business situs in Kentucky.

V

CONCLUSION; TAXABLE

It is possible, by the foregoing analysis, to say that a nonresident decedent's interest in a Kentucky partnership has a business situs in Kentucky. Yet strain is caused by the fact that the concept of business situs is difficult to apply to an intangible such as the one under consideration here. A right to receive money, which is what we are concerned with, is not *actively* used in business so as to acquire a business situs anywhere, in the ordinary sense of business situs. However, there are important policy considerations which should influence the Court to find that a partner's interest has a business situs in Kentucky.

A state's tax laws should be interpreted to give the state the most tax revenue possible, without placing an unfair or arbitrary burden on the taxpayer. There appears to be no good reason why a nonresident taxpayer should be able to transfer his interest in a Kentucky partnership tax free at his death, while a resident of Kentucky, perhaps even in the same partnership, must pay an inheritance tax on the transfer of his interest at death. In the protection of partnership assets the state offers each the same benefits. Nor would the result be unreasonable to the nonresident who succeeds to the interest. The partnership, and indirectly the interest in it, has materially benefited from the protection afforded by the laws of this state.

Then, too, Kentucky is a *debtor* state. Unless Kentucky, by legislative action and judicial interpretation, adopts a favorable attitude toward taxing intangible property which enjoys the benefit and protection of Kentucky laws, it will not be deriving the maximum revenue from the tax base constitutionally available.[43] Therefore, whenever benefits and protection of Kentucky laws extend to physical assets on or against which the nonresident decedent's representative has a claim, the business situs should be determined to be in Kentucky in order to maximize tax revenues.

Kentucky, prior to the Uniform Partnership Act, could tax the transfer at death of the nonresident partner's right to specific tangible assets located in Kentucky. It is illogical to say that because the right to specific property has been converted to a right to receive money (to be realized from the properties), then the transfer of the interest at death is no longer taxable.

While the conclusion reached herein would subject the same property interest to taxation by two states, that in itself should not, and as developed previously does not, limit the taxing power of the State of Kentucky. The apparent hardship on the taxpayer would be more equitably resolved, if either of the states should be denied the power to tax, by exclusively allowing the state of the partnership to tax. Comparing the respective benefits afforded by the respective states, the claims of the state where the partnership is located should have priority in tax matters concerning the partnership and interests in the partnership.[44]

The taxing power of debtor states is seriously diminished by transferring, by means of a legal fiction, the situs of intangible personalty to the owner's domicile, when in reality it represents property existing in another jurisdiction. A liberal application of the business situs rule would undoubtedly result in a more equitable distribution of the taxing power among the states.

Eugene C. Roemele

[43] Compare the situation of New York, California, or Illinois and other creditor states. These states, since the residents have large accumulations of capital, favor taxes against the *person*. In this way they obtain the largest tax revenue possible.

[44] Suggested solutions to multi-state death taxation have generally involved reciprocity. See Legis, Reciprocity and Retaliatory Tax Statutes, 43 Harv. L.R. 641 (1930); Note, 26 Iowa L. Rev. 694 (1940); Kentucky, in 1942, passed a limited reciprocity provision concerning death taxation of trusts. Ky. Rev. Stat., sec. 140.275 (1942). However, it is debatable whether reciprocity would be beneficial to Kentucky. Since Kentucky is a debtor state, we have more to lose than to gain by entering into reciprocal agreements allowing the domiciliary state to tax.