INHERITANCE TAX 1. When the estate of any deceased person has not been appraised for inheritance tax purposes, the probate court, or any interested person, may make application to the probate court to reopen said estate for the purpose of determining its clear market value so that an inheritance tax may be imposed upon the interests of property transferred.

2. The statute of limitations does not apply to collection of inheritance taxes until such time as the taxes have been duly assessed.

May 17, 1939

5-15

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Honorable Charles M. Abbett,
Judge of Probate Court,
Tuscumbia, Missouri

Dear Judge:

This is to acknowledge your letter of recent date requesting an opinion from this office on the following set of facts:

> "On or about February 9th, 1930, Effie Adcock a resident of this county died leaving a will of which the enclosed is a true copy as same is on file in my office.
>
> "The will of the deceased was admitted to probate in this office on the 15th day of February, 1930 and the estate closed and finally settled on the 27th day of November 1931.
>
> "No inheritance tax appraiser was ever appointed and I wish to inquire if I should appoint one now and if so the approximate amount of tax due and from whom it should be collected."

Your attention is directed to Section 586, R. S. Mo. 1929, relating to the jurisdiction of the probate court to appoint appraisers for the purpose of determining the amount of inheritance tax due and payable in any particular estate. This section reads in part as follows:

> "The probate court which grants letters testamentary or of administration, either original or ancillary, on the estate of any decedent, shall have jurisdiction to determine the amount of tax provided for in this article and the person, persons, association, institution or corporation liable therefor, and to determine any

> question which may arise in connection therewith, and to do any act in relation thereto which is authorized by law to be done by such court in other matters or proceedings coming within its jurisdiction."

You will particularly notice that the probate court may determine any question which may arise in connection with the estate of a decedent, and do any act authorized by law to be done in connection with such estate. It is further provided in this same section that:

> "If it appear that said estate may be subject to such tax, it shall be the duty of the court to set a day for the hearing and determining the amount of said tax and to cause notice thereof to be given in the same time and manner and to the same parties as is hereinafter provided for appraisers, or the court before determining such matters, may of its own motion, or on the application of any interested person, including the state treasurer, the prosecuting attorney or attorney-general, appoint some qualified taxpaying citizen of the county as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under the provisions of this article."

Obviously, the above section of the statute is for the purpose of determining the clear market value of estate of the decedent, as it is upon the clear market value of the estate that the tax is to be imposed.

If the estate of the party about which you inquire may be reopened at this time to determine the clear market value at the date of the deathof the decedent for the purpose of imposing an inheritance tax, it must be by the authority of the section above noticed.

In the case of In re Bernero's Estate, 197 S. W., 121, the Supreme Court considered a statute very similar to the one we have before noticed as was contained in the old

Collateral Inheritance Tax Law. The facts in this case disclose that one Louis Bernero, Sr., died testate on August 8, 1904. Under the terms of his will, Theresa Bernero, his wife, was given a life estate in certain property, thereafter to pass unto one Manuello Bernero, the adopted son of the decedent. Administration was had upon the estate and final settlement was made December 14, 1908. During the administration of the said estate, an assessment of collateral inheritance tax was made, but as to the devisees aforementioned, no tax was assessed. On April 4, 1910, Manuello Bernero died. On July 15, 1911, Theresa Bernero died testate and she exercised in her will the power of appointment given to her in the devise hereinabove mentioned. At the time of Manuello's death, he left surviving him one child by the name of Louis Bernero, Jr., who sought to establish himself as the sole heir at law of Theresa Bernero, deceased, with respect to the devise.

This proceeding was first commenced in the probate court to assess the collateral inheritance tax in the estate of Louis Bernero, Sr., who died, as we before noticed, in 1904. After a judgment was obtained in the probate court, the proceeding was thereafter appealed to the Circuit Court of the City of St. Louis, and the court entered its order on December 6, 1915, assessing a collateral inheritance tax on the interest to be received. Thereafter the case was appealed to the Supreme Court. The appellant contended that the judgment must be reversed because the probate court after final settlement in the Louis Bernero, Sr., estate had no jurisdiction to entertain the present proceeding to assess a collateral inheritance tax. Secondly, that the first assessment of collateral inheritance tax in the estate which was made during the pendency of administration of said estate operated as res adjudicata of the right to the making of an assessment at this particular time. Therefore, any other assessments are barred. Final settlement was made in the Louis Bernero, Sr., estate in December, 1908, and the proceeding to make assessment of collateral inheritance tax was not attempted in the probate court until January, 1912.

The court in reaching its conclusion that the probate court did have jurisdiction to make an assessment of collateral inheritance tax, observed at page 123, that:

> "* * * the assessment of collateral inheritance tax does not directly involve the administration of a

> decedent's estate. The proceeding is one, not against the property of a decedent; it is not a claim against the estate as such, but is against the interest or property right which the heir, legatee, devisee, etc., has in the property formerly held by the decedent."

Thus, it is to be observed from the above that the collateral inheritance tax law was of the same nature as our present inheritance tax law, in that the tax is imposed upon the right to receive property. In Re Rosing's Estate, 85 S. W.(2d), 495.

The section of the statute which we noticed above in our present inheritance tax law is very similar to the section of the statute upon which the court based the right of the probate court to entertain the proceeding for the assessment of a collateral inheritance tax. As to contention number one of the appellant's, the court said:

> "This being true, unless the statute otherwise directs, no good reason would appear limiting the right to make such assessment to such time as the decedent's estate was in the course of administration. Appellants contend that the language of section 326, Revised Statutes 1909, to wit, 'The Court of Probate having * * * * * jurisdiction of the settlement of the estate of the decedent shall have jurisdiction to hear and determine all questions in relation to said tax that may arise.' etc., does so limit the jurisdiction of the probate court; that the phrase 'having jurisdiction of the settlement of the estate' means 'then exercising jurisdiction of the settlement of the estate,' and that, once the estate is closed, its jurisdiction over collateral inheritance tax matters against property formerly owned by such decedent is also at an end. We are unable to agree with this construction. We are of the opinion that the phrase 'the court of probate having jurisdiction of the settlement

> of the estate' simply means the particular court of probate in any instant case upon which the law has conferred the right of administering the estate."

In ruling appellant's second contention, the court made the observation that:

> "At the time of the first assessment of collateral inheritance tax against any of the property formerly owned by decedent, it was not then definitely known, nor could it be definitely foreseen, that any of the property involved in the present proceeding would ever be subject to such a tax. As the property then stood, it was subject to a life estate in decedent's wife, with power of appointment in her, under which, upon the happening of certain contingencies, she could, by will, dispose of this very property. As pointed out by the learned attorney for the respondent if she had exercised such power of appointment, by devising the property to some educational, charitable, or religious purpose in this state, the property would not have been subject to the assessment of the tax. Section 309, Revised Statutes 1909. In other words, until a valid exercise of said power of appointment had been made, or until the contingency of the possible exercise of the same should become removed, it could not be foreseen that the property would be subject to a tax.
>
> "Under the facts as disclosed by this record, whether the wife would or would not undertake to exercise such power of appointment could not have been known until her death on July 15, 1911, which was long after the first assessment was made. Under such conditions the former proceeding against the other property formerly owned by decedent, then known to be subject to such a tax, would certainly not operate as res adjudicata as to the right to tax the present property not involved, for the reason that it could not have been involved, as explained above, in the original proceeding. As to whether it would have been res adjudicata if the present property had

> then been subject to such an assessment, we do not decide, because not here involved.
>
> "After a careful consideration of the same, we have reached the conclusion that this point should be ruled against appellant's contention."

You will particularly notice the court did not rule upon whether or not the administration proceedings would have been res adjudicata if the property before the court at that time had been subject to an assessment of collateral inheritance tax. In the instant case, from the facts presented by your request, it is not known whether or not the property of the decedent was subject to the payment of a tax. In the course of this opinion we have not considered that question.

If the estate in the present case may be opened for the purpose of determining the clear market value of said estate for an inheritance tax, it must be by reason of the authority of Section 585, heretofore considered. We believe the Bernero estate case, above reviewed, is sufficient authority for the reopening of the estate which you have referred to in your request for an opinion.

From what has been said it logically follows, would the statute of limitations apply in a case of this kind even though the estate may be reopened for the purpose of assessing an inheritance tax? Ordinarily, where the statute makes no provision with respect to the time within which a suit for inheritance taxes may be brought, such taxes may be recovered irrespective of the time. This general proposition of the law is stated in 61 C. J., Section 2688, p. 1739:

> "Suits to collect transfer or inheritance taxes may be begun at any time within the period limited by statute, or, <u>if no period is so limited, inheritance taxes may be recovered irrespective of time</u>."

This above general proposition of law presupposes that taxes have been duly assessed, and unless such taxes have been duly assessed, then suits may not be instituted. While your inquiry is limited to whether or not an estate may be reopened for the purpose of assessing an inheritance tax, we deem it essential in support of our conclusion reached to determine whether or not the statute of limitations would apply.

In the case of State ex rel. Hammer, Collector, v. Vogelsang, reported in 183 Mo. 17, the Supreme Court had before it for consideration the question whether or not a suit could be maintained by the Collector of the City of St. Louis to collect taxes on certain real estate for the years 1885 to and including 1890 that had been omitted from assessment during those years. It is disclosed that such omission for assessment was discovered in 1896 and at that time the assessment was made. Thereafter suit was instituted in December, 1901. It was contended by defendant in this case that the assessments against the omitted property for the years in question were barred by the statute of limitations. In this case it disclosed there was a specific statute giving the Assessor the right to make an assessment against the property which had been omitted for previous years. For this reason the statutes referring to omitted assessments may be likened unto Sections 585 and 598 of the Revised Statutes, 1929. In this case, the statute of limitations was five years and the court tersely said at page 24:

> "that no right of action accrued until the taxes were assessed and had become delinquent."

In support of the court's view in the above case they cited the case of State ex rel. v. Fullerton, 143 Mo. 682, wherein it was held that the statute of limitations did not run against the property that was omitted from the Assessor's books until after the discovery of such omission and the assessment of taxes.

In the case of State ex rel. Western Union Tel. Co. v. Markway, 341 Mo. 976, 110 S. W. (2d), 1118, the Supreme Court considered the case above noticed, and said at page 981:

> "In the case of State ex rel. Hammer v. Vogelsang, 183 Mo. 17, 81 S. W. 1087, we held that where property omitted from taxation is subsequently assessed, the taxes thereon do not become delinquent until after expiration of the year in which such taxes were actually assessed. In that case we were construing Section 9789 which deals with real property, but we see no real distinction on principle between that section and the section dealing with railroads."

From these considerations you will have noticed that unless an assessment has been made against property

and the taxes so assessed have become delinquent, no cause of action accrues, therefore the statute of limitations does not commence to run until after the assessment of the taxes. We think, by analogy, such general proposition of law is here applicable in determining whether or not the taxes in this instance are subject to the statute of limitations.

CONCLUSION

In view of the above, it is the opinion of this department that any estate may be reopened by any interested person for the purpose of determining whether or not an inheritance tax is due and payable upon the interest of property succeeded to by others. Further, that the probate court which grants letters of testamentary or administration may, of its own motion, reopen an estate for the purpose of assessing a tax.

We further rule that the statute of limitations does not apply to the collection of inheritance taxes until such time as the taxes have been duly assessed.

Yours very truly,

APPROVED:

RUSSELL C. STONE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

RCS:VC