INHERITANCE TAX: Where a legatee is to receive his legacy tax free, the inheritance tax should be computed upon the total of the legacy and the tax, then deducted therefrom as the tax is to be considered as an interest in property.

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Mr. E. J. Arnett, Supervisor
Inheritance Tax Department
Jefferson City, Missouri

Dear Mr. Arnett:

This is to acknowledge receipt of your recent request for an opinion based upon a letter received from the Clerk of the St. Louis City Probate Court under date of September 28th. This letter reads as follows:

> "A certain will here provides that all inheritance taxes shall be paid out of the residue of the estate. In the case at hand the appraiser determined the tax due on certain specific bequests and then in determining the amount of taxable residue deducted the amount of these taxes. In this manner the estate procured the benefit of a deduction of an amount paid for inheritance taxes which seems to me to be contrary to the intent of the act.
>
> "What is the opinion of your office as to the way this should be handled? It seems to me each legatee besides the amount of his bequest has, under this will, been granted a further amount, namely, the amount of the tax upon his bequest. Should not his inheritance be taxed upon the basis of the larger amount? In that way the

estate would not receive the benefit of a deduction for inheritance tax paid."

This very question which now concerns the Clerk of the Probate Court of the City of St. Louis was decided in the case of In Re Levalley's Estate, 210 N. W. 941 by the Supreme Court of the State of Washington. In that case, the will of the testator provided that the inheritance tax was to be paid out of the residuary estate. In the State of Wisconsin, the inheritance tax statute imposes a tax upon the transfer of property or any interest therein and is identical with our statutes insofar as it relates to the question with which we are concerned. This case reveals that when the county court determined the amount of inheritance tax due on the various bequests the amount which each beneficiary was to receive was increased by the amount of the tax. The court illustrated this increase at page 941 as follows:

"'In the case of a $50,000 bequest, the court instead of computing the tax upon $50,000 (in accordance with the claim of the executors) as follows:

Legatee	Relationship	Share	Exemption	Net Taxable Legacy
Mrs. Louise D. Edwards	Stranger	$50,000	$150	$49,850.00
		(Rate of Tax)		
$24,850.00		x	.08	1,988.00
$25,000.00		x	.16	4,000.00
				$5,988.00

computed it upon $57,879 as follows:

$ 150.00	Exempt	
$24,850.00	8%	$1,988.00
$25,000.00	16%	4,000.00
$ 7,879.00	24%	1,891.00
$57,879.00	total interest	$7,879.00 Total tax
7,879.00	tax subtracted	
$50,000.00	net legacy.'"	

In deciding the case, the court held:

> "Under the terms of the will, the legatee in the illustration has a right to have applied upon the payment of the tax on account of her legacy a sum sufficient to leave her the net amount of $50,000. This is a right which the courts recognize and which they will enforce against the executors. The right of the legatee to compel the application of a sum sufficient to pay the tax which would otherwise be assessable upon her legacy is certainly an interest in the transfer of property. It is a right recognized in law and enforced in practice, but it is argued that, if the statute be so construed, it results in a payment of a tax upon a tax. This is not strictly true. While it is true in the supposed case that $7,879 goes to the state and not to the legatee, it is equally true that a tax is reckoned upon the whole amount of a legacy, including that part of it necessary to pay the tax when the tax is not payable from the residue and is deducted from the legacy."

In the case of In Re Bowlin's Estate, 248 N. W. 741, the Supreme Court of Minnesota had before it for consideration the question as to whether or not the inheritance tax might be deducted where there was a testamentary declaration that the tax should be paid from the residue of the estate. In this case, the inheritance taxes were on forty bequests aggregating Five Thousand Two Hundred Eighty Eight Dollars and Eighty Nine Cents ($5,288.89) and the probate court included this sum along with the appraised value of the personal property for taxation. In passing upon the question as to whether the amount of the tax should have been added to the bequests, the court said at page 742:

> "When a bequest like those made to the forty beneficiaries first above

> mentioned is accompanied by a direction that inheritance taxes be paid out of the residue of the estate, it is in effect a bequest in the stated sum plus an amount sufficient to pay the tax properly chargeable to the entire bequest when so calculated. When the tax is computed upon the sum so arrived at and deducted therefrom, the remainder is the amount of the legacy which, by the terms of the will, is to be received by the legatee free from the tax."

In support of this decision, the court cited the In Re Levalley's Estate, supra, and observed at page 742:

> "Applying the Wisconsin rule to the case at bar would increase the amount of the tax on the forty bequests, but the tax would not be included in the aggregate of the rest and residue of the estate, the tax upon which has been included as a charge against the relators. We think the logic of the rule is sound and should be adopted in computing the inheritance tax in this state in like cases."

In the case of Textor et al vs. Textor 183 Atlantic 247, the Court of Appeals in Maryland also followed the rule as announced by the Supreme Court of Wisconsin in the Levalley's Estate that if a testator direct that inheritance tax be paid out of his estate, he thereby increases his gift to the extent of the tax.

In the case of In Re Henry's Estate, 66 Pacific (2nd) 350, the Supreme Court of the State of Washington had before it for consideration a will which provided that all of the inheritance taxes which might be charged to any of the legatees under the will were to be paid out of the estate and that the legacies were not to be reduced by any such taxes. The question arose as to how the tax was to be computed. The appellant contended that while it was to be paid by the estate, it should be figured upon the amount

of the specified legacy, while the respondent said the tax should be figured upon the sum which, when added to the specified legacy and the tax deducted therefrom would leave a balance which should be the amount of the legacy provided for under the terms of the will. The court in passing upon these contentions rejected the appellant's theory and decided the case upon the rule as was announced in the cases of Bowlin and Levalley, supra, above noticed.

A review of these authorities clearly indicates that any legatee, under the provisions of any will which has a testamentary declaration to the effect that taxes levied upon the legacies are to be borne out of a residuary estate are to receive such legacies or bequests tax free, on the theory that the tax given the legatees is an interest in property transferred to them. Therefore, the inheritance tax should be added to the legacies or bequests in arriving at the amount of tax to be paid, then deducted therefrom in arriving at the net legacy, as provided for in the In Re Levalley Estate above noticed.

CONCLUSION

In view of the above, it is the opinion of this department that any testator may provide for the payment of inheritance taxes out of the residuary estate. Inasmuch as a legatee receives his legacy tax free by reason of the testamentary declaration to the effect that such taxes are to be paid out of the residuary estate, the inheritance taxes due this state should be computed upon the legacy and the tax. This is because the tax bequeathed is an interest in property and being so said tax must be computed upon the sum of the legacy and tax.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
(Acting) Attorney General
RCS:RT