C O P Y

Re: INHERITANCE TAX: (1) When interest and penalties may be abated (2) Taxation of the interest of partner in partnership property.

March 22, 1937.

FILED 39

Honorable Mitchell J. Henderson,
Probate Judge,
Kansas City, Missouri.

Dear Judge Henderson:

This Department is in receipt of your letter of March 6, requesting an opinion as to the following facts:

> "I am herewith enclosing to you the application of executor for extension of time in which to pay inheritance tax and for the abatement of penalties thereof, also an order they prepared for me and a short resume of the situation as reported to me by the inheritance tax appraiser and from personal knowledge of my own.
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> This estate was filed in the probate court some ten years ago but has been in litigation from that time to the present date. I do not mean, now, from the standpoint of taxes, that matter has never become a question until this moment. Most of the estate was in the form of partnership assets out of which grew the litigation that continued for so many years. Because of the successful termination of the litigation the estate is worth around three hundred thousand dollars. Now they are asking me to abate all interest and penalties. My personal opinion is that I have no right to charge interest or fix penalties against them because the appraiser could not make a report until the litigation which finally terminated the interests of all parties was ended.
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> The appraiser reports to me in writing that while the litigation was in progress he from time to time took it up with Judge Guinotte; Judge Guinotte told him there was nothing that he could do except wait until the litigation was con-

cluded. Now it has been concluded and he is filing his report and wants me to approve it and to abate the interest and penalties. In addition thereto, I might add, that the partnership offices were in Missouri, the deceased died a resident of Kansas City, Missouri, but part of this estate was composed of land in the State of Kansas; I think about 38%, so they are filing here only 42% of the estate for taxation. It is their position that Kansas has a right to collect on that part of the estate that was in Kansas in land and Missouri has no right to assess it.

I would like to have an opinion from your office as to whether or not I should, in light of the facts, abate the interest and penalties, also as to whether or not they have a right to exclude from the appraised value of the property the lands located in the state of Kansas. If you are able to reach a conclusion about this matter from this letter and find that they are correct and will so advise me I will make the order they request. If there is some doubt about the matter I would like to set it down for hearing and have you assign some assistant attorney-general to take the matter up before me at a certain time so that I might hear them and you on this matter.

Would appreciate your writing me at your earliest possible moment as I would like to get it behind me."

I.

The application for an extension of time within which to pay inheritance taxes and for the abatement of penalties should be sustained.

The facts in this case, briefly, are as follows:

John Moffett died August 23, 1927 and under his will T. S. Moffett, a brother, of Kansas City, Missouri, was appointed as Executor of his Estate.

A large claim of John Moffert against Moffert Brothers (John Moffett and T. S. Moffett) partnership, hereinafter several times referred to, in the opinion of the widow and most of the heirs of John Moffett should have been filed against the Moffett Brothers partnership estate, but the said T. S. Moffett refused to file said claim and Helen Moffett, widow of John Moffett, deceased, filed an application in the Jackson County probate court for the removal of the said T. S. Moffett. This application was continued a number of times in the hope that it would not be necessary to remove T. S. Moffett, and there were many conferences, but, after some three or four continuances, the matter was heard by a special judge, Samuel Strother, sitting for Judge Guinotte, whereupon the said T. S. Moffett was removed as executor of the John Moffett estate for conflict of interest and thereupon the Commerce Trust Company, which was also named in the will of John Moffett as an Executor, qualified and became Executor De Bonis Non of the said estate of John Moffett, deceased, on November 28, 1928. There was litigation from the very start regarding this claim of the John Moffett estate. Although the Commerce Trust Company filed such a claim in the probate court of Jackson County, Missouri, at Kansas City, as hereinafter stated, the said claim was included in the equity accounting suit, No. 7374, instituted by T. S. Moffett in the district court of Harper County, Kansas against the heirs and beneficiaries of John Moffett, deceased, hereinafter mentioned. This equity suit involved many issues between the John Moffett and T. S. Moffett people, but,when finally adjudicate recently, greatly clarified same.

As shown by the report of the appraiser of the John Moffett Estate, Samuel L. Trusty of Kansas City, Mr. Trusty reported the pendency of the Moffett equity accounting litigation, Suit 7374, in the district court of Harper County, Kansas, and Mr. Trusty was instructed by the probate court of Jackson County, Missouri, at Kansas City (Honorable Jules E. Guinotte) to defer making his appraiser's report until the outcome of that litigation, because until the final adjudication of said litigation no one could tell what the assets of the John Moffett Estate could consist of.

In the appraiser's report is shown a claim of the John Moffett Estate for $152,947.63 against the Moffett Brothers (John Moffett and T. S. Moffett) partnership estate at the date of the death of John Moffett, August 23, 1927. This claim constitutes a large part of the estate of John Moffett, and, with the exception of some payments made on said account subsequent to the death of John Moffett, the final judgment of the district court of Harper County, Kansas, of $142,452.24, part of said $152,947.63 was the bone of contention in the litigation which has but recently been terminated in the state and federal courts. The outcome of that litigation determined whether said assets would or would not be in the John Moffett estate, as the entire amount was in question in said liti-

gation. In other words, if the litigation in question had been lost by the John Moffett Estate, the aforementioned item of $152,947.63, as reported by the appraiser, Mr. Trusty, would have been eliminated, and, in addition, there would have been a claim of some $38,441.18 against the John Moffett estate. This is shown in abstract of said Harper suit on appeal in Kansas Supreme Court ("B" at Abs. 567 in Appeal No. 30826).

The appraiser, S. L. Trusty, in my opinion was fully justified in awaiting the outcome of the litigation before making his report. In fact, I do not see how he could make a report without doing an injustice to the heirs and beneficiaries, except after the termination of the litigation mentioned.

I find that there was other litigation than the equity accounting suit in the district court of Harper County, Kansas, which also make it difficult for the appraiser to determine what are the assets of the John Moffett estate. The more important cases are as follows:

Moffett v. Moffett, 131 K. 582; 292 P. 947
Clark v. Moffett, 136 K. 711; 18 P. (2nd) 555
Moffett v. Moffett, 290 U. S. 642; 290 U. S. 602
Moffett v. Robbins, 14 Fed. Supp. 602
Moffett v. Robbins, 81 Fed. (2nd) 431
Zombro v. Moffett, 44 S. W. (2nd) 149 (Mo. Sup. Ct.)

Section 578 R. S. 1929 provides, in part, as follows:

> "All taxes imposed **** shall be due and payable at the death of the decedent, and interest at the rate of six percent (6%) per annum shall be charged and collected thereon for such time as said taxes are not paid, unless the payment of interest is abated or time of payment extended by order of the probate court, because without negligence final assessment of tax cannot be made; ******"

In view of this section of our statutes and in view of the facts set out above, this Department is of the opinion that the application for the extension of time within which to pay inheritance taxes in this estate and for the abatement of penalties should be sustained.

II.

The interest of a partner in partnership property is taxable at the domicile of the deceased partner.

There is no question but that the lex rei sitae controls the title and disposition of real estate, so that if this were merely a case of a resident decedent owning real estate in Kansas there would be no question but that the real estate would be taxable in Kansas and not in Missouri. However, the appraiser's report shows that the real estate in question belonged not to John Moffett, the deceased, personally, but belonged to Moffett Brothers, a partnership, and to the partnership of Moffett Brothers and Andrews. The share of John Moffett in the partnership of Moffett Brothers and Andrews is valued at $26,722.69. The appraiser, however, has set up as taxable in Missouri only $15,787.29 for the reason that the balance is located outside of Missouri, the assets of the partnership being entirely real estate. The value of John Moffett's interest in the partnership of Moffett Brothers is set out in the report as $86,117.20. However, the appraiser has here allocated to Missouri only $39,834.74. The assets of this partnership consisted principally of live stock, wheat, farm equipment and real estate.

It is the opinion of this Department that when a co-partner dies, his interest in the partnership is the surplus after payment of debts and is therefore intangible personalty, even though the partnership owned real estate. Blodgett v. Silbermann, 277 U.S. 1 In that case the decedent was domiciled in the state of Connecticut, but was a member of the partnership of William Openhym of the state of New York. The partnership owned considerable real estate in the state of New York. In discussing this question the Court said:

> "A partner has a right equal to that of his partners to possess specific partnership property for partnership purposes, but not otherwise. His right to specific partnership property is not assignable, nor is it subject to attachment or execution upon a personal claim against him; upon his death the right to the specific property vests not in the partner's personal representatives, but in the surviving partner; his right in specific property is not subject to dower, curtesy or allowance to widow's heirs or next of kin..... It is very plain, therefore, that the interest of the decedent in the partnership ..... was simply a right to share in what would remain in the partnership assets after its liabilities were satisfied. It was merely an interest in the surplus, a chose in action. It is an intangible and carries with it a right to an accounting."

Honorable Mitchell J. Henderson March 22, 1937.

In view of this decision of the Supreme Court of the United States, it is the opinion of this Department that the interest of John Moffett, deceased, in the two partnerships heretofore referred to is a right to an accounting, a chose in action, an interest in the surplus after the payment of debts, and is taxable as intangible personal property in the State of Missouri, the domicile of the decedent.

In conclusion, we wish to call the Court's attention to the deduction of $5000.00 paid to R. O. Robbins as administrator's fee in Kansas. It is our opinion the administrator's fee paid in Kansas is deductible in Kansas, but not in Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant Attorney General.

APPROVED:

J. E. Taylor
ACTING ATTORNEY GENERAL

JWH:EG