

PROBATE COURTS:) Inheritance tax appraiser cannot
) employ attorney to advise him
INHERITANCE TAX:) relative to the appraisement and
charge the fee of such attorney
as necessary expenses incurred
in the performance of his duties
as appraiser.

January 5, 1939



Hon. Mitchel J. Henderson
Probate Judge
Kansas City, Missouri

Dear Judge:

This will acknowledge receipt of your request for
an opinion of recent date which reads as follows:

"As Probate Judge and a County official I
am desirous of obtaining an opinion from
you as it affects Section 589. You are
familiar with the fact that the Court
appoints inheritance tax appraisers to
appraise estates. Section 589 states that
the appraiser is entitled to Five Dollars
a day, etc., "And the actual and necessary
expenses incurred by him in the performance
of his duties."

In the large cities we have, of course, large
estates with many intricate legal problems
and other problems. The inheritance tax
appraiser must know about certain legal prob-
lems before he can file a proper report. In
the Bernheimer estates we have here, Jerome
Bernheimer was a very rich man. He died in
September, not this year, but a year or two
ago, and his wife died the following December.
A legal question arose in the mind of the
appraiser as to whether or not that portion
of the Jerome Bernheimer estate which was
left to Mrs. Bernheimer was taxable in the
Bertha Bernheimer estate. Second, whether
or not that portion of the estate which was
left in trust for Earl Bernheimer is taxable
because of the fact that there is a clause
in the Will that if Earl Bernheimer dies with-
out issue, at his death the estate will go to
charitable institutions.

I have always understood that an appraiser had a right to employ an accountant or experts to give him advice about ninety-nine year leases and things of that kind because the statute says he is entitled to "actual and necessary expenses incurred by him in the performance of his duties." I take it that means more than mere street car fare or taxi cab fare in going to and from the various pieces of property.

In the Bird estate and in the Peters estate which consisted largely of stock in the Emery, Bird, Thayer Company depending much on the value of the stock in that company, the stock of that company depended on the value of certain lease-hold interests they had at 11th & Walnut and Grand and in addition to that the Emery, Bird lease provided that the rent should be payable in gold. That matter, as you perhaps know, has been in the Courts for some time as to whether or not they had to pay the rents in gold or coin of the realm. We have had several estates that have had Emery, Bird, Thayer stock. As a lawyer I couldn't advise them just exactly how to value it.

Some members of the Bar Committee claim that you as attorney-general are the legal adviser of the appraiser. That couldn't possibly be, for the simple reason you are legal adviser for the State; you are legal adviser for the State Treasurer; you are interested in every dollar being collected that can be collected. You are a part and parcel of the inheritance tax laws. You have to be notified in these matters. In other words, you occupy in my judgment a partisan position (not that I haven't confidence in any position you take with respect to these matters) and being a part and parcel of it and representative of the State Treasurer who is charged with the authority of collecting these things, it looks unreasonable and unjust that you should be called upon to advise every inheritance

tax appraiser in the state of Missouri about what the law is on every little subject that comes up within his jurisdiction.

The inheritance tax appraiser stands as a fair and impartial appraiser between the State of Missouri and the estate. The lawyer for the estate shouldn't, of course, be the legal adviser of the appraiser and as a corollary, if the lawyer of the estate shouldn't advise him, should the attorney-general representing the state and those in charge of collecting the taxes be the adviser? In my opinion the appraiser is entitled to outside legal advice from lawyers who can give him the benefit of their judgment as to legal questions involved without any interest on either side.

These appraisers come to me almost every day with their problems. I don't think it is my duty to give them advice because I am supposed to sit as a Court if there are exceptions filed to hear the thing impartially from the standpoint of the State of Missouri and the estate.

Some seem to be of the opinion that all you have to do is appraise a few knives and forks or appraise 40 acres of land out here in the country some where and that is all there is to it. But that is far from it. In my opinion the law means just what it says that he is "entitled to the actual and necessary expenses incurred by him in the performance of his duty."

The performance of an appraiser's duty means full performance. Now, if this requires the expert advice of a tax man in order that he might make full performance, then I think he is entitled to employ him. If it requires the advice and the opinion of a lawyer, I think he is entitled to employ him. If it requires the opinion and advice of experts on the values of leases and leaseholds, Ninety-nine year leases and things of that kind, I think he is entitled to employ them. But I don't want to make a mistake in this matter and I would like to have the benefit

of your judgment in a written opinion directed to me about it."

- As we interpret your letter, your question stated briefly is:

In cases where the value of estates depends in a large measure upon a correct interpretation of certain legal questions connected with the estates, can the Probate Court allow the fee of an attorney for the appraisers as part of the actual and necessary expenses incurred by the appraiser in the performance of his duties.

Section 585, R. S. Mo. 1929, reads 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. Such court or the judge thereof in vacation shall immediately upon the filing of the inventory and appraisal of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the said court or judge, that such estate is not subject to the tax provided for in this law, such finding and opinion shall be entered of record in said court, and thereupon the provisions of section 583 shall become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisal be shown. 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 tax-paying 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. Every such appraiser shall make and subscribe, and file with the court appointing him, an oath that he will faithfully and impartially discharge his duties as such appraiser and that he will appraise all the property, estate, interest therein or income therefrom involved in the proceeding in which he is appointed at its clear market value and shall forthwith fix a time and place for hearing the evidence and shall file notice thereof with the court appointing him not less than ten days prior to the date so fixed and shall also give notice by mail to all interested persons whose address he may have, always including the state treasurer and the prosecuting attorney of the county."

It will be seen from the foregoing section that the power to determine the amount of the inheritance tax and any other question connected therewith is vested in the Probate Court. To determine the amount of the tax necessarily requires a determination of the value of the estate subject to the tax. The probate court under the foregoing statute may set a day for hearing and determining the amount of the inheritance tax against any estate. At such hearing the court would of necessity have to determine the value of the assets of the estate. If this procedure is followed no doubt the probate court would subpoena witnesses to testify as to the value of the assets, and from such evidence and from other knowledge or information the court may have, the court would set a value on the estate. In other words, the court would appraise the estate for the purpose of determining the amount of inheritance tax due by the estate.

Said section 585 R. S. Mo., 1929 provides, however, that before the probate court determines the amount

of the tax due, it may appoint, "some qualified tax-paying 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 ****". Such appraiser must subscribe to an oath that he "will appraise all the property, estate, interest therein or income therefrom **** at its clear market value". He is also given authority to set a date for hearing evidence as to the value of such assets, and by section 586 R. S. Mo., 1929 he is authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers and all other material evidence and to take the testimony of all witnesses under oath. The appraiser is therefore given ample power to secure all information that is necessary to assist him to arrive at the clear market value of the property, which is all he is required to do.

It is suggested in your letter that in some cases the value of certain assets depends upon a determination of certain legal questions such as the legal effect of certain clauses in a lease. However, the appraiser is not charged with the duty of determining the actual value of the assets. He is charged with the duty of determining the "clear market value". Clear market value is the amount which property will bring at a fair sale between a willing seller and a willing purchaser. The appraiser can ascertain from market reports, from the opinions of witnesses brought before him and from other information readily available to him what the clear market value of property is. The question for him to determine is; "What would this property bring in an exchange between an owner who is willing but not compelled to sell and a buyer who is able and willing to buy"? It is true the interpretation which the seller and buyer put upon legal questions affecting the property would affect their respective estimates of the value of such property, but this would be of little importance in appraising the property at its clear market value. If property will sell at a fair sale for a certain figure, then that is its market value even though the seller or purchaser, or both, might be badly mistaken as to what title either had or was acquiring. Certain legal questions would no doubt in some cases hold the market value of property down but the ultimate value to be determined is the market value and not what the market value should be. In other words, suppose the stock of Emery, Bird, Thayer Company has not sold and is not valued by anyone at more than a certain figure per share and the reason given by those placing such a low value

on it is that there is a serious question as to whether rent on certain leases has to be paid in gold. Even if the appraiser should secure able attorneys and those attorneys should advise him that under the terms of the lease in question the rent did not have to be paid in gold, would that alter the fact that the stock could not be sold for more than a certain figure because there was a doubt in the mind of the buying public as to whether that interpretation of the lease provisions was correct? The ultimate question is one of fact, that is, what will the stock sell for at a fair sale, and it is not a question of what it would sell for if people really understood some lease provision. The thing to be determined is what the property will sell for on the market at a fair sale and not what it ought to sell for.

It therefore seems to us that the advice of an attorney is not necessary for an appraiser before he can perform his duties. He can use all the evidence and information he can get to arrive at a clear market value of the estate. He then reports to the court what his findings are (Sec. 586, R. S. Mo., 1929). Any interested person may file exceptions to such report (Sec. 587, R. S. Mo., 1929). The court will rule upon the exceptions and assess the tax and from that assessment interested parties may appeal to the circuit court (Sec. 587, R. S. Mo., 1929).

In your letter you state that you do not deem it your duty to advise appraisers because you are supposed to sit as a court if exceptions are filed to the appraiser's report. We are not saying that it is your duty to advise appraisers, but in so far as inheritance tax matters are concerned the Probate Court is not a judicial tribunal but is an administrative agency.

In the case of De Pauw University vs. Brunk, 53 Fed. (2d) 1.c. 651, it is said:

"The probate court, so far as inheritance tax matters are concerned, is not a judicial tribunal. It is an administrative agency. It is not uncommon for states to commit to courts administrative functions. The assessment of a tax and its collection are administrative matters. The function assigned to the probate court is that of the assessment of the tax."

Hon. Mitchel J. Henderson

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Likewise the Missouri Supreme Court has held that the assessment of taxes is an administrative act, (In Re: Hall's Estate, 85 SW (2d) 621)

CONCLUSION

It is therefore the opinion of this office that inheritance tax appraisers appointed to appraise estates for the purpose of assessment of inheritance tax cannot employ attorneys to advise them relative to the appraisement and charge the fee of such attorneys as a necessary expense incurred in the performance of their duties as appraisers.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
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HHK:RW