INHERITANCE TAXES:
EXPENDITURES FOR LEGAL
SERVICES A DEDUCTION
AGAINST, WHEN:

Under Sec. 465.100 RSMo 1949, reasonable value of necessary legal services furnished to the administrator to be allowed; are administration expenses and deductible against inheritance taxes. Also reasonable value of services of additional attorneys secured by heirs to assist administrator's attorney where such services were necessary and beneficial to estate to be allowed and paid from estate funds; are administration expenses, and deductible against inheritance taxes.

March 22, 1951

3-23-51

FILED
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Mr. R. E. Moulthrop
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

> "The following question has arisen incident to the appraisal of an estate for inheritance tax purposes, upon which, an opinion from your office is desirable.
>
> "Where a claim is filed against the estate of a decedent for services rendered the decedent during his lifetime, the Administrator through regularly employed counsel for the estate proceeds to resist the claim through ensuing litigation and all heirs join in the employment of additional counsel to assist in the resistance of the claim. Are fees paid such additional attorneys properly chargeable as expenses and deductible as such as against inheritance taxes?"

In those instances when an action is brought by the executor or administrator, or when it is necessary for him to defend any action brought against him, in which the estate is involved, the probate court by its order may allow a reasonable amount for legal services rendered to the executor or administrator in the settlement of his accounts, as provided by Section 465.100, RSMo 1949, as follows:

> "In all settlements of executors or administrators the court shall settle the same according to law, allow all disbursements and appropriations made by order of the court, and all reasonable charges for funeral expenses, leasing real estate, legal advice and service, and collecting and preserving the estate, * * *."

Reasonable amounts thus expended for attorney fees have long been held to be administration costs by the courts of this state, and we believe the decision in the early case of Crow v. Lutz, 175 Mo. App. 427, states the general rule with reference to legal services. In commenting on attorney fees for services furnished an administrator, the court at l. c. 434 said:

> "On the contrary, our statute provides and our courts hold that such claims are expenses of administration and, if reasonable, must be allowed by the probate court. Our statute clothes the probate court with power to directly allow such a claim and order its payment out of the assets of the estate. (State ex rel. v. Walsh, 67 Mo. App. 348.)"

It appears that some qualification was made to this rule in the later case of In re Estate of Thomasson, 350 Mo. 1157, in which the court stated:

> "This ruling in the Matson case was partly right and partly wrong, in our opinion. The holding that a claim for attorney fee for services rendered an estate is an expense of administration, is correct, with qualifications. As more fully explained in Nichols v. Reyburn, 55 Mo. App. 1, 5, the attorney contracts on the credit of <u>both</u> the administrator and the estate. The administrator making the contract is personally bound by its terms; the estate, only insofar as the services are necessary or beneficial and the charges reasonable. * * *"

From the facts given in your letter the administrator employed an attorney to represent him in his defense to an action involving a claim against the estate, and subsequently thereto additional attorneys to assist the administrator's attorney were employed by the heirs of decedent.

While the statement of facts does not indicate whether there was any necessity for the additional legal services, whether same was for the benefit of the whole estate, or merely beneficial to the heirs, and also whether the fees to be charged therefor were reasonable. It does appear that the expense of such additional legal services has already been paid although the source of the payment is not given. The chief inquiry is whether the fees of the additional attorneys may be deducted against inheritance taxes which may be due against the estate.

The employment of additional counsel was by all of decedent's heirs without the apparent knowledge, or consent of the administrator.

Ordinarily, attorneys employed by a person other than the administrator, under circumstances the same or similar to those given above, are the attorneys of the person employing them and not those of the administrator. It appears that the general rule in such matters has been well stated in Section 548, pages 688-9, Volume 21, American Jurisprudence, which is quoted as follows:

> "The general rule is that no allowance may be made out of the estate of a deceased person for the services of an attorney not employed by the personal representative of the estate where the services were rendered for the sole benefit of an individual or group of individuals interested in the estate. In some jurisdictions, this rule has been applied, although the services were incidentally beneficial to the estate. In other jurisdictions, however, allowances have been made for the services of attorneys thus employed by persons other than the personal representative, where the services benefited all persons interested in the estate and were beneficial to it. In accordance with the general rule, no allowance may be made out of an estate for fees of attorneys for services rendered to any individual claiming as a beneficiary of the estate, for his sole benefit, although an allowance may be made for services of attorneys for persons claiming as beneficiaries where those services are beneficial to the whole estate. * * *"

In view of the foregoing, it is our thought that since it does not appear that the additional legal services were necessary or the expense of same is reasonable, and that such services were contracted voluntarily by the heirs, and not by the administrator in

his effort to preserve the estate property, and in view of the fact that the administrator had previously secured legal counsel to represent him in an action filed against him in his official capacity and involving a claim against the estate, it is assumed that the attorneys were those of the heirs and not the administrator, and that the additional legal services were for their benefit in protecting their respective interests in the estate, and were not beneficial to the whole estate; that the court may not allow a claim for the payment of such services and order same paid from estate funds, as a reasonable expenditure for legal services within the meaning of Section 465.100, supra, and that the cost of additional legal services cannot be classified as administration expenses.

The conclusion reached in the preceding paragraph was the result of the assumption of certain facts therein stated, but in the event our assumption is wrong, then we hasten to add that the conclusion reached is not applicable, and that the conclusion would be different if the true facts of the case are also different from those assumed.

The general rule given above that no allowance may be made from a deceased person's estate for an attorney's services when the attorney was employed by someone other than the personal representative, where the services rendered were for the benefit of an individual interested in the estate, like other general rules has exceptions, to some of which we desire to call attention.

One of the most notable exceptions being in those instances where an heir employs an attorney to protect his own interests in the estate, but that from the nature of the services rendered they are not merely beneficial to the individual interest of the heir, but are beneficial to the whole estate as well. Under such circumstances the reasonable value of the legal services should be allowed and paid from the funds of the estate, and in the case of In re Hirsch's Estate, 278 N. Y. S. 255, such a payment from the estate was held to be proper. In discussing the matter, the court said at l. c. 257:

> "It is well established that, where the services of the attorney have resulted in benefit to the estate as a whole, the payment to him should be made from the entire fund and not merely from the distributive interest of the person on behalf of whom he primarily acted. * * *"

Again, it appears that another notable exception to the general rule given above, exists in those instances in which additional

counsel has been secured to assist an attorney in litigation involving estate property. Although the services were of benefit to the heirs in protecting their individual interests, yet where the additional legal services were beneficial to the whole estate, the reasonable value of such services should be allowed and paid from estate funds. This in effect was the holding in the case of In re Schwint's Estate, 183 Okla. 439, the applicable portion of the court's opinion being found at l. c. 441, and which reads as follows:

> "The general rule is that the employment of an attorney by an heir or legatee will not of itself create a liability on the part of the estate for the fees of such attorney. * * * But where the services of the attorney employed by some of the heirs or legatees are beneficial to the estate, as a whole, the court may, if the facts justify it, allow out of the estate a reasonable fee for such services. * * * In some of the cited cases the proceedings were against the representative of the estate and were beneficial to the entire estate. However, we think the principle is the same in those cases as in this case, where the services are for assisting the attorney employed by the representative and are found to be beneficial to the estate. Here both the county court and the district court found that defendants in error performed services which benefited the estate as a whole, and the plaintiffs in error do not question the correctness of that finding. * * *"

Therefore, it is our further thought that in the event the facts assumed above do not exist, but if the true facts are that although the attorneys employed by the heirs to assist the attorney previously employed by the administrator in resisting an action involving a claim against the estate was for the benefit of the heirs, and the services were beneficial to the whole estate, such services were necessary to the whole estate, and the cost of the services were reasonable, then the probate court may allow a claim for such reasonable services and order same paid from the estate funds under the provisions of Section 465.100, supra, and in that event the additional legal services would constitute administration expenses.

The specific inquiry in the opinion request, which we repeat here is:

> "Are fees paid such additional attorneys properly chargeable as expenses and deductible as such as against inheritance tax?"

Since we have discussed the first part of the inquiry, and in view of our assumption of the existence of certain facts and have ruled that the fees of the additional attorneys were not and could not be classified as administration expenses; or in the alternative the reasonable cost of additional legal services might properly be allowed and paid from estate funds in the same manner as the law provides that other administration expenses may be allowed and paid, under the circumstances mentioned above, we turn now to the discussion of the latter part of the inquiry, namely, whether such fees are deductible against inheritance taxes, which may be assessed against the estate.

This inquiry necessarily calls for a consideration of the Missouri inheritance tax laws and how the amount of the tax is to be determined. The statutes which provide the necessary procedure to be followed in levying state inheritance taxes are to be found in Chapter 145, entitled "Inheritance Tax" of the RSMo 1949. These statutes are quite volumnious, and we find it impractical to quote all of them in a short opinion of this kind, but merely refer to them here in passing. It also appears that such matters have been ably discussed in several opinions of the courts, to which we desire to call attention.

In the case of Bernays v. Major, 344 Mo. 135, l. c. 140, the court said:

> "The tax in question is a tax on the right to receive property rather than on the right to transfer property after death. (In re Rosing's Estate, 337 Mo. 544, 85 S.W. (2d) 495; Brown v. State, 323 Mo. 138, 19 S. W. (2d) 12.) * * *."

In the case of In re Rosing's Estate, supra, in discussing the nature of inheritance taxes, the court at l. c. 547 said:

> "* * *An inheritance tax in its common form is however an excise tax on the privilege of taking property by will or by inheritance or by succession in any other form upon the death of the owner, and in such case is imposed upon each legacy or distributive share of the estate as it is received. Such tax is called a legacy or succession tax. (26 R. C. L. sec. 166 p. 195.)"

The statutes do not specifically provide what deductions are to be made from the gross estate in arriving at the net-base value of the same, from which the amount of inheritance taxes are to be determined, and the court so held in the case of In re McKinney's Estate, 351 Mo. 718, at l. c. 721, as follows:

> "Under our statutes the legislative formula for determining the property subject to the tax is the net or 'clear market' value of all property actually coming into the possession and enjoyment of the intended beneficiary. Mo. R. S. A., Secs. 571-574; In re Rosing, supra; In re Costello, supra. There is no express statutory provision for deductions and so what may or may not be deducted from the gross estate in arriving at the base for the tax is left to construction and interpretation subject to the statutory limitation of the clear market value of all property actually coming into the possession and enjoyment of the recipients. * * *"

In this case the court held that in arriving at the clear net market value of the estate subject to payment of inheritance taxes, the fees of a trustee of a trust created by the will of deceased should have been considered as a deduction.

While the statutes or court decisions of Missouri do not specifically hold that administration expenses are deductible against inheritance taxes, it appears that such expenses should be deductible, and in other states where the inheritance tax laws are similar to those of Missouri, such expenses have been held to be deductible.

In the case of In re Matter of Gihon, 169 New York Reports, page 443, in discussing the deductibility of administration expenses from state inheritance taxes, the court said at l. c. 445:

> "This appeal presents for determination the propriety of the deduction of three certain items in assessment of the value of the testator's estate for the purpose of the imposition of a transfer tax. The probate of the will was contested and in the proceedings arising on such a contest a temporary administrator was appointed. The amount of his fees and disbursements was deducted from the value of the estate. The appellant challenges the correctness of this allowance. We think the

> deduction was properly made. It was an expense of administration, and, therefore, chargeable to the estate, and not to the legatees or devisees. The transfer tax imposed by the laws of this State is a tax, not on the property of the estate, but on the succession by the legatee, devisee, next of kin or heirs at law to the fortune of the deceased. Personal property does not pass directly from the deceased to his legatee or next of kin, but all that such legatee or next of kin takes is what may be coming to him from the estate on its distribution after settlement. The amount represented by the expenditures of the administrator or the expense of administration never passes to the legatee or next of kin, and, therefore, is not subject to the tax. * * *"

Again in the case of State ex rel. v. Probate Court, 101 Minnesota, 485, at l. c. 487, the court said:

> "* * *The expenses of the administration of the estate of a deceased person are proper to be deducted in ascertaining the value of the estate for the purposes of taxation under the inheritance tax law. * * * The expenses of administration are imposed as a matter of law, and are caused by the use of the legal machinery provided by the state to wind up the affairs of deceased persons, and cannot ordinarily be avoided; hence it is just that they should be deducted from the valuation of the estate. * * *"

The provisions of the inheritance tax laws of the states of New York and Minnesota appear to be similar to those of Missouri in that the tax is to be determined from the net value of the estate rather than from the gross value of same. In those states, as well as in Missouri, certain deductions are allowable in arriving at the net value of the estate. In the former states administration expenses have been held to be a lawful deduction, but the decisions in Missouri have not so declared. However, in view of the fact that the tax is to be levied on the actual net value of the property coming into the possession or enjoyment of the beneficiaries it is our thought that administration expenses are properly deductible under Missouri law, for the reasons given in the quoted portion of above opinions.

The expense of additional attorneys employed by the heirs under the facts assumed above, were held not to constitute administration expenses, and it is our further opinion that such expenses cannot legally be deducted from the gross value of the estate for the purpose of arriving at the net value of such property subject to payment of the state inheritance taxes. However, in the event such assumption is contrary to the true facts, then under such circumstances, and for the reasons given above, the additional attorneys' fees may be allowed and paid from the estate funds in the same manner as the law provides for the payment of other administration expenses, and may also be deducted against state inheritance taxes which are due from said estate.

CONCLUSION

It is therefore the opinion of this department that an administrator who employs an attorney to represent him in his defense to a legal action involving a claim against the estate, is, under the provisions of Section 465.100, RSMo 1949, entitled to credit in the settlement of his accounts for the reasonable amount or value of such legal services, which amount is to be allowed and ordered paid from estate funds, by the court. That such reasonable amount spent for legal services is an administration expense and is deductible from the gross value of the estate in arriving at the clear net value of same for the purpose of determining the amount of state inheritance taxes due thereon.

It is the further opinion of this department that in the instance referred to above, and where it is assumed that all the heirs of deceased, apparently without the knowledge or consent of the administrator employed additional attorneys to assist the attorney previously employed by the administrator in his defense to an action involving a claim against the estate, that such additional legal services were for the benefit of the heirs in their effort to protect their respective interests in the estate, and not for the benefit of the estate as a whole. There not being any apparent necessity or benefit to the whole estate for such additional legal services, and which were not furnished to the administrator, but to the heirs, the court cannot allow a claim for said services as a reasonable amount spent for attorneys' fees within the meaning of Section 465.100, and cannot allow same paid from estate funds. That such amount cannot legally be classified as administration expenses and does not constitute a deduction within the meaning of the inheritance tax laws of Missouri.

However, where the facts are different from those assumed, and it is true that although the additional legal services were

secured by all the heirs of decedent, primarily to protect their respective interests in the estate, yet, where the services were necessary and beneficial to the whole estate, and the amount of fees claimed for such services is reasonable, the court may allow same and order such amount paid from the funds of the estate under the provisions of Section 465.100, supra. That such reasonable amount expended for additional attorney's fees is an administration expense and may properly be deducted as such against state inheritance taxes.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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