

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1759.

TAXES AND TAXATION—WHERE FAILURE TO FILE WITH PROBATE COURT APPLICATION TO DETERMINE INHERITANCE TAX—LIMITATIONS—JURISDICTION OF PROBATE JUDGE—FEES—FINDING AND DETERMINATION CERTIFIED TO COUNTY AUDITOR.

SYLLABUS:

Where the executor, administrator or other person or corporation in the possession of the property of a decedent's estate, the succession to which is subject to inheritance taxes under the provisions of Section 5332 and related sections of the of the General Code, does not within one year of the decedent's death file with the probate court having jurisdiction in the matter, an application to determine the inheritance taxes upon the succession or successions to the decedent's estate, and the Tax Commission of Ohio does not thereafter file such application, the probate judge as such court may make a finding and determination with respect to such inheritance taxes; and upon the certification of such finding and determination to the county auditor in the manner provided by law such probate judge is entitled to receive the fees therefor prescribed by Section 5348-10a General Code.

CLEVELAND, OHIO, January 13, 1938.

HON. LEO M. WINGET, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR: As previously acknowledged, I am in receipt of a communication from you in which my opinion is requested on certain questions stated in your communication as follows:

"1. Where the inheritance tax in an estate was not determined within one year of the date of death of said decedent and no application for the determination of said tax has been filed by the Executor or administrator or interested person of the Tax Commission under the provisions of

Section 5345-4 of the General Code, has the probate court authority on his own motion and without consulting any person including the County Auditor, to determine said tax?

2. If a Probate Judge would proceed to determine the inheritance tax in an estate under the section set forth above would he be entitled to the fee provision in Section 5348-10 of the General Code?"

In the consideration of the questions presented in your communication, I do not deem it necessary to discuss at length the statutory provisions relating to the levy of inheritance taxes in this State. It is sufficient to note in this connection that by Section 5332 and succeeding sections of the General Code provision is made for the levy of taxes upon successions to property passing, in trust or otherwise, to or for the use of a person, institution or corporation in the particular cases therein mentioned and provided for and at the rates prescribed by Section 5335, General Code.

As a consideration more immediately pertinent to the discussion of the questions here presented, it may be further observed that original jurisdiction with respect to the determination and certification of inheritance or succession taxes is conferred upon the probate court of a county. As to this, Section 5340, General Code, provides as follows:

"The probate court of any county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent, on the succession to whose property a tax is levied by this subdivision of this chapter, or to appoint a trustee of such estate, or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine the questions arising under the provisions of this subdivision of this chapter, and to do any act in relation thereto authorized by law to be done by a probate court in other matters or proceedings coming within its jurisdiction; and if two or more probate courts shall be entitled to exercise such jurisdiction, the court first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other probate court. Such jurisdiction shall exist not only with respect to successions in which the jurisdiction of such court would otherwise be invoked but shall extend to all cases covered by this act, to the end that succession inter vivos, taxable under the provisions of this subdivision of this chapter, may be reached thereby."

This section of the General Code should be read in connection with Section 5345, General Code, which, among other things, provides:

“From the report of appraisal and other evidence relating to any such estate before the probate court, such court shall forthwith upon the filing of such report, by order entered upon the journal thereof, find and determine, as of course, the actual market value of all estates, the amount of taxes to which the succession or successions thereto are liable, the successors and legal representatives liable therefor; and the townships or municipal corporation in which the same originated. Provided, however, that in case no application for appraisement is made the probate court may make and enter such findings and determinations without such appraisement. Thereupon the judge of such court shall immediately give such notice of such order to all persons known to be interested therein, and shall immediately forward a copy thereof to the tax commission of Ohio, together with copies of all orders entered by him in relation to or affecting in any way the taxes on such estate, including orders of exemption.”

By Section 5345-3, General Code, it is provided that within thirty days after the inventory and appraisement of a decedent's estate has been filed in the probate court, the executor or administrator of such estate shall give a written notice to the Tax Commission of Ohio; and that where no administration of a decedent's estate is being had, the person or corporation having custody of any property subject to inheritance taxes shall give such notice within sixty days of the decedent's death. This section further provides that where a portion of the property of a decedent's estate subject to inheritance taxes is not subject to administration in the probate court, and there is administration of the decedent's estate in the probate court, the notice required to be given herein by a person or corporation in possession of such property not subject to administration shall be given by such person or corporation to the executor or administrator of the estate and to the Tax Commission of Ohio.

Section 5345-4, General Code, is obviously pertinent in the consideration of these questions. This section provides as follows:

“The executor, administrator or such other person or corporation as may be in possession of property, the succession to which is subject to inheritance taxes under this sub-

division of this chapter, shall within one year of the decedent's death, file with the probate court having jurisdiction, an application, in the form prescribed by the tax commission of Ohio, to determine the inheritance tax upon the decedent's estate. Upon the failure of the executor, administrator or other person or corporation to file such application within one year of the decedent's death, the tax commission of Ohio shall have authority to execute and file an application for the determination of inheritance taxes in such estate, which application when so executed and filed shall be prima facie good and sufficient for all purposes and the tax shall be forthwith determined thereon by the probate judge. The time for filing the application may be extended by the tax commission not to exceed six months."

In view of the above noted statutory provisions relating to and providing for the jurisdiction of the probate court in matters relating to the determination and certification of taxes on successions to property in this State, I assume that the questions here presented have suggested themselves to your mind by reason of the general principle that before a court can exercise the jurisdiction reposed in it by law with respect to any particular matter, such jurisdiction must be invoked in manner and form as provided by law. This principle is adverted to in the case of *Spoors v. Coen*, 44 O. S., 497, wherein it was held:

"The judgment of a court upon a subject of litigation within its jurisdiction, but not brought before it by any statement or claim of the parties, is null and void, and may be collaterally impeached."

This rule is further stated in the opinion of the court in the case above cited as follows:

"To bring a cause before a court, competent to adjudicate it, it is not only necessary that the parties should be *in jus vocatio*, cited or summoned in the manner required by the law of procedure, but a case must also be made, or stated, affecting the party against whom relief is asked. The power to hear and determine a cause is defined to be jurisdiction. Freeman on Judg., Section 118. And, to use the language of Ranney, J., in *Sheldon vs. Newton*, 3 Ohio St. 494, 'it is *coram judice* whenever a case is presented that

brings this power into action.' 'But,' he adds, 'before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; *that such complaint has actually been preferred*; and that such person or thing has been properly brought before the tribunal to answer to the charge therein contained.'"

Although in the consideration of the questions here presented in light of the principles of law above referred to, it is noted from the facts stated in your communication that no application for the determination of inheritance taxes in any of the cases therein referred to, was filed with the Probate Court by any executor, administrator or other person or by the Tax Commission of Ohio, however, in this connection and in the situation here presented by the facts stated by you, consideration should be given to Section 5345-5, General Code, which provides that "if any person, company or corporation fails to give notice within the time prescribed in Section 5345-3 or fails to file an application within the time prescribed in Section 5345-4, the probate judge shall add to the tax fifteen per centum of its amount, except that when a notice or application is filed after such time and it is shown that the failure to file was due to a reasonable cause and not wilful neglect, no addition shall be made to the tax if the tax commission consents thereto." Although this section does not in terms provide that where no application for the determination of inheritance taxes has been filed with the probate court by any of the persons or officers authorized to file such application under the provisions of Section 5345-4, General Code, and within the time therein prescribed, the probate court upon its own motion may determine such inheritance taxes, this section clearly contemplates a situation of this kind and with respect to a situation of this kind provides that "the probate judge shall add to the tax fifteen per centum of its amount," except in cases where a notice or application is filed after such time and it is shown that the failure to file the application within the time prescribed was due to reasonable cause and not to wilful neglect, in which case, it is provided, no addition shall be made to the tax if the Tax Commission consents thereto. Inasmuch as it is not seen how in a situation of this kind the probate judge can make an addition by way of penalty or otherwise to the tax without having made a determination of the fact that any such taxes are due and payable and as to the amount thereof, if any, this section of the General Code by clear implication authorizes the probate judge on his own initiative to determine the fact and amount of inheritance

taxes on successions to all property having its taxable situs in this State where no application for the determination of such inheritance taxes is filed with the court in the manner provided by Section 5345-4, General Code. And since, further, in legal contemplation it cannot be known in any case whether inheritance taxes have accrued and have become due and payable on successions to property appearing in such case unless a determination of such fact is made by the probate court in the exercise of the jurisdiction conferred upon it by law, the probate court is authorized to make such determination in all cases whether such determination when made indicates the accrual and liability for inheritance taxes in the particular case or not.

Having reached the conclusion above noted with respect to your first question, your second question is answered by Section 5348-10a, General Code, which provides as follows:

“For services performed by him under the provisions of this chapter each probate judge shall be allowed a fee of five dollars in each inheritance tax proceeding in his court in which tax is assessed and collected and a fee of three dollars in each such proceeding in which no tax is found, which fees shall be allowed and paid to such judges as the other costs in such proceedings are paid but are to be retained by them personally as compensation for the performance by them of the additional duties imposed on them by this chapter. Provided always, however, that the amount paid to any probate judge under this section shall in no case exceed the sum of three thousand dollars in any one year.”

By way of specific answer to the questions presented in your communication, I am of the opinion that the same should be answered in the affirmative.

Respectfully,

HERBERT S. DUFFY,

Attorney General.