

3733.

INHERITANCE TAX—APPLICATION FOR DETERMINATION THEREOF
MANDATORY REGARDLESS OF SIZE OF ESTATE.

SYLLABUS:

In estates being administered in the probate court, where it clearly appears by reason of the smallness of the estate or by reason of the insolvency thereof that the succession to any property of said estate could not be subject to inheritance tax, it is nevertheless, the mandatory duty of the executor or administrator to file with the probate court an application for the determination as to the inheritance tax on the decedents' estates.

COLUMBUS, OHIO, January 2, 1935.

HON. PAUL SPRIGGS, *Prosecuting Attorney, Paulding County, Paulding, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, which reads as follows:

“I have been requested to procure an opinion from you relative to the following question:

In estates being administered in the Probate Court where it clearly appears, by reason of the smallness of the estate or by reason of the insolvency thereof, that the succession to any property of said estate could not be subject to inheritance tax, is it necessary for the executor or administrator to file with the court an application for the determination as to the inheritance tax on decedents' estates?

This opinion is requested by reason of the fact that at the present time the probate judge is requiring executors and administrators to file a statement for determination of inheritance tax in every estate that is administered in the Probate Court of this county.”

Sections 5345-3, 5345-4 and 5345-5, General Code (114 O. L., 799-800), passed in 1931, in one Act, read as follows:

“Sec. 5345-3. Within thirty days after the inventory and appraisal 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. 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. Provided, however, 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.”

"Sec. 5345-4. 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."

"Sec. 5345-5. 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. In case a false or fraudulent notice or application is wilfully made, the probate judge shall add twenty-five per centum to the amount of the tax. The penalty of twenty-five per centum here prescribed may be omitted by the probate judge if the tax commission consents thereto. The penalties so added shall be collected at the same time and in the same manner as the tax itself. The penalties provided herein shall be charged against the executor, administrator or other person or corporation having custody or control of any property subject to the inheritance taxes levied by this subdivision of this chapter and such executor, administrator or other person or corporation shall be personally liable for the penalties herein provided. Such penalties shall be divided in the manner prescribed for the division of the tax in section 5348-11 of the General Code."

The second of the above quoted sections appears to require executors and administrators to file with the probate court having jurisdiction of the particular estate, an application to determine the inheritance tax upon the decedent's estate within one year of the decedent's death. There does not appear to be any exception to this mandate. It is true that Section 5345-5, General Code, does not provide a penalty for failure to file the application, if there is no tax against the succession; however, such failure to provide a penalty does not in my opinion serve to indicate that the legislature did not intend to make it the mandatory duty of an administrator or an executor of an estate to file such application in each estate subjected to administration, regardless of whether or not it is apparent to all concerned, that there will be no tax.

There are several reasons which may be urged, after an examination of the Inheritance Tax Law (Sections 5331 to 5348-14a, General Code), to show that the legislature intended that an application for determination of the tax be filed by the executor or administrator in every case where there is administration of an estate,

Under the inheritance tax statutes, where a decedent is shown to have transferred property to another person during his lifetime without a valuable consideration "in contemplation of death" or with intention to take effect in possession or enjoyment at or after his death, the succession is taxable. Section 5332-2, General Code, after providing that the transfer of any property within two years prior to the death of transferor without a valuable consideration shall be deemed "in contemplation of death," unless shown to the contrary, states that,

"It shall be the duty of the persons by whom the application for determination of tax is filed to set forth in detail therein a list of all such transfers. If no such transfers have been made such fact shall be stated."

In other words, the presumption is that any transfers of property made by a decedent within the two years preceding his death without valuable consideration were made "in contemplation of death" and that consequently the successions are taxable. This presumption has to be rebutted by evidence and therefore it is necessary for a court to make a judicial inquiry into this matter to determine whether or not as a matter of law the transfers were "in contemplation of death." Even though the value of an estate may be small and such estate might appear to be insolvent, it might be that after an inheritance tax hearing by the Probate Court certain transfers of property made by the decedent in his lifetime and sometime before his death, which transfers appeared to be for valuable consideration, would be held by the court not to have been made for a valuable consideration, but rather in contemplation of death.

Furthermore, Section 5348-10a, General Code, provides:

"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.*" (Italics mine.)

It appears to me that by the italicized language of the foregoing section, the legislature has shown that it intended that an inheritance tax proceeding be had in every estate, because provision is made for the fee for a probate judge where no tax is found to be due. As shown by Opinions of the Attorney General for 1921, page 718, the fees of a probate judge under Section 5348-10a, General Code, together with other fees and expenses are to be paid out of the state's share of the undivided inheritance taxes in the county treasury, and therefore the individual estate does not bear such costs.

It would seem that the Supreme Court of Ohio has indirectly taken the view heretofore set forth. Section 10501-13, General Code, part of the new Probate Code, effective since January 1, 1932, provides:

"The several judges of the probate court shall make rules not inconsistent with the laws of the state, for regulating the practice and conducting the business of the court, which they shall submit to the supreme court. The supreme court may alter and amend such rules, and make other and further rules, from time to time as they deem necessary for regulat-

ing the proceedings in all the probate courts of the state in order to maintain regularity and uniformity in their proceedings."

The Probate Code Committee of the Probate Judges' Association, pursuant to the authority set forth in Section 15001-13, General Code, submitted to the Supreme Court forty-five uniform rules of practice for the Probate Courts of Ohio.

On February 24, 1932, the Supreme Court in an entry approved these rules.

Rule 23 of these rules, to be found on page 23 of the 934 Cumulative Supplement to Addams and Hosford's Ohio Probate Practice and Procedure, is entitled "Inheritance Tax Proceeding," and reads as follows:

"No administrator or executor will be discharged on the filing of a final or distributive account, until an application has been filed to determine the inheritance tax, if any, chargeable against the estate administered."

Section 10509-170, General Code, requires that an executor or administrator render his final or first partial account of his administration within nine months of his appointment. See also G. C. 10508-13 (a). Sections 10509-188 and 10509-189, General Code, provide for the granting of a final discharge to an administrator or executor by the Probate Court, after such administrator or executor has filed his final account and his account of distribution.

From Rule 23, quoted, supra, it would appear that the Supreme Court has taken the view that the language of section 5345-4, General Code, is a mandatory requirement that every executor or administrator file an application for determination of inheritance tax within one year of the decedent's death, and as a means of enforcing this requirement, under authority of section 10501-13, General Code, to approve rules "*not inconsistent with the laws of this state,*" has required that the Probate Court withhold an executor's or administrator's discharge until the application for determination of inheritance tax has been filed with the court.

I therefore feel that the Supreme Court has taken the position that it is necessary for each executor or administrator to file with the Probate Court an application for the determination of inheritance tax on the decedent's estate, under all circumstances.

In view of the foregoing, I am of the opinion, in specific answer to your question that, in estates being administered in the Probate Court, where it clearly appears by reason of the smallness of the estate or by reason of the insolvency thereof that the succession to any property of said estate could not be subject to inheritance tax, it is nevertheless the mandatory duty of the executor or administrator to file with the Probate Court an application for the determination as to the inheritance tax on decedents' estates.

Respectfully,

JOHN W. BRICKER,
Attorney General.