4551.

INHERITANCE TAX LAW—TAX PROVIDED BY SECTION 5335-1, G. C., IN ESTATE TAX RATHER THAN INHERITANCE TAX—PAID AS CHARGE AGAINST NET ESTATE OF DECEDENT.

SYLLABUS:

The additional tax provided for by Section 5335-1, *General Code, is an estate tax and not an inheritance tax within the ordinary meaning of that term and is to be paid by the administrator or executor as a charge against the net estate of the decedent without any right upon the part of such administrator or executor to reimbursement from the heirs, devisees, legatees or other beneficiaries succeeding to the estate. Where the estate of the decedent passes by last will nad testament, the burden of this tax falls upon the residuary estate to the extent that the same is sufficient in amount to pay the tax, and specific devises, bequests and legacies are not affected by the payment of the tax, except by way of proportional abatement where the residuary estate, if any, is not sufficient to pay such additional tax and other taxes, debts and charges against the estate.*

COLUMBUS, OHIO, August 8, 1932.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—My opinion has been requested by you upon certain questions presented in a communication which reads as follows:

"A question upon which we respectfully request your opinion and advice is whether the tax under G. C. 5335-1 (80 per cent. of federal estate tax) is, like the federal estate tax, paid by the estate and, where there is a will, charged against the residuary estate (*Y. M. C. A.* vs. *Davis,* 264 U. S. 47), or a succession tax, the same as under G. C. 5332, and paid by the legatees or devisees.

The inheritance tax imposed by section 5332 is a tax upon the succession and is payable by the persons to whom the property succeeds. The additional tax under section 5335-1 is 'upon the transfer at death of the estates of resident decedents,' just as the estate tax under section 301 of the federal statute is 'upon the transfer of the net estate'.

It would appear, therefore, that the tax under section 5335-1, like the tax under section 301 of the federal act, is imposed upon the transfer and is paid by the estate and, where there is a will, it is charged against the residuary legatees and not paid by or charged to legatees and devisees. But section 5335-4 provides—'Such additional tax shall be administered, collected and paid in the same manner as is provided for the administration, collection and payment of the tax levied under G. C. 5332'. Section 5336 provides that the tax under section 5332 shall be paid by the executor and collected by him from the persons entitled to the successions.

The question upon which we request your opinion is whether the tax imposed by section 5335-1, is, under the authority of section 5335-4, to be collected and paid as provided in section 5336, that is, paid by the executor and collected from all those who, under the

will, succeed to the property or is it a tax on the transfer to be paid by the executor and charged against and deducted from the residuary estate."

The questions presented in this communication require a consideration of the provisions of an act of the 87th General Assembly, enacted May 18th, 1927 (112 O. L. 421), which were carried into the General Code as Sections 5335-1 to 5335-4, inclusive. At the time of the enactment of the act here referred to, which is one for the stated purpose of levying an additional tax upon the transfer at death of the estates of resident decedents, Section 5332, General Code, made provision for the levy of an inheritance tax upon the succession to any property passing, in trust or otherwise, in the cases and in the manner provided for in said section, and at the rates provided for in Section 5335, General Code. This tax is a succession tax on the beneficial interest of each heir, legatee, devisee or other beneficiary of a decedent's estate. *Tax Commission* vs. *Lamprecht,* 107 O. S. 535.

Likewise at the time of the enactment of the act of the 87th General Assembly here under consideration, Title III of the Revenue Act provided for by an act of Congress, approved February 26th, 1926, provided for a federal estate tax upon the transfer of the net estate of every decedent dying after February 26th, 1926, at the rates designated in said act. This act of Congress is found in U. S. C. Title 26, Sections 1091 to 1121, inclusive.

Section 1092 of Title 26, U. S. C., is the section providing for the imposition of the federal estate tax and the rates thereof.

Section 1093 of said title provides as follows:

"The tax imposed by section 1092 of this title shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this section shall not exceed 80 per centum of the tax imposed by section 1092 of this title, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 1096 of this title."

The act of the 87th General Assembly of the State of Ohio, above referred to, was passed for the purpose of taking advantage of the credit allowed to the states by the provisions of Section 1093 of Title 26, U. S. C., above quoted.

Section 5335-1, General Code, enacted by the act of the 87th General Assembly above noted, provides that "in addition to the tax levied under Section 5332 of the General Code of Ohio, there is hereby levied an additional tax upon the transfer at death of the estates of resident decedents of an amount equal to 80 per centum of the tax imposed by Title III of the act of Congress, approved February 26th, 1926, known as the 'Revenue Act of 1926' ", at the rates contained in said act of Congress.

Section 5335-2, General Code, provides that the rules and regulations for determining the amount of the net estate upon which the tax imposed by Section 5335-1, General Code, shall be imposed shall, insofar as applicable, be the same rules and regulations adopted by the Commissioner of Internal Revenue for determining the net estate under the act of Congress known as the "Revenue Act of 1926".

By Section 5335-3, General Code, it is provided that the tax imposed

on any estate by Section 5335-1, General Code, shall be credited with the amount of the tax levied on successions from such estate under the provisions of Section 5332, General Code, at the rates provided for in Section 5335, General Code, and with the amount of any estate, inheritance, legacy or succession taxes actually paid to any state or territory of the United States or the District of Columbia in respect to any property included in the gross estate. This section further provides that in no event shall the tax payable under Section 5335-1, General Code, exceed the amount, if any, by which the maximum credit allowable to the estate against the United States estate tax exceed the special credits provided for, as above noted, in Section 5335-3, General Code.

By Section 5335-4, General Code, as amended June 8th, 1931 (114 O. L. 597), it is provided that the additional tax levied under Section 5335-1, General Code, "shall be administered, collected and paid in the same manner as is provided for the administration, collection and payment of the tax levied under Section 5332." This section, as amended, further provides, however, that no discount shall be allowed for advance payment of such additional tax, and that no interest shall be charged upon such additional tax until sixty days after the time of determination of the federal estate tax liability, and that after such time the interest charged shall be at the rate set forth in Section 5338, General Code, which interest shall be collected as part of the tax.

Reverting to a consideration of the purpose of the act of the legislature above referred to, it is noted that the Supreme Court of Pennsylvania in the case of *In re Knowles,* 295 Pa. 571, having for consideration a similar act of that state, and referring to the estate tax credit allowed by the provisions of the Revenue Act of February 26th, 1926, set out in Section 1093 of Title 26, U. S. C., said:

> "By this statute, the Federal government has declared it to be the national policy that the net value of all estates, in excess of $100,000, that amount being exempt (§ 303(a) (4), 44 Stat. at L. 72 chap. 27, U. S. C. title 26, § 1095(a) (4)), shall, before distribution to the persons entitled thereto, be reduced by certain percentages, progressively levied as succession taxes, but it is willing that the several states shall indirectly profit by this system; to that end, the Federal statute in effect provides that, in all instances where a state imposes inheritance taxes, the Federal government will allow, to those paying such local inheritance taxes, the amount thereof, up to a sum equal to 80 per cent of its own inheritance taxes, retaining the right to collect only so much of the Federal tax as may exceed the sum thus relinquished. This is a method of distributing to the several states moneys collectible by the national government from their taxables, and the provision in question is not intended to either burden or benefit the taxpayer. Whenever a state does not see fit to take advantage of the situation thus created, the national government will collect the entire 100 per cent of its assessed Federal inheritance taxes."

The foregoing discussion relating to the occasion for the enactment of the provisions of sections 5335-1, et seq., General Code, and to the purpose of their enactment leads to a consideration of the first question presented in your communication, that is, whether the tax provided for by Section 5335-1,

General Code, is an estate tax with the ordinary incidents of such tax, or whether on the other hand, the same is an ordinary inheritance tax imposed on the beneficial interest of each heir, legatee, devisee, or other beneficiary, succeeding to the decedent's estate by descent or by the last will and testament. Touching this question in its more general aspects, the following language found in 26 R. C. L., 195, 196, is here noted:

> "An inheritance tax, using the term in its broadest sense, is an excise which may be imposed on either, or both, of two entirely different subjects. It may be a tax upon the transmission of property by a deceased person, in which case it will be charged upon the whole estate, regardless of the manner in which it is to be distributed. Such a tax is called a probate duty, or estate tax. An inheritance tax in its common form is however an excise 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 a tax is called a legacy or succession tax. The inheritance taxes imposed by the states have almost uniformly been construed to have been imposed upon the right to receive rather than upon the right to transmit, and so constitute legacy or succession taxes, rather than probate duties or estate taxes. In some instances however the states have imposed estate taxes, either standing alone, or in addition to succession taxes. A tax imposed by a state upon the clear value of the estate passing from any person who may die seized or possessed thereof is, however, undoubtedly an estate tax, and what passes to the heir or devisee and to which he acquires title is his share of the estate remaining after the payment of the tax."

In the case of *Stebbins* vs. *Riley,* 268 U. S. 137, the court in its opinion, discussing this more general question, says:

> "The subject matter of an inheritance tax statute may be either the transmission or the exercise of the legal power of transmission of property by will or descent * * *, or it may be the legal privilege of taking property by devise or descent."

The court in its opinion in this case in the discussion of this question further says:

> "There are two elements in every transfer of a decedent's estate: the one is the exercise of the legal power to transfer at death; the other is the privilege of succession. Each, as we have seen, is the subject of taxation. The incidents which attach to each, as we have observed, may be made the basis of classification. We can perceive no reason why both may not be made the basis of classification in a single tax statute, so that the amount of tax which a legatee shall pay may be made to depend both on the total net amount of the decedent's estate passing under the inheritance or testamentary laws of the legacy to which the legatee succeeds under those laws."

As above noted, the tax provided for by Section 1092 of Title 26, U. S. C., the same being a part of Title III of the Revenue Act of 1926, is a tax

"imposed upon the transfer of the net estate" of a decedent. This tax is, therefore, in every sense an estate tax and not a succession or inheritance tax. *Y. M. C. A.* vs. *Davis,* 264 U. S. 47.

> "The Federal estate tax is not a tax on inheritances but an impost upon estates, levied before anything reaches the beneficiary. Theoretically, this tax is on the transfer from the dead to the living imposed upon the right of the decedent to transfer his property and not upon the right of the beneficiary to receive it."
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> Gleason & Otis Inheritance Taxation (3Ed.) 3; 4 Cooley on Taxation (4Ed.) Sec. 1721.

The tax provided for by Section 5335-1, General Code, above referred to, is by its terms "an additional tax upon the transfer at death of the estate of a resident decedent of an amount equal to 80 per centum of the tax imposed by Title III of the Act of Congress approved February 26th, 1926, known as the 'Revenue Act of 1926' ", at the rates provided in said Act of Congress. It is noted that the language of Section 5335-1, General Code, above quoted, providing for said additional tax, is quite identical with that employed by the Act of Congress in providing for the Federal estate tax. It follows from this consideration, as well as from the others above noted, with respect to the occasion and purpose of the tax provided for by Section 5335-1, General Code, that this tax is to be ascribed the character of an estate tax, and not that of a succession of inheritance tax.

In the case of *Brown* vs. *State,* 323 Mo. 138, the Supreme Court of that state had under consideration an amendment of the inheritance tax law of that state providing for an additional tax on the estate of decedents of 80 per cent of the amount of tax imposed under Title III of an Act of Congress, approved February 26th, 1926. The Supreme Court of Missouri in the case just cited held that "the additional tax provided by this amendment is in the nature of an estate tax, or tax on the right to transfer property."

The same view with respect to the nature of this tax is indicated by the decision of the Supreme Court of North Carolina in the case of *Hagood* vs. *Doughton,* 195 N. C. 811, in a consideration of a similar tax law enacted by the General Assembly of that state for the purpose of taking advantage of the credit allowance provided for by the Act of Congress above referred to in the enactment of the Rvenue Act of 1926. The court held that the act there in question imposes a tax upon the transfer of the estate of a decedent and "is not an inheritance tax, but a tax upon the right of devolution and transfer of property situate in this state."

The court in its opinion in this case, speaking of said act, said that "the statute taxes, not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death."

From a consideration of the authorities above noted and discussed, it follows that the tax here in question is an estate tax rather than an inheritance tax within the ordinary meaning of that term, and that unless a contrary conclusion is required by the provisions of section 5335-4, General Code, this tax is to be paid by the administrator or executor as a charge against the net estate of the decedent and is not payable by the heirs, devisees or legatees as beneficiaries of the estate. As above noted, section 5335-4, General Code, provides that this additional tax levied under section 5335-1, General Code, shall be administered, collected and paid in the same manner as is provided for the administration, collection and payment of inheritance taxes provided for by section 5332, General Code.

With respect to inheritance taxes, provided for by section 5332, General Code, it may be said that the primary as well as the ultimate liability with respect to the payment of such taxes, is on the persons who, under the laws of descent and distribution, or under the last will and testament of the decedent, succeed to his estate; although in such case it is likewise provided that the executor or administrator shall also be personally liable for such taxes (section 5336, General Code). In other words, inheritance taxes as such may be paid by the administrator or executor out of the corpus of the decedent's estate, with the right in such administrator or executor in such case to reimbursement from the heirs, devisees, legatees or other beneficiaries of the estate to the extent of the amount of taxes levied on their respective successions. See *Wellman* vs. *Trust Co.*, 107 O. S. 267.

However, I am inclined to the view that the provisions of section 5335-4, General Code, above noted, expend their force in providing for the administrative machinery whereby the additional tax levied under section 5335-1, General Code, is to be collected and covered into the county treasury to the credit of the undivided special tax fund otherwise provided for by law, and that it was not intended by the legislature in the enactment of the provisions of section 5335-4, General Code, to provide for the ultimate incidence of this additional tax as between the estate of the decedent and the beneficiaries succeeding thereto. It would perhaps have been competent for the legislature in the enactment of the act providing for this additional tax to have provided that the same should be paid by the beneficiaries of the estate of the decedent, and for a method of determining how such tax should be apportioned to such beneficiaries, as was done in the legislation under consideration by the court in the case of *In re Knowles, supra.*

In the absence of any provision of this kind in the act here under consideration, it must be held that this additional tax is to be paid out of the estate of the decedent in the same manner as the federal estate tax is to be paid, and that such payment is to be made without any right upon the part of the administrator or executor to reimbursement from the heirs, devisees, legatees or other beneficiaries succeeding to the estate. It follows as a result from the conclusion here reached that where the estate of the decedent passes by last will and testament, the burden of the tax falls upon the residuary estate to the extent that the same is sufficient in amount to pay the tax, and that specific devises, bequests and legacies are not affected by the payment of the tax, except by way of proportional abatement where the residuary estate, if any, is not sufficient to pay such additional tax and other debts and charges against the estate.

Respectfully,
GILBERT BETTMAN,
Attorney General.