Opinion No. 38-1913

March 16, 1938

BY: FRANK H. PATTON, Attorney General,

TO: Mr. John D. Bingaman Commissioner of Revenue Santa Fe, New Mexico. Attention: Mr. H. L. Andrews, Auditor Succession Tax Department

*{*221}* I have carefully considered the *{*222}* case about which you consulted us a day or two ago, wherein by will certain stock was specifically bequeathed to decedent's sister (entitled to $ 10,000.00 exemption), and the "residue" to step-children (not entitled to exemption and taxable at 5%).

The schedule shows the gross estate to be $ 4,945.97, and debts, expenses and other deductions (not including exemptions), $ 1,955.38, leaving a balance of $ 2,990.59. The stock bequeathed to the sister is shown appraised at $ 3,500.00. Therefore, without the deductions the estate would be more than $ 3,500.00, but with the deductions it would be less.

Under the circumstances, the question is whether there is any tax due -- that is, whether the estate is to be classified for taxation purposes by determining the proportion each would have received but for the deductions, and then apportioning to each the same proportion of deductions; or whether it should be classified by first subtracting the deductions from the gross and then determining what if any is the residue, and using that in determining the ratio of exemption applicable to the residuary legatee as well as the amount taxable to such legatee.

The latter method is correct. The Supreme Court in construing our first inheritance tax law, Chapter 122, Laws of 1919, made it clear that an act such as ours lays a tax "upon the right to receive or succession to property of a decedent". State vs. Gomez, 34 N.M. 250, 280 P. 251. It is not a death duty upon an estate. It would seem, therefore, that if, by failure of a residuary bequest because of lack of property after deducting debts, expenses and the specific bequests, there is no transfer of property to the Class 2 residuary legatee, then there is no tax to that class.

And it is, of course, fundamental that in determining the residue, unless the will provides otherwise, all debts, expenses and specific legacies are first deducted. 69 C. J. 427.

"Gift of 'residue' is subject to precedent claims on the estate; it is a gift of what remains after the debts **and legacies** are paid." 69 C. J. 427, Note 19 (a).

Where the property goes to two classes, as it would in this estate but for the failure of the residuary legacy, another question arises: What is the amount of exemption allowable to each class? We had an exemption of $ 10,000.00 and provision was made for apportionment of that exemption where the estate went to two classes. By the

amendment in Section 1 of Chapter 181, Laws of 1937, an exemption is created of $ 500.00 to class two. In my opinion the $ 500.00 exemption should be apportioned in like manner when the estate passes to two classes. There is no reason for proration as to one and not the other. If the exemptions are on the whole net estate, proration would be proper even in the total absence of any statutory direction.

In prorating such exemptions, it is my opinion that the amount of exemption allowed to each class is that proportion of the total exemption allowed that class which the property passing to that class bears to the total value of the whole estate transferable; -- that is, each class is allowed only that proportion of its exemption which the share passing to it bears to the total net estate. I say this despite the unfortunate language in Section 2 of Chapter 181, Laws of 1937, which seems to class exemptions as deductions when in fact they are not. Any other construction would only cause endless confusion. The expression found in Section 141-1101, 1929 Code, "total value of the whole estate" must necessarily mean the total net value, in *{*223}* view of the Supreme Court's construction that it is the right of transfer or succession of property that is taxed.

"Whether a tax of the character under consideration is levied upon the entire estate of decedent or upon the interest of passing to particular recipients is to be determined from the language of the statute involved. **In either case,** whether the act is computed on the entire estate, or upon the interest passing to the particular recipient, the basis of computation ordinarily taken is the net value thereof after proper deductions have been made . . . ." 61 C. J. 1690, Paragraph 2550.

The net estate, therefore, is the basis for all computations, and the respective shares or legacies, as well as the residue, and the proration of the same is to be determined with respect to that net estate.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.