

Opinion No. 39-3136

May 17, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Bureau of Revenue, Succession Tax Division, Santa Fe, New Mexico. Attention: Mr. H. L. Andrews, Auditor

{*50} As I stated to you verbally sometime ago, it is my opinion that when an extension of time to pay inheritance tax is made in accordance with the provisions of Section 141-1111, 1929 Compilation, the penalty provided by Section 141-448, 1929 Compilation, should be charged only after thirty days have elapsed without payment from the time to which such extension is granted; but that the interest at 10% per year provided by Section 141-1102, 1929 Compilation, should be charged from the time the tax was payable under the statute, that is, from twelve months after the qualification of the executor or administrator, and not remitted by reason of the extension of time.

There seem to be no authorities one way or the other dealing directly with this point, but in view of the modern tendency of the courts to make a distinction between interest and penalty in tax cases, it is my opinion that the interest should be charged until such time as our own courts should hold the contrary. It may be that a different interpretation may be given to the statute because of the fact that the statute makes the interest chargeable only from the time that the tax becomes payable, and the payment of the tax may be extended by the probate judge.

As stated above there is a penalty provided for by the statute as well as interest. The Supreme Court of the United States has held that in such cases the penalty is considered as punishment for non-payment, whereas the interest is to be viewed as "a consideration for the use of money or forbearance in demanding it when due." *United States vs. Child*, 69 L. Ed. 299, 266 U.S. 304. See also *Union Pacific R. Co. vs. Bowers*, 21F. (2d) 856. Since the failure to pay is by permission of the court granting the extension, the penalty should not be charged; but if the interest is in the nature of a consideration for the use of money or forbearance in demanding it when due, the same reasoning does not apply. The extension of time is forbearance, and the state should be entitled to a consideration for the use of the money so withheld from the state by reason of such forbearance. Cf. *Billings vs. United States*, 232 U.S. 596.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.