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TAXATION OF ESTATES PENDING PROBATE

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A PHASE that is generally overlooked by an attorney during the probate of an estate is the question of taxation. How often has an attorney about to close an estate, and as a matter of fact having the final report ready to be approved, been confronted with a claim made by the assessor for taxes levied on the property? Also it is quite shocking not to say embarrassing if, after painstaking work, the day's mail brings a statement of taxes due. Then with certain proper self-addressed declarations we sit and wonder how the assessor obtained the information on which the tax is based.

A former judge of the County Court once declared himself to the effect that if the assets of an estate consisted of seven hundred dollars the estate is taxed on that sum; whereas if an individual possesses a like amount it is a mere question of policy with the latter whether or not he shall make a correct return to the assessor for the purpose of taxation.

In order to have a better understanding of the method, and there is a method in this madness, pursued by the assessor in levying a tax we must familiarize ourselves to some extent with the various sections of the Revenue Laws since they are used in fixing the valuation of an estate. In this article we treat only with intangible assets since they form the majority of estate taxation cases.

The following sections of the Statutes are the ones considered by the assessor in determining the valuation of an estate:

Section 7231 Compiled Laws of Colorado 1921. In ascertaining the amount of moneys of any taxpayer, or the moneys by such taxpayer invested in merchandise or manufactures, the assessor shall ascertain the average amount during the fiscal year for which the tax is to be levied; and the average amount of such moneys and the average value of such merchandise or manufactures during the twelve months ending with the thirty-first day of March of such fiscal year shall be taken as a true measure of the average amount of moneys and the value of such moneys invested in merchandise or manufactures for such fiscal year.

Section 7232 Compiled Laws of Colorado 1921. In listing the moneys, credits and moneys invested in merchandise and manufactures, the person making the list shall state the average of such moneys and credits and the average value of money invested in merchandise or manufactures, during each calendar month of the year ending with the thirty-first day of March of the then current year. If he has not been a resident of the County or has not been engaged in the business of merchandising so long, then he shall take the average during such time as he may have been so engaged; and if he be commencing, he shall take the amount of money or the value of the property on hand at the time of the listing.

Section 7233 Compiled Laws of Colorado 1921. In listing the credits, the person making a list shall set down the aggregate cash value of all promissory notes, bonds, debentures or other written evidences of indebtedness. In stating the amount due him on book accounts or other accounts not evidenced by writing he shall set down the aggregate cash value thereof.

Section 7236 Compiled Laws of Colorado 1921. In listing the amount of notes and credits held by him, the person making such schedule may deduct therefrom the amount of all his debts, but not including any liability to any insurance company for premiums on policies, or on account of any subscription to any literary, scientific, charitable or other like institution or society, or on account of any subscription due or indebtedness payable upon or for the capital stock of any company, whether incorporated or unincorporated, or for the purchase of any bonds or treasury notes or other securities of the United States not taxable, or other exempt property, or for or on account of any obligations signed by such party as surety for another, nor any acknowledgment of indebtedness not found on actual consideration, or made for the purpose of being so deducted; and the party making such return and demanding any abatement upon credits by reason of any indebtedness, shall set down in a separate statement all liabilities in respect whereof a deduction is claimed.

Section 7249 Compiled Laws of Colorado 1921. All personal property within this state on April 1st in the then current year shall be listed and assessed in the county where it shall be on said April first.

Section 7252 Compiled Laws of Colorado 1921. All credits arising from the deposit of money, checks, drafts or other cash items in any bank or banking institution, either state or national, including savings banks, trust companies, or other corporations so receiving deposits in any form, shall be subject to assessment like other personalty; the assessment shall not be made on credits as they exist in favor of any creditor on any day certain, but the assessor shall ascertain as near as may be the average credits for the year for which the assessment is made, and assess the average thereof. The assessor may examine the creditor under oath in reference to such average credits; and upon such information or other information obtainable, the assessor shall make the assessment of such credits. This section shall apply to all residents of this state who have made deposits outside the limits of this state, and all such credits are assessable in this state the same as deposits made within the state.

Section 7180 Compiled Laws of Colorado 1921. Taxes for the current year shall be payable as now provided by law, provided however, that at any

time after the lien of taxes has attached and the County Treasurer for any reason believes that taxable property will or may be removed from his jurisdiction or may be dissipated or distributed so that taxes on the same for the current year cannot be collected, then and in that event, the treasurer shall at once collect the full amount of taxes on said personal property for the current tax year and if necessary may make the same together with all penalties and costs by distraint and sale of said personal property.

The theory followed by the assessor in levying a tax on an estate is that the estate is a continuation of the decedent's business for the purpose of winding up his affairs and while there are assets belonging to the estate they are subject to taxation the same as the property of a person in *esse*. The assessor gleans the information upon which the estate is taxed from the Inventory, which is a part of the estate records, filed in the office of the Clerk of the County Court. Sometimes a resort is made to the files in the office of the Inheritance Tax Commissioner where a more detailed report is available.

In order to determine what securities are taxable it is well to mention briefly the securities that are tax exempt either by federal legislation or by state law.

Liberty Bonds are exempt from taxation because they are issued by the National Government and to lexy a tax on these bonds would be a restraint on the operation of a law constitutionally passed by congress. Similarly, any debentures or credits issued in the name of the United States are likewise exempt. This principle was established early in the history of the United States in the opinion given by Chief Justice Marshall in the case of *McCulloch v. Maryland, 4 Wheat. 316,* wherein it was decided that to levy a tax on government stocks or bonds would be to tax the power to borrow money on the credit of the United States.

Bonds, notes and mortgages secured by property within the State of Colorado are likewise exempt. Securities issued by the State of Colorado, or any municipality situated therein, or any irrigation district, school district or improvement district are exempt from taxation. The principle underlying this doctrine is similar to the law applicable to a bond or debenture of the federal government except that it is only state wide in scope.

Bonds issued by a corporation incorporated under the

laws of the State of Colorado, or any corporation formed under the laws of any foreign state but whose physical property is located within the State of Colorado are not subject to taxation. The tangible property of a corporation is reflected partly in the bonds issued, which in turn are represented by its property holdings and equipment and a property tax is levied on the latter.

Stocks of any corporation or association whether located within or without the State of Colorado are exempt from taxation. The physical property of a corporation or association is represented by the stock it issues and a tax is levied on such physical property. To levy a tax on the stock and also on the physical property of a corporation or association would be double taxation and this principle was settled in the case of *City and County of Denver v. Hobbs Estate, 58 Colorado 522.*

Mortgages secured by real estate or chattels located within the State of Colorado are exempt from taxation by statute. The tax in such cases is levied on the physical property by which they are secured and to tax both the property and the security would be double taxation. This applies to promissory notes that are secured. The leading case on this matter is *Washington County v. Murray, 71 Colorado 522,* where the Court held that to tax a mortgage and the property by which the mortgage was secured would be double taxation and inconsistent with the spirit of the law.

Where a bequest is made to a charitable organization or institution it appears that the whole legacy is exempt from taxation. The statutes provide that the property of religious and charitable institutions are exempt from taxation and any donations or gifts made to such in furtherance of their objects are exempt. Since a will speaks from the instant a person dies any legacy left to a charitable organization is impressed with a charitable character and therefore not subject to taxation. This was settled in the case of *Bishop and Chapter of St. John Evangelist v. City and County of Denver, 37 Colorado 378.* The Supreme Court later held that a charitable organization need not be public but may be private and still retain the benefits of the exemption laws in the case of *Horton v. Colorado Springs Masonic Building Society, 64 Colorado 529.*

This leaves the matter of bonds issued by a foreign state or corporation, mortgages and notes secured by property outside the State of Colorado, unsecured notes, accounts receivable, money and various other classes of personalty subject to assessment.

In brief a bond, note or mortgage is considered as a negotiable instrument and treated as a credit or cash item for the purpose of taxation. While the state in which the bond was originally issued might have provided that the bond should be exempt from taxation it is well settled by numerous decisions of the United States Supreme Court that a law has no extra-territorial effect and another state need take no cognizance of such a law.

Bonds, accounts receivable, notes secured by property outside the state and unsecured notes are listed in the aggregate value as of April first of the current tax year. Any credits arising from the deposit of money or other cash items in any bank or banking institution are averaged for the twelve month period ending with March thirty-first and the average amount is taken for the purpose of taxation in accordance with Sections 7231, 7232 and 7252 of the Compiled Laws of Colorado 1921.

Quite frequently an attorney in his zeal to save an estate any liability for taxes by reason of cash on deposit in a bank petitions the Court for an order authorizing his client to invest the money on hand in Liberty Bonds or other tax exempt securities. This is done a few days before April first of the current tax year. However, since no attention is paid to the statute that provides that money is not taxed as a credit existing on any particular day but that the average is taken for the preceding twelve month period the attorney is dumbfounded when his client receives a statement for taxes on the very thing he tried to avoid.

Thus if a taxpayer had ten thousand dollars in deposit in a bank for eleven months of the twelve month period ending with March thirty-first of the then current tax year and the same sum was invested in Liberty bonds on March first, it would be an evasion of taxes to say that since the taxpayer had no money on deposit on April first he should not be taxed on

the cash deposit that was in existence for the eleven month period. In such a case the last month would be omitted and the average monthly balance would be properly taxable.

In the matter of the proceeds of a life insurance policy payable to the estate the same is properly taxed if received prior to April first of the current tax year in accordance with the principles enunciated previously. The money would be prorated for the time it had been on hand. If it is not received prior to April first then it is treated as an account receivable.

Having determined the total amount of taxable property which the estate has on hand the next thing we are concerned with is the matter of deduction of debts. These are computed as in the case of an individual and more specifically set forth in Section 7252 of the Compiled Laws of Colorado 1921. If a person departs this life after April first there is a hardship imposed on his estate for in such a case the decedent is entitled to a deduction of debts that actually existed on March thirty-first of the then current tax year; whereas if a person dies prior to April first he is entitled to a deduction of all his debts such as funeral expenses, costs of administration and all debts and expenses enumerated in the five classes of claims allowed against an estate. However, a tax that has been imposed or levied on any property is not a legitimate deduction as the Courts have held that a tax is not a debt founded on actual consideration but one of the incidents of government which an individual must pay in return for the many advantages and protection given him.

Frequently an attorney will receive a notice or statement of taxes due which appears to be quite high and not consistent with the true condition of the estate. The reason for this is apparent. Since the attorney has not filed a schedule with the assessor wherein a list of the assets and liabilities were enumerated the assessor used the best information he had on hand, which in most cases would be the inventory of the estate. In such cases an adjustment is readily made by the assessor. If this discrepancy is called to the attention of the assessor and he is furnished with a list containing the various assets and a list setting forth the liabilities before the Tax Roll is delivered to the Treasurer on January first, the correction may

be made by the assessor *sua sponte*. If the matter is not noticed until after the warrant has been delivered to the Treasurer there are two methods by which the correction may be made. If the amount involved is less than fifty dollars in taxes the assessor may make the correction. If the amount involved exceeds fifty dollars in taxes then it becomes necessary to file a petition with the Board of County Commissioners asking for an abatement of taxes and setting forth in the petition wherein the assessment complained of is erroneous.

Oftentimes an estate is closed after April first and prior to the time fixed by law for the collection of taxes for the fiscal year. In such cases we feel that an injustice is being done in requiring the payment of taxes on the assets remaining on hand. According to Section 7249, C. L. 1921, the lien for taxes attaches on all property on April first. As long as the estate is intact and no distribution is made there will be no attempt to collect the taxes. In case of distribution the assets will be scattered and the probability of collecting the tax from the distributees is *nil* and in accordance with the provisions of Section 7180, C. L. 1921, the tax is collected on the assessed valuation as fixed by the assessor.

It is well to bear in mind that the laws of Colorado are not as stringent as those of other jurisdictions. For example, at one time a certain aggressive legislator of Austria called attention to his fellow members that cats were not taxed. Immediately a law was passed taxing all such animals; the cats on which a tax was paid would be beribboned whereas those not ribboned were impounded and if no one appeared to claim or redeem them they were either sold for taxes or poisoned. Peter the Great, during his reign recognizing the failing of men for a hirsute appendage, placed a tax on all beards. Catherine I was likewise gifted in recognizing these facial ornaments and decreed that anyone manly enough to exhaust his patience in caring and curing this superfluous hair should be doubly taxed in respect to his entire property.

There is still a vast field for improvement in the Revenue Laws of the State of Colorado. A few years ago the State of Colorado was considered one of the progressive states in the field of taxation; but the present laws were enacted in 1902 and very few changes or amendments have been made since

that time. Possibly we may have some member of the legislature who might abolish all taxes in the years to come and then some future poet in singing his praises may write:

"He took the tax away
And built for himself an everlasting name."

But until Colorado appoints this poet laureate let us resign ourselves to the adage that two things are certain, Death and Taxes.

THE LAYMAN'S VIEW OF A LAWYER

The chief function of a lawyer is to predict for his client what the court will or would do under given circumstances.

Every lawyer knows this; or, if he gives a little thought to the point, will acknowledge it, but the layman views the matter otherwise. Use to him the term "great lawyer" and he sees Rufus Choate before a jury, or Daniel Webster before the Supreme Court of the United States. The picture which he does not see is that before such appearances each of these great men has been consulted and has given his opinion as to what the result will be, is likely to be, or ought to be under the facts as they are detailed to him.

But the function of prediction is more frequently performed to guide the client in his future conduct. This may be called prediction before the fact, the former prediction after the fact.

The client who asks advice before he acts gets more value, and usually for less money, than he who acts and then asks whether he can win a lawsuit.

Law students often have the layman's view, but a majority of them are learning that the law is not the career of an orator but of a prophet.

—*John H. Denison.*