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May 22, 1952  
Op. No. 52-156

Mrs. Geraldine C. Swift  
Estate Tax Commissioner  
Estate Tax Department  
State House  
Phoenix, Arizona

M.R.

Dear Mrs. Swift:

Re: ESTATE OF ALEXANDER J. CHANDLER,  
DECEASED

In reply to your letter of May 10, 1952 relative to the refund requested by the administrator of the above estate arising out of additional claimed widow's allowance for and during the time taken to determine, and additional attorney and administrator's fees incurred in litigating the question of marital deduction in the Federal estate tax return, we believe the refund should be made, but only after the conditions later set out have compliance.

There appear two questions here; the first concerns the timeliness of the refund request, and the second whether or not the items upon which the requested refund is predicated are valid deductions. We are conceding that the item of \$650.00 for valuation of certain stock was clearly an error. If the request is not timely made, no discussion of the second question is necessary.

Two sections of the Estate Tax Act, 40-117 (a) and 40-122 ACA 1939, refer to refunds. Section 40-117 (a) reads as follows:

"(a) As soon as practicable after the return is filed the commissioner shall examine it; if it then appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed. If the amount paid exceeds that which should have been paid on the basis of the return so computed, the excess so paid shall be credited or refunded to the taxpayer. If the amount paid is less than the amount which should have been paid, the difference, together with interest or interest and penalties, shall become due and

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payable upon notice and demand by the commissioner, and the executor shall be liable to the state personally and on his official bond, for any loss to the state accruing by reason of his negligence or wilful neglect."

Section 40-122, in all its briefness, reads as follows:

"Whenever taxes of any kind are or have been, through clerical error or misinterpretation of the law, collected and paid into the state treasury in excess of the amount legally due the state, the estate tax commissioner shall refund such excess illegally paid to the taxpayer out of any estate tax moneys he may have on hand."

Under Section 40-117 (a) determination of the tax due must be made "as soon as practicable" (or within a reasonable time, governed by the circumstances) after the return is filed. In this case, it does not appear that any final determination has as yet been made. Notice to the administrator of your final determination that the correct amount of tax due is the total amount paid in August of 1951, is the notice required to be given so that your determination could be contested in court. See Section 40-118 ACA 1939.

However, the case of O'Malley v. Sims, 51 Ariz. 155, which involved a refund under the old law of 1928 (which provided for final determination of the tax by the superior court), held in effect that a request for refund is timely made if it is made at any time before the tax is definitely and finally fixed.

The other applicable section, 40-122, appears to us to apply in situations where an error, either in figuring, or in interpretation of law, is discovered after final determination is made and the time for contest, as provided in Section 40-118, has gone by.

We believe, therefore, that the application for refund is timely made.

As to the additional items of fees claimed as deductions we refer to Section 40-106 which sets out allowable deductions in determining net value. Paragraph 1 of this section, in part, allows for "administration expenses". The claimed items for additional attorney and administrator's fees are undoubtedly proper deductions even though

incurred by reason of a contest over federal estate taxes. This litigation was a necessary part of the "management and settlement of the estate" and evidence of this is shown by the fact that the estate was upheld in its contention by the tax court. Section 38-1402 ACA 1939, defining allowed expenses of administration, reads as follows:

"Allowed expenses of administration--Attorney's fees.-- He shall be allowed all necessary expenses in the care, management and settlement of the estate and for his services such fees as provided in this chapter; but when the decedent by his will, makes provisions for the compensation of his executor, that shall be a full compensation for his services, unless by a written instrument filed in the court, he renounces the compensation provided by the will. He shall also be allowed reasonable fees paid or contracted to be paid to attorneys at law for services to him, and an attorney who has rendered such services may apply to the court for an allowance as compensation therefor. Upon the hearing, a reasonable allowance shall be made, and the court shall order the payment thereof out of funds of the estate." (Emphasis supplied)

and answers the question for us. We believe therefore that the items of \$5180.26 for additional attorney fees and \$4716.59 for administrator's fees, if and when approved by court order, are proper deductions as administration expenses.

As to the item of \$12,000.00 additional family allowance, we again refer to Section 40-106, this time to paragraph 3 thereof, which reads as follows:

"3. Such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent as are allowed by the laws of the jurisdiction under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent or any estate, succession, legacy, or inheritance taxes." (Emphasis supplied)

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Reference is also made to Section 38-903 ACA 1939 which reads as follows:

"Family allowance--Preference.-- If the amount set apart be insufficient for the support of the widow and children, or either, the court shall make such allowance out of the estate as may be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate; which, in case of an insolvent estate, must not be longer than one (1) year after granting letters testamentary or of administration. The allowance shall be paid in preference to all other charges, except funeral charges and expenses of administration, and may, in the discretion of the court, take effect from the death of the decedent." (Emphasis supplied)

and particularly to the emphasized words.

In view of this and in light of the court order entered June 14, 1950 allowing the widow "\$2000. per month from the estate \* \* \* for her support during the progress of the administration of the estate", we conclude that the item of \$12,000.00 additional widow's allowance, if evidenced by the widow's receipts therefor, should be allowed as a further deduction.

Therefore, upon the presentation of (1) a certified copy of the court order allowing the additional fees of \$5180.25 and \$4716.59, and (2) receipt of the widow for the amount of \$12,000.00 claimed as widow's allowance, you would be justified in making the refund computed upon the total of these items plus the \$650.00 error in valuation.

Very truly yours,

FRED O. WILSON  
Attorney General

JOSEPH A. CROWE  
Assistant Attorney General

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