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MARYLAND DEATH TAXES†

By Charles G. Page*

The primary purpose of this paper is to discuss certain problems involving death taxes which arise in the administration of Maryland estates.1 There are three sorts of death taxes in Maryland: (1) the inheritance taxes, (2) the Maryland estate tax, and (3) the so-called "tax on executor's commissions".2

The Inheritance Tax Act imposes a 7½% tax on collateral inheritances and a 1% tax on direct inheritances. The Maryland estate tax is limited to the credit allowed for federal estate taxes. Ordinarily these taxes are not very large, and there are many instances where the amounts involved are too small to justify litigation. Hence the practice regarding the imposition of these taxes has grown up in haphazard fashion, mostly from rulings of the Attorney General, and more or less from the arbitrary rules of the administrative agencies.

THE INHERITANCE TAX

The collateral inheritance tax has been on the books for a long time. It was first imposed in 1845.3 The direct inheritance tax was first imposed in 1935.4 For all intents and purposes the two taxes are the same except their rates. Therefore, what will be said regarding the present status of the collateral inheritance tax also applies to the direct tax.

† This paper was originally prepared for presentation before the Wranglers, A Baltimore Law Club.
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2. The Inheritance Tax: Md. Code Ann. art. 81, §§ 149-93 (1957); Maryland Estate Tax: Md. Code Ann. art. 81, §§ 144-48 (1957). This paper will not consider the last of these taxes. The amendments by the 1965 session of the Maryland Legislature are not considered in this paper.
4. Md. Laws 1935, ch. 90, § 104A.
Inconsistent Theories on Which the Tax is Imposed

The theories underlying the inheritance tax have changed from time to time, although the language of the sections imposing the tax has not. Since 1845, the inheritance tax has been imposed upon property "passing at the death" of a decedent. That is still the language of the act. But as we shall see, the inheritance tax is not limited to the passing of property at death. It is also exacted upon the transfer of property, ownership of which had passed from the decedent many years before death, and upon the transfer of property to a beneficiary who receives it many years after the decedent's death.

A "pass" requires a passer and a receiver. In Maryland, the stress has been upon the receiving aspect of the transaction. The primary liability for the tax is on the beneficiary, and it has been established for a long time that the amount of the tax is based on the value of the property received, rather than the value of the property when transmitted. In these respects, the tax differs in nature from an estate tax which is levied as a primary liability of the estate in its entirety and is based upon the value of the interest passing from the decedent in an estate at his death. The emphasis in the latter case is value of the property at death.

Despite the difference in the two taxes, the Maryland legislature and the Maryland courts have been strongly influenced by the actions of Congress and the Supreme Court in regard to the federal estate tax. The tendency has been to steadily expand the federal estate tax to cover not only what one transfers at death, but also certain economic benefits which survive the decedent whether or not anything passes at death. So to speak, the tax has become a tax on the privilege of dying.

Maryland took over these ideas and applied them to its inheritance tax act in 1935, but when it did this, it did not change the taxing section of the act which still is nominally imposed on property "passing at the death" of the decedent. The extensions were effected by article 81, section 151, which commences: "The taxes imposed by Sections 149 and 150 of this subtitle shall apply to" property passing by will or under the intestate laws, as well as to property transferred during

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7. Connor v. O'Hara, supra note 6, at 531.
9. Until 1931 an irrevocable inter vivos transfer reserving to the grantor only an interest for life was not within the Federal estate tax act because the Supreme Court had held that nothing passed at death. May v. Heiner, 281 U.S. 238 (1930). The Internal Revenue Service did not agree with this conclusion and brought up three more test cases. The Supreme Court stood fast. Burnett v. Northern Trust Company, 283 U.S. 782 (1931); E. M. Morsman, Jr., Admr. (Est. of E. M. Morsman) v. Burnett, 283 U.S. 783 (1931); C. H. McCormick, et al., Exrs. (Est. of N. F. McCormick) v. Burnett, 283 U.S. 784 (1931). These cases were decided on March 2, 1931. The print of these opinions was hardly dry when Congress enacted a joint resolution designed to overrule the Court. Joint Resolution to Amend Section 302 of the Revenue Act of 1926, 46 Stat. 1516 (1931). This resolution, passed on March 3, 1931, represents the turning point in federal estate taxation. Since that time, both Court and Congress have constantly expanded the Federal estate tax act.
life, where the transfer is in contemplation of death or intended to take
effect in possession or enjoyment after death. The statute also includes
property held as joint tenant or tenant in common and all property
"over which the decedent retained any dominion during his lifetime."
Chief Judge Conwell Smith once called these new categories "quasi-
inheritances", and that is as good a name as any.

The theoretical inconsistencies in the law which are mentioned
above are not limited to amendments to the statute. The Attorney
General of Maryland and the Maryland courts have tended to follow
the leadership of the Supreme Court in its interpretations of the
federal estate tax law, and they often have taken the attitude that
whatever can constitutionally be taxed on any theory is covered by
the Maryland act. This has led to a number of confusing decisions as
exemplified by Safe Deposit & Trust Co. v. Bouse.11 That case in-
volved several trusts but the holding here referred to was with regard
to a trust created by the will of a testatrix who died in 1923. The
trust required that payment of income to a son for life with con-
tingent remainder of the trust estate to testatrix' daughters. In 1940,
the son died, and the trust estate was distributed to the daughters of
the testatrix. The question was whether the daughters should pay
a direct inheritance tax upon the distribution of the remainder to
them in 1940. At the time of the death of the testatrix in 1923 there
was no direct inheritance tax, i.e., no tax upon the passing of property
from a decedent to her descendants. The first such tax was imposed
in 1935,12 and the answer to the question depended upon whether
the taxable event was the "passing" of the property "at death" from
the testatrix, or the receipt of the property by the remaindernen.
The act by its terms imposed the tax upon the passing of property
from a decedent at death. The theory advanced by the Attorney
General in support of the tax was that the remainder was contingent
until the life estate had fallen in, and since this did not occur until
after the enactment of the direct inheritance tax act, there was a
"passing at death" when the remainder vested. At that time the
testatrix had been lying in her grave for seventeen years. The court
sustained this argument.

This prodigious "pass" so startled the legislature, which was
then in session, that it promptly enacted an emergency act disclaim-
ing any intent to legislate in such a fashion.13 The act was passed in

10. Opinion August 29, 1942, in Ex Parte: In the Matter of the Trusts u/w Ellen
M. Tormey, Deceased, etc., Cir. Ct. Balto. City, Case No. A24698. For citation on
appeal of this case see note 11.
11. 181 Md. 351, 29 A.2d 906 (1943).
12. Md. Laws 1935, ch. 90, § 104A.
13. "An Act to declare and clarify the legislative intent with respect to the retro-
active effect of Chapter 90 of the Acts of 1935 [and later amendments].

"Whereas, the General Assembly has from time to time amended the
Inheritance Tax law; and doubt has arisen as to whether the said amend-
ments, in so far as they have increased the rate of tax or have broadened the
incidence of the tax, are intended to apply to the estates of persons dying prior
to the effective date of such acts; now therefore

"Section 1. Be it enacted by the General Assembly of Maryland, That in
so far as Chapter 90 of the Acts of 1935, [and later amendments], . . . , change
or increase liability for Inheritance taxes or change the rate of said taxes,
time to be applied to the very proceeding which had gone to the Court of Appeals, and in effect changed the law applicable to that very case.\textsuperscript{14}

The law, as declared by the 1943 act, remains in effect. The act and the rate of tax to be applied is the act and rate of tax in effect at a decedent’s death. However, the 1943 act did not wipe out the entire effect of the \textit{Bouse} decision. Another branch of that case involved an irrevocable inter vivos trust created in 1923 by a settlor who reserved to himself a life estate with remainder to his children. In absence of any children living at his death, the property was to pass to his brothers and sisters. The question before the court was whether the contingent remainder was subject to a collateral inheritance tax. Created in 1923, the trust was irrevocable, and it was not until 1935 that the inheritance tax act had been changed so as to require taxation of a remainder if the settlor had retained a life estate. The court held that the remainders would not have been subject to the tax if they had vested prior to the tax act, but because the remainders were contingent until after the act was passed, they were taxable. Here again, the settlor’s entire interest in the property had “passed” to a trustee not at death, but when the trust was created in 1923. Yet the court held that the interest “passed” from the decedent to the remainderman when it vested in him. This holding is still the law and reflects the idea that in reality the tax is on the receipt and not the transfer. The 1943 act does not affect this ruling because the settlor died after the 1935 change in the law.\textsuperscript{15}

An excise tax is normally upon a single “event”. However, as we have seen above, there are three events and three dates which are of importance in determining the Maryland inheritance tax: the date of death of the original owner, “the passer”; the date of vesting of ownership in the “receiver”; the date of distribution, sometimes called “vesting in possession” in the receiver. Any one of these events can be termed a “passing” of property from a decedent and give rise to a tax. Despite what has been said, the idea that the tax is imposed upon a “passing” — a transfer at death — occasionally reappears. Consider this example: A man who dies with a general power of appointment granted by a third person does not have legal title to the property, and yet it is his for the asking and economic benefits are determined by his unrestrained powers. He certainly has “dominion”. Nonetheless, under Maryland law, an appointee takes direct from the

\textsuperscript{14} Second opinion of Smith, J. in Superior Ct. of Baltimore City in the case, \textit{Ex parte: In the Matter of Trusts u/w Ellen M. Tormey}, cited \textit{supra} note 10, Daily Record, July 19, 1943, p. 2, col. 1; \textit{I Sykes, Probate Law And Practice} \textsection 788, n.47 (1956). Since this paper was prepared, the Attorney General has ruled that the rate of tax to be collected upon the vesting (in 1962) of a contingent remainder created by the will of a decedent who died in 1911, is the 7.5% rate. Op. Att’y Gen. to Bernard F. Nossel, Oct. 5, 1964, reported in the Daily Record, Oct. 9, 1964. This ruling appears to disregard the 1943 act.

original creator of the power and not from the donee of the power. Hence the succession which follows the death of the donee of the power is not a passing of property from a decedent at his death and is therefore not subject to inheritance tax.\textsuperscript{16}

The foregoing has been designed to give a cursory outline of conflicting theories which the courts have from time to time relied upon in the imposition of the inheritance tax. With such a background, one would expect many administrative problems and considerable confusion in regard to collection of the tax. There are.\textsuperscript{17}

We now turn to the main point of this paper: a consideration of some of these administrative problems.

\section*{Administrative Problems Dealing With The Inheritance Tax}

\textit{Record Title}

The record title of real property may be in the decedent, but someone else may claim ownership. There are many such situations. An unrecorded trust is an example. Is there an inheritance tax?

The Attorney General has taken the position that the record title is conclusive on the Register of Wills in the case of real estate and that a court action is necessary to establish a different title than that which appears of record in order for the State or the taxpayer to claim the benefit of a variation.\textsuperscript{18}

A special situation arises in the case of bank accounts. Article 81, section 151, describing property subject to tax, provides in part:

"In the case of joint bank accounts or joint building or homestead association accounts or shares, or registered securities, the form of the account or registration shall be controlling notwithstanding a parol trust to a contrary effect. In cases of joint tenancy, where the interests are not otherwise specified or fixed by law, the interest passing shall be determined by dividing the value of the property by the number of joint tenants."

Although there are many forms of so-called joint bank accounts, in Maryland the most usual form of bank account for two persons is as


\textsuperscript{17} One of the results of this confusion comes to hand just as this paper is being reviewed for final printing. Op. ATT'Y GEN. to Ruth R. Startt, dated March 11, 1965, Daily Record, April 5, 1965. In this case the question involved was the taxation of a contingent remainder under a testamentary trust created by a will which was probated in 1918. The trust, consisting of real and personal property, was for the benefit of a daughter for life with contingent remainder over to collaterals dependent upon contingencies to be resolved at the daughter's death. The daughter (life tenant) died in 1963. The remainders were not inventoried within ninety days \textit{after the life tenant's death} and the Attorney General ruled that a 25\% penalty was thereupon payable on the theory that the remainder "passed" by reason of the death of the life beneficiary to the remaindermen, and that an inventory should therefore have been filed in compliance with Article 81, Section 169. The opinion appears to be contrary to earlier rulings. See Op. ATT'Y GEN. to Roby, May 13, 1964, Daily Record, June 8, 1964; also 38 Md. ATT'Y GEN. Ops. 444, 448.

follows: "A in trust for himself and B, joint owners, subject to the order of either, balance at the death of either to belong to the survivor."

The Attorney General takes the position that such a bank account, even though it is subject to the complete withdrawal by the contributing joint owner, is nonetheless taxable only to the extent of one-half of the interest when the contributing joint owner dies. The Court of Appeals in Mitchell v. Register of Wills recently decided that the death of the non-contributing joint owner under the foregoing form of bank account is also the occasion for a tax upon one-half of the amount of the deposit. This decision was based upon the assumption, conceded in that case, that the contributing joint owner intends that the non-contributing joint owner shall have a full right to ownership at the former's death. It should be noted in the opinion that the court was careful to state, "This Court has many times held, and appellant concedes, that the bank accounts such as the one in question here, opened by her, constitute a presumptively valid, but rebuttable, trust."

It is quite possible that a deposit in the form described above may be made under circumstances where it is not intended that the non-contributing party shall acquire ownership on the death of the creator of the account. Such a situation frequently arises where an aged person relies on another to care for him. A power of attorney to withdraw funds may be inadequate because the power may be automatically revoked if the true owner becomes incompetent, and it may be intended that the property shall belong to the estate despite the words in the deposit. It may be assumed in such a case that a surviving non-contributing party will voluntarily surrender any interest which he may have in the deposit to the estate of the contributing depositor and true owner. Under such circumstances, it would appear that the entire deposit should be taxable on the death of the contributing depositor. To the contrary, if it can be shown that the parties did not intend that the bank account should ever become the property of the non-contributing party, then the tax should logically not be imposed upon the contributing party upon the death of the non-contributing party. However, it would appear that in order to avoid the effect of the above quoted section of the statute, a proceeding must be filed in court to "fix by law" the interest of the decedent.

In a case decided before the Mitchell decision, a proceeding was instituted for the express purpose of showing that, though the title to a bank account was in the decedent, he did not in fact have any beneficial interest in the account. As a result, the court decreed that there was no inheritance tax payable. There is nothing in the Mitchell decision which should affect this conclusion.

19. [1955] 40 Md. Att'y Gen. Op's. 546. Compare the ruling with [1943] 28 Md. Att'y Gen. Op's. 261, where a joint bank account opened within two years prior to death is taxable as a transfer in contemplation of death, even though in the name of husband and wife. Deposits are made in most savings accounts within the two-year period.


21. Id. at 309.

Appraisals

In administration of estates, appraisals serve two purposes. One is to create a basis for administration accounting; the other is to determine the inheritance tax. But the mechanics for the official appraisal in a Maryland probate proceeding are primarily designed for administration of estates, not the imposition of a tax. Hence the general law relating to the administration of estates (article 93) and not the law relating to taxes (article 81) is the law under which most appraisers are chosen. In many counties, the executors are themselves allowed to nominate the appraisers, and the procedure for appraisal is hardly to be termed adversary, as in the case of ordinary tax assessments. None of this is adapted to the imposition of an inheritance tax.

The executor must file an inventory within three months after taking out letters, and the appraisal, usually made as of date of death, is a useful method of establishing a basis for his accounting. But from the inheritance tax point of view, it has long been established that valuations for purpose of inheritance taxes are values as of the date when the property is distributed. The value may have changed considerably before a distribution account is stated. Nonetheless, no attempt is normally made by the Register of Wills or the average executor to have appraisals brought up to date when distribution occurs. In this day of advancing prices, the executor is tempted to studiously avoid a reappraisal in order to avoid an increase in tax. If he is making a distribution in kind of assets which have materially changed in value, the executor has a real problem in bringing his distribution account, which is based upon a division of assets at current values, in line with his inventory appraisals which are based on a date which may be long since past. In fact, there is a provision in the law that the Orphans' Court cannot even order a reappraisal of assets after fifteen months from date of letters. Considering that it sometimes takes a number of years to administer a complicated estate, this is in substance a direction that the assets distributed in kind shall not be valued at the time when the law requires that they shall be valued — at the time of distribution.

This situation arose recently in the administration of an estate involving large quantities of assets which were to be distributed in

24. Baltimore City is excepted from this practice and appraisers are appointed by the Register under the terms of the City Charter (Balto. City Charter 1947, § 290). Some counties follow a similar practice. A statute requires appraisers in the counties to report to the local supervisor of assessment, who in turn reports to the "State Tax Commission" (now the State Department of Assessments and Taxation) which may hold hearings if not satisfied. (Md. Code Ann. art. 93, § 235 (1957)). Reports are not required in Baltimore; but "the State Tax Commission" may at "all times" review the appraisals (Md. Code Ann. art. 93, §§ 235, 251 (1957)). One never hears of an exercise of this visitorial power.
25. See cases cited note 6 supra.
26. Md. Code Ann. art. 81, §§ 153-54 (1957). Section 153 forbids a reappraisal of property "included in the inventory" after fifteen months from the grant of letters of administration. Section 154 forbids reappraisal of property included in a distribution account. This difference in wording, though perhaps inadvertent, is important.
27. See cases cited note 6 supra.
kind. The values of the assets had materially changed. The administration was in a court of equity. An attempt to juggle values at death with values at time of distribution in order to make an equitable division would have been a large and difficult task. In many cases real property in the estate had been acquired by liquidation of corporations in exchange for stock; and in such cases the stock, but not the real estate, had been inventoried. If the fifteen month prohibition against reappraisal had been enforced, the executors would have been faced with a very difficult task. This was taken up with the Attorney General, and, adopting a realistic approach, he ruled that in the case of an equity court administration (as distinguished from an Orphans' Court administration) the fifteen month limit was inapplicable. As a result, a reappraisal for purpose of division was ordered by the court for each distribution and the Register of Wills was held bound by the reappraisals for purpose of determining inheritance taxes. It should be kept in mind that the ruling was in the special case of an equity court administration. There is still very much of a problem if administration remains in the Orphans' Courts.

**Appraisals and the Marital Deduction**

This confusion in the practice regarding appraisals should be considered in connection with its possible impact on claim of a marital deduction for federal estate tax purposes. The marital deduction is based upon the "adjusted gross estate" with certain adjustments. In order to obtain a maximum marital deduction, lawyers frequently use a "formula clause". These clauses are divided into two classes: (1) the so-called "fractional formula", which is measured by a fraction of the residuary estate, *as of the time of distribution*; and (2) the so-called "pecuniary formula", which provides that the wife is to receive a "dollar amount" from the estate with a provision for determination of the formula amount at values established for federal estate tax purposes (as of death or one year after death if that date is elected).

If a "fractional formula" is set up, it appears to be essential that a reappraisal of the assets on hand be made as of the date of distribution. According to the will, a distribution account must be stated based on such valuations. Yet as shown above, a reappraisal in the Orphans' Court may be forbidden. Of course, the executor may attempt to "average out" by splitting up the property which has appreciated or depreciated since the federal estate tax valuation, without stating a distribution account which is in accordance with actual values as of date of distribution. But this may prove difficult or impossible, and it leaves the executor in a position where on the face of his account he has accepted values as of death, when he is instructed by the will to value as of date of distribution. Some executors file

30. INT. REV. CODE OF 1954, § 2056.
31. In Maryland, it is normally an executor's duty to distribute property in kind, rather than to sell it, unless the will authorizes him to sell for purpose of division. Sykes v. Hughes, 182 Md. 396, 401, 35 A.2d 132 (1943).
a memorandum to be attached to the official account, showing actual values at date of distribution. But this is not officially recognized, and the valuations in the memorandum are not by the official appraisers. It is, of course, of vital importance that nothing in the local administrative procedure should imperil the allowance of the marital deduction.

Let us turn now to the "pecuniary formula", where in effect the gift is a dollar amount. Such a gift is often accompanied by an authority to the executor to distribute property of the estate rather than money. If the executor is authorized to make distribution of property valued at the estate tax values, and the estate uses the optional date of valuation one year after death, new valuation problems arise. Should he apply for a reappraisal of his estate in order to bring his distribution account into line with the values in his inventory? The same problem appears if the "dollar amount" is established by reference to estate tax values, but the property is to be distributed at values existing when the distribution account is stated. Here there is a third set of values, which can only be established for purposes of administration accounting by a revaluation.

This problem is complicated by the newly established rules of the Internal Revenue Service with regard to these "pecuniary formula" gifts.32 The Commissioner has suggested that where executors have the power to distribute property at estate tax values in satisfaction of the marital gift, they might select property which has depreciated at time of distribution below estate tax values.33 In this way, after claiming maximum marital deduction, they might reduce the true value in the estate of the surviving spouse and the estate tax upon the latter's estate at the survivor's death would accordingly be reduced. The regulations, in effect, require that this shall not be done. That is to say, the distributions to the spouse, on which marital deduction is based, must be in cash or in property which, valued at date of distribution, is either equivalent to the "dollar amount" determined by the formula, or at the very least not more than a pro rata part of the depreciated property.

The troubled executor may ask, how is he to demonstrate these facts to the Internal Revenue Service if his distribution account, in the Orphans' Court, is based upon a valuation as of death?

It seems apparent that the value for administration accounting should be as of death; the valuation for purpose of determining the dollar amount under a pecuniary formula clause should be the date effective for federal estate tax purposes; and the valuation for purpose of distribution and to fix inheritance taxes should be as of the date of distribution.

**Assessment of Tax**

The statutes and rulings relating to the assessment of inheritance taxes are very confusing. Of course, the date when a tax is assessed, *i.e.*, becomes payable, is important for two reasons: (1) It determines

33. In Maryland such a distribution would be a violation of an executor's duty to treat all distributees equally, unless there is some express direction, or power, which permits the executor to discriminate.
when interest commences, and (2) it starts limitations running. By statute, interest commences at the rate of 6% per annum thirty days from the due date.\textsuperscript{33A} The statute of limitations bars collection four years after "the due date".\textsuperscript{34}

There appears to be no specific provision of any law of Maryland which provides for a formal assessment of an inheritance tax except in the case where a life interest and remainder is valued under article 81, sections 160, 161. It will be recalled that these sections have to do with the valuation of a life estate or lesser interest which vests in possession at death, or in the case of personalty, on distribution (section 160), and the election of a person having a future interest either to have it valued at the same time, or to delay valuation until it vests \textit{in possession}. Under both these sections the Orphans' Court determines the tax, and this is equivalent to assessment. By a recent amendment to the law,\textsuperscript{35} the assessment of a life estate (under section 160) need not even here be by specific action of the court if it is in accord with federal estate tax regulations. The approval of the account in such a case is in effect a determination of tax and an assessment by the court.\textsuperscript{36}

In all cases other than the "life interest and remainder" cases, the inheritance tax is assessed, \textit{i.e.}, becomes payable not by statute but by force of administrative practice.\textsuperscript{37}

Administrative practice regarding assessment of an inheritance tax appears to depend to a large extent on whether sections 169 and 170 are applicable to the particular property. These sections provide that where there is no formal administration it is the duty of the trustee or other fiduciary having possession of the property, or of the beneficiary who succeeds in ownership of the property, to file an inventory of the property for the purpose of an assessment of inheritance tax. If the inventory is not filed, a penalty of 25% is imposed. Where these sections are applicable, the assessment is not completed until the inventory is filed and the property appraised. Until that event, the tax is not due and the statute of limitations does not run.\textsuperscript{38} Interest only runs from the due date and is therefore sacrificed,\textsuperscript{39} but the 25% penalty is in most instances substituted.\textsuperscript{40}

\textsuperscript{33A} Md. Code Ann. art. 81, § 152 (1957).
\textsuperscript{34} Md. Code Ann. art. 81, § 212 (1957). Compare this statute with the four-year limitation on liens for taxes, which runs in the case of real estate owned by the decedent from date of death, and in the case of personalty from the date of distribution (Sects. 158, 160) except in the case of remainders valued under Section 161, which are a lien for four years after they vest in possession.
\textsuperscript{35} Md. Laws 1963, ch. 449.
\textsuperscript{36} This special provision does not apply to assessment of a remainder interest under Section 161.
\textsuperscript{37} [1955] 40 Md. Att'y Gen. Ops. 558, 560. There is no specific authority granted to any court "to fix" the inheritance tax, except in the above cases involving "life estates" and remainders. The Orphans' Court has limited jurisdiction (Md. Code Ann. art. 93, § 287 [1957]) and the Attorney General has ruled that the Orphans' Court has no authority to fix the tax. [1955] 40 Md. Att'y Gen. Ops. 569. The State Tax Commission may have this power (Md. Code Ann. art. 93, § 235).
\textsuperscript{38} State v. Cadwalader, 227 Md. 21, 26, 174 A.2d 786 (1961).
\textsuperscript{40} The 25% penalty is not always substituted. If administration is taken out within ninety days after death, it would still appear to be necessary for the trustee,
In other cases the assessment is ruled to occur where the executor fails to perform some duty which is preliminary to the assessment. It is therefore vital to determine first whether sections 169 and 170 apply or not. If these sections apply, the actual filing of an inventory is the test; if not, the failure of the executor to perform some duty preliminary to the assessment is the test.

Until recently the Attorney General has taken the position that these sections apply in any doubtful situation, and some of the rulings appear to go beyond statutory authority. The sections are by their language only applicable where "there is no formal administration". Yet, as will be seen, the Attorney General rules that the sections apply to several situations where there is a formal administration.

In cases where letters of administration are granted, the rules applicable to assessment of inheritance tax divide into three categories, depending upon whether the taxes involve: (1) personal property which is subject to administration; (2) real estate; and (3) personal property which is taxable but not subject to administration, such as jointly held property, property held under inter vivos trust, or property transferred in contemplation of death.

(1) In cases where property is actually subject to administration, article 81, section 154, seems to be applicable. This section (as recently amended) provides that the executor must state his first account and pay the tax upon "distributive shares and legacies distributed therein" within fifteen months. Otherwise he forfeits his

surviving joint tenant, or transferee of property in contemplation of death, to file an inventory and have the inheritance tax fixed; but if he fails to do so, the penalty imposed by Section 170 is not applicable. Ruling of Attorney General to James M. Roby, May 13, 1964, Daily Record, June 8, 1964; Cf. ruling of Attorney General to Miss Ruth R. Startt, March 11, 1965, supra note 16.

41. In an opinion rendered since this paper was prepared, but referred to in several notes, it has been asserted that where administration is commenced in Maryland within ninety days after death, Sections 169 and 170 do not apply to any property, real or personal, whether or not the property is subject to administration. Op. Att’y Gen. to James M. Roby, May 13, 1964, supra note 40. The new ruling is commendable, if it is limited to relief from the 25% penalty imposed for failure to file an inventory under Section 170. But the ruling also eliminates Section 169. In such cases a new problem is created. How is jointly held real or personal property, or property transferred in contemplation of death, to be inventoried and the tax fixed? It is the duty of the executor or administrator to file an information return regarding such property (Article 81, Sections 155, 171) but it is not his duty to inventory the property, or have the tax fixed, or to collect the tax. Section 167 permits "any one interested in" "any real estate" subject to tax to apply for an appraisal; but this section is conditioned upon "no administration" of an estate of the decedent; and of course it does not apply to personal property which is not subject to administration. There is no section other than Section 169 which permits any other person to inventory the property, or have it appraised. The Attorney General has ruled that in the absence of statute the Register has no implied authority to inventory or seek an appraisal. Op. to Roby, ibid.

42. The Attorney General has ruled that Code, Sections 169 and 170, are never applicable to property which is subject to administration. Op. Att’y Gen. to Roby, supra note 40.

43. See also Md. Code Ann. art. 93, § 1 (1957). Do these sections extend time before interest commences to accumulate on legacies? The sections merely require administration accounts, and payment of tax on distributive shares, if any. A note to art. 93, § 109, suggests that interest on pecuniary legacies starts running at the end of twelve months. Art. 93, § 109, still requires distribution to creditors in thirteen months. See State v. Brown, 170 Md. 97, 101, 183 Atl. 256 (1936); 1 SYKES, op. cit. supra note 6, § 919. It impliedly requires distribution of the residue to beneficiaries
commissions. The Register of Wills, who has an interest in the collection of inheritance taxes, has a right to object to retentions beyond fifteen months. If a distribution account is not stated in that time, the tax obviously cannot be determined. If rulings of the Attorney General were consistent with the section 169-170 cases, no interest would accrue, and the remedy of the Register of Wills would be to come into the Orphans' Court and require a distribution account to be stated. Yet the Attorney General contends that interest commences to run when the distribution account should have been stated:

"If he [the Administrator] fails to file a statement of account, the tax is due at the end of the period in which the account should have been stated. Thus, the due date on inheritance tax for personal property is the date of the account stated. Interest begins to accrue thirty days after that due date." 

It should be noted that the Attorney General recognizes that circumstances may arise which justify a delay in the statement of a distribution account and in such cases he suggests interest may be waived. It is not stated who does the waiving, i.e., whether the Orphans' Court, the Register of Wills or the Attorney General has the power to waive interest.

(2) If an executor or administrator is appointed, it is his duty to collect inheritance tax on real estate owned by the decedent, in fee. The beneficiary has fifteen months to pay, and interest starts thirty days after that. This sort of property does not pass through administration, any more than property (real or personal) which is jointly held. Yet the Attorney General draws a distinction between (a) real property owned by the decedent at his death, and (b) real property jointly owned by the decedent and another, or real property transferred in contemplation of death. In the latter case the survivor has only ninety days to inventory the property or incur a default. As to the former, the Attorney General rules that if administration is taken out unless there is an order of retention. In the absence of such an order, interest on residuary shares should probably run after fifteen (thirteen?) months.

45. [1955] 40 Md. Att'y Gen. Ops. 542, 561. The statutory time for filing an account has been extended from the thirteen months, allowed when this ruling was issued. Md. Code Ann. art. 93, § 1 (1957).
47. [1955] 40 Md. Att'y Gen. Ops. 558, 563. See rulings on an earlier version of this statute where the Attorney General recognizes that the forfeiture of commissions will occur only where a distribution account has been stated. [1941] 26 Md. Att'y Gen. Ops. 403; [1939] 24 Md. Att'y Gen. Ops. 901.
48. In any event, it becomes an executor's duty to make distribution not later than fifteen months after letters are granted, and if more time is necessary, he should obtain an order from the Orphans' Court permitting him to retain assets for further administration. Such an order should avoid a default and interest from starting on the inheritance tax liability.
49. Md. Code Ann. art. 81, § 158 (1957); [1955] 40 Md. Att'y Gen. Ops. 558, 560. It should be noted that the statute does not by its terms apply to real estate which has been transferred in contemplation of death or which was jointly held.
within ninety days, then the trustee or devisee has fifteen months to pay the executor.  However, if ninety days go by before letters are issued, there is a default; the appointment of an executor (or administrator) after that time does not retroactively cure the default, and the penalty imposed by section 170 applies. In such a case, though the trustee is in default, no interest commences to run, but the recipient of the property is subject to a penalty. The ruling reads:

“We have also had occasion to consider the effect of situations arising where taxable property escaped formal administration and also escaped inventory and appraisal. Such property is subject to a penalty of 25%. Article 81, Sec. 169 [now Sec. 170]. Since, however, the tax on property not subject to administration is due upon appraisal and there has been no appraisal, the tax is not yet due, hence no interest is deemed to have accrued. . . .”

(3) Article 81, section 158, which allows the recipient of real estate fifteen months to pay the inheritance tax due, does not apply by its terms to personal property which is not subject to administration, such as property held jointly or under a taxable inter vivos trust, or property transferred in contemplation of death. By analogy to the real estate cases, the recipient has ninety days to inventory the property under section 169, and upon his failure to do so, the penalty provisions of section 170 apply. But interest will only start running when the property is inventoried as provided in sections 169 and 170.

Assessment of Remainders

Where a life estate is created, article 81, section 160, requires valuation of that estate before distribution. Under section 161, the remainderman or other person holding a future interest is permitted to come in and have it valued immediately, or await a revaluation when the interest vests in possession.

It is frequently advisable for the executor to pay all inheritance taxes immediately. If this election is made, questions arise as to whether a direct or a collateral tax is applicable. Take, for instance, a testamentary trust for life of a son, remainder to the son's descendants, and if none, to the persons who would then be the testator's rightful heirs. It is very probable that the remainders will ultimately go to direct descendants and so be subject to direct tax. But because of the possibility that there may be a failure of issue and the heirs may turn

54. Here again it should be noted that the Attorney General rules that Sections 169 and 170 are inapplicable if letters of administration are granted within ninety days after death. Op. Att'y Gen. to Roby, supra note 40.
out to be collaterals, a tax must be paid at the 7½% rate. It was once the practice to permit the payment of the direct tax at 1%, and if the remainder ultimately vested in a collateral, an additional tax was paid by the trustee upon distribution. This practice was ruled out in 1957 by the Attorney General.

Another problem arises out of the general power of testamentary appointment granted to a wife, to qualify a trust for marital deduction. One opinion of the Attorney General says that the tax on the remainder of this estate cannot be assessed immediately. A later opinion declares that it can be assessed immediately, but the 7½% rate is applicable. If the former opinion were upheld, an executor or trustee could not pay the entire tax, even though directed to do so by the will. It is understood that trustees and executors do pay the entire tax, despite this opinion.

In any event, the effect of an ultimate "catch-all" remainder in a will, dependent upon there being no direct descendants living when the prior life estates fall in, to the persons who are then the testator's rightful heirs, should be considered if inheritance taxes are to be paid immediately. Sometimes such remainders are tossed in to make a will complete, but the possibility that such a remainder will vest in a collateral, however unlikely, will step up the rate of tax. Of course, the 7½% tax based on the possibility of a remote remainder or reversion to collaterals can be avoided by a gift outright to living persons — whether or not they survive — and a step up in the tax rate can also be avoided by an ultimate remainder to an exempt charity.

The Penalty

The provisions of article 81, sections 169 and 170, have been rather fully considered under the heading "Assessment of Tax". One further question is raised: Suppose property, real or personal, is not subject to administration either because it is (a) jointly owned personal property or personal property transferred in contemplation of death, (b) jointly owned real estate or real estate transferred in contemplation of death, or (c) real estate owned by the decedent at death. It will be recalled that the Attorney General ruled that sections 169 and 170 apply to (a) and (b); and that if letters of administration are not granted in Maryland within ninety days, they also apply to (c). In

56. Ibid. In the particular opinion, however, it was also held that the statute of limitations had run against further assessment. Compare the case of a trust permitting withdrawal of principal by a life tenant who is a lineal descendant. Here an initial tax is assessed on the life estate and an additional tax is assessed on all withdrawals. [1952] 37 Md. Att'y Gen. Ops. 449, 452. See also Op. Att'y Gen. to Thomas W. Parks, Aug. 16, 1963, Daily Record, Sept. 24, 1963. Op. Att'y Gen. to Kathryn J. Corddry, April 5, 1965, Daily Record, April 14, 1965.
59. An unanswered question: Suppose there is a "marital deduction" trust which bequeaths a life estate to the wife, and the remainder to the wife's estate. Is a collateral tax avoided? Is the gift valid? The regulations state that it qualifies for marital deduction for federal estate tax purposes (Treas. Reg. § 20.2056(c)–2(b) (1954)); but there are a number of logical objections to such a conclusion.
the event that property is not inventoried by the transferee or recipient within the ninety-day period, is the 25% penalty automatically imposed? The writer suggests that the answer should be, "no".

The rules of statutory construction relating to penalty provisions, particularly in taxing statutes, are clear. A taxing statute is narrowly construed. 60 Penal statutes are construed strictly in favor of the citizen and against the State. 61

It can be strongly argued that under sections 169 and 170 a penalty is not collectible unless: (a) there is no administration whatsoever; and (b) the Register himself actually inventories the property before the tax is paid.

Apparently the Attorney General believes that no one has authority to waive the penalty. He has specifically ruled that the Register has no authority to do so. 62

Inter Vivos Trusts

One of the common devices in this day and age is the revocable inter vivos "trust". Often this will take the form of a sort of revocable management trust with all or substantially all of decedent's estate in the trust. It has certain advantages including privacy and the elimination of the assets from administration (executor's commission, etc.). Unless there is real estate, the trust deed ordinarily need not be probated or recorded.

In such a trust, care must be taken to provide for payment of debts, administration expenses and taxes, if the administrable estate is not sufficient. There is usually a clause for this purpose. This raises problems. One is, how the trustee is to comply with his duties and yet avoid the possibility of penalties under article 81, sections 169 and 170. 63

If a management trust of the sort above described holds all of the valuable assets of the estate, the trust will sooner or later have to provide funds to pay estate taxes and other administration expenses, and obviously the trustee cannot determine inheritance taxes until the administration is completed. Obviously this will take more than the ninety days allowed by section 169, and the trustee then faces the penalty of section 170.

One trust company follows the following practice: It files a petition for appraisal of the assets of the trust as required by section 169, and incorporates an estimate (on the liberal side) of its anticipated liability for administration expenses. The appraisers are then invited to appraise the assets of the trust as subject to this estimated

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62. [1952] 37 Md. ATT'Y GEN. Ops. 444, 446.
63. It may be that the question is partially answered by the recent ruling of the ATT'Y GEN. to Roby, supra note 40, to the effect that Sections 169 and 170 are never applicable where administration is commenced within ninety days after death. The following discussion has nonetheless been retained, against the possibility that the opinion may be modified; or the provisions of Sections 169, 170 amended. An opinion filed March 11, 1965, appears to overrule by implication this part of the opinion to Roby. Op. ATT'Y GEN. to Ruth R. Startt, supra note 17.
liability and an inheritance tax is accordingly fixed and paid. There are two objections to such a procedure: (1) It is doubtful that the appraisers have authority to do more than appraise the assets in the inventory without making any deduction for possible liabilities; and (2) the trust estate must immediately pay the inheritance taxes. If they are sizeable, the interest on the money paid is sacrificed.

The writer has used a somewhat different procedure in two Orphans' Courts and it has been effective. The trustee's petition for an appraisal is filed with inventory of assets as required by section 169. The petition prays for the appointment of appraisers. It also recites the facts relating to the expenses and the trustee’s inability to report expenses, and asks the court to include in its order appointing the appraisers a direction to them not to make their return until the executor informs him that the administration is complete. The petition and order are then deposited in the administration file of the Register of Wills until the administration expenses have been determined. The tax only becomes due when the court has approved the appraisal. Hence no interest is due and the penalty is avoided. When the administration is completed, the appraisers’ report is filed and approved. The trustee can then file a second petition, setting out the administration expenses which it has paid and pray the court to fix the tax.

There may be other ways of handling this problem. However, something should be done in each case, because the Attorney General has ruled that if there is a violation, the penalty cannot be waived, however innocent the trustee may be.

The penalty provisions could be clarified. At the very least, the statute should delegate authority to some court, perhaps the Orphans’ Court, to waive the penalty, or at least to rule that it is applicable or inapplicable.

**The Estate Tax**

The Maryland estate tax was first imposed in 1929. Its primary purpose is to absorb the unused part of the credit for state death taxes applied by the federal estate tax law. Section 2 of the act contains an express proviso which reads:

“[P]rovided, however, that such ‘Maryland estate tax’ hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the ‘federal estate tax’ payable by or out of the ‘estate’ of the ‘decedent’ had this article not been enacted.”

65. It can be argued that the Orphans' Court has authority to fix the tax under Section 169. In any event it would appear that the report of the specially appointed appraisers is not final until it is approved by the court.
66. [1952] 37 MD. ATT’Y GEN. Ops. 444, 446.
68. INT. Rev. CODE Or 1954, § 2011. The federal estate tax credit is based upon the exemptions established by the Revenue Act of 1926, when an exemption of $100,000.00 rather than the present $60,000.00 was allowed. Consequently there is no Maryland estate tax upon estates in which the gross taxable estate for federal estate tax purposes does not exceed $100,000.00.
A Maryland estate tax return must be filed when the federal estate tax return is filed and must be amended when the federal estate tax return is amended or changed by audit. The tax is payable when the return is filed, and deficiencies are payable when amended returns are filed.

The amount of the Maryland estate tax is fixed by the credit allowed for the federal estate taxes, but it is determined after deducting other death taxes paid. The tax is payable to the Comptroller of the State of Maryland.

Refund Procedure

The Maryland estate tax, having been imposed for a very particular and special reason, was not made part of article 81, which is the taxing article of the Code. This is important because refund procedures are described in article 81, and they are expressly made applicable to "ordinary" and "special" taxes as defined in article 81. The Maryland estate tax is not included in the definition of an ordinary or a special tax set out in section 6 of article 81. Being in a separate article, some question can arise as to whether the refund procedures available under article 81 are applicable. If they are applicable, are they exclusive of all other remedy?

A case bearing on this point was recently decided by the Court of Appeals. The decision had to do with a beer tax under article 2B of the Code, and whether it was covered by article 81, sections 215–217, so as to confer jurisdiction on the Tax Court on a petition for refund. The court sustained the Tax Court's jurisdiction. The decision does not decide that the Tax Court has exclusive jurisdiction.

Supposing the administration is being conducted in an equity court, can the equity court be called upon for a decision regarding estate taxes without a prior petition to the Tax Court as provided by article 81, sections 215–217? In a recent decision, the Court of Appeals did not question the jurisdiction of an equity court to decide questions involving estate taxes, although a preliminary appeal to the Tax Court provided by section 215 of article 81 for claims for refund of special taxes, had not been taken. However, in that case, the Attorney General had expressly consented to the submission, and did not question the jurisdiction of the equity court when the appeal was heard. If the point is ever directly raised, the jurisdiction of the equity court should be sustained.

Limitations on Refunds

Article 81, section 215, provides that a claim for refund for special taxes "erroneously or illegally assessed or collected, or penalties or interest thereon collected without authority, or in any other manner

73. The Tax Court has express jurisdiction over petitions for inheritance tax refunds. (Md. Code Ann. art. 81, §§ 6, 215 (1957)).
wrongfully collected" must be filed within three years after payment; and section 216 contains a further provision that if the state collecting agency finds in favor of the claimant, the Comptroller shall be notified "and the claim for refund shall be allowed". This section also contains a proviso reading:

"provided, however, that no claim for refund shall be allowed to any taxes, fees, charges, penalties, or interest paid more than three years prior to the filing of such claim for refund."

Overpayment of Maryland estate tax frequently does not develop until more than three years after payment, and if article 81 is applicable to claims for refund of overpayments of estate taxes, it may be argued that the claim is barred. However, even if the above quoted provisions are applicable, they should not apply in the case of overpayments which result from subsequent payments of inheritance taxes. The executor who makes the overpayments of estate tax does so in accordance with the precise requirements of the law, and it cannot be stated that they are "erroneously or illegally assessed or collected . . . or in any manner wrongfully collected." 77

Complications Involving Payment

It will be seen that in any case which involves an estate large enough to involve a Maryland estate tax (over $100,000.00), we have a confusing picture.

In the usual uncomplicated case, an executor who is ready to distribute states his administration account and a distribution account. In the meanwhile, he has prepared, amongst others, his federal estate tax return and charged the expected tax to be paid in the return as an administration expense. In his federal estate tax return he has claimed the full amount of the credit for state death taxes, and has retained from his distribution sufficient amounts to indemnify him against all adjustments made in the audit of his estate and income tax returns. Now things begin to get complicated. The net Maryland estate tax is the amount of the credit less the Maryland inheritance taxes paid. The Maryland inheritance taxes are upon distributive shares which are subject to at least two adjustments, (1) the amounts paid for Maryland estate taxes, and (2) the amount of the retention. Thus, each tax depends upon the amount of the other. This involves a tedious mathematical calculation of variables.

Assume we come up with an answer and find that the Maryland estate tax is determined to be $15,000.00 and the Maryland inheritance taxes payable on the present distribution are to be $20,000.00. It is perfectly obvious that this determination will ultimately be wrong, because the ultimate Maryland estate tax is determined only after deducting all inheritance taxes now or hereafter paid, and we have a retention which is to be distributed at some future time after the estate and income tax audits have been completed.

This then means that if the procedure established by the statute is followed, the executor is faced with an overpayment of Maryland estate tax. It might be suggested: Why make the overpayment? We

know that sooner or later it must be refunded when we pay additional inheritance taxes. But here we are faced with the statutory requirement that the Maryland estate tax be paid promptly when the federal estate tax return is filed, and the executor is liable for 6% interest until it is paid. So, in the absence of some special arrangement, he must overpay the Maryland estate tax and count upon a refund.

There are several special arrangements that can be made in an attempt to deal with this situation. Each has its objections. First, let us assume that the executor is directed to pay inheritance taxes out of the residue. An estimated total of Maryland inheritance taxes can be paid by the executor to the Register of Wills. The Register will always accept a check. Then the Maryland estate tax return is filed, and the full estimated amount of inheritance tax is claimed. If it ultimately turns out that the estimate of Maryland inheritance taxes was too liberal, by not too large an amount, the executor often writes it off, perhaps reasoning: “If I got a refund of inheritance taxes, it would merely increase my Maryland estate tax. It all goes to the State, so why bother.”

But this method is dangerous. The Maryland estate tax is collected by the Comptroller and the inheritance tax by the Register of Wills. The two may not see eye to eye, and in the Register’s case, he gets a collection fee of 25% of the tax collected. Furthermore, this involves loss of use of the additional inheritance tax money which is advanced before it is payable, and a claim by the Comptroller for interest on a deficiency in Maryland estate tax if it turns out that there is an over-estimate of inheritance tax. Again, if the guess regarding the inheritance tax is over-estimated, a claim for refund of inheritance tax overpaid must be made within three years from date of payment or it is barred. Furthermore, if the payment of inheritance taxes is made in advance of due date, there may be some question of right to recover on the ground that the payment is “voluntary.” The expedient suggested is acceptable if only small amounts are involved, but these taxes can go into large figures.

A second method of handling this situation is to pay the entire Maryland estate tax, deducting only for inheritance tax to be immediately paid (if a distribution account is to be stated at or about that time). In this regard it can be noted that frequently the executor is unable to make distribution of any part of a residue of an estate until after the fifteen months when he must state his account. Of course he will, if possible, have paid out all legacies by that time to avoid interest charges; but complications in his income tax or estate tax audit may make any further distribution impractical. In such a case, a very heavy Maryland estate tax may be levied which must inevitably result in an overpayment. However, the executor is comforted by the fact that if a procedure to recover the refund of overpayment of estate tax is worked

81. Wasena Housing Corp. v. Levay, 188 Md. 383, 387-8, 390, 52 A.2d 903 (1947). The court held that a recovery of overpayments of tax is a matter of legislative grace, and that a tax is not paid under duress, even if paid under protest. See also Md. Code Ann. art. 81, § 215 (1957).
out, interest at the rate of 6% is allowed from the date of overpayment to the date of refund. 82

In line with the subject matter discussed above, we can here mention a curious result of the interrelationship between Maryland estate and inheritance taxes. So long as Maryland inheritance taxes will not exceed the federal estate tax credit, the executor is usually glad to swell the inheritance tax to as large a sum as he can rightfully pay. This includes an immediate payment of the tax on all future interests, even though the rate of tax is 7½%. If, as is the case in many wills, he is directed to pay all death taxes on property passing at death out of the residuary estate, the estate gains by throwing as much as possible of the burden into inheritance taxes and as little as possible into Maryland estate taxes. On the other hand, if there is no clause in the will requiring payment of Maryland inheritance taxes on remainder interests out of residue, the executor is in a different position. 83

The same comment can be made with regard to the trustee under a residuary trust.

Procedure to be Followed for a Court Ruling

As has been stated, there is no statutory procedure available by which the executor can raise questions of the sort described above and obtain a conclusive ruling as to the amount of each tax which is payable. The procedure relating to a claim for refund of inheritance taxes 84 is hardly satisfactory in the ordinary case, and there is no procedure at all prescribed for the Maryland estate tax. With the law for the most part being declared by the Attorney General through rulings, it may be of great importance to get a firm ruling before deciding on what course to take. Since even the Attorney General changes his mind, it may be advisable to add a court decree to the Attorney General's ruling. The question is — How do you get a court decree binding on the State?

For many years it has been accepted practice, in case of a doubt as to the amount of inheritance taxes due, to file a petition in the administration proceeding — whether it be in the Orphans' Court or in an equity court — requesting that the court fix the tax and authorize payment. In such a proceeding a special order nisi is issued joining the Register as a party. The Attorney General has cooperated with this procedure and generally files an answer for the Register. This method of litigation has been accepted without question by the Court of Appeals. 85

Usually, the Comptroller (who collects the estate tax)

82. Comptroller v. Davidson, 234 Md. 269, 199 A. 2d 360 (1964). An amusing circle can develop here. Suppose a complete distribution is made and inheritance taxes are paid. The tax payments generate an overpayment of Maryland estate tax, which is then refunded to the estate with interest. This in turn results in a new distribution with additional inheritance taxes paid. This generates a new overpayment of Maryland estate tax. And so we go, round and round, until the payments of inheritance tax becomes too small to seek a refund of overpayment of Maryland estate tax.

83. If the power to immediately pay all Maryland inheritance taxes is not expressly delegated to the executor or the trustee, he very probably does not have the power to elect an immediate payment of tax on the remainders.


is not joined. However, in dealing with a large estate, it is a safer practice to join both Comptroller and Register where any question is raised which might involve both.

Election to Pay Inheritance Tax Immediately
Under Section 161

It is very usual for wills nowadays to contain express exoneration provisions relating to all death taxes, i.e., federal and state estate taxes and all inheritance taxes. These clauses often instruct that the executor shall pay all taxes on specific devises and bequests and that the executor or the trustee immediately pay inheritance taxes on all interests in each trust out of the corpus of that trust. Such instructions are very helpful. Some of the reasons are:

(1) It provides a way for prompt payment of the inheritance tax. Such a tax on chattels and the like is a nuisance, and normally the testator does not wish the beneficiary to have to raise money for the privilege of receiving chattels.

(2) In the case of substantial interests, it provides a way out for the life beneficiary and remaindermen who may find it very burdensome to pay cash for such interests.

(3) It provides a way for prompt payment of enough of the inheritance taxes to enable the executor to claim the full federal estate tax credit, with a minimum payment of Maryland estate taxes.

In the absence of an exoneration provision in the will, there is the possibility that a substantial amount of the federal estate tax credit may be entirely lost. Take this example: A residuary trust with a life estate to a son, remainder to the son's wife. The wife is, of course, a collateral. If no provision is made in the will for payment of the 7½% tax on her remainder, she must either raise the money elsewhere or wait until the vesting in possession of her remainder. Assuming she does the latter, we have this picture: A Maryland estate tax return must be filed. The only inheritance tax paid at the time of distribution is the direct inheritance tax on the life estate. Hence the estate loses the benefit of the credit resulting from the payment of the 7½% inheritance tax on the remainder; and, if a Maryland estate tax is payable, a large sum may be taken from the general residue in the form of increased Maryland estate tax.

It is true that sooner or later this will result in an overpayment of Maryland estate tax, but that will only occur when the son dies, which may be many years away. In such a case, the administration will have long since been completed, yet the cause of action for refund lies in the estate and constitutes an undistributed asset of the estate which is subject to redivision among the beneficiaries of the residuary estate.

CONCLUSION

No particular effort has been made in this paper to suggest changes. The writer has never favored piecemeal amendments to laws. As often as not amendments merely complicate rather than correct,
as witness the horrible condition of the federal estate and income tax laws. Usually the administrative problems gradually work themselves out, and if there is a fair amount of consistency and not too much tinkering, the machine can be made to run. However, a reworking of the entire death tax setup may be advisable, and if that is the case, some of the administrative difficulties and inconsistencies mentioned above might be corrected.

Perhaps, as Mr. Vernon Eney says in his article, the best idea would be to repeal the inheritance tax and impose a larger estate tax. If that were done, the Maryland estate tax act could be reworked so as to really produce revenue and not merely exhaust credits allowed for federal estate tax. As a starter it might be suggested that the Maryland estate tax be levied on the same base, and with the same exemptions, as the federal estate tax, rather than on only that part of the federal law (the 1926 act) which allows a credit for state death taxes.

In any event, there is a lot of room for improvement in the administration of death taxes. If the inheritance tax is to stay, the responsibility for collection could be centered in one, not two, officials. Some provision could be made for set-off of liability for Maryland estate taxes and Maryland inheritance taxes — at least where there is a provision in the will that all such taxes are to be paid immediately. There could be some method by which liabilities for both taxes might be fixed and determined, and this includes penalties, if any are assessable. The procedure for tax refunds, especially in the case of Maryland estate taxes, could be established, and perhaps some effort could be made to eliminate the complicated calculations which are required by these interdependent taxes. Assessment and collection procedure, particularly in the case of joint interests, transfers in contemplation of death, and taxable inter vivos trusts, could be spelled out. Or, perhaps both of these death taxes could be repealed to the end that the task of dying might become a little simpler.

Finally, if the two sorts of taxes are to be retained, a caveat might be suggested to the administrative officers and perhaps even to the courts. With ever increasing expenditures of public funds and consequent deficits, the temptation to extend the language of a tax act is greater in these days than ever before. The urge is strong to construe a tax act to cover a particular situation wherever that can be done without violating constitutional restraint, and many constitutional restraints on the taxing power have been destroyed. Death taxes such as ours cannot be successfully administered in this spirit. Unwarranted extensions of the true meaning of the act merely to reach a particular case cause confusion and uncertainty. This can, in the long run, result in loss, not gain, to the public revenue. Most people want to pay what is properly due, however strongly they may oppose the constant increase in taxes. The treasury will not be depleted if taxpayer and administrative official alike are equipped with sure and certain rules; and this is true even though in a particular case the ruling be, No tax!