

December 28, 1938.

OPINION NO. 1680

TAXATION, INHERITANCE; DE-  
DUCTIONS ALLOWABLE.

Trustee's commissions provided for in trust instrument may not be deducted in computing inheritance tax, such commissions being payment for services rendered for the beneficiaries of the trust and not comprising expenses of administration of the estate of deceased settler.

Honorable W. C. McGonagle,  
Treasurer, Territory of Hawaii,  
Honolulu, T. H.

Sir:

Your letter of December 13 asks whether or not an item representing trustee's commissions on the principal of a trust estate created by a trust instrument *inter vivos* may be deducted in computing inheritance taxes, the letter also stating that the trust was intended to take effect after death of the settlor. In my opinion such a deduction may not be allowed. Trustee's commissions are considered in *State ex rel. Basting v. Probate Court*, 101 Minn. 485, 112 N. W. 878 (1907). The court says:

"The expenses of the administration of the estate of a deceased person are proper to be deducted in ascertaining the value of the estate for the purposes of taxation under the inheritance tax law. But the compensation of a trustee, earned, not in the administration of the estate, but in the management thereof for the benefit of the legatees or devisees, does not come properly within the class or reason for exempting administration expenses. \* \* \* Trusts, however, of the character of that here before the court, are created for the benefit of those to whom the property ultimately passes are of voluntary creation, and intended for the preservation of the estate."

The New York rule allows the deduction of trustee's commissions in certain cases, but it appears that this rule is based upon a peculiar statutory provision which does not appear in our law. New Jersey follows the New York rule for the reason that the New Jersey statute was copied from the New York statute and under the usual rule it is presumed that the judicial construction given to the statute in the other state is adopted with the statute. The New Jersey court, in following the New York rule for the reason above stated, nevertheless criticised that rule.

In 61 C. J. 1705, sec. 2595, it is stated that in the absence of a statutory provision on the subject, trustees' commissions are not to be deducted, and it is pointed out that the rule of some states allowing such a deduction is based upon the statute of the state and the construction placed thereon.

In my opinion the compensation of the trustee payable out of the principal of the trust estate should not be deducted in the absence of a statutory provision allowing such deduction. Such commissions are paid for services rendered for the benefit of the beneficiaries of the trust, and the services of the trustees are part of the benefits received by the beneficiaries. In fixing the value of the property transferred the cost of the services rendered for the benefit of the beneficiaries of the trust should not be deducted.

Very truly yours,

RHODA V. LEWIS,  
Deputy Attorney General.

APPROVED:

J. V. HODGSON,  
Attorney General.