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Op. 56-117

November 19, 1956

Mr. J. A. Bell
Deputy Tax Commissioner
Territory of Hawaii
Honolulu, Hawaii

RE: Estate of Ida M. Keniston; deducti-
bility of litigation expenses.

Dear Sir:

This is in response to yours of June 27, 1956 seeking our advice as to the deductibility of expenses incurred by the caveators against the will of Ida M. Koniston. Please be advised as follows:

It seems to be well settled that expenses incurred in defending a will by an administrator or executor, including attorney fees, constitute an administration expense which is deductible in computing the inheritance tax. See Connell v. Crosby, (1904) 210 Ill. 380, 71 N.E. 350; Re Gihon, (1902) 169 N.Y. 443, 62 N.E. 561; Re Reed, (1916) 98 Misc. 102, 162 N.Y.S. 412; Shelton v. Campbell, (1903) 109 Tenn. 690, 72 S.W. 112.

There are only a few cases on the question at hand, but those that there are seem to establish the rule that amounts expended by heirs or legatees in an attempt to establish their alleged rights in an estate are not deductible expenses for the purpose of figuring the inheritance tax. This rule has even been extended to that case where the caveators have been successful in establishing their rights. See Re Westurn (1897) 152 N.Y. 93, 46 N.E. 315; Ann. 30 A.L.R. 2d. 1108 and 96 A.L.R. 626. The Keniston estate matter is a case of the latter type wherein the caveators were successful; that is, although the original will was entered into probate and a court approved compromise agreement reached, this was only accomplished after the caveators had received a favorable jury verdict.

There are no Hawaii cases directly in point, but the case of In re Afong, 26 Haw. 337, while not being an

inheritance tax case, held that attorneys' fees of successful caveators are payable out of the estate prior to distribution to the legatee on the ground that where an invalid will is successfully contested, while not adding anything to the value of the corpus of the estate, it results in preventing an unlawful distribution of the assets and brings about a lawful distribution to the lawful heirs and devisees and is therefore of direct benefit to the estate.

In the light of (1) the successful will contest in the Keniston estate and (2) the Afong case above referred to, it is the opinion of this office that the attorney's fees of the contestants of the Keniston will be allowed as a deduction from the gross estate for inheritance tax purposes.

Returned herewith please find your office file regarding this matter.

Very truly yours,

HAROLD W. NICKELSEN
Deputy Attorney General

APPROVED:

RICHARD K. SHARPLESS
Attorney General

cc: Kenneth Young