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Tax Accounting Problems of Personal Representatives

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COMMENTS

TAX ACCOUNTING PROBLEMS OF PERSONAL REPRESENTATIVES*

In addition to the non-tax accounting responsibilities discussed in the preceding issue of the *Marquette Law Review*,[1] the personal representative of a decedent's estate has a number of tax accounting burdens.

A. Wisconsin Inheritance Tax

The basic Wisconsin death tax is an inheritance tax.[2] An inheritance tax is a tax imposed upon the privilege of receiving property from a decedent at death.[3] It is an excise tax[4] measured by the value of the estate at the time of the transferor's death.[5]

The form provided for the Wisconsin inheritance tax is entitled *Notice to Department of Taxation of Hearing on Final Account and Determination of Inheritance Tax and Information Required by the Department of Taxation.* This notice is to be filed within 15 months after the issuance of letters testamentary or of administration, unless the court finds special causes of delay exist.[6] Such notice is to be filed with the county court having probate jurisdiction, with the Wisconsin department of taxation, and with the public administrator.[7] The executor or administrator must report the value of the assets for Wisconsin inheritance tax purposes at clear market value.[8] Clear market value has been defined as the sum which property would bring on a fair sale when sold by a willing seller not obligated to sell to a willing buyer not obligated to buy.[9] In the absence of special or suspicious circumstances and where there is regular administration, the usual practice is merely for the county court to determine value at the time and place for hearing the final account of the executor or administrator, and to use the ordin-

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* This article will consider the tax accounting problems and techniques of the personal representative, while a subsequent article appearing in the next issue of the Marquette Law Review will consider such problems as faced by the trustee.

[1] Comment, *Probate Accounting,* 46 Marq. L. Rev. 462 (1963) (hereinafter cited as *Probate Accounting*).

[2] Wis. Stat. §§72.01-72.24 (1961) set forth the basic inheritance tax laws, §§77.50-72.61 the Wisconsin estate tax laws which are designated to secure for the state the benefit of the 80% credit allowable under the federal estate tax and therefore imposing a state estate tax in the amount of the difference between the federal credit and the amount of all state inheritance taxes, and §72.74 the additional emergency tax in the amount of 30% of the total of the state inheritance and state estate taxes.

[3] Lowndes and Kramer, Federal Estate and Gift Taxes 2 (2d ed. 1962).

[4] Estate of Atkinson, 261 Wis. 481, 53 N.W.2d 185 (1952).

[5] Estate of Benjamin, 235 Wis. 152, 292 N.W. 304 (1940).

[6] Wis. Stat. §313.13 (1961).

[7] Wis. Stat. §72.15(2) (1961).

[8] Wis. Stat. §72.01(8) (1961).

[9] *In re* Ryerson's Estate, 239 Wis. 120, 300 N.W. 782 (1941).

ary inventory and the account as a basis of computing the inheritance tax.[10]

The determination of the value of the assets is only part of the problem confronting the executor or administrator at the outset. The other part is to determine what assets are subject to the Wisconsin inheritance tax. The particular assets that the writer is concerned about are those discussed in Part I of *Probate Accounting.*[11] These are income items which were earned by the decedent prior to death but not received until after death: rent and interest accrued, dividends, and annuity payments receivable under the terms of an annuity contract whereby the decedent can provide by will the person to whom the payments for the remainder of the term are to be made in case of the death of the decedent prior to the end of the term.

The Wsiconsin court held in *Herzberg v. Wisconsin Tax Commission*[12] that where an insurance agent dies leaving rights to renewal commissions on insurance written prior to his death, such rights can be included in the value of the gross estate for inheritance tax purposes. A few years later, the Wisconsin court held in *Norris v. Wisconsin Tax Commission*[13] that installment payments due to the decedent under a contract to purchase stock from the decedent become part of the corpus of the estate and are subject to inheritance taxes. In the *Norris* case, the court stated that items uncollected at the time of the decedent's death fix themselves into the estate, become part of the corpus, and are subject to inheritance taxes. The time at which these items fix themselves into the estate is the death of the decedent.[14] Is the language in the *Norris* case broad enough to subject *all* such income items to an inheritance tax, or is it limited to its facts? Further, if the *Norris* case does require the same inheritance tax treatment for all such income items, it appears that the executor or administrator will treat rents accrued, but not payable until after the testator's death, with respect to realty passing as an absolute devise differently for inheritance tax accounting purposes than he would for probate accounting purposes.[15] But if the *Norris* case does set up a separate tax accounting rule, why does the form provided for computing the Wisconsin inheritance tax appear to require that only *interest* accrued to the date of death be reported, for tax purposes, separately if not listed in the inventory?[16] It would seem

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[10] See CALLAGHAN'S, WISCONSIN PROBATE LAW §14.60 (1959).
[11] See *Probate Accounting, supra* note 1.
[12] 194 Wis. 126, 215 N.W. 936 (1927).
[13] 205 Wis. 626, 237 N.W. 113 (1931).
[14] *Supra* notes 12 and 13.
[15] See *Probate Accounting* to the effect that rents are not apportionable at common law; hence, they do not appear in the inventory if not payable in advance and death is prior to the due date.
[16] See question 11 of the form provided for computing the Wisconsin inheritance tax.

that only items listed as assets of the estate in the probate inventory and account should be subject to Wisconsin inheritance tax,[17] and any other income received subsequent to the death of the decedent is not an asset of the estate for probate accounting and inheritance tax purposes since the value of the estate is determined at the death of the decedent.[18] Such income is more properly subject to an income tax which will be discussed later.[19]

The executor or administrator is allowed deductions for the various estate liabilities discussed in *Probate Accounting.* Sections 72.015(1) through 72.015(3) of the 1961 Wisconsin statutes allow, for Wisconsin inheritance tax purposes, deductions for debts of the decedent, reasonable burial expenses and expenses of administration. Section 72.015(4) allows a deduction for:

> A portion of the Wisconsin income taxes paid on income reported by the executor or administrator pursuant to §71.08(1) for the income year in which the decedent's death occurred, commencing with income of the year 1959 and thereafter.[20]

No deduction is allowed under the statute if such portion of the Wisconsin income taxes has been deducted by the executor or administrator for reporting Wisconsin taxable income.[21] A comparison of the relative inheritance and income tax rates can be made so as to determine which method of reporting will result in the greatest benefit to the estate.[22]

In computing the Wisconsin inheritance tax, the personal representative is allowed to deduct the federal estate tax.[23] This deduction is to be computed by taking the amount of the Wisconsin taxable estate subject to federal estate taxes, computing the federal estate taxes on that amount, and allowing this portion of the federal estate tax deductible in computing the state inheritance tax.[24] This special computation is applicable whenever part of the estate is within Wisconsin and part is without.[25]

Although no time is specified in the Wisconsin statutes as to when the inheritance tax should be paid, section 72.06 provides for a discount

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[17] See Wisconsin Probate Form No. 35P—*Final Account And Petition,* line 8 which uses the Net Personal Estate arrived at for probate accounting purposes as the amount subject to the Wisconsin inheritance tax. See also line 10 where accruals are apparently listed in the Final Account only.

[18] Estate of Pabst, 139 Wis. 561, 121 N.W. 351 (1909); Estate of Stephenson, 171 Wis. 452, 177 N.W. 579 (1920); Will of Matthews, 174 Wis. 220, 182 N.W. 744 (1921).

[19] WIS. STAT. §71.08(1)(b) (1961).

[20] See WIS. STAT. §72.015(4) (1961).

[21] *Ibid.,* Wisconsin income taxes paid during the year are deductible for income tax purposes under WIS. STAT. §71.05(2c)(b)(4) (1961).

[22] BULLINGER, WISCONSIN INHERITANCE, GIFT, ESTATE AND EMERGENCE TAX LAW MANUAL 87 (1963).

[23] WIS. STAT. §72.015(5) (1961).

[24] Estate of Stevens, 266 Wis. 331, 63 N.W.2d 732 (1954).

[25] *Supra* note 22, at 88.

of 5 per cent if the tax is paid within one year from death. If it appears that a determination of the tax due cannot be made within one year, the executor or administrator should estimate the amount due and tender payment within the one year in order to preserve the discount.[26] After the inheritance tax is determined by the probate court, an order is drawn pursuant to section 72.15(10) in a form prescribed by the department of taxation.[27] The executor or administrator as well as the person to whom the property is transferred are personally liable for the inheritance taxes until they are paid.[28]

B. Federal Estate Tax

The 1954 Code provides that a preliminary notice must be filed with the federal government where the gross estate at death exceeds $60,000.[29] The time for filing this notice is two months after death or after the personal representative's qualification, whichever occurs later.[30] This notice simply serves to alert the Service that a federal estate tax return will be filed.[31] Should it later be determined that the gross estate does not exceed $60,000, the Service will generally accept a copy of the estate inventory filed with the local probate court accompanied by an affidavit of the executor to the effect that the assets did not exceed $60,000 in value, or the executor could file the estate tax return, Form 706, to accomplish the same purpose.[32]

When the gross estate exceeds $60,000, the estate tax return is to be filed within 15 months after the date of the decedent's death.[33] Where the decedent died testate, a certified copy of the will must be filed with the return.[34] Failure to file in time may result in the loss of the right to use the optional valuation date.[35] A late return must value all of the estate's assets as of the date of death.[36]

Where a timely return is filed, the executor or administrator will have to determine the valuation date to be used. Assets for the federal

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[26] Swietlik, *Taxes at Death*, Wisconsin Continuing Legal Education, pt. II, at 80 (1962).
[27] Wis. Stat. §72.15(10) (1961) also provides that no final judgment shall be entered in such estates until due proof is filed with the Court that copies of the order have been mailed or delivered to the county treasurer and the department of taxation.
[28] Wis. Stat. §72.05(1) (1961).
[29] Int. Rev. Code of 1954, §6018 also provides that notice is required if the decedent is not a citizen and over $2,000 of his gross estate is situated in the United States. The form provided by the Service is numbered 704.
[30] See Int. Rev. Code of 1954, §6071; Treas. Reg. §20.6071-1, 20.6036-1.
[31] Treas. Reg. §20.6036-1(a).
[32] See Huffaker, Stutsman & Angvire, Tax Problems of Fiduciaries, 167 (1961).
[33] Int. Rev. Code of 1954, §6075(a). Extensions of time for filing provided for under §6081.
[34] Treas. Reg. §20.6018-4(a).
[35] Int. Rev. Code of 1954, §2032(c).
[36] Treas. Reg. §20.2032-1(b)(2).

estate tax may be valued as of the death of the decedent,[37] or the personal representative may utilize the alternative valuation date.[38] The alternative valuation date is one year subsequent to the date of death, or if the property is sold within one year, the date of its disposition.[39] *All* assets must be valued on the date chosen by the executor or administrator.[40] Thus the aggregate value of the estate is to be considered rather than any one item. Generally, the executor will choose the date that produces the lower overall valuation because the estate tax will then be lower. When the election to use the alternative valuation date is taken, the federal income tax basis of the property in the hands of one acquiring it from a decedent is its value at the applicable valuation date rather than at the death of the decedent.[41] This alternative valuation date allowable under the federal estate tax has no counterpart under the Wisconsin inheritance tax, since the time of value for Wisconsin inheritance tax purposes is the date of the decedent's death.[42]

How will the personal representative determine the value of the gross estate for federal estate tax purposes? The value used is the fair market value either at the date of death, or if the executor elects the alternative valuation date, the value thereof at that date.[43] The Regulations define fair market value as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[44] The definition of fair market value used for federal estate tax purposes is quite similar to that of clear market value used for Wisconsin inheritance tax purposes.[45]

How is the executor to treat for federal estate tax purposes income earned prior to death but received after death? The Regulations state:

> Interest and rents accrued at the date of the decedent's death constitute a part of the gross estate. Similarly, dividends which are payable to the decedent or his estate by reason of the fact that on or before the date of the decedent's death he was a stockholder of record (but which have not been collected at death) constitute a part of the gross estate.[46]

It appears that the position of the Service is clear as to the three items mentioned above. However, is the Regulation limited to the three items mentioned therein? It has been held that post-death partnership

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[37] INT. REV. CODE OF 1954, §2031(a).
[38] INT. REV. CODE OF 1954, §2032.
[39] *Ibid.*
[40] INT. REV. CODE OF 1954, §2031(a), 2032(a).
[41] INT. REV. CODE OF 1954, §1014.
[42] *Supra* notes 5 and 18.
[43] Treas. Reg. §20.2031-1(b).
[44] *Ibid.*
[45] See *supra* note 9.
[46] Treas. Reg. §20.2033-1(b); see also Mellie Esperson Stewart v. Commissioner, 18 B.T.A. 1010 (1930).

income paid to a deceased partner's estate was income includible in the gross estate for purposes of determining the estate tax.[47] The court in so holding stated that if the income is the fruit of activity during the decedent's life, then it will be includible in his gross estate. Apparently all income items should be included in the gross estate for federal estate tax purposes if they meet the above requirement. Thus, the Regulation may not be limited to interest, rents, and dividends, and the special annuity payment discussed under *Probate Accounting*,[48] though not mentioned in the Regulation, may have to be included in the gross estate for federal estate tax purposes.

If the executor or administrator elects to use the alternative valuation date, how are such income items to be treated? The Regulations state that:

> . . . property earned or accrued (whether received or not) after the date of the decedent's death and during the alternate valuation period with respect to any property interest existing at the date of the decedent's death is excluded in valuing the gross estate under the alternate valuation method.[49]

Further, the Supreme Court has held that when a personal representative elects to have the estate valued as of one year after death or to have items of the estate which have been disposed of during the year valued as of the time of disposition, then the rents, dividends and interest accrued and received between the time of death and the time of such valuation should not be included as part of the value of the gross estate.[50]

If the federal estate tax requires inclusion of income earned by the decedent up to his death and exclusion of income earned subsequent to the date of death even if the alternative valuation date is used, then the federal tax accounting responsibilities appear similar to the inheritance tax accounting responsibilities if the *Norris*[51] case holds for a separate inheritance tax treatment of such items; however, the probate accounting responsibilities will be different as to rents.[52] If the *Norris* case does not state a separate tax rule for such income items, then it appears that the personal representative will have to apply a different rule to rental income for federal estate tax accounting purposes than he would for inheritance tax accounting.[53]

The executor or administrator is allowed deductions for various liabilities listed in section 2053 of the Code[54] provided that such deduc-

[47] See Estate of Riegelman v. Commissioner, 253 F.2d 315 (2d Cir. 1958).
[48] See *supra* note 11.
[49] Treas. Reg. §20.2032-1(d).
[50] See Maass v. Higgins, 312 U.S. 443 (1941).
[51] *Supra* note 13.
[52] See *supra* note 15.
[53] *Supra* note 46.
[54] Treas. Reg. §20.2053-1(b)(1).

tions are allowable by the laws of the jurisdiction where the estate is being administered.[55] Said section allows deductions for funeral expenses, for administration expenses, for claims against the estate and for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness is included in the value of the gross estate. Also, interest paid on legacies at the legal rate is deductible.[56] Such interest seems to be taxable under the income tax laws to the legatees.[57] A credit for state death taxes is allowed under section 2011 of the Code.[58]

The executor or administrator is liable for the payment of the estate tax.[59] If the personal representative pays a debt due by the decedent's estate before all the estate tax is paid, he is personally liable to the extent of the payment for so much of the estate tax as remains due and unpaid.[60] Also, the personal representative is liable in a similar manner if he distributes any portion of the estate before all the estate tax is paid.[61] The federal estate tax is due 15 months after the date of death.[62] Extensions for payment are available under the Code.[63]

C. Federal Income Tax Accounting by Executor

The initial federal income tax return or returns required to be filed by a personal representative are for the period or periods from the end of the last taxable period for which a return was filed by the decedent to the date of his death.[64] An important decision to be made by the personal representative is whether to file a joint return with the surviving spouse.[65] For example, if he decides to file a joint return for the year of death, it will include the income of the decedent down to the date of death and the income of the spouse for the entire year. The surviving spouse may file a joint return if the executor has not been appointed, but the executor has a year after appointment to disaffirm.[66] If the decedent is the wife and the major portion of the income is the husband's, an election to file a joint return will not benefit the estate;

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[55] Int. Rev. Code of 1954, §2053(a); Treas. Reg. §20.2053-1(1).
[56] See Rev. Bull. 1644 III-2 Cum. Bull. 114 and Rev. Rul. 982 11-2 Cum. Bull. 54.
[57] Treas. Reg. §1.61-7.
[58] See Int. Rev. Code of 1954, §2011(b) for the amount of the credit allowable on the federal estate income tax return.
[59] Int. Rev. Code of 1954, §2002.
[60] Treas. Reg. §20.2002-1.
[61] *Ibid.*
[62] Int. Rev. Code of 1954, §6151.
[63] See Int. Rev. Code of 1954, §§6161(a)(2), 6166.
[64] Treas. Reg. §1.6012-3(b).
[65] See Int. Rev. Code of 1954, §6013(a)(2) which provides that a joint return may be filed by the personal representative on behalf of a decedent if the taxable years of the two spouses begin on the same day and end on different days only because of the death of either or both.
[66] Int. Rev. Code of 1954, §6013(a)(3).

instead the estate may then be liable for the entire tax under rules applicable to those who file a joint return.[67]

The deadline for filing the above return is the date that it would have been due had the decedent lived.[68] The personal representative is allowed credits for any payments made by the decedent on his estimated tax, and no further installment payments are due in connection with the original estimate of the decedent except that a surviving spouse should amend the estimate and continue to pay what she owes.[69] The personal representative is entitled to the full personal exemption for the decedent without regard to the time of death.[70] The additional $600 for a taxpayer over sixty-five is also allowed to the personal representative providing the decedent attained sixty-five before his death.[71]

The next federal income tax return to be filed by a personal representative is one for the estate itself. The Code requires every estate to file if the gross income is $600 or more.[72] In general, estates are subject to an income tax on the same items as an individual with three major exemptions. First, the estate can take an unlimited deduction for amounts paid or permanently set aside for a charitable purpose.[73] Second, the estate receives an additional deduction for income which is required to be distributed or which is properly paid or credited to the beneficiaries during the taxable year;[74] these distributions are then reportable by the beneficiaries on their individual 1040 returns. Third, various credits and deductions are divided between the estate and the beneficiaries on the basis of the income allocable to each.[75]

How is the executor to treat income in respect to a decedent on the estate's income tax return? Such income is that which the decedent would have been entitled to had he lived but which is not properly includible in his last return.[76] The Code provides that such items must be included, when received, in the gross income of the estate if it acquired the right to receive the income item and had not distributed the right,[77] or in the gross income of the person to whom the estate his distributed the right in the form of a bequest, devise or inheritance,[78] or in the gross income of the person who received the right if it was not received by

[67] See INT. REV. CODE OF 1954, §6013(d)(3) which states that if a joint return is filed the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.
[68] INT. REV. CODE OF 1954, §6072(a).
[69] Treas. Reg. §1.6015(b)-1(c)(2).
[70] INT. REV. CODE OF 1954, §443(c) does not require an adjustment when the taxpayer is not in existence for the entire taxable year.
[71] INT. REV. CODE OF 1954, §151(c)(1).
[72] INT. REV. CODE OF 1954, §641(a).
[73] INT. REV. CODE OF 1954, §642(c).
[74] INT. REV. CODE OF 1954, §661(a).
[75] INT. REV. CODE OF 1954, §691.
[76] Treas. Reg. §1.691(a)-1(b).
[77] INT. REV. CODE OF 1954, §691(a)(1)(A); Treas. Reg. §1.691(a)-2(a).
[78] INT. REV. CODE OF 1954, §691(a)(1)(c); Treas. Reg. §1.691(a)-2(a)(3).

the estate.[79] The person receiving income in respect to a decedent is allowed a deduction for federal estate tax paid on such income by the decedent's estate.[80]

How is a Wisconsin personal representative to treat for Federal income tax purposes rental income which is not income in respect to a decedent? The general rule is that income from solely owned real estate of the deceased is to be reported by the heirs or beneficiaries unless such income or the real estate is needed to pay debts of the estate.[81] This is in accord with the non-tax probate accounting treatment of such income.[82]

How is the executor to treat for federal estate income tax purposes dividends and interest received during the period of administration that are not income in respect to a decedent? Such items are includible in gross income on the estate's income tax return.[83] The Code provides that when dividends are received by an estate and a portion is distributed to beneficiaries, both are entitled to the dividend exclusion in section 116, and both are entitled to the dividend received tax credit provided for in section 34.[84] However, the estate is only entitled to such a prorated share of the $50 dividend exclusion as the amount of dividends retained by the estate bears to the total dividends received during the taxable year.[85] The dividends received tax credit is limited to the dividends retained which are not subject to the $50 dividend exclusion.[86]

The personal representative will have to decide whether to take as expenses of administration under section 2053(a)(2) or as income tax deductions under section 212.86(a) in computing the federal estate tax.[87] If he decides to do the latter, the personal representative must file a waiver to the effect that such deductions will not be taken on the estate return.[88] The only exception to the rule against double deductions are the allowable deductions (interest, business and non business expenses, taxes) relating to the decedent's after-death income, or more commonly known as income in respect to a decedent.[89] They may be claimed for both purposes. Perhaps the reason for this exception is that such income is subject to both estate and income taxes.

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[79] INT. REV. CODE OF 1954, §691(a)(1)(B); Treas. Reg. §1.691(a)-2(a)(2).
[80] INT. REV. CODE OF 1954, §691(c).
[81] Swietlik, *Taxes At Death,* WISCONSIN CONTINUING LEGAL EDUCATION, pt. I, at 95 (1961).
[82] See *Probate Accounting, supra* hotel to the effect that in determining probate income the personal representative cannot include rent from real property when he has no claim to such rent for the payment of debts or expenses.
[83] Treas. Reg. §1.641(a)-2(d).
[84] INT. REV. CODE OF 1954, §642(a)(3).
[85] *Ibid.*
[86] *Supra* note 32, at 36.
[87] Treas. Reg. §1.212-1(i).
[88] Treas. Reg. §1.642(g)-1.
[89] Treas. Reg. §1.642(g)-2.

Medical and dental expenses of a decedent, although deductible for estate tax purposes, are not deductible in computing the estate's income even though paid by the estate.[90] Likewise, funeral expenses were held non deductible in computing the estate's income even though a proper waiver is filed.[91] Section 642(h) of the Code allows the beneficiaries succeeding to the property of the estate deductions for a net operating loss carryover or excess of deductions over gross income for the last taxable year of the estate. Such excess deductions are only allowable in the taxable year of the beneficiary with which the estate terminates.[92] The term "beneficiaries succeeding to the property of the estate," as used in the Code, is defined to mean those who bear the burden of the loss for which the deduction is allowed, the heirs to whom an intestate estate is distributed, the residuary beneficiary under the will, or any person taking under the will whose distribution is determined by reference to the value of the estate as reduced by such loss or deductions.[93]

The fiduciary is permitted to elect the initial accounting period for the estate.[94] In addition to the calendar year, the fiduciary has a right to select a fiscal year which may end on the last day of any month subsequent to the date of death, so long as the total period covered by the first return does not exceed twelve months.[95] To illustrate, assume the decedent dies on April 3, 1961. The personal representative could file a return on April 30, 1961, or he could wait as late as March 31, 1962. In a large estate the more tax years that can be included, the lower the overall taxes will be. Thus, a prolongation of the period of administration and using a short initial taxable year is often times desirable. The fiduciary income tax return must be filed on or before the fifteenth day of the fourth month following the close of the taxable year.[96]

The Regulations set forth the basic test as to when the period of administration is concluded.[97] However, the facts in each case must be carefully examined to determine whether reasonable grounds exist for the continuation of administration by the fiduciary. The following reasons have provided a basis for extention: necessity of accounting,[98] de-

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[90] *Ibid.*, see §213(d), which allows these deductions on the decedent's final 1040 return if paid within one year beginning the day after the date of death.
[91] See Orville F. Yetter v. Commissioner, 35 T.C. 737 (1961).
[92] See Rosbe, *Income Tax Planning For The Estate And Successors (Heirs Or Devisees) Of Decedents*, 1958 TULANE TAX INST. 62.
[93] Treas. Reg. §1642(h)-3(b) and (c).
[94] Treas. Reg. §1.441-1.
[95] *Supra* note 32, at 18.
[96] INT. REV. CODE OF 1954, §6072(a).
[97] Treas. Reg. §1.641(b)-3, states that the period of administration is the time actually required by the administrator or executor to perform the ordinary duties of administration, such as the collection of assets and the payment of debts, taxes, legacies and bequests whether the period required is longer or shorter than the period specified under the applicable local law for the settlement of estates.
[98] Caro du Bignon Alston, 8 T.C. 525 (1947).

termination of outstanding tax liabilities,[99] and the necessity of partition to jointly held property.[100] Reasons that have been determined not to justify extension of the period of administration include: building up a credit rating for the decedent's business,[101] paying off a mortgage in real estate,[102] incapacity of the legatees,[103] and the fact that the estate was to participate in the decedent's partnership for a considerable period of time.[104]

The personal liability that may be imposed upon the executor or administrator if he does not retain sufficient estate assets to meet income tax liabilities is provided for by the following federal statute:

> Every executor, administrator or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.[105]

As mentioned previously, the Regulations state that the word "debt" as used in the above-quoted statute includes a beneficiary's distributive share of an estate.[106]

D. Wisconsin Income Tax Accounting by Executor

The personal representative under Wisconsin law does not have to file a separate return for the period from the end of the decedent's last taxable period to the date of his death as is necessary under the federal law.[107] Under Wisconsin law, a fiduciary income tax return is required to be filed by the executor or administrator on behalf of the decedent if the decedent, if living, would have been required to file such a return.[108] Section 71.10(2) requires every individual with a gross income of $600 or more and married individuals with a combined gross income of $1,400 or more to file a return. Thus, under Wisconsin law the income earned subsequent to death is combined with the income earned prior to death in order to determine whether a return is to be filed. This

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[99] Brown v. Commissioner, 1954-2 USTC §9591 (5th Cir. 1954).
[100] *Ibid.*
[101] Estate of W. G. Farrier, 15 T.C. 277 (1950).
[102] Alma Williams, 16 T.C. 893 (1951).
[103] *Ibid.*
[104] Josephine Stewart, 16 T.C.1 (1951), *aff'd*, 196 F.2d 397 (5th Cir. 1952).
[105] 48 Stat. 760 (1934), 31 U.S.C. §192 (1958); however, §191 may limit this liability to those estates whose assets are insufficient to pay all the debts due from the decedent.
[106] *Supra* note 60.
[107] See Wis. Stat. §71.08 (1961) which states that the first return of the executor or administrator shall include the income received by the decedent during the portion of the year preceding the demise of the deceased and also items specified in §71.08(1).
[108] *Ibid.*

return must be filed within the time that a return should have been filed by the decedent had he survived.

How is the executor or administrator to treat income in respect to a decedent for Wisconsin income tax purposes? The Wisconsin court has held that such income is not to be subject to the Wisconsin income tax.[109] This apparently is the rule that prevails in Wisconsin at present. [110] At the time the court decided that such income was not subject to the Wisconsin income tax the applicable statute read:

> Every executor and administrator shall be assessed on the taxable income received by him from the estate of the deceased during the year, together with the income received by the decedent during that portion of the year covered by the return preceding the demise of the deceased. . . .[111]

Presently the statute reads:

> Every executor and administrator shall file an income tax return . . .: in all cases where the decedent if living, would have been required to file such return. . . .
> (b) All receipts by him from the estate of the deceased . . . if such receipts would have been taxable as income to the decedent, had he survived.[112]

Under the 1925 statute, it was not clear whether income earned by the decedent but not received until after his death was subject to the Wisconsin income tax. However, under the present statute it appears as though such income is subject to the Wisconsin income tax.

The court stated in the *Norris* case that a statute which attempts to impose an income tax on what is, and commonly understood to be, principal, capital or corpus of an estate is void. This view has been criticized.[113]

The latest case on this question, though not a Supreme Court decision, is *Mabie v. Wisconsin Department of Taxation.*[114] Here it was held that income from a partnership accruing to the decedent at the date of his death was reportable by the decedent's executrix because it would have been taxable to the decedent under section 71.08(1). The executrix relied on the *Norris* and *Smart* cases, but the Board of Tax Appeals differentiated the two cases by stating:

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[109] *Supra* note 13; Smart v. Wisconsin Tax Commission, 205 Wis. 632, 237 N.W. 114 (1931).

[110] See CLARKE, WISCONSIN INCOME TAX MANUAL 16 (1957) to the effect that income in respect to a decedent is not to be subject to the Wisconsin income tax.

[111] WIS. STAT. §71.09(5) (1925).

[112] WIS. STAT. §71.05(4) (1961).

[113] See Brown, *Lost Income,* 16 MARQ. L. REV. 271 (1932) where the author is of the opinion that the decision in the *Norris* and *Smart* cases deprives the state of income taxes to which the state is on every count justly entitled.

[114] 3 WBTA 80, (1946).

> It is of significance that each cited case involved an income tax period *prior* to the effective date of Section 71.095 which was enacted by Chapter 539, Laws of 1927, and approved August 10, 1927.[115]

It is the writer's opinion that had this case been appealed to the Supreme Court, the decision of the Board of Tax Appeals would have been sustained and the *Norris* and *Smart* cases would have been overruled.

How is the personal representative to treat for Wisconsin income tax purposes rental income which is not income in respect to a decedent? Such income is to be reported by the personal representative only if it is required to pay debts of the estate.[116] Thus, the treatment of this income for Wisconsin income tax purposes is similar to its treatment for federal income tax purposes and probate accounting purposes.[117]

How is the personal representative to treat, for Wisconsin income tax purposes, dividends and interest received during the period of administration which are not income in respect to a decedent? Such items are includible in the gross income for Wisconsin income tax purposes.[118] Thus, the treatment of this income for Wisconsin income tax purposes is similar to its treatment for federal income tax purposes and probate accounting purposes.[119]

Unlike the option available under federal law to take administration expenses as estate tax or income tax deductions, such expenses must be taken as Wisconsin inheritance tax deductions,[120] but a Wisconsin income tax deduction is also allowed for any surety bond premium.[121] Up until the taxable year beginning in 1962, the federal income tax paid or withheld was deductible.[122] The personal representative is not allowed any deduction on the estate's Wisconsin income return for income distributed to beneficiaries, as he is under the estate's Federal income tax return[123] since in Wisconsin there is only one taxable entity, namely the estate.

The personal representative before his application for a discharge from his trust and a final settlement of his accounts is granted, must file returns of income received in his representative capacity not previously filed, a return for the period between the close of the preceding income year and the date of his application for discharge, and returns of income received by the deceased during each of the years open to audit

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115 *Id.* at 86.
116 *Supra* note 81, at 73.
117 *Supra* notes 81 and 82.
118 WIS. STAT. §71.08(1)(b) (1961).
119 *Supra* note 83; see also *Probate Accounting* to the effect that such items are includible in the computation of net probate income.
120 WIS. STAT. §72.015(3) (1961).
121 WIS. STAT. §71.08(3) (1961). No reason for singling out this item as a double deduction has been found.
122 WIS. STAT. §71.05(4) (1961).
123 *Supra* note 74.

under section 71.11(21) if such returns have not heretofore been filed.[124] The amount of taxes owed is then determined by the assessor of incomes, and such amount is paid by order of the court after which the assessor's receipt is taken.[125] The executor may be personally liable for any income tax due before the estate is closed.[126]

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[124] WIS. STAT. §71.08(11) (1961).
[125] *Ibid.*
[126] See Estate of Greenwald, 17 Wis. 2d 533, 117 N.W. 2d 609 (1902), where the court states that the personal representative is liable for income tax due on income earned by the estate from the time of the death of the testatrix up until it is duly assigned to the named beneficiaries.