

# Distribution of Income and Corpus and Allocation of Deductions in Louisiana Estates Which Are in the Process of Administration

Alvin B. Rubin

---

### Repository Citation

Alvin B. Rubin, *Distribution of Income and Corpus and Allocation of Deductions in Louisiana Estates Which Are in the Process of Administration*, 13 La. L. Rev. (1953)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol13/iss4/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kayla.reed@law.lsu.edu](mailto:kayla.reed@law.lsu.edu).

# Distribution of Income and Corpus and Allocation of Deductions in Louisiana Estates Which Are in the Process of Administration\*

ALVIN B. RUBIN†

Estates in the process of administration must file an income tax return. In general the principles applicable to preparation of this return are the same principles as those which apply to the return of an individual or a trust. All income realized during administration of the estate is included in gross income of the estate. Deductions authorized to the estate include the usual business and nonbusiness expenses. But there is one deduction that is allowed on the estate's income tax return that is not allowed on an individual's return: Income received by the estate during administration which is properly paid or disbursed to any legatee or heir during the year is *deductible* in computing the estate's income tax. This means that there may be a choice of whether the tax on certain income shall be paid by the estate as an entity or by the individual heirs or legatees at their respective rates. Our first mission will be to explore the question of what income may be considered "properly paid" in Louisiana, and in order to do this we shall consider the general question of whether any distributions may be made from an estate in the course of administration in Louisiana. Although our discussion of this topic will deal principally with the effect of Louisiana law, if any, upon actions otherwise permissible under federal income tax statutes and regulations, we will try to give some insight into the general problem to persons who must deal with it in other states.

---

\* This article contains the substance of an address which the author delivered to the Tulane Tax Institute, New Orleans, Louisiana, on November 21, 1952. The Tulane Tax Institute, which was held in New Orleans on November 19-20-21, 1952, was sponsored by the College of Law and the College of Commerce and Business Administration of Tulane University.

† Member, Baton Rouge Bar; Assistant Professor of Law, Part-time, Louisiana State University.

The second portion of this article will deal with a related but essentially separate topic. In addition to the income tax return which must be filed for every estate, an estate tax return must be filed in the case of every decedent whose gross estate exceeds \$60,000. There are some allowable deductions which may properly be taken *either* from the gross estate in computing the estate tax or from the gross income in computing the estate's income tax. A discussion of these deductions will form the second portion of the article.

It is always gratifying to the student of tax law to discover a "taxpayer's choice" in the federal tax laws. By "taxpayer's choice" is meant a valid option to the taxpayer to handle a matter in one of two ways in order to attain the greatest tax benefit without benefit of loopholes and without suspicion of avoidance. Each of the two portions of this article deals with provisions of the Internal Revenue Code which recognize the taxpayer's choice. For that reason it is important that the tax adviser be aware of the range of the choice and the method of determining which choice is best.

#### DISTRIBUTION OF INCOME AND CORPUS IN LOUISIANA

According to Section 162 of the Internal Revenue Code, "The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual . . ." But additional deductions for the estate are allowed by Sections 162 (b) and 162 (c) if income is "to be distributed currently" or if income is "properly paid or credited" to the heir or legatee. The heir or legatee then reports the income deducted by the estate on his individual income tax return. In Louisiana, if a will providing for distribution of income has been left by the decedent, Section 162 (b) would apply; if, however, there is no will, or if the will makes no specific provisions for the distribution of income, then Section 162 (c) perhaps becomes applicable. Some competent practitioners have questioned whether an amount can properly be paid out of an estate in the process of administration in Louisiana, at least in the absence of express authorization in a will.

The administrator in Louisiana "is the officer appointed to take charge of and liquidate a succession."<sup>1</sup> The purposes of the administration are "the payment of the debts and the eventual

---

1. Cross, A Treatise on Successions 77 (1891).

transfer of the residuum to the heirs."<sup>2</sup> The administrator is said to have "no business to make partition, or to control the property after the debts are paid."<sup>3</sup>

But the Louisiana Civil Code contemplates that, at least in some circumstances, distributions may be made to heirs or legatees before a full administration of the succession is completed. Article 1012 prohibits the heirs from claiming effects of a succession "which may be in suit" or from receiving "any money of such succession when there shall be claims thereon pending in court, unless they give bond with good and sufficient security, if the plaintiffs in such suits require it . . ." The inference is possible that, under other circumstances, the heirs may properly receive "effects" or "money" of the succession. Nor does the article seem to contemplate that such receipt by the heirs amounts to termination of the administration. Article 1671 of the code, dealing with testate successions, permits the heirs to take seizin from the testamentary executor, "on offering him a sum sufficient to pay the movable legacies and on complying with the requirements of Article 1012." Here again is a situation in which there may be a distribution to heirs from a succession whose administration is not completed.<sup>4</sup>

Therefore, notwithstanding the theoretical functions of the administration, a distribution to heirs may conceivably be made. There is relatively little jurisprudence directly on the subject. But if we differentiate the cases in which an executor makes a distribution, either of corpus or income, to the heirs in advance of termination of the administration, from the cases in which the heirs seek to require an unwilling executor or administrator to make distribution, there is respectable authority for considering distributions in the former situations "properly paid."

Cross, writing in 1891, said that "In the regular performance of his gestion, an administrator has no right to make payments to heirs; but in solvent successions it is often done, and credit allowed him on his account."<sup>5</sup> Later, in discussing the administrator's account, he showed how such disbursements should be treated.<sup>6</sup> Cases decided before as well as after the publication

---

2. *Ibid.*

3. *Ibid.*

4. Another pertinent analogy may be drawn from Article 1188, which contemplates a situation in which distribution is made and thereafter additional creditors "present themselves."

5. Cross, *A Treatise on Successions* 84 (1891).

6. Cross, *A Treatise on Successions* 460 (1891).

of the treatise sanction, at least in part, distributions pending the administration.<sup>7</sup>

The only cases which deny the propriety of ordering a partial distribution are those in which the administrator was unwilling to make such payments.<sup>8</sup> In estate planning, it would be well to note that there is some authority justifying advance payments where the will of the decedent requires them,<sup>9</sup> and a provision

---

7. In *Boisse v. Dickson*, 31 La. Ann. 741 (1879), there had been a distribution during administration to one of seven heirs. Later, plaintiff obtained judgment against this heir, caused the heir's interest in the succession to be sold, and purchased that interest. Plaintiff then sought an accounting from the administratrix. The administratrix set up as credits in her accounting the amounts distributed. The court refused to allow the plaintiff to claim the amounts already distributed. *Succession of Piffet*, 39 La. Ann. 466, 1 So. 889 (1887), permits an inference that a distribution to an heir prior to termination of the administration would not be set aside. In *Succession of Sparrow*, 42 La. Ann. 500, 7 So. 611 (1890), the administrator listed in his account distributions to minor heirs and to major heirs. The court did not rule expressly on the propriety of the advances but found the account acceptable on the basis that the proof "satisfies us that Chaffe, administrator, made the advances stated in the tableau . . ." In a later case involving the same succession, *Succession of Sparrow*, 44 La. Ann. 475, 10 So. 882 (1892), the court quoted its earlier opinion in 39 La. Ann. 696 at 706, "The administrator's advances to the minors were manifestly prompted by laudable feelings and considerations of fairness and humanity, for which [he] should not be made to suffer . . ." As a "matter of justice" he was permitted credit for such advances on his account. The court did refer to the proceedings as "irregular" but justified "under the exceptional circumstances stated." (See earlier opinions in the same matter at 39 La. Ann. 696, 706, 2 So. 501 (1887); 40 La. Ann. 484, 4 So. 513 (1888). In *Succession of Bothnick*, 109 La. 1, 33 So. 47 (1902), seven of nine heirs brought a rule to compel a distribution of funds. The other two heirs objected because they were not made parties to the rule. The court held that all of the heirs should have been joined but did not hold a partial distribution improper. In *Succession of Ferrill*, 166 La. 879, 118 So. 69 (1928), the deceased created a testamentary trust for his daughter. The trust provided for monthly payments "primarily out of revenues" to the beneficiary. The beneficiary sought allowance of the monthly payments from the executors prior to the time the administration was completed and the funds were turned over to the trustee. The court ordered payment of the sum because ". . . the object of the testator would be completely defeated if the executors could withhold that monthly stipend indefinitely whilst settling up the details of the succession." See also *Succession of Heffner*, 49 La. Ann. 407, 21 So. 905 (1897).

The following comment expresses the opinion that a distribution is not valid. *Slovenko, Powers of a Succession Representative in Louisiana*, 27 *Tulane L. Rev.* 87, 91 (1952).

8. E.g. *Succession of Gilcrease*, 181 So. 688 (La. App. 1938). But cf. *Succession of Ferrill*, 166 La. 879, 118 So. 69 (1928). Compare also *In re Labauve*, 39 La. Ann. 338, 1 So. 830 (1887), in which one heir complained that advances had been made to other heirs but that he had received nothing. The court held that this heir could not compel advance distribution to himself and that "the adjustment of the questions relating to the distributive shares of the heirs and the collections to be made by them . . . should have been relegated to the partition. . . ."

9. See *Succession of Ferrill*, 166 La. 879, 118 So. 69 (1928). This might also qualify the distribution as a deduction under 162(b). See also *Cross*, on *Successions 88* (1891) and case there cited. Since the executor is simply the personal mandatary of the deceased, there would appear to be little doubt

in a testament authorizing or requiring the executor to distribute funds out of income or corpus, or both, might serve a useful function.

In any event personal observation justifies the conclusion that, in 1952 as in 1891, the advance partial distribution "is often done." Assuming that a petition is presented to the court requesting permission to make a distribution, and that a court order for distribution is entered, this order would presumably be final as to the validity of the distribution.<sup>10</sup> While the matter is not therefore entirely free from question, decisions and commentaries presently available would justify a conclusion that distributions may be made of both corpus and income from Louisiana estates in the process of administration.

Let us for the remainder of this article assume the correctness of that conclusion. The court order for distribution should be after due advertisement, and should specify whether the distribution is to be made from income, from corpus, or in specified proportions from both. Rules for determination of proportions are found in Section 162(d) of the Internal Revenue Code.

To the extent that a distribution can be made from income, a "taxpayer's choice" arises. Will it reduce the ultimate tax burden to keep the income in the estate, report it on the estate tax return, and pay the tax on that basis, or would it be less costly taxwise to distribute the income to the heirs and allow them to report it on their individual returns? To determine the answer to this question, several computations may be necessary. Obviously, if there are several heirs in low income tax brackets and the estate is in a high income tax bracket, a total or partial income distribution will result in tax saving. On the other hand, if the heirs are already in high income tax brackets and the estate's income is relatively smaller than the heirs, a tax saving will result if the estate reports the income.

From Table I (see addendum), some computations can be made to illustrate the factors of choice. If there are two heirs, both married and both entitled to the benefits of income-splitting, and if each of them has a net income, before splitting, of \$12,000

---

that a Louisiana will might validly provide for current distributions of income.

10. See *Baron v. Baum*, 46 La. Ann. 1101, 15 So. 364 (1894); *Succession of Spyker*, 159 So. 347 (La. App. 1935). Of course such an order might not preclude the Collector of Internal Revenue because the proceeding is not an adversary one.

a year, then any additional income which accrues to them will be taxed at a rate of 34% (see column 5). If the estate's net income is under \$2,000 for the year, it will be in a bracket taxed at 22.2%. Therefore \$120 in tax saving per \$1,000 of income would result from retaining the income in the estate for each year in which the income could be lawfully retained.

Another illustration will demonstrate a contrary situation. Assume that the two heirs are married but they each have net incomes of \$3,000 a year, and the estate has an income of \$20,000. If we examine line 1 on Table I, we will see that the estate's income tax rate is 62% (column 4), but that the heirs' rate, if the full income is distributed, is 38%. A substantial saving is available by distribution of all of the income, and an even greater saving may be made by distributing only that part of the income necessary to bring the estate's income tax rate down to a rate equal with that of the heirs.

Of course, other problems arise. The heirs may, and generally do, have unequal incomes. A tax saving to one heir may be offset by a tax loss to another heir. But these are factors to be weighed in the ultimate consideration of whether distribution or retention of income is advisable and whether any tax benefit will arise from one course of action as compared with the other.

One further consideration suggests itself. It may be advantageous taxwise, particularly where the heirs have substantial incomes, to retain income in the estate. How long can this be done? The regulations give one answer to this question. "The period of administration or settlement of the estate is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies."<sup>11</sup> This standard would require a factual determination in each case as to whether administration of the estate is being unduly protracted.<sup>12</sup>

Where the administration of the estate has been found to have continued beyond the "period required . . . to perform the

---

11. U.S. Treas. Reg. 111, Sec. 29.162-1. The regulations were considered approvingly in *Chick v. Commissioner*, 166 F. 2d 337 (1st Cir. 1948), cert. denied, 334 U.S. 845 (1948).

12. *Stewart v. Commissioner*, 196 F. 2d 397 (5th Cir. 1952); *Adams v. Commissioner*, 110 F. 2d 578 (8th Cir. 1940). See, as illustrative of the considerations to be weighed, *King*, 3 TCM 11, Dec. 13, 678(M). See also *Roebbling*, 18 TC . . . (1952), holding income taxable to the beneficiaries on the ground that administration was unduly prolonged.

ordinary duties pertaining to administration," the income of the estate during the unduly extended period is taxable to the beneficiaries, just as if it had been distributed.<sup>13</sup> A testamentary provision as to the period of administration is not controlling if it extends beyond the time ordinarily required.<sup>14</sup>

Normally the date of final distribution to the beneficiaries is the date of closing the administration.<sup>15</sup> However, the requisite period to perform the ordinary duties of administration obviously depends at least to some extent on the nature of those duties under state law. In Louisiana, the Civil Code apparently contemplates a situation in which a part of the estate is distributed and the remainder continued in administration.<sup>16</sup> Of course in the event of such action, the estate's return would account for income only from the assets retained.

In the usual administration in Louisiana, the administration terminates upon the rendition of the court order discharging the administrator. This occurs after the date of distribution of the assets of the estate, which follows approval (or homologation) of the administrator's tableau of distribution, and the usually concomitant order or judgment to distribute the assets. It is possible to urge, therefore, three dates as ending the period required to perform the duties of administration: (1) The date of homologation of the tableau of distribution; (2) the date of actual distribution of the estate's assets;<sup>17</sup> (3) the date of discharge of the administrator. These dates normally fall within a relatively short time of each other and therefore there would usually be no issue raised by the choice of one or the other of them. However, considering the regulations, it seems that the second suggestion (the date of actual distribution) is the date on which the income tax burden is shifted from the estate to the heirs or legatees. It should be noted that it is possible that the period of administration may not be considered ended at this time, particularly if the order for distribution of the estate was improvidently entered.<sup>18</sup>

---

13. *Estate of W. G. Farrier*, 15 TC 277 (1950); *Josephine Stewart*, 16 TC 1 (1951).

14. *Marion M. Jackson*, 18 BTA 875 (1930).

15. See IT 3556, 1942-1 Cum. Bull. 130.

16. See Arts. 1012, 1671, La. Civil Code of 1870. See *Succession of Marioni*, 192 La. 751, 189 So. 124 (1939) (involving interpretation of Article 1671).

17. See *Succession of Braun*, 187 La. 185, 174 So. 257 (1937), in which the Court said that a judgment sending the heirs into possession "did not close the succession." It must be accompanied by an order compelling the succession representative to render an account.

18. See *Succession of Pizzati*, 147 La. 496, 85 So. 218 (1920), in which an



In view of the fact that estate taxes are a debt of the estate, and in view of the administrator's personal liability for them if the taxes are not paid,<sup>19</sup> it should be possible to extend the period required for administration at least long enough to secure an audit and a discharge of the administrator from personal liability. To be certain that the length of time spent awaiting this discharge is not construed to be unreasonably extended by the taxpayer it is advisable to file as soon as possible a request for prompt determination of the amount of estate tax due and for discharge of the administrator from personal liability."<sup>20</sup>

### THE ALLOCATION OF DEDUCTIONS

The taxpayer has the choice of claiming certain deductions either on the estate's income tax return or on the estate tax return. This choice was created in the main by the 1942 amendments to the Internal Revenue Code.

Prior to 1942, it had been held that non-business expenses were not deductible on an individual's income tax return.<sup>21</sup> The 1942 act added Section 23(a)(2) to the code, providing for the deduction of "ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income . . ." This widened substantially the range of allowable deductions on the individual income tax return. Since in general the same deductions allowed to an individual are allowed on

---

ex parte order obtained by the executor, sending a widow and heirs into possession of property omitted from an original inventory, was improvidently granted. Cf. *Succession of Uthoff*, 196 La. 392, 200 So. 290 (1941), which held heirs properly sent into possession despite the pendency of claims against the succession, with cases cited and distinguished therein. In *Kelley v. Kelley*, 198 La. 338, 3 So. 2d 641 (1941), a succession sale held after a judgment sending heirs into possession was held valid on the ground that the judgment of possession was not properly entered since the heirs were minors and could only accept with the benefit of inventory. Compare *Succession of Moore*, 42 So. 2d 907 (La. App. 1949), in which it was held that the heirs were entitled to be placed in possession of movable effects at the time the administratrix filed her final account.

19. See Int. Rev. Code § 900; U.S. Treas. Reg. 105, § 81.99.

20. See Int. Rev. Code § 825. The procedure for such application is set forth in Code of Federal Regulations, 1949 Edition, Tit. 26, Part 601, § 601.31. There is of course liability on the part of transferees for the estate tax. See *Equitable Trust Company*, 13 TC 731 (1949), for a typical case holding the transferee of the estate liable. The property of the estate remains subject to tax, and the liability for the estate tax primes a mortgage given by the heirs even though no tax lien is recorded. *Detroit Bank v. U.S.*, 317 U.S. 329 (1943). Therefore there is in effect a cloud on the title to the estate's property pending final settlement of the tax, and this argument might likewise be urged as valid ground for failure to close the estate until the clearance is granted.

21. *Higgins v. Commissioner*, 312 U.S. 212 (1941).

the estate's income tax return, this amendment likewise made additional allowable deductions on that return.

The extra latitude provided was not quite so wide as that provided for an individual taxpayer because the regulations had permitted somewhat greater scope in determining the ordinary and necessary business expenses of an estate than in determining those of an individual. Nonetheless, the regulations prior to 1942 provided that expenses incurred in probate proceedings, in collecting non-income assets of the estate, in adjusting claims against the decedent, and in conserving assets or distributing assets to the beneficiaries were not deductible. Despite the addition of Section 23(a)(2) to the code in 1942, these regulations were not changed. In 1945, however, the Supreme Court applied Section 23(a)(2) to allow a deduction to a trust for legal fees incurred in contesting an income tax deficiency and for legal fees incurred in distributing the assets of the trust fund to the beneficiaries.<sup>22</sup> Following that decision the Treasury withdrew the pre-1942 regulation. It substituted a provision that expenses incurred in connection with performance of "the duties of administration" are deductible under Section 23(a)(2).<sup>23</sup>

While it is not our purpose here to explore the limits of the additional allowable deductions thus recognized, it is clear that some administration expenses which could formerly be deducted only in computing the estate tax can now be deducted in computing the estate's income tax as well. Congress did limit the situation to one of a choice by adding Section 162(e) to the code providing that amounts which might be deductible in computing the net estate shall not be allowed as deductions on the estate's income tax return unless there is filed a waiver of the right to have the deductions allowed on the estate tax return.<sup>24</sup> This provision was necessary because of the possibility of a construction of the law to permit the same deduction to be taken on both returns.<sup>25</sup>

Thus, although there is a choice, the choice must be made early. If a claimed deduction might be allowed on both returns,

---

22. *Bingham Trust v. Commissioner*, 325 U.S. 365 (1945).

23. U.S. Treas. Reg. 111, § 29.23(A)-15.

24. See U.S. Treas. Reg. 111, § 29.162-1.

25. See *Adams v. Commissioner*, 110 F. 2d 578 (8th Cir. 1940), holding that the Commissioner could not deny deductions in computing the net estate for the purpose of the estate tax on the ground that "some or all of the deductions claimed here were claimed also in connection with returns for income taxation of the estate."

it will be disallowed on the estate's income tax return unless the right to deduct it in computing the estate tax is waived. That being so, the taxpayer must make his choice early and wisely.

It immediately becomes obvious that where an estate is relatively small, but the annual income of the estate is relatively large, every possible deduction should be thrown into the income tax return. Conversely, where the net estate is large and the annual income relatively small, every possible deduction should be utilized to reduce the net estate. A comparison of columns 2 and 4 in Table I will give an approximate idea of the type of comparison to be made in determining whether allowable deductions should be allocated to the estate tax return or to the estate's income tax return. Where the net estate is approximately \$300,000, any deductions from the net estate will create a saving of 30% of the amount of the deduction (line h). Where the estate's net income exceeds \$6,000, an income deduction will save 34% of the amount of the deduction (line j, column 4). Therefore, if the net estate is expected to be \$300,000 and the annual net income of the estate is expected to be \$6,500, a \$500 deduction will save \$20 in taxes if taken on the income tax return rather than on the estate tax return.

It will be noted that, as a practical matter, in most situations where an estate contains income producing properties, claiming the deduction on the income tax return will be advantageous. This is not universally true, however. If the net estate is \$4,000,000 a deduction will reduce the tax by 63% of its amount (line r, column 2). If this estate expected \$8,500 in net income, a \$500 deduction on the income tax return would reduce the income tax by 38% of the amount of the deduction (line l, column 4). Therefore, claiming the \$500 deduction on the estate tax return would result in a tax saving of \$125 (63% less 38% equals 25%. 25% times \$500 equals \$125).

Note, however, that this choice does not apply to *all* items which might be deductible in computing the net estate. Funeral expenses, for example, could not be deemed in any sense an income tax reduction. The legal expense of administration could, however, be an item of choice. The same thing would be true of much of the court costs. Conversely, not all items which might be deducted on the estate's income tax return would be deductible in computing the net estate.<sup>26</sup>

---

26. See, for example, Estate of Bluestein, 15 TC 770 (1950), following

Although no explicit criterion is set forth either in the law or regulations, the choice seems to extend throughout the range of expenses incurred in collection of income of the estate, administration of the estate, and maintenance of property of the estate.<sup>27</sup>

If the decision is made to deduct attorney's fees in computing the estate tax, some thought should be given to the fact that a claim for refund may be filed and that additional attorney's fees may be incurred in that action. For a time a conflict in the cases existed as to the right later to amend the estate tax return to claim a deduction for the additional fees paid.<sup>28</sup> In 1947 a section was added to the regulations providing that the refund due upon deduction of the additional attorney fees sustained in prosecuting the principal refund claim should be sought at the time of the principal refund claim.<sup>29</sup>

Louisiana practitioners should also note that the full costs of administration of an estate consisting of community property have been held deductible in computing the net estate, in the face of the commissioner's contention that one-half of these charges should have been borne by the surviving spouse.<sup>30</sup> This may influence the choice of returns on which to claim the deduction because, if claimed as an income tax deduction, the deductible item would presumably be divided between the estate's return and the surviving spouse's return.<sup>31</sup>

---

Estate of Lowenstein, 12 TC 694 (1949). Here charitable gifts were made by a partnership in which the estate was a member. These were deductible on the estate's income tax return although they would not have been otherwise deductible because they were not made pursuant to the terms of the will.

27. Among the deductions which have been allowed are: capital loss on worthless bonds, *Jones v. Whittington*, 194 F. 2d 812 (10th Cir. 1952); widow's annual allowance required to be paid from income, *Sneed*, 17 TC... (1952) (non-acq.); legal expense in obtaining income tax refund, *Howard E. Cammack*, 5 TC 467 (1945) (acq.); legal expense in unsuccessful litigation (for income tax refund?), *James A. Connelly*, 6 TC 744 (1946) (acq.). But cf. *Hall*, 17 TC...No. 5 (1951) denying a deduction for premiums paid by estate on life insurance policy on life of a debtor. (An appeal of this decision is pending in the Second Circuit.)

28. Compare *Magruder v. Safe Deposit & Trust Co.*, 159 F. 2d 913 (4th Cir. 1947), with *Cleveland v. Higgins*, 148 F. 2d 722 (2d Cir. 1945).

29. U.S. Treas. Reg. 105, § 81.34, added Dec. 22, 1947, by TD 5596. The validity of this regulation was sustained in *Van Dyke v. Kuhl*, 171 F. 2d 187 (7th Cir. 1948).

30. *Vaccaro v. U.S.*, 55 F. Supp. 932 (E.D. La. 1944).

31. See *Henderson's Estate v. Commissioner*, 155 F. 2d 310 (5th Cir. 1946). But cf. *Henderson*, 2 TCM 1092, Dec. 13, 631(M), holding that if there were debts in substantial amounts the estate was taxable on the entire income from community property. See also *Newman*, 37 BTA 72 (1938) (acq.) where there were no debts and the income was split.

Another interesting problem can only be suggested here. Louisiana Civil Code Article 1194 provides for a commission to the executor of 2½% "on the amount of the effects of the succession." This would be an expense of administration subject to the taxpayer's choice, whether paid out of income or corpus.<sup>32</sup> Can the commission be increased, thus giving additional income to the executor, which, under some circumstances, might effect an overall tax saving? No definitive answer can be given, but some authorities are set forth in the footnotes.<sup>33</sup>

Since no rule to the contrary is stated in the regulations, it would appear permissible for the executor to deduct some items on the income tax return and others on the estate tax return. Thus, if it were advantageous to do so, legal expense in administration might be deducted on the estate's income tax return and all other expenses might be claimed as deductions from the gross estate. In addition, what is done in one year on the estate's income tax return is not a choice for future years. Therefore, although certain expenses might be deducted on the estate tax return, like expenses could be reserved for use on the estate's income tax return.

Of course, the problem of allocation of deductions diminishes in importance as the period of administration is shortened. But the taxpayer may make his choice if any administration is had, however brief. In most cases the tax saving available by wise use of the taxpayer's choice will be substantially enough to justify full consideration of the alternatives available.

---

32. IT 3736, 1945 Cum. Bull. 102.

33. The commission may be computed on income as well as on inventory of the estate. Succession of Sparrow, 40 La. Ann. 484, 4 So. 513 (1888). Contra: Young v. Chaney, 3 La. 462 (1832). Cases holding that an administrator may not charge for any services rendered beyond the amount of this commission include Succession of Sprowl, 21 La. Ann. 544 (1869); Succession of Calloway, 49 La. Ann. 968, 22 So. 225 (1897); Succession of Turnell, 34 La. Ann. 888 (1882); cf. Succession of Linton, 31 La. Ann. 130 (1879).

On the other hand in Succession of Moore, 28 So. 2d 465 (La. App. 1946), a judgment of the district court reducing the commission of the administratrix to 5% was affirmed. In Succession of Robertson, 49 La. Ann. 80, 21 So. 197 (1896), the court allowed a 5% commission for revenues collected during administration.

TABLE I—SELECTED ILLUSTRATIVE TAX RATES

(Does not include state inheritance taxes.)

1.	2.	3.	4.	5.	6.
Size of Net Estate.	Approximate Tax Rate on Amounts in Excess of Sum in Column 1.	Net Estate Income.	Approximate Income Tax Rate on Amounts in Excess of Sum in Column 3.	Approximate Effective Rate on Amount of Income in Column 3, if Added to Income of Each of 2 Married Heirs, with net Income of \$12,000.	Approximate Effective Rate on Amount of Income in Column 3, if Added to Income of Each of 2 Married Heirs, with net Income of \$6,000 Each.
(a) \$ 60,000	3%				
(b) 65,000	7%				
(c) 70,000	11%				
(d) 80,000	14%				
(e) 100,000	22%	Under \$2,000	22.2%	34%	24.6%
(f) 110,000	25%	2,000	24.6%	34%	24.6%
(g) 120,000	28%	4,000	29%	34%	29%
(h) 160,000	30%				
(i) 310,000	32%				
(j) 560,000	35%	6,000	34%	34%	29%
(k) 810,000	37%				
(l) 1,060,000	39%	8,000	38%	38%	29%
(m) 1,310,000	42%	10,000	42%	38%	29%
(n) 1,560,000	45%				
(o) 2,060,000	49%	12,000	48%	38%	34%
(p) 2,560,000	53%	14,000	53%	38%	34%
(q) 3,060,000	56%	16,000	56%	42%	34%
(r) 4,060,000	63%	20,000	62%	42%	38%
		22,000	66%	42%	38%
(s) 5,060,000	67%	26,000	67%	48%	38%
(t) 6,060,000	70%	32,000	68%	53%	42%
(u) 7,060,000	73%	38,000	72%	53%	48%
(v) 8,060,000	76%	44,000	75%	56%	53%
(w) 10,060,000	77%	50,000	77%	59%	53%
		60,000	80%	62%	56%