

1981 WL 158067 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

December 7, 1981

***1 SUBJECT: Priority of Funeral Expenses, Payment of Estate and Gift Taxes.**

1. Funeral expenses are given priority over both estate and gift taxes owed by an estate.
2. Executor of estate is personally liable for payment of estate taxes generated by non-probate property included in taxable estate.
3. Executor is liable for gift taxes owed by donor-decedent's estate. However, if taxes are not paid when due, the recipients of donated property become personally liable.

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QUESTIONS:

1. Do funeral expenses have priority in estate assets over estate and gift taxes owed by estate?
2. Is the executor of estate personally liable for payment of estate taxes generated by non-probate assets?
3. Would executor be liable for gift taxes owed by donor-decedent's estate?

STATUTES:

South Carolina Code of Laws, 1976, §§ 21-15-660, 12-15-710, 12-15-1540, 12-17-210, 12-17-230 and 12-15-1020.

DISCUSSION:

1. Under state statute funeral expenses are given priority over other claims against the estate. Section 21-15-660 provides in part that:

'The assets which come to the hands of an executor or administrator, in the due course of administration shall be applied to the payment of debts in the following order, that is to say:

(1) Funeral and other expenses of last sickness, charges of probate and letters of administration;

(2) Debts due the public; * * *.'

Thus, after proper presentation to and allowance of claims by the personal representative or the probate court, it is the duty of the executor or administrator to pay the claims, in the order of their priority to the extent of assets of the estate in his hands.

Hence, § 21-15-660(1) established a higher priority for funeral expenses than for either estate or gift taxes, since such taxes would be considered 'debts due the public'.

2. Section 12-15-710 states as follows:

'The tax imposed under this chapter shall be due and payable no later than nine months from the date of the decedent's death and shall be payable to the Commission at its office in Columbia.'

If such an estate tax is payable, the executor is liable for paying the tax. Under § 12-15-660(2) a failure to pay the debts of the estate in statutory priorities can impose personal liability upon the representative to a creditor prejudiced thereby. [Lazenby v. Mackey, 196 S. C. 507, 14 S. E. 2d 12 \(1941\)](#).

Section 12-15-1540 reads as follows:

'Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate * * * the executor shall be entitled to recover from the person receiving or in possession of such property such portion of the total tax paid as the value of such property bears to the sum of the taxable estate and the amount of the specific exemption allowed in computing the taxable estate * * *. If there is more than one such person, the executor shall be entitled to receive from such persons in the same ratio.'

*2 Thus, since the executor is liable for the payment of estate taxes he is entitled to charge assets passing outside of the will ratably with a portion of the estate taxes assessed against a decedent's estate. The executor then, has the ability to recover taxes from persons for non-probate property they have received or in their possession which has generated estate taxes. This right of recovery does not relieve the executor of his liability or responsibility to pay estate taxes under § 21-15-660(2).

3. Section 12-17-210 establishes the donor's liability for gift taxes. It provides in part:

'(a) The tax imposed under this chapter shall be due and payable by the donor * * *.'

However, where the gift tax has not been paid at the donor's death, it would be a liability of the donor-decedent's estate and entitled to the priority established it under § 21-15-660(2).

If there are insufficient assets in the estate to pay the gift taxes and they cannot be paid by the donor-decedent's estate, §§ 12-17-230 and 12-15-1020 would control. Section 12-17-230 states:

'The provisions of Chapter 15, Title 12, that provide for the administration, assessment, enforcement, and collection of the South Carolina estate tax shall whenever applicable be adopted for the purpose of the administration assessment, enforcement, and collection of the tax provided for herein.'

Reference must thus be made to applicable estate tax provisions.

Section 12-15-1020 provides:

'If the estate taxes imposed by this chapter are not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death property included in the gross estate under §§ 12-15-40 and 12-15-230 to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax.'

It can be surmised that if the gift taxes cannot be paid by the estate, then the person in possession, or who received the donated property would be liable for his ratable share of the tax.

CONCLUSION:

1. Funeral expenses are given priority over both estate and gift taxes owed by an estate.
2. Executor of estate is personally liable for payment of estate taxes generated by non-probate property included in taxable estate.
3. Executor is liable for gift taxes owed by donor-decedent's estate. However, if taxes are not paid when due, the recipients of donated property become personally liable.

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