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BUREAU OF LAW

Income Tax Determinations A-Z

MEMORANDUM

Kernan, Joseph P.

TO: Commissioners Murphy, Palestin & Macduff

FROM: Solomon Sies, Hearing Officer

SUBJECT: JOSEPH P. KERNAN

Petition for Redetermination of a Deficiency or for Refund of Personal Income Taxes under Article 22 of the Tax Law for the years 1960 and 1961.

1960 File #1-8837959
1961 File #1-5577298

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y., on January 5, 1965. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue involved herein is whether certain payments received by the taxpayer from his employer constituted taxable income or whether they represented pension payments or annuities exempt from tax for a non-resident taxpayer in accordance with Section 632 (b) (2) of the Tax Law.

The taxpayer did not appear at the hearing due to ill health. He was represented by his accountant who would not make any statements under oath but presented certain exhibits on behalf of the taxpayer. On February 4, 1965, a letter was sent to the taxpayer's representative requesting him to submit to the taxpayer a copy of the stenographic transcript of the hearing and submit to the hearing officer an affidavit to the effect that the statements contained therein are true and are being adopted by him as if he appeared in person and testified accordingly. No reply was received from the taxpayer's representative. Since the representative stated at the hearing that he was unable to secure a copy of the Rules and Regulations of the Retirement Fund from the taxpayer's employer, the hearing officer requested and received a booklet covering the Rules and Regulations of the United States Lines Company Retirement Fund and submitted a copy thereof to the representative by letter dated August 20, 1965. Specific attention was called to Section IV, sub-section 3, pertaining to early retirement allowances, paragraph (c), page 10 of the booklet. The representative was requested to submit or present any statements, affidavits or comments in connection therewith. However, he has failed to do so.

Prior to 1957, the taxpayer had been in the employ of United States Lines as manager of an operations unit at 1 Broadway, New York City. In 1958, the employer in a process of reorganization, abolished the Department in which the taxpayer had been employed. At that time, the taxpayer had been employed for twenty years and was covered by a retirement fund of the employer.

There was introduced into evidence a letter addressed by the employer to the taxpayer (Taxpayer's Exhibit #1) which provides in part that an arrangement had been made granting the taxpayer special leave of absence beginning February 1, 1958 to continue until his 65th birthday (taxpayer at that time was about 55 years of age). The taxpayer was to receive $3,832.00 per annum in monthly installments and the company agreed to make contributions to the retirement fund based upon the taxpayer's salary of $8,232.00 per annum. It was further agreed that when the taxpayer reached his 65th birthday, a pension of approximately $3,832.00 per annum would be paid to him by the United States Lines Retirement Fund; that in the event of death before his 65th birthday, all payments would cease and that his designated beneficiary would be entitled to refund of the contributions made by him to the Fund, the total payment to include interest on the total employee contributions at the rate of 2% per annum, compounded annually. The letter further provided that:

> "In consideration of your past services and this change in status, you will also be granted five (5) special allowances of $1,646.40 each, to be paid on dates that you may select in the years 1958, 1959, 1960, 1961 and 1962. If you should die before you receive all of these payments, any unpaid balance will be paid to your estate."

The rules and regulations of the Retirement Fund of the United States Lines Company, Section IV, subsection "3", paragraph (e) (Page 10), pertaining to early retirement allowances, provides as follows:

> "Any active member with 20 years or more of creditable service, who has attained age 45, on withdrawal from active service, may, in lieu of taking an early retirement allowance, elect to receive when he attains age 65, the annual retirement allowance provided by his own contributions, if any, and by the Company's payments during his active membership, provided, however, that a member making such election who made contributions to the Fund by reason of his membership prior to July 1, 1957 shall agree to leave such contributions in the Fund."

Section 632 (b) (2) of the Tax Law provides that:

> "Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, profes-

sion, trade or occupation carried on in this state."

The taxpayer concedes that the $1,646.40 payments constitute severance pay but contends that the payments of $3832.00 per annum represent pension payments or annuities from which a non-resident is exempt from tax in accordance with Section 632 (b) (2) of the Tax Law.

I am of the opinion that since the taxpayer elected not to avail himself of the early retirement allowances under the rules and regulations of the Retirement Fund but decided to enter into a special agreement with the employer which would defer his rights to receive a pension until he reached the age of 65, the payments received by him in the sum of $3832.00 per annum constituted leave of absence pay and fall in the same category as the $1646.40 payments (severance pay). These payments are, in effect, compensation for past services rendered by the taxpayer to the employer and constitute compensation attributable to New York sources in accordance with Section 632 (b) (1) (B) of the Tax Law.

For the reasons stated above, I recommend that the determination of the Tax Commission in the above matter be substantially in the form submitted herewith.

SOLOMON SIES

Hearing Officer

OCT 20 1965

/s/ MARTIN SCHAPIRO

Approved

/s/ E. H. BEST

Approved

SS/tc (10/25/65)

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

JOSEPH P. KERNAN

FOR A REDETERMINATION OF A DEFICIENCY OR FOR REFUND OF PERSONAL INCOME TAXES UNDER ARTICLE 22 OF THE TAX LAW FOR THE YEARS 1960 AND 1961.

Case No. [illegible]

Joseph P. Kernan, having filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1960 and 1961 (File #1-8837959) and a hearing having been held on the 5th day of January, 1965, in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, N.Y., before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer was represented by Hallbergh, Whiteman & Sweeney, Public Accountants, 52 Wall Street, New York, N.Y., by John G. Hallbergh, Public Accountant, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed New York State personal non-resident income tax returns for the years 1960 and 1961 in which he reported no New York adjusted gross income for said years; that on January 27, 1964, audit changes were made recomputing the tax liability of the taxpayer for the years 1960 and 1961 to include certain payments received by the taxpayer from United States Lines Company and imposing additional taxes in the sums of $75.80 and $93.23 for the years 1960 and 1961, respectively and notices of deficiency were issued pursuant thereto on January 27, 1964; that the notice of deficiency for the year 1960 in the sum of $75.80 disallowed a refund to said extent.

(2) That prior to 1957, the taxpayer had been in the employ of United States Lines as manager of an operations unit at

1 Broadway, New York City; that in 1958, the employer, in a process of reorganization, abolished the Department in which the taxpayer had been employed; that at that time, the taxpayer had been employed for over twenty years and was covered by a retirement fund of the employer.

(3) That on January 31, 1958 the taxpayer entered into an agreement which provided, in part, as follows:

> "This will confirm the arrangement which was recently discussed with you by B.N. Hicks, Executive Vice President, under which you are granted special leave of absence beginning February 1, 1958 to continue until your 65th birthday. During this period you will be paid $3,832.00 per annum in monthly installments, and the Company will make contributions to United States Lines Retirement Fund based upon your present salary of $8,232.00 per annum. When you reach your 65th birthday, pension of approximately $1,832.00 per annum will be paid by the United States Lines Retirement Fund.
>
> If your death should occur before your 65th birthday, all payments as outlined above will cease and your designated beneficiary will be entitled to refund of your contributions to the Fund, the total payment to include interest on the total employee contributions at the rate of 2% per annum, compounded annually.
>
> In consideration of your past services and this change in status, you will also be granted five (5) special allowances of $1,646.40 each, to be paid on dates that you may select in the years 1958, 1959, 1960, 1961 and 1962. If you should die before you receive all of these payments, any unpaid balance will be paid to your estate."

(4) That the taxpayer while employed by the United States Lines Company, was a member of its Retirement Fund and made contributions thereto; that the rules and regulations of the Retirement Fund of the United States Lines Company, Section IV, subsection "3", paragraph (c) (Page 10), pertaining to early retirement allowances, provides as follows:

> "Any active member with 20 years or more of creditable service, who has attained age 45, on withdrawal from active service, may, in lieu of taking an early retirement allowance, elect to receive when he attains age 65, the annual retirement allowance provided by his own contributions, if any, and by the Company's payments during his active membership, provided, however, that a member making such election who made contributions to the Fund by reason of his membership prior to July 1, 1957 shall agree to leave such contributions in the Fund.";

that the taxpayer elected not to avail himself of the early retirement allowances under the rules and regulations of the aforementioned Retirement Fund but entered into the special arrangement with his employer as more fully set forth in Finding #3 above; that in accordance with the special arrangement the taxpayer was granted special leave of absence beginning February 1, 1958 to continue until he reached his 65th birthday at which time he would be eligible for retirement benefits pursuant to the rules and regulations of the Retirement Fund; that in accordance with the special arrangement between the taxpayer and the United States Lines Company he was to receive and did receive five (5) special allowances of $1,646.40 for a period of five (5) years and in addition thereto the sum of $3,832.00 per annum which was to be paid to him in 1958 and was to continue to be paid to him until he reached the age of 65; that the aforementioned payments were granted the taxpayer in consideration of past services rendered by him to the employer.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DETERMINES AND DECIDES:

(A) That the payments received by the taxpayer for the years 1960 and 1961 did not represent pension payments or annuities exempt from New York State income tax for a non-resident in accordance with Section 632 (b) (2) of the Tax Law; that said payments constituted compensation for past services rendered and were attributable to New York State sources in accordance with Section 632 (b) (1) (B) of the Tax Law.

(B) That, accordingly, the notices of deficiency imposing additional taxes upon the taxpayer for the years 1960 and 1961 are correct; that said notices of deficiency do not include any tax or other charges which could not have been lawfully demanded and that the taxpayer's petition for redetermination or refund with respect thereto be and the same is hereby dismissed.

DATED: Albany, New York, on the 19th day of November, 1965.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ IRA J. PALESTIN
Commissioner

Commissioner