Linsley-Bleecker & Julia Q. (22) Pers. Income 1971

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

Duncan R. & Julia Q. Linsley

For a Redetermination of a Deficiency or a Refund of Personal Income Taxes under Article(s) 22 of the Tax Law for the (Year(s)1961, 1962 & 1963

AFFIDAVIT OF MAILING OF NOTICE OF DECISION BY (CERTIFIED) MAIL

State of New York
County of Albany

Martha Funaro , being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 20th day of January , 1971 , she served the within Notice of Decision (or Determination) by (certified) mail upon Duncan R. & Julia Q. Linsley (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Emil Sebetic, Atty.
233 Broadway
New York, New York

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) petitioner herein and that the address set forth on said wrapper is the last known address of the (representative of the) petitioner.

Sworn to before me this
20th day of January , 1971

Linda Wilson

Martha Funaro

STATE OF NEW YORK
STATE TAX COMMISSION

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Duncan R. & Julia Q. Linsley
c/o Fiduciary Trust Co. of N.Y.
One Wall Street
New York, New York

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) petitioner herein and that the address set forth on said wrapper is the last known address of the (representative of the) petitioner.

Sworn to before me this
20th day of January, 1971.

Martha Funaro

Linda Wilson

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DUNCAN R. and JULIA Q. LINSLEY	:	DECISION
for a Redetermination of a Deficiency or for Refund of Personal Income Taxes under Article 22 of the Tax Law for the Years 1961, 1962 and 1963	:	

Taxpayers petitioned for a redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1961, 1962 and 1963. A formal hearing was held in the offices of the State Tax Commission in the City of New York on October 13, 1966. The taxpayers were represented by Emil Sebetic, Esq.

FINDINGS OF FACT

1. The issues involved in this case are: (1) whether income received by the taxpayer, Duncan R. Linsley, under a deferred compensation agreement and as consulting fees are subject to New York State Income Tax and (b) whether the loss sustained by the taxpayers on the subleasing of an apartment was deductible from taxable income.

2. The taxpayer, Duncan R. Linsley, retired from his employment with the First Boston Corporation in 1960 at age 60. He was a member of the company's qualified pension plan, and had selected an option whereby he would begin receiving payment at age 65 of $16,384.00 per year, paid monthly, for life.

3. While an employee of the company, the taxpayer entered into a deferred compensation agreement that would mature upon the occurrence of one of the following events, whichever occurred first: (a) employee reaches age sixty-five, (b) employee is discharged, (c) employee resigns, (d) employee dies, (e) the corporation dissolves or merges. Upon maturity the taxpayer was to receive the amount credited to his deferred compensation fund in ten approximately equal installments paid yearly. Fifty per cent was paid in stock of the corporation and fifty per cent in cash.

4. In 1960 the taxpayer entered into a consultation agreement with the corporation under which he would act as an advisor following his retirement. Rate of payment was divided into five periods as follows:

(a) October 1, 1960 through May 1, 1961 - $50,000 per annum

(b) May 1, 1961 through April 30, 1962 - $40,000 per annum

(c) May 1, 1962 through April 30, 1963 - $35,000 per annum

(d) May 1, 1963 through April 30, 1964 - $30,000 per annum

(e) May 1, 1964 through April 30, 1965 - $25,000 per annum

All payments were in equal monthly installments. Under the agreement the taxpayer was not permitted to engage in any occupation that would be in conflict with the business or interests of the corporation.

5. At the time of his retirement the taxpayer was obligated under a three year lease for his apartment, located at 40 East 78th Street, N.Y.C. Upon retirement he moved to Connecticut and sublet this apartment.

6. On his 1961, 1962 and 1963 non-resident returns, the taxpayer reported as income those payments received under the deferred compensation agreement, but excluded from his income those payments received under the consultation agreement.

7. In 1964 the taxpayer filed amended returns for each year in question in which he excluded payments received under the deferred compensation agreement as well as those payments received under the consultation agreement on the basis that they constituted an annuity and were exempt from taxation against non-residents. Additionally, the taxpayer deducted a rental loss of $966.62 on the apartment he sublet in New York.

8. A notice of deficiency, file # 3-8543558, was issued March 15, 1965, for the amount of $7,253.95 plus interest for the three years in question. This deficiency was based upon the holding that the deferred compensation payments and the consultation fees constituted taxable income. Further, the rental loss of $966.62 claimed for 1961 was disallowed.

DECISION

A. The deferred compensation payments, and payments received under the consultation agreement do not constitute an annuity, but are income received from sources within New York State for services rendered, and taxable under Article 22 of the Tax Law.

B. The rental loss suffered by the taxpayer when he sublet his apartment did not result from a transaction entered into for profit and is therefore not deductible.

C. The petition is therefore denied and the notice of deficiency is sustained.

DATED: Albany, New York
January 20, 1971.

STATE TAX COMMISSION

Norman Gallman
COMMISSIONER

Bruce Manley
COMMISSIONER

Milton Koerner
COMMISSIONER

L-9 (5/71)

BUREAU OF LAW
MEMORANDUM

TO

FROM : [redacted]

SUBJECT: [redacted]

[redacted]

Attached is a copy of the Appellate Division opinion in the above case, together with Judge Conway's opinion. The Tax Commission's January 20, 1971 decision has been remitted by the Court and remains for recomputation of the petitioners' tax liability without the inclusion of income received pursuant to a deferred compensation plan and a consulting agreement.

I have under consideration as to whether or not I will recommend an appeal.

[redacted]

JB:lh/mlf
Enc.
April 11, 1972

cc: John Donovan, Director
Edward Rock, Secretary

March 13, 1972. 18126

In the Matter of DUNCAN R. LINSLEY et al.,
Petitioners,
v.
NORMAN F. GALLMAN et al., Constituting the State Tax Commission of the State of New York,
Respondents.

Determination modified, on the law, and matter remanded to respondent Tax Commission for recomputation of petitioners' tax liability without inclusion of income received pursuant to the Deferred Compensation plan and the consulting agreement, and, as so modified, confirmed, with costs to petitioners.

Opinion per SWEENEY, J.

HERLIHY, P. J., STALEY, JR., GREENBLOTT and KANE, JJ., concur.

#18126

STATE OF NEW YORK SUPREME COURT

APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of DUNCAN R. LINSLEY et al.,

Petitioners,

-against-

NORMAN F. GALLMAN et al., Constituting the State Tax Commission of the State of New York,

Respondents.

Argued, January 14, 1972.

Before:

HON. J. CLARENCE HERLIHY,
Presiding Justice,
HON. ELLIS J. STALEY, JR.,
HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
Associate Justices.

PROCEEDING under CPLR article 78 (transferred to the Appellate Division in the Third Judicial Department by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the State Tax Commission holding that petitioners are liable for personal income taxes for the years 1961, 1962 and 1963 and denying refunds of taxes paid under protest for those years.

EMIL SEBETIC (Henry L. Glenn, of counsel) for petitioners, 233 Broadway, New York, N. Y. 10007.

LOUIS J. LEFKOWITZ, Attorney General (Ruth Kessler Toch and Vincent P. Molineaux, of counsel) for respondents, The Capitol, Albany, New York.

OPINION FOR MODIFICATION

SWEENEY, J.

This is a proceeding under CPLR article 78 (transferred to the Appellate Division in the Third Judicial Department by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the State Tax Commission holding that petitioners are liable for personal income taxes for the years 1961, 1962 and 1963 and denying refunds of taxes paid under protest for those years.

Petitioner Duncan Linsley was employed as an executive of a New York investment banking corporation. He was required to take an early retirement in 1960 because of ill health at the age of sixty, whereupon he moved to Connecticut. It is not controverted that he was a bona fide nonresident during the years in question. In December of 1955 petitioner's corporate employer adopted a Deferred Compensation plan supplemental to a qualified pension plan, under which he was permitted to resign at age sixty. Other employees participated in basically similar plans by individual agreement with the employer. Upon petitioner's retirement this plan matured and he received the amount credited to his Deferred Compensation fund in ten approximately equal annual installments, fifty percent in stock of the corporation and fifty percent in cash. The Tax Commission determined that income received under this plan did not constitute an annuity, and was thus taxable. The New York adjusted gross income of a nonresident includes income from annuities "only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state". (Tax Law, §632, subd. [b], par. [2].) We interpret this provision to mean that the "property employed in a business, trade, profession or occupation carried on in this state" is that of the taxpayer, and not his employer. The commission does not contend otherwise. It is the commission's position, however,

that a 1968 regulation should apply to the income received by petitioner under this Deferred Compensation plan in the years 1961, 1962 and 1963. The 1968 regulation issued by the Tax Commission defines an annuity as a pension or other retirement benefit which, among other things, "must be paid in money only, not in securities of the employer or other property". (20 NYCRR, ch. II, Taxation and Finance, §131.4, subd. [d], par. [2].) Prior to 1968 the former regulation promulgated by the commission in connection with section 359 of the Tax Law (the forerunner of section 632 of such law [L. 1960, ch. 563]), stated: "When received by a non-resident, a pension of any kind is not taxable income as it is an annuity, and therefore exempt from taxation against a non-resident". (NYS Personal Income Tax Regulations [1945], art. 413.) There was no substantial change in the language of subdivision (b), paragraph (2) of section 632 over that of former subdivision (3) of section 359. A retroactive application of this administrative ruling would result in the taking of property arbitrarily. The 1968 regulation, in effect, enlarged the particular tax statute by further limiting the definition of an annuity. There is a presumption that legislative rules are to be applied only prospectively. (See United States v. Leslie Salt Co., 350 U.S. 383; Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110.) We hold that petitioner's income under the Deferred Compensation plan constituted an annuity under the prior regulation and under the Internal Revenue Code of 1954 which is not inconsistent therewith (Tax Law, §607; Internal Revenue Code, §72[a]; Federal Income Tax Reg., §1.72, subd. 2[b][2]). The commission's finding that the income received under this plan was not an annuity and was not, therefore, exempt, is erroneous and that part of its determination must be annulled.

Under an agreement dated June 1, 1960 between petitioner and the corporation, the employer agreed to pay him on a declining annual scale for a period of five years for advisory services to be performed by petitioner following his retirement. It was understood that he would not be required to come to New York, but would be available for telephone consultation, and he was not, in fact, required to be in New York during the entire period involved to render these services. The Tax Commission determined that the payments received under this consultation agreement did not constitute an annuity, but were income received from a source within this State for services rendered, and taxable. We find uncontradicted evidence that petitioner did actually perform some of the services called for in the contract and, therefore, we do not consider whether or not the payments constituted an annuity. In Matter of Oxnard v. Murphy (19 A D 2d 138, 140, affd. 15 N Y 2d 593), we construed the applicable statutory language (Tax Law, §632, subd. [b], par. [1]) as relating source of income to "the work done, rather than the person paying for it". (See also NYS Personal Income Tax Regulations [1945], art. 412; 20 NYCRR, ch. II, Taxation and Finance, §131.4 [b].) The commission's reliance on People ex rel. Cerf v. Lynch (237 App. Div. 283, affd. 262 N.Y. 549) is misplaced. The taxpayer in Lynch performed the initial services for which he was being paid renewal commissions when he was engaged in business in New York. These facts are distinguishable from those of the instant case. Petitioner, a non-resident, performed no services in New York for the income in question, nor did he maintain an office or place of business in New York. We conclude that the commission's finding that the income was received from a source within New York is erroneous, and that part of its determination should also be annulled.

Finally, the Tax Commission determined that rental loss sustained by petitioner when he sublet his New York apartment did not result from a transaction entered into for profit and was, therefore, not deductible. We find no reason to disturb this factual determination.

The determination should be modified, on the law, and matter remanded to respondent Tax Commission for recomputation of petitioners' tax liability without inclusion of income received pursuant to the Deferred Compensation plan and the consulting agreement, and, as so modified, confirmed, with costs to petitioners.

April 7, 1971

Emil Sebetic, Esq.
233 Broadway
New York, New York 10007

Re: Duncan R. and Julia Q. Linsley
Decision, Years 1961 through 1963

Dear Mr. Sebetic:

Your letter dated April 2, 1971, includes a petition to the State Tax Commission to reconsider its decision. dated January 20, 1971.

However, there is no provision in the Tax Law for this procedure. The review that you are seeking is afforded to a petitioner under the provisions of Article 78 of the Civil Practice Law and Rules. Such action should be commenced within four months of the date of the mailing of the decision.

Your letter also inquires into the provisions for a bond under section 690 of the Tax Law.

The petitioner may deposit with the State Tax Commission the amount of the deficiency together with any penalties and interest to date, in lieu of the bond. In this case, the amount would be computed as follows:

Amount of Deficiency	$ 8,057.09
Interest to April 15, 1971	2,647.69
TOTAL	$10,704.78

(Add $1.16 interest for each day after April 15, 1971.)

In addition, a bond in the amount of $500.00 for costs would also be required, approved by a justice of the Supreme Court.

There is no statutory form for a bond for costs, and the format customarily used by surety companies is acceptable.

Very truly yours,

Lawrence A. Newman
Hearing Officer

LAN/maf

EMIL SEBETIC
Attorney at Law

WOOLWORTH BUILDING
233 BROADWAY
NEW YORK, N.Y. 10007
TELEPHONE 964-6270

April 2, 1971

Mr. Lawrence A. Newman
Hearing Officer
State of New York
Department of Taxation and Finance
Building 9, Room 214A
State Campus
Albany, New York 12226

Re: Duncan R. & Julia Q. Linsley
Years 1961-1963

Dear Mr. Newman:

Referring to your notice of the Commission's decision dated January 20, 1971, we enclose the original and a copy of the taxpayers' motion for reconsideration and statement of grounds for the Commission's decision.

In view of the fact that the petition for redetermination was filed in June, 1965 and the hearing held in October, 1966 (without intending to imply blame on the part of anyone), it would be greatly appreciated if this motion could be disposed of expeditiously.

We would appreciate your advising us whether the petitioners may deposit cash in lieu of the bond required by section 690 of the Tax Law and, if so, whether the proper amount in this case would be $8,057.09 and whether in addition to this amount a bond for costs would be required, and in what amount.

Very truly yours,

Emil Sebetic

Encl.
ES:dpc

P.S. Do you have a statutory form for a bond for cost?

The taxpayer may deposit with the State Tax Commission the amount of the deficiency together with any penalties and interest to date in lieu of ~~the bond~~ the bond required under Section 690(c) of the Tax Law. The amount computed is as follows:

The amount of deficiency	$ 8,057.09
Interest computed to April 15, 1971	2,647.69
	10,704.78
~~Additional interest for each day after April 15, 1971~~	1.16

In addition to the above amount, a $ 500.00 bond for costs, will also be required.

, approved by a justice of the Supreme Court,

Surety Co usually prepared.

NEW YORK STATE TAX COMMISSION

---X

In the Matter of the PETITION

Of

DUNCAN R. & JULIA Q. LINSLEY

For a Redetermination of a Deficiency and for Refund of Personal Income Taxes under Article 22 of the Tax Law for the Years 1961, 1962 and 1963

MOTION FOR RECONSIDERATION AND STATEMENT OF GROUNDS UPON WHICH THE COMMISSION's DETERMINATION IS MADE

---X

The petitioners move for reconsideration by the Commission of its decision of January 20, 1971, denying petitioners' petition for redetermination of deficiencies or for refund of personal income taxes for the years 1961, 1962 and 1963 and sustaining the notice of deficiency for such years, and for a statement of the grounds or theory on which such determination is based, for the following reasons:

(1) Section 690(a) of Article 22 of the Tax Law provides for judicial review of a decision of the Commission "in the manner provided by law for the review of a final decision or action of administrative agencies of the state". Such review is afforded by the institution of an Article 78 proceeding (CPLR 7801 et seq) in the Supreme Court, Special Term, for the appropriate county, followed possibly by a transfer of the proceeding to the Appellate Division. Neither the Special Term, Supreme Court, nor the Appellate Division can intelligently review the determination in this matter unless the basis of the administrative action is set forth with clarity, since the court cannot guess at the theory underlying the commission's action. Moreover, the court cannot affirm an administrative determination by substituting its own correct ground for a wrong or unstated ground of the agency (SEC v. CHENERY CORP., 318 U.S.80, 87, 94, 332 U.S.194, 196).

(2) In view of the foregoing, the result of a judicial review of the determination in this proceeding would be a remand to the Commission for the same action that is requested by this motion. The decision of January 20, 1971 states no grounds, nor theory, nor legal basis for the application of the law and regulations to the findings of fact made. The decision contains conclusions only, -- a statement of the ultimate facts that the payments received did not constitute annuities and that the sublease was not a transaction entered into for profit. A reviewing court could not determine whether the decision follows as a matter of law from the findings of fact stated (cf. MATTER OF BARRY v. O'CONNELL, 303 N.Y. 46, 50-51). Indeed the conclusory statements in the decision do not constitute "a brief statement of the grounds of decision", as directed by the Tax Law itself (Sec. 689(a)).

The decision does not state that the payments under the consulting agreement are taxable as severance pay, although severance pay is "income received from sources within New York State for services rendered", to quote from conclusion A of the decision. It does not state whether the services for which the payments were made were rendered within or without the state. It does not state why such payments were not an annuity. It does not state whether or not the old regulation, section 413 under section 359, subdiv. 3, of Article 16, the old law (a section that read substantially the same as section 632(b)(2) of Article 22, the new law enacted in 1960) was applicable. It does not state whether or not the new regulation (sec. 131.4(d) under sec. 632(b)(2) of the new law), which was not issued until 1968, was intended to be retroactive to the years 1961, 1962 and 1963.

The foregoing observations are also pertinent to the distributions under the Deferred Compensation Agreement. There is, however, an additional omission in that the decision does not

state why, if the new regulation was intended to be retroactive, the payments of cash under that agreement do not fall within even the new regulation's definition of an annuity. Nor has the Commission made even a finding of fact as to the value of the stock distributed under this agreement, although it was restricted investment stock whose value was obviously less than its market value.

Nor does the decision state any ground for the conclusion that the sublease was not a transaction entered into for profit, nor even any finding of fact from which such conclusion might be derived. Is the ground for the conclusion that no profit in fact was made, or that a sublease entered into to minimize loss on moving to another state is not entered into for profit, or that the federal income tax ruling (GCM 1940-2 C.B.214) to the contrary is for some reason not controlling, despite the mandate of sections 631 and 632 of the Tax Law that income for New York tax purposes includes losses entering into the computation of income for federal tax purposes?

The difficulty of ascertaining the basis for the Commission's determination is compounded by the fact that no brief was filed in opposition to the petitioners' position.

WHEREFORE it is requested that the Commission reconsider its decision in this matter and determine that the petitioners are entitled to a refund of taxes for the years 1961, 1962 and 1963 in the amount of $1,597.82, $2,144.12 and $1,305.04, respectively, and that in any event the Commission set forth the specific grounds or basis for its decision so that a court may intelligently review the decision at the present time without the necessity for a future remand for this purpose. It is also prayed that this motion be decided at the earliest possible time so that there may be a prompt judicial review.

Respectfully submitted,

Emil Sebetic

EMIL SEBETIC