



TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

45

September 15, 1942

OPINION NO. 1826

TAXATION, NET INCOME:

Interest allowed as part of a condemnation award as compensation for the period during which the taxpayer has neither the land nor value thereof in money represents compensation for loss of use and is ordinary income, not capital gain.

Honorable Wm. Borthwick
Tax Commissioner
Territory of Hawaii
Honolulu, T. H.

Dear Sir:

Your letter of June 20 requests our opinion upon the following matter:

A taxpayer's land is condemned, and under statutory proceedings the government takes possession prior to final judgment. At the time possession is taken by the government there is deposited in court a sum representing the value of the land as estimated by the government, which the taxpayer receives. By the final judgment he receives an additional award with six per cent interest

thereon, pursuant to the statute, 40 U.S.C.A., Secs. 258a to 255e, inclusive. The interest covers the period between the taking of possession by the government and the final payment.

The so-rolled "interest" was paid under the statute as compensation for the period during which the taxpayer had neither the land nor, to the extent that the original payment was deficient, the value thereof in money. The "interest" so paid therefore constitutes compensation for loss of use, and as such is ordinary income, not capital gain. The Circuit Court of Appeals for the Third Circuit so held in Commissioner of Internal Revenue v. Kieselbach, 127 Fed. (2d) 359, 361, C.C.A. 3, 1942. The Second Circuit holds to the contrary. Seaside Improvement Company v. Commissioner, 105 Fed. (2d) 990, C.C.A. 2, 1939, (cert. den. 308 U.S. 618, but the petition for certiorari was filed by the corporate taxpayer which was not affected by this part of the decision); Commissioner v. Appleby's Estate, 123 Fed. (2d) 700, C.C.A. 2, 1941. However, in the latter case the court indicated some members of the court disagreed with this conclusion but felt obliged to follow the rule established in that circuit. The Board of Tax Appeals which had followed the view that the interest was capital gain before the Third Circuit's decision, still follows it.

Ada B. Storm, Memo. Op., June 17. 1942, C.C.H. Dec.
12, 570B.

I am of the opinion that the Third Circuit's decision is correct and in accordance with the reasoning of such cases as Hort v. Commissioner, 313 U.S. 28, 31, Burnet v. Harmel, 287 U.S. 103, 111, and Work v. Mosier, 261 U.S. 352, 357. These cases hold that payments representing the value of the use of land are ordinary income, not capital gain". Our statute, like the federal statute, uses the term "capital gain" in contradistinction to ordinary income.

Respectfully,

(s) Rhoda V. Lewis

RHODA V. LEWIS
Deputy Attorney General

APPROVED:

(s) Ernest L. Kai
Ernest L. Kai
Attorney General