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Op. 57-96

TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 5, 1957

Honorable Earl W. Fase
Tax Commissioner
Territory of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to your request for our interpretation of the Income Tax Law of 1957, enacted by Act 1 of the Special Session Laws of 1957, in respect of certain matters presented by a "prospective resident" who states that upon arrival in the Territory he will have reached the age of 65 years, that he is married and has no dependents other than his wife who will accompany him, and that he does not intend to "participate in any local enterprises". As outlined by the inquirer, his income will consist exclusively in "annuities, company benefits and bonuses, and dividends".

The inquirer states that all this income is "from the mainland", from which we understand that all of this income will be paid to him by mainland companies.

A prime question is the interpretation of the words "income received or derived from property owned * * * in the Territory", appearing in the proviso of subsection (a) of section 121-3, Income Tax Law of 1957.

These same words appear in the Income Tax Law of 1932, subsection (b) of section 121-6, formerly section 5505 of the Revised Laws of Hawaii 1945, which remains in effect for taxable years beginning prior to January 1, 1958.

The income tax law preceding the Income Tax Law of 1932 contained similar language. The meaning was explained in cases involving 1920 income of a domestic corporation (Ewa Plantation v. Wilder, 26 Haw. 299, 1922, aff'd 289 Fed. 664), and 1926 income of a Hawaiian domiciliary (Carter v. Hill, 31 Haw. 264, 1930, aff'd 47 F.2d 869). Both cases concerned intangible property in the form of securities, including in the first case bonds and notes, and in the second case stocks and bonds. The court concluded that these

words referred to the situs of the intangible personal property involved, and further, that the situs was to be determined by application of the maxim mobilia sequuntur personam, which however, said the court, is a legal fiction and is not determinative of the situs of the intangibles if under the particular circumstances they have a situs elsewhere. See also 51 Am. Jur. 474, § 463.

The situs of intangibles is a matter giving rise to many questions. One of these is the extent to which there may be a dual situs. This has been considered in many cases. However, in view of the above cited Hawaiian cases, the repetition of the words "received or derived from property owned * * * in the Territory" or similar language in each income tax law, and the long continued administrative practice under which these words have been given the interpretation put upon them by the above cited Hawaiian cases, only one situs of intangibles which are owned by the taxpayer himself is contemplated by the above quoted expression as used in the proviso of subsection (a) of section 121-3, 1957 Income Tax Law. (No opinion is expressed as to the application of the 1957 tax law in respect of trusts; this is a matter governed by specific provisions.)

In the situation here presented, intangible personal property will be deemed to have its situs at the place of domicile of the owner, unless under the particular circumstances it has acquired a situs elsewhere, and will be deemed to be "owned * * * in the Territory" if it has its situs in the Territory, but not otherwise.

It will be noted that the legal fiction makes the place of domicile the situs of intangible personal property if under the circumstances it has not acquired a situs elsewhere. Under the 1957 law the word "resident" is defined so as to include both domiciliaries and also other residents (sec. 121-1).

The portion of subsection (a) of section 121-3, preceding the proviso which relates to persons taking up residence in the Territory after attaining the age of 65 years, makes taxability of income dependent upon residence status, and eliminates all questions as to the situs of the property. This tax treatment of residents, whether or not they are domiciliaries, has precedent in the laws of many states. See example, Wood v. Tawes, 28 Atl.2d 850, Md. 1942, cert. denied 318 U.S. 788.

Turning now to the proviso of subsection (a) of section 121-3 of the 1957 law, it reads as follows:

> "* * * provided, that in the case of an individual who takes up residence in the Territory after attaining the age of sixty-five years the tax imposed by this chapter applies to the income received or derived from property owned, personal services performed, trade or business carried on, and any and every other source in the Territory."

While as above noted an individual taking up residence in the Territory does not necessarily become a domiciliary of the Territory, when a person moves to Hawaii after retiring from his business or occupation he may very well lack those ties with the place from which he came which indicate retention of domicile there. Moreover, his handling of his property may be such as to give it a situs in the Territory, even though there may be doubt as to his having changed his domicile to Hawaii.

The above quoted proviso certainly has significance in cases where the facts are such as set out in Carter v. Hill, but it is equally certain that this proviso does not exclude from taxation the income from intangibles owned by persons just because they take up residence in the Territory after attaining the age of 65 years. No answer can be given without considering all of the circumstances both as to domicile and also those circumstances of the type which permit intangible personal property to acquire a situs apart from the owner's domicile.

As to the items of income presented by the inquiry you have transmitted to us, both the dividends and the annuities are income from intangible personal property, and no assurance can be given on the facts stated that they will not be taxed by the Territory. Under the circumstances the intangible personal property might be deemed to be property "owned" in the Territory and the income therefore taxable.

As to the bonuses, these presumably constitute additional compensation for personal services performed on the mainland, and if so under the proviso above quoted are not taxable by the Territory. In view of this, the question also presented to you as to whether only the net bonuses after deduction of withheld amounts is taxable is not important. However, it should be noted that where a bonus is taxable the gross amount of the compensation must be returned as gross income, including amounts withheld for taxes. The deduction of these amounts turns upon the deductibility of the tax itself. To the extent that certain amounts (i.e. payments to an exempt trust forming part of a stock bonus, pension or profit sharing plan or under or to a qualified annuity plan) are not included in employee income of the taxable year under the Internal Revenue Code, they also are not included in employee income of the taxable year under the 1957 law of the Territory.

As to the company benefits, an explanation of their nature is necessary for a ruling to made. If they constitute a pension they are excluded from taxation by section 121-5, subsection (a), clause (3) of the 1957 law.

Respectfully,

Rhoda V. Lewis

RHODA V. LEWIS
Deputy Attorney General