Opinion No. 57-60-A

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BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Director F. E. McCulloch, Income Tax Division, Bureau of Revenue, State of New Mexico, Santa Fe, New Mexico

QUESTIONS

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Are wages or other benefits paid to employees under "sick leave," "job injury," or "wage continuation plans" when considered in the light of Section 72-15-5, N.M.S.A., 1953 Comp., permitted as deductions or excluded from "income" when computing adjusted gross income for tax purpose? (Attorney General's Opinion No. 57-60 reconsidered.)

CONCLUSION

Yes.

OPINION

ANALYSIS

This office or recent date expressed its opinion (Attorney General's Opinion No. 57-60, dated March 27, 1957) concerning the exclusion of benefits as contemplated in the above stated question when computing adjusted gross income as provided for in Article 15, Chapter 72. Based upon the statutory provisions and judicial determinations then published and decided, a negative conclusion was reached.

Subsequent questions, presentments, and recent judicial determinations necessitate we believe, a reconsideration of the aforesaid opinion.

Section 72-15-4, N.M.S.A., 1953 Comp., in defining and providing for the inclusions in "gross income" is expressed as follows:

"'Gross income' as used herein includes gains, profits and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries of all elective or appointive state, county, municipal or other officers or employees, or from professions, vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or use, or interest in such property; also from rent, interest, dividends, securities, or transactions of any business carried on for gain or profit, or gains or profits, and income

derived from any source whatever, including gains or profits and income derived through estates or trusts by the beneficiaries thereof, whether as distribution or as distributable shares. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless under methods of accounting permitted herein such amounts are to be properly accounted for as of a different period."

With reference to the aforequoted Section, there follows, in § 72-15-2, N.M.S.A., 1953 Comp., an allowance of certain deductions (exclusions) from gross income which ought to be excluded as items of income in arriving at the sum upon which a final tax return will be completed. Of prime importance with reference to the instant question is paragraph four of the last mentioned Section, which provides that:

"The following deductions shall be allowed in ascertaining net income by this act defined; . . . . (4) Any amount received through accident or health insurance, or under Workmen's Compensation Act or under any plan for employee's pensions, disability benefits or death benefits, as compensation or pension for personal injuries or sickness, disability, or superannuation, and the amount of any damages received, whether by suit or agreement, on account of any injury, sickness, or death."

No further or additional deductions or examples relative to sickness or accident benefits are found in our law. Looking momentarily, however, to the provisions of the Federal Income Tax Law, as found in 26 U.S.C.A., § 104, we find the following expression, as may well be considered the basis of, or at least contemplated in the enactment of, the New Mexico Statutes. The aforesaid Federal law provides in part that:

"(a) Except in the case of amounts attributable to (and not in excess of) deductions allowed under § 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include (1) amounts received under Workmen's Compensation Acts as compensation for personal injuries or sickness; (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness; (3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (a) are attributable to contributions by the employees which were not includable in the gross income of the employer, or (b) are paid by the employer); and . . . ."

In Haynes v. United States, U.S. , April 1, 1957, the Supreme Court, by way of certiorari, considered conflicting rules relative to wage continuation plans. The Court, relying on Epmeier v. United States, 199 F.2d, 508, said of the "health insurance" (wage continuation plan) provided for by the Southern Bell Company, and with reference to the federal exclusionary section supra (former Section 22 (b) (5)), pointed out the following:

"Broadly speaking, health insurance is an undertaking by one person for reasons satisfactory to him to indemnify another for losses caused by illness. We believe that the Southern Bell disability plan comes within the meaning of this health insurance."

And, continuing:

"The payment of premiums in a fixed amount at regular intervals is not a necessary element of insurance. Similarly, there is no necessity for a ,definite fund set aside to meet the insurer's obligations. And the fact that the amount and duration of benefits increased with the length of time that an employee worked for Southern Bell reflected the added value to the company of extra years of experience and service. Apparently the government relies on these facts primarily to show that Southern Bell's plan did not contain features which would would be present in the normal commercial insurance contract. The Government, however, offers no persuasive reason why the term 'health insurance' in Section 22 (b) (5) should be limited to the particular forms of insurance conventionally made available by commercial companies. Certainly there is nothing in the language of Section 22 (b) (5) which compels this limitation.

"There is no support in the legislative history for the Government's argument that Congress intended to restrict the exemption provided in § 22 (b) (5) to 'conventional modes of insurance' and not to include employer disability plans. For reasons deemed satisfactory, Congress, since 1918, has chosen not to tax receipts from health and accident insurance contracts."

From Epmeier v. United States, supra, the Court relies on the following language:

"We conclude that 'free' life insurance and 'free' sickness benefits, 'free' medical facilities, as used here means simply that these matters are furnished as additional factors of the employee's compensation, free of any money advancement. The provisions of § 22 (b) (5) undoubtedly were intended to relieve a tax payer who has the misfortune to become ill or injured of the necessity of paying income tax upon insurance benefits received to combat the ravages of disease or accident."

And, continuing:

"We conclude that the fact that there is no formal contract of insurance is immaterial, and it is clear, as here, that, for an adequate consideration, the company has agreed and has become liable to pay and has paid sickness benefits based upon a reasonable plan of protection of its employees."

The Federal law provides further and specifically in Section 105-D an exception relative to wage continuation plans nowhere suggested or contemplated in our State law. However, considering the legislative history of both our State provision and the Federal law, it may be reasonably concluded that an interpretation of the language used in Section 104 supra may well be applied and given weight in giving meaning to the language of § 72-15-5 (4) supra.

Accordingly, it is our opinion, in reviewing the question here considered, as is discussed by the Supreme Court in Hayne v. United States, supra, that sick leave, job injury and

wage continuation plans benefits are deductible (excludable) in computing adjusted gross income.