

Opinion No. 53-5728

April 13, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. M. W. Hamilton Chief Counsel Bureau of Revenue Santa Fe, New Mexico

{*123} In your letter dated March 25, 1953, you enclosed a memorandum from a taxpayer who received income in another state while a non-resident of New Mexico during the first half of the year and then acquired residence in New Mexico. The state of his former residence does not levy a state income tax, however the municipality in which he resided did levy and collect a municipal income tax. The memorandum of the taxpayer further states that he brought the income received elsewhere with him to New Mexico.

You have asked two questions pertaining to this matter. First, should the income tax paid by the taxpayer to a municipality of another state be allowed as a deduction or as a direct credit and offset against the tax computed against the taxpayer in this state. Second, whether the earned income outside of the state before acquiring residence in New Mexico should be included in the net income of the taxpayer although he acquired residence and resided here only a part of the year.

Section 76-1224 of the 1941 Compilation provides for a credit or offset against the taxes assessed in New Mexico to a resident taxpayer who pays an income tax to another state. This Section does not authorize an offset merely because an income tax is paid **in** another state, but the tax must be paid **to** another state. Since a municipality is a separate entity from the sovereign state, an income tax paid merely to a municipality is not a tax paid to the state as such and therefore the full credit or offset would not be allowed under the foregoing Section, but the tax paid is deductible in computing that income under the provisions of Section 76-1207 (c).

Your second question is more difficult. The pertinent sections or portions of sections of the law are as follows:

Section 76-1203 (m) defines a "resident" as follows:

"Resident' applies only to natural persons and includes for the purpose of determining liability to the taxes imposed by this act upon the income of any taxable year, every person domiciled in this state, during any part of the taxable year; * * *"

This same section states that a resident who permanently changes his place of abode to a place without the state before the last day of the year shall be taxable the same as a non-resident. In view of this language and the language in Section 76-1223 of the 1941 Compilation, it is apparent that anyone who becomes {*124} domiciled in New

Mexico on or before the last day of the year is to be considered a resident for tax purposes.

Section 76-1220 of the 1941 Compilation provides in part as follows:

"The tax assessed by this act is hereby imposed at the following rates upon every resident and nonresident, as by this act defined, individual of this state, and said tax shall be levied, collected and paid annually upon his entire net income less the deductions and exemptions provided in this Act:"

The last paragraph of this section provides that persons non-resident of this state are to be taxed upon the net income derived from property owned, or business, trade, profession or occupation carried on in this state by such natural persons.

The Legislature probably had in mind a situation similar to the instant case when it made provision for allowing an offset of income taxes paid to another state.

In the case of **Martin vs. Gage** a Kentucky case decided in 1939, reported in 134 SW 2nd, 966, 126 ALR 449, a similar situation was involved and the Court held that a person who received income in another state prior to acquiring residence in Kentucky was not liable for income tax on such income received prior to acquiring residence. The statute was similar to that in this state except that it did not levy a tax upon the entire net income of all resident taxpayers. The Court stated, however, that the statute involved was broad enough to authorize a tax on the entire income but that since the exaction of such a tax was questionable the statute was construed as not requiring payment of the tax in Kentucky. The annotation in 93 ALR 1199 and in 126 ALR 455, states that the number of cases dealing with the question is insufficient to determine the weight of authority but that the trend is in support of the Kentucky decision cited above.

In spite of this authority, in view of the language in our statute and in view of the fact that the Supreme Court in the case entitled **Jackling vs. State Tax Commission**, 40 N.M. 241, 58 P. 2nd 1167, quoted favorably certain language from **State ex rel Sallie F. Moon Co. vs. Wisconsin Tax Commission**, 166 Wis. 287, 165 N. W. 470 as follows:

"The tax is upon the right or ability to produce, create, receive, and enjoy, and not upon specific property."

We are inclined to feel that a tax upon the entire net income of the taxpayer should be levied and collected because the taxpayer was a resident of New Mexico at the end of the taxable year and received the protection of the state's laws at least in the enjoyment of the income received elsewhere prior to acquiring residence here. As previously stated, this is a close question and one in which our Supreme Court in a proper case might well follow the Kentucky case above cited, but until the court decides otherwise it is the opinion of this office that a tax for the entire year's net income should be collected.

By: C. C. McCulloh

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