

Opinion No. 57-60

March 22, 1957

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

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

QUESTIONS

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Are wages paid to employees under "sick leave" and "job injury" plans excluded from "income" when computing adjusted gross income for income tax purposes?

CONCLUSION

No.

OPINION

ANALYSIS

Section 72-15-4, N.M.S.A., 1953 Compilation, in spelling out the meaning of gross income for the purpose of establishing a basis for the tax levy imposed, states 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, business 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 distribution 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."

And following, Section 72-15-5, statute supra, provides in part:

"The following deductions shall be allowed in ascertaining net income as by this act defined: ". . . .

"(4) Any amounts received through accident or health insurance or under workmen's compensation acts or under any plan for employees' pensions, disability benefits or death benefits, as compensation of pension for personal injuries or sickness, disability or superannuation, and the amount of any damages received, whether by suit or agreement or account of any injury, sickness or death."

Generally speaking, items of income will include all forms of compensation or gain received in consideration for services performed, profits realized from business transactions, and from property exchanges. On the other hand, compensation realized as indemnification for the loss of either property or personal well-being is excluded in arriving at the sum represented as gross income. It is with the latter that we are concerned here.

As specifically stated in Section 72-15-5 (4) supra, and in keeping with the theory herein expressed ". . . amounts received through accident or health insurance or under workmen's compensation acts . . ." shall be excluded "in ascertaining net income." Likewise, disability, sickness and death benefits are also excluded; such being all recompense for loss of a state of personal well-being. The situation herein considered, however, goes a step further; that of receiving continuing wages or compensation based upon existing wage scales supplementing any benefits paid under the workmen's compensation act, or other indemnifying insurance.

The New Mexico Income Tax Code does not spell out an exclusion comparable to that found in Section 105 (d) Internal Revenue Code. Of the latter it is said:

"Nor does gross income include amounts up to \$ 100.00 per week referred to in the general rule as constituting gross income, gross income if constituting wages or payments in lieu of wages for a period when the employee is absent from work on account of personal injuries or sickness. The exclusion is, however, inapplicable to sums paid during the first seven calendar days of a period of absence from work on account of sickness unless the employee is hospitalized on account of such illness for at least one day during such period." **26 USCA 34.**

In discussing accident and health plans, it is pointed out in 26 USC A supra, that:

"In general, amounts received by an employee through accident or health insurance for personal injuries or sickness are includible in gross income where paid by the employer or are attributable to contributions by the employer which did not constitute gross income to the employee."

The provision in § 105 (d) supra is admittedly an exception to the general rule, 26 USCA 35; and an exception not found in or implied from our statute.

It is true that provisions in our State law are not limited or governed by any congressional expression. However, it is our understanding that argument as propounded to the Bureau of Revenue is based upon comparison with Federal provisions and exclusions, thus the basis for comparison and interpretation herein presented.

Looking once again at our exclusion provision, we do not argue with that language found in Section 72-15-5 (4) which provides ". . . 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." On the contrary, such benefits as arise from Workmen's Compensation, accident and health insurance plans, or damages paid as the result of permanent injury, loss of a bodily function or disfigurement, plainly are exempt. Here insurance has been provided and paid for, or something or some function has been lost or destroyed which cannot be replaced in fact. In the case of a salary continuation plan however, where no reportable forbearance is suffered by either the employer or the employee, then it is our opinion that such compensation as is not definable as insurance benefits must be reported as salary.

It might be argued, with some degree of logic, that where, under a sick, leave plan, an employer provides for an accumulation of sick-leave time for the benefit of an employee, based on a weekly or monthly participation schedule, and for which the employee is not required to be a contributor, such employer is providing an insurance (wage) benefit. The compliment of such an argument is, however, that such a forbearance, by the employer, must then be considered as reportable compensation before the benefits therefrom may be excluded.