Opinion No. 59-162

October 8, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Miss Clarice Perkinson Superintendent Girls' Welfare Home Box 6038, Station B Albuquerque, New Mexico

*{*252}* By Opinion No. 59-51, dated May 21, 1959, addressed to former Superintendent Paul Gallegos, we wrote that the meals and lodging furnished employees of the Girls' Welfare Home do not constitute "wages" under the Social Security Act. The local administrator and regional attorney for the Social Security Administration of the Department of Health, Education and Welfare have questioned the correctness of our opinion and have submitted legal memoranda supporting their position that our opinion was erroneous. In view of the questions raised, we decided to review this matter.

As a result of our review, we are constrained to hold that our previous opinion was in error and that meals and lodging furnished to employees of the Girls' Welfare Home are "wages" under the Social Security Act.

The basic statutory authority defining "wages" under the Social Security Act is 42 U.S.C.A., Sec. 409, which reads as follows:

"For the purposes of this subchapter, the term 'wages' means -- remuneration paid after 1950 for employment, including the cash value of all except that, in the case of remuneration paid after 1950, such term shall not include -- (g) (1) Remuneration paid in any medium other than cash to an employee for service **not in the course of the employer's trade or business** * * *;" (Emphasis supplied)

The regulations issued pursuant to this statute (26 CFR, Sec. 31.3121 (a) (7)-1 (a)-(1)), state that wages do not include, among other things, lodging and food not in the course of the employer's trade or business. We have found no cases which specifically define "not in the course of the employer's trade or business" under the Social Security Act. However, in our opinion, there is no question that the meals and lodging provided for your employees are provided in the course of the employer's business since your employees are required to be present at the Welfare Home in furtherance of the interests of the employer. Analogous employment has been held to be in the usual course of business of the employer under State Workmen's Compensation Act. **Walker v. Industrial Accident Commission,** 177 Cal. 737, 171 Pac. 954 (1918); **Cookson v. Knauff,** 157 Pa. Super. 401, 43 A. 2d 402 (1945). We are sure that a definition at least as *{*253}* broad as given in the **Walker** and **Cookson** cases would be applied to cases arising under the Social Security Act. Therefore, in our opinion, your employees are to be considered as employed in the course of business of the Welfare Home so that meals and lodging furnished them do not come under the above-cited exception to the Social Security Act.

In our previous opinion, we referred to 26 CFR, Section 31.3401 (a)-1(9), part of the 1959 employment tax regulations, to support our conclusion. This regulation reads as follows:

"The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals and lodging is excludable from the gross income of the employee. See the Income Tax Regulations (Part 1 of this chapter) under Sec. 119."

You will note that this regulation refers to Section 1.119 of the Income Tax Regulations (26 CFR 1.119-1). At first blush, Section 1.119 spelling out the rule under the Federal Income Tax laws that meals and lodging furnished on the employer's premises and for the convenience of the employer are not considered as gross income for which withholding deductions are made, has been incorporated by reference into the Social Security Regulations, and thus override the regulations previously discussed. However, Section 31.3401(a)-1(9) is under subpart E of the Federal Tax Regulations entitled "Collection of Income Tax at Source of Wages (Chapter 24, Internal Revenue Code of 1954)."

Chapter 24 (26 U.S.C.A., Sections 3401-3404) spells out the procedures for withholding income taxes by the employer. Section 3401 (a) defines "wages" for the purpose of computation of the amount to be withheld. It is this section which the regulations cited above (26 CFR, Secs. 1.119-1 and 31.3401 (a)-1(9)) amplify. In essence, the regulations define which remuneration is not included in gross income. Such income is not subject to withholding by virtue of 26 U.S.C.A., Section 3401(a) which states in effect that "wages" shall not include remuneration which will be excluded from gross income.

Therefore, we conclude that meals and lodging furnished employees of the Girls' Welfare Home, while not considered as included in gross income subject to taxation under the Federal Income Tax laws, constitute income under the Social Security Act. Attorney General's Opinion 59-51 must be, and hereby is, overruled.

Philip R. Ashby

Assistant Attorney General