Opinion No. 60-183

October 6, 1960

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

TO: Mr. Richard H. Robinson Chief Counsel Bureau of Revenue State Capitol Santa Fe, New Mexico

QUESTION

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Do employees of White Sands Missile Range who reside in El Paso, Texas, have to pay New Mexico income tax as nonresidents?

CONCLUSION

Yes.

OPINION

*{*578}* **ANALYSIS**

We have been honored with a brief on this subject from the attorney representing these protesting taxpayers. In substance, two contentions are advanced to uphold the proposition that these employees do not have to pay our state income tax. First, the claim is made that the income is earned on a Federal reservation and the Buck Act notwithstanding, this income is not properly taxable by this State. The second contention is to the effect that these nonresidents are discriminated against because they cannot take certain deductions in determining their tax which residents of this State are entitled to take. We have researched these questions at some length and are of the opinion that neither of these contentions contain merit.

As regards the contention that the State has no jurisdiction over this income, we are of the opinion that Title IV, Sec. 106 (61 Stat. 644) of the United States Code, commonly called the "Buck Act", is decisive. That section reads in part as follows:

"(a) No person shall be relieved from liability for any income tax levied by any state, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a federal area or receiving income from transactions occurring or services performed in such area; and such state or taxing authority shall have full jurisdiction and power to levy and collect such tax in any federal area within such state to the same extent and with the same effect as though such area was not a federal area."

The protestants argue, through their attorney, that since the State ceded exclusive jurisdiction to the United States over this area and since the United States accepted exclusive jurisdiction to this area, the Buck Act does not apply. This contention in our view is erroneous. First of all, a reading of the *{*579}* Buck Act reveals that the United States did not accept exclusive jurisdiction to the area since Section 106 specifically leaves the power to tax in the area to the state. The United States did not accept "exclusive" jurisdiction over the area until May 16, 1953, subsequent to the passage of the Buck Act so its acceptance of jurisdiction was conditioned upon the right of taxation granted by the Buck Act. If we follow complainants' argument correctly, they contend that even if the Federal Government did not accept exclusive jurisdiction, the State government gave exclusive jurisdiction and in so doing gave up the right of taxation in that area. If this argument were correct, then there would be a portion of jurisdiction over this area lurking somewhere in the "great unknown" which no one could claim, neither the State nor the United States. Such a result is patently absurd. The question of this type of jurisdiction should be analogized to real property, the title of which has to be vested in someone at all times. If the Federal Government did not accept total jurisdiction in this area -- and it did not under the Buck Act -- then that portion of jurisdiction which the Federal Government did not accept remains vested in the State. We hold that the State of New Mexico has the right and power to tax that portion of a nonresident's income which is earned on the White Sands Missile Range. See also Secs. 72-15-1.1 and 7-2-4.1, N.M.S.A., 1953 Comp. (PS) in this regard.

We find the second contention equally without merit. The contention here is that these nonresidents are being discriminated against because they cannot claim as deductions on their New Mexico income tax returns bad debt losses, interest and ad valorem taxes paid outside the State. The Income Tax Division has provided by regulation that nonresidents are entitled to expense deductions, etc., only insofar as these are incurred as a result of their income earned in New Mexico. Their contention seems to be that ad valorem taxes paid in El Paso, Texas, contributions made in Texas, interest paid in Texas, and bad debts incurred in Texas, should be allowed as deductions from their New Mexico income in determining their New Mexico tax. The United States Supreme Court has settled this question once and for all in the case of **Shaffer v. Carter,** 252 U.S. 37 (19-20). The Court there said:

"Appellant contends that there is a denial to noncitizens of the privileges and immunities to which they are entitled and also a denial of equal protection of the laws in that the Act permits residents to deduct from their gross income not only losses incurred within the State of Oklahoma but also those sustained outside of that state, while nonresidents may deduct only those incurred within the state. The difference, however, is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases and cannot be regarded as an unfriendly or unreasonable discrimination. As to the residents it may, and does, exert its taxing power over their income from all sources, whether within or without the state, and it accords to them a corresponding privilege of deducting their losses, whereever these accrue. As to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from

those sources. Hence, there is no obligation to accord to them a deduction by reason of losses elsewhere incurred. * * *"

This case was followed in the case of **Travis v. Yale & Towne Manufacturing Co.,** 252 U.S. 60, upon which the complainants rely so heavily. There the Court said:

"* * * That there is no unconstitutional discrimination against citizens of other states *{*580}* in confining the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state, likewise is settled by that decision." (Shaffer v. Carter.)

We deem these two cases controlling on this subject and hold that in this respect our income tax statutes and the administrative interpretations of them do not discriminate against nonresidents.

As to the contention that nonresidents must file returns if their income exceeds $ 500.00 within the State while residents need only file returns if their income is in excess of $ 1500.00, suffice it to say, that this is merely the manner that the State uses to determine the income of out-of-state residents and this does not determine the amount of tax paid. It only requires that a return be filed. It does not require the nonresidents to pay tax on all income that exceeds $ 500.00.

As regards the allowance of credit for taxes paid in other states, we deem **Minich v. City of Sharon,** 366 Pa. 267, 77 A. 2d 347, App. Dism., 341 U.S. 945, and the cases following its rationale, controlling.

By: Boston E. Witt

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