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## BUREAU OF LAW

MEMORANDUM

*Income Tax Determinations**Lind, Dan and Anne*

TO: Commissioners Murphy, Palestine & MacGuff

FROM: Solomon Sles, Hearing Officer

SUBJECT: DAN LIND and ANNE LIND, his wife

**Petition for Redetermination of Deficiency  
or for Refund of Personal Income Taxes under  
Article 22 of the Tax Law for the year 1960.**

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y. on January 6, 1965. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue involved herein is whether the taxpayer, reporting on a cash basis, is entitled to exclude on his New York State income tax resident return back pay received in 1960 for services performed without the State in prior years while he was a non-resident during such prior years even though the Internal Revenue Service adjusted his Federal return to include said income for the year in issue.

The taxpayer lived and worked in New Jersey from 1952 through 1956 as sales manager for Park & Tilford Distillers Corp. (subsequently known as Schenley Industries, Inc.). In 1957, he commenced an action against the aforementioned employer for back pay. In 1960, he received the sum of \$36,953.10 from Schenley Industries, Inc. as back pay. He did not include this sum of income on his Federal return. The Internal Revenue Service adjusted, upon audit, the taxpayer's Federal return for 1960 so as to increase the amount of income in the sum of \$37,618.76 which includes the back pay plus adjusted medical and dental expenses, decreased thereby. Accordingly, the Income Tax Bureau issued a statement of audit changes and notice of deficiency computing additional personal income tax in accordance with the audit of his Federal income tax return for the year 1960.

The taxpayer is contesting the determination of the Internal Revenue Service contending that the back pay received in 1960 should be spread back to prior years. The matter is now before the Appellate Division of the Internal Revenue Service for review. The taxpayer contends that despite the outcome of the decision of the Internal Revenue Service, the back pay is not subject to income tax by the State of New York since the right to same arose out of his employment while he was a resident of the State of New Jersey; that 2612 which defines New York adjusted gross income as Federal adjusted gross income without permitting a modification thereof is violative of both the 14th Amendment to the U.S. Constitution and the provisions of the Constitution of the State of New York and, therefore, is invalid.

In CCH, Standard Federal Tax Reporter, 1965, Volume I, 964,015, page 17,046, it is stated, that:

RE: DAN LIND &amp; ANNE LIND, his wife

"Salaries, commissions, tips, payment for services on the basis of a percentage of profits, and other forms of compensation are income in the year received and not in the year earned, unless the taxpayer reports on the accrual basis. Thus, a salesman reporting on the cash basis and receiving commissions in 1965, for sales made in 1964, reports them as income in 1965 and not in 1964."

In the case of Hanson v. U.S., (251 U.S. 177, 1919), it was held that a back pay award under the power of the N.L.R.B. on account of wrongful discharge for union activities, the award representing pay during the time taxpayer was illegally prevented from working is taxable when received as compensation for personal services.

I am of the opinion that the deficiency notice against the taxpayer for the year 1962 and the audit changes including his New York adjusted income the amount received as back pay in accordance with the Federal audit are correct in accordance with the provisions of §612 of the Tax Law.

For the reasons stated above, I recommend that the determination of the Tax Commission in the above matter be substantially in the form submitted herewith.

FEB 17 1966

SOLOMON SIES

Leaving Office

/s/

M. SCHAPIRO

Approved

/s/

SAUL HECKELMAN

Approved.

ss/te (March 14, 1966)

**STATE OF NEW YORK  
STATE TAX COMMISSION**

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**IN THE MATTER OF THE PETITION**

**OF**

**DAN LIND AND ANNE LIND, his wife**

**FOR A REEXAMINATION OF A DEFICIENCY  
OR FOR REFUND OF PERSONAL INCOME TAXES  
UNDER ARTICLE 22 OF THE TAX LAW FOR  
THE YEAR 1960.**  
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The taxpayers herein, having filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the year 1960 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, N.Y. on the 6th day of January, 1965, before Solomon Sles, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers, Dan and Anne Lind, filed a joint New York State income tax resident return for the year 1960; that the taxpayers reported Federal adjusted gross income pursuant to their Federal income tax return for the year 1960, in the sum of \$14,746.00; that attached to said return were two withholding statements, one from Peel Richards, Ltd., showing total wages paid to the taxpayer Dan Lind during the year 1960 in the sum of \$10,581.93, the other showing total wages paid to the taxpayer during the year 1960 by Schenley Industries, Inc. in the sum of \$36,953.10; that the taxpayer omitted from both his New York State income tax return and from his U.S. individual income tax return for the year 1960 the aforementioned sum of \$36,953.10 received from Schenley Industries, Inc.; that the U.S. Internal Revenue Service audited the taxpayer's Federal return for the year 1960 and made adjustments to income including an additional income back pay received by the taxpayer from Schenley Industries, Inc. in the sum of \$36,953.10, additional business expenses

disallowed in the sum of \$366.66 (entertainment expense \$300.00, depreciation of automobile \$66.66) and further adjusted the taxpayer's medical and dental expenses to include as additional income the sum of \$299.00 so that the total additional income adjusted amounted to \$37,618.76 and further allowed the taxpayer's deduction of legal expenses in the sum of \$25,685.45; that on April 6, 1961, the Department of Taxation and Finance issued a statement of audit changes adjusting the income of the taxpayers to conform with the audit of their Federal income tax return for the year 1960 so as to include as additional income the sum of \$11,933.31 and imposed additional personal income taxes in the sum of \$1,015.90 and accordingly issued a notice of deficiency therefor.

(2) That the taxpayer Dan Lind lived and worked in New Jersey from 1952 through 1956 as sales manager for Park & Tilford Distillers Corporation (subsequently known as Schenley Industries, Inc.); that in 1957 he commenced an action against the aforementioned employer for back pay; that as a result of such action the taxpayer Dan Lind received during the year 1960 from Schenley Industries Inc. as back pay the sum of \$36,953.10; that the taxpayers reported their income on a cash basis.

(3) That the taxpayer Dan Lind contends that the back pay which he received in 1960 represented wages to which he was entitled during the period he worked and lived in New Jersey, and that said back pay was not attributable to New York sources.

(4) That it is found, however, that the taxpayer is not entitled to a modification of New York adjusted gross income; that the adjusted Federal gross income was properly includable in the taxpayer's New York adjusted gross income for the year 1960; that the taxpayers reporting on a cash basis were required to include in their New York adjusted gross income the back pay received by the taxpayer Dan Lind in the year 1960.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

**REDETERMINES AND DECIDES:**

**That the New York adjusted gross income of a resident individual is Federal adjusted gross income as defined in the laws of the U. S. for the taxable year in accordance with section 612(a) of the Tax Law with the modifications specified in said section; that the adjustments made on the New York State income tax return of the taxpayers to conform with the audit of the Federal income tax return pursuant to the statement of audit changes and notice of deficiency are correct; that the same do not include any tax or other charge which could not have been lawfully demanded and that the petition of the taxpayers for redetermination of such deficiency for the year 1960 be and the same is hereby dismissed.**

**DATED: Albany, New York, on the 24th day of March , 1966.**

**STATE TAX COMMISSION**

/s/

**JOSEPH H. MURPHY**

**President**

/s/

**IRA J. PALESTIN**

**Commissioner**

/s/

**JAMES R. MACDUFF**

**Commissioner**