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## BUREAU OF LAW

## MEMORANDUM

*Income Determinations*  
*7-2*  
*Kewley, Dorothy*

TO: Commissioners Murphy, Macduff and Conlon

FROM: Solomon Sies, Hearing Officer

SUBJECT: In the Matter of the Application of Dorothy Kewley for Revision or Refund of Personal Income Taxes under Article 22 of the Tax Law for the Year 1960.

A hearing was held in the above matter at the New York City office on October 16, 1964.

The issues involved herein are: (1) whether the taxpayer effected a change of domicile from Illinois to New York on January 13, 1960; and (2) whether the taxpayer is entitled to a modification of Federal adjusted gross income under Section 654(c)(2) of the Tax Law applicable to special accruals of an individual who changes his status from non-resident to resident during the taxable year.

Prior to 1960, the taxpayer was a domiciliary of the State of Illinois. Her husband, William H. Kewley, died on July 26, 1958, a resident of the State of Illinois. His last will and testament was duly admitted to probate in the Probate Court of Sangmon County, Illinois, on August 27, 1958. The taxpayer was appointed executrix of her husband's estate and was the sole beneficiary under his will.

The Estate of William H. Kewley was on a fiscal year basis from July 1st to June 30th. However, the taxpayer reported her income on a cash calendar year basis. A Federal Fiduciary Income Tax Return was filed by the Estate for the fiscal year ending June 30, 1960, indicating total income in the amount of \$67,314.97 but no taxable income was reported since the Estate was distributed to the taxpayer during the fiscal year ending June 30, 1960. The taxpayer filed a Federal Income Tax Return for the year 1960 and reported thereon the income distributed to her from her husband's estate. On December 8, 1959, an order was entered in the Probate Court of Sangmon County, Illinois authorizing the

taxpayer as executor of the Estate of William H. Kewley to transfer and assign to herself as residual legatee and devisee, all of the property and assets of the estate except that she was required to retain as such Executor an amount not less than \$20,000 until the approval of the Federal and State tax returns and final closing of the estate. The aforementioned assets of the Estate were distributed to the taxpayer prior to January 1, 1960.

On December 14, 1959, the taxpayer entered into a written lease of an apartment at 55 East End Avenue, New York City for a term of two years and nine months commencing January 1, 1960 and terminating September 30, 1962. The taxpayer departed Springfield, Illinois for the Bahama Islands on or before December 31, 1959 to spend a vacation there. She returned to New York City on or about January 13, 1960 to undertake the furnishing of the apartment and remained in New York City for the rest of the year 1960. She did not actually remove to New York and maintain a place of abode therein prior to January 13, 1960. Taxpayer continued to be a resident of this state until date of her death February 8, 1966.

The taxpayer filed a New York State income tax resident return for the year 1960 in which she reported Federal adjusted gross income in the amount of \$48,445.51. On January 17, 1962 taxpayer filed application for revision or refund for the year 1960 together with an amended return for said year claiming a refund in the amount of \$2,989.51 upon the ground that the income reported by her represented income which had accrued prior to January 13, 1960 when it is alleged she became a resident of this State and that the aforementioned income was therefore attributable to sources without the State of New York. She claimed that her original resident return was filed in error. The Income Tax Bureau denied taxpayer's claim for refund on grounds that (a) taxpayer maintained permanent place of abode within the state for more than 183 days and was therefore a resident for the entire year of 1960; (b) that pursuant to Section 612 of the Tax Law taxpayer was required to report on her state return her Federal adjusted gross income for 1960 and that there can be no modification; (c) that since the change of resident status did not occur during the taxable year, Section 654 (c) (2) of the Tax Law does not apply.

If the taxpayer was a resident of this State on January 1, 1960, Section 654 (c) would not apply and her New York adjusted gross income would necessarily have to include her Federal adjusted gross income for the taxable year since there is no provision in our Tax Law for a modification thereof.

In other words, one who is a resident on January 1st of the taxable year, reporting on a cash calendar year basis income required to be reported for Federal tax purposes in that taxable year would also be required to report such income for State tax purposes even though the income was received in a prior taxable year and such income was attributable to sources outside the State prior to the time the taxpayer became a resident.

Article 502 of Personal Income Tax Regulations 55 provides, in part, that:

"The domicile is not changed by removal for a definite period or for particular purposes nor by abandonment of the old domicile until the acquisition of a new one is effected. To constitute a change, there must be intent to change, actual removal, and a new abode." (Emphasis supplied)

Section 662(c) of the Internal Revenue Code provides that, "If the taxable year of a beneficiary is different from that of the Estate or Trust the amount to be included in the gross income of the beneficiary shall be based upon distributable net income of the Estate or Trust and the amounts properly paid, credited or required to be distributed to the beneficiary during any taxable year or years of the Estate or Trust ending within or with his taxable year." A similar provision is contained in Subdivision 4, Section 365 of the Tax Law.

An estate or trust beneficiary who is a non-resident of New York is taxable upon his distributive net income share only to the extent that it includes net income from rental of property located in New York State, or from business carried on in the State. Whether the estate or trust itself is resident or non-resident has no bearing on the taxability or non-taxability of its income to a beneficiary. (Manual of Policy Income Tax Bureau Art. 245, page 1-8/25/58)

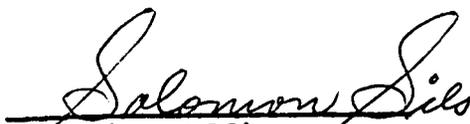
Proposed personal income tax regulations Part 148 Sec. 148.10(f) page 160 provides: "No items of income, gain loss or deduction accrued under this section (referring to Sec. 654(c) of the Tax Law) for the portion of a taxable year prior to a change of residence status are taken into account in determining New York Adjusted Gross Income or the New York itemized deduction of any subsequent taxable period."

I am of the opinion that the taxpayer effected a change of domicile from the State of Illinois to the State of New York on Jan. 13, 1960 the date she actually moved into the apartment in New York City; that she was therefore entitled to accrue the income prior to such change of status and that she was only required to report the taxable income attributable to New York sources within the intent and meaning of Section 654 (c) (2) of the Tax Law.

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

OCT 18 1967

11-9-67

  
Hearing Officer

**STATE OF NEW YORK**

**STATE TAX COMMISSION**

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**IN THE MATTER OF THE APPLICATION** :

**OF** :

**DOROTHY NEWLEY** :

**FOR REVISION OR REFUND OF PERSONAL INCOME** :

**TAXES UNDER ARTICLE 22 OF THE TAX LAW FOR** :

**THE YEAR 1960** :

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The taxpayer having filed an application for revision or 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 at 80 Centre Street, New York, N. Y. on the 16th day of October, 1964 before Solomon Sies, Hearing Officer of the Department of Taxation & Finance, at which hearing the taxpayer was represented by Ernst & Ernst, C.P.A.'s, by Irvin Klopfer, C.P.A. and the matter having been duly examined and considered, the State Tax Commission hereby finds:

(1) That the taxpayer, Dorothy Newley, filed a New York State Income Tax Resident Return for the year 1960 in which she reported Federal adjusted gross income in the amount of \$48,445.51; that on January 17, 1962, the taxpayer filed an application for revision or refund for the year 1960 together with an Amended Income Tax Return for said year claiming a refund in the amount of \$2,989.51 upon the ground that the income reported on her 1960 return represented income which had accrued prior to January 13, 1960 when it is alleged she became a resident of the State of New York and that the aforementioned income was therefore attributable to sources without the State of New York during

the year 1960.

(2) That prior to 1960 the taxpayer was domiciled in Springfield, Illinois; that the taxpayer's husband, William H. Kewley, died on July 26, 1958 a resident of the State of Illinois; that the last will and testament of William H. Kewley, the taxpayer's husband was duly admitted to probate in the Probate Court of Sangamon County, State of Illinois on August 27, 1958; that the taxpayer was duly appointed executrix of the Estate of William H. Kewley and was the sole beneficiary under the last will and testament of her deceased husband; that on December 8, 1959, an order was entered in the Probate Court of Sangamon County, Illinois, authorizing the taxpayer as Executrix of the Estate of William H. Kewley to transfer and assign to herself as residual legatee and devisee all of the property and assets of the Estate except that she was required to retain as such Executrix an amount not less than \$20,000.00 until the approval of the Federal and State Tax Returns and the final closing of the Estate; that all of the assets of the Estate mentioned above were distributed to the taxpayer prior to January 1, 1960.

(3) That the Estate of William H. Kewley was on a fiscal year basis from July 1st to June 30th; that the William H. Kewley Estate filed a United States Fiduciary Income Tax Return for the fiscal year beginning July 1, 1959 and ending June 30, 1960 indicating total income in the sum of \$67,314.97, but reported no taxable income since the income from the estate was distributed during the fiscal year ending June 30, 1960 to the taxpayer, Dorothy Kewley; that the taxpayer filed a United States Individual Income Tax Return for the year 1960 and reported thereon the income distributed to her from the Estate of William H. Kewley;

that the taxpayer reported her income, for tax purposes, on a cash calendar year basis.

(4) That on December 14, 1959, the taxpayer entered into a written lease of an apartment at 55 East End Avenue, New York City for a term of two years and nine months commencing January 1, 1960 and terminating September 30, 1962; that on or about December 31, 1959, the taxpayer departed from Springfield, Illinois for the Bahama Islands to spend a vacation there; that the taxpayer returned to New York City on January 13, 1960 to undertake the furnishing of the apartment she had leased and remained in New York City for the rest of the year 1960; that she conveyed her Illinois dwelling on June 27, 1960; that the taxpayer did not actually remove to the State of New York and maintain a place of abode therein prior to January 13, 1960.

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

DETERMINES:

(A) That the taxpayer effected a change of domicile from Illinois to New York on January 13, 1960 when she actually removed to the State of New York; that the taxpayer became a resident of New York on January 13, 1960.

(B) That the taxpayer was entitled to a modification of Federal Adjusted Gross Income for the year 1960 with respect to the income accrued for the portion of the taxable year prior to the change of residence status pursuant to Section 654(c)(2) of the Tax Law.

(C) That, accordingly, the application for refund for the year 1960 is granted; that there be refunded to the taxpayer the amount of \$2,989.51 together with any interest that may be lawfully due thereon.

AND IT IS SO ORDERED.

Dated: Albany, New York this 27th day of Nov. 1967.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**President**

**Commissioner**

/s/

WALTER MACLYN CONLON

**Commissioner**