Income Tax Determinations 1965
A-Z

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BUREAU OF LAW Shattuck, Frank M.

MEMORANDUM

TO: Commissioners Murphy, Palestin and Macduff

FROM: E. H. Best, Counsel

SUBJECT: MATTER OF SHATTUCK v. STATE TAX COMMISSION

Enclosed herein please find letter of Mr. Robert Bush, Assistant Attorney General, requesting a reconsideration of the determination denying the refund of tax on sick pay paid pursuant to an oral sick pay plan of the employer for the year 1956. Mr. Bush's argument appears to be:

(1) That the 1957 ruling of the State Tax Commission requiring a written plan with reference to the year 1956 was retroactive.

(2) That no writing was required by the employer to constitute a valid and forceful plan and that such plan could be enforceable under equitable principals of quantum meruit.

(3) That the plan should be construed liberally on the basis of policy or constant opinion which the employees had placed reliance.

In view of the Attorney General's opinion that the court would decide this matter in favor of the taxpayer in the interest of substantial justice, I am of the opinion that the proceeding be discontinued and the relief sought by the taxpayer be granted.

Kindly return the entire file which is submitted herewith together with your comments in this matter.

E. H. Best
Counsel

MS:ca
Enc.

November 10, 1965

MATTER OF SHATTUCK v. STATE TAX COMMISSION

I believe the determination of December 12, 1962 and memoranda pertinent thereto are in error. We should rule tax-free the $13,581.25 received as sick pay for the year 1956, and the pending court proceeding should be discontinued. Discontinuance is recommended by the Attorney General.

Error resulted from taxing this payment made under an unwritten obligation by the employer for the extension of sick pay. The company's long-standing unwritten plan of disability pay for office and executive employees was legally enforceable on principles of simple contract. Young v. U. S. Mortgage, 214 N.Y. 279; Weinberg v. Seemon Brothers, Inc., 21 N.Y.S. 2d 187; Church v. Harnit 35 F. 2d 499. In the Harnit case the court said at p. 502:

> "In the instant case there was an express understanding between the corporation and each of the defendants as to additional compensation which is entirely consistent with the also expressed contract as to a minimum compensation. . . It is sufficient if there was a clear and well-defined understanding."

The April 4, 1957 Ruling of the Tax Commission which governs disposition of this case recited that, for exclusion of sick pay benefits under sec. 359, the payment must be made under a bona fide written plan in existence when the disability occurred; that whether or not a plan qualifies is a question of fact and law; a plan approved by the Workmen's Compensation Board under the Disability Benefits Law will be qualified; any other plan will "generally be considered as a qualified plan" if it (1) covers all or a specified class of employees; (2) imposes a legally enforceable obligation to indemnify in case of sickness or injury; (3) establishes the amount, duration and conditions for payment; (4) notice thereof was given the employee at the time he began his employment or prior to the time of his sickness.

These latter conditions will rule qualified a disability plan even though it does not exist in writing. This conclusion is reinforced by the statement at p. 3 of the Ruling:

> "Similarly, any voluntary payments made by an employer to his employee on account of sickness or personal injury, where there is neither an enforceable obligation nor any existing formal plan requiring such payments, do not fall within the purview of this exclusion."

The concepts (1) an enforceable obligation and (2) existing formal plan are in the disjunctive. It is no requirement that for enforceability of contract the plan be in writing. Under the cases above cited, oral agreements for incentive compensation to employees over and above their salaries, even though fixdd by written agreement, are enforceable.

Nor is there invalidity of this unwritten wage extension plan under the Statute of Frauds. Assuming this decedent's employment contract was in writing and in usual agreement form, the custom or oral plan providing wage extension in the event of sickness or disability does not contradict the terms of the employment agreement. Instead, it extends the agreement in accordance with social principles of an enlightened society. There is not presented here such a closeness of subject matter in the writing and the offered parol as to constitute subject identity between them, disqualifying the parol. Mitchell v. Lath, 247 N.Y. 377. The long-continued wage extension plan, applicable to a general class of employees and probably antedating most of their individual contracts, was the proper subject of a general and separate contract relationship between the corporation and its employees.

The determination error should be corrected, pertinent papers to be appropriately executed.

IRA J. PALESTIN
State Tax Commissioner

January 27, 1966