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Income Tax Determination
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BUREAU OF LAW
MEMORANDUM

Startup, Charles H.

Jane H.

TO: **State Tax Commission**

FROM: **Salomon Sica, Hearing Officer**

SUBJECT: **Charles H. and Jane W. Startup**

Petition for Redetermination of a Deficiency or for Refund of Personal Income Taxes Under Article 22 of the Tax Law for the Year 1962.

A hearing with reference to the above matter was held before me at the New York City office on November 9, 1963.

The issues involved herein are: (1) Allocation of a non-resident's salary income earned within and without the state; and (2) whether a lump sum payment received by the taxpayer from his employer constituted wages or severance pay includible in New York income, or whether it represented non-taxable income received in consideration for cancellation of an employment contract.

The taxpayer, Charles H. Startup, a resident of Connecticut, had been employed by American Airlines, Inc. since 1939. He was employed as an executive officer of the corporation assigned to its offices at 633 Third Avenue, New York City. His duties involved the setting of policy and the planning of sales programs, service standards and the training of personnel. He was required to perform work both within and without the State of New York. On June 20, 1962 the taxpayer entered into a written employment agreement with American Airlines, Inc. for a period of two years at an annual salary of not less than \$30,000 per year. The agreement provided, in part, that: "Notwithstanding any other provision of this agreement, American shall have the right to terminate such employment with or without cause on thirty days' written notice to the employee sent to his last known address." In accordance with the aforementioned agreement the taxpayer was paid \$1,250 on the 1st and the 15th of each month from January 1 to September 30, 1962. At that time, due to a reorganization of the employer-corporation, the taxpayer's position was eliminated and his services were terminated on September 30, 1962.

The taxpayer was unemployed during the month of October 1962. He was employed by National Car Rental System in Jackson, Mississippi for a period of 41 working days in November and December 1962, for which he received remuneration amounting to \$4,166.66. The aforementioned services were rendered entirely outside the State of New York and did not constitute wages (See 20 NYCRR Sect. 258.5).

The IT-2102 (New York State Withholding Tax Statement) attached to the taxpayer's non-resident return indicates wages paid by American Airlines, Inc. in 1962 in the amount of \$37,750. The taxpayer allocated this amount on the basis of 365 days and included the 41 days worked outside the state for National Car Rental. He claimed 121 days worked outside the state and the total days worked in the year as 226. The taxpayer submitted a schedule indicating that the actual days worked outside the state for American Airlines, Inc. were 57, which included one Saturday and one Sunday spent in travel. He reported New York income in the amount of \$17,538.72.

The Income Tax Bureau issued a Statement of Audit Changes on November 9, 1964 allocating the salary income of the taxpayer (\$37,750 received from American Airlines, Inc., but excluding the \$4,166.66 remuneration received for services rendered entirely outside the state) on the basis of 273 days worked (January 1 to September 30, 1962). On the basis of information submitted by the taxpayer, it was determined that the number of non-working days was 109, including Saturdays, Sundays, holidays, illness and vacation with pay (See 20 NYCRR Sect. 263.2(b); that the taxpayer performed services for American Airlines, Inc. outside the state for 57 days, which included one Saturday and one Sunday; that the total number of days worked within the state was 107. Applying the formula $107/164 \times \$37,750 = \$24,629.57$, New York income (See 20 NYCRR Sect. 263.2(a)). The deductions were apportioned on the same basis. Additional tax was imposed in the amount of \$581.17 plus interest in the total amount of \$635.86 and a notice of deficiency was issued therefor.

At the hearing the taxpayer contended that on or before September 30, 1962 he had entered into an oral agreement

with American Airlines, Inc., his employer, whereby he was to receive a lump sum payment of \$30,000, of which \$14,000 was to be paid in 1962 and the balance of \$16,000 to be paid in 1963 in consideration for the cancellation of the employment agreement. He stated, at the hearing, that he received a letter from the employer explaining the payments he received; that he would submit a copy of said letter (Minutes of Hearing, p. 9). However, he failed to submit the same. The taxpayer contends that only \$22,500 of the salary he received from American Airlines, Inc. (\$2,500 a month for nine months) was subject to allocation; that the balance was not attributable to New York sources.

Section 632(b)(1)(B) provides that items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to a business, trade, profession or occupation carried on in this state. Subdivision (c) of this section provides for an apportionment and allocation under Regulations of the Tax Commission of items of income, gain, loss and deduction derived from or connected with New York sources if a business, trade, profession or occupation is carried on partly within and partly without this state.

The gross income of all non-resident employees, including corporate officers, except salesmen, includes that portion of the total compensation for services which the total number of working days employed within the state bears to the total number of working days employed both within and without the State of New York. Allowable deductions must be apportioned on the same basis (See 20 NYCRR Sect. 263.2(a); also, Art. 452 Personal Income Tax Regulations Art. 16).

In 20 NYCRR Sect. 258.3 (b) (4) it is stated, in part, that: "Any payments made by an employer on account of dismissal or involuntary termination of employment constitute wages regardless of whether the employer is legally bound by contract, statute or otherwise to make such payments."

I am of the opinion that the lump sum payment in the amount of \$15,250 (\$37,750, as indicated on the IT-2102, less

Charles H. & Jane W. Startup

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\$22,500 - \$2,500 for nine months - in accordance with the employment agreement) constituted wages or severance pay (compensation for past services rendered); that the allocation of the taxpayer's salary income derived from or connected with New York sources was correct and proper.

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

August 14, 1968
SSrwar

SOLOMON SIES
Hearing Officer

9-18-68

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE ESTATE OF

OF

CHARLES H. & JOSEPH W. STARBUCK

**FOR A REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF PERSONAL INCOME TAXES
UNDER ARTICLE 22 OF THE TAX LAW FOR
THE YEAR 1962.**

The above-named taxpayers 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 1962 (File 62-2664434), and a hearing having been held at the office of the State Tax Commission at 60 Centre Street, New York, N. Y. on the 9th day of November, 1962 before Solomon Sica, Esq., Hearing Officer of the Department of Taxation & Finance, at which hearing the taxpayer Charles H. Starbuck appeared personally and was represented by D. Barrion Halstead, Accountant, and the matter having been examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer Charles H. Starbuck, a non-resident, had been employed by American Airlines, Inc. since June, 1939; that in 1960 he became Vice President of Passenger Sales and Services; that on June 20, 1962 the taxpayer entered into a written employment agreement with American Airlines, Inc. for a period of two years in such capacity as may be assigned to him by the Board of Directors or the

president of the corporation at an annual salary of not less than \$20,000 per year; that he was assigned an office at the offices of American Airlines, Inc. at 633 Third Avenue, New York City; that the duties of the taxpayer involved the setting of policy, planning sales programs, service standards and training personnel; that the taxpayer was required from time to time to perform services on behalf of American Airlines, Inc. outside the State of New York; that the agreement provided, in part, that "Notwithstanding any other provision of this agreement, American shall have the right to terminate such employment with or without cause on thirty days' written notice to the Employee sent to his last known address;" that as a result of a reorganization of the employer company, the taxpayer's position was eliminated and his services were terminated on September 30, 1962.

(2) That during the period from January 1 to September 30, 1962 the taxpayer received a salary of \$2,500 per month payable at the rate of \$1,250 on the 1st and 15th of each month; that the taxpayer was unemployed during the month of October, 1962; that he was employed during November and December, 1962, a period of forty-one working days, by National Car Rental Service outside the State of New York (Jackson, Miss.) for which he received remuneration in the amount of \$4,166.66 for services rendered entirely outside the State of New York.

(3) That Charles H. and Jane W. Startup filed a joint New York State income tax non-resident return for the year 1962 in which they reported federal adjusted gross income in the amount of \$41,999.66; that the taxpayer Charles H. Startup claimed an allocation of salary income of \$37,750

earned while employed within the State of New York on the basis that he worked 236 days during the year, of which he was required to work 186 days outside the State of New York; that said taxpayer in the computation of the allocation formula used a base of 265 days and included the 41 days employed entirely without the State but excluded the remuneration received therefrom; that the taxpayers reported New York income in the amount of \$17,738.72.

(4) That on November 9, 1964 the Department of Taxation and Finance issued a Statement of Audit Changes adjusting the income tax of the taxpayers to reflect income allocable to New York State based upon earnings in the amount of \$37,750 paid by American Airlines, Inc. from January 1, 1962 to September 30, 1962 or a total of 272 days derived from or connected with New York sources but excluded the remuneration paid the taxpayer in the amount of \$4,166.66; that the taxpayer Charles H. Startup was credited with 27 days worked outside New York State, which included one Saturday and one Sunday in accordance with the information submitted by him; that the total of non-working days including Saturdays, Sundays, holidays, illness and vacation with pay was 107; that the total number of days worked in New York State was 164; that the taxpayer's salary income was apportioned or allocated on the basis that it included that portion of the total compensation for services which the total number of working days employed within the State bears to the total number of days employed both within and without the State of New York; that allowable deductions were apportioned on the same basis; that the New York income of the

taxpayer was recomputed at \$24,629.57, finding a deficiency of taxes and interest in the amount of \$635.66.

(5) That at the hearing the taxpayer claimed that on or before September 30, 1962 he entered into an oral agreement with American Airlines, Inc., whereby he was to receive a lump sum payment of \$30,000 in consideration for the cancellation of his employment contract, payable in the amount of \$14,000 in 1962 and the balance of \$16,000 in 1963; that he received a letter from the aforementioned employer explaining the arrangement; that although he was requested to submit a copy of said letter, he failed to do so; that the taxpayer contends that the lump sum payment received by him in 1962 should not be included as wages or income attributable to the State of New York.

(6) That the lump sum payment received by the taxpayer from American Airlines, Inc. in 1962 amounted to \$15,250 (the difference between \$37,750 as shown on N.Y.S. Withholding Tax Statement and \$22,500, the actual wages paid to him for nine months at the rate of \$2,500 per month); that the taxpayer rendered no services to American Airlines, Inc. after September 30, 1962; that the aforementioned lump sum payment constituted wages or severance pay representing compensation for past services rendered.

Based upon the foregoing findings and all of the evidence presented herein,

The State Tax Commission hereby

DECIDES:

(A) That the salary income of the taxpayer received from American Airlines, Inc. in 1962 was derived

from or connected with New York sources in accordance with the provisions of Section 632(b)(1)(B)(c) of the Tax Law; that the lump sum payment included therein constituted wages or compensation for past services rendered; that the apportionment or allocation of the taxpayer's salary income as more fully set forth in Finding (4) above was proper and correct.

(B) That, accordingly, the Notice of Deficiency issued against the taxpayers for the year 1962 is correct and does not include any tax or other charge which could not have been lawfully demanded; that the taxpayers' petition for redetermination of a deficiency or for refund filed with respect thereto be and the same is hereby denied.

Dated: Albany, New York, the 19 day of Sept. , 1966.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

J. BRUCE MANLEY

Commissioner

Commissioner