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MEMORANDUM

Income Tax Determination
McCarthy, Helen D. A-Z
+ Est. by J. M. G.

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: Helen D. McCarthy, Individually and as
Executrix of the Estate of William G.
McCarthy

Petition for Redetermination of a
Deficiency or for Refund of Personal
Income Taxes under Article 22 of the
Tax Law for the Year 1963

A formal hearing was held in the above-captioned matter at the New York City office on October 14, 1963.

The primary issue involved herein is whether or not the decedent, William G. McCarthy, a nonresident, was entitled to an allocation of income for the year 1963.

William G. McCarthy had been employed by the New York Telephone Company until October 31, 1960 when he reached the compulsory retirement age of 65. Prior to his retirement Mr. McCarthy was an assistant vice president of the New York Telephone Company and its registered legislative representative receiving an annual salary of about \$40,000 per annum. His duties consisted of attending sessions of the New York State Legislature at Albany, New York and advising and assisting the Company with respect to any proposed or pending legislation by which it might be affected. Upon retirement, the decedent taxpayer received a non-contributory pension from the New York Telephone Company of about \$7,500 per annum. On November 1, 1960 the decedent was retained by the New York Telephone Company as a consultant and registered legislative representative on a retainer fee basis, performing duties similar to those performed by him prior to his retirement. His compensation was the difference between the pension payments and the salary received prior to retirement. During the year 1963 the decedent attended legislative sessions at Albany, New York in the months of January, February and March and remained in Albany from Monday through Wednesday and then returned to his home in Connecticut. The Company reimbursed the decedent for expenses while in Albany.

In the latter part of 1962 the decedent became ill. However, he continued with his duties as legislative representative for the New York Telephone Company. In June 1963, he was confined to the Neurological Institute in New York City for two weeks. He was again confined to the same hospital for two weeks. His illness continued until the date of his death on February 25, 1964. The New York Telephone Company paid the decedent his regular compensation during his illness and said payments were charged to "departmental expenses" on the books of the Company. The remuneration paid to the decedent for 1963 was reported as fees by the Company on Form IT 2102.1.

Helen B. McCarthy individually and as Executrix of the Estate of William S. McCarthy, deceased, filed a non-resident return for 1963 in which she indicated total wages received by the decedent from the New York Telephone Company as reported on the Federal return for said year in the amount of \$33,800, of which 25% or \$8,450 was allocated to New York sources. Interest income of \$1,195.57 and pension income of \$7,340.92 were reported for Federal income tax purposes but were excluded from New York income. Adjusted itemized deductions were claimed in the amount of \$3,932.23 of which 25% or \$983.06 was attributable to New York sources. On the State return it was stated that the decedent worked three months in New York and then became disabled. On Form IT-2332 (Questionnaire as to claim for allocation of personal compensation--Tax Commission Exhibit C) it was stated that the decedent performed no services outside the State of New York. See also affidavit of Executrix submitted to Social Security Administration (Taxpayer's Exhibit 1).

On January 4, 1965 a Statement of Audit Changes was made adjusting the tax of the taxpayers so as to include the entire wages of the decedent in the amount of \$33,800 less maximum sick pay exclusion of \$3,520 so that the total wages for New York State tax purposes amounted to \$30,280. An adjustment was also made allowing New York itemized deductions in the amount of \$2,812.42. Interest income and pension payments were excluded from the recomputation although the file contains no information with respect to the treatment of the pension payments. It appears most likely that the Income Tax Bureau determined that the pension constituted an annuity not taxable to a nonresident in accordance with the provisions of Reg. 20.2031-4(d). Additional tax was imposed in the amount of \$940.79 including interest and a notice of deficiency issued therefor.

The Executrix claims that the remuneration received by the decedent for the period from April 1, 1963 to December 31, 1963 was not attributable to New York sources but was a gift or bonus since the taxpayer performed no services within the State of New York during such period; that, in the alternative, the decedent was entitled to an allocation of income on the ground that he performed services at his home in Connecticut consulting with the officers and officials of the New York Telephone Company by phone.

In Duberstein v. Commissioner and Stanton v. U. S. 363 U.S. 378, the Supreme Court held that what constituted a gift for income tax purposes is not to be decided under common law doctrine, but that the term "gift" is used in the Federal income tax law in a more colloquial sense. The court laid down certain broad guide lines for the fact-finder which are summarized in U. S. v. Masynski, 284 F. 2d 143. The court there stated as follows:

" * * * Supreme Court in Duberstein did recognize certain guiding principles which should be applied to the facts in determining whether there was a gift. A transfer without consideration is not necessarily a gift within the meaning of the statute. If the payment proceeds primarily from the impulsion of a moral or legal duty or from the incentive of an anticipated economic benefit, it is not a gift. If the transfer results from 'detached and disinterested generosity' arising 'out of affection, respect, admiration, charity or like impulses,' it is a gift. The most critical consideration is a transferor's intention. This requires an objective inquiry in which the hopes and expectations of tax treatments are immaterial. The proper criterion requires determination of the dominant reason for the transfer."

I am therefore of the opinion that no part of the compensation received constituted a gift since the compensation was given for service to be rendered and actually rendered by the taxpayer prior to his illness.

A question arises as to whether the decedent taxpayer was an employee or engaged in his own business. Section 632(c) of the Tax Law provides that if a business, trade, profession or occupation is carried on partly within and partly without this State, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation. Reg. 20.131.4(b) provides, in part, that "A business, trade, profession

or occupation (as distinguished from personal services as an employee) is carried on within the State by a nonresident when he occupies, has, maintains or operates desk room, an office, a shop, a store, a warehouse, a factory, an agency or other place where his affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without the State. * * * If a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for his income or part thereof, he is carrying on a business or occupation. * * * If the decedent taxpayer were engaged in his own business, his entire net income could very well be subject to tax without allocation for the following reasons: (a) he maintained no place of business outside the State; (b) he systematically and regularly carried on his business at Albany, N. Y. If the decedent taxpayer were deemed to have been engaged in his own business, he would also be subject to unincorporated business tax.

I am of the opinion, however, that the decedent taxpayer was an employee, since his activities on behalf of the New York Telephone Company were almost identical prior to and after his retirement, despite the arrangement regarding him as a "consultant". I am of the further opinion that the place of the decedent taxpayer's employment was at Albany, N. Y. or the Telephone Company's New York City offices and that the decedent taxpayer performed no services on behalf of the New York Telephone Company outside the State of New York or if he performed any such services, such as phone calls to officials of the Company, they were performed for his greater convenience in accordance with the decision of Burke v. Buzgalini, 10 A 2d 634.

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

SOLOMON SIES

DRAFTING OFFICE

SS:sc

November 21, 1968

Sent to Commission 1/15/69

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION :
OF :
HELEN D. McARTHUR :
INDIVIDUALLY AND AS EXECUTRIX OF THE :
ESTATE OF WILLIAM G. McARTHUR DECEASED :
FOR A REDETERMINATION OF A DEFICIENCY :
OF PERSONAL INCOME TAXES UNDER ARTICLE :
22 OF THE TAX LAW FOR THE YEAR 1963 :

Helen D. McArthur individually and as Executrix of the estate of William G. McArthur, deceased, 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 1963 at a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, New York on the 14th day of October, 1963 before Solomon Sles, Hearing Officer, of the Department of Taxation and Finance, at which hearing the taxpayer, Helen D. McArthur, appeared personally and was represented by Henry T. Nicholas, CPA, and the matter having been examined and considered,

The State Tax Commission hereby finds:

(1) That during the year 1963 William G. and Helen D. McArthur were nonresidents of the State of New York residing at 3 Putnam Hill, Greenwich, Connecticut; that William G. McArthur died on February 25, 1964; that Helen D. McArthur, individually and as Executrix of the estate of William G. McArthur, deceased, filed a New York State income tax return for the year 1963 in which she indicated total wages received by the decedent William G. McArthur from the New York Telephone Company as reported on the Federal return for said year in the amount of \$33,800, of which 25% or \$8,450 was allocated to New York sources; that income

interest in the amount of \$1,195.57 and pension income in the amount of \$7,340.92 were reported for Federal income tax purposes but were excluded from New York income; that adjusted itemized deductions were claimed in the amount of \$3,932.83 of which \$35 or \$784.48 was attributable to New York sources; that on the New York State return it was stated that the decedent worked three months in New York and then became disabled.

(2) That on January 4, 1963 the Department of Taxation and Finance issued a Statement of Audit Changes against the taxpayers for the year 1963 disallowing the allocation of wages claimed and holding that the decedent's entire wages less maximum sick pay exclusion in the amount of \$3,520 or \$30,280 was attributable to New York sources; that the itemized deductions were prorated so that New York itemized deductions were allowed in the amount of \$2,812.42; that additional tax was imposed in the amount of \$901.76 with interest of \$39.03 for a total of \$940.79; that accordingly, a Notice of Deficiency was issued therefor.

(3) That the decedent William G. McCarthy had been employed by the New York Telephone Company until October 31, 1960 when he reached the compulsory retirement age of 63; that prior to his retirement the decedent was an assistant vice president of the New York Telephone Company and its registered legislative representative receiving an annual salary of approximately \$40,000 per annum; that his duties consisted of attending sessions of the New York State Legislature at Albany, New York and advising and assisting the Company with respect to any proposed or pending legislation by which it might be affected; that upon his retirement the decedent taxpayer received a non-contributory pension from the New York Telephone Company of approximately \$7,500 per annum; that on November 1, 1960 the decedent was retained by the New York

Telephone Company as a consultant and registered legislative representative on a retainer fee basis performing duties similar to those performed by him prior to his retirement; that his compensation was the difference between the pension payments and the salary or wages received prior to retirement.

(4) That during the year 1963 the decedent taxpayer attended legislative sessions at Albany, New York in the months of January, February and March and remained in Albany from Monday through Wednesday and then returned to his home in Connecticut; that the decedent taxpayer was reimbursed by the Company for his expenses while in Albany, New York; that in the latter part of 1962 decedent became ill but continued, however, with his duties as legislative representative for the New York Telephone Company; that in June 1963, he was confined to the Neurological Institute in New York City for about two weeks; that he was again confined to the same hospital for about two weeks in August, 1963; that his illness continued until the date of his death on February 23, 1964; that the New York Telephone Company paid the decedent his regular compensation during his illness and said payments were charged to "departmental expenses" on the books of said Company; that the remuneration paid to the decedent in 1963 was reported as fees by the Company on Form IT 2102.1.

(5) That the Executrix claims that the remuneration received by the decedent from the New York Telephone Company during the period in which said decedent rendered no services (after March 31, 1963) represented a nontaxable gift; that in addition thereto, the Executrix claims that the compensation paid to the decedent should be allocated on the ground that decedent performed services on behalf of the New York Telephone Company at his home in Connecticut; that the Executrix submitted a statement to the Social Security

Administration in which she stated that the only months the decedent rendered services in 1963 were January, February, and March (Taxpayer's Exhibit No. 1); that there was also submitted a questionnaire with reference to allocation of personal compensation (Form IT 2332) in which it was stated that the number of days worked outside the State of New York by decedent was "none" (Tax Commission's Exhibit C).

(6) That the services performed by the decedent taxpayer were performed in Albany, New York; that no part of said services was performed by the decedent taxpayer on behalf of the New York Telephone Company outside the State of New York during the year 1963; that if any services were performed by him at his home in Connecticut such services were performed for his greater convenience.

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

DECIDES:

(A) That during the year 1963 the decedent taxpayer was an employee of the New York Telephone Company and the remuneration received by him was not a gift but was salary income.

(B) That the decedent taxpayer was not entitled to an allocation of salary income since the total amount of such income was derived from or attributable to New York sources within the intent and meaning of section 612 of the Tax Law.

(C) That there was no necessary ingredient required by the nature of the services performed by the decedent taxpayer which necessitated the State of Connecticut or the home of the decedent taxpayer as the locus for performance; that such services were performed by him at his home for his greater convenience and the income therefrom was attributable to services rendered within the State of New York in accordance with the provisions of section 632(c) of the Tax Law.

(D) That the remuneration received by the decedent taxpayer during the period of his illness was derived from or attributable to New York sources; that the decedent was properly credited with maximum sick pay exclusion.

(E) That accordingly, the statement of audit changes and Notice of Deficiency are correct; that they do not include any tax or other charge which could not have been lawfully demanded and that the petition of the taxpayer for redetermination of a deficiency or for refund of personal income taxes for the year 1953 be and the same is hereby denied.

Dated: Albany, New York this 24th day of January , 1958⁹.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

~~Commissioner~~

/s/

A. BRUCE MANLEY

~~Commissioner~~

~~Commissioner~~