July 24, 1962

4

Honorable Walter Jenkins
Administrative Assistant
Office of the Vice President
Washington, D. C.

Dear Mr. Jenkins:

The District of Columbia Income and Franchise Tax Act of 1947 (61 Stat. 331; D.C. Code § 47-1551) imposes, with the usual exemptions, taxes upon the entire income of residents of the District. However non-residents are taxed only upon certain income derived from sources within the District (D.C. Code §§ 47-1567, 1574, 1580). Section 4(t) of the Act (D.C. Code § 47-1551c(t) defines the word "nonresident" to mean "every individual other than a resident." As amended in 1949, Section 4(s) defines "resident", but provides in pertinent part:

> "* * *. The word 'resident' shall not include any elective officer of the Government of the United States or any employee on the staff of an elected officer in the legislative branch of the Government of the United States if such employee is a bona fide resident of the State of residence of such elected officer, * * *." (D.C. Code § 47-1551c(s))

You have sent me a copy of a letter dated June 6, 1962, to the Board of Commissioners of the District of Columbia from Robert A. Brenkworth, Financial Clerk, United States Senate, in which he concludes that the employees on the staff of the President of the Senate are not "residents" within the meaning of the section and have inquired whether I agree with this conclusion.

I do agree with the conclusion reached by Mr. Brenkworth because (1) the quoted language of Section 4(s) is

adequate to cover such employees on the staff of the Vice President and nothing in the legislative history is to the contrary, (2) the pattern of congressional treatment of the Vice President has been to treat him as being in the legislative branch, and (3) the administrative construction of Section 4(s) to date has been to treat employees on the staff of the Vice President as non-residents. In this connection it may be noted that the employees involved in the inquiry are those who are employed to aid the Vice President in carrying out the functions of the office conferred upon him by the Constitution. The Vice President has in recent years been given duties in addition to those so conferred./1/ However, no employees of government bodies in connection with which the Vice President exercises functions conferred upon him by statute or Executive order are involved in the inquiry.

13 I

The Vice President is, of course, elected. The question presented is therefore whether he is an "officer in the legislative branch." This question would appear to be squarely answered by Article I, Section 3, Clause 4 of the Constitution which states that "The Vice President of the United States shall be President of the Senate, * * *."/2/

1/ The Vice President has by statute been made Chairman of the National Aeronautics and Space Council (42 U.S.C. 2471(a)) and a member of the National Security Council (50 U.S.C. 402(a)). In addition, Executive Order No. 10925 of March 6, 1961 (26 F.R. 1977, March 8, 1961) designates him Chairman of the President's Committee on Equal Employment Opportunity.

2/ The functions of the Vice President as President of the Senate are significant and varied. For example, he refers bills to the committees as endorsed by their sponsors, although these references may be changed upon sponsor objection where the Senate assents. George H. Haynes, The Senate of the United States, Vol. 1, 211 (1960). For many years he has exercised control of the members of the Senate in maintaining order, and it is his duty to main-

The clause also confers upon him the right to vote in the event of an equal division in the Senate. He is thus made an officer of the Senate and given a right to vote in certain circumstances. It would reasonably follow that he is "in the legislative branch."

It is true that upon the death of the President or upon the occurrence of inability the Vice President assumes the powers of the Presidency and thereafter exercises the executive powers. But Article I, Section 3 of the Constitution deals with this situation in the same way it deals with an "absence of the Vice President," providing that the Senate shall then choose "a President pro tempore." Accordingly, it seems difficult to conceive that an officer whose only constitutional function, when the President is capable of exercising the Executive power, is to preside over the Senate and to vote, and who is treated in the same way as if he were absent when he exercises the powers of the Presidency is not "in the legislative branch."

It may be conceded that certain aspects of the Vice Presidency distinguish him from others in the legislative branch. For example, the office is created by Article II, dealing with the executive branch, and Section 4 of that article makes the Vice President, like the President, subject to impeachment. So too, Clauses 1 and 2 of Article I, Section 5 of the Constitution provide that each House shall be the judge of the elections, returns and qualifications of its own members and may punish and expel them; and these clauses do not apply to the Vice President. 3/

2/ (continued)
tain order in the gallery. Id. 215-216. He also maintains considerable control in recognizing who shall be permitted to speak, since by Senate rules a Senator desiring to speak may not proceed until he is recognized, and the decision of the Vice President on this score is, as a result of precedent, free from appeal. Id. 216-217. Moreover, he decides questions of order as to breaches of the Senate's rules of procedures. Id. 218.

3/ This may explain the reason for making the Vice President subject to impeachment.

These provisions, however, indicate what may be admitted--that the Vice President has a unique status in the legislative branch. They do not indicate that he is not "in" it. Indeed, from the very beginning of the Nation, the office of Vice President has been considered as being in the legislative branch. This has been manifested in many ways, only several of which need be cited here.

For example, John Adams not only presided as President of the Senate, but also actively participated in its debates. /4/ When approached by the President to undertake a mission to England in 1794, Adams rejected the suggestion on the grounds that the Constitution required him to preside over the Senate. /5/ This precedent in turn was followed when Adams requested Jefferson as Vice President to go to France on a diplomatic mission. /6/ Jefferson considered his office "as constitutionally confined to legislative functions." /7/ Although Adams on one occasion, while the President was away, sat with the Cabinet and took active part in discussion, this was the single exception to the rule. When he became President he did not invite the Vice President to sit in the Cabinet, and for nearly one hundred and forty years thereafter this was the practice. /8/

It is true that in recent years the Vice President has attended Cabinet meetings and has had conferred upon him functions by the President or the Congress in addition to those provided for in the Constitution. /9/ Nevertheless, in the opinion of statesmen and scholars expressed in the last several years the office of Vice President remains in the legislative branch. This was manifested particularly at hearings held in 1956 on proposals to

---

4/ Haynes, Op. cit. supra Note 2, 208.
5/ Williams, The Rise of the Vice Presidency, 25 (1956).
6/ Id.
7/ Haynes, supra Note 2, 223.
8/ Id.
9/ Footnote 1, supra.

create an Administrative Vice President. Several witnesses, including former President Hoover, Clark Clifford, formerly Special Assistant to President Truman, Dr. John Steelman, formerly the Assistant to President Truman, and Senator John L. McClellan of Arkansas were in agreement that the Vice President constitutionally "is in the legislative branch of the Government." /10/ One of the major objections to the proposal creating an Administrative Vice President by statute was that this change, which would move him from the legislative branch "where he now is" to the executive branch, would take a constitutional amendment. /11/

Nothing in the House or Senate Reports or in the hearings on the 1949 amendment of Section 4(s) suggests that employees on the staff of the President of the Senate were intended to be treated less favorably than those of the staff of each individual Senator and Congressman. /12/ In

/10/ Senate Report No. 1960, 84th Cong., 2d Sess. 7-8 (1956); Hearings before the Subcommittee on Reorganization of the Committee on Government Operations, U.S. Senate, 84th Cong., 2d Sess., On Proposal to Create Position of Administrative Vice President (1956), Testimony of Mr. Hoover, p. 8; Senator McClellan, p. 18; Mr. Clifford, p. 57; Mr. Steelman, p. 87.

/11/ Id. p. 7.

/12/ The Senate Report on this amendment merely restated the words of the statute in this language (S. Rept. No. 260, 81st Cong., 1st Sess., 1949, p. 12):

> "The bill provides that the word 'resident' shall not include any elective officer of the Government of the United States or any employee on the staff of an elective officer in the legislative branch of the Government of the United States if such employee is a bona fide resident of the State of residence of such elected officer, * * *."

The House Report repeated in substance the Senate Report (H. Rept. 315, 81st Cong., 1st Sess., 1949, pp. 6-8). The hearings on the 1949 Amendment do not appear to touch on the problem. Hearings before the Joint Subcommittee on Fiscal Affairs of the Committees on the District of Columbia, Congress of the United States, 81st Cong., 1st Sess. on H.R. 1937 (1949).

describing the proposed amendment to Section 4(a), Senator Hunt, sponsor of the bill and Chairman of the Committee drafting it, said on the Senate floor (95 Cong. Rec. 5868):

10 "Exempt from the provisions of this bill are also employees on the staffs of elected officers of the legislative branch of the Federal Government, if such employee is a bona fide resident of the State of residence of such elected officer. This wording was designed to exempt those employees in the offices of Members of Congress who are in Washington solely by virtue of employment in our respective offices."

No further reference was made to the subject in the course of the debate.

From Senator Hunt's references to "employees in the offices of Members of Congress", it might be argued that the exemption was not intended to extend to employees of the Vice President, who is not strictly a member of Congress. But it is to be doubted that in using this phrase Senator Hunt meant to convey the view that the words "employees on the staff of an elected officer in the legislative branch" and the language of the House and Senate Reports which used similar language, were intended to have a restricted meaning. Rather, the Senator, after repeating the substance of the language of the bill and the reports, merely gave an example of the most numerous class intended to be affected. This does not imply an intention to exclude others, such as employees of the President of the Senate, who would normally be thought to be covered by the language.

13 II

This conclusion is reinforced by the fact that Congress has had a long history of treating the Vice President as being in the legislative branch and his employees as being on the staff of an officer of that branch. Mr. Brenkworth observed in his letter (p. 6):

"* * * the employees of the Vice President * * *, are defined as Congressional employees by the Civil Service Retirement Act, [13] are paid from appropriation in the Legislative Branch Appropriation Act, and are listed as Senate employees in the publication of salaries required by Senate Resolution 139, 86th Congress."

Congress has recognized the position of the Vice President in the legislative branch by granting to him, as President of the Senate, benefits and privileges enjoyed by members of the Senate or House. These include, among others, mileage fees, 2 U.S.C. 43a (1958); air-mail and special-delivery postage allowances, 2 U.S.C. 42a (1958); long distance telephone calls, 2 U.S.C. 46d-1 (1958); stationery allowances, 2 U.S.C. 46a (1958); use of the Senate's recording studio, 2 U.S.C. 123b (1958); the right to send official correspondence as franked mail, 39 U.S.C. 4161 (Supp. II, 1959-1960); and to receive public documents as franked mail, 39 U.S.C. 4162 (Supp. II, 1959-1960). So too, the lump-sum appropriated by Congress for reimbursement for franked mailings covers mail both of members of the Congress and the Vice President. 39 U.S.C. 4167 (Supp. II, 1959-1960). Furthermore, the term "Member" for the purposes of the Civil Service Retirement Program, 5 U.S.C. 2251(b) (1958), means "the Vice President, a United States Senator, Representative in Congress * * *."

It seems unlikely that Congress, having consistently chosen to treat the Vice President and his staff in a manner similar to members of the House and Senate and their staffs, would determine to treat his staff differently for tax purposes. In the absence of either language in Section 4(a) or legislative history compelling such a conclusion, it would be incongruous to read an intent to discriminate into the provision.

[13] Under the Civil Service Retirement Program, the term "congressional employee" is defined to mean not only employees of the members of Congress, but also "an employee of the Vice President if such employee's compensation is disbursed by the Secretary of the Senate." 5 U.S.C. 2251(c).

III

Finally, in determining the meaning of a statute, courts give weight to an established administrative interpretation of a statute which has been consistently followed. Commissioner v. Estate of Sternberger, 348 U.S. 187, 199. If, therefore, the Income and Franchise Division of the District of Columbia had asserted from the time of the adoption of the Act that employees on the staff of the Vice President were residents under Section 4(s), it might be difficult lightly to dismiss such a construction. Commissioner v. Estate of Sternberger, supra, 348 U.S. at 199.

Here, however, the contrary has been the case. We are advised that this is the first year since enactment of the amended statute in 1949 that it has been suggested that the term "resident" in Section 4(s) applies to employees on the staff of the Vice President. Failure to take a contrary position for almost twelve years should be regarded as manifesting substantial acceptance of the interpretation that the term "resident" in Section 4(s) does not embrace employees on the staff of the President of the Senate.

In accordance with your request, Mr. Brenkworth's letter is enclosed herewith.

Sincerely,

Harold F. Reis
Acting Assistant Attorney General
Office of Legal Counsel