1. *Canons of Professional Ethics*, Canon 5. See also *State v. Farrell*, 61 *N.J.* 99, 104 (1972).
2. Note, "Prosecutorial Discretion," 1 *Crim. Just. Q.* 154 (1973). See *e.g.*, *United States v. Cox*, 342 F. 2d 167 (5 Cir. 1965); *Moses v. Kennedy*, 219 *F. Supp.* 762 (D.D.C. 1963); *Pugach v. Klein*, 193 *F. Supp.* 630 (D.D.C. 1961).
3. *N.J.S.A.* 2A:158-5.
4. *State v. Winne*, 12 *N.J.* 152, 174 (1973).
5. *State v. LaVien*, 44 *N.J.* 323, 327 (1965).
6. *Id.*
7. *State v. Winne, supra* at 174.
8. *Id.*
9. See, *e.g.*, A.B.A. Project on Standards, "The Prosecution Function and the Defense Function," §3.4 (Tent. Draft 1971).
10. *State v. Winne, supra* at 171.
11. *Id.*
12. See *e.g.*, *State v. Zimmelman*, 62 *N.J.* 279 (1973); *State v. Hampton*, 61 *N.J.* 250 (1972); *State v. States*, 44 *N.J.* 285 (1965); *Kingsley v. Wes Outdoor Advertising Co.*, 59 *N.J.* 182 (1971); *State v. Reed*, 34 *N.J.* 554 (1961); *State v. Covington*, 113 *N.J. Super.* 229 (App. Div. 1961), aff'd 59 *N.J.* 536 (1971); *State v. White*, 105 *N.J. Super.* 234 (App. Div. 1969); *State v. Milano*, 94 *N.J. Super.* 337 (App. Div. 1967).

April 6, 1976

HONORABLE RICHARD LEONE
State Treasurer
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 12—1976

Dear Treasurer Leone:

The Division of Taxation has asked whether income derived by authors in the form of royalties paid for rights to utilize their writings is subject to taxation under N.J.S.A. 54:8B-1 *et seq.*, enacted as L. 1975, c. 172, and known as the "Tax on Capital Gains and Other Unearned Income Act." It is our opinion that royalty payments taxable under the Act include only royalties derived from a taxpayer's investment of his capital and do not include payments derived from property which has been created by a taxpayer's personal efforts.

Section 3 of the Act (N.J.S.A. 54:8B-3) imposes a tax upon "unearned income," which is defined in Section 2 (N.J.S.A. 54:8B-2) to consist of certain enumerated categories of income:

> " 'Unearned income' means dividends, gains from the sale or exhange of capital assets, interest, royalties, income from an interest in an estate or trust pursuant to regulations of the director and compensation derived from a partnership or corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for personal services actually rendered."

The term "royalties" is also defined in Section 2:

> " 'Royalties' means gross royalties as defined by regulations of the director consistent with those prescribed for Federal income tax purposes, less deductions allowed which are attributable to property held for the production of the royalties."

The ordinary and usual definition of the term "royalty" is a share of the product or profit reserved by the owner for permitting another to use property. 77 C.J.S., *Royalty.* Broadly speaking, royalty payments to authors (and also to inventors or others) for the license to utilize property created by the personal efforts of the one receiving payment would fall within the definition of the term royalty. See generally *American Photocopy Equipment Co. v. Ampto, Inc.,* 82 N.J. Super. 531 (App. Div. 1964); *LeDuc v. J.T. Baker Chemical Co.,* 23 N.J. Super. 28 (App. Div. 1952); *Pargman v. Maguth,* 2 N.J. Super. 33 (App. Div. 1949). In addition, such payments would be treated as royalty income, includable in gross income under § 61(6) of the Internal Revenue Code. Income Tax Reg. § 1.61-8. The present issue arises because the terms of the Act subsume royalty income under the general denomination of "unearned income." Since for some purposes having relevance to federal taxation, royalty income to those whose personal efforts created the property upon which the royalty is paid is considered to be "earned" rather than "unearned" income,* the question is posed whether such royalty payments are taxable under the Act. An examination of the provisions of the Act in their total context, in light of the apparent legislative purpose, leads to the conclusion that such forms of royalty payments are not taxable.

Initially, royalty income is included in taxable income under § 2 of the Act, *supra,* together with five other categories of income, all of which are the character of a return upon capital rather than a product of individual effort. The meaning of one of such a series of statutory terms is to be derived in the light of the other terms in the series, according to the familiar rule of *noscitur a sociis.* 2A *Sutherland on Statutory Construction* (4th ed.), § 47.16, p. 101. *Ford Motor Co. v. Dept. of Labor and Industry,* 5 N.J. 494, 502 (1950). It would therefore be a fair inference that in imposing a tax on royalty income under Section 3, the Legislature intended to include only those forms of royalty income which represent investment income or a return on capital.

The Act's title and structure give additional support for this conclusion. The Act is entitled "An act imposing a tax upon capital gains and other unearned income and supplementing Title 54 of the Revised Statutes." Section 1 of the Act (N.J.S.A. 54:8B-1) provides that the statute "shall be known and may be cited as the 'Tax on Capital Gains and other Unearned Income Act.' " While the title of a statute may not operate to limit or enlarge upon the plain meaning of the statute's language, it may be of resort in discovering the legislative meaning of particular ambiguous provisions. *St. John the Baptist Greek Catholic Church v. Gengor,* 121 N.J. Eq. 349, 353 (E. & A. 1937); *Pancoast v. Director General of Railroads,* 95 N.J.L. 428, 431 (E. & A. 1921); *Swede v. Clifton,* 39 N.J. Super. 366 (App. Div. 1956), aff'd 22 N.J. 303 (1956).

In its enactment of this statute, the Legislature chose the concept of "unearned" income to signify the character of income subject to taxation. Section 3 specifically *imposes* the tax upon "unearned" income. The title of the statute speaks of a tax

on capital gains and "*other* unearned income." Capital gains, of course, are clearly the product of invested capital. The title therefore reinforces the inference that the other unearned income subject to taxation is of that same general character. Cf. *Transcontinental Gas Pipe Line Corp. v. Dept. of Conservation and Economic Development,* 43 N.J. 135, 145-46 (1964); *DeFazio v. Haven Savings and Loan Ass'n.,* 22 N.J. 511, 518 (1956).

Section 2 of the Act provides that the director shall define royalties subject to taxation by regulations consistent with those prescribed for federal income tax purposes. Payments to authors or others for the license to use property created by their individual efforts are not generally treated as a form of unearned income for federal income tax purposes. See *Internal Revenue Code* §§ 401(c)(2)(C) and 1348(b), noted *supra,* and Regulations thereunder. Although the Act's definition of taxable royalties does not explicitly require the director to follow federal categories of earned or unearned income, the full statutory content of the Act, in light of its apparent underlying purpose, strongly suggest that the Legislature did not intend to subject to taxation those royalty payments received for the license to use property created by the individual efforts of the licensor.

Exclusion of this form of royalty from the purview of the Act is furthermore supported by the general rule of construction that any doubt as to the reach of a tax imposition provision should be resolved in favor of the taxpayer. *Kingsley v. Hawthorne Fabrics, Inc.,* 41 N.J. 521, 528-29 (1964). Application of this general rule to the present matter where the express intention of the Legislature to tax is not clearly manifested on the face of the Act would appear to be appropriate.

You are therefore advised that payments to authors or others for the license to use property created by their individual efforts are not subject to taxation as "royalties" under the Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* E.g., § 401(c)(2)(C) of the Internal Revenue Code would appear to include in the definition of earned income applicable to the qualification of pension plans under § 401 royalties paid both to authors and inventors. Similarly, under § 1348, such income is subject to taxation as earned income at a rate not to exceed 50%.