

Bernard, Anne V. ^{A-2}

Commissioners Murphy, Palestin & Macduff

Solomon Sies, Hearing Officer

ANNE V. BERNARD

**Applications for Refunds of
Personal Income Taxes for the
years 1955, 1956 and 1957 under
Article 16 of the Tax Law**

A hearing with reference to the above matter was scheduled before me at 80 Centre Street, New York, N. Y. for February 2, 1965. The taxpayer defaulted in appearance at such hearing. The taxpayer and her representative failed to respond to subsequent letters affording them an opportunity to request a rescheduled hearing.

The issue involved herein is whether certain payments received by the taxpayer as beneficiary under employment contracts entered into between her late husband and his employers constituted payments made by reason of the death of an employee taxable pursuant to §359, subd. 2.a. (2) of the Tax Law, as amended by Chapter 629, Laws of 1956 applicable to returns commencing with the calendar year January 1, 1955.

On January 20, 1945, the taxpayer's late husband J. E. Bernard entered into written agreements with two corporations, J. E. Bernard & Co., Inc., a corporation organized under the State of Illinois and J. E. Bernard & Co. Inc., a domestic corporation, having its principal place of business in the City and State of New York whereby death benefits were to be paid by both corporations to his wife (the taxpayer) and their children upon his death in an annual sum not to be less than the total salary and bonus paid to him during the calendar year preceding his death for a period of two years following such death. The agreements further provided that the corporations would pay the taxpayer an annual sum to be determined by the Board of Directors of said corporations but that said sums were not to be less than one-half (1/2) of the amount paid to the taxpayer's deceased husband during the calendar year preceding his death.

To: Commissioners Murphy, Palestin & Macduff
Re: Anne V. Bernard

-2-

The taxpayer's late husband did not possess, prior to death, a nonforfeitable right to receive the amounts while living. Taxpayer's husband, J. E. Bernard died on June 30, 1955. The taxpayer reported the payments received by her in her 1955, 1956 and 1957 income tax returns. In 1955, the taxpayer received \$6,000.00 and excluded \$5,000.00, reporting the excess amount of \$1,000.00 as taxable income. For the years 1956 and 1957, the amounts received totalling \$22,500.00 and \$22,000.00 respectively were reported by the taxpayer in their entirety. Thereafter, the taxpayer filed applications for refund of the taxes so paid by her.

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 principals 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."

In Law Bureau memorandum of September 10, 1962, (copy attached) interpreting §359 subd. 2. a. and Article 23 Personal Income Tax Regulations involving voluntary payments to widows of deceased employees it was held that voluntary payments made to widows are taxable whether made prior or subsequent to January 1, 1955 if the payments did not constitute a "gift". However, if the payments made subsequent to January 1, 1955 are considered to be made

To: Commissioners Murphy, Palestin & Macduff
Re: Anne V. Bernard

-3-

not as a "gift" then the taxpayer would be solely entitled to the benefit of the \$5,000.00 exclusion in accordance with the 1956 amendment to subd. 2a of §359.

I am of the opinion that the payments received by the taxpayer did not constitute "gifts" in accordance with the fact-finding guide lines set out in Duberstein and Stanton, supra.

The taxpayer's income tax return for 1957 was lost or misplaced and is no longer available. The records pertaining to the taxpayer's payment of her 1957 tax have been destroyed. (See memorandum H. E. Keegan dated September 5, 1962). In my letter to the taxpayer of April 6, 1965, I requested her to submit copies of her returns for the years involved and informed her that she was being afforded a final opportunity to appear at a formal hearing; that in the event, she failed to respond, her default would stand. The taxpayer failed to respond. Since it would be inconsistent to grant the taxpayer a partial refund for 1956 (based on the \$5,000.00 exclusion) and deny her such refund for 1957, (the refund for 1957 cannot be processed without the return) on the same facts. I believe that her applications for refund should be denied in toto.

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

SOLOMON SIES

Hearing Officer

APR 29 1965

/s/ M. SCHAPIRO

Approved

/s/ E. H. BEST

Approved

SS:nbl

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION
OF

ANNE V. BERNARD

FOR REVISION OR REFUND OF PERSONAL
INCOME TAXES UNDER ARTICLE 16 OF THE
TAX LAW FOR THE YEARS 1955, 1956 &
1957

Anne V. Bernard, the taxpayer herein, having filed applications for revision or refund of personal income taxes under Article 16 of the Tax Law for the years 1955, 1956 and 1957 and a notice of hearing having been mailed to her on January 12th, 1965, scheduling a hearing at 80 Centre Street, New York, N.Y. for February 2, 1965 at 2:30 o'clock P.M. before Solomon Sico, Hearing Officer of the Department of Taxation & Finance and the taxpayer having defaulted in appearance at the aforementioned scheduled hearing; that subsequent letters having been mailed on March 4th, 1965 and April 6th, 1965 to the taxpayer and her representative affording them an opportunity to request a re-scheduled hearing; that the taxpayer having failed to respond to such letters and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That on January 20, 1943, the taxpayer's late husband, Jules H. Bernard, entered into written agreements with two corporations, J. H. Bernard & Co., Inc. a corporation organized under the laws of the State of Illinois and J. H. Bernard & Co., Inc., a domestic corporation having its principal

place of business in the City and State of New York whereby death benefits were to be paid by both corporations to his wife (the taxpayer herein) and children upon his death in an annual sum not to be less than the total salary and bonus paid to him during the calendar year preceding his death for a period of two years following such death; that the agreements further provided that the corporations would pay the taxpayer an annual sum to be determined by the Board of Directors of said corporations but that such sums were not to be less than one-half (1/2) of the amount paid to the taxpayer's deceased husband during the calendar year preceding his death; that the aforesaid amounts were to be paid to the taxpayer during her lifetime and in the event of her death to her two children, pro rata, during their lifetime; that the taxpayer's late husband did not possess, immediately before his death a nonforfeitable right to receive the amounts while living; that the taxpayer's husband, Jules E. Bernard died on June 30, 1935.

(2) That at the time of her husband's death, the taxpayer, her deceased husband and her children owned more than 50% of the value of the outstanding stock of the New York Corporation and more than 60% of the stock in the Illinois Corporation heretofore referred to in finding (1) above; that pursuant to the provisions of the agreements mentioned in finding (1) above, the taxpayer received during the years 1936, 1936 and 1937 from J. E. Bernard & Co. Inc., the New York corporation the sums of \$3,000.00, \$6,000.00 and \$4,500.00 respectively and from J. E. Bernard & Co. Inc. the Illinois Corporation, the sums of \$3,000.00, \$16,500.00 and \$17,500.00 respectively.

(3) That the taxpayer filed income tax returns for the years 1955, 1956 and 1957 in which she reported income received pursuant to the agreements referred to in finding (1) above; that in the year 1955, she received \$6,000.00 and excluded \$5,000.00 but reported the excess amount of \$1,000.00 as taxable income; that for the years 1956 and 1957, the amounts received by the taxpayer totalling \$22,500.00 and \$23,000.00 respectively, were reported by her in their entirety; that the taxpayer thereafter filed applications for refund of the taxes so paid by her.

(4) That the payments made to the taxpayer and received by her pursuant to the agreements more fully set forth in finding (1) above did not constitute tax free gifts excludable from gross income.

Based upon the foregoing findings and the record as personally constituted, the State Tax Commission hereby

DETERMINES:

(A) That the taxpayer has failed to establish that she is entitled to a refund of taxes due; that, accordingly, there can be no recomputation, resettlement or revision of the taxes for the year 1955, 1956 and 1957 and that the taxpayer's applications with respect thereto be and the same are hereby denied.

DATED. Albany, New York on the 26th day of August 1965.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

Commissioner

/s/

JAMES R. MACDUFF

Commissioner