

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Philip H. & Ruth M. Trout

:

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1974.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of November, 1981, he served the within notice of Decision by certified mail upon Philip H. & Ruth M. Trout, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip H. & Ruth M. Trout
4 Continental Drive
Greenville, SC 29615

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
6th day of November, 1981.

Connie C. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

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Philip H. & Ruth M. Trout :

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for Redetermination of a Deficiency or a Revision :
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Tax under Article 22 of the Tax Law for the Year :
1974

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of November, 1981, he served the within notice of Decision by certified mail upon Michael Dolan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael Dolan
Cadwalader, Wickersham & Taft
One Wall St.
New York, NY 10005

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
6th day of November, 1981.

Cornelia P. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 6, 1981

Philip H. & Ruth M. Trout
4 Continental Drive
Greenville, SC 29615

Dear Mr. & Mrs. Trout:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Michael Dolan
Cadwalader, Wickersham & Taft
One Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
PHILIP H. TROUT and RUTH M. TROUT
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1974.

DECISION

Petitioners, Philip H. Trout and Ruth M. Trout, 4 Continental Drive, Greenville, South Carolina 29615, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974 (File No. 17724).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 27, 1981 at 9:15 A.M. Petitioners, Philip H. Trout and Ruth M. Trout, appeared by Cadwalader, Wickersham and Taft (Michael Dolan and Wayne Grzecki, Esqs., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the sum of \$9,279.27 received by petitioner Philip H. Trout from The Bowery Savings Bank constituted an annuity, as defined in 20 NYCRR 131.4(d)(2), and therefore not taxable income to petitioners as nonresidents.

FINDINGS OF FACT

1. Petitioners, Philip H. Trout and Ruth M. Trout, timely filed a joint New York State Income Tax Nonresident Return for the year 1974. Attached to said return was a wage and tax statement from The Bowery Savings Bank (hereinafter "Bowery") which indicated that petitioner Philip H. Trout had received from

Bowery wages totaling \$11,712.87. None of the wages received from Bowery were reported as derived from New York sources and, accordingly, petitioners' return claimed a refund of \$189.12, the amount of New York State tax withheld as shown on the Bowery wage and tax statement.

2. On October 26, 1976, the Audit Division issued to petitioners a Notice of Deficiency asserting that personal income tax of \$236.43 was due for the year 1974. Subtracted from the alleged tax due was the \$189.12 tax withheld by the Bowery, leaving a net tax due of \$47.31, plus interest. Additional tax due of \$627.53 for the year 1973 was also included in the Notice of Deficiency dated October 26, 1976. In a letter dated December 27, 1976, petitioner Philip H. Trout indicated that he agreed with the \$627.53 tax due assessed for the year 1973, but disagreed with the disallowance of the \$189.12 refund claimed for 1974 and the subsequent assessment of an additional tax due of \$47.31. Attached to petitioner's letter of December 27, 1976 was a check in the amount of \$521.56, said amount computed as follows:

Tax due for 1973	\$627.53
Less 1974 refund	<u>189.12</u>
Balance	438.41
Plus pro rata interest	<u>83.15</u>
Total	<u>\$521.56</u>

Since petitioner Philip H. Trout has indicated agreement to the tax assessed for the year 1973 and since the perfected petition filed by petitioners indicates only the year 1974 in dispute, the adjustments made for the year 1973 will not be addressed hereafter. At the hearing held herein, both parties agreed that 1974 was the only year at issue.

3. The abovementioned Notice of Deficiency was based on an explanatory Statement of Audit Changes originally dated July 23, 1975. Said Statement of Audit Changes held that wages of \$11,712.87 received by petitioner Philip H.

Trout from Bowery were taxable since "Vacation and terminal leave wages are considered to be payment for prior service and as such are reportable to and taxable by New York State". Petitioners conceded that \$2,433.60 of the \$11,712.87 received from Bowery was taxable to New York as severance pay, but claimed that the remaining portion, \$9,279.27, was not taxable, as said amount constituted an annuity pursuant to 20 NYCRR 131.4(d)(2).

4. Petitioner, Philip H. Trout, retired from Bowery on February 1, 1974 at age 60 after more than 38 years service. Bowery maintained a funded retirement plan under a deposit administration contract with the Metropolitan Life Insurance Company (hereinafter said plan referred to as "Metropolitan Pension"). Under the provisions of the Metropolitan Pension (Section 4.2), petitioner Philip H. Trout was eligible to receive for life a pension commencing at age 65 or he could elect to have his pension commence at his early retirement date, receiving an actuarially reduced amount. The Metropolitan Pension was maintained by Bowery pursuant to authority granted under Subsection 3 of Section 250 of the Banking Law.

5. Bowery also maintained the practice of granting a direct bank pension (hereinafter "Bank Pension") to early retirees between the ages of 60 and 65. An early retiree was eligible for a Bank Pension if, on January 1, 1964, his age plus years of service with Bowery totaled 71 or more. The Bank Pension was payable monthly, from the date of an individual's early retirement until attainment of age 65.

6. Petitioner Philip H. Trout was eligible for and granted a Bank Pension via a resolution of the Executive Committee of the Board of Trustees which authorized payment "...to Philip H. Trout, commencing February 1, 1974, and continuing until the end of the month during which he attains age 65, or until

his death, whichever shall first occur, a pension under Section 250, Subdivision 1 of the Banking Law, of \$10,122.84 per annum, payable in equal monthly installments...".

The Bank Pension of \$10,122.84 was computed by taking 60 percent of petitioner Philip H. Trout's final average salary and subtracting therefrom the additional purchase cost which would have been required under the Metropolitan Pension in effect prior to January 1, 1970 to provide full unreduced benefits at age 65.

The actual figures used in computing the Bank Pension are shown below:

Final Average Salary	\$25,006.40
Multiplied by 60%	x .60
Legal Maximum	15,003.84
Less Additional Purchase Costs	4,881.00
Bank Pension	<u>\$10,122.84</u>

7. Petitioner Philip H. Trout could elect to receive payment of his Bank Pension in one of three optional methods. He chose to have his Bank Pension paid pursuant to option 1, described on page 11D of an employee manual as follows:

1. You may arrange for your funded retirement benefit payments (Metropolitan Pension) to begin to you before age 65 in an amount which, when added to the Bank's direct pension payments, will provide you with a monthly pension equal to the legal maximum from early retirement date to age 65. If you elect this option, however, your funded retirement benefit payments after age 65 will be less for the rest of your life than under either options 2 or 3.

8. The legal maximum referred to in Finding of Fact "7", supra, is contained in Subdivision 3 of Section 250 of the Banking Law where it is stated that:

...the total of retirement and disability benefits, provided by a savings bank under this subdivision (Metropolitan Pension) and subdivision one (Bank Pension), to any one officer or employee shall not exceed per annum two per centum of his average annual salary for the three years immediately preceding his retirement, for each year of service, nor shall such total exceed per annum sixty per centum of such average annual salary..."

9. Under the option chosen by petitioner Philip H. Trout, his Bank Pension amounted to \$10,122.84 and his Metropolitan Pension totaled \$4,881.00. When the Bank Pension expired on June 1, 1978, the date upon which petitioner Philip H. Trout turned 65, the amount of the Metropolitan Pension increased from \$4,881.00 to an amount which was more than 99 percent of the combined amounts previously being received from the Bank Pension and Metropolitan Pension. No documentary evidence was submitted as to the exact dollar amount of the Metropolitan Pension once petitioner Philip H. Trout turned 65 or how said amount was computed.

10. Of the \$11,712.87 received by petitioner Philip H. Trout from Bowery in 1974, \$2,433.60 represented severance pay (conceded by petitioners as taxable) and \$9,279.27 represented a total of the eleven monthly Bank Pension payments which commenced on February 1, 1974.

CONCLUSIONS OF LAW

A. That a pension or other retirement benefit is not taxable if the individual receiving it is a nonresident and it constitutes an annuity as defined in 20 NYCRR 131.4(d)(2). That the sections of 20 NYCRR 131.4(d)(2) relevant to the issue addressed in this decision are as follows:

(2) Definition. To qualify as an annuity, a pension or other retirement benefit must meet the following requirements:

- (A) It must be paid in money only, not in securities of the employer or other property;
- (B) It must be payable at regular intervals at least annually, for the life of the individual receiving it, or over a period not less than half his life expectancy, as of the date payments begin. An individual's life expectancy shall be the expected return multiple shown for the applicable age and sex in the table entitled "TABLE I.--ORDINARY LIFE ANNUITIES--ONE LIFE--EXPECTED RETURN MULTIPLES" promulgated under Regulation 1.72-9 of the Federal Income Tax Regulations.

- (C) It must be payable at a rate which remains uniform during such life or period or at a rate which varies only with the fluctuation in (i) the market value of the assets from which such benefits are payable, or (ii) a specified and generally recognized cost-of-living index; and
- (D) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees.

B. That petitioner, Philip H. Trout, received, during the tax year 1974, two separate and distinct retirement benefits. That the Bank Pension and Metropolitan Pension are interconnected only to the extent that the benefits payable under both pensions, when combined, cannot exceed a statutory limit imposed by Subdivision 3 of Section 250 of the Banking Law. That both pensions are paid pursuant to separate written plans.

C. That the conditions necessary to qualify as an annuity pursuant to 20 NYCRR 131.4(d)(2) must be applied individually to each separate retirement benefit. That the Bank Pension does not qualify as an annuity within the meaning and intent of 20 NYCRR 131.4(d)(2) since said pension is not payable for the life of the individual receiving it, or over a period not less than half his life expectancy. That a statute or regulation authorizing an exemption from taxation is to be strictly construed against the taxpayer (Matter of Grace v. New York State Tax Comm., 37 N.Y.2d 193).

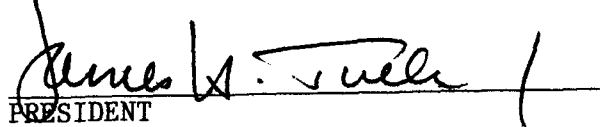
D. That the petition of Philip H. Trout and Ruth M. Trout for redetermination of a deficiency and for a refund is denied and the Notice of Deficiency dated

October 26, 1976 is sustained, together with such additional interest as may be lawfully due and owing.

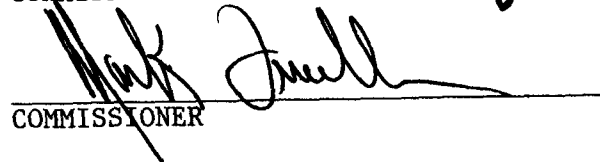
DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER