

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
William K. & Virginia S. Barry :  
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. :  
\_\_\_\_\_:

AFFIDAVIT OF MAILING

State of New York  
County of Albany

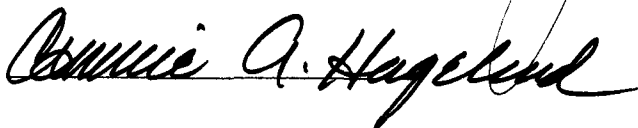
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of June, 1982, he served the within notice of Decision by certified mail upon William K. & Virginia S. Barry, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

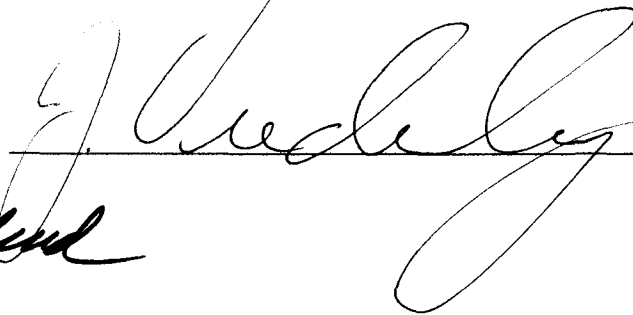
William K. & Virginia S. Barry  
311 Jane's Lane  
Stamford, CT 06903

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  
4th day of June, 1982.

  
Commie A. Hagelund



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
William K. & Virginia S. Barry :  
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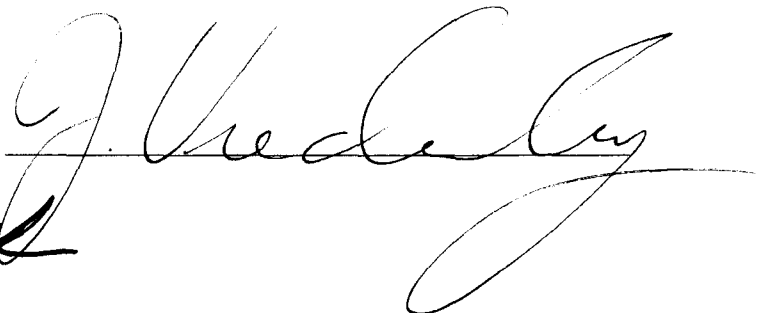

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of June, 1982, he served the within notice of Decision by certified mail upon Bruce J. Kniffen the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bruce J. Kniffen  
Hardy, Peal, Rawlings, Werner & Coogan  
750 Third Ave.  
New York, NY 10017

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  
4th day of June, 1982.

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

June 4, 1982

William K. & Virginia S. Barry  
311 Jane's Lane  
Stamford, CT 06903

Dear Mr. & Mrs. Barry:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Bruce J. Kniffen  
Hardy, Peal, Rawlings, Werner & Coogan  
750 Third Ave.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
WILLIAM K. BARRY AND VIRGINIA S. BARRY  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1974.

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DECISION

Petitioners, William K. Barry and Virginia S. Barry, 311 Jane's Lane, Stamford, Connecticut 06903, 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. 24051).

A formal hearing was held before Julius Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 4, 1981 at 10:45 A.M. Petitioners appeared by Hardy, Peal, Rawlings, Werner & Coogan, Esqs. (Bruce J. Kniffen, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq. of counsel).

ISSUES

I. Whether an "experience credit" dividend of \$3,671.70 paid by an insurance company along with the stipulated monthly pension payment should be treated as a variable annuity.

II. Whether the payment of \$2,220.00 paid by the J.C. Penny Company as a substitute for social security benefits can be treated as a part of pension annuity benefits.

III. Whether a lump-sum distribution from a profit-sharing and retirement plan qualified as an annuity and thus exempt from tax.

IV. Whether income earned on voluntary contributions of a nonresident employee to the profit sharing plan of J.C. Penny Company may be treated as income earned on capital invested in New York by the employee.

V. Whether income earned on company contributions to a profit sharing plan may be treated as income earned on the vested interest of a nonresident employee in the profit-sharing plan and therefore not taxable by New York.

#### FINDINGS OF FACT

1. On November 10, 1977 the Audit Division issued a Statement of Audit Changes imposing additional tax due in the amount of \$18,705.54 plus interest of \$4,094.34 for a total of \$22,799.88 on the grounds that the capital gain in the form of a lump sum distribution from the former employer was New York State income and therefore taxable; that "the percentage used as a basis is total State wages over total federal wages for the prior three years and the current year", that "a minimum tax has been asserted as a result of capital gain and a modification made for allocable expenses attributable to items of tax preference" and that other income had been determined to be State income and therefore allocated. Accordingly a Notice of Deficiency was issued on April 4, 1978 in the amount of \$23,427.15, including interest.

2. Petitioner William K. Barry an executive vice president of J.C. Penny Company retired on April 1, 1974. As a resident of Connecticut, he filed a nonresident return for 1974. He allocated his salary income on the basis of services performed inside and outside the State. He received in addition to a monthly annuity payment an "experience credit dividend" of \$3,671.70. The dividend was declared under the pension contract based upon an experience rating process which analyzed investment returns and mortality experience. If it proved to be more favorable than what was guaranteed under the plan, the

excess was to be paid to the participants. This payment was a so-called 13th payment of an annuity contract, and was paid yearly.

3. In 1974, Mr. Barry, who was not qualified to receive social security but was required to retire at the age of 60, received a payment from the company of \$2,220.00 as a "substitute".

4. Mr. Barry received from his former employer a distribution of \$214,602.48 in stock which under the Internal Revenue Code was considered long term capital gain, also an amount of \$1,532.88 was considered ordinary income. Of this amount the company contributed \$110,620.06. Earnings from the total contributions to the plan including earnings on Mr. Barry's personal contribution amounted to \$105,515.30. His personal contribution of \$67,220.44, which was returned to him in 1974, had been deducted on a periodic basis from the salary paid to him by J.C. Penny Company.

#### CONCLUSIONS OF LAW

A. That the interest, dividends and gains at issue are includible in petitioners' New York adjusted gross income only if such items are derived from or connected with New York sources (section 632(a) of the Tax Law).

Section 632(b) of the Tax Law provides in part as follows:

"(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

\* \* \*

(B) a business, trade, profession, or occupation carried on in this state.

(2) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state.

(3) Deductions with respect to capital losses, net long-term capital gains and net operating losses shall be based solely on income, gain, loss and deduction derived from or connected with New York sources, under regulations of the tax commission, but otherwise shall be determined in the same manner as the corresponding federal deductions."

Section 632(c) of the Tax Law provides as follows:

"(c) Income and deductions partly from New York sources. If a business, trade, profession, or occupation is carried on partly within and partly without the state, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations."

B. That the income earned on those contributions made by petitioner William K. Barry to the profit-sharing plan constituted income from intangible personal property and was not derived from New York sources. It is therefore not taxable. Matter of Bryon S. Pardee and Sarah Virginia Pardee, State Tax Commission, September 5, 1980.

C. That the income earned on the company contributions to the profit-sharing plan constituted income from New York sources within the meaning of section 632(a) of the Tax Law. Since Mr. Barry's services were performed partly within and partly without New York State such income was properly allocated under 20 NYCRR 131.18.

D. That under the Employee Retirement Income Security Act of 1974 the Internal Revenue Code has been amended so that, of a lump-sum distribution from a pension or profit-sharing plan, or from certain annuity plans, the amount attributable to years of participation before 1974 is treated as a long-term capital gain, while the amount attributable to years after 1973 is treated as ordinary income. The amendment further provides that the ordinary income portion is a deduction from Federal gross income when the special 10 year averaging method has been elected under which a separate tax is computed.

Therefore, that ordinary income portion is removed from Federal adjusted gross income. Chapter 771 of the Laws of 1975 amended section 612(b) of Article 22 of the Tax Law by adding paragraph (12) to provide a modification increasing Federal adjusted gross income by the amount excluded therefrom by the new Federal method of taxing the ordinary income portion at normal rates; no income averaging provision is provided. The effective date of this amendment is August 9, 1975, and applies to lump-sum distributions made after December 31, 1973, in taxable years beginning after December 31, 1973.

That lump-sum distributions received by nonresidents from pension or profit-sharing trusts are not periodic payments and thus do not qualify as annuities exempt from tax. Such distributions are taxable to nonresidents as deferred compensation to the extent based on personal services rendered in New York (see Ruling of State Tax Commission, November 30, 1959; also see Matter of the Petition of Karl Frank and Ruth Frank, State Tax Commission, September 28, 1979.) Therefore, the allocation of the capital gain and ordinary income portion of the lump-sum distribution was properly made in accordance with section 632(c) of the Tax Law and 20 NYCRR 131.18.

E. That payments to petitioner William K. Barry of the experience credit dividend of \$3,671.70 and the substitute social security of \$2,220.00 do not qualify as annuities; therefore, said amounts should be allocated on the same basis stated in Conclusion of Law "C", supra.

F. That the petition of William K. Barry and Virginia S. Barry is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is

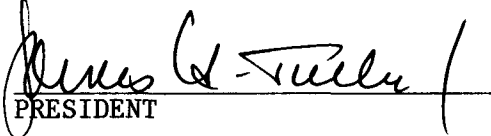


hereby directed to modify the Notice of Deficiency issued on April 4, 1978; and that, except as so granted, the petition is in all other respects denied.

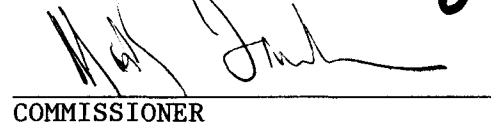
DATED: Albany, New York

JUN 04 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

*[Handwritten signature]*

MOVED NOT FORWARDED

William K. & Virginia S. Barry  
311 Jane's Lane  
Stamford, CT 06903

*WKF*

TAX APPEALS BUREAU  
JUN 15 1982



PI  
STATE OF NEW YORK

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William K. & Virginia S. Barry  
171 Island Creek Dr.  
Vero Beach, FL 32960

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  
20th day of August, 1982.

Cornie A. Hagedorn

J. Vredenburg

REQUEST FOR BETTER ADDRESS

Requested by <i>J. Vreda by</i>	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request <i>6-15-82</i>
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number <i>009-03-9920</i> <i>486-12-9259</i>	Date of Petition <i>Fr. Da.</i> <i>6-4-82</i>
Name <i>William K. &amp; Virginia S. Barry</i>	
Address <i>311 Jane's Lane</i> <i>Stamford, CT</i> <i>06903</i>	

## Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<i>Call Rep</i> <input type="checkbox"/> Other: <i>986 4466</i>	<i>171 Island Creek Dr.</i> <i>Vero Beach Fl. 32960</i>

Searched by	Section	Date of Search

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER