STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition of Brantley F. Barr, Jr. & Cheri L. Barr | AFFIDAVIT OF MAILING |
| for Redetermination of a Deficiency or for Refund of Personal Income Taxes under Article 22 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York for the Years 1977, 1978 and 1979. | |

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Brantley F. Barr, Jr. & Cheri L. Barr, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brantley F. Barr, Jr. & Cheri L. Barr
135 Weston Avenue
Chatham, NJ 07928

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
21st day of October, 1983.

Connie A Hagelund

Patricia Kupcheni

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 21, 1983

Brantley F. & Cheri L. Barr, Jr.
135 Weston Avenue
Chatham, NJ 07928

Dear Mr. & Mrs. Barr:

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 and Chapter 46, Title U of the Administrative Code of the City of New York, 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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition<br>of<br>BRANTLEY F. BARR, JR. AND CHERI L. BARR<br>for Redetermination of a Deficiency or for Refund of Personal Income Taxes under Article 22 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York for the Years 1977, 1978 and 1979. | DECISION |

Petitioners, Brantley F. Barr, Jr. and Cheri L. Barr, 135 Weston Avenue, Chatham, New Jersey 07928, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City non-resident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1977, 1978 and 1979 (File Nos. 32723 and 33139).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 11, 1983 at 1:15 P.M. Petitioners appeared by Neil Oswald Eriksen, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

## ISSUE

Whether the Audit Division properly disallowed the adjustments to income taken by petitioners for alimony payments made.

## FINDINGS OF FACT

1. Brantley F. Barr, Jr. (hereinafter petitioner) and his wife, Cheri L. Barr, filed a joint New York State Income Tax Nonresident Return (with New York City Nonresident Earnings Tax) for each of the years 1977, 1978 and 1979. On

each return petitioner claimed an adjustment to income for alimony payments made to his former wife. Said adjustments were for $3,777.80 (1977), $4,577.80 (1978) and $6,007.80 (1979).

2. On September 11, 1980 the Audit Division issued a Statement of Audit Changes wherein petitioner's claimed adjustment for alimony payments of $3,777.80, for the year 1977, was disallowed on the basis that the alimony paid was "not for the production of New York income". Accordingly, a Notice of Deficiency was subsequently issued against petitioners asserting additional New York State personal income tax of $423.87, plus interest.

3. On August 27, 1980 the Audit Divison issued a Statement of Audit Changes for the years 1978 and 1979 wherein petitioner's claimed adjustments for alimony payments of $4,577.80 (1978) and $6,007.80 (1979) were disallowed on the basis that such payments "were not expenses incurred for the production of income". Accordingly, a Notice of Deficiency was subsequently issued against petitioners asserting additional New York State and City[1] personal income tax of $714.24, plus interest of $58.33, for a total due for 1978 and 1979 of $772.57.

4. On April 10, 1981 petitioners filed a petition for the year 1977. On January 16, 1981 they filed a petition for the years 1978 and 1979. Both petitions were deemed perfected on April 23, 1982.

5. During the years at issue herein petitioner was a resident of the State of New Jersey.

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[1] The deficiency and/or overpayment determined for New York City purposes for 1978 and 1979 were for amounts under one dollar and resulted solely from the mechanics involved in the recomputation of tax. The adjustments at issue do not effect petitioners' New York City liability.

6. Petitioner argued that he is entitled to the adjustments claimed for alimony under proper construction of section 632 of the Tax Law.

CONCLUSIONS OF LAW

A. That the adjusted gross income of a nonresident individual is defined by section 632(a)(1) of the Tax Law as the net amount of income, gain, loss and deduction entering into his federal adjusted gross income, derived from or connected with New York sources. Income and deductions from New York sources is defined by subdivision (b) of the same section, as follows:

> "(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."

B. That alimony is not a deduction attributable to petitioner's business, trade, profession or occupation carried on in this state, within the meaning of section 632(b)(1)(B) of the Tax Law. See Matter of Daniel C. Maclean, New York State Tax Commission, May 15, 1981.

C. That the petitions of Brantley F. Barr, Jr. and Cheri L. Barr are denied and the notices of deficiency at issue herein are sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York
OCT 21 1983

STATE TAX COMMISSION

Roderick A Chu
PRESIDENT

Francis R. Koenig
COMMISSIONER

COMMISSIONER

I cannot sign a decision against petitioners, Brantley F. Barr, Jr. and Cheri L. Barr, because the proposed finding is both inequitable and irrational.

Petitioner, Brantley F. Barr, Jr. is a non-resident, whose income is derived from sources within New York State. He pays alimony to his former wife, who is also a non-resident. This decision wishes to tax the income, but to disallow the alimony deduction.

If the deduction for alimony were merely one of the itemized deductions which he could make use of on his Federal Schedule A (such as charitable contributions, etc.), he would have no problem. In that case the deduction would be permissible under the Tax Law Section 635(c)(1), which allows non-resident taxpayers the same deductions that are available to resident taxpayers, with some exceptions that are not relevant here.

The reason for his problem in this case is the action of the Federal Government in 1977, making the alimony deduction an "adjustment to income" instead of any "itemized deduction." This was done as an "act of mercy" to allow users of the standard deduction to reduce their income by alimony paid. Thus, the deduction for alimony paid was shoved into "adjustments to income" although philosophically it did not really belong there.

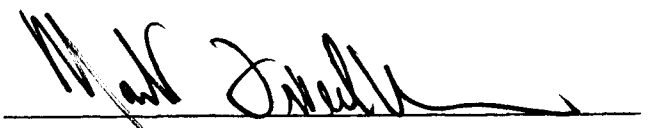
"Adjustments to income" were meant to allow a businessman taxpayer to deduct certain costs of doing business, before arriving at his adjusted gross income. Consequently, New York State does not allow a non-resident taxpayer to make adjustments unless such adjustments, under Tax Law Section 632(b)(1), derive from a business, trade, profession or occupation carried on in this state. The reason for this is obvious. A taxpayer who derived income from a business in New York State could not make adjustments to such income based upon business travel relating to a second job performed only in New Jersey. However, payments of alimony do not fall within the categories contemplated in Tax Law Section 632.

The deduction for alimony payments was more properly an itemized deduction, not directly related to his source of income. The Hearing Officer now wishes to use Section 632 to disallow his use of his alimony deduction, because the alimony is not "attributable to" a business, trade, profession or occupation carried on in New York State. This result is clearly inequitable, and was not intended by Section 632 of the Tax Law. Furthermore, the Federal Government never intended to harm the economic interests of alimony payers, in making the 1977 change. Nor did New York State have such an intent when it conformed to the said Federal change.

As a result of the above, until legislative change is made to Section 632, to reflect the recently broadened categories of "adjustments to income," I propose that the Tax Commission adopt the policy that alimony falls within Section 632(b)(1)(B), since it can be said to be an item attributable to a business, trade, profession or occupation carried on in this state. The basis for this interpretation is that an award of alimony is always based upon the income of the person paying alimony. This is the prime consideration of the Court making such an award. Therefore, the alimony adjustment is attributable to the business, trade or profession carried on in New York State. The instant petitioner, Brantley F. Barr, Jr., although a New Jersey resident, derives almost all of his income from his New York State job. His payments of alimony are predicated upon the income drawn from that job, i.e., from his business, trade or profession carried on in this state.

There can be no doubt that any other interpretation is both inequitable and irrational, and defeats the general purpose of the alimony deduction.

I DISSENT:



MARK FRIEDLANDER
Commissioner