L 9 (8-68)

Income Tax Determin. A-Z

BUREAU OF LAW

MEMORANDUM Barry, Louis S.

TO: The State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: LOUIS S. BARRY

1955 Assessment No. B-451888
1956 Assessment No. B-451889

Article 16

Hearings with reference to the above matters were held at the New York City Office on February 24 and 28, 1964.

The primary issue involved herein is whether payments received by the taxpayer, a nonresident, from his employer for the period from February 17, 1955 through December 31, 1956, were excludable from gross income as "sick pay".

The taxpayer was employed by L. B. Foster Co., a foreign corporation organized under the laws of Pennsylvania, licensed to do business in the state of New York with an office located at 11 Park Place, New York City. For a number of years prior to and during the years 1955 and 1956, the taxpayer was a vice president of said corporation and head of its New York office.

On February 17, 1955, the taxpayer suffered a stroke and a nervous breakdown. He has been incapacitated ever since and has performed no services for the company either within or without the state of New York. The employer continued to pay the taxpayer his full salary after his illness. It appears that the continuation of salary payments after the taxpayer was unable to perform his services was made in accordance with the oral policy of the company insofar as executive employees are concerned.

The taxpayer contends that: (1) he performed no services within the state of New York during the period for which he received the payments in question; that such payments did not represent wages or compensation attributable to New York sources subject to tax by a nonresident; (2) that the aforesaid payments constituted gifts not subject to tax; and (3) the amounts were paid pursuant to a regularly established policy of the employer to continue the salaries of disabled employees and should be excludable from income in accordance with subdivision 2, paragraph e of Section 359 of the Tax Law.

In the case of Lougee v. C. I. R., 26 B.T.A. 23, aff'd 63 F. 2d 112, it was held that payments made to a former official of a corporation after his resignation constituted additional compensation for services rendered and not a gift. See also Laurie v. C. I. R., 12 T.C. 86; Duberstein v. Commr. and Stanton v. U. S., 363 U.S. 278; U. S. v. Kasynski, 284 F. 2d 143.

Section 359(2)(e) of the Tax Law, prior to its amendment by Chapter 1048 (E.S.) of the Laws of 1957, applicable to returns for taxable years beginning prior to January 1, 1957, excluded from gross income disability benefit payments received as wages or in lieu of wages by employees under an employer-financed accident and health plan or under a wage continuation plan through accident or health insurance or under workmen's compensation acts, whether insured or uninsured. It placed no maximum on the amount of excludable sickness or disability pay and set no minimum period of sickness for the application of the exclusion. The amendment limited the extent of such payments to $100 per week and set a minimum period of sickness for the application of the exclusion.

The memorandum of the Tax Commission, with respect to the 1957 amendment to Section 359, subdivision 2-e of the Tax Law, states, in part, as follows:

> "Prior to April 1, 1957, there was considerable uncertainty as to the applicability of this provision to amounts paid by employers under self-insured plans. This uncertainty was resolved by the decision of the Supreme Court in Haynes v. U. S., 1957, 77 S. Ct. 649 on that day. In that case it was held that payments made on account of sickness or personal injuries by employers under self-insured plans were wholly excludable from gross income for Federal income tax purposes under the provisions of the 1939 Internal Revenue Code, which were identical with the present provisions of subdivision 2, paragraph e, of Section 359 of the Tax Law.
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> "On the basis of this decision, it is clear that under the present provisions of law an unlimited exemption is allowable for amounts paid to employees on account of sickness or personal injuries under accident or health plans maintained or financed by their employers, whether insured or uninsured."

Section 104 of the Internal Revenue Code of 1954 provided for the exclusion from gross income of amounts received through accident or health insurance for personal injuries or sickness by an employee to the extent such payments are attributable to contributions by the employer which were not includible in the gross income of the employee or were paid by the employer. Similar provisions to this section were contained in Section 22(b)(5) of the Internal Revenue Code of 1939.

Section 1.105-5 of the Federal Income Tax Regulations in effect for the years 1955 and 1956 provided, in part, as follows:

> "An accident or health plan may be either insured or non-insured and it is not necessary that the plan be in writing or that the employee's rights to benefits under the plan be enforceable. However, if the employee's rights are not enforceable, an amount will be deemed to have been received under a plan only if, on the date the employee became sick or injured, the employee was covered by a plan (or a program, policy, or custom having the effect of a plan) providing for the payment of the amounts to the employee in the event of personal injuries or sickness, and notice or knowledge of such plan was reasonably available to the employee."

It is to be noted that the taxpayer deducted "sick pay" on his Federal income tax returns for the years 1955 and 1956; that said returns were accepted, as filed.

In the light of the discontinuance of Shattuck v. State Tax Commission on the ground that a valid enforceable sick pay plan need not be in writing, I am of the opinion that there was in existence an enforceable oral sick pay plan.

I am of the further opinion that the payments received by the taxpayer constituted disability benefit payments in lieu of wages under an employer-financed health plan excludable from gross income in accordance with the provisions of subdivision 2, paragraph e, Section 359 of the Tax Law, in effect for the years 1955 and 1956.

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

SOLOMON SIES
Hearing Officer

SS:dv
Enc.
October 15, 1968

11-8-68

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

LOUIS S. BARRY

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

Louis S. Barry, 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 and 1956, and hearings having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, N. Y. on the 24th and 28th days of February, 1964, before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearings the taxpayer was represented by George M. Sherriff, Esq., 42 Broadway, New York, N. Y., testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That at all of the times hereinafter mentioned, the taxpayer, Louis S. Barry, was and still is a nonresident, residing at Ridgewood, New Jersey; that the taxpayer since 1938 has been employed by L. B. Foster Company, a foreign corporation organized under the laws of the state of Pennsylvania, licensed to do business in the State of New York and maintaining an office at 11 Park Place, New York City, N. Y.; that the aforementioned corporation was in the business of selling various items of railroad track materials and steel-sheet piling and other steel

products; that during the years 1955 and 1956 and for some years prior thereto, the taxpayer was a vice president of the aforementioned corporation and also manager of its New York office.

(2) That on February 17, 1955, the taxpayer suffered a stroke and nervous breakdown; that he was incapacitated from February 17, 1955 to and including December 31, 1956; that he performed no services for the employer corporation either within or without the State of New York during said period; that the corporation continued to pay the taxpayer his full salary after his illness for the balance of 1955 and for the entire year of 1956.

(3) That the taxpayer filed nonresident New York State income tax returns for the years 1955 and 1956; that the taxpayer on said returns indicated total income for said years amounting to $52,500.00 and $43,750.00, respectively; that the amount of wages reported attributable to New York during 1955 amounted to $6,272.51; that he reported no wages attributable to New York during the year 1956; that the taxpayer excluded "sick pay" for New York State income tax purposes in the amounts of $43,727.53 for 1955 and $43,750.00 for 1956; that the taxpayer paid on his return for 1955 the tax which he computed to be due in the sum of $80.66 but did not pay any New York State income tax for 1956; that on July 29, 1958, the Department of Taxation and Finance made additional assessments against the taxpayer for the years 1955 and 1956 (Assessment Nos. B-451888 and B-451889, respectively) recomputing the tax due from the taxpayer to the State of New York in the sums of $3,071.34 and $2,539.50, respectively, on the ground that the payments made to the taxpayer by his employer during his illness

did not qualify as excludable "sick pay" in accordance with the provisions of subdivision 2, paragraph e, Section 359 of the Tax Law and that the amounts so received were subject to New York State income tax.

(4) That the continuation of salary payments after the taxpayer was unable to perform his services was in accordance with a plan or policy of the employer corporation to compensate its executive employees during a period of illness or disability; that the taxpayer had notice or knowledge of such plan or policy.

(5) That L. B. Foster Co., the employer of the taxpayer, did have a valid enforceable sick pay plan for its employees and more particularly, its executive employees during the years in question for payment of benefits to employees absent from work due to illness.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DETERMINES:

(A) That the payments made to the taxpayer by his employer for the years 1955 and 1956 constituted amounts received through accident or health insurance in accordance with the provisions of Section 359, subdivision 2, paragraph e of the Tax Law, in effect for said years, excludable from gross income.

(B) That the additional taxes imposed against the taxpayer for the years 1955 and 1956 in the amounts of $2,317.96 and $1,911.69, respectively, were not lawfully due and owing; that the assessments for the years 1955 and 1956 (Assessment

Nos. B-451888 and B-451889, respectively) be and the same are hereby cancelled in full.

DATED: Albany, New York, on the 22nd day of November, 1968.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

COMMISSIONER