

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Margaret H. Sholl :
Formerly Margaret H. Cleary : 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 1973. :

State of New York
County of Albany

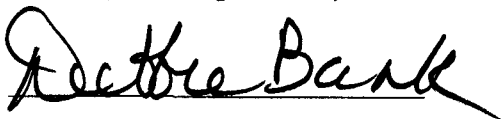
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of September, 1980, he served the within notice of Decision by certified mail upon Margaret H. Sholl, Formerly Margaret H. Cleary, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

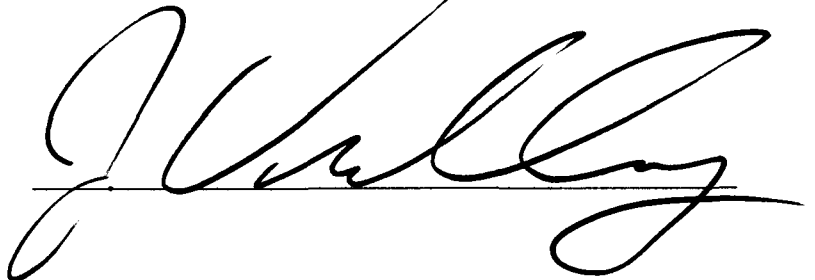
Margaret H. Sholl
Formerly Margaret H. Cleary
1603 Sue St.
Neptune, NJ 07753

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
5th day of September, 1980.





STATE OF NEW YORK
STATE TAX COMMISSION

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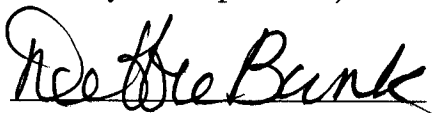
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of September, 1980, he served the within notice of Decision by certified mail upon Wesley R. Sholl the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

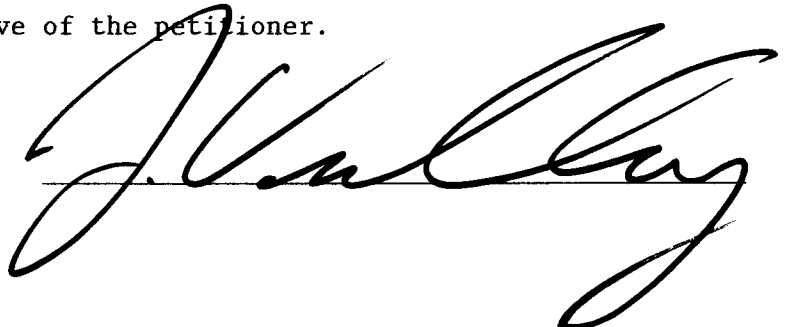
Mr. Wesley R. Sholl
1603 Sue St.
Neptune, NJ 07753

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
5th day of September, 1980.


Notary Public



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

September 5, 1980

Margaret H. Sholl
Formerly Margaret H. Cleary
1603 Sue St.
Neptune, NJ 07753

Dear Mrs. Sholl:

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
Wesley R. Sholl
1603 Sue St.
Neptune, NJ 07753
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| MARGARET H. SHOLL | : | DECISION |
| FORMERLY MARGARET H. CLEARY | : | |
| | : | |
| for Redetermination of a Deficiency or | : | |
| for Refund of Personal Income Tax under | : | |
| Article 22 of the Tax Law for the Year | : | |
| 1973. | : | |

Petitioner, Margaret H. Sholl, (formerly Margaret H. Cleary), 1603 Sue Street, Neptune, New Jersey 07753, 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 1973 (File No. 19499).

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 5, 1980 at 10:45 A.M. Petitioner appeared by Wesley H. Sholl. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether monies received by petitioner from her former husband, pursuant to a judgment of divorce, constituted alimony.

FINDINGS OF FACT

1. Petitioner, Margaret H. Sholl, for the subject year, filed an unsigned New York State Income Tax Resident Return on which she reported gross income from alimony of \$4,510.00.

2. On February 28, 1977, the Audit Division issued a Statement of Audit Changes, based on information, that petitioner had received alimony of \$9,269.00 rather than the amount reported by her of \$4,510.00. This resulted in an

adjustment to gross income of \$4,759.00. Accordingly, on April 11, 1977, the Audit Division issued a Notice of Deficiency against petitioner for additional personal income tax due in the amount of \$318.26, plus interest of \$71.35, for a total due of \$389.63.

3. Petitioner contended that \$4,759.00 of the \$9,269.00 received by her during the year in issue constituted payment for support of a minor child of her former marriage, and therefore was excludible from her gross income. In support of her contention, she relied on the various interlocutory decrees promulgated prior to the judgment of divorce. Specifically, the third and ninth paragraph of the separation agreement dated April 10, 1969, which provided, in relevant part that:

"3. ...the wife shall pay for the education of the issue of said marriage."

"9. However, the wife agrees to pay out of the monies paid to her by the husband for the support of the children of the marriage any and all minor doctor and dental expense."

The supplemental separation agreement dated July 2, 1971, provided, in relevant part, that:

"1. The Husband shall pay to the Wife, until the death of either party or until the remarriage of the Wife should the parties hereinafter be divorced, as and for her support and for the support, care and maintenance of Roger..."

Petitioner argued that based on the above interlocutory decrees, which were incorporated in the judgment of divorce, she was required to expend specific amounts for the support of the minor child of the former marriage; and therefore, such amounts were properly excludible from her reported gross income.

4. Paragraph five of the separation agreement dated April 10, 1969 between petitioner and her former husband, Thomas Cleary, incorporated into the divorce decree, provided in relevant part that:

"The Husband shall pay to the Wife the sum of \$125.00 per week, plus the Husband shall pay to the Wife one-half of the net bonus received by him each year from his employer for the support of the children of the marriage and the Wife."

CONCLUSIONS OF LAW

A. That the \$4,759.00 included in the amount required to be paid to petitioner by her former husband was not designated as a sum which was payable for the support of a minor child pursuant to section 71(b) of the Internal Revenue Code.

B. That where an agreement pursuant to a divorce decree did not state that a specific amount was payable only for child support, no portion of the payments made under that agreement were for child support (J. Lester, 366 U.S. 299, 6 L.Ed.2d 306).

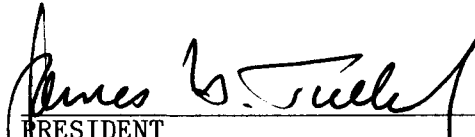
C. That amounts paid to a former spouse under a separation agreement incorporated in a divorce decree which does not specifically designate the amount for child support that is inferable from other clauses of the agreement are alimony includible in the petitioner's gross income (Rev. Rul. 70-557, 1970-2 C.B. 10).

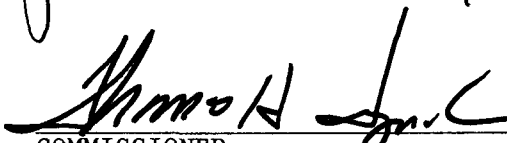
D. That the petition of Margaret H. Sholl is denied and the Notice of Deficiency issued April 11, 1977 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER