

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
John B. Daniels :  
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.

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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 11th day of December, 1981, he served the within notice of Decision by certified mail upon John B. Daniels, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

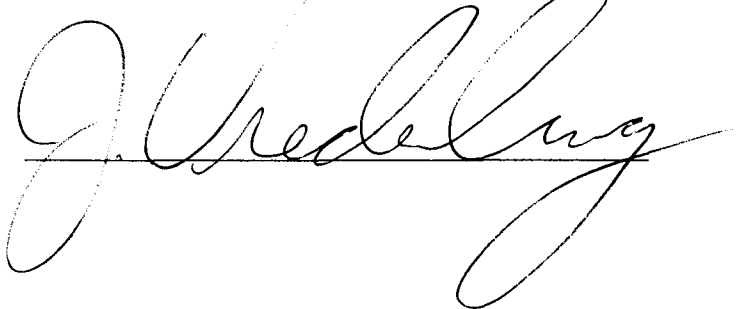
John B. Daniels  
425 E. 58th St.  
New York, NY 10022

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  
11th day of December, 1981.





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

December 11, 1981

John B. Daniels  
425 E. 58th St.  
New York, NY 10022

Dear Mr. Daniels:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN B. DANIELS	:	DECISION
	:	
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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Petitioner, John B. Daniels, 425 East 58th Street, New York, New York 10022, 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. 20278).

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 April 27, 1981 at 1:15 P.M. Petitioner John B. Daniels appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether amounts paid by petitioner to his former spouse, pursuant to oral instructions from a Trial Judge, constitute support or separate maintenance payments required to be made under a decree, thereby permitting petitioner an alimony expense deduction equal to the total of said payments.

FINDINGS OF FACT

1. Petitioner, John B. Daniels, timely filed a 1974 New York State Resident Income Tax Return wherein he indicated his filing status as "Married Filing Separate Return". On said return petitioner claimed an alimony expense deduction totaling \$9,423.00 for payments he made to his former spouse.

2. On September 26, 1977 the Audit Division issued to petitioner a Notice of Deficiency for the year 1974, asserting that additional personal income tax of \$1,413.45 was due together with interest. Said deficiency was based on an explanatory Statement of Audit Changes, originally dated August 24, 1976, wherein petitioner's claimed alimony expense deduction of \$9,423.00 was disallowed in full.

3. In mid 1971 petitioner's former spouse initiated a matrimonial action with the filing of a suit for divorce. The actual trial did not commence until February of 1974. Concurrent with the commencement of the trial both parties ceased sharing the same abode.

4. In April of 1974, at the continued trial, Mrs. Daniels' attorney made an oral motion to the Trial Judge in open court wherein an order was sought which would direct petitioner to pay to Mrs. Daniels a monthly sum for her support and for the support of Deborah, the sole issue of the marriage. After argument, the Judge orally instructed petitioner to pay to Mrs. Daniels the sum of \$1,047.00 per month until further notice. The trial was completed in September of 1974 and a written decree was issued in late December which required petitioner to pay \$600.00 per month in alimony and \$800.00 per month in child support.

5. Petitioner complied with the instructions of the Trial Judge and has substantiated, via photocopies of cancelled checks, that the sum of \$9,423.00 (\$1,047.00 x 9) was in fact paid to his former spouse during the 1974 tax year. Petitioner did not know whether or not his former spouse had included the \$9,423.00 in her gross income for the year 1974.

6. A court reporter was present at the above mentioned trial; however, a transcript of the proceeding was not made since same was not requested.

Petitioner testified that he did not obtain a copy of the transcript since the cost was prohibitive and since there was little likelihood that an appeal would be taken.

CONCLUSIONS OF LAW

A. That section 215(a) of the Internal Revenue Code provides that the husband is allowed a deduction for those amounts which are includable in his wife's gross income under section 71 of the Code. That section 71(a)(3) of the Code provides that a wife's income includes periodic payments received by her from her husband under a decree requiring the husband to make payments for her support and maintenance.

B. That petitioner has failed to sustain the burden of proof imposed under section 689(e) of the Tax Law to show that he was required to make support payments to his former spouse or what portion of the payments represented child support versus the spouse's support. (See H. Paul Baker v. Commissioner, 37 TCM 475.)

C. That an oral order directing petitioner to make payments to his spouse does not constitute a decree within the meaning and intent of section 71(a)(3) of the Internal Revenue Code. In Taylor v. Commissioner, 55 TC 1125, the Tax Court held that:

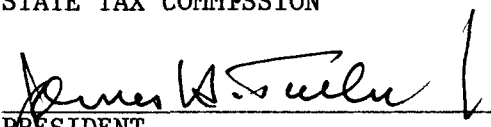
Nor do we think that the trial court's oral characterization of the resettled order as a "temporary award of alimony" or its oral direction that such payments be increased requires a different conclusion. Such oral pronouncements do not satisfy the requirements of New York law and consequently cannot be elevated to the status of an order or decree, the violation of which would be subject to judicial sanction.

D. That the petition of John B. Daniels is denied and the Notice of Deficiency dated September 26, 1977 is sustained, together with such additional interest as may be lawfully due and owing.

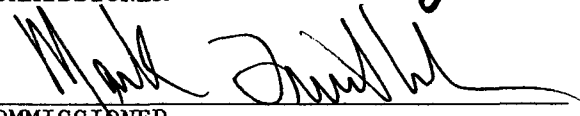
DATED: Albany, New York

DEC 11 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER