

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Ann Palestrini

:

:

: 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 Years :
1967, 1968 & 1969.

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Ann Palestrini, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ann Palestrini
211 N. Boston Ave.
N. Massapequa, NY 11758

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
6th day of November, 1981.

Carrie A. Hagelund

J. Vredenburg

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

November 6, 1981

Ann Palestrini
211 N. Boston Ave.
N. Massapequa, NY 11758

Dear Ms. Palestrini:

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

In the Matter of the Petition	:	
of	:	
ANN PALESTRINI	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1967, 1968 and	:	
1969.	:	

Petitioner, Ann Palestrini, 211 North Boston Avenue, North Massapequa, New York 11758, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1967, 1968 and 1969 (File No. 21153).

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 January 29, 1981 at 9:15 A.M. Petitioner Ann Palestrini appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner must include in taxable income support payments she received from her husband during the years 1967, 1968 and 1969.

II. Whether the provisions of the Internal Revenue Code and New York Tax Law which impose an income tax on alimony and separate maintenance payments are unconstitutional and violative of due process.

FINDINGS OF FACT

1. Petitioner, Ann Palestrini, timely filed New York State income tax resident returns for the years 1967, 1968 and 1969. The 1967 and 1968 returns

indicated petitioner's filing status as "married - filing separate returns", while the 1969 return was filed as a "single individual".

2. Total New York income of \$8,370.00, \$876.00 and \$3,272.00 was reported on the 1967, 1968 and 1969 returns respectively. These amounts did not include support payments received by petitioner from her husband, Emil J. Palestrini. Said support payments totaled \$3,430.00 in 1967, \$3,675.00 in 1968 and \$4,155.00 in 1969.

3. The Audit Division determined that the support payments received by petitioner constituted taxable income and, accordingly, assessed additional tax due of \$157.15 for 1967 and \$47.19 for 1968 and 1969, and, with the inclusion of interest of \$115.83, the total due amounted to \$320.17. The total amount due of \$320.17 was paid by petitioner on April 12, 1976.

4. On May 3, 1976 petitioner filed claims for refund requesting a return of the \$320.17 additional tax and interest paid for the years 1967, 1968 and 1969. Said claims for refund were based upon petitioner's contention that the support payments did not constitute taxable income. The Audit Division denied the claims for refund in full via letter dated December 8, 1976.

5. Petitioner testified that her husband had abandoned her and their two children sometime during the year 1964. Prior to the years at issue, petitioner obtained an order of support from the Nassau County Family Court compelling her husband to make support payments. The support payments received by petitioner during the years 1967, 1968 and 1969 were received pursuant to the order of support issued by Family Court.

6. Petitioner was unable to offer into evidence the order of support obtained from Family Court, however, she testified that said order provided for "...a certain amount to be paid for support of the wife and two children".

During the years at issue petitioner, although separated from her husband, remained legally married since neither party had filed for divorce nor did there exist a formal written separation agreement. Petitioner and her husband were divorced in a year subsequent to the years at issue.

CONCLUSIONS OF LAW

A. That Treasury Regulation 1.71-1(b)(3)(i) states as follows:

Where the husband and wife are separated and living apart and do not file a joint income tax return for the taxable year, paragraph (3) of section 71(a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after August 16, 1954, from her husband under any type of court order or decree (including an interlocutory decree of divorce or a decree of alimony pendente lite) entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. It is not necessary for the wife to be legally separated or divorced from her husband under a court order or decree; nor is it necessary for the order or decree for support to be for the purpose of enforcing a written separation agreement. (underlining supplied)

B. That pursuant to Treasury Regulation 1.71-1(e) periodic payments that are:

...received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 71(a).

C. That the payments received by petitioner from her husband pursuant to the Family Court order of support constitute payments made under a court order or decree within the meaning and intent of Treasury Regulation 1.71-1(b)(3)(i). That said order did not specify a designated portion of the payments as being solely for the support of the two children and, therefore, the total of all support payments are includable in petitioner's gross income within the meaning and intent of section 71(a) of the Internal Revenue Code and Article 22 of the Tax Law. (Ruth W. Copper v. Commissioner, 21TCM 1190; Commissioner v. J. Lester, 366 U.S. 299.)

D. That the constitutionality of the laws of the United States of America and New York State is presumed by the State Tax Commission. There is no jurisdiction at the administrative level to declare such laws unconstitutional; therefore, it must be presumed that the relevant sections of the laws are constitutional to the extent that they relate to the imposition of the income tax liability on petitioner.

E. That petitioner's claims for refund are denied and the notice of disallowance dated December 8, 1976 is hereby sustained.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER