

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Lila M. Goldwert	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1975.	:	

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Lila M. Goldwert, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lila M. Goldwert
2515 Glenwood Rd.
Brooklyn, NY 11210

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
4th day of August, 1982.

Connie A. Dayland

J. Vredenburg

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

August 4, 1982

Lila M. Goldwert
2515 Glenwood Rd.
Brooklyn, NY 11210

Dear Ms. Goldwert:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

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	:	
LILA M. GOLDWERT	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1975.	:	

Petitioner, Lila M. Goldwert, 2515 Glenwood Road, Brooklyn, New York 11210, 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 1975 (File No. 23651).

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 July 6, 1981 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether payments received by petitioner from her former spouse constituted only alimony or both alimony and child support.

FINDINGS OF FACT

1. Lila M. Goldwert (hereinafter petitioner) timely filed a New York State Income Tax Resident Return for the year 1975 whereon she reported alimony income of \$3,000.00.

2. On June 2, 1977 the Audit Division issued a Statement of Audit Changes to petitioner, wherein an adjustment was made holding an additional \$6,600.00 taxable to her as alimony on the basis that "since your agreement does not specify an amount as child support, the entire payment is alimony." Accordingly,

a Notice of Deficiency was issued against petitioner on May 12, 1978 asserting additional personal income tax of \$444.60, plus interest of \$86.34, for a total due of \$530.94.

3. On November 19, 1968, petitioner was legally separated from her husband, Sidney Goldwert. The pertinent terms of the separation agreement, which were incorporated into the divorce decree in 1969, provided, that:

"The husband shall pay to the wife for her support and maintenance and for the support, maintenance and education of the children the sum of Eight Hundred (\$800.00) Dollars per month." and that;

"If the parties are divorced and the wife re-marries, the husband shall be under no obligation to her for further support, except that while each child is under the age of 21 and unmarried, the husband shall pay to the wife the sum of One Hundred Fifty (\$150.00) Dollars per month for each such child, until he dies, marries, or reaches the age of 21, whichever event occurs first."

4. Petitioner had three children, none of which had reached the age of 21 or had married prior to or during the year at issue herein.

5. Petitioner had not remarried prior to or during the year at issue herein.

6. Petitioner submitted a joint affidavit with Mr. Sidney Goldwert wherein they state that when the separation agreement was drawn, it was their intent that \$350.00 per month was to be for alimony and \$450.00 per month (\$150.00 for each child) was to be for child support.

CONCLUSIONS OF LAW

A. That Internal Revenue Code Section 71(a)(1) provides that:

If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments received after such decree in discharge of a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

B. That Internal Revenue Code Section 71(b) provides in pertinent part that:

Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband.

C. That the fortuitous or incidental mention of a figure in a provision meant to be inoperative unless some more or less probable future event occurs, will not suffice to shift the tax burden from the wife to the husband (Weil v. Commissioner, 240 F.2d 584).

Since in the instant case the agreement provided for reductions only in the event the divorced wife remarried, it cannot be construed that child support payments were "fixed". Accordingly, all payments received pursuant to the agreement are deemed to constitute alimony and as such, are fully includable in petitioner's gross income.

D. That the petition of Lila M. Goldwert is denied and the Notice of Deficiency dated May 12, 1978 is hereby sustained.

DATED: Albany, New York

AUG 04 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER