

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

JEFFREY STANDER

DECISION

for Redetermination of a Deficiency or for  
Refund of New York State Personal Income Tax  
under Article 22 of the Tax Law and New York  
City Personal Income Tax under Chapter 46,  
Title T of the Administrative Code of the City :  
of New York for the Year 1979.

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Petitioner, Jeffrey Stander, 2274 78th Street, Brooklyn, New York 11214,  
filed a petition for redetermination of a deficiency or for refund of New York  
State personal income tax under Article 22 of the Tax Law and New York City  
personal income tax under Chapter 46, Title T of the Administrative Code of the  
City of New York for the year 1979 (File No. 44398).

A 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  
September 12, 1985 at 9:15 A.M., with all briefs to be submitted by October 12,  
1985. Petitioner appeared pro se. The Audit Division appeared by John P.  
Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

#### ISSUES

I. Whether petitioner is liable for penalties for failure to file his  
return on time and for failure to pay the tax due on time.

11. Whether it was proper for the Audit Division to assess interest on the  
tax due.

#### FINDINGS OF FACT

1. On November 5, 1982, the Audit Division issued a Statement of Audit

"Since you failed to reply to our previous letter(s), your 1979 personal income tax liability has been computed from information obtained from the Internal Revenue Service under authorization of Federal Law (Section 6103(D) of the Internal Revenue Code).

Penalty for late filing at 5% per month, maximum 25%.

Penalty for late payment at  $\frac{1}{2}$ % per month, maximum 25%.

Interest for late payment or underpayment at the applicable rate."

Said Statement was issued to petitioner since the Audit Division had no record of a 1979 return having been filed by Mr. Stander.

2. Based on the aforementioned Statement, the Audit Division, on February 25 1983, issued a Notice of Deficiency ("Notice") to petitioner for 1979. Said Notice imposed New York State and City personal income tax due of \$2,701.52, plus penalties' of \$1,080.60 and interest of \$865.47, for a total allegedly due of \$4,647.59.

3. On April 27, 1984, petitioner submitted his 1979 New York State and City income tax return together with two (2) wage and tax statements. Based on a review of said 1979 return, the Audit Division, on May 4, 1984, advised petitioner that: the tax due asserted in the Notice dated February 25, 1983 was reduced to \$268.63, plus penalties and interest. Petitioner agrees with the computation of additional tax due of \$268.63, but disagrees with the imposition of any penalty or interest charges. It is petitioner's position that no penalty or interest charges should be imposed since his 1979 return was timely prepared and mailed together with a personal check in full payment of the tax due shown on said return.

5. Mr Stander filed for and was granted an extension of time until June 15, 1980 to file his 1979 New York State and City tax return. Said extension was granted by the New York State Processing Division. Petitioner testified to the effect that his 1979 New York State and City income tax return was prepared and mailed before the extended due date had passed and that attached to said return was his personal check in payment of the tax due.

6. Due to personal bankruptcy certain of petitioner's records were not available to him and he was therefore unable to produce (i) a copy of his 1979 New York State and City tax return; (ii) a copy of his personal check in payment of the tax due shown on the 1979 return allegedly filed on or before June 15, 1980; (iii) his personal checkbook register which showed a check being drafted to the Department of Taxation and Finance on or before June 15, 1980; and (iv) any documentary evidence (e.g. certified mail receipt, registered mail receipt or other personal notations) to show that the 1979 return was actually mailed on or before June 15, 1980.

7. Petitioner personally prepared his 1979 New York State and City income tax return and said return was prepared in a timely fashion. Petitioner's income tax returns for prior and subsequent tax years have been filed in a timely manner.

8. On July 7, 1984, petitioner paid the revised tax due of \$268.63. On November 13, 1984 and November 19, 1984, petitioner made additional payments of 268.64 and \$143.93, respectively.

#### CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law and section T46-189.0(e) of the Administrative Code of the City of New York both place the burden of proof on petitioner. In the instant matter petitioner has testified that he is a

filed his 1979 New York State and City income tax return together with a personal check in full payment of the tax shown due on said return. However, petitioner's testimony that his 1979 return was timely filed, in and by itself, is insufficient to sustain his burden of proof given the fact that the Audit Division has no record of receiving said return and also the fact that Mr. Stander could not produce:

(i) any documentary evidence to show that the 1979 return was mailed;

(ii) a copy of a check in payment of the tax due shown on his 1979 return or even a copy of the return allegedly filed;

(iii) any documentary evidence from the bank which allegedly issued the check; and/or

(iv) a copy of petitioner's checkbook register showing that a check was made payable to the Department of Taxation and Finance on or before June 15, 1980.

B. That petitioner's 1979 New York State and City tax return was timely prepared and was apparently lost or misplaced. This fact, when considered together with petitioner's exemplary record of filing timely returns for years both prior and subsequent to the year at issue, leads to the conclusion that petitioner's failure to file a return for 1979 was due to reasonable cause and not willful neglect. Accordingly, the penalties asserted in the Notice of Deficiency dated February 25, 1983 are cancelled.

C. That there is no provision in the Tax Law or Administrative Code of the City of New York which permits interest charges to be waived, abated or cancelled. Accordingly, petitioner is liable for the payment of interest.

D. That pursuant to Finding of Fact "3", supra, the tax due is reduced from \$2,701.52 to \$268.63. Furthermore, pursuant to Finding of Fact "8",


supra, petitioner is entitled to credit for payments of \$111.40 and \$101.00.

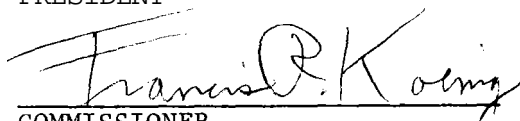
the payments made by petitioner exceed the tax and interest due, the Audit Division is directed to refund to petitioner such excess payments together with any interest to which he is legally entitled to receive.

E. That the petition of Jeffrey Stander **is** granted **to** the extent indicated in Conclusions of Law "B" and "D", supra, and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER