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BUREAU OF LAW  
MEMORANDUM*Income Tax Determinations*  
*A-Z*  
*Nikonschuk, Stephen*

TO: Commissioners Murphy,  
Macduff and Conlon

FROM: Francis V. Dow, Hearing Officer

SUBJECT: In the Matter of the Application  
of Stephen Nikonschuk for Revision  
or Refund of Personal Income  
Taxes under Article 16 of the  
Tax Law for the Year 1957

A hearing with reference to the above matter was scheduled before me on March 9, 1967 at 80 Centre Street, New York, New York. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issues involved herein are whether the taxpayer was subject to the imposition of penalty and interest because of the late filing of his return and payment of tax and whether the deposit of his check marked "paid in full" by the Department discharged the taxpayer's liability for 1957.

As a result of a District Office field follow-up, on November 1, 1962 the taxpayer filed an income tax return for the year 1957. He claimed specific deductions of \$963.08 and computed his tax liability, penalty and interest to be in the sum of \$162.21. The penalty was computed at the rate of twenty-five per cent of the tax. Interest was computed at the rate of one per cent per month. Although the taxpayer signed the return, he refused to sign a deferred payment agreement objecting to the imposition of the penalty and interest. He made no payment of his tax liability at that time.

On December 19, 1963, an assessment (Assessment No. AB 053012) was issued for the year 1957 in which the taxpayer's liability was recomputed and assessed normal tax of \$124.89, penalty at the rate of twenty-five per cent in the amount of \$31.22 and interest computed at the rate of one per cent per month in the amount of \$66.17 which totaled \$222.28 based on the Federal audit of his return which disallowed his itemized deductions as substantiated. The taxpayer mailed his check in the amount of \$124.89, the amount of basic tax, together with his application for revision or refund. The check was marked "paid in full". It was deposited by the Department and applied to the taxpayer's obligation. The taxpayer's application includes the statement, "Enclosed is a check for the amount that is claimed I owe".

The taxpayer did not submit any evidence to substantiate his itemized deductions nor did he contest their disallowance. His objection was directed to the imposition of penalty and interest.

Section 376(2) of the Tax Law provides that if a taxpayer fails voluntarily to make a return of income or to pay a tax if one is due within 60 days of the time required, he is subject to the imposition of a one hundred per cent penalty and an interest charge at the rate of one per cent per month. The policy of the Department as set forth under E Memorandum 41 provides for a rate of penalty of twenty-five per cent of tax and the interest rate of one per cent per month to be applied where a return is filed as a result of a District Office field follow-up.

While the policy of the Department is not to accept a check marked "paid in full" where it is less than the amount of the assessment (see memorandum of Counsel Best to Mr. Callahan, dated March 21, 1964, a copy of which is attached hereto) the deposit of the check by the Department in the amount of the basic tax did not constitute a waiver, compromise or accord and satisfaction of the taxpayer's liability for the payment of penalty and interest. The circumstances of filing an application for revision and refund at the time the check was tendered by the taxpayer is inconsistent with its delivery and acceptance as full satisfaction of the taxpayer's liability. Taxes cannot be compromised merely by the acceptance of a check for less than a full payment. This has been discussed in a memorandum from Counsel Kessell to Deputy Commissioner Greene, dated October 22, 1957, a copy of which is attached hereto.

While the Commission has power to waive penalty and interest, there was no showing that the Commission intended to accept the taxpayer's check as such a waiver. The statement in the application that the check was in "the amount that is claimed I owe" is misleading. Negligence, oversight or thoughtlessness does not create a waiver (see Alana American Portland Cement Works v. Barron Contracting Co., 222 N. Y. 34).

However, the taxpayer's application for revision or refund can be construed as a petition for a waiver of the penalty and interest assessed. I do not recommend such a waiver by the State Tax Commission since the taxpayer did not present any evidence which would justify his delay in filing his return or paying the tax due. The taxpayer did not show any hardship to warrant the granting of a waiver of the penalty and interest.

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For the reasons stated above, I recommend that the determination of the State Tax Commission denying the taxpayer's application in the above matter be in the form submitted herewith.

/s/

FRANCIS V. DOW

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Hearing Officer

FVD:rlp  
Enc.  
May 16, 1967

MS  
AA

5-22-67

**STATE OF NEW YORK**  
**STATE TAX COMMISSION**

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**IN THE MATTER OF THE APPLICATION**  
**OF**  
**STEPHEN WINDOGHUK**  
**FOR REVISION OR REFUND OF PERSONAL**  
**INCOME TAXES UNDER ARTICLE 16 OF THE**  
**TAX LAW FOR THE YEAR 1957**  
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The taxpayer having duly filed an application for revision or refund of personal income taxes under Article 16 of the Tax Law for the year 1957, and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on March 9, 1967 before Francis V. Dev, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

- (1) That the taxpayer did not voluntarily make a return of income or pay his income tax within 60 days of the time required for the year 1957.
- (2) That on November 1, 1962 as a result of a District Office field follow-up, the taxpayer filed an income tax return for the year 1957 in which he claimed itemized deductions of \$963.08 and computed his tax, penalty and interest to be in the sum of \$162.21; that the taxpayer made no payment on his tax liability at the time that he filed his income tax return; that the taxpayer contested the imposition of penalty

and interest for the year 1957.

(3) That on December 19, 1963 an assessment (Assessment No. AB 053012) was issued for the year 1957 in the sum of \$242.28 finding normal income tax due in the amount of \$124.89, penalty due at the rate of twenty-five per cent in the amount of \$31.22 and interest due at the rate of one per cent per month in the amount of \$86.17; that the assessment was based on the disallowance of the taxpayer's itemized deductions as unsubstantiated on a Federal audit of the taxpayer's return.

(4) That the taxpayer failed to submit any evidence to substantiate his itemized deductions.

(5) That the taxpayer mailed his application for revision or refund of Assessment No. AB 053012 for the year 1957 in which he stated, "Enclosed is a check for the amount that is claimed I owe", together with his personal check in the amount of \$124.89, which check had marked on its face the words "paid in full"; that the check was deposited by the Department of Taxation and Finance and credited toward the payment of the taxpayer's 1957 tax liability; that the taxpayer's application for revision or refund of the Assessment No. AB 053012 contested the imposition of penalty and interest.

Based upon the foregoing findings and all the evidence presented herein, the State Tax Commission hereby

**DETERMINES:**

(A) That the taxpayer did not substantiate his itemized deductions since he did not submit any documentary support or other sufficient evidence of their nature or the amount of them, and that the normal tax due in the amount of \$124.89 was correct.

(B) That the imposition of penalty and interest in computing the taxpayer's liability for the year 1957 was proper and less than the maximum amount which could have been imposed by subdivision 2 of section 376 of the Tax Law since the taxpayer had failed to voluntarily make a return of income or pay the tax due for the year 1957 within 60 days of the time required by such statute.

(C) That the deposit of the taxpayer's check in the amount of \$124.89 was not a waiver, compromise or accord and satisfaction of the taxpayer's liability as set forth in Assessment No. AB 053012.

(D) That the assessment for the year 1957 (Assessment No. AB 053012) does not include any tax or other charges which could not have been lawfully demanded; that the taxpayer's application for revision or refund with respect to the assessment issued for 1957 be and the same is hereby denied.

Dated: Albany, New York, this 26th day of May, 1967.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**President**

/s/

JAMES R. MACDUFF

**Commissioner**

/s/

WALTER MACLYN CONLON

**Commissioner**