

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lee C. Diesem :
: 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 :
1966.

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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Lee C. Diesem, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lee C. Diesem
31 El Lobo Ct.
Clifton Park, NY 12065

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
25th day of September, 1981.

Ernie A. Bagellund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
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Lee C. Diesem :
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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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Robert S. Trieble the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert S. Trieble
Simon, Trieble & Werner
57 W. High St., P.O. Box 361
Ballston Spa, NY 12020

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
25th day of September, 1981.

Emmie R. Haglund

J. Vredenburg

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

September 25, 1981

Lee C. Diesem
31 El Lobo Ct.
Clifton Park, NY 12065

Dear Mr. Diesem:

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
Robert S. Trieble
Simon, Trieble & Werner
57 W. High St., P.O. Box 361
Ballston Spa, NY 12020
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LEE C. DIESEM	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1966.	:	

Petitioner, Lee C. Diesem, 31 El Lobo Court, Clifton Park, New York 12065, 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 1966 (File No. 20670).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Albany, New York, on December 12, 1980 at 1:15 P.M. Petitioner, Lee C. Diesem, appeared with Simon, Trieble & Werner (Robert S. Trieble, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether petitioner is entitled to claim an exemption for his daughter Sandra.

II. Whether the deficiency issued against petitioner is barred by reason of laches.

FINDINGS OF FACT

1. Petitioner, Lee C. Diesem, filed a 1966 New York State personal income tax return wherein he claimed an exemption for his daughter Sandra.

2. On November 18, 1976 the Audit Division issued a Notice of Additional Tax Due against petitioner for the year 1966 which assessed personal income tax due of \$35.99. The explanation section of the Notice of Additional Tax Due

indicated that "Under authorization of Federal Law (section 6103(b) of the Internal Revenue Code), we have received notification of Federal audit changes and the following deficiency is based on failure to report such changes".

3. Based upon the above mentioned Notice of Additional Tax Due, petitioner was issued a Statement of Audit Changes and a Notice of Deficiency, both dated October 31, 1977. Lee C. Diesem timely filed a petition for redetermination of said Notice of Deficiency.

4. Petitioner's 1966 Federal income tax return was audited by the Internal Revenue Service (IRS) and as a result of said examination, the exemption claimed by petitioner for his daughter, Sandra, was disallowed. The findings of said IRS examination were protested, however, petitioner was unsuccessful in his appeal and said results became final sometime in 1971.

5. Petitioner did not report to the Department of Taxation and Finance, as required by section 659 of the Tax Law, the final results of the IRS examination for the year 1966. The Notice of Deficiency referred to in Finding of Fact 3, supra, is based solely on the IRS audit wherein the exemption for Sandra was disallowed.

6. Petitioner and his former spouse were divorced pursuant to a Final Decree of Divorce dated January 7, 1964. In accordance with said decree petitioner was required to pay to his former wife "...the sum of \$10.00 per week, per child, for support and maintenance for Sandra and Christopher Diesem..." and that "It is agreed that the \$10.00 per week per child for Sandra and Christopher Diesem is 51% of their support, and the Respondent (Lee C. Diesem) shall claim State and Federal income tax deductions for all the children".

7. In a letter dated June 2, 1970 the IRS advised petitioner that:

"This office has carefully reviewed the information and evidence you submitted and we regret to advise that we can not allow the exemption for Sandra on your 1966 and 1967 income tax returns. The decree of January 7, 1964 does contain the statement with regard to 51% of the support of Sandra and Christopher; however many amendments have been made to this document and therefore that agreement is not binding for the years 1966 and 1967.

Unfortunately, the income tax returns of your former spouse were not examined by our office. However, full details which you provided us, were given to the District Director's office at Kentucky, and this information, I am sure was evaluated before that office allowed the exemption and advised us that their files are now closed. Based on that determination, and the fact that two taxpayers can not claim the same exemption, this office must disallow the exemption on your returns."

Petitioner argued at the hearing held herein that to the best of his knowledge the divorce decree dated June 7, 1964 had not been amended, modified or otherwise changed and that the IRS disallowance of the exemption claimed for Sandra, premised on a fact that the decree had been amended, is erroneous and incorrect.

8. Petitioner testified that he provided a total of "approximately \$900.00" towards the support of his daughter Sandra. No documentary evidence was offered in support of his testimony. Petitioner did not know how much his former spouse had spent towards the support of Sandra.

9. The issue of laches was raised by petitioner due to the expiration of a four year period from the time he received the Notice of Additional Tax Due in November of 1976 until the time of the Small Claims Hearing held on December 12, 1980.

CONCLUSIONS OF LAW

A. That the argument to dismiss on the ground of laches is denied on the authority of Matter of Jamestown Lodge 1681 Loyal Order of Moose, Inc. (Catherwood) 31 A.D.2d 981, where it is said that "Laches, waiver or estoppel may not be

imputed to the State in the absence of statutory authority" and that "This rule is generally applied in connection with tax matters".

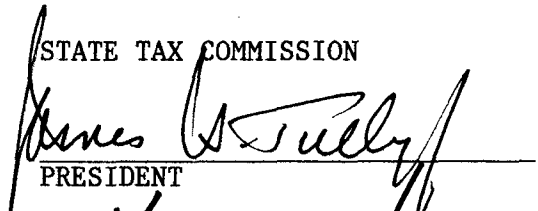
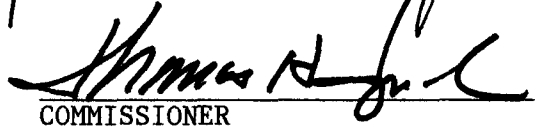

Said argument is also denied for the further reason that the record does not establish that petitioner has been damaged or prejudiced by delay.

B. That section 689(e) of the Tax Law places the burden of proof upon the petitioner to overcome the State's deficiency. Petitioner has failed to sustain the burden of proof to show that the IRS improperly, incorrectly or erroneously disallowed the exemption claimed for Sandra nor has he shown that he provided more than one-half of Sandra's total support.

C. That the petition of Lee C. Diesem is denied and the Notice of Deficiency issued October 31, 1977 is sustained together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

SEP 25 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER