

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Luis Diaz Carlo : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1973.

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Luis Diaz Carlo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Luis Diaz Carlo
603 Avenue of the Americas
New York, NY 10011

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
18th day of January, 1984.




pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Luis Diaz Carlo
603 Avenue of the Americas
New York, NY 10011

Dear Mr. Diaz Carlo:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LUIS DIAZ CARLO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1973.	:	

Petitioner, Luis Diaz Carlo, 603 Avenue of the Americas, New York, New York 10011, 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 1973 (File No. 35165).

A small claims hearing was held before Anthony J. Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 13, 1983 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the Tax Department took too long to assess petitioner for a federal audit change and in scheduling a hearing after petitioner protested the assessment.

II. Whether the negligence penalty imposed pursuant to section 685(b) of the Tax Law should be cancelled.

FINDINGS OF FACT

1. On July 1, 1980, the Audit Division issued a Notice of Additional Tax Due for 1973 to Luis Diaz¹ and Edith Carlo asserting personal income tax due of

¹ While the Notice was issued jointly, the petition was filed only by Luis Diaz Carlo. Sometime between the filing of joint income tax returns and the federal audit, Mr. Carlo and his wife were divorced.

\$357.50, penalty pursuant to section 685(b) of the Tax Law of \$17.87 and interest. The Notice explained, in part, that "[w]e (the Audit Division) have received notification of federal audit changes and the following deficiency is based on failure to report such changes."

2. On August 29, 1980, the Audit Division issued a Notice and Demand for Payment of Income Tax Due to petitioner and his wife. On January 9, 1981, the Audit Division issued a Payment Document to petitioner and his wife, at which time he made a partial payment. He wrote on the document a request to appeal the penalty and interest and that he was paying under protest. On September 2, 1981, the Audit Division issued another Payment Document showing petitioner's partial payment. He wrote, in part, on this document "request never answered for hearing to be held in N.Y. City". On or about September 5, 1981, petitioner filed a petition for refund.

3. Petitioner's 1973 federal income tax return was audited by the Internal Revenue Service. Upon completion of the audit, the Internal Revenue Service imposed a 5 percent negligence penalty pursuant to section 6653(a) of the Internal Revenue Code. Mr. Carlo stated that it was an agreement between his accountant and the Internal Revenue Service to settle the amount in dispute and that he never conceded to it.

4. Petitioner argued that the Tax Department took too long from the date of the completion of the federal audit (January 13, 1978) to issue the Notice of Additional Tax Due on July 1, 1980. He also argued that there was undue delay from the date of his petition (September 5, 1981) to the scheduling

of a pre-hearing conference on May 21, 1982. He argued, therefore, that any additional charges assessed should be waived.

CONCLUSIONS OF LAW

A. That petitioner's argument that any additional charges should be waived because of undue delay is tantamount to a waiver on the grounds of laches. "Laches, waiver or estoppel may not be imputed to the State in the absence of statutory authority. This rule is generally applied in connection with tax matters." (Matter of Jamestown Lodge 1681 Loyal Order of Moose, Inc., (Catherwood) 31 A.D.2d 981).

B. That petitioner has not submitted any evidence to show that he was not negligent in filing his returns. Since no evidence was submitted, there is no basis for cancelling the penalty imposed pursuant to section 685(b) of the Tax Law.

C. That the petition of Luis Diaz Carlo is denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984

Rodnicewicz
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Friedman
COMMISSIONER