

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

November 7, 1985

Edwin J. Day
2 Capral Lane
New City, NY 10956

Dear Mr. Day:

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 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, 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
EDWIN J. DAY

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.

Petitioner, Edwin J. Day, 2 Capral Lane, New City, New York 10956, 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. 46272).

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 April 23, 1985 at 10:45 A.M., with all briefs to be submitted by June 23, 1985. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether petitioner timely filed a New York State and City personal income tax return for 1979 and paid the tax due shown on said return.

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

FINDINGS OF FACT

1. On October 15, 1982, the Audit Division issued a Statement of Audit Changes to petitioner for 1979 which stated:

"Since you have 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).

Interest for late payment or underpayment at the applicable rate.

Penalty for late filing at 5% per month, maximum 25%. Penalty for late payment at $\frac{1}{2}$ % per month, maximum 25%."

The Statement of Audit Changes was issued to petitioner since the Audit Division had no record of a New York State and City income tax return having been filed by Mr. Day for 1979, while information received from the Internal Revenue Service indicated that he filed a 1979 Federal return from an address within the State and City of New York.

2. Based on the aforementioned Statement of Audit Changes, the Audit Division, on July 21, 1983, issued a Notice of Deficiency to petitioner for 1979, asserting additional New York State and City income tax due of \$1,763.26, plus penalty of \$735.53 and interest of \$619.62, for a total allegedly due of \$3,118.41. Said Notice allowed petitioner credit for a payment of \$1,000.00, leaving a balance due of \$2,118.41.

3. On May 24, 1983, petitioner, at the request of the Audit Division, submitted a copy¹ of his 1979 New York State and City tax return which showed a balance due of \$1,623.59. Pursuant to a letter dated September 14, 1983, the

1 Petitioner testified that he lost his copy of the 1979 return when moving from one residence to another. The "copy" of his return submitted to the Audit Division constituted petitioner's reconstruction of his 1979 return to the best of his recollection.

Audit Division accepted as correct the balance due of \$1,623.59 computed by petitioner on his return.

4. On his U.S. Individual Income Tax Return for 1979 petitioner was entitled to a refund and therefore said return was filed by Mr. Day in late January or early February of 1980. For New York State and City income tax purposes, petitioner had a balance due exceeding \$1,600.00. Petitioner maintains that his 1979 New York State and City income tax return was filed in late March or early April of 1980 and that attached to said return was an official bank check in excess of \$1,600.00 in full payment of the tax shown due on the return. The Audit Division has no record of receiving petitioner's 1979 return or a payment exceeding \$1,600.00.

5. Petitioner asserted that he was unable to produce a copy of his 1979 New York State and City income tax return since said copy was lost when he moved from one residence to another (see footnote "1", supra). Mr. Day also asserted that his copy of the bank check was attached to the copy of the 1979 return and was also lost when moving. Petitioner was unable to obtain any documentation from the bank which allegedly issued the bank check.

6. 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.

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 timely filed his 1979 New York State and City income tax return together with a bank

check of some \$1,600.00 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. Day could not produce:

- (i) any documentary evidence that the 1979 return was mailed;
- (ii) a copy of the bank check in payment of the tax due shown on his 1979 return;
- (iii) any documentary evidence from the bank which allegedly issued the bank check; or
- (iv) any documentary evidence that a sum exceeding \$1,600.00 was withdrawn from either a checking account or savings account sometime in late March or early April of 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 July 21, 1983 are cancelled.

C. That pursuant to Finding of Fact "3", supra, the tax due is reduced from \$1,763.26 to \$1,623.59.

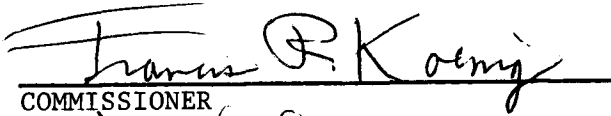
D. That the petition of Edwin J. Day is granted to the extent indicated in Conclusions of Law "B" and "C", supra; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER