

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>FRED SCHILDKRAUT</b>	:	DECISION
<b>AND MAGIC ENTERPRISES, INC.</b>	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1980	:	
through February 28, 1981.	:	

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Petitioners Fred Schildkraut and Magic Enterprises, Inc., 123-32 82nd Road, Kew Gardens, New York 11415, filed an exception to a determination of the Administrative Law Judge issued on November 2, 1989 with respect to their petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1980 through February 28, 1981 (File No. 801605). Petitioners appeared by Jerald L. Wank, Esq.

On its own motion, after reviewing the determination, the exception, the mailing records of the Division of Tax Appeals, the Tribunal's file in this matter and the response of the parties to the Tax Appeals Tribunal's Notice of Intent to Dismiss Exception, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioners timely filed their exception to the determination of the Administrative Law Judge.

***FINDINGS OF FACT***

The determination of the Administrative Law Judge was mailed to petitioners on November 2, 1989 at petitioners' last known address at 123-32 82nd Road, Kew Gardens, New York 11415.

Petitioners' initial application for an extension of time to file an exception to the determination of the Administrative Law Judge was received by the office of the Secretary to the Tribunal on November 30, 1989. By letter dated December 5, 1989 the office of the Secretary to

the Tribunal granted an extension of time for filing an exception until January 15, 1990. Two further extensions were later granted, making the exception due on February 25, 1990. Said exception was received by the office of the Secretary to the Tribunal on March 7, 1990.

The envelope containing the exception to the Administrative Law Judge's determination bore an office metered mail postmark of February 28, 1990 and a United States Postal Service postmark of March 5, 1990.

On June 14, 1990 the Tribunal issued a Notice of Intent to Dismiss this exception on the ground that it was not timely filed. The parties were given 30 days to respond to this notice. A response was received from petitioners on July 11, 1990 alleging that they were granted a further extension until March 10, 1990 to file an exception to the Administrative Law Judge's determination and submitting an office copy of a letter dated February 20, 1990 addressed to the Tribunal confirming the alleged extension. Therefore, petitioners assert that the exception was timely and request that their exception be heard.

The Division of Taxation responded to petitioners' letter of July 8, 1990 by stating that they have no record of receipt of the alleged confirmation letter from petitioners and that, therefore, the exception should be dismissed as untimely.

The Secretary to the Tribunal searched her records and found no evidence indicating that petitioners had requested an extension until March 10, 1990 nor that the Tribunal had granted such an extension.

### ***OPINION***

Section 2006 of the Tax Law provides as follows:

"The tribunal shall have the following functions, powers and duties:

\* \* \*

"7. To provide for a review of the determination of an administrative [sic] law judge if any party to a proceeding conducted before such administrative law judge, within thirty days after the giving of notice of such determination, takes exception to the determination . . . " (Tax Law § 2006.7).

20 NYCRR 3000.11(a) provides as follows:

"Review by tribunal. (a) Filing of exception.

(1) Within 30 days after the giving of notice of the determination of an administrative law judge, any party may take exception to such determination and seek review thereof by the tribunal, by filing an exception and two conformed copies with the secretary. A copy of the exception shall be served at the same time on the other party. When the Division of Taxation is the other party, service shall be made on the director of the Law Bureau." (20 NYCRR 3000.11[a][1].)

Exceptions must be filed within 30 days after the giving of notice of the determination of the Administrative Law Judge (Tax Law § 2006.7; 20 NYCRR 3000.11([a][1])). An exception received by this Tribunal after the date it was due is deemed to be filed on the date of the United States postmark stamped on the envelope (20 NYCRR 3000.16[a][1])). This exception was received ten days after the date the exception was due. Neither the office metered mail postmark nor the United States Postal Service postmark on the envelope containing the exception were on or before the prescribed date for filing. However, petitioners argue in their response to the Tribunal's Notice of Intent to Dismiss Exception that they wrote to the Tax Appeals Tribunal on February 20, 1990 confirming a further extension of time until March 10, 1990 to file the exception. The regulations of the Tax Appeals Tribunal at 20 NYCRR 3000.11(a)(2) provide that the Tribunal may extend the 30-day period for filing an exception provided an application for extension is filed within such period and served upon the other party and if "good cause" is shown. Here, the Tax Appeals Tribunal has no record of an application for an extension of time to file to March 10, 1990 and the Division of Taxation states that it has no record of being served with a copy of this application for extension. Furthermore, petitioners have not offered any proof

that they made a timely written request for an extension other than an office copy of an alleged letter dated February 20, 1990 from their office to the Tax Appeals Tribunal confirming the March 10, 1990 date. With no evidence that it was received, the copy of the alleged letter cannot serve as proof of an extension. In the absence of evidence of registered or certified mail or similar proof, other evidence, such as testimony as to mailing, would also be insufficient (see, Matter of Sipam, Tax Appeals Tribunal, March 10, 1988). Therefore, the exception was not timely filed and the Tribunal lacks jurisdiction to review it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of petitioners, Fred Schildkraut and Magic Enterprises, Inc., be, and hereby is, dismissed with prejudice as of this date.

DATED: Troy, New York  
October 25, 1990

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner