

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ROBERT H. AND HANNA H. SABEL</b>	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1981.	:	
	:	

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 20, 1988 with respect to the petition of Robert H. and Hanna H. Sabel, c/o Iwanyshyn, Kesich & Co., 834 Ridge Avenue, Pittsburgh, Pennsylvania 15212, for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1981 (File No. 802535). Petitioner appeared by Rona Klein, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

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

***ISSUE***

Whether the Division of Taxation timely filed its exception to the determination of the Administrative Law Judge.

***FINDINGS OF FACT***

The determination of the Administrative Law Judge was mailed to the Division of Taxation on October 20, 1988.

Both parties filed exceptions to the determination of the Administrative Law Judge. The Tribunal, in a previous decision, denied the motion of the Division of Taxation to dismiss the petitioners' exception. This decision deals only with the exception of the Division of Taxation.

The Division of Taxation's 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 16, 1988. By letter dated November 16, 1988 the Secretary to the Tribunal granted an extension of time for filing an exception until December 16, 1988.

The exception to the determination of the Administrative Law Judge filed by the Division of Taxation was received by the office of the Secretary to the Tribunal on December 19, 1988. The envelope which contained the exception to the Administrative Law Judge's determination bears no postmark, having been sent through the inter-office mail system of the New York State Department of Taxation and Finance.

On December 28, 1989 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.

A response was received on behalf of the Division of Taxation in the form of an affidavit setting forth its position. The Division contends that it is not the date of receipt that governs the timely filing of an exception, but argues that an analysis under the Tribunal regulations is required to determine whether an exception is received within the time period it could have reasonably been expected to be received, had it been mailed within the time period by ordinary mail. The Division of Taxation requests that should its exception be dismissed, the Tribunal address the issues contained therein pursuant to Tax Law § 2006.7 and 20 NYCRR 3000.11(e).

### ***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)(i) provides as follows:

"(a)(i) Filing of exception. 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][i].)

Exceptions must be filed within 30 days after the giving of notice of the determination of the Administrative Law Judge or within the time granted by the Tribunal for an extension of time to file an exception (Tax Law § 2006[7]; 20 NYCRR 3000.11[a][i], [ii]). Under certain circumstances the date of a United States or metered mail postmark may be deemed to be the date of filing of an exception. However, these specific circumstances are set forth in the regulations governing practice before the Tribunal. There is no provision in the regulations allowing an exception contained in an envelope bearing no postmark and received after the due date to be deemed timely filed.

20 NYCRR 3000.16(a)(1) provides as follows:

"... Where delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed to be the date of filing."

This provision specifically applies to the exception filed by the Division of Taxation in this case. The exception to the determination of the Administrative Law Judge was due on December 16, 1988. It was received by the office of the Secretary to the Tribunal on December 19, 1988, three days after the date the exception was due, with no postmark on the envelope. Therefore, the exception was not timely filed and the Tribunal lacks jurisdiction to review it.

We deal next with the Division's assertion that if its exception is dismissed, the Tribunal should in any event consider the issues raised therein pursuant to Tax Law § 2006.7 and 20 NYCRR 3000.11(e). We agree with the Division that the Tribunal has the authority to review any aspect of the Administrative Law Judge's determination (see, Matter of Klein's Bailey Foods, Inc., Tax Appeals Tribunal, August 4, 1988; Tax Law § 2006.7; 20 NYCRR 3000.11[e]). However, the exercise of such authority is discretionary with the Tribunal. It is necessarily

dependent upon the deliberations of the Tribunal, particularly, the relationship between the issues properly before the Tribunal on exception and the other issues dealt with in the determination of the Administrative Law Judge. It would be premature at this point to prejudge our deliberations with regard to the relationship between the issues raised by the Division in its untimely exception and the issues properly before us by virtue of petitioners' timely exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of the Division of Taxation be, and hereby is, dismissed with prejudice as of this date. We direct the Secretary to the Tribunal to schedule the oral argument for petitioners' exception.

DATED: Troy, New York  
May 10, 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