

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ES & C ASSOCIATES	:	DECISION
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, ES & C Associates, 919 Third Avenue, New York, New York 10022, filed an exception to the determination of the Administrative Law Judge issued on December 22, 1988 with respect to its petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 804300). Petitioner appeared by Alan Hoffman, C.P.A.

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 petitioner to the Tax Appeals Tribunal's Notice of Intent to Dismiss Exception, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner 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 petitioner on December 22, 1988, at the petitioner's last known address at 919 Third Avenue, New York, New York 10022.

Petitioner'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

January 23, 1989, the date either an exception or such an application was due. By letter dated January 24, 1989 the Secretary to the Tribunal granted an extension of time for filing an exception until February 22, 1989.

The exception to the determination of the Administrative Law Judge filed by the petitioner was received by the office of the Secretary to the Tribunal on March 2, 1989. The envelope containing the exception to the Administrative Law Judge's determination had an office metered mail postmark of February 27, 1989.

On September 26, 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 petitioner in the form of an affidavit which recites that it is made by an attorney who "served as counsel to East Hills Funding Corp. ("East Hills") on behalf of the taxpayer in the above captioned matter."

The affiant states that she mailed a copy of the exception to the Division of Taxation on February 22, 1989, as evidenced by an affidavit of service, and at the same time mailed the exception to the Tribunal. The affiant can offer no explanation as to why the envelope containing the Tribunal's copy bore a meter stamp of February 27, 1989. The affiant requests the Tribunal to extend the period for filing an exception in this case, even though the request was not made within the extension period.

OPINION

Subdivision 7 of 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:

"Review by tribunal. (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]). If an exception is received by the Tribunal after the due date, and the postmark on the envelope containing the exception is an office metered mail postmark, then such postmark must bear a date within the prescribed period or on or before the prescribed date for filing the exception (20 NYCRR 3000.16). The exception to the determination of the Administrative Law Judge in this matter was due on February 22, 1989. It was received by the office of the Secretary to the Tribunal on March 2, 1989. The envelope containing the exception had an office metered mail postmark of February 27, 1989, five days after the date the exception was due. Therefore, the exception was not timely filed and the Tribunal lacks jurisdiction to review it. Accordingly, the Tribunal is also without authority to grant an extension to the period for filing this exception.

Accordingly, it ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of the petitioner, ES & C Associates, be, and hereby is, dismissed with prejudice as of this date.

DATED: Troy, New York
January 11, 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