

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MILLBROOK ENTERPRISES, INC.	:	DECISION
ALBERT E. SCHMITT, PRESIDENT	:	
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	:	

Petitioner Millbrook Enterprises, Inc., Albert E. Schmidt, President, P.O. Box 2318, Marco Island, Florida 33969, filed an exception to the determination of the Administrative Law Judge issued on June 28, 1990 with respect to its 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. 806003). Petitioner appeared by its president, Albert E. Schmitt. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was not held.

On its own motion, after reviewing the determination, the exception and the mailing records of the Division of Tax Appeals in this matter, 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

We find the following facts.

The determination of the Administrative Law Judge was mailed to petitioner on June 28, 1990, at petitioner's last known address at 4407 Verona Drive, Wilmington, Delaware 19804.

Petitioner's exception to the determination of the Administrative Law Judge was required to be filed by July 30, 1990. Said exception was received by the Office of the Secretary to the Tribunal on August 2, 1990. The envelope containing the exception to the Administrative Law Judge's determination had a United States Postal Service postmark of July 31, 1990, and an office metered mail postmark of July 30, 1990.

On August 13, 1990, the Tribunal issued a Notice of Intent to Dismiss this exception on the ground that it was not timely filed. The Notice of Intent to Dismiss sent to petitioner was addressed to the address shown for petitioner on its exception. The parties were given 30 days to respond to this notice. The notice sent to petitioner was returned to this office with a notation that it was unclaimed. The notice was mailed again to petitioner on September 11, 1990, and was also returned unclaimed. Neither party has responded to the notice.

OPINION

Subdivision 7 of section 2006 of the Tax Law provides that the Tribunal shall have the following functions, powers and duties:

"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:

"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]). The 30-day filing period

for filing an exception in this case expired on July 30, 1990. The envelope containing the exception had a United States Postal Service postmark of July 31, 1990. The envelope also bore an office metered mail postmark of July 30, 1990. When an envelope bears a United States Postal Service postmark and another postmark not made by the United States Postal Service (such as an office metered mail postmark), the other postmark is disregarded and the postmark made by the United States Postal Service establishes the date of filing (20 NYCRR 3000.16[b][3]). In this case, the exception is untimely as the United States postmark falls outside the 30-day filing period for filing an exception and, therefore, the Tribunal lacks jurisdiction to review such exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of petitioner Millbrook Enterprises, Inc., Albert E. Schmitt, President, be, and hereby is, dismissed with prejudice as of this date.

DATED: Troy, New York
February 7, 1991

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

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

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