

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
CHENG KAI YU AND HUI HUI YU : DECISION
 : DTA No. 806696
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 Years 1984 and 1985. :

Petitioners Cheng Kai Yu and Hui Hui Yu, 903 Ocean Avenue, Brooklyn, New York 11226 filed an exception to the determination of the Administrative Law Judge issued on February 22, 1991 with respect to their 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 years 1984 and 1985. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

On its own motion, after reviewing the determination, the exception, the mailing records of the Division of Tax Appeals and the response of petitioners 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

We find the following facts.

The determination of the Administrative Law Judge was mailed to petitioners on February 22, 1991 at petitioners' last known address at 903 Ocean Avenue, Brooklyn, New York 11226.

Petitioners' exception to the determination of the Administrative Law Judge was required to be filed by March 25, 1991. Said exception was received by the Office of the Secretary to the Tribunal on April 25, 1991. The envelope containing the exception had an illegible United States Postal Service postmark.

On May 10, 1991, 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 to the Notice was received from petitioners on June 17, 1991 stating that the post office had misplaced the Administrative Law Judge's determination but that petitioners filed an exception to the determination as soon as they received it from the post office.

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)(1) provides as follows:

"Within 30 days after the giving of notice of the determination of the administrative law judge, any party may take exception to such determination and seek review thereof by the tribunal by filing an exception 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). The exception in this matter was required to be filed by March 25, 1991. The exception was received by the Office of the

Secretary to the Tribunal on April 25, 1991, which is not within the 30-day period for filing an exception. The envelope containing the exception bore an illegible United States Postal Service postmark. Pursuant to 20 NYCRR 3000.16(a)(2)(iii) when an envelope contains an illegible postmark, the burden is upon the person required to file the document to prove when the postmark was made. Petitioners have not submitted any evidence to prove the postmark was timely.

In response to the Notice of Intent to Dismiss Exception, petitioners submitted evidence in an attempt to prove that the Flatbush Station Post Office temporarily lost the Administrative Law Judge's determination and, therefore, they should be allowed additional time to file their exception. This evidence consisted of a letter to the Manager of the Flatbush Station Post Office, inquiring about certified mail that had been lost, and certified mail receipts proving mailing and delivery of this letter. However, this does not prove that the Administrative Law Judge's determination was temporarily lost by the post office and that petitioners were not able to gain access to it until April 1, 1991. This evidence only proves that petitioners sent a letter to the Flatbush Station Post Office. There is nothing in the record from the Flatbush Station Post Office confirming that certified mail addressed to Cheng Kai Yu and Hui Hui Yu was temporarily lost.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of petitioners Cheng Kai Yu and Hui Hui Yu is hereby dismissed with prejudice as of this date.

DATED: Troy, New York
January 9, 1992

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

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

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