

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RUBO SALES CORP.	:	DECISION
	:	DTA No. 807347
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 March 1, 1985 through November 30, 1987.	:	

Petitioner Rubo Sales Corp., c/o S. Dansky, CPA, Garden City, New York 11530, filed an exception to the determination of the Administrative Law Judge issued on April 9, 1992 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 March 1, 1985 through November 30, 1987. Petitioner appeared by Milton Weinstein, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

On July 24, 1992, the Tax Appeals Tribunal (hereinafter the "Tribunal") issued a Notice of Intent to Dismiss this exception on the ground that petitioner's second request for an extension of time to file the exception was not timely. The parties were given 30 days to respond to this Notice. Both petitioner and the Division of Taxation (hereinafter the "Division") submitted letters in response to the Notice of Intent to Dismiss.

On its own motion, after reviewing the determination, the applications for extensions of time to file an exception, the exception, the mailing records of the Division of Tax Appeals in this matter, the Notice of Intent to Dismiss Exception, and the responses of the parties, the Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed its second request for an extension of time to file an 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 April 9, 1992 at petitioner's last known address at 913 Sunrise Mall, Massapequa, New York 11758. A copy of the determination of the Administrative Law Judge was also mailed to petitioner's representatives Lawrence Cole, CPA, at 350 Fifth Avenue, Suite 7190, New York, New York 10118 and Milton Weinstein at 111 Great Neck Road, Great Neck, New York 11021.

Petitioner's first 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 May 6, 1992. The envelope containing the request had a United States Postal Service postmark of May 4, 1992. A copy of the request was also transmitted via facsimile to the office of the Secretary to the Tribunal on May 4, 1992. By letter dated May 13, 1992, the Secretary to the Tribunal granted an extension of time to file an exception until June 10, 1992.

Petitioner's second 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 June 15, 1992. The envelope containing this second request had an office-metered postmark of June 10, 1992 and a United States Postal Service postmark of June 11, 1992. A copy of the request was also transmitted via facsimile to the office of the Secretary to the Tribunal on June 10, 1992. By letter dated June 12, 1992, the Secretary to the Tribunal granted petitioner's second request for an extension of time to file an exception, extending the due date for such exception to June 24, 1992.

The Division by letter received by the Secretary to the Tribunal on June 17, 1992 submitted an objection to the second extension granted to petitioner. As a basis for such objection, the Division cites § 3000.11(a)(2) and § 3000.16(a)(1) and (2) of the New York Code of Rules and Regulations. In response to the Division's objection, the Secretary to the Tribunal by letter dated June 19, 1992 notified both parties that because there was no procedure to dismiss

extensions, the matter would proceed as follows: petitioner should file its exception by June 24, 1992 and, if such exception was filed, the Tribunal would issue a Notice of Intent to Dismiss which would allow time for both parties to comment on the issue of timeliness.

Petitioner's exception to the determination of the Administrative Law Judge was received by the office of the Secretary to the Tribunal on June 26, 1992. The envelope that contained the exception had a United States Postal Service postmark of June 24, 1992.

OPINION

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

"[t]o 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. . . . The tribunal may also grant an extension of time for filing an exception provided an application for such extension is filed within the time period for taking exception to a determination under this subdivision, and if good cause is shown" (Tax Law § 2006[7]).

20 NYCRR 3000.11(a)(1) provides as follows:

"[w]ithin 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 with the secretary. The exception should be filed with the secretary either in person at the offices in Troy or by mail addressed to:

Secretary to the Tax Appeals Tribunal
State of New York
Division of Tax Appeals
Riverfront Professional Tower
500 Federal Street
Troy, NY 12180-2893

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]).

20 NYCRR 3000.11(a)(2) provides as follows:

"[t]he tribunal may extend the 30-day period for filing an exception, provided an application for extension is filed within such period and served on the other party, and if good cause is shown. 'Good cause' depends on the circumstances of each case, but would include any cause which appears to an ordinarily prudent person as a reasonable ground for failure to file an exception within the prescribed period" (20 NYCRR 3000.11[a][2]).

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][1], [2]). An extension of the 30-day period for filing an exception may be granted by the Tribunal provided an application is filed within such period and served on the other party, and if good cause is shown (20 NYCRR 3000.11[a][2]). An extension request that is not timely received by the Tribunal may be treated as timely filed if the envelope containing the extension request bears a United States Postal Service postmark which falls within the prescribed period or on or before the prescribed date for filing. Where delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed to be the date of filing (20 NYCRR 3000.16[a][1]). While the Tribunal's rules of practice and procedure provide for the use of office-metered mail postmarks, such rules specifically state that where an envelope has a United States Postal Service postmark in addition to a postmark not so made, the latter postmark is disregarded (20 NYCRR 3000.16[b][3]). There are no provisions in the mailing rules of the Tribunal for filing by means of facsimile transmission.

An extension having been granted, the exception, or an additional request for an extension of time to file an exception, to the determination of the Administrative Law Judge in the matter was due on June 10, 1992. In addition to an office-metered mail postmark, the envelope containing the second request for an extension of time had a United States Postal Service postmark of June 11, 1992, which is not within the prescribed period or on or before the

prescribed date for filing. Therefore, it appears that the second extension request was not timely filed as required by Tax Law § 2006(7).

It is petitioner's position that filing by facsimile is provided for by section 20 NYCRR 3000.16(a)(1) where the term "similar service" is used and also provided for in the Civil Practice Law & Rules ("CPLR") section 2103(b)(5). Specifically, petitioner asserts that on June 9, 1992 during a telephone conversation, the Secretary to the Tribunal directed petitioner's representative to submit the second extension request via facsimile and to also mail a copy. It is petitioner's contention that by giving such instructions and then by granting the application by letter dated June 12, 1992, the Tribunal has implied that the "similar service" provision allows filing by facsimile. The response of the Division to the Notice of Intent to Dismiss merely states that the Division has no objection to petitioner's exception being dismissed.

20 NYCRR 3000.16(a) provides that when a document is delivered by United States mail to the Tribunal after the date on which it is due, the United States Postal Service postmark is deemed to be the date of filing. This subsection then continues by providing that "[w]here delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed to be the date of filing." Reading the subsection in its entirety, the obvious meaning of courier, messenger or similar services involves actual physical delivery of the document. There is no provision anywhere in the rules of practice before the Tribunal that allows or even mentions filing or service of papers by electronic means. Petitioner's assertion that the Secretary to the Tribunal directed petitioner's representative to both transmit the second extension request by facsimile and to mail such request does not change the clear language of the regulations, assuming arguendo, that the assertions are correct. It was incumbent upon petitioner to ensure that the second extension request was postmarked on or before June 10, 1992. Furthermore, not allowing the filing of required documents by facsimile transmission does not impose a hardship on parties appearing before the Tribunal. The Tribunal does not require personal service. Filing

of documents may be accomplished by mail and a party need only ensure that the United States Postal Service postmark is within the time for filing the document.

Petitioner also points to CPLR section 2103(b)(5) which allows for service by electronic means. However, this section only applies if an action is pending (i.e., it applies only to interlocutory papers), and only if the attorney upon whom papers are served has previously designated a facsimile number to be used in the pending action. A request, or a second request, for an extension of time within which to file an exception is a jurisdictional document not an interlocutory paper served in a pending action. Therefore, CPLR section 2103(b)(5) would not allow attempted service by facsimile in this case even if we held it applicable to proceedings before the Tribunal. The Tribunal has not even implicitly authorized facsimile service by designating a facsimile number in its regulations, exception form or even on its letterhead.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of petitioner Rubo Sales Corp. be, and hereby is, dismissed with prejudice as of this date.

DATED: Troy, New York
February 25, 1993

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

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