

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CORLEY R. BARNES	:	DECISION
	:	DTA No. 809496
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and Title T of the New York City	:	
Administrative Code for the Year 1986.	:	

Petitioner Corley R. Barnes, P.O. Box 102, Aspen, Colorado 81612, filed an exception to the determination of the Administrative Law Judge issued on April 8, 1993. Petitioner appeared by Thomas C. McEvoy, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Donna Gardiner, Esq., of counsel).

On June 17, 1993, the Tax Appeals Tribunal (hereinafter the "Tribunal") issued a Notice of Intent to Dismiss this exception on the ground that it was not timely filed. The parties were given until July 19, 1993 to respond to this Notice, which date began the six-month period for the issuance of this decision. A response to the Notice was filed by petitioner. The Division of Taxation did not submit a response.

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

ISSUE

Whether petitioner timely filed his 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 8, 1993, at petitioner's last known address at P.O. Box 102, Aspen, Colorado 81612. A copy of the determination of the Administrative Law Judge was also mailed, on April 8, 1993, to petitioner's representative, Thomas C. McEvoy, C.P.A., Kolinsky & McEvoy, 107 Northern Boulevard, Great Neck, New York 11021.

Petitioner's exception to the determination of the Administrative Law Judge was received by the office of the Secretary to the Tax Appeals Tribunal on May 17, 1993. The envelope containing the exception bears a United States Postal Service postmark of May 13, 1993.

On June 17, 1993, the Tribunal issued a Notice of Intent to Dismiss this exception on the ground that it was not timely filed. The parties were given until July 19, 1993 to respond to this Notice. Petitioner responded by letter dated June 23, 1993. The Division of Taxation did not respond.

OPINION

Subdivision 7 of section 2006 of the Tax Law provides that the Tribunal shall have the following functions, 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" (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 3000.16(a)(1) provides as follows:

"[i]f any document required to be filed under this Part within a prescribed period or on or before a prescribed date under authority of any provision of article 40 of the Tax Law is, after such period or date, delivered by United States mail to the New York State Division of Tax Appeals or Tax Appeals Tribunal, Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180, the date of the United States postmark stamped on the envelope or other appropriate wrapper in which such document is contained will be deemed to be the date of filing" (20 NYCRR 3000.16[a][1]).

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]). The exception to the determination of the Administrative Law Judge in this matter was due on May 10, 1993. It was received by the office of the Secretary to the Tax Appeals Tribunal on May 17, 1993. The envelope containing the exception bears a United States Postal Service postmark of May 13, 1993. Therefore, it was not timely filed as required by Tax Law § 2006(7), and the Tribunal lacks jurisdiction to review petitioner's exception.

In petitioner's response to the Notice of Intent to Dismiss Exception, he states that 20 NYCRR 3000.17 provides that "[t]he provisions of the C.P.L.R. regarding service shall apply to this part unless they clearly conflict." This language is not contained in that section of the regulations. We do find language similar to that quoted by petitioner in 20 NYCRR 3000.5(a)(6); however, that section pertains to motion practice and not to service.

Petitioner argues that since service of the determination was by mail, the Tribunal should follow CPLR 2103 and allow an additional five days for filing the exception. As we held in Matter of Designer Realty Corp. (Tax Appeals Tribunal, November 12, 1992), the presumption of notice five days after a document is mailed:

"only occurs when papers are being served in a pending action. The Court of Appeals has held that proceedings before an administrative

agency are not an action and that, therefore, CPLR 2103 does not apply (Matter of Fiedelman v. New York State Dept. of Health, 58 NY2d 80, 459 NYS2d 420). . . . it should be noted that, for the purpose of instituting an Article 78 proceeding concerning a Tribunal decision, the giving of notice occurs when the decision is mailed (Tax Law § 2016). The Tribunal has consistently held that the giving of notice of an Administrative Law Judge determination occurs when the determination is mailed (Matter of Meyer, Tax Appeals Tribunal, June 25, 1992; Matter of Shipcentral Realty, Tax Appeals Tribunal, May 21, 1992)."

Finally, as a timely exception was not filed, the Tribunal lacks jurisdiction to review petitioner's assertion that the Law Bureau's answer to the petition was not timely filed and that his motion for a determination on default should have been granted by the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

DATED: Troy, New York
September 2, 1993

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

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