

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**FRANK R. DeMILT** : DECISION  
for Redetermination of a Deficiency or for Refund of : DTA No. 809935  
Personal Income Tax under Article 22 of the Tax Law and :  
Chapter 17, Title 11 of the New York City Administrative :  
Code for the Year 1988. :  
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Petitioner Frank R. DeMilt, c/o Murphy & O'Connell, One Battery Park Plaza, New York, New York 10004, filed an exception to the determination of the Administrative Law Judge issued on December 12, 1994. Petitioner appeared by Murphy & O'Connell (Patrick J. Murphy, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

On February 9, 1995, 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 30 days to respond. Only petitioner submitted a response to the Notice of Intent to Dismiss. Any responses from the parties were due on March 13, 1995 and this date began the six-month period for the issuance of this decision.

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, the Tribunal renders the following decision.

***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 December 12, 1994 at petitioner's last known address at c/o Murphy & O'Connell, One Battery Park Plaza, New York, New York 10004. A copy of the determination of the Administrative Law Judge was also mailed on December 12, 1994 to petitioner's representative Patrick J. Murphy, Esq., Murphy & O'Connell, at One Battery Park Plaza, New York, New York 10004.

Petitioner's exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on January 17, 1995. The envelope containing the exception bears a United States Postal Service postmark of January 12, 1995.

On February 9, 1995, 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. Petitioner responded by a letter dated March 15, 1995.

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]).

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 January 11, 1995. It was received by the office of the Secretary to the Tax Appeals Tribunal on January 17, 1995. The envelope containing the exception bears a United States Postal Service postmark of January 12, 1995. Therefore, the exception was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review it.

In his response to the Notice of Intent to Dismiss Exception, petitioner states that he "did not get notice of the . . . determination until December 16, 1994" (Opposition to Motion to Dismiss Exception) and that the exception was sent by United States Certified Mail on January 12, 1995. Petitioner next argues that the "Tribunal's power to grant extension of time as to notice of appeal and extension of time are within the exercise of discretion to regulate and control its proceedings and is not a jurisdictional limitation on its powers" (Opposition to Motion to Dismiss Exception).

We reject petitioner's argument that notice commenced when the determination was received. As we stated in Matter of Dimino (Tax Appeals Tribunal, July 1, 1993), "[t]he statute and regulation provide that a petitioner has 30 days from the giving of notice of the Administrative Law Judge's determination to file an exception, not 30 days from receipt of the determination. The giving of notice commences when the determination is mailed by the Division of Tax Appeals (Tax Law § 2006[7]; 20 NYCRR 3000.17[a])" (Matter of Dimino, *supra*; *see also*, Matter of Designer Realty Corp., Tax Appeals Tribunal, November 12, 1992; Matter of Meyer, Tax Appeals Tribunal, June 25, 1992). In addition, the Tribunal does not have the discretion and is not empowered to waive the 30-day time period for filing an exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

DATED: Troy, New York  
May 18, 1995

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner