

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RED APPLE SUPERMARKETS, INC.	:	DECISION
for Redetermination of a Deficiency/Revision	:	DTA No. 815235
of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Periods June 1, 1987 through	:	
May 31, 1993 and March 1, 1994 through	:	
November 30, 1994.	:	

Petitioner Red Apple Supermarkets, Inc., 823 Eleventh Avenue, New York, New York 10019-3535, filed an exception to the order of the Administrative Law Judge issued on October 3, 1996. Petitioner appeared pro se by its corporate officer, Michael Seltzer. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

On November 18, 1996, the Tax Appeals Tribunal (hereinafter the "Tribunal") issued a Notice of Intent to Dismiss Exception on the ground that petitioner's exception was not timely filed. The parties were given until December 23, 1996 to respond. Neither party responded to the notice.

On its own motion, after reviewing the order, the exception and the mailing records of the Division of Tax Appeals in this matter, the Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner timely filed its exception to the order of the Administrative Law Judge.

FINDINGS OF FACT

We find the following facts.

The Order Dismissing Petition, dated October 3, 1996, by the Administrative Law Judge was mailed to petitioner on October 3, 1996 at petitioner's last known address at 823 Eleventh Avenue, New York, New York 10019-3535, Attn: Michael Seltzer, Corporate Officer.

Petitioner's exception to the order of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on November 8, 1996. It was delivered to said office by Airborne Express.

On November 18, 1996, the Tribunal issued a Notice of Intent to Dismiss Exception on the ground that petitioner's exception was not timely filed. The parties were given until December 23, 1996 to respond. No response was received from either party.

Opinion

Section 2006 of the Tax Law provides that the Tribunal shall have certain functions, powers and duties. Tax Law § 2006(7) provides, in pertinent part, as follows:

"7. 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."

The Tribunal's regulation at 20 NYCRR 3000.17(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. 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 office of counsel."

The Tribunal's regulation at 20 NYCRR 3000.22(a)(1) provides:

"Date of Filing. If 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. Where delivery is made by courier, delivery, messenger or similar service, the date of delivery will be deemed to be the date of filing."

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 3000.17[a][1]). Where delivery of an exception is made by a courier or similar service, the date of delivery will be deemed to be the date of filing (20 NYCRR 3000.22[a][1]). The order of the Administrative Law Judge was issued to petitioner on October 3, 1996. Therefore, the exception to the order of the Administrative Law Judge in this matter was due on November 4, 1996. The exception was delivered by Airborne Express and was received by the office of the Secretary to the Tribunal on November 8, 1996. Therefore, it was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review petitioner's exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of petitioner Red Apple Supermarkets, Inc. is dismissed with prejudice as of this date.

DATED: Troy, New York
April 10, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner