

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DAVID PRICE D/B/A DAVID PRICE PHOTOGRAPHY	:	DECISION DTA NO. 815745
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 June 1, 1992 through May 31, 1995.	:	

Petitioner David Price, d/b/a David Price Photography, 4 East 78th Street, New York, New York 10021-1715, filed an exception to the determination of the Administrative Law Judge issued on September 23, 1998. Petitioner appeared by Soloway, Goldstein, Silverstein & Co. (Herman J. Soloway, C.P.A.). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Robert Maslyn, Esq., of counsel).

On November 25, 1998, 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 30, 1998 to respond. 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, the Tribunal renders the following decision. Commissioner Jenkins took no part in the consideration of this 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 by certified mail (certified control number Z 303 892 889) in Troy, New York to petitioner on September 23, 1998 at petitioner's last known address at 4 East 78th Street, New York, New York 10021-1715. A copy of the determination was also mailed by certified mail (certified control number Z 303 892 890), on September 23, 1998, to petitioner's representative Herman J. Soloway, C.P.A., Soloway, Goldstein, Silverstein & Co., 275 Madison Avenue, New York, New York 10016.

Petitioner's exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on November 2, 1998. The envelope containing the exception bears a United States Postal Service postmark of October 29, 1998 and an office metered postmark of October 20, 1998.

On November 25, 1998, 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 30, 1998 to respond. Petitioner responded by a "Notice of Opposition to Notice of Intent to Dismiss Exception" dated December 10, 1998.

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:

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 3000.23(a) provides as follows:

Service of decisions, determinations and orders of the tribunal, administrative law judges and presiding officers shall be made by mail. Registered and certified mail will be used and service shall be complete upon the deposit of the appropriate document, enclosed in a post-paid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States postal service. Such service shall constitute the giving of notice pursuant to section 2006(7) of the Tax Law and service pursuant to section 2016 of the Tax Law.

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 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 office of counsel.

Exceptions must be filed within 30 days after the giving of notice of the determination or order 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], [2]). The exception to the determination of the Administrative Law Judge in this matter was required to be filed by October 23, 1998. The envelope containing the exception bears a United States Postal Service postmark of October 29, 1998 which date is deemed to be the date of filing (*see*, 20 NYCRR 3000.22[a][1]). The envelope also contained an office metered postmark of October 20, 1998 which is within the 30-day period for filing an exception. However, when an envelope contains both a United States Postal Service postmark and an office metered postmark, the postmark not made by the United States Postal Service will be disregarded (*see*, 20 NYCRR 3000.22[b][3]). Therefore, the exception was not timely filed as required by Tax Law § 2006(7).

Petitioner has submitted an affidavit by its representative's employee in an attempt to prove that the exception was timely filed. However, in the absence of a timely postmark we must reject petitioner's affidavit as proof of timely mailing of the exception. "The scheme of the statute and implementing regulations is designed to avoid testimony as to date of mailing in favor of tangible evidence in the form of an official government notation" (*Shipley v. Commissioner*, 572 F2d 212, 78-1 USTC ¶ 9211). When a legible postmark appears on an envelope, no evidence that the petition was mailed on some other day will be allowed; the untimely postmark is the controlling factor (*see, Shipley v. Commissioner, supra*). The rules of the Tribunal specifically state that if the postmark stamped by the United States Postal Service does not bear a date within the prescribed filing period, the document will not be considered timely filed regardless of when the envelope was deposited in the mail (20 NYCRR 3000.22[a][2][iii]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of David Price d/b/a David Price Photography is dismissed with prejudice as of this date.

DATED: Troy, New York
June 17, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner