

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

GEORGE AND DOLORES BAKER :

DECISION
DTA NO. 816259

for Redetermination of a Deficiency or for Refund of New York City Personal Income Tax under the Administrative Code of the City of New York for the Years 1993 and 1994. :

Petitioners George and Dolores Baker, P.O. Box 353235, Palm Coast, Florida 32135-3235, filed an exception to the determination of the Administrative Law Judge issued on September 9, 1999. Petitioner appeared by Binder and Binder (Harry J. Binder, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Justine Clarke Caplan, Esq., of counsel).

On October 19, 1999, the Tax Appeals Tribunal (hereinafter the "Tribunal") issued a Notice of Intent to Dismiss Exception on the ground that petitioners' exception was not timely filed. The parties were given until November 23, 1999 to respond. A response to the Notice was filed by petitioners.

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 petitioners, the Tribunal renders the following decision.

ISSUE

Whether petitioners timely filed their 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 P 286 340 862) in Troy, New York to petitioners on September 9, 1999 at petitioners' last known address at P.O. Box 353235, Palm Coast, Florida 32135-3235. A copy of the determination was also mailed by certified mail (certified control number P 286 340 863), on September 9, 1999, to petitioners' representative Harry J. Binder, Esq., Binder and Binder, 1393 Veterans Memorial Highway, Hauppauge, New York 11788-3000.

Petitioners' exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on October 15, 1999. The envelope containing the exception bears a United States Postal Service postmark of October 13, 1999 and an office metered postmark of October 8, 1999.

On October 19, 1999, the Tribunal issued a Notice of Intent to Dismiss Exception on the ground that petitioners' exception was not timely filed. The parties were given until November 23, 1999 to respond. Petitioners responded by letter dated November 22, 1999.

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 3000.17(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 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 regulation at 20 NYCRR 3000.23(a) provides that service of determinations shall be complete upon enclosing the document in a post-paid properly addressed wrapper and depositing it in a post office under the exclusive care and custody of the United States Postal Service. Following this procedure constitutes the giving of notice under section 2006(7) of the Tax Law.

The exception to the determination of the Administrative Law Judge in this matter was required to be filed by October 12, 1999. The envelope containing the exception bears a United States Postal Service postmark of October 13, 1999 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 8, 1999 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) (*see, Matter of Fresina*, Tax Appeals Tribunal, January 30, 1997; *Matter of Kaufman*, Tax Appeals Tribunal, November 7, 1991).

Petitioners have submitted an affirmation, an affidavit by their representative's employee and a letter from James A. Welsh, the Postmaster of the Smithtown, New York post office, in an attempt to prove that the exception was timely filed. However, in the absence of a timely postmark, we must reject petitioners' evidence 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, at 83,355). 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 George and Dolores Baker is dismissed with prejudice as of this date.

DATED: Troy, New York

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner