

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
HENRY H. AND SYLVIA K. HEUMANN : DECISION
for Redetermination of a Deficiency or for Refund : DTA NO. 818140
of New York State Personal Income Tax under Article :
22 of the Tax Law for the Years 1996 and 1997. :

Petitioners Henry H. and Sylvia K. Heumann, 6 Deer Run Road, New Hartford, New York 13413, filed an exception to the order of discontinuance of the Administrative Law Judge issued on June 14, 2001. Petitioners appeared *pro se*. The Division of Taxation (hereinafter the “Division”) appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

On September 26, 2001, 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 October 31, 2001 to respond. Petitioners filed a response to the Notice on October 3, 2001 and the Division filed a response on October 26, 2001.

Petitioners filed a reply to the Division’s response on November 13, 2001.

On its own motion, after reviewing the order of discontinuance, correspondence of the parties and Chief Administrative Law Judge Andrew F. Marchese, the exception, the mailing records of the Division of Tax Appeals in this matter and the responses of petitioners and the Division, the Tribunal renders the following decision.

ISSUES

I. Whether petitioners timely filed their exception to the order of discontinuance of the Administrative Law Judge.

II. Whether petitioners timely filed their request for an award of costs.

FINDINGS OF FACT

We find the following facts.

The Division of Tax Appeals mailed the order of discontinuance of the Administrative Law Judge by certified mail (certified control number 7000 1670 0013 7896 4931) in Troy, New York to petitioners Henry H. and Sylvia K. Heumann on June 14, 2001 at petitioners' last known address of 6 Deer Run Road, New Hartford, New York 13413.

By letter dated June 28, 2001, petitioners requested that they be provided with appropriate documents in order that they might take an exception to the June 14, 2001 order of discontinuance. As an alternative thereto, petitioners requested an award of \$1,000.00 to defray the expense of their "time and travel" relative to this matter.

On July 6, 2001, Chief Administrative Law Judge Andrew F. Marchese responded to petitioners' letter of June 28, 2001 by sending an exception form to petitioners as they had requested and advising them that in order to pursue the alternative remedy they sought, they might wish to file a written application for costs pursuant to Tax Law § 3030. He advised them that the application for costs must be submitted within 30 days of the date of the order of discontinuance.

By letter dated July 19, 2001, petitioners responded to the July 6, 2001 letter of Chief Administrative Law Judge Marchese and stated that they wished to "appeal the Order of Discontinuance" and requested "reimbursement of \$1000 in expenditures *without submission of the required application under Section 3030 of the Tax Law*" (emphasis supplied).

On July 30, 2001, Chief Administrative Law Judge Marchese responded to petitioners' letter of July 19, 2001 advising petitioners that no right of appeal was available to them because they had voluntarily entered into a settlement agreement with the Division and their case was closed on that basis. Chief Administrative Law Judge Marchese further advised petitioners that no reimbursement of expenses was available except by application pursuant to Tax Law § 3030 and, since petitioners did not wish to file an application for costs pursuant to Tax Law § 3030, he denied their request for reimbursement.

Petitioners' exception to the order of discontinuance of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on September 24, 2001. The envelope containing the exception bears a United States Postal Service postmark of September 20, 2001.

On September 26, 2001, 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 October 31, 2001 to respond. Petitioners filed a response to the Notice on October 3, 2001 and the Division filed a response on October 26, 2001. Petitioners filed a reply to the Division's response on November 13, 2001.

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.

Further, 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 services, the date of delivery will be deemed to be the date of filing.

The Tribunal's regulation at 20 NYCRR 3000.23(a) provides that service of determinations and orders shall be made by registered or certified mail and 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.

In their response to the Notice of Intent to Dismiss Exception, petitioners have not presented any evidence to prove that their exception was timely filed nor have they even argued that it was timely. Rather, petitioners' arguments are addressed to the merits of their claim. We reject petitioners' arguments.

A petitioner has 30 days from the giving of notice of the Administrative Law Judge's determination to file an exception. The giving of notice occurs when the determination (or, as in this case, the notice of discontinuance) is mailed by registered or certified mail as prescribed by 20 NYCRR 3000.23(a) which date, in this case, was June 14, 2001 (Tax Law § 2006[7]; 20 NYCRR 3000.23[a]; *Matter of Roemer*, Tax Appeals Tribunal, May 20, 1999).

Measuring 30 days from the date on which petitioners were given notice of the Administrative Law Judge's order of discontinuance, an exception to that order was required to have been filed by July 16, 2001.¹ The envelope containing petitioners' exception bears a United States Postal Service postmark of September 20, 2001 which is deemed to be the date of filing (*see*, 20 NYCRR 3000.22[a][1]). Therefore, the exception was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review it.

Additionally, there is no basis presented on which to consider petitioners' request for reimbursement of travel and time expenditures. While petitioners indicated in their correspondence of June 28, 2001 to Chief Administrative Law Judge Marchese that they requested an award of \$1,000.00 to reimburse them for such expenditures, they failed to make a timely application for such costs in the manner required by Tax Law § 3030. Tax Law

¹ July 14, 2001 is the 30th day from June 14, 2001. However, as July 14, 2001 fell on a Saturday, the exception was required to be filed by Monday, July 16, 2001 (*see*, General Construction Law §§ 20, 25-a).

§ 3030(c)(5)(A)(ii)(I) provides that a petitioner has 30 days from the date on which an Administrative Law Judge's determination becomes final to file an application for costs pursuant to Tax Law § 3030. In this matter, the Administrative Law Judge's order of discontinuance plainly stated that: "This Order shall constitute the final judgment in this matter for purposes of Tax Law § 3030. Any application by petitioners for costs and fees must be filed with the Division of Tax Appeals within 30 days of the date of this order." The failure to make a timely application pursuant to Tax Law § 3030 to the Division of Tax Appeals precludes petitioners from any further relief herein (*see, Matter of Lawson*, Tax Appeals Tribunal, October 4, 2001).

On the Tax Appeals Tribunal's own motion, the exception of Henry H. and Sylvia K. Heumann is dismissed with prejudice as of this date.

DATED: Troy, New York
February 28, 2002

/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