

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ROBERT L. AND ROSALYN D. HUTCHINGS</b>	:	DECISION
	:	DTA NO. 818142
for Redetermination of a Deficiency or for Refund	:	
of New York State Personal Income Tax under Article	:	
22 of the Tax Law and New York City Nonresident	:	
Earnings Tax under the New York City Administrative	:	
Code for the Years 1993 and 1994.	:	

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Petitioners Robert L. and Rosalyn D. Hutchings, P.O. Box 561, Effort, Pennsylvania 18330, filed an exception to the determination of the Administrative Law Judge issued on June 21, 2001. Petitioners appeared *pro se*. The Division of Taxation (hereinafter the "Division") appeared by Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel).

On August 3, 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 September 7, 2001 to respond. Petitioners filed a response to the Notice on September 6, 2001 and the Division filed a response on September 5, 2001.

On its own motion, after reviewing the determination, 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.

***ISSUE***

Whether petitioners timely filed their exception to the determination of the Administrative Law Judge.

***FINDINGS OF FACT***

We find the following facts.

The Division of Tax Appeals mailed the determination of the Administrative Law Judge by certified mail (certified control number 7000 1670 0013 7896 4818) in Troy, New York to petitioners Robert L. and Rosalyn D. Hutchings on June 21, 2001 at petitioners' last known address of P.O. Box 561, Effort, Pennsylvania 18330.

On July 12, 2001, the envelope containing the determination was returned to the Division of Tax Appeals marked "Unclaimed." On July 18, 2001, the Division of Tax Appeals remailed the determination of the Administrative Law Judge to petitioners at their last known address at P.O. Box 561, Effort, Pennsylvania 18330 by first class mail.

Petitioners' exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on July 27, 2001. The envelope containing the exception bears a United States Postal Service postmark of July 25, 2001.

On August 3, 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 September 7, 2001 to respond. Petitioners filed a response to the Notice on September 6, 2001 and the Division filed a response on September 5, 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.

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 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. Petitioners argue that the notice was timely mailed in that it was filed with the Secretary to the Tax Appeals Tribunal within 30 days of the date the determination was mailed to them by regular mail. We reject petitioners' argument. As we have held in *Matter of Parkview Auto Sales* (Tax Appeals Tribunal, July 11, 1996) and *Matter of Dimino* (Tax Appeals Tribunal, July 1, 1993), 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 the receipt of the determination. The giving of notice occurs when the determination is mailed by registered or certified mail as prescribed by 20 NYCRR 3000.23(a) which date, in this case, was June 21, 2001 (Tax Law § 2006[7]; 20 NYCRR 3000.23[a]; *Estate of Sidney Roemer & Sadie Roemer*, Tax Appeals Tribunal, May 20, 1999). While the determination was not received by petitioners but was returned to the Division of Tax Appeals marked as "Unclaimed," this does not toll the running of the period within which petitioners may file an exception with the Tax Appeals Tribunal.

Measuring 30 days from the date on which petitioners were given notice of the Administrative Law Judge's determination, an exception to that determination was required to have been filed by July 23, 2001.<sup>1</sup> The envelope containing petitioners' exception bears a United States Postal Service postmark of July 25, 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.

On the Tax Appeals Tribunal's own motion, the exception of Robert L. and Rosalyn D. Hutchings is dismissed with prejudice as of this date.

DATED: Troy, New York  
December 13, 2001

/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

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<sup>1</sup> July 21, 2001 is the 30<sup>th</sup> day from June 21, 2001. However, as July 21, 2001 fell on a Saturday, the exception was required to be filed by Monday, July 23, 2001 (*see*, General Construction Law §§ 20, 25-a).