

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

IHAB M. HILWEH :
D/B/A ALBANY RESTAURANT SUPPLY :

DECISION
DTA NO. 818465

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, 1994 through May 31, 1997.

Petitioner Ihab M. Hilweh d/b/a Albany Restaurant Supply, 7 Interstate Avenue, Albany, New York 12205, filed an exception to the determination of the Administrative Law Judge issued on September 26, 2002. Petitioner appeared by Maury Kimmel, Comptroller. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

On November 5, 2002, 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 10, 2002 to respond. Petitioner filed a response to the Notice which was received on November 13, 2002. The Division of Taxation filed a response to the Notice which was received on December 10, 2002.

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 the parties, the Tribunal renders the following 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 Division of Tax Appeals mailed the determination of the Administrative Law Judge by certified mail (certified control number 7002 0860 0008 3339 5442) in Troy, New York to petitioner Ihab M. Hilweh d/b/a Albany Restaurant Supply on September 26, 2002 at petitioner's last known address of 7 Interstate Avenue, Albany, New York 12205.

Petitioner's exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on October 31, 2002. The envelope containing the exception bears a United States Postal Service postmark of October 30, 2002.

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.

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]). An exception received by this Tribunal after the date it was due is deemed to be filed on the date of the United States Postal Service postmark stamped on the envelope (20 NYCRR 3000.22[a][1]). The exception in this matter was due on October 28, 2002.¹ The envelope containing petitioner's exception bears a United States Postal Service postmark of October 30, 2002. Therefore, the exception was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review it.

¹October 26, 2002 is the 30th day from September 26, 2002. However, as October 26, 2002 fell on a Saturday, the exception was required to be filed by Monday, October 28, 2002 (*see*, General Construction Law §§ 20, 25-a).

In his response to the Notice of Intent to Dismiss Exception, petitioner has not presented any evidence to prove that the exception was timely filed. In fact, petitioner does not deny that the exception was late. Petitioner urges the Tribunal to accept the exception due to the pressing demands made upon him by Albany Restaurant Supply. However, the Tribunal does not have the authority to disregard the statutory time frame for any reason.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of Ihab M. Hilweh d/b/a Albany Restaurant Supply is dismissed with prejudice as of this date.

DATED: Troy, New York
March 13, 2003

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner