

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ERSKINE S. AND ELINOR R. AGEE : DECISION
 : DTA NO. 819544
for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Taxes :
under Article 22 of the Tax Law and the Administrative :
Code of the City of New York for the Year 1995. :

Petitioners Erskine S. and Elinor R. Agee, 165 Argyle Road, Brooklyn, New York 11218, filed an exception to the determination of the Presiding Officer issued on October 7, 2004. Petitioners appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Peter B. Ostwald, Esq., of counsel).

On December 22, 2004, 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 January 26, 2005 to respond. A response to the Notice was filed by petitioners on January 26, 2005. The Division of Taxation also filed a response on January 26, 2005.

On its own motion, after reviewing the determination of the Presiding Officer, the exception, the mailing records of the Division of Tax Appeals in this matter and the responses of petitioners and the Division of Taxation to the Tribunal's Notice of Intent to Dismiss Exception, the Tribunal renders the following decision.

ISSUE

Whether the Tax Appeals Tribunal has jurisdiction to review the exception filed by petitioners.

FINDINGS OF FACT

We find the following facts.

The small claims determination of the Presiding Officer was mailed by certified mail (certified control number 7002 0510 0003 3749 3079) in Troy, New York to petitioners on October 7, 2004 to petitioners' last known address at 165 Argyle Road, Brooklyn, New York 11218. The envelope containing the small claims determination was not returned to the Division of Tax Appeals.

Petitioners filed an exception to the small claims determination which was received by the Office of the Secretary to the Tribunal on December 20, 2004. The envelope containing the exception bore a United States Postal Service postmark of December 17, 2004.

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 3000.23(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.

Exceptions must be filed within 30 days after the giving of notice of the determination of an 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 or the date of delivery (20 NYCRR 3000.22[a][1]).

In this case, the small claims determination was served on petitioners on October 7, 2004. Petitioners claim that they "responded" to the determination within 30 days as required. They rely on their letter, dated November 3, 2004, to Chief Administrative Law Judge Marchese in which they state that they wish to appeal the determination. On November 5, 2004, Chief

Administrative Law Judge Marchese responded to petitioners, advising them that as they had elected to proceed with their case as a small claims matter, they had no right under the law to appeal the determination that was rendered. Despite this advice, petitioners filed their exception to the determination on December 17, 2004.

As a result of the foregoing, we conclude that petitioners' exception was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review it.¹

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of petitioners Erskine S. and Elinor R. Agee is dismissed with prejudice as of this date.

DATED: Troy, New York
May 26, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

¹Additionally, even if petitioners' exception had been timely filed, review by the Tribunal is precluded by the provisions of Tax Law § 2012.