

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PHYLLIS DININO	:	DECISION
	:	DTA NO. 820014
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 March 1, 1979 through	:	
February 28, 1985.	:	

Petitioner Phyllis Dinino, 16 North Lorna Lane, Monsey, New York 10952-4212, filed an exception to the determination of the Administrative Law Judge issued on July 7, 2005.

Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel).

On August 29, 2005, 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 October 3, 2005 to respond. A response to the Notice was filed by petitioner on September 6, 2005 and by the Division of Taxation on October 3, 2005.

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 to the Tribunal's Notice of Intent to Dismiss Exception, the Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed her 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 7003 1680 0004 6323 6704) in Troy, New York to petitioner on July 7, 2005 at petitioner's last known address of: 16 North Lorna Lane, Monsey, New York 10952-4212.

The envelope containing the determination mailed to petitioner on July 7, 2005 was returned to the Division of Tax Appeals on August 8, 2005 with a United States Postal Service ("USPS") notation of "unclaimed" and "returned to sender." A copy of the determination was remailed by regular mail to petitioner at petitioner's last known address on August 9, 2005.

Petitioner filed an exception to the determination which was received by the Office of the Secretary to the Tax Appeals Tribunal on August 24, 2005. The envelope containing the exception bore a USPS postmark of August 22, 2005.

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 USPS. 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 USPS postmark stamped on the envelope or the date of delivery (20 NYCRR 3000.22[a][1]).

In this case, the determination was served on petitioner on July 7, 2005 and the exception to the determination of the Administrative Law Judge was due to be filed on or before August 8, 2005.¹ The envelope containing petitioner's exception bore a USPS postmark of August 22, 2005. Therefore, the exception was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review it.

In her 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 fact that she was on vacation and unable to pick up her registered mail. Therefore, as stated above, since the exception was not timely filed, the Tribunal lacks jurisdiction to review it.

DATED: Troy, New York
March 30, 2006

/s/Charles H. Nesbitt

Charles H. Nesbitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner

¹August 6, 2005 is the 30th day from July 7, 2005. However, as August 6, 2005 fell on a Saturday, the exception was required to be filed by Monday, August 8, 2005 (*see*, General Construction Law §§ 20, 25-a).