

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

ARTHUR AND RUTH LEHRER :

DECISION
DTA NO. 820640

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 Personal Income Tax under the Administrative Code of the City of New York for the Year 1999. :

Petitioners Arthur and Ruth Lehrer, 29-06 210th Street, Flushing, New York 11360, filed an exception to the determination of the Administrative Law Judge issued on February 23, 2006. Petitioners appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel).

On April 11, 2006, 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 May 16, 2006 to respond. A response to the Notice was filed by petitioners on May 1, 2006 and by the Division of Taxation on May 11, 2006.

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 of Taxation to the Tribunal's Notice of Intent to Dismiss Exception, 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 determination of the Administrative Law Judge was mailed by certified mail (certified control number 7005 2570 0001 4656 3881) in Troy, New York to petitioners on February 23, 2006 at petitioners' last known address at 2906 210th Street, Flushing, New York 11360.

The envelope containing the determination mailed to petitioners on February 23, 2006 was returned to the Division of Tax Appeals on March 15, 2006 with a United States Postal Service ("USPS") notation of "unclaimed" and "returned to sender." This copy of the determination was remailed by regular mail to petitioners at petitioners' last known address on March 15, 2006.

Petitioners filed an exception to the determination which was received by the Office of the Secretary to the Tax Appeals Tribunal on April 10, 2006. The envelope containing the exception bore a USPS postmark of April 6, 2006.

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 or official depository 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 (*see*, 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 (*see*, 20 NYCRR 3000.22[a][1]).

In this case, the determination was served on petitioners on February 23, 2006 and the exception to the determination of the Administrative Law Judge was due to be filed on or before March 27, 2006.¹ The envelope containing petitioners' exception was received by the Office of the Secretary to the Tax Appeals Tribunal on April 10, 2006, subsequent to the date it was due to be filed, and bears a USPS postmark of April 6, 2006. Therefore, the exception was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review it.

In their response to the Notice of Intent to Dismiss Exception, petitioners have not presented any evidence to prove that the exception was timely filed. In fact, petitioners do not deny that the exception was late. They urge, however, that the Tribunal accept the exception since they were on vacation when delivery of the determination was attempted and did not return home until the 30-day period to file an exception had expired. The Tribunal, however, does not have the authority to disregard the statutory time frame for any reason.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

¹March 25, 2006 is the 30th day from February 23, 2006. However, as March 25, 2006 fell on a Saturday, the exception was required to be filed by Monday, March 27, 2006 (*see*, General Construction Law §§ 20, 25-a).

On the Tax Appeals Tribunal's own motion, the exception of Arthur and Ruth Lehrer is dismissed with prejudice as of this date.

DATED: Troy, New York
August 10, 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