

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ROCKWELLS RESTAURANT CORP.</b>	:	DECISION
	:	DTA NO. 820879
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, 2005	:	
through May 31, 2005.	:	

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Petitioner Rockwells Restaurant Corp., 97 Brookby Road, Scarsdale, New York 10583, filed an exception to the order of the Administrative Law Judge issued on February 23, 2006. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel).

On April 5, 2006, 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 May 10, 2006 to respond. The Division of Taxation filed a response to the Notice on April 17, 2006.

On its own motion, after reviewing the order, the exception, the mailing records of the Division of Tax Appeals in this matter and the response of the Division of Taxation, the Tribunal renders the following decision.

***ISSUE***

Whether petitioner timely filed its exception to the order of the Administrative Law Judge.

***FINDINGS OF FACT***

We find the following facts.

The order of the Administrative Law Judge was mailed by certified mail (certified control number 7005 2570 0001 4656 3904) in Troy, New York to petitioner on February 23, 2006 at petitioner's last known address at 97 Brookby Road, Scarsdale, New York 10583.

Petitioner filed an exception to the order which was received by the Office of the Secretary to the Tax Appeals Tribunal on April 3, 2006. The envelope containing the exception bore a United States Postal Service postmark of March 31, 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 order was served on petitioner on February 23, 2006 and the exception to the order of the Administrative Law Judge was due to be filed on or before March 27, 2006.<sup>1</sup> The envelope containing petitioner's exception was received by the Office of the Secretary to the Tax Appeals Tribunal on April 3, 2006, subsequent to the date it was due to be filed, and bears a USPS postmark of March 31, 2006. Therefore, the exception was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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<sup>1</sup>March 25, 2006 is the 30<sup>th</sup> 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 Rockwells Restaurant Corp.  
is dismissed with prejudice as of this date.

DATED: Troy, New York  
November 2, 2006

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/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

\_\_\_\_\_  
/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

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/s/ Robert J. McDermott  
Robert J. McDermott  
Commissioner