

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSE AND CARMEN BATISTA	:	DECISION DTA No. 821221
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Tax Under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2001 and 2002.	:	

Petitioners, Jose and Carmen Batista, filed an exception to the order of the Administrative Law Judge issued on February 1, 2007. Petitioners appeared by Allen Lokensky, Enrolled Agent. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

On March 14, 2007, 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 April 18, 2007 to respond. No responses were filed.

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

ISSUE

Whether petitioners' timely filed their 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 7006 0100 0001 8756 2355) in Troy, New York to petitioners on February 1, 2007 at petitioners' last known address at 73 Desales Place, Brooklyn, NY 11207-1707. A copy of the order was also mailed by certified mail (certified control number 7006 0100 0001 8756 2362) in Troy, New York to petitioners' representative Allen Lokensky, Allen Lokensky & Associates, 209 Brittany Court, Valley Cottage, NY 10989.

Petitioners filed an exception to the order which was received by the Office of the Secretary to the Tax Appeals Tribunal on March 9, 2007. The envelope containing the exception bore a United States Postal Service postmark of March 7, 2007.

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 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 the notice of the determination of an Administrative Law Judge or within the time granted 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 petitioners February 1, 2007 and the exception to the order of the Administrative Law Judge was due to be filed on or before March 5, 2007.¹ The envelope containing petitioners' exception bore a USPS postmark of March 7, 2007. Therefore, the exception was not timely filed as required by Tax Law § 2006(7).

Although there was no response filed with the Tribunal to the Notice of Intent to Dismiss Exception, there was a letter attached to petitioners' Notice of Exception. However, we are unable to address the merits of this case since the exception was not timely filed.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

¹March 3, 2007 is the 30th day from February 1, 2007. However, as March 3, 2007 fell on a Saturday, the exception was required to be filed by Monday, March 5, 2007 (*see*, General Construction Law, § 20, 25-a).

On the Tax Appeals Tribunal's own motion, the exception of Jose and Carmen Batista is dismissed with prejudice as of this date.

DATED: Troy, New York
October 18, 2007

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

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

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