

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of : DECISION  
**JOHN A. GREEN** : DTA NO. 821552  
for Redetermination of a Deficiency or for Refund :  
of New York State Personal Income Tax under :  
Article 22 of the Tax Law for the Year 1998. :

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Petitioner, John A. Green, filed an exception to the order of the Administrative Law Judge issued on May 30, 2007. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

On July 11, 2007, 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.

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 petitioner timely filed his 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 2150 0003 7752 3318) in Troy, New York to petitioner on May 30, 2007 at

petitioner's last known address at c/o 593 Vanderbilt Avenue, Apt. 250, Brooklyn, NY 11238-3512.

Petitioner filed an exception to the order which was received by the Office of the Secretary to the Tax Appeals Tribunal on July 5, 2007. The envelope containing the exception bore a United State Postal Service Postmark ("USPS") of July 2, 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 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*, NYCRR 3000.22[a][1]).

In this case, the order was served on petitioner on May 30, 2007 and the exception to the order of the Administrative Law Judge was due to be filed on or before June 29, 2007. The envelope containing petitioner's exception bore a USPS postmark of July 2, 2007. Therefore, the exception was not timely filed as required by Tax Law § 2006(7).

In his response to the Notice of Intent to Dismiss Exception, petitioner has not presented any evidence that the exception was timely filed. Rather, he argues that because he actually received the determination in the mail on June 2, 2007, this should be the presumed date of notice. However, as we held in *Matter of Roemer* (Tax Appeals Tribunal, May 20, 1999), the giving of notice commences when the determination is mailed by the Division of Tax Appeals. The 30-day period to file an exception does not commence when the determination is received.

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

On the Tax Appeals Tribunal's own motion, the exception of John A. Green is dismissed with prejudice as of this date.

DATED: Troy, New York  
January 17, 2008

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

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

/s/ Robert J McDermott  
Robert J. McDermott  
Commissioner