

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>3 LITTLE INDIANS CIGAR &amp; TRADING CO., INC.</b>	:	
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period December 11, 2006.	:	DECISION DTA NO. 821966

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Petitioner, 3 Little Indians Cigar & Trading Co., Inc., filed an exception to the order of the Administrative Law Judge issued on February 29, 2008. Petitioner appeared by Milton Shaiman, accountant. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

On June 13, 2008, the Tax Appeals Tribunal (hereinafter "Tribunal") issued a Notice of Intent to Dismiss Exception on the grounds that petitioner's exception was not timely filed and the envelope containing the amended exception did not bear a United States Postal Service Postmark. The parties were given until July 18, 2008 to respond. A response was filed by the Division of Taxation.

On its own motion, after reviewing the order, the exception, the mailing records of the Division of Tax Appeals in the matter and the response of the Division of Taxation to the Tribunal's Notice of Intent to Dismiss Exception, 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 7006 2760 0000 8453 6558) in Troy, New York to petitioner on February 29, 2008 at petitioner's last known address at 3 Little Indians Cigar & Trading Co., Inc., c/o Larry Amoruso, 192 Grand Street, New York, NY 10013. A copy of the order was also mailed by certified mail (certified control number 7006 2760 0000 8453 6565) in Troy, New York to petitioner's representative Milton Shaiman, 1 Rural Place, Commack, NY 11725.

Petitioner filed an improper exception to the order, which was received by the Office of the Secretary to the Tax Appeals Tribunal on May 19, 2008. The envelope containing the exception bore a United States Postal Service ("USPS") postmark of May 15, 2008.

On May 20, 2008, the Secretary's Office sent a letter to petitioner's representative, with a copy to petitioner, stating that an amended exception, with the proper caption and correct DTA#, must be submitted if petitioner wished to proceed with the apparently untimely exception.

Petitioner filed an amended exception to the order, which was received by the Office of the Secretary to the Tax Appeals Tribunal on June 9, 2008. The envelope containing the amended exception did not bear a USPS postmark.

***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, New York 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*, 20 NYCRR 3000.22[a][1]).

In this case, the order was served on petitioner on February 29, 2008 and the exception to the order of the Administrative Law Judge was due to be filed on or before March 31, 2008.<sup>1</sup> It

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<sup>1</sup>March 30, 2008 is the 30<sup>th</sup> day from February 29, 2008. However, as March 30, 2008 fell on a Sunday, the exception was required to be filed by Monday, March 31, 2008 (*see*, General Construction Law, §§ 20, 25-a).

was received by the Office of the Secretary to the Tribunal on June 9, 2008<sup>2</sup> in an envelope that does not bear a USPS postmark. Therefore, the exception is not timely filed as required by Tax Law § 2006(7).

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

On the Tax Appeals Tribunal's own motion, the exception of 3 Little Indians Cigar & Trading Co., Inc. is dismissed with prejudice.

DATED:Troy, New York  
January 15, 2009

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

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

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

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<sup>2</sup>The original exception on May 15, 2008 was filed untimely and in improper form. Petitioner was given additional time to submit a corrected exception. Although the corrected exception was filed by petitioner on June 9, 2008, it is still considered untimely.