

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
V & Z DELI, INC.	:	DECISION
	:	DTA NO. 822461
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period June 1, 2004 through February	:	
28, 2007.	:	

Petitioner V & Z Deli, Inc. filed an exception to the determination of the Administrative Law Judge issued on June 18, 2009. Petitioner appeared by George Maiman, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

On September 22, 2009, the Tax Appeals 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 October 27, 2009 to advise the Tax Appeals Tribunal why such a decision should not be issued. Neither party responded to the Notice.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this decision.

ISSUE

Whether petitioner timely filed its 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 7008 1830 0003 9726 4796) in Troy, New York to petitioner on June 18, 2009 at petitioner's last known address at: c/o Zohir Laham, President, 162 - 68th Street, Brooklyn, NY 11220-5101. A copy of the determination was also mailed by certified mail (certified control number 7008 1830 0003 9726 4802) in Troy, New York to petitioner's representative George Maiman, CPA at 250 West 57th Street, Suite 732, New York, NY 10107-0732.

On July 16, 2009, petitioner filed a request for a 30 day extension of time within which to file its Notice of Exception. On July 21, 2009, the Secretary to the Tax Appeals Tribunal ("Tribunal") granted petitioner an extension for filing its Notice of Exception until August 19, 2009.

Petitioner filed a Notice of Exception to the determination, which was received by the Office of the Secretary to the Tribunal on August 21, 2009. The envelope containing the exception did not bear a United States Postal Service ("USPS") postmark.

By letter dated August 24, 2009, the Secretary to the Tribunal acknowledged receipt of petitioner's exception but returned the exception to petitioner because the exception was deemed improperly filed. The letter stated that the Notice of Exception did not comply with section 3000.17(b)(1) of the Tribunal's Rules of Practice and Procedure, to wit: the exception must contain a statement of the findings of fact and conclusions of law contained in the Administrative Law Judge's determination with which the party taking exception disagrees, and a statement of requested alternative findings of fact and conclusions of law.

The letter further advised that if petitioner chose to file an exception that did comply with the provisions of 20 NYCRR 3000.17(b)(1), it would be dismissed as untimely, since a properly filed exception was due by August 19, 2009.

Petitioner filed a Notice of Exception to the determination, which was received by the Office of the Secretary to the Tribunal on September 11, 2009. The envelope containing the exception did not bear a USPS postmark.

By letter dated September 22, 2009, the Secretary to the Tribunal acknowledged receipt of petitioner's exception and issued a Notice of Intent to Dismiss Exception on the ground that petitioner's exception was not timely filed.

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 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 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 (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 (20 NYCRR 3000.22[a][1]).

Pursuant to 20 NYCRR 3000.22(a)(3) and (b)(1)(ii), if an envelope containing a document and bearing sufficient United States postage is missing a postmark that should have been affixed by the USPS, then the document must be received by the Tribunal not later than the time when an envelope that is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the USPS within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document).

In this case, the determination was properly served on petitioner on June 18, 2009 and, with the extension of time granted for petitioner to file its exception, any exception to the determination of the Administrative Law Judge was due to be filed on or before August 19, 2009.

The envelope containing petitioner's exception did not bear a USPS postmark and was received by the Office of the Secretary to the Tribunal on September 11, 2009, or 23 days after it was due to be filed. We find that 23 days is not within the time that a document mailed and postmarked by the USPS would ordinarily be received (*see, Matter of Brenner*, Tax Appeals Tribunal March 1, 1990 [wherein we found 18 days was not within the time that a document mailed and postmarked by the USPS would ordinarily be received]; *cf., Matter of Harron's Elec. Serv.*, Tax Appeals Tribunal, February 19, 1988 [wherein we held five days is not later than the date a document would ordinarily be received when mailed through the USPS]).

If the document is received after the time when a document so mailed and so postmarked by the USPS would ordinarily be received, such document will be treated as having been received at the time when a document so mailed and so postmarked would ordinarily be received, if the person who is required to file the document establishes: (i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit that was postmarked (except for metered mail) by the USPS within the prescribed period or on or before the prescribed date for filing the document; (ii) that the delay in receiving the document was due to a delay in the transmission of the mail; and (iii) the cause of such delay (*see*, 20 NYCRR 3000.22[b][2]).

As petitioner failed to respond to the Notice of Intent to Dismiss Exception, the record contains no evidence concerning the mailing of the Notice of Exception received by the Office of the Secretary to the Tribunal on September 11, 2009. Therefore, we conclude that 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:

On the Tax Appeals Tribunal's own motion, the exception of petitioner V & Z Deli, Inc. is dismissed with prejudice as of this date.

DATED: Troy, New York
March 18, 2010

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

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