

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
VICTOR CINEAS	:	DECISION
		DTA NO. 822697
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 2005.	:	

Petitioner, Victor Cineas, filed an exception to the order of the Administrative Law Judge issued on April 24, 2009. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

On June 3, 2009, 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 July 8, 2009 to respond. No responses were filed.

On its own motion, after reviewing the order of the Administrative Law Judge, 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 7008 2810 0000 8043 4171) in Troy, New York to petitioner on April 24, 2009 at petitioner's last known address at 1835 N. Jerusalem Road, East Meadow, NY 11554.

The envelope containing the determination mailed to petitioner on April 24, 2009 was returned to the Division of Tax Appeals on May 18, 2009 with a United States Postal Service ("USPS") notation of "unclaimed" and "returned to sender." This copy of the determination was re-mailed by regular mail to petitioner at petitioner's last known address on May 19, 2009.

Petitioner filed an exception to the determination, which was received by the Office of the Secretary to the Tax Appeals Tribunal on June 1, 2009. The envelope containing the exception bore a USPS postmark of May 29, 2009.

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 or order 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 April 24, 2009 and the exception to the order of the Administrative Law Judge was due to be filed on or before May 26, 2009.¹ The envelope containing petitioner's exception was received by the Office of the Secretary to the Tax Appeals Tribunal on June 1, 2009 and bears a USPS postmark of May 29, 2009, which is

¹May 24, 2009 is the 30th day from April 24, 2009. However, as May 24, 2009 fell on a Sunday, and May 25, 2009 was Memorial Day, the exception was required to be filed by Tuesday, May 26, 2009 (*see*, General Construction Law §§ 20, 25-a).

subsequent to the date it was due to be filed. 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:

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

DATED: Troy, New York
December 23, 2009

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

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