

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

STEVEN DVORAK :

for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period March 1, 2004 through :
February 28, 2007. :

In the Matter of the Petition :

of :

TRIPLE C RETAIL CORPORATION :

for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period March 1, 2004 through :
February 28, 2007. :

In the Matter of the Petition :

of :

TRIPLE C RETAIL CORP. :
- TINDERBOX #362 :

for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period March 1, 2004 through :
February 28, 2007. :

DECISION
DTA Nos. 823879,
823880 and 823881

Petitioners, Steven Dvorak, Triple C Retail Corporation and Triple C Retail Corp. -

Tinderbox #362, filed an exception to the determination of the Administrative Law Judge issued

on January 3, 2013. Petitioners appeared by Labin & Buffomante (Frank J. Buffomante, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michelle Helm, Esq., of counsel).

On February 12, 2013, the Tax Appeals Tribunal (Tribunal) issued a Notice of Intent to Dismiss Exception on the ground that petitioners' exception was not timely filed. The parties were given until March 19, 2013 to respond. A response was filed by petitioners and the Division of Taxation (Division).

On its own motion, after reviewing the determination, the exception, the relevant mailing records of the Division of Tax Appeals and the responses filed by petitioners and the Division to the Tribunal's Notice of Intent to Dismiss Exception, the Tribunal renders the following decision.

ISSUE

Whether petitioners timely filed their 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 7012 1010 002 0043 9639) in Albany, New York, to petitioners, Steven Dvorak, Triple C Retail Corporation, and Triple C Retail Corp. - Tinderbox #362 on January 3, 2013 to petitioners' last known address at 39 Whispering Court, East Amherst, NY 14051. A copy of the determination was also mailed by certified mail (certified control number 7012 1010 002 0043 9646) in Albany, New York, to petitioners' representative, Frank J. Buffomante, Esq.,

at his office at Labin & Buffomante, located at 531 Farber Lakes Drive, Williamsville, NY 14221.

Petitioners filed an exception to the determination, which was received by the Office of the Secretary to the Tribunal on February 8, 2013. The envelope containing the exception bore a United States Postal Service (USPS) postmark of February 5, 2013. This exception requested a thirty day extension so that petitioners could submit additional evidence into the record.

On February 12, 2013, the Secretary's Office sent a letter and Notice of Intent to Dismiss Exception to petitioners' representative, with a copy to petitioners, stating that the exception appeared to have been mailed beyond the 30-day filing period. Specifically, the Notice indicated that the period for filing an exception with the Tribunal expired on February 4, 2013, and that the USPS postmark on the envelope bore a date of February 5, 2013. Moreover, the letter stated that the Tribunal would not consider any additional evidence submitted into the record, and that petitioners and the Division had until March 19, 2013 to file comments on the Notice of Intent to Dismiss Exception.

Petitioners argue that the exception was timely filed. Calculating the 30-day filing period from the receipt of the determination, January 7, 2013, petitioners contend that the exception was filed on the last day, February 5, 2013. Petitioners also ask the Tribunal to consider that their circumstances, namely, the acquisition of new evidence, gave rise to the delay. As such, petitioners ask the Tribunal to withdraw the Notice of Intent to Dismiss Exception.

The Division supports dismissal because the exception was not filed within the 30-day period. Moreover, it notes that the submission of additional evidence is not permitted on exception.

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 Albany or by mail addressed to:

Secretary to the Tax Appeals Tribunal
State of New York
Division of Tax Appeals
Agency Building 1
Empire State Plaza
Albany, New York 12223

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 determination was served on petitioners on January 3, 2013 and the exception to the determination of the Administrative Law Judge was due to be filed on or before February 4, 2013.¹ It was received by the Office of the Secretary to the Tribunal on February 8, 2013 in an envelope that bore a USPS postmark of February 5, 2013. As this date is beyond the expiration of the 30-day period, the exception was not timely filed as required by Tax Law § 2006 (7). Accordingly, this Tribunal lacks jurisdiction to consider this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of Steven Dvorak, Triple C Retail Corporation, and Triple C Retail Corp. - Tinderbox #362 is dismissed with prejudice.

DATED: Albany, New York
September 5, 2013

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ Roberta Moseley Nero
Roberta Moseley Nero
Commissioner

¹ February 2, 2013 is the 30th day from January 3, 2013. However, as February 2, 2013 fell on a Saturday, the exception was required to be filed by Monday, February 4, 2013 (*see* General Construction Law, §§ 20, 25-a).