

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION
MICHAEL BURKE	:	DTA NO. 824933
for Redetermination of a Deficiency or for Refund	:	
of Personal Income Tax under Article 22 of the	:	
Tax Law for the Year 1999.	:	

Petitioner, Michael Burke, filed an exception to the determination of the Administrative Law Judge issued on December 6, 2012. Petitioner appeared *pro se*. The Division of Taxation appeared by Amanda Hiller, Esq. (Michelle Helm, Esq., of counsel).

On March 29, 2013, the Tax Appeals Tribunal (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 May 3, 2013 to respond. Neither petitioner nor the Division of Taxation (Division) filed a timely response to the motion.

On its own motion, after reviewing the determination, the exception and the relevant mailing records of the Division of Tax Appeals, the Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed his 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 7010 0290 0000 0160 8547) in Albany, New York, to petitioner, Michael Burke, on December 6, 2012 at petitioner's last known address, 21 E. 2nd Street, Apt. 201, Dunkirk, NY 14048.

Petitioner filed an exception to the determination, which was received by the Office of the Secretary to the Tribunal on March 27, 2013. The envelope containing the exception bore a United States Postal Service (USPS) postmark of March 22, 2013.

On March 29, 2013, the Secretary's Office sent a letter and Notice of Intent to Dismiss Exception to petitioner. This Notice indicated that the exception to the determination of the Administrative Law Judge was due on January 7, 2013. It stated that the exception was filed late because the USPS postmark on the envelope bore a date of March 22, 2013. The Notice advised petitioner and the Division that they had until May 3, 2013 to file comments on the Notice of Intent to Dismiss Exception. Neither petitioner nor the Division filed a comment within this period.

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 petitioner on December 6, 2012 and the exception to the determination of the Administrative Law Judge was due to be filed on or before January 7, 2013. It was received by the Office of the Secretary to the Tribunal on March 27,

2013 in an envelope that bore a USPS postmark of March 22, 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). Given the foregoing, this Tribunal lacks jurisdiction to consider this matter.

As noted in the determination of the Administrative Law Judge, petitioner has asserted that he was unable to meet the requisite deadlines because of his medical condition. Tax Law § 2006 (7) permits the Tribunal to grant extensions for the filing of exceptions upon a showing of good cause. However, an extension request must be filed prior to the expiration of the initial 30-day period. Petitioner did not avail himself of this opportunity. As such, this Tribunal lacks the power to grant petitioner relief based upon good cause.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of Michael Burke is dismissed with prejudice.

DATED: Albany, New York
October 17, 2013

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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