

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**BEN-ZION SUKY** : DECISION  
for Revision of a Determination or for Refund of : DTA NO. 829768  
Sales and Use Taxes under Articles 28 and 29 of the :  
Tax Law for the Period December 1, 2014 through :  
February 28, 2015. :  
\_\_\_\_\_:

Petitioner, Ben-Zion Suky, filed an exception to the determination of the Administrative Law Judge issued on December 15, 2022. On March 10, 2023, the Tax Appeals Tribunal (Tribunal) issued a notice of intent to dismiss the exception on the ground that petitioner's exception was not timely filed. The Tribunal granted the parties until April 14, 2023 to respond.

Petitioner, appearing by Wayne R. Landesman, Esq., filed a response by letter on April 7, 2023 and received by the Tribunal on April 10, 2023. The Division of Taxation, appearing by Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel), filed a response by letter on April 13, 2023, and received on April 21, 2023, which date commenced the six-month period for the issuance of this decision.

On its own motion, after reviewing the determination of the Administrative Law Judge, petitioner's exception, the relevant records of the Division of Tax Appeals and the parties' responses to the notice of intent to dismiss the exception, the Tribunal renders the following decision.

***ISSUE***

Whether petitioner timely filed an exception to the determination of the Administrative Law Judge.

***FINDINGS OF FACT***

We find the following facts.

1. On December 15, 2022, the Division of Tax Appeals mailed, by properly addressed United States Postal Service (USPS) certified mail, copies of the determination of the Administrative Law Judge to petitioner and to Dmitriy Ishimbayev, Esq.
2. Petitioner had previously executed a power of attorney form, dated October 20, 2021, which designated Mr. Ishimbayev as petitioner's representative in this matter.
3. Petitioner also executed a power of attorney form, dated January 5, 2023, that did not revoke previous powers of attorney, designating Rinat Gareev, Esq., as petitioner's "primary individual representative" in this matter, and listing Mr. Ishimbayev as the representative to receive copies of notices and other communications.
4. On January 10, 2023, Mr. Gareev, on behalf of petitioner, filed a request for an extension to file an exception.
5. The Tribunal granted an extension to petitioner to file an exception until February 16, 2023.
6. On March 2, 2023, the Tribunal received petitioner's exception by USPS mail, signed by Wayne R. Landesman, Esq. The envelope containing the exception bore a privately metered stamp dated February 14, 2023 indicating that it was mailed from zip code 10016 (New York City). The envelope did not have a USPS postmark. Included with the exception was a new power of attorney, dated January 31, 2023, that did not revoke previous powers of attorney,

designating Mr. Landesman as petitioner's representative.

7. On March 10, 2023, the Tribunal issued a notice of intent to dismiss the exception on the ground that petitioner's exception was not timely filed.

### ***OPINION***

Pursuant to the Tax Appeals Tribunal Rules of Practice and Procedure (Rules), notice of an Administrative Law Judge determination is given by registered or certified mail and is complete upon placing the determination in a post-paid, properly addressed envelope, in the exclusive care and custody of the USPS (20 NYCRR 3000.23 [a]). Either party may file an exception for review of a determination with this Tribunal (Tax Law § 2006 [7]). An exception must be filed within 30 days from the date of mailing of the determination (Tax Law § 2006 [7]; 20 NYCRR 3000.17 [a] [1]).

Extensions may be granted for good cause if the application for the extension is filed within the 30-day period (Tax Law § 2006 [7]; 20 NYCRR 3000.17 [a] [2]).

Exceptions are filed with the Secretary to the Tribunal either in person or by mail. An exception delivered by the USPS to this Tribunal after the due date is deemed to be filed on the date of the USPS postmark stamped on the envelope (20 NYCRR 3000.22 [a] [1]).

In this case, the Administrative Law Judge's determination was properly mailed to petitioner by certified mail on December 15, 2022 (*see* Tax Law § 2006 [7]; 20 NYCRR 3000.23 [a]). Thus, an exception to the determination of the Administrative Law Judge was due to be filed on or before January 14, 2023 (Tax Law § 2006 [7]; 20 NYCRR 3000.17 [a] [1]). A duly requested extension was granted, rendering the due date as February 16, 2023.

Petitioner contends that the exception should be treated as filed on February 14, 2023, the date of the privately metered stamp on the envelope. However, the privately metered date is not a USPS postmark and therefore is not independently determinative of the issue.

Our Rules provide that if a postmark on the envelope is made by other than the USPS, the date of the postmark must fall within the prescribed period for the filing of the document (20 NYCRR 3000.22 [b] [1]). Here, the postal meter date of February 14, 2023 is indeed before February 16, 2023. However, absent a USPS postmark, the document must also be received by the Tribunal not later than the time when it would ordinarily be received if it had been postmarked at the same point of origin by the USPS (20 NYCRR 3000.22 [b] [1] [ii]). The document was received by the Tribunal on March 2, 2023, some 16 days after the date on the postal meter and 14 days beyond the extended due date granted to petitioner for filing an exception.

This Tribunal has determined that five days is not later than the date a document would ordinarily be received when mailed through the USPS (*see Matter of Harron's Elec. Serv.*, Tax Appeals Tribunal, February 19, 1988). This Tribunal has also held that longer intervals of 18 days and 23 days were beyond that ordinary period (*Matter of Brenner*, Tax Appeals Tribunal, March 1, 1990, *Matter of V & Z Deli, Inc.* Tax Appeals Tribunal, March 18, 2010) and therefore untimely.

Here, we conclude that 14 days is not within the time that a document mailed and postmarked by the USPS in New York City would ordinarily be received.

Where, as here, when there is an inordinate delay, to satisfy this alternative calculation, the party required to file the document has a multi-part obligation to establish that the document

was deposited in the mail on the date asserted, that the delay was in the transmission of the mail and to explain the cause of the delay (20 NYCRR 3000.22 [b] [2]).

In response to the notice of intent to dismiss exception, petitioner offered an affidavit of an employee of their attorney's firm asserting that the document was deposited "in an official depository of the United States Post Office located at 9 East 40<sup>th</sup> Street, New York, NY" on February 14, 2023. However, as acknowledged by petitioner, according to the official USPS certified mail tracking information, the first notation of USPS custody is February 24, 2023, fully 10 days after petitioner asserts that it was deposited and eight days after it was due. By way of substantiating that the delay was in mail transmission and the cause of the delay, petitioner offers only an affidavit of their attorney's employee regarding a non-specific conversation they had with an unidentified person at the post office.

We find that petitioner has not met the burden of proving timeliness in the mailing of their exception to the determination of the Administrative Law Judge. Accordingly, pursuant to our Rules (20 NYCRR 3000.22 [b] [2]), the filing of the exception is beyond the 30-day deadline or within any granted extensions and is, therefore, not timely filed as required by Tax Law § 2006 (7).

As this Tribunal's jurisdiction is statutorily limited (*see* Tax Law § 2006 [4]), we lack jurisdiction to consider the merits of the matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that

On the Tax Appeal's Tribunal's own motion, the exception of Ben-Zion Suky is hereby dismissed.

DATED: Albany, New York  
September 21, 2023

/s/ Anthony Giardina  
Anthony Giardina  
President

/s/ Cynthia M. Monaco  
Cynthia M. Monaco  
Commissioner

/s/ Kevin A. Cahill  
Kevin A. Cahill  
Commissioner