

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JOHN W. AND DORIS N. RIEHM : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1982 and 1983. :

Petitioners, John W. and Doris N. Riehm, 1321 South College Avenue, Tyler, Texas 75701, filed an exception/application for an extension of time to file an exception to the determination of the Administrative Law Judge issued on January 4, 1990 with respect to their petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1982 and 1983 (File No. 803437). Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

On its own motion, after reviewing the determination, the exception, the mailing records of the Division of Tax Appeals in this matter and the response of the petitioners to the Tax Appeals Tribunal's Notice of Intent to Dismiss Exception, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners timely filed their exception/application for an extension of time to file an exception to the determination of the Administrative Law Judge.

FINDINGS OF FACT

The determination of the Administrative Law Judge was mailed to petitioners on January 4, 1990 at petitioners' last known address at 1321 South College Avenue, Tyler, Texas 75701.

The Division of Taxation, by letter dated February 1, 1990, requested an extension of time to file an exception. The Tribunal granted the request allowing the Division until March 7, 1990 to file its exception. The Division filed an exception on March 6, 1990.

Petitioners' exception/application for an extension of time to file an exception to the determination of the Administrative Law Judge was received by the office of the Secretary to the Tribunal on March 1, 1990.

The envelope containing the exception/application for an extension of time to file an exception had an office metered mail postmark of February 26, 1990.

On May 21, 1990 the Tax Appeals Tribunal issued a Notice of Intent to Dismiss Exception on the ground that petitioners' exception/application for an extension of time to file an exception was not timely filed. The parties were given 30 days to respond.

A response was received by petitioners in the form of a motion requesting the Tribunal to withdraw its Notice of Intent to Dismiss and grant petitioners' exception/application for an extension of time to file an exception.

In their motion, petitioners do not dispute the fact that their exception/application for an extension of time to file an exception was not filed within 30 days after the issuance of the determination of the Administrative Law Judge.

Petitioners request that their exception/application for an extension of time to file an exception be viewed liberally in accordance with the introductory language of § 3000.0 of the Tax Appeals Tribunal Rules of Practice and Procedure.

Petitioners also assert that the Division's delay in requesting an extension of time to file an exception until February 1, 1990 precluded petitioners from timely filing their exception because they were out of the country until February 13, 1990. They request that their

exception/application for an extension of time to file an exception be treated as a cross-appeal to the Division's request for an extension of time to file an exception.

OPINION

Subdivision 7 of section 2006 of the Tax Law grants the Tax Appeals Tribunal the following authority:

"7. 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." (Tax Law § 2006.7.)

20 NYCRR 3000.11(a)(1) provides as follows:

(1) 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 and two conformed copies with the secretary. 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 director of the law bureau." (20 NYCRR 3000.11[a][1].)

Exceptions must be filed within 30 days after the giving of notice of the determination of the 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 3000.11[a][1], [2]). If an exception is received by the Tribunal after the due date, and the postmark on the envelope containing the exception is an office metered mail postmark, then such postmark must bear a date within the prescribed period or on or before the prescribed date for filing the exception (20 NYCRR 3000.16). The exception to the determination of the Administrative Law Judge in this matter was due on February 5, 1990. It was received by the office of the Secretary to the Tribunal on March 1, 1990. The envelope containing the exception had an office metered mail postmark of February 26, 1990, 21 days after the date the exception was due. Therefore, the exception was not timely filed and the Tribunal lacks jurisdiction to review it. Accordingly, the Tribunal is also without authority to grant an extension to the period for filing this exception.

We find petitioners' argument, that the Division's filing of its request for an extension of time to file an exception 4 days before the end of the filing period precluded petitioners from timely filing their exception, unpersuasive. If petitioners had wanted to file an exception, they clearly had 30 days from the date of issuance of the Administrative Law Judge's determination to do so. In addition, we cannot treat petitioners' late filed exception/application for an extension of time to file an exception as a cross-appeal. The statute and the Rules of Practice and Procedure do not provide for a cross-exception nor for any exception outside the 30 day time period, unless an extension of this period has been requested (see, Matter of Klein's Bailey Foods, Inc., Tax Appeals Tribunal, August 4, 1988).

Accordingly, it ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of the petitioners, John W. and Doris N. Riehm, be, and hereby is, dismissed with prejudice as of this date.

DATED: Troy, New York
July 26, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner