

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOE N. AND BLANCHE DAVINGER	:	
for Redetermination of a Deficiency or for Refund of	:	DECISION
Personal Income Tax under Article 22 of the Tax Law for	:	
the Year 1975.	:	

Petitioners Joe N. and Blanche Davinger, 241 Central Park West, New York, New York 10024, filed an exception to the determination of the Administrative Law Judge issued on December 22, 1988 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 year 1975 (File No. 804258). Petitioner appeared by William J. Salvie, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner did not file a brief on exception or request oral argument. The Division of Taxation did not file a brief.

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 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 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 to petitioners on December 22, 1988, at petitioners' last known address at 241 Central Park West, New York, New York 10024.

Petitioners' exception to the determination of the Administrative Law Judge was required to be filed by January 23, 1989. Said exception was received by the Office of the Secretary to the Tribunal on May 29, 1990. The envelope containing the exception to the Administrative Law Judge's determination had a United States Postal Service postmark of May 25, 1990.

Petitioners have submitted photocopies of a receipt for certified mail and a domestic return receipt, indicating that the exception was previously received by the Division of Tax Appeals on December 5, 1989.

On July 23, 1990, the Tribunal issued a Notice of Intent to Dismiss this exception on the ground that it was not timely filed. The parties were given 30 days to respond to this Notice. On August 27, 1990, a request was received from petitioners for an extension of time to respond to the Notice. The extension was granted. A response to the Notice was received from petitioners on September 24, 1990, stating that the computation of the assessment against them was erroneous. Furthermore, petitioners requested that all penalties be waived and that they only be charged the deficiency assessed, plus interest.

Opinion

Subdivision 7 of section 2006 of the Tax Law provides as follows:

"The Tribunal shall have the following functions, powers and duties:

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:

"Review by tribunal. (a) Filing of exception.

(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 (Tax Law § 2006[7]; 20 NYCRR 3000.11[a][1]). An exception received by this Tribunal, after the date it was due, is deemed to be filed on the date of the United States postmark stamped on the envelope (20 NYCRR 3000.16).

The exception, or request for an extension of time to file an exception, to the determination of the Administrative Law Judge in this matter was due on January 23, 1989. It was received by the Office of the Secretary to the Tribunal, at the earliest, on December 5, 1989. If the original certified mailing receipts were submitted to the Tribunal, the postmark on the sender's receipt of certified mailing would establish the date of filing as November 30, 1989 (20 NYCRR 3000.16[c]). However, even accepting the date of November 30, 1989 as the date of filing the exception, the exception was filed over ten months after it was due. Therefore, the exception was not timely filed 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 the petitioners, Joe N. and Blanche Davinger, be, and hereby is, dismissed with prejudice as of this date.

DATED: Troy, New York
December 20, 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