

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
AARDVARK SANITATION, INC. : DECISION
for Redetermination of a Deficiency or for Refund of :
Corporation Franchise Tax under Article 9-A of the Tax :
Law for the Years 1975 through 1982. :

Petitioner Aardvark Sanitation, Inc., 39 Cornehlson Drive, Huntington Station, New York 11746 filed an exception to the determination of the Administrative Law Judge issued on July 26, 1990 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the Years 1975 through 1982 (File No. 804768). Petitioner appeared by Myer Zimmerman, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation did not.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed its 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 petitioner on July 26, 1990 at petitioner's last known address at 39 Cornehlson Drive, Huntington Station, New York 11746.

Petitioner's exception to the determination of the Administrative Law Judge was required to be filed by August 27, 1990. A timely request for an extension of time to file an exception in this matter and in the related case of In the Matter of Joseph Petito was received by the Secretary to the Tribunal on August 20, 1990. The Secretary to the Tribunal granted an extension of time to file an exception in both of these matters until October 26, 1990.

An exception was received In the Matter of the Petition of Joseph Petito (DTA #804767) on October 29, 1990. This exception was timely filed as the envelope containing the exception had a United States Postal Service postmark of October 26, 1990.

An exception was received In the Matter of the Petition of Aardvark Sanitation, Inc. (DTA #804768) on November 1, 1990. The envelope containing this exception had a United States Postal Service postmark of October 29, 1990 which is after the extension of time to file an exception which expired on October 26, 1990.

On December 14, 1990 the Tax Appeals Tribunal issued a Notice of Intent to Dismiss petitioner's exception on the ground that it was not timely filed. The parties were given 30 days to respond to this notice. Neither party has responded to the notice.

OPINION

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

"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]). The Tribunal may extend such 30-day period if an application for an extension of time is filed within the 30-day period (Tax Law § 2006[7]; 20 NYCRR 3000.11[a][2]). Here, petitioner timely filed a request for an extension of time to file an exception. Therefore, the time for filing an exception expired on October 26, 1990. An exception in this matter was received by the Tribunal on November 1, 1990. The envelope containing the exception had a United States Postal Service postmark of October 29, 1990. 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[a][1]). In this case, the exception is untimely as the United States postmark falls outside the extension of time to file an exception and, therefore, the Tribunal lacks jurisdiction to review such exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of petitioner Aardvark Sanitation, Inc. be, and hereby is, dismissed with prejudice as of this date.

DATED: Troy, New York
June 6, 1991

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

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

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