

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANTHONY DIMINO	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA No. 809795
Personal Income Tax under Article 22 of the Tax Law for	:	
the Years 1985 and 1986.	:	

Petitioner Anthony Dimino, 7 Hewitt Drive, Northport, New York 11768, filed an exception to the determination of the Administrative Law Judge issued on February 4, 1993. Petitioner appeared by Randolph W. Spelman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

On April 22, 1993, the Tax Appeals Tribunal (hereinafter 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. A response to the Notice was filed by petitioner. The Division of Taxation did not submit a response. Petitioner's response was received on May 24, 1993 and began the six-month period for the issuance of this decision.

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 petitioner to the Tribunal's Notice of Intent to Dismiss Exception, the Tribunal renders the following decision per curiam.

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 to petitioner, on

February 4, 1993, at petitioner's last known address at 7 Hewitt Drive, Northport, New York 11768. A copy of the determination of the Administrative Law Judge was also mailed, on February 4, 1993, to petitioner's representative, Randolph W. Spelman, Esq. at 17 Robert Lennox Drive, Northport, New York 11768.

Petitioner's exception to the determination of the Administrative Law Judge was received by the office of the Secretary to the Tax Appeals Tribunal on March 11, 1993. The envelope containing the exception bears a United States Postal Service postmark of March 9, 1993.

On April 22, 1993, 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. Petitioner responded by letter dated May 18, 1993. The Division of Taxation did not respond.

OPINION

Subdivision 7 of section 2006 of the Tax Law provides that the Tribunal shall have the following functions, powers and duties:

"[t]o 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:

"[w]ithin 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 Troy or by mail addressed to:

Secretary to the Tax Appeals Tribunal
State of New York
Division of Tax Appeals
Riverfront Professional Tower
500 Federal Street
Troy, NY 12180-2893

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]).

20 NYCRR 3000.16(a)(1) provides as follows:

"[i]f any document required to be filed under this Part within a prescribed period or on or before a prescribed date under authority of any provision of article 40 of the Tax Law is, after such period or date, delivered by United States mail to the New York State Division of Tax Appeals or Tax Appeals Tribunal, Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180, the date of the United States postmark stamped on the envelope or other appropriate wrapper in which such document is contained will be deemed to be the date of filing" (20 NYCRR 3000.16[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]). The exception to the determination of the Administrative Law Judge in this matter was due on March 8, 1993. It was received by the office of the Secretary to the Tax Appeals Tribunal on March 11, 1993. The envelope containing the exception bears a United States Postal Service postmark of March 9, 1993. Therefore, it was not timely filed as required by Tax Law § 2006(7), and the Tribunal lacks jurisdiction to review petitioner's exception.

In his response to the Notice of Intent to Dismiss Exception, petitioner requests that the Tribunal not dismiss his exception as this would violate his constitutional rights to due process and a hearing. Petitioner admits that the exception was not filed within 30 days of the issuance of the Administrative Law Judge's determination, but asserts that he did file the exception within 30 days of receipt of the determination. In addition, petitioner argues that neither he nor his attorney, upon receipt of the Administrative Law Judge's determination, had 30 days to prepare and respond to the determination. We find this argument without merit. The statute and regulation provide that a petitioner has 30 days from the giving of notice of the Administrative Law Judge's determination to file an exception, not 30 days from receipt of the determination. The giving of notice commences when the determination is mailed by the Division of Tax Appeals (Tax Law § 2006[7]; 20 NYCRR 3000.17[a]; see also, Matter of Designer Realty Corp., Tax Appeals Tribunal, November 12, 1992; Matter of Meyer, Tax Appeals Tribunal, June 25, 1992).

Further, petitioner argues that, in an effort to insure the exception was not lost in the mail,

his representative waited until March 9, 1993 (one day after the exception was due) to mail the exception at a United States Post Office, rather than depositing the exception in a mail box when it was prepared and signed on March 5, 1993. Petitioner states that his representative was not able to get to a United States Post Office until March 9, 1993 to mail the exception certified mail, return receipt requested. We also find this argument without merit. While we understand petitioner's desire to use certified mail (the Tribunal's regulations certainly suggest the use of certified mail to avoid the risk of an untimely postmark when using regular mail), this can in no way justify disregarding a filing date while attempting to find an opportunity to get to a United States Post Office to use certified mail.

Petitioner further argues that his exception should not be dismissed for being one day late as the determination of the Administrative Law Judge was not issued within six months of the completion of the hearing, and no good cause was shown for that lateness. While we do not condone the Administrative Law Judge's lateness in issuing the determination (see, Matter of Sandrich, Inc., Tax Appeals Tribunal, April 15, 1993), that lateness does not empower us to waive the 30-day time period for filing an exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

DATED: Troy, New York
July 1, 1993

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

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