

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| PARKVIEW AUTO SALES, INC. | : | DECISION |
| | : | DTA No. 812504 |
| for Revision of a Determination or for Refund | : | |
| of Sales and Use Taxes under Articles 28 and 29 | : | |
| of the Tax Law for the Period September 1, 1988 | : | |
| through November 30, 1991. | : | |

Petitioner Parkview Auto Sales, Inc., c/o David P. Antonucci, Esq., The Bonadio Bldg., 12 Public Square, Watertown, New York 13601, filed an exception to the determination of the Administrative Law Judge issued on November 2, 1995. Petitioner appeared by David P. Antonucci, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kathleen D. Church, Esq. of counsel).

On January 4, 1996, the Tax Appeals Tribunal (hereinafter the "Tribunal") issued a Notice of Intent to Dismiss this exception on the grounds that it was not timely filed. The parties were given until February 8, 1996 to respond. Petitioner and the Division of Taxation responded to the Notice of Intent to Dismiss. Petitioner's response was received on February 12, 1996, which date 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 responses of the parties to the Tribunal's Notice of Intent to Dismiss, the 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 November 2, 1995 at petitioner's last known address at P.O. Box 6300, Outer Washington Street, Watertown, New York 13601. A copy of the determination of the Administrative Law Judge was also mailed on November 2, 1995 to petitioner's representative David P. Antonucci, Esq., 138 Factory Street, Watertown, New York 13601.

Petitioner's copy of the determination of the Administrative Law Judge was received by the Division of Tax Appeals on November 8, 1995 with a United States Postal Service return to sender stamp stating, "moved left no order." While the letterhead on the covering letter to petitioner's exception indicates petitioner's representative, David P. Antonucci, is now located at the Bonadio Building, 12 Public Square, Watertown, New York 13601, Mr. Antonucci's copy of the determination was not returned to the Division of Tax Appeals.

Petitioner's exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on December 26, 1995. The envelope containing the exception bears a United States Postal Service postmark of December 22, 1995. In the covering letter filed with the exception, petitioner's representative requested that the letter be accepted as a request for an extension of time to file an exception.

On January 4, 1996, the Tribunal issued a Notice of Intent to Dismiss this exception on the ground that it was not timely filed. The parties were given until February 8, 1996 to respond. The Division of Taxation responded by a letter dated January 16, 1996. Petitioner responded by a letter dated February 7, 1996.

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 3000.17(a)(1) provides as follows:

"[w]ithin 30 days after the giving of notice of the determination of the 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 office of counsel" (20 NYCRR 3000.17[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 3000.17[a][1], [2]). The exception to the determination of the Administrative Law Judge in this matter was due on December 4, 1995. It was received by the Office of the Secretary to the Tax Appeals Tribunal on December 26, 1995. The envelope containing the exception bears a United States Postal Service postmark of December 22, 1995. Therefore, the exception was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review it.

In its response to the Notice of Intent to Dismiss Exception, petitioner argues that the delay in filing the exception was due to a change of address and also due to holiday mail. Petitioner further argues that neither it "or its counsel received notice as required by 20 NYCRR 3000 et. seq." and, therefore, could not "act, or have any reason to act, until the decision was known" (Comment upon Notice of Intent to Dismiss Exception, p. 1). We reject this argument. As we stated in Matter of Dimino (Tax Appeals Tribunal, July 1, 1993), "[t]he 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 3000.11[a])" (Matter of Dimino, *supra*; *see also*, Matter of DeMilt, Tax Appeals Tribunal, May 18, 1995; Matter of Designer Realty Corp., Tax Appeals Tribunal, November 12, 1992; Matter of Meyer, Tax Appeals Tribunal, June 25, 1992).

Petitioner also argues that 20 NYCRR 3000.11 allows the Tribunal to extend the time to file an exception for good cause, and that the change of address and holiday mail arguments constitute good cause. Petitioner has misinterpreted this regulation. The regulation provides that: "[t]he tribunal may extend the 30-day period for filing an exception, provided an application for extension is filed within such period . . ." (20 NYCRR 3000.11[a][2], *emphasis added*). While petitioner's representative requested in the covering letter filed with the exception that the letter be construed as a request for an extension of time to file, the letter and exception were not filed within the 30-day period and, therefore, no extension can be granted.

Petitioner also argues that the Tribunal has the discretion under 20 NYCRR 3000.17 to grant its extension request. This regulation provides that: "[t]he tribunal . . . may, on its . . . own motion . . . order . . . [an] extension of time . . . for good cause, provided no statutory prohibition exists" (20 NYCRR 3000.17[b], *emphasis added*). However, petitioner's request for an extension of time to file its exception is prohibited by Tax Law § 2006(7) because it was not filed within the 30-day period to file an exception. The Tribunal does not have the discretion and is not empowered to waive the 30-day period for filing an exception or an extension of time to file an exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

DATED: Troy, New York
July 11, 1996

/s/Donald C. DeWitt
Donald C. DeWitt
President

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