

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
RAUL ALARCON, JR. AND MARIA ALARCON : DECISION
for Redetermination of a Deficiency or for : DTA No. 813557
Refund of Personal Income Tax under Article :
22 of the Tax Law and the New York City :
Administrative Code for the Years 1989 and 1990. :

Petitioners Raul Alarcon, Jr. and Maria Alarcon, 232 Cleft Road (Beaucourt), Millneck, New York 11765, filed an exception to the order of the Administrative Law Judge issued on March 21, 1996. Petitioners appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Gary Palmer, Esq., of counsel).

On April 25, 1996, 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 until May 30, 1996 to respond. Both parties submitted responses to the Notice of Intent to Dismiss. Any responses from the parties were due on May 30, 1996, which date began the six-month period for the issuance of this decision.

On its own motion, after reviewing the order, 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 petitioners timely filed their exception to the determination of the Administrative Law Judge.

FINDINGS OF FACT

We find the following facts.

The order of the Administrative Law Judge was mailed to petitioners on March 21, 1996 at petitioners' last known address at 232 Cleft Road, Mill Neck, New York 11765. A copy of the order was also sent to petitioners' representative, Ben A. Milchman, CPA, 147-26 70th Avenue, Flushing, New York 11367.

Petitioners' exception to the order of the Administrative Law Judge was received by the Office of the Secretary to the Tax Appeals Tribunal on April 23, 1996. It was delivered to said office by Federal Express Priority Overnight.

On April 25, 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 May 30, 1996 to respond. Petitioners responded by a letter dated May 16, 1996. The Division of Taxation (hereinafter the "Division") responded by a letter dated May 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) and 3000.22(a)(1) provide 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]).

"[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. Where delivery is made by courier, delivery, messenger or similar service, the date of delivery will be deemed to be the date of filing" (20 NYCRR 3000.22[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]). Where delivery of an exception is made by a courier or similar service, the date of delivery will be deemed to be the date of filing (20 NYCRR 3000.22[a][1]). The exception to the order of the Administrative Law Judge in this matter was due on April 22, 1996. It was received by the office of the Secretary to the Tribunal on April 23, 1996. The exception was delivered by Federal Express and is deemed filed on April 23, 1996. Therefore, it was not timely filed as required by Tax Law § 2006(7), and the Tribunal lacks jurisdiction to review petitioners' exception.

In their response to the Notice of Intent to Dismiss this exception, petitioners have submitted several documents for the Tribunal's review and also address the merits of their case. However, as noted above, without a timely exception having been filed, we have no jurisdiction to address the merits of petitioners' exception.

The response of the Division to the Notice of Intent to Dismiss states that the Division has no objection to petitioners' exception being dismissed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of petitioners Raul Alarcon, Jr. and Maria Alarcon is dismissed with prejudice as of this date.

DATED: Troy, New York
August 1, 1996

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

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