

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ROBERT I. OZIEL</b>	:	DECISION
	:	DTA NO. 814380
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1989.	:	

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Petitioner Robert I. Oziel, 4 Sherwood Gate, Oyster Bay, New York 11771, filed an exception to the determination of the Administrative Law Judge issued on November 6, 1997. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel).

On May 12, 1998, the Tax Appeals Tribunal (hereinafter the "Tribunal") issued a Notice of Intent to Dismiss Exception on the ground that petitioner's exception was not timely filed. The parties were given until June 11, 1998 to respond. A response to the Notice was filed by the Division of Taxation. Petitioner did not submit a response.

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 the Division of Taxation to the Tribunal's Notice of Intent to Dismiss Exception, the Tribunal renders the following decision.

***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 November 6, 1997 at petitioner's last known address at 4 Sherwood Gate, Oyster Bay, New York 11771.

Petitioner's exception to the determination of the Administrative Law Judge was required to be filed by December 8, 1997. Petitioner's request for an extension of time to file an exception was received by the Office of the Secretary to the Tribunal on December 15, 1997. The envelope containing the request for an extension of time to file an exception had a machine metered postmark of December 5, 1997, however, the letter itself was dated December 10, 1997.

By letter dated December 15, 1997, the Secretary to the Tribunal granted petitioner's request for an extension of time to file his exception until January 7, 1998.

Petitioner then filed an exception which was received by the Office of the Secretary to the Tribunal on January 12, 1998. The envelope containing the exception had a machine metered postmark of January 7, 1998.

By letter dated January 12, 1998, the Secretary to the Tribunal acknowledged receipt of petitioner's exception and set up a briefing schedule in the matter.

On May 12, 1998, the Tribunal issued a Notice of Intent to Dismiss Exception on the ground that petitioner's request for an extension of time to file an exception was not timely filed. The parties were given until June 11, 1998 to respond. The Division of Taxation responded by letter dated May 13, 1998.

***OPINION***

Section 2006 of the Tax Law provides that the Tribunal shall have certain functions, powers and duties. Tax Law § 2006(7) provides, in pertinent part, as follows:

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.

The Tribunal's regulation at 20 NYCRR 3000.17(a)(1) provides as follows:

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 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)(2) provides as follows:

The tribunal may extend the 30-day period for filing an exception, provided an application for extension is filed within such period and served on the other party, and if good cause is shown. "Good cause" depends on the circumstances of each case, but would include any cause which appears to an ordinarily prudent person as a reasonable ground for failure to file an exception within the prescribed period.

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]). An extension of the 30-day period for filing an exception may be granted by the Tribunal provided an application is filed within such period and served on the other party, and if good cause is shown (20 NYCRR 3000.17[a][2]). An extension request that is not timely received by the Tribunal may be treated as timely filed if the envelope containing the exception bears a United States Postal Service postmark which falls within the prescribed period or on or before the prescribed date for filing (20 NYCRR 3000.22[a][2][iii]). If the postmark on the envelope is not made by the United States Postal Service (i.e., office metered mail), the postmark must bear a date which falls within the prescribed period or on or before the prescribed date for filing and must be received by the Tax Appeals Tribunal not later than the time when an envelope which is properly mailed and postmarked by the United States Postal Service would ordinarily be received (20 NYCRR 3000.22[b]).<sup>1</sup>

In this case, the envelope containing the request for an extension bore a machine metered postmark falling within the prescribed period for filing but the envelope was not received within such period or within the time a document so mailed and so postmarked by the United States

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<sup>1</sup>As set forth in the facts, the Secretary to the Tribunal inadvertently granted petitioner's request for an extension of time within which to file his exception. However, the failure to timely request an extension of time in which to file an exception is a jurisdictional matter and the Secretary's oversight in granting such extension does not cure the jurisdictional defect (*see, Matter of Rubo Sales Corp.*, Tax Appeals Tribunal, February 25, 1993 [wherein the Tribunal determined that, despite the Secretary's granting the petitioner a second extension of time in which to file its exception, since the extension request was not postmarked nor received by the Tribunal within the prescribed time frame for filing a request for extension, the granting of such request was in error and the exception was dismissed]).

Postal Service would ordinarily have been received. The request for an extension was received by the Tax Appeals Tribunal on December 15, 1997, seven days after the prescribed period for filing expired. We conclude that seven days is not within the time that a document mailed and postmarked by the United States Postal Service would ordinarily be received (*see, Matter of Brenner*, Tax Appeals Tribunal, March 1, 1990; *cf., Matter of Harron's Elec. Serv.*, Tax Appeals Tribunal, February 19, 1988 [five days was found to be an appropriate amount of time in which a document would ordinarily be received]). Therefore, petitioner must establish the following in order to satisfy the Tax Appeals Tribunal Rules of Practice and Procedure:

(i) that it [the document] was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the prescribed period or on or before the prescribed date for filing the document;

(ii) that the delay in receiving the document was due to a delay in the transmission of the mail; and

(iii) the cause of such delay (20 NYCRR 3000.22[b][2]).

Since petitioner did not submit any response to the Notice of Intent to Dismiss Exception that would establish that he timely filed his request for an extension, we find that he did not meet his burden to prove timely filing of the request for an extension. Therefore, 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 petitioner Robert L. Oziel is dismissed with prejudice as of this date.

DATED: Troy, New York  
December 10, 1998

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner