

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PATRICK J. O'DEA, JR.	:	DECISION
	:	DTA NO. 816402
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 December 1, 1990 through November 30, 1993.	:	

Petitioner Patrick J. O'Dea, Jr., 753 South Broadway, Hicksville, New York 11801, filed an exception to the determination of the Administrative Law Judge issued on November 19, 1998. Petitioner appeared by Joel A. Goldman, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel).

On November 20, 2000, 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 December 26, 2000 to respond. Neither party responded to the Notice.

On its own motion, after reviewing the determination, the exception and the mailing records of the Division of Tax Appeals in this matter, 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 by certified mail (certified control number Z 345 767 989) in Troy, New York to petitioner Patrick J. O'Dea, Jr. on November 19, 1998 at petitioner's last known address at 753 South Broadway, Hicksville, New York 11801. A copy of the determination was also mailed by certified mail (certified control number Z 345 767 990) on November 19, 1998 to petitioner's representative Joel A. Goldman, CPA at 107-14 91st Street, Ozone Park, New York 11417.

Petitioner's exception to the determination of the Administrative Law Judge was required to be filed by December 21, 1998. Petitioner's first application for an extension of time to file an exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on December 21, 1998. The envelope containing the request had a United States Postal Service postmark of December 17, 1998. Since the postmark fell within the time to file an exception or a request for an extension of time to file, the request was timely. By letter dated December 22, 1998, the Secretary to the Tribunal granted petitioner an extension of time to file an exception until January 20, 1999.

Petitioner's second application for an extension of time to file an exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on January 21, 1999. The envelope containing this second request had a United States Postal Service postmark of January 19, 1999. By letter dated January 25, 1999, the Secretary to the Tribunal granted petitioner's second request for an extension of time to file an exception,

extending the due date for such exception to February 22, 1999. The letter also stated that no further extensions would be granted.

By letter dated March 9, 1999, the Secretary to the Tribunal advised petitioner that since no exception was filed by February 22, 1999, the Tribunal considered petitioner's request for an extension of time in which to file an exception withdrawn and was closing its file in the matter.

Petitioner subsequently filed an exception which was received by the Office of the Secretary to the Tribunal on November 2, 2000. It was delivered to said office by Federal Express.

On November 20, 2000, 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 December 26, 2000 to respond. No response was received from either party.

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.

The Tribunal's regulation at 20 NYCRR 3000.22(a)(1) provides:

Date of filing. If 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 services, the date of delivery will be deemed to be the date of filing.

The regulation at 20 NYCRR 3000.23(a) provides that service of determinations shall be complete upon enclosing the document in a post-paid properly addressed wrapper and depositing it in a post office under the exclusive care and custody of the United States Postal Service.

Following this procedure constitutes the giving of notice under section 2006(7) of the Tax Law.

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 determination of the Administrative Law Judge was issued to petitioner on November 19, 1998. Therefore, the exception to the determination of the Administrative Law Judge in this matter was due on

December 21, 1998. However, petitioner had filed for an extension of time in which to file his exception on two separate occasions, which requests were granted. Accordingly, petitioner was advised that his exception was required to be filed by February 22, 1999. The exception in this matter was received by the Office of the Secretary to the Tribunal on November 2, 2000.

Therefore, it was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review petitioners' exception.

On the Tax Appeals Tribunal's own motion, the exception of Patrick J. O'Dea, Jr. is dismissed with prejudice as of this date.

DATED: Troy, New York
May 24, 2001

/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