

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**GOOD LUCK LIQUOR, INC.** :  
**AND ZHONG XIANG TIAN** :

DECISION  
DTA NOS. 816578  
AND 816579

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 March 1, 1993 through November 30, 1995.

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Petitioners Good Luck Liquor, Inc., 369 Nostrand Avenue, Brooklyn, New York 11216 and Zhong Xiang Tian, 60-06 84<sup>th</sup> Street, Elmhurst, New York 11373, filed an exception to the determination of the Administrative Law Judge issued on October 28, 1999. Petitioners appeared by Leslie S. Fields, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Gary Palmer, Esq., of counsel).

On January 11, 2000, the Tax Appeals Tribunal (hereinafter the "Tribunal") issued a Notice of Intent to Dismiss Exception on the ground that petitioners' exception was not timely filed. The parties were given until February 15, 2000 to respond. A response to the Notice was filed by the Division of Taxation.

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, 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 determination of the Administrative Law Judge was mailed by certified mail (certified control number P286340881) in Troy, New York to petitioner Zhong Xiang Tian on October 28, 1999 at petitioner's last known address at 60-06 84<sup>th</sup> Street, Elmhurst, New York 11373 and to petitioner Good Luck Liquor, Inc. on October 28, 1999 by certified mail (certified control number P286340883) at petitioner's last known address at 369 Nostrand Avenue, Brooklyn, New York 11216. A copy of the determination was also mailed by certified mail (certified control number P286340884) on October 28, 1999 to petitioners' representative, Leslie S. Fields, CPA , 1220 Lexington Avenue, New York, New York 10028.

Petitioner's exception to the determination of the Administrative Law Judge was received by the Office of the Secretary to the Tribunal on December 29, 1999. The envelope containing the exception bears an illegible United States Postal Service postmark.

On January 11, 2000, the Tribunal issued a Notice of Intent to Dismiss Exception on the ground that petitioners' exception was not timely filed. The parties were given until February 15, 2000 to respond. The Division of Taxation responded by letter dated February 7, 2000.

***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.

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 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.

An exception received by this Tribunal, after the date it was due, is deemed to be filed on the date of the United States postmark stamped on the envelope (20 NYCRR 3000.22). The

exception in this matter was required to be filed by November 29, 1999. The exception was received by the Office of the Secretary to the Tribunal on December 29, 1999, which is not within the 30-day period for filing an exception. The envelope containing the exception bore an illegible United States Postal Service postmark. When an envelope contains an illegible postmark, the burden is upon the person required to file the document to prove when the postmark was made (20 NYCRR 3000.22[a][2][iii]). Petitioners have not submitted any evidence to prove that the postmark on the envelope containing their exception was stamped by the United States Postal Service on or before the prescribed date for filing that exception. Accordingly, we find the exception was not timely filed and the Tribunal lacks jurisdiction to review it.

On the Tax Appeals Tribunal's own motion, the exception of Good Luck Liquor, Inc. and Zhong Xiang Tian is dismissed with prejudice as of this date.

DATED: Troy, New York  
July 20, 2000

/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