

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>MANUEL A. ALMANZAR</b>	:	DECISION
	:	DTA NO. 817125
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the years 1990 through	:	
1993 and 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 June 1, 1991 through February	:	
28, 1993.	:	

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Petitioner Manuel A. Almanzar, 438 61<sup>st</sup> Street, Apt. 1C, Brooklyn, New York 11220, filed an exception to the determination of the Administrative Law Judge issued on November 16, 2000. Petitioner appeared by Ismael Gonzalez, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

On January 26, 2001, 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 March 2, 2001 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 by certified mail (certified control number 70000600002408360307) in Troy, New York to petitioner on November 16, 2000 at petitioner's last known address at 438 61<sup>st</sup> Street, Apt. 1C, Brooklyn, New York 11220. A copy of the determination was also mailed by certified mail (certified control number 70000600002408360291) in Troy, New York on November 16, 2000 to petitioner's representative, Ismael Gonzalez, 250 West 57<sup>th</sup> Street, Suite 507, New York, New York 10107.

Petitioner filed an exception to the determination which was received by the Office of the Secretary to the Tax Appeals Tribunal on January 18, 2001. The envelope containing the exception bore a machine metered postmark of December 16, 2000. The envelope containing the exception did not bear a United States Postal Service postmark.

By letter dated January 26, 2001, the Secretary to the Tribunal acknowledged receipt of petitioner's exception and issued a Notice of Intent to Dismiss Exception on the ground that petitioner's exception was not timely filed. The parties were given until March 2, 2001 to respond. The Division of Taxation responded by letter dated February 7, 2001.

***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 3000.23(a) provides as follows:

Service of decisions, determinations and orders of the tribunal, administrative law judges and presiding officers shall be made by mail. Registered and certified mail will be used and service shall be complete upon the deposit of the appropriate document, enclosed in a post-paid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States postal service. Such service shall constitute the giving of notice pursuant to section 2006(7) of the Tax Law and service pursuant to section 2016 of the Tax Law.

In this case, the exception to the determination of the Administrative Law Judge was due to be filed on or before December 18, 2000. The envelope containing the exception bore a machine metered postmark falling within the prescribed period for filing but the envelope was

not received by the Tax Appeals Tribunal until January 18, 2001 or 31 days after the prescribed period for filing expired.

If the postmark on the envelope containing the exception is not made by the United States Postal Service (e.g., office metered mail): 1) the postmark must bear a date which falls within the prescribed period or on or before the prescribed date for filing; and 2) must be received by the 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 in order to be considered timely filed (20 NYCRR 3000.22[b][1]). We conclude that 31 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, in order to satisfy the Tribunal Rules of Practice and Procedure that the exception was timely filed, petitioner must establish the following:

(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, we find that he did not meet his burden to prove timely filing of the exception. Therefore, the Tribunal lacks jurisdiction to review it.

On the Tax Appeals Tribunal's own motion, the exception of petitioner Manuel A. Almanzar is dismissed with prejudice as of this date.

DATED: Troy, New York  
June 7, 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