

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

DOUGLAS AND GAYLE CAIRES : DECISION
DTA NO. 818986

for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1992 and 1993.

Petitioners Douglas and Gayle Caires, 2864 NE 36th Street, Fort Lauderdale, Florida 33308, filed an exception to the determination of the Administrative Law Judge issued on December 26, 2002. Petitioners appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

On December 2, 2003, 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 January 6, 2004 to respond. A response to the Notice was filed by petitioners on December 8, 2003. The Division of Taxation did not respond.

On its own motion, after reviewing the determination of the Administrative Law Judge, the exception, the mailing records of the Division of Tax Appeals in this matter and the response of petitioners to the Tribunal's Notice of Intent to Dismiss Exception, 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 7001 2510 0000 5292 9100) in Troy, New York to petitioners on December 26, 2002 to petitioners' last known address at 2971 Shore Drive, Merrick, New York 11566. The envelope containing the determination mailed to petitioners on December 26, 2002 was not returned to the Division of Tax Appeals.

Petitioners filed an exception to the determination which was received by the Office of the Secretary to the Tax Appeals Tribunal on November 26, 2003. The envelope containing the exception did not bear a United States Postal Service postmark.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

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 that service of determinations and orders shall be made by registered or certified mail and 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 an 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 exception received by this Tribunal after the date it was due is deemed to be filed on the date of the United States Postal Service postmark stamped on the envelope or the date of delivery (20 NYCRR 3000.22[a][1]).

In this case, the determination was served on petitioners on December 26, 2002 and the exception to the determination of the Administrative Law Judge was due to be filed on or before January 25, 2003. The envelope containing petitioners' exception did not bear a United States

Postal Service postmark. However, the exception was delivered to the Office of the Secretary to the Tax Appeals Tribunal on November 26, 2003.

Petitioners claim that they have been living in Florida since November 2002 and that an unidentified person at their prior address must have signed for the certified mail containing the determination. Therefore, petitioners assert that they were not properly served with the determination.

Despite petitioners' claim, there is no evidence that petitioners ever notified the Division of Tax Appeals of their change in address prior to the date on which the determination was mailed to them. Petitioners have provided no evidence that the certified mail containing the determination was, in fact, delivered to someone other than petitioners.

As a result, we conclude that petitioners' exception to the determination of the Administrative Law Judge was not timely filed as required by Tax Law § 2006(7) and 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 petitioners Douglas and Gayle Caires is dismissed with prejudice as of this date.

DATED: Troy, New York
May 27, 2004

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

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner