

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
NAN S. ZAVOSKI : DECISION
for Revision of a Determination or for Refund of Sales : DTA NO. 819119
and Use Taxes under Articles 28 and 29 of the Tax Law
for the Year 2001. :

Petitioner Nan S. Zavoski, 583 Haverstraw Road, Montebello, New York 10901, filed an exception to the determination of the Administrative Law Judge issued on September 11, 2003. Petitioner appeared by her spouse, Michael C. Zavoski. The Division of Taxation appeared by Mark F. Volk, Esq. (Justine Clarke Caplan, Esq., of counsel).

On October 22, 2003, 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 November 26, 2003 to respond. A response to the Notice was filed by petitioner on October 27, 2003 and by the Division of Taxation on October 29, 2003.

On its own motion, after reviewing the determination, the exception, the mailing records of the Division of Tax Appeals in this matter and the responses of petitioner and 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 her 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 7002 0510 0003 3749 0658) in Troy, New York to petitioner on September 11, 2003 at petitioner's last known address at 583 Haverstraw Road, Montebello, New York 10901. A copy of the determination was also mailed by certified mail (certified control number 7002 0510 0003 3749 0641) in Troy, New York to petitioner's representative on September 11, 2003.

Petitioner filed an exception to the determination which was received by the Office of the Secretary to the Tax Appeals Tribunal on October 20, 2003. The envelope containing the exception bore a United States Postal Service postmark of October 18, 2003.

By letter dated October 22, 2003, 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 November 26, 2003 to respond.

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 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 (20 NYCRR 3000.22[a][1]).

In this case, the determination was served on petitioner on September 11, 2003 and the exception to the determination of the Administrative Law Judge was due to be filed on or before

October 14, 2003.¹ The envelope containing petitioner's exception bears a United States Postal Service postmark of October 18, 2003. Therefore, the exception was not timely filed as required by Tax Law § 2006(7) and the Tribunal lacks jurisdiction to review it.

In response to the Notice of Intent to Dismiss Exception, petitioner claims that she originally filed her exception on September 17, 2003 by First Class Mail and that since she did not receive an acknowledgment from the Tribunal, she mailed her exception a second time on October 18, 2003 via the same method. Despite petitioner's allegations, the Tribunal was only in receipt of petitioner's exception which was enclosed in an envelope bearing a United States Postal Service postmark date of October 18, 2003. Without the submission of any proof evidencing the mailing of another exception, we must rely on the filed date of October 18, 2003 which falls outside the time frame set forth by statute.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of Nan S. Zavoski is dismissed with prejudice as of this date.

DATED: Troy, New York
March 18, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

¹October 11, 2003 is the 30th day from September 11, 2003. However, as October 11, 2003 fell on a Saturday and the following Monday, October 13, 2003 was a legal holiday, the exception was required to be filed by Tuesday, October 14, 2003 (*see*, General Construction Law §§ 20, 25-a).