

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| PAWEL CZERNICKI | : | DECISION DTA NO. 819148 |
| for Revision of a Determination or for Refund of | : | |
| Mortgage Recording Tax under Article 11 of the Tax | : | |
| Law with Reference to an Instrument Recorded on | : | |
| November 17, 1999. | : | |

Petitioner Pawel Czernicki, 156 Nassau Avenue, Apt. 1-R, Brooklyn, New York 11222, filed an exception to the order of the Administrative Law Judge issued on September 25, 2003. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner's motion to reopen the record or for reargument was timely.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge in his order, except for finding of fact “2” which has been modified. The Administrative Law Judge’s findings of fact and the modified finding of fact are set forth below.

On June 14, 2002, petitioner filed a claim for refund of mortgage recording tax with reference to an instrument recorded on November 17, 1999. By letter dated June 25, 2002, the Division of Taxation (“Division”) denied the refund claim because it had not been filed within two years from the time the erroneous payment of tax was received, as required by Tax Law § 263.

We modify finding of fact “2” of the Administrative Law Judge’s order to read as follows:

Petitioner filed a petition for a hearing with the Division of Tax Appeals on September 21, 2002 to contest the denial of his claim for refund. The Division filed an Answer to the petition on October 10, 2002. On November 7, 2002, the Division of Taxation brought a motion seeking summary determination pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division’s motion stated that there was no material and triable issue of fact presented as to the issue of the timeliness of the refund claim and therefore it was entitled to a determination in its favor. Petitioner did not respond to the motion for summary determination.¹

On February 13, 2003, the Administrative Law Judge issued a determination granting summary determination in favor of the Division, which denied petitioner’s petition and sustained the Division’s denial of petitioner’s refund claim. Petitioner did not file an exception to the determination with the Tax Appeals Tribunal.

¹We modified finding of fact “2” to more accurately reflect the record.

Petitioner, on June 23, 2003, filed a motion entitled “Vacatur of default” in which he alleged additional facts in support of his original petition requesting a refund of mortgage recording tax. Petitioner’s motion also requested a modification of the determination which granted summary determination to the Division and dismissed his petition.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Administrative Law Judge considered petitioner’s motion as one to reopen the record or for reargument pursuant to Tax Appeals Tribunal Rules of Practice and Procedure § 3000.16. The Administrative Law Judge noted that pursuant to those rules (20 NYCRR 3000.16[b]), a motion to reopen the record or for reargument, with or without a new hearing, must be made to the Administrative Law Judge who rendered the determination within 30 days after the determination was served. The Administrative Law Judge noted that the determination in this matter had been served upon petitioner on February 13, 2003, which was 133 days prior to petitioner’s filing of his motion to reopen the record. The Administrative Law Judge concluded that petitioner’s motion to reopen the record was untimely. The Administrative Law Judge also noted that the factual allegations contained in petitioner’s motion, which were submitted after the hearing was closed and the determination issued, could not be considered. As a result, the Administrative Law Judge denied petitioner’s motion.

ARGUMENTS ON EXCEPTION

On exception, petitioner presented arguments regarding the merits of his claim for refund of mortgage recording tax and in opposition to the Division’s motion for summary determination. Petitioner argues that the Administrative Law Judge’s determination improperly granted the Division’s motion for summary determination and, therefore, the determination was invalid. As a result, petitioner asserts that he did not have to timely respond to it.

In opposition, the Division argues that petitioner's motion to reopen the record or for reargument was untimely and was properly denied by the Administrative Law Judge.

OPINION

We affirm the order of the Administrative Law Judge. A motion to reopen the record or for reargument, with or without a new hearing, is to be made to the Administrative Law Judge who rendered the determination within 30 days after giving notice of the determination (*see*, 20 NYCRR 3000.16[b]). Petitioner's time to file a motion to reopen or reargue expired on March 15, 2003. Thus, petitioner's motion was untimely. Therefore, petitioner's motion was properly denied.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Pawel Czernicki is denied;
2. The order of the Administrative Law Judge is sustained;
3. The petition of Pawel Czernicki is denied; and
4. The denial of the refund claim by the Division of Taxation is sustained.

DATED: Troy, New York
April 22, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner