

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROCKWELLS RESTAURANT CORP.	:	DECISION
	:	DTA NOS. 819724 &
	:	819752
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods November 30, 2002 through February 23,	:	
2003 and May 31, 1998 through August 31, 2000.	:	

Petitioner Rockwells Restaurant Corp., 97 Brookby Road, Scarsdale, New York 10583, filed an exception to the determination of the Administrative Law Judge issued on May 12, 2005. Petitioner appeared by its president, Stephen Robins. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel).

On June 17, 2005, 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 July 22, 2005 to respond. A response to the Notice was filed by petitioner on July 21, 2005 and by the Division of Taxation on July 19, 2005.

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. Commissioner Nesbitt took no part in the consideration of this decision.

ISSUE

Whether petitioner timely filed its 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 7003 1680 0004 6323 5066) in Troy, New York to petitioner on May 12, 2005 at petitioner's last known address at 97 Brookby Road, Scarsdale, New York 10583.

Petitioner filed an exception to the determination which was received by the Office of the Secretary to the Tax Appeals Tribunal on June 16, 2005. The envelope containing the exception bore a United States Postal Service postmark of June 14, 2005.

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 or official depository 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 (*see*, 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 (*see*, 20 NYCRR 3000.22[a][1]).

In this case, the determination was served on petitioner on May 12, 2005 and the exception to the determination of the Administrative Law Judge was due to be filed on or before June 13, 2005.¹ The envelope containing petitioner's exception was received by the Office of the Secretary to the Tax Appeals Tribunal on June 16, 2005, subsequent to the date it was due to be

¹ June 11, 2005 is the 30th day from May 12, 2005. However, as June 11, 2005 fell on a Saturday, the exception was required to be filed by Monday, June 13, 2005 (*see*, General Construction Law §§ 20, 25-a).

filed, and bears a United States Postal Service postmark of June 14, 2005. 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 it originally filed its exception on June 13, 2005 by depositing it on that date in a United States Post Office mailbox in Hartsdale, New York. Despite petitioner's allegations, the exception was not received until after the date it was due to be filed and, thus, the United States Postal Service postmark date of June 14, 2005 controls the date of filing, 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 Rockwells Restaurant Corp. is dismissed with prejudice as of this date.

DATED: Troy, New York
December 15, 2005

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

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner