

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>NORMAN AND SUSAN SCHULMAN</b>	:	DECISION
		DTA NO. 821395
for Redetermination of a Deficiency or for Refund of New York City Personal Income Tax under the Administrative Code of the City of New York for the Years 1998, 1999 and 2000.	:	

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Petitioners, Norman and Susan Schulman, filed an exception to the determination of the Administrative Law Judge issued on March 12, 2009. Petitioners appeared by Sidney Yoskowitz & Co., P.C. (Hirshel Bernstein, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle Helm, Esq., of counsel).

On July 20, 2009, 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 August 24, 2009 to respond. A response to the Notice was filed by petitioners on August 14, 2009 and by the Division of Taxation on August 13, 2009.

On its own motion, after reviewing the determination of the Administrative Law Judge, the exception, the records of the Division of Tax Appeals in this matter and the response of petitioners and the Division of Taxation to the Tribunal's Notice of Intent to Dismiss Exception, the Tribunal renders the following decision.

***ISSUE***

Whether petitioners filed a timely exception.

***FINDINGS OF FACT***

We find the following facts.

The determination of the Administrative Law Judge was mailed by certified mail (certified control number 7008 1830 0003 9726 3874) in Troy, New York to petitioners on March 12, 2009 at petitioners' last known address at 12 Windward Road, Glen Cove, NY 11542-1763. A copy of the determination was also mailed by certified mail (certified control number 7008 1830 0003 9726 3881) in Troy, New York to petitioners' representative Hirshel Bernstein, CPA, Sidney Yoskowitz & Co., P.C., 445 Northern Boulevard, Suite 36, Great Neck, NY 11021.

Petitioners filed an exception to the determination, which was received by the Office of the Secretary to the Tax Appeals Tribunal on July 16, 2009. The envelope containing the exception bore two machine-metered postmarks, one bearing the date July 13, 2009, in the amount of \$5.71, and the other bearing the date July 14, 2009, in the amount of \$0.44. It did not bear a United States Postal Service ("USPS") postmark.

***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 USPS. 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 the 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 USPS postmark stamped on the envelope (*see*, 20 NYCRR 3000.22[a][1]).

In this case, the determination was served on petitioners on March 12, 2009. Petitioners timely requested two extensions of time to file their exception. The exception to the determination of the Administrative Law Judge was due to be filed on or before July 13, 2009. The envelope containing petitioners' exception bore a machine-metered postmark dated July 13, 2009 and a second machine-metered postmark dated July 14, 2009.

Petitioners do not dispute that the determination of the Administrative Law Judge was mailed to them on March 12, 2009. However, petitioners claim that their exception to the determination of the Administrative Law Judge was timely mailed on July 13, 2009 from the local post office.

As proof of mailing, petitioners provided a certified mail receipt that was postmarked on July 13, 2009 in Great Neck, NY. The postage paid on this certified mail receipt states \$5.71. This amount coincides with the postage of \$5.71 that was affixed to the envelope using a machine-metered postmark date of July 13, 2009.

However, as indicated on the face of the mailing envelope, there is a notation made in ink that reads "Total \$6.15." Also, the second machine-metered postmark was dated July 14, 2009 in the amount of \$0.44. Petitioners did not file a certified mail receipt indicating the additional \$0.44 affixed to the mailing envelope on July 14, 2009.

Thus, the issue before us is whether the initial attempt to mail the notice of exception on July 13, 2009 was deemed to be a timely filing with the Tribunal. We conclude that it was not.

Our Rules of Practice and Procedure address the issue of service and filing of documents at 20 NYCRR 3000.22. Specifically, at 20 NYCRR 3000.22(a)(2), it states, in pertinent part, that:

Any document required to be filed under this Part will not be considered to be timely mailed or timely filed unless the document is mailed in accordance with the following requirements:

(i) the document must be contained in an envelope or other appropriate wrapper and properly addressed . . . .

(ii) The envelope containing the document must be deposited in the mail of the United States within the prescribed period or on or before the prescribed date with sufficient postage prepaid . . . .

As discussed above, petitioner's exception was enclosed in an envelope properly addressed to our offices with a machine-metered postmark with postage in the amount of \$5.71. However, we conclude that the information handwritten on the face of the envelope, along with the additional machine-metered postmark dated the following day, July 14, 2009, in the amount of \$0.44, demonstrates that the envelope was not mailed with sufficient postage prepaid on July 13, 2009. Since additional postage was required and such postage was affixed on July 14, 2009, the exception is deemed to be untimely. Therefore, petitioners failed to meet their burden of proof to show that the exception was timely filed and we do not have jurisdiction to review it.

On the Tax Appeals Tribunal's own motion, the exception of petitioners Norman and Susan Schulman is dismissed with prejudice as of this date.

DATED: Troy, New York  
November 12, 2009

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

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