

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>LANA MARKS LTD. OF NEW YORK</b>	:	DECISION
		DTA NO. 823164
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period March 1, 2002 through February 28, 2005.	:	

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Petitioner, Lana Marks Ltd. of New York, filed an exception to the determination of the Administrative Law Judge issued on April 1, 2010. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

On July 15, 2010, the Tax Appeals 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 August 19, 2010 to advise the Tax Appeals Tribunal why such a decision should not be issued. Neither party responded to the Notice.

On its own motion, after reviewing the determination, the exception, the mailing records of the Division of Tax Appeals and the Notice of Intent to Dismiss Exception in this matter, the Tax Appeals Tribunal renders the following 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 7009 2250 0000 9026 7199) in Troy, New York to petitioner on April 1, 2010 at petitioner's last known address at: Lana Marks Ltd. of New York, Attn: Lana J. Marks - CEO, 125 Worth Avenue - Suite 221, Palm Beach, FL 33480.

The envelope containing the determination mailed to petitioner on April 1, 2010 was returned to the Division of Tax Appeals on June 1, 2010 with a United State Postal Service ("USPS") notation of "unclaimed" and "returned to sender." A courtesy copy of the determination was remailed by regular mail to petitioner.

Petitioner filed an exception to the determination, which was received by the Office of the Secretary to the Tax Appeals Tribunal ("Tribunal") on June 25, 2010. The envelope containing the exception bore a USPS postmark of June 23, 2010.

By letter dated July 15, 2010, 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.

### ***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, New York 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 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 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 petitioner on April 1, 2010. It was noted by the USPS that there were three separate delivery attempts on April 7, April 16 and April 22, before the determination was returned to the Offices of the Division of Tax Appeals on June 1, 2010. The exception to the determination of the Administrative Law Judge was due to be filed on

or before May 3, 2010.<sup>1</sup> The envelope containing petitioner's exception bore a USPS postmark of June 23, 2010. Therefore, the exception 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 petitioner Lana Marks Ltd. of New York is dismissed with prejudice.

DATED: Troy, New York  
February 17, 2011

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
President

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

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner

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<sup>1</sup> May 1, 2010 is the 30<sup>th</sup> day from April 1, 2010. However, as May 1, 2010 fell on a Saturday, the exception was required to be filed by Monday, May 3, 2010 (*see* General Construction Law, §§ 20, 25-a).