

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
LAWRENCE FINKELMAN	:	
AND	:	DECISION
HIGBIE HEROS & CATERING, INC.	:	DTA NOS. 825241
	:	AND 825242
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period June 1, 2003 through May 31,	:	
2005, and for the Periods ended February 29, 2008,	:	
March 31, 2008 and August 31, 2008.	:	

Petitioners, Lawrence Finkelman and Higbie Heros & Catering, Inc., appearing *pro se*, filed an exception to the order of the Administrative Law Judge issued on May 16, 2013. On August 6, 2013, the Tax Appeals Tribunal (Tribunal) issued a Notice of Intent to Dismiss Exception on the ground that petitioners' exception was not timely filed. The parties were given until September 10, 2013 to respond. Neither petitioners nor the Division of Taxation filed a response to the Notice of Intent to Dismiss Exception.

On its own motion, after reviewing the order, the exception and the mailing records of the Division of Tax Appeals, the Tribunal renders the following decision.

ISSUE

Whether petitioners timely filed their exception to the order of the administrative law judge.

FINDINGS OF FACT

We find the following facts.

The order of the Administrative Law Judge was mailed by certified mail (certified control number 7011 0110 0000 3001 7963) in Albany, New York, to petitioners, Lawrence Finkelman and Higbie Heros & Catering, Inc., on May 16, 2013 at petitioners' last known address, 1113 Patricia Avenue, W. Islip, NY 11795.

Petitioners filed an exception to the order, which was received by the Office of the Secretary to the Tribunal on August 2, 2013. The envelope containing the exception bore a United States Postal Service (USPS) postmark of July 31, 2013.

On August 6, 2013, 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 September 10, 2013 to respond. Neither party filed a response.

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*” (emphasis added).

Notice of a determination or order is given by registered or certified mail and is complete upon placing it, in a post-paid properly addressed envelope, in the exclusive care and custody of the USPS (Tax Law § 2006 [7]; 20 NYCRR 3000.23 [a]). A party filing an exception has 30 days from the date that service is complete to file the exception. Exceptions are to be filed with the Secretary to the Tax Appeals Tribunal either in person or by mail (20 NYCRR 3000.17 [a] [1]). An exception delivered by the USPS to this Tribunal after the date it was due is deemed to

be filed on the date of the USPS postmark stamped on the envelope (20 NYCRR 3000.22 [a] [1]).

In this case, the notice of the order was properly given to petitioners by certified mail on May 16, 2013 (Tax Law § 2006 [7]; 20 NYCRR 3000.23 [a]). Thus, the exception to the order of the Administrative Law Judge was due to be filed on or before June 15, 2013¹ (Tax Law § 2006 [7]; 20 NYCRR 3000.17 [a] [1]). It was received by the Office of the Secretary to the Tribunal on August 2, 2013, in an envelope that bore a USPS postmark of July 31, 2013, the deemed date of filing (20 NYCRR 3000.22 [a] [1]). Therefore, the exception was not timely filed as required by Tax Law § 2006 (7) and this Tribunal lacks jurisdiction to consider it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of Lawrence Finkelman and Higbie Heros & Catering, Inc. is dismissed with prejudice.

DATED: Albany, New York
March 6, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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

¹ June 15, 2013 is the 30th day from May 16, 2013. However, as June 15, 2013 fell on a Saturday, the exception was required to be filed by Monday, June 17, 2013 (*see* General Construction Law §§ 20, 25-a).