

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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|--|---|----------------|
| In the Matter of the Petition                              | : |                |
| of   | : |                |
| <b>JAKE RESTAURANT CORPORATION</b>                         | : | DECISION       |
| for Revision of a Determination or for Refund of Sales and | : | DTA NO. 826645 |
| Use Taxes under Articles 28 and 29 of the Tax Law for the  | : |                |
| Period March 1, 2009 through November 30, 2012.            | : |                |

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Petitioner, Jake Restaurant Corporation, filed an exception to the determination of the Administrative Law Judge issued on July 2, 2015. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

On September 11, 2015, 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 October 16, 2015 to respond with comments. The Division of Taxation filed a response on October 16, 2015. Petitioner did not file a response. The six-month period for issuance of this decision began on October 16, 2015.

On its own motion, after reviewing the determination, the exception and the records of the Division of Tax Appeals, 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.

1. The Administrative Law Judge's determination was mailed to petitioner by certified mail on July 2, 2015. It was addressed to petitioner at the address listed on its petition. Petitioner did not notify the Division of Tax Appeals of any change of address on or before the mailing date.
2. Petitioner contacted the Division of Tax Appeals on August 19, 2015 and, at that time, provided a new address.
3. Petitioner filed an exception to the determination, which was received by the Secretary to the Tax Appeals Tribunal (Secretary) on September 10, 2015. The envelope containing the exception bore a United State Postal Service (USPS) postmark of August 25, 2015.
4. On September 11, 2015, The Tax Appeals Tribunal issued a notice of intent to dismiss exception on the ground that petitioner's exception was not timely filed.<sup>1</sup>

***OPINION***

Notice of an administrative law judge determination must be given by registered or certified mail and is complete upon placing such determination, 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 has 30 days from the date of such mailing to file an exception (Tax Law § 2006 [7]). An exception delivered by the USPS to this Tribunal after the due date is deemed to

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<sup>1</sup> The notice of intent to dismiss erroneously stated that the July 2, 2015 determination was mailed to petitioner at the new address provided by petitioner on August 19, 2015. This error did not prejudice petitioner in any way, however, because at the time the notice of intent was issued, petitioner had filed its exception asserting, as an excuse for its late-filing, that the determination had been mailed to its old address. Furthermore, petitioner had the opportunity to respond to the notice of intent, but did not.

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

In this case, notice of the Administrative Law Judge's determination was given to petitioner at its last known address by certified mail on July 2, 2015 (Tax Law 2006 [7]; 20 NYCRR 3000.23 [a]). Thus, petitioner's exception to the determination of the Administrative Law Judge was due to be filed on or before August 3, 2015.<sup>2</sup> Petitioner's exception was received by the Secretary on September 10, 2015, in an envelope that bore a USPS postmark of August 25, 2015, 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 (*see Matter of Finkelman*, Tax Appeals Tribunal, March 6, 2014).

In its exception, petitioner contends that it did not receive the determination until August 19, 2015 because it was no longer located at the address to which the determination was mailed. Unfortunately for petitioner, it had not notified the Division of Tax Appeals of any change of address as of the date the determination was mailed. The Division of Tax Appeals thus properly mailed the determination to petitioner's last known address on July 2, 2015 and the 30-day period within which to file an exception commenced as of the mailing date (*see Matter of Caires*, Tax Appeals Tribunal, May 27, 2004).

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<sup>2</sup> August 1, 2015 is the 30<sup>th</sup> day from July 2, 2015. However, as August 1, 2015 fell on a Saturday, the exception was required to be filed by Monday, August 3, 2015 (*see* General Construction Law §§ 20, 25-a).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of Jake Restaurant Corporation is dismissed with prejudice.

DATED: Albany, New York  
April 14, 2016

/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