

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition
of
ZEWU ZHU

DECISION
DTA NO. 828334

for Revision of Determinations or for Refund of Cigarette Tax
under Article 20 of the Tax Law for the Period February 26,
2016.

Petitioner, Zewu Zhu, filed an exception to the determination of the Administrative Law Judge issued on April 29, 2021. On June 24, 2021, the Tax Appeals Tribunal (Tribunal) issued a notice of intent to dismiss exception on the ground that petitioner’s exception was not timely filed. The Tribunal granted the parties until July 28, 2021 to respond. The Division of Taxation, appearing by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel), filed a letter in response on July 9, 2021. Petitioner, appearing by Robert N. Lerner, Esq., filed a letter in response on July 28, 2021. The six-month period for the issuance of this decision began on July 28, 2021.

On its own motion, after reviewing the determination of the Administrative Law Judge, petitioner’s exception, the relevant mailing records of the Division of Tax Appeals, and the parties’ responses to the notice of intent to dismiss exception, the Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed his exception to the determination of the Administrative Law Judge.

FINDINGS OF FACT

We find the following facts.

1. The determination of the Administrative Law Judge was mailed by United States Postal Service (USPS) certified mail on April 29, 2021 to both petitioner and his representative in this matter, Robert N. Lerner, Esq.
2. The address to which the determination was mailed to petitioner matches the last known address for petitioner in the records of the Division of Tax Appeals.
3. The address to which the determination was mailed to Mr. Lerner matches the last known address for Mr. Lerner in the records of the Division of Tax Appeals.
4. Petitioner filed an exception to the determination in an envelope bearing a USPS postmark of June 17, 2021 and delivered to the Office of the Secretary to the Tribunal on June 23, 2021.
5. On June 24, 2021, the Tribunal issued a notice of intent to dismiss exception on the ground that petitioner's exception was not timely filed.

OPINION

Either party may file an exception for review of an administrative law judge determination with this Tribunal (Tax Law § 2006 [7]). An exception must be filed within 30 days after the giving of notice of the determination (*id.*).

The giving of notice requirement in Tax Law § 2006 (7) is met upon the mailing of the determination in accordance with section 3000.23 (a) of the Tax Appeals Tribunal Rules of Practice and Procedure (Rules) (20 NYCRR 3000.23 [a]). The determination must be enclosed in a post-paid properly addressed wrapper and mailed using certified or registered USPS mail

(*id.*). Assuming compliance with 20 NYCRR 3000.23 (a), the 30-day limitations period to file an exception thus begins to run from the date of mailing.

In this case, the records of the Division of Tax Appeals show that the Administrative Law Judge's determination was properly mailed to petitioner and Mr. Lerner on April 29, 2021. Accordingly, an exception to the determination was due to be filed with the Tax Appeals Tribunal on or before June 1, 2021.¹

Petitioner's exception was delivered to the Tribunal by the USPS on June 23, 2021. An exception delivered by the USPS to the Tribunal after the due date is deemed to be filed on the date of the USPS postmark stamped on the envelope (20 NYCRR 3000.22 [a] [1]). Here, the USPS postmark on the envelope containing petitioner's exception is dated June 17, 2021. This date is beyond the 30-day statutory limitations period in which to file an exception.

In his response to the notice of intent to dismiss exception, petitioner's representative contends that the exception should be considered timely because it was mailed to the Tribunal within 30 days of his receipt of the determination. As noted, however, our Rules provide that compliance with our mailing procedures meets the giving of notice requirement in Tax Law § 2006 (7) (20 NYCRR 3000.23 [a]). The 30-day period thus begins to run upon proper mailing.

Petitioner's representative also requested that this Tribunal consider his age and health, both of which have "considerably slowed [him] down." Statutory deadlines in the Division of Tax Appeals are strictly enforced (*see e.g. Matter of Quinn*, Tax Appeals Tribunal, November 22, 2017). Even sympathetic personal circumstances that may explain a failure to meet such a deadline may not excuse it.

¹ May 29, 2021 is the 30th day from April 29, 2021. However, as May 29, 2021 fell on a Saturday and the following Monday was a public holiday, the exception was required to be filed by Tuesday, June 1, 2021 (*see* General Construction Law § 25-a).

We note finally that, as our jurisdiction is statutorily limited by Tax Law § 2006 (7), we may not consider the merits of a late-filed exception (*Matter of Yim*, Tax Appeals Tribunal, March 16, 2020).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of Zewu Zhu is dismissed.

DATED: Albany, New York
October 21, 2020

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner