

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

JON AND AMY BAROVICK

:
DECISION

DTA NO. 820781

for Redetermination of a Deficiency or for Refund of :
New York State and New York City Personal Income :
Taxes under Article 22 of the Tax Law and the :
Administrative Code of the City of New York for the :
Second and Third Quarters of the Year 2004. :

Petitioners Jon and Amy Barovick, 17 West 71st Street, #4A, New York, New York 10023, filed an exception to the order of the Administrative Law Judge issued on December 21, 2005. Petitioners appeared by Rochelle Nechin, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel).

On February 28, 2006, 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 April 4, 2006 to respond. Neither party filed a response to the Notice.

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

ISSUE

Whether petitioners timely filed their exception to the determination 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 7005 0390 0004 8923 0718) in Troy, New York to petitioners on December 21, 2005 at petitioners' last known address at 17 West 71st Street, #4A, New York, New York 10023. A copy of the order was also mailed by certified mail (certified control number 7005 0390 0004 8923 0725) in Troy, New York to petitioners' representative Rochelle Nechin, CPA on December 21, 2005 at 128 Prospect Avenue, Douglaston, New York 11363.

The envelope containing the order mailed to petitioners on December 21, 2005 was returned to the Division of Tax Appeals on January 23, 2006 with a United States Postal Service ("USPS") notation of "unclaimed" and "returned to sender." This copy of the order was remailed by regular mail to petitioners at petitioners' last known address on January 23, 2006.

Petitioners filed an exception to the order which was received by the Office of the Secretary to the Tax Appeals Tribunal on February 23, 2006. The envelope containing the exception bore a USPS postmark of February 21, 2006.

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 United States Postal Service. 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 petitioners on December 21, 2005 and the exception to the determination of the Administrative Law Judge was due to be filed on or before January 20, 2006. The envelope containing petitioners' exception was received by the Office of the Secretary to the Tax Appeals Tribunal on February 23, 2006, subsequent to the date it was due to be filed, and bears a USPS postmark of February 21, 2006. 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 Jon and Amy Barovick is dismissed with prejudice as of this date.

DATED: Troy, New York
August 24, 2006

/s/Charles H. Nesbitt

Charles H. Nesbitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner