

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

JOHN AND CAROLINE GOULD

:
DECISION

DTA NO. 819897

for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal :
Income Tax under Article 22 of the Tax Law and :
the New York City Administrative Code for the :
Years 1998, 1999 and 2000. :

Petitioners John and Caroline Gould, 184 Meadow Street, Litchfield, Connecticut 06759, filed an exception to the determination of the Administrative Law Judge issued on March 16, 2006. Petitioner appeared by William O. Lenihan, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Peter B. Ostwald, Esq., of counsel).

On May 19, 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 June 23, 2006 to respond. A response to the Notice was filed by the Division of Taxation on May 25, 2006 and by petitioners on June 8, 2006.

On its own motion, after reviewing the determination, the exception, the mailing records of the Division of Tax Appeals in this matter and the responses of the parties to the Tribunal's Notice of Intent to Dismiss Exception, 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 determination of the Administrative Law Judge was mailed by certified mail (certified control number 7005 2570 0001 4656 4420) in Troy, New York to petitioners on March 16, 2006 at petitioners' last known address at c/o William Lenihan, 10 Park Avenue, #8B, New York, New York 10016. A copy of the determination was also mailed by certified mail (certified control number 7005 2570 0001 4656 4437) in Troy, New York to petitioners' representative William O. Lenihan, Esq., 10 Park Avenue, #8B, New York, New York 10016.

The envelope containing the determination mailed to petitioners on March 16, 2006 was returned to the Division of Tax Appeals on April 21, 2006 with a United States Postal Service ("USPS") notation of "unclaimed" and "returned to sender." A courtesy copy of the determination was remailed by regular mail to petitioners. The envelope containing the determination mailed to petitioners' representative on March 16, 2006 was also returned to the Division of Tax Appeals with a USPS notation of "unclaimed" and "returned to sender."

Petitioners filed an exception to the determination which was received by the Office of the Secretary to the Tribunal on May 8, 2006. The envelope containing the exception bore a USPS postmark of May 4, 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 March 16, 2006 and the exception to the determination of the Administrative Law Judge was due to be filed on or before April 17, 2006.¹ The envelope containing petitioners' exception bore a USPS postmark of May 4, 2006. Therefore, the exception was not timely filed as required by Tax Law § 2006(7).

In their response to the Notice of Intent to Dismiss Exception, petitioners have not presented any evidence that the exception was timely filed. Rather, they argue that their representative never received the determination and that they filed their exception as soon as they received it. However, as we held in *Matter of Roemer* (Tax Appeals Tribunal, May 20, 1999), the giving of notice commences when the determination is mailed by the Division of Tax Appeals. The 30-day period to file an exception does not commence when the determination is received.

¹April 15, 2006 is the 30th day from March 16, 2006. However, as April 15, 2006 fell on a Saturday, the exception was required to be filed by Monday, April 17, 2006 (*see*, General Construction Law, §§ 20, 25-a).

Therefore, as stated above, 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 John and Caroline Gould is dismissed with prejudice as of this date.

DATED: Troy, New York
December 7, 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