STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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    In the Matter of the Petitions
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              of
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   MARSHALL FARMS USA, INC.   DECISION
                                                          :   DTA NO.'S 800173/803958
for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29   :
of the Tax Law for the Periods June 1, 1976
through February 28, 1981 and March 1, 1981   :
through February 28, 1986.
_____:

        Petitioner, Marshall Farms USA, Inc., Box 91, R.D. 1, North Rose, New York 14516, made a motion before the Tax Appeals Tribunal to dismiss a request by the Division of Taxation for an extension of the 30 day time period within which an exception to a determination of an Administrative Law Judge must be filed. Petitioner alleged two grounds for its dismissal: (1) that the request was not timely served by the Division upon the petitioner and (2) that the request did not state "good cause" for the extension.

        The Tribunal grants the motion on both grounds.

        Tax Law section 2010(4) provides:

> "4. A determination issued by an administrative law judge shall finally decide the matters in controversy unless any party to the hearing takes exception by timely requesting a review by the tax appeals tribunal as provided for in section two thousand six of this article."

        Tax Law section 2006(7) authorizes the Tribunal:

> "7. To provide for a review of the determination of an administative [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 in its discretion may grant oral argument. The tribunal may also grant an extension of time for filing an exception provided an application for such extension is filed within the time period for taking exception to a determination under this subdivision, and if good cause is shown. . . ."

        The regulations adopted by the Tax Appeals Tribunal to implement the statute provide:

(a) Filing of exception. 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 tribunal may extend the 30-day period for filing an exception, provided an application for extension is filed within such period <u>and served on the other party, and if good cause</u> is shown. "Good cause" depends on the circumstances of each case, but would include any cause which appears to an ordinarily prudent person as a reasonable ground for failure to file an exception within the prescribed period." (20 NYCRR 3000.11[a].) (Emphasis added.)

With respect to the service of process, the regulations provide:

(1) Filing of all pleadings, motions and other papers with the Division of Tax Appeals or the tribunal, or service on a division, bureau or unit of the department pursuant to this Part, shall be made by either delivery during business hours to its Albany offices or by mail properly addressed to such offices. Where service is made by mail, the date of service is the date of the United States postmark stamped on the envelope. <u>Where a machine-metered stamp is used on the envelope, or where service is made by courier, delivery, messenger or similar services, the date of service is the date of receipt.</u> Service on parties can be made in the same manner. The provisions of the CPLR regarding service shall apply to this Part unless they clearly conflict." (20 NYCRR 3000.16[1].) (Emphasis added.)

In this case, the Division communicated with the Secretary to the Tribunal within the 30-day period and orally requested an extension of time for the filing of an exception to the determination of the Administrative Law Judge. The Division was informed that such extension could be granted for good cause shown provided the request was timely filed with the Tribunal and served on the petitioner in accordance with the regulations of the Tribunal. Thereafter the written request for an extension was filed with the Tribunal within the 30-day time period prescribed by section 2006(7). The request did not state any cause for the extension. Service on the petitioner was effected by mail. The envelope, in which the copy of the request to the Tribunal was enclosed, bore a machine-metered postmark and was not received by the petitioner until after the expiration of the 30-day time period.

The request was defective on its face because no good cause was shown. In addition, it was not timely served on the petitioner since the petitioner did not receive the request until after the expiration of the 30-day time period.

We find no support for the Division's argument that the omission in the request filed with the Tribunal, i.e., the absence of a statement of good cause, can be corrected after the fact.

While the CPLR does not apply directly to the instant proceeding, it does provide some guidance in this case - one of first impression for the Tribunal. CPLR section 5520(a) provides a procedure for remedying a defect or omission with regard to a notice of appeal or motion for permission to appeal - where the notice must be served on the opposing party and filed with the clerk of the court, a two step process. If the appellant either files the notice of motion or serves it, the act omitted can later be remedied by permission of the court.

Section 3000.11(a) has a similar two step process - and based on the principles embodied in CPLR section 5520(a), a failure to do one of the acts, i.e., file or serve, could be remedied. However, implicit in the application of section 5520(a) is that the act which is done, must be done correctly in order for the omitted act to be cured. That is not the case here since the filing of the request for extension with the Tribunal was deficient on its face for failure to state "good cause". Thus, the other required act - service on the petitioner cannot be cured.

Accordingly the motion of the petitioner is granted.

DATED: Albany, New York
            August 4, 1988

                                    /s/ John P. Dugan
                                      John P. Dugan
                                      President

                                    /s/ Francis R. Koenig
                                      Francis R. Koenig
                                      Commissioner