

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STANDARD MANUFACTURING CO., INC.	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	
Corporation Franchise Tax under Article 9-A of the	:	
Tax Law for the Fiscal Years Ended July 31, 1980 and	:	
July 31, 1981.	:	

Morrison & Foerster (Arthur R. Rosen, Esq., Paul H. Frankel, Esq., Hollis L. Hyans, Esq., of counsel) filed a motion before the Tax Appeals Tribunal for leave to appear and file an amicus curiae brief on exception, and to be heard at oral argument as an amicus curiae (File No. 801415). Petitioner appeared by Lombardi, Reinhard, Walsh & Harrison, P.C. (Thomas J. Jordan, of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

- I. Whether Morrison & Foerster should be granted permission to file a brief amicus curiae on exception.
- II. If such permission is granted, whether Morrison & Foerster should be granted permission to be heard at oral argument on exception.

FINDINGS OF FACT

We find the following facts.

On June 21, 1990, the Administrative Law Judge issued a determination that the Division of Taxation could not require petitioner, and its subsidiary Caribbean Outerwear Corporation, to file a combined return, but that an allocation of management expenses must be made. On July 17, 1990, the Division of Taxation filed a request for an extension of time to file an exception to the

determination of the Administrative Law Judge, which was granted by the Secretary to the Tribunal. On August 20, 1990, the Division of Taxation filed its exception. Both parties filed a brief on exception. On April 26, 1991, the office of the Secretary to the Tribunal issued a Notice of Oral Argument scheduling oral argument in the case for June 27, 1991 in Troy, New York.

On May 17, 1991, Morrison & Foerster filed a Notice of Motion for leave to appear and file a brief amicus curiae, and for permission to be heard at oral argument. Annexed to the motion were an affidavit and the proposed brief amicus curiae. The Division of Taxation filed an affidavit in opposition to the motion. Petitioner did not submit any comment. As a reply, on June 17, 1991, Morrison & Foerster submitted a copy of a motion for leave to file a brief amicus curiae filed by the Division of Taxation in a case currently before the Court of Appeals.

OPINION

Morrison & Foerster seek permission to appear as amicus curiae in that they have spent considerable time researching and analyzing the law concerning the issues presented herein because they represent clients similarly situated. Their position is that because of their knowledge in the area, they could be of assistance to the Tribunal and that, therefore, they should be granted permission to appear as amicus curiae.

The Division of Taxation (hereinafter the "Division") opposes this motion based on the following: (1) Neither the rules and regulations of the Division of Tax Appeals, nor the Civil Practice Law and Rules (hereinafter "CPLR"), provide for motions to appear as an amicus curiae; (2) If the Tribunal determines that a motion to appear as an amicus curiae is allowable, this motion was not timely filed; (3) This applicant has not satisfied the criteria for appearing as an amicus curiae set forth in the rules of the Court of Appeals; and (4) The applicant has other means available to it to make the Tribunal and the public aware of its opinion on the issues presented herein.

The majority of provisions relating to motion practice before the Division of Tax Appeals are set forth in 20 NYCRR 3000.5. While specific types of motions are mentioned, the general description of motion practice is as follows:

"To better enable the parties to expeditiously resolve the controversy, this Part permits an application to the tribunal for an order, known as a motion, provided such motion is for an order which is appropriate under the Tax Law and the CPLR, but does not include a motion for costs or disbursements or motions related to discovery procedures as provided for in the CPLR" (20 NYCRR 3000.5[a]).

The CPLR also sets forth specific rules for certain specific motions. However, the definition of a motion is "an application for an order" (CPLR 2211). Motion practice is not limited to the types of motions that are specifically discussed in the CPLR, but is open-ended to the extent a particular jurist finds a particular motion appropriate (see, Siegel, NY Prac § 243, p. 363). A motion to file a brief amicus curiae is appropriate under the CPLR. There are references in various court rules as to how to bring such a motion, the criteria for the motion being granted, the maximum length of a brief, etc. (see, 22 NYCRR 500.11[e], 670.11, 800.8). There have been forms created for bringing a motion for leave to file a brief as an amicus curiae and for orders granting such leave (see, CLS CPLR Rule 5530, Form 4, Form 5, Form 6). The Tax Appeals Tribunal Rules of Practice and Procedure require that a motion be appropriate under the Tax Law and the CPLR. There is nothing in the Tax Law that would prohibit this Tribunal from entertaining a motion to file an amicus curiae brief. Therefore, as a motion for leave to file a brief amicus curiae is appropriate under the Tax Law and the CPLR, and based upon the preference of the Tribunal to have as much information as possible regarding a particular case, such motions shall be allowed before the Tribunal.

The rules concerning amicus curiae relief contained in 22 NYCRR 500.11(e) regarding the filing of such briefs before the Court of Appeals are the most specific and informative of any New York State court rules concerning this issue. The Tribunal will, therefore, look to such rules for guidance in determining whether to grant amicus curiae relief. Such rules provide as follows:

"(e) Amicus Curiae Relief. (For appeals selected for sua sponte examination of the merits see section 500.4 of this Part). A brief may be filed only by leave of court granted on motion, or upon the court's own request.

"Motions for amicus curiae relief, when appropriately made on notice to all of the parties and sufficiently in advance of the argument of the appeal to allow adequate court review of the motion and the proposed brief, must include consideration of and satisfaction of the court of at least one of the following criteria:

"(1) a showing that the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency;

"(2) that movants would invite the court's attention to law or arguments which might otherwise escape its consideration; or

"(3) that amicus curiae briefs would otherwise be of special assistance to the court."

The proposed amicus brief submitted meets the criteria set forth above in that it invites the Tribunal's attention to arguments which might not otherwise be considered and is of special assistance to the Tribunal. In looking to the Court of Appeals rule for guidance we are specifically excluding that part of the rule which prohibits an amicus from raising an issue for the first time on appeal. We have previously held that parties may raise issues for the first time on exception and, therefore, see no prejudice to the parties that would result from allowing an amicus to do the same (see, Matter of Small, Tax Appeals Tribunal, August 11, 1988). We do not find the fact that the proposed amicus curiae has other means available to make the Tribunal and the public aware of its position on the issues presented here to be relevant to a decision on whether to grant amicus curiae relief using the Court of Appeals rules as a guideline.

The Division also argues that amicus curiae relief should be denied as the motion requesting such relief was not filed within 90 days after the serving of a pleading by the adverse party as required by the Rules of Practice and Procedure of the Tribunal (20 NYCRR 3000.5[a][1]). There is no definition of pleading(s) contained in the Tribunal's Rules of Practice and Procedure: 20 NYCRR 3000.4 appears to be the only section of the rules that mentions the term pleadings.

It specifically sets forth requirements for the Law Bureau's answer to the petition and petitioner's reply. The provisions concerning amended pleadings also implicitly include petitions as pleadings. If petitions, answers, replies and amended versions of any of these are the only "pleadings," then there could be no motion practice on exception before the Tribunal if the 90 day requirement is strictly construed. Obviously, this cannot be the case. Petitioners and the Division have filed motions with the Tribunal on exception and this has been accepted practice. Again, we look to the Court of Appeals' rules on amicus curiae relief for guidance. Motions to file an amicus brief must be made "sufficiently in advance of the argument of the appeal to allow adequate court review of the motion and the proposed brief." Morrison & Foerster submitted their motion and proposed amicus brief approximately five weeks prior to oral argument. While we would prefer more time to consider such a motion, we cannot hold that the brief was not timely filed. However, due to the relatively short time frame allowed, the parties will not be expected to comment on the contents of the amicus brief at oral argument, but will be given thirty days after the oral argument to submit written responses to the amicus brief.

The request of Morrison & Foerster to be granted leave to appear at oral argument is hereby denied. The only reference to a request to appear at oral argument by an amicus in any of the various court rules reviewed was in the Federal Rules of Appellate Procedure. Rule 29 provides that "[a] motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons" (Federal Rules of Appellate Procedure, Rule 29). Using this rule for guidance, we find no extraordinary circumstances present in this case that would warrant oral argument by an amicus.

Accordingly, we grant Morrison & Foerster's motion for leave to file an amicus curiae brief on exception, and we deny Morrison & Foerster's motion to be heard as an amicus curiae at oral argument on exception. The parties are hereby granted until July 29, 1991 to submit any written response to, or comments concerning, Morrison & Foerster's amicus brief.

DATED: Troy, New York

July 11, 1991

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner