

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions :
of :
M & B APPLIANCE, INC. :
AND MAN M. MUNJAL AND INDER S. BINDRA, : DECISION
AS OFFICERS :
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period December 1, 1979 through August 31, 1983. :

Petitioners M & B Appliance, Inc., and Man M. Munjal and Inder S. Bindra, as officers, 8315 Broadway, Elmhurst, New York 11373 filed a motion before the Tax Appeals Tribunal to dismiss the exception filed by the Division of Taxation to the Administrative Law Judge's determination dated August 17, 1990 (File Nos. 801653, 802764, 802765 and 802766). Petitioners appeared by John R. Serpico, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the exception filed by the Division of Taxation to the determination of the Administrative Law Judge was timely.

FINDINGS OF FACT

On August 17, 1990, the Administrative Law Judge issued a determination which granted petitioners' petition and directed that the notices of determination and demand for payment of sales and use taxes due issued on September 20, 1984 and August 27, 1985 be cancelled. The Division of Taxation (hereinafter the "Division") filed a request for a 30-day extension of time in which to file its exception to the Administrative Law Judge's determination which was received by the Secretary to the Tax Appeals Tribunal on August 31, 1990. The Division was granted an extension until October 17, 1990 in which to file its exception. As of October 31, 1990, the Division had not filed its exception. Therefore, the Secretary to the Tax Appeals Tribunal

contacted the Division's representative, Anne W. Murphy, and stated that the Tribunal had not received an exception filed by the Division. Ms. Murphy stated that the Division had, in fact, mailed another request for an extension of time in which to file its exception on October 15, 1990. The Secretary to the Tax Appeals Tribunal told Ms. Murphy to send the proof of certified mailing and a copy of the request for an extension. Such documentation was submitted and on December 13, 1990 the Division was granted a two week extension, until December 28, 1990, in which to file its exception. The exception filed by the Division was received by the Secretary to the Tax Appeals Tribunal on December 24, 1990. Petitioners filed a motion, which was received by the Secretary to the Tax Appeals Tribunal on December 27, 1990, to dismiss the exception filed by the Division.

OPINION

Petitioners herein seek to dismiss the Division's exception as untimely. Petitioners argue that the granting of additional time to the Division to file the exception is unwarranted and prejudicial to petitioners. Petitioners argue that the Division was granted an extension to file until October 31, 1990 and that the Division failed to file within this time period.

Petitioners' argument is based on language contained in the first paragraph of a letter from the Division, dated October 15, 1990, to the Tribunal which asks for an additional two week extension. The paragraph states:

"I write to confirm my oral request of Friday, October 12, 1990 for an additional two weeks' [sic] extension of time for the Division to file its Notice of Exception to the Administrative Law Judge Determination in the above-noted matter."

Petitioners contend that it is apparent from this letter to the Tribunal that the Division was orally granted a two week extension within which to file its exception. Therefore, petitioners argue that "the exceptions were to be submitted no later than October 31, 1990. The law bureau's letter of October 15, 1990 did not require a response. It merely confirmed the Tribunal's consent for an additional two weeks to file exceptions. There is no further correspondence by the law bureau. What was the law bureau waiting for to file their exceptions? They received permission to file

two weeks after October 17, 1990, but did not do so" (Petitioners' letter in support of their motion to dismiss). We disagree.

Section 2006(7) of the Tax Law states, in pertinent part, that:

"To provide for a review of the determination of an administrative 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 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."

Therefore, in order for an extension of time to be granted, any application for such extension must be filed with the Tribunal within 30 days of the determination of the Administrative Law Judge. There is no procedure for an oral request for an extension of time. Although the Division's letter of October 15, 1990 states that it was mailed "to confirm my oral request," the Tribunal is precluded by section 2006(7) of the Tax Law from accepting any request unless an application has been made in writing to the Tribunal. Therefore, the October 15, 1990 letter is deemed to be the request for the two week extension.

Petitioners argue that even though the Tribunal did not receive the October 15, 1990 letter, the Division knew that it had an extension of time until October 31, 1990 within which to file its exception. Therefore, they argue that the proof of mailing submitted by the Division is meaningless since the Division asked for a two week extension until October 31, 1990, and it still failed to file its exception by that date. Petitioners state that "they [the Division] did not require a notice of the extension" (Petitioners' letter in support of their motion). We disagree.

20 NYCRR 3000.17(b) of the Rules of Practice and Procedure for the Tax Appeals Tribunal states, in pertinent part, that:

"Extension of time. The tribunal, administrative law judges or presiding officers may, on its or their own motion, or on the motion of any party, order a continuance, extension of time or adjournment for good cause, provided no statutory prohibition exists. Notice of any such order shall be given to all parties."

Therefore, contrary to petitioners' argument, the Division did require notice that its extension had been granted. After examining the proof of certified mailing submitted by the

Division, a letter was sent to the Division granting its extension. This letter was dated December 13, 1990 and stated that the Division had until December 27, 1990 within which to file its exception. The exception was received by the Secretary to the Tax Appeals Tribunal on December 24, 1990. Therefore, the exception was timely filed.

Accordingly, we deny petitioners' motion to dismiss the Division's exception.

DATED: Troy, New York
July 25, 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