

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
AMERICAN EXPRESS COMPANY AND : DECISION
AMERICAN EXPRESS INTERNATIONAL :
BANKING CORPORATION :
for a Revision of a Determination or for a :
Refund of Tax Derived from Certain Real :
Property Transfers Under Article 31-B of the :
Tax Law :

Petitioner American Express Company and American Express International Banking Corporation, American Express Tower, World Financial Center, New York, New York 10285-4680, filed a motion before the Tax Appeals Tribunal: (1) to strike the notice of exception filed by the Division of Taxation to the Administrative Law Judge's determination dated December 20, 1990, and (2) to recuse John P. Dugan, president of the Tax Appeals Tribunal, from adjudicating, or participating in the adjudication of, this motion or any matter in this action (File No. 803265). Petitioner appeared by Stroock & Stroock & Lavan (Kevin L. Smith, Esq. and William A. Rome, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

- I. Whether the Division of Taxation timely filed its exception to the determination of the Administrative Law Judge.
- II. Whether the Division of Taxation stated "good cause" for its request for an extension.
- III. Whether petitioner's motion to recuse was premature.

IV. Whether John P. Dugan, president of the Tax Appeals Tribunal, should recuse himself, or be disqualified from, participating in proceedings relating to this motion brought by petitioner and from the appeal of this case.

FINDINGS OF FACT

On December 20, 1990, the Administrative Law Judge issued a determination which granted petitioner's petition and directed the Division of Taxation (hereinafter the "Division") to grant in full that portion of petitioner's April 4, 1985 refund claim denied by the Division, together with such interest as was lawfully due and owing. The Division filed a request for an extension of time in which to file an exception which was received by the Secretary of the Tax Appeals Tribunal on January 23, 1991. The envelope containing the request bore an office meter postmark of January 22, 1991. Petitioner claims that it did not receive a copy of the Division's request for an extension of time in which to file the exception until January 26, 1991. On February 1, 1991, petitioner filed a Notice of Motion to Strike Appeal and to Recuse President John P. Dugan from participating in these proceedings and from the appeal of this case. Such motion also contained a request for oral argument which was denied. The Division filed an affirmation in opposition to petitioner's motion. Petitioner filed a reply to the Division's affirmation.

OPINION

Petitioner herein seeks to strike the Division's exception as untimely. Petitioner argues that Tax Law § 2006(7) provides that the Tribunal may grant an extension of time for the filing of an exception provided that such filing takes place within the 30-day period for filing an exception. Moreover, petitioner cites to 20 NYCRR 3000.11(a)(2) which states that:

"The tribunal may extend the 30-day period for filing an exception, provided any application for extension is filed within such period and served on the other party, and if good cause is shown" (20 NYCRR 3000.11[a][2]).

Petitioner argues that the 30-day period commenced on the date of the Administrative Law Judge's determination which, in this case, was December 20, 1990. Petitioner states that 30

days from December 20, 1990 is January 18, 1991. Therefore, petitioner argues that because the Division's request for an extension of time was not mailed until January 22, 1991, such request is clearly untimely. We disagree.

General Construction Law § 20 states that:

"A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made . . . In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning" (General Construction Law § 20).¹

As above-mentioned, the determination of the Administrative Law Judge was dated December 20, 1990. Therefore, according to General Construction Law § 20, an exception or an extension of time in which to file an exception must be filed within 30 days from December 21, 1990. Thirty days from December 21, 1990 was January 19, 1991. January 19, 1991 was a Saturday and the next business day, Monday, January 21, 1991, was Dr. Martin Luther King, Jr. Day. When any period of time, computed from a certain day, within which an act is required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day (General Construction Law § 25-a). Since Dr. Martin Luther King, Jr. Day is a public holiday (General Construction Law § 24), the Division's exception or request for an extension of time in which to file an exception, was required to be filed by January 22, 1991.

In determining whether the Division's request was timely mailed, our Rules of Practice at 20 NYCRR 3000.16(b)(1) state:

"If the postmark on the envelope or wrapper containing the document is made by other than the United States Postal Service (i.e., office metered mail):

"(i) the postmark so made must bear a date which falls within the prescribed period or on or before the prescribed date for filing the document (including any extension of time granted for filing the document); and

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The General Construction Law "is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter" (General Construction Law § 110). Contrary to petitioner's suggestion, we see nothing in section 2006(7) of the Tax Law that precludes the application of section 20 of the General Construction Law to it.

"(ii) the document must be received by the New York State Division of Tax Appeals or the Tax Appeals Tribunal, Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180, not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document)" (20 NYCRR 3000.16[b][1]).

The envelope containing the request for an extension bore an office meter postmark of January 22, 1991. Such date falls within the prescribed period of time in which to request an extension (20 NYCRR 3000.16[b][1][i]). Moreover, the Secretary to the Tribunal received the envelope the following day, January 23, 1991. Clearly, the Tax Appeals Tribunal's receipt just one day after the office meter postmark is within a reasonable time period (20 NYCRR 3000.16[b][1][ii]; see, Matter of Harron's Elec. Serv., Tax Appeals Tribunal, February 19, 1988 [where receipt of petition five days after the date of its meter stamp was held to be receipt not later than the date a document would ordinarily be received when mailed through the United States Postal Service]). Therefore, we conclude that the Division's request was timely filed within the 30-day period.

Next, petitioner argues that even if we conclude that the 30-day period ended on January 22, 1991, the Division's exception is still untimely. Petitioner argues that 20 NYCRR 3000.11(a)(2) requires that such request had to be filed within the 30-day period and a copy had to be served upon petitioner. Petitioner argues that it did not receive a copy of the Division's request for an extension until January 26, 1991. Therefore, petitioner contends that the Division's exception is still untimely.

We have addressed this procedural question and held that where a petitioner had conferred subject matter jurisdiction on the Tribunal by timely filing the notice of exception on the Secretary within the 30-day statutory time period (see, Tax Law § 2000[7]), the Tribunal may, in the exercise of its discretion, excuse the petitioner's failure to serve the Director of the Law Bureau (Matter of Sabel, Tax Appeals Tribunal, November 30, 1989; Matter of Abramowitz, Tax Appeals Tribunal, November 9, 1989; Matter of Macbet Realty Corp., Tax Appeals

Tribunal, November 9, 1989). In reaching that conclusion, we were guided by the curative provision in the Civil Practice Law and Rules (hereinafter "CPLR") which empowers the court to excuse a party's failure to perform one of the two procedural steps required by CPLR 5515 to initiate an appeal, provided that one of the two steps has been timely performed so that the court has jurisdiction over the matter (see, CPLR 5520[a]; Peck v. Ernst Bros., 81 AD2d 940, 439 NYS2d 515). The situation presented here commands the same result. The Division has conferred jurisdiction upon the Tribunal by timely filing the request for an extension of time in which to file the exception within the statutory period. Consequently, we conclude that the Division's failure to serve petitioner does not bar the Division's underlying claims on exception (see, Matter of Sabel, supra; Matter of Abramowitz, supra; Matter of Macbet Realty Corp., supra).

Lastly, petitioner asserts that even if we conclude that the Division's request for an extension was timely filed and served on petitioner, the Division has failed to show good cause for an extension. Therefore, petitioner argues that the Division's exception should be dismissed because good cause has not been shown.

Section 3000.11(a)(2) of the regulations states:

"The tribunal may extend the 30-day period for filing an exception, provided an application for extension is filed within such period and served on the other party, and if good cause 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][2]).

The Division requested an extension of time in which to file an exception to the determination made by the Administrative Law Judge because the attorney representing the Division stated that he had a large number of deadlines that became due during a short span of time. We conclude that such cause is a reasonable ground in this case for failure to file an exception within the prescribed period (cf., Matter of Marshall Farms USA, Tax Appeals Tribunal, August 14, 1988 [where good cause was not shown where request for an extension of time did not state any reason to grant an extension]).

The next issue that we must deal with concerns petitioner's motion to recuse. 20 NYCRR 3000.5(e)(2)(iii) states that "[t]he motion [to recuse a commissioner of the Tribunal] must be made with the exception where the movant is the party taking the exception or with the brief in opposition to the exception where the movant is not the party taking the exception." The Division contends that petitioner's motion to recuse is premature because the motion should be made in petitioner's brief in opposition to the Division's exception.

This regulation addresses the situation where the only motion made by a party is a motion to recuse. In this instance, the motion to recuse is part of another motion. The regulations do not set forth the proper procedural methods for a situation that involves joint motions. Therefore, since the Division has responded to the merits of the motion, we do not think any purpose would be served by directing the petitioner to make a separate motion to recuse in its brief in opposition to the Division's exception. Therefore, we conclude that the motion to recuse was timely made by petitioner.

Accordingly, we deny petitioner's motion to strike the Division's exception.²

DATED: Troy, New York
July 3, 1991

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

/s/Maria T. Jones
Maria T. Jones
Commissioner

²John P. Dugan took no part in the resolution of this motion. In accordance with the Tribunal's Rules of Practice and Procedure, 20 NYCRR 3000.5(e)(2)(vi), a separate decision will not be issued on petitioner's motion to recuse John P. Dugan.