

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
HERBERT ABRAMOWITZ : DECISION
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 Chapter 46, :
Title T of the Administrative Code of the City of New :
York for the Year 1981. :

The Division of Taxation filed a motion before the Tax Appeals Tribunal to strike the notice of exception filed by petitioner, Herbert Abramowitz, to the Administrative Law Judge's determination dated June 8, 1989. Petitioner appeared by William Liebowitz, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

ISSUE

Whether the Division's motion to dismiss the notice of exception filed by petitioner should be granted.

FINDINGS OF FACT

On June 8, 1989, the Administrative Law Judge issued a determination which sustained a Notice of Deficiency that had been issued to petitioner, Herbert Abramowitz, on April 12, 1985. Petitioner filed a notice of exception postmarked July 6, 1989 with the Tax Appeals Tribunal. At that time, petitioner failed to simultaneously serve a copy of the notice of exception on the Director of the Law Bureau as required by 20 NYCRR 3000.11(a)(1) of the Rules of Practice and Procedure for the Tax Appeals Tribunal. Subsequently, the Law Bureau received correspondence on or about July 12, 1989 from the Tax Appeals Tribunal which acknowledged the receipt of petitioner's exception papers and contained a copy of petitioner's exception. Thereafter, the Division filed a motion with the Tax Appeals Tribunal seeking, inter alia, to strike

petitioner's notice of exception on the ground that petitioner failed to serve the notice of exception on the Law Bureau in accordance with 20 NYCRR 3000.11(a)(1).

OPINION

The Division's motion to dismiss petitioner's notice of exception on the ground that petitioner failed to serve the Director of the Law Bureau as required by 20 NYCRR 3000.11(a)(1) is denied. The procedural rule set forth in that regulation provides in relevant part that:

"Within 30 days after the giving of notice of the determination of an administrative law judge, any party may take exception to such a determination and seek review thereof by the tribunal, by filing an exception and two conformed copies with the secretary. 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 director of the Law Bureau." (20 NYCRR 3000.11[a][1])

Here the record before us establishes that while petitioner timely filed its notice of exception with the Secretary to the Tribunal, it failed to simultaneously serve the Director of the Law Bureau. We conclude that this defect in service need not result in the dismissal of petitioner's underlying claims before this forum.

The precise procedural question before us presents an issue of first impression for the Tribunal. Initially, we find it helpful to consider analogous provisions in the Civil Practice Law and Rules (hereinafter "CPLR") which, while not dispositive here, provide some guidance in this case. To initiate an appeal, CPLR 5515 requires an attorney to simultaneously perform a two-step requirement of filing a notice of appeal in the clerk's office and serving a copy on the adverse party. It is firmly established that, pursuant to CPLR 5520, the failure to accomplish both of these procedural steps, however, need not be fatal (Peck v. Ernst Bros., 81 AD2d 940, 439 NYS2d 515; see, CPLR 5520[a]). As long as one of the two acts has been correctly and timely performed, a failure to accomplish the other may be excused by the court (see, Peck v. Ernst Bros., supra; Gamble v. Gamble, 259 NYS2d 910, 23 AD2d 887). The court will, in its discretion, excuse the lateness in performance of either one of the steps upon a showing of "mistake or excusable neglect" (Peck v. Ernst Bros., supra; see, Messner v. Messner, 42 AD2d

889, 347 NYS2d 589). The remedial application of CPLR 5520(a) presumes, however, that one of the two steps, i.e., filing with the clerk's office or service on the adverse party, has occurred within the statutory time period in order that the court has jurisdiction over the matter (see, Cappiello v. Cappiello, 66 NY2d 107, 495 NYS2d 318, 320; Messner v. Messner, supra, 347 NYS2d 589, 590; see also, 4 NY Jur 2d, Appellate Review § 159, at 235-236).

As in the CPLR, the procedural rule set forth in 20 NYCRR 3000.11(a)(1) outlines a two-step requirement in order to initiate the review process by the Tribunal. Here the record establishes that petitioner properly performed one of the two requisite acts by filing a notice of exception with the Tribunal while failing to serve the Director of the Law Bureau. In these limited circumstances, we find the rationale behind the curative provisions of the CPLR persuasive and accordingly conclude that the defect in service here does not bar petitioner's underlying claims. Where petitioner has 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]), we hold that the Tribunal may, in the exercise of its discretion, excuse petitioner's failure to serve the Director of the Law Bureau¹ (cf., Matter of Marshall Farms USA, Tax Appeals Tribunal, August 4, 1988; Matter of Chaipis, Tax Appeals Tribunal, November 3, 1988). This result is particularly appropriate here because approximately six days after petitioner filed its notice of exception with the Tribunal the Division received from the Tribunal an acknowledgement of petitioner's exception papers and a copy of petitioner's completed exception form. Hence, it is clear that the Division cannot seriously argue that it has suffered any prejudice as a result of the few days delay in service present here (see, Matter of Dworkin Construction Co., Tax Appeals Tribunal, August 4, 1988; cf., Matter of Heller v. Chu, 111 AD2d 1007, 1008).

¹Pursuant to Tax Law § 2000(7), subject matter jurisdiction is conferred upon the Tribunal if the party taking the exception files its notice of exception with the Tribunal within 30 days after the giving of notice of a determination of an Administrative Law Judge. Accordingly, we observe that if a party timely serves the Law Bureau but fails to file its notice of exception with the Secretary within the statutory 30-day time limitation, the Tribunal is without jurisdiction over the matter and hence lacks the inherent power to correct that defect.

Accordingly, we deny the Division's motion to dismiss petitioner's notice of exception and we direct the Secretary to the Tribunal to schedule this case for oral argument.

DATED: Troy, New York
November 9, 1989

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

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

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