

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>MACBET REALTY CORP.</b>	:	DECISION
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

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The Division of Taxation filed a motion before the Tax Appeals Tribunal to dismiss the notice of exception filed by petitioner, Macbet Realty Corp., to the Administrative Law Judge's determination dated May 11, 1989. Petitioner appeared by Goldberg, Weprin and Ustin, Esqs. (Andrew W. Albstein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. LeFebvre, 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 May 11, 1989, the Administrative Law Judge issued a determination which sustained an assessment of gains tax in the amount of \$99,999.00 against petitioner. Petitioner filed a notice of exception postmarked June 7, 1989 with the Tax Appeals Tribunal. At that time, petitioner failed to simultaneously serve a copy of the 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. Petitioner claims that it also mailed a "courtesy" copy of the notice of exception to counsel for the Division on June 7, 1989. The Law Bureau subsequently received correspondence on or about June 30, 1989 from the Tax Appeals Tribunal acknowledging the receipt of petitioner's exception papers. On July 7, 1989, the Tax Appeals Tribunal received a

memorandum of law from petitioner in support of its exception. Thereafter, on August 9, 1989, the Division filed a motion with the Tax Appeals Tribunal seeking, inter alia, an order to dismiss petitioner's notice of exception on the ground that petitioner failed to serve the exception on the Law Bureau in accordance with 20 NYCRR 3000.11(a)(1). In addition, the Division filed a memorandum of law in response to petitioner's memorandum in support of its exception. Petitioner subsequently filed an affirmation in opposition to the Division's motion to dismiss and a reply memorandum in support of its notice of exception.

### ***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 serving 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 Bureau<sup>1</sup> (cf., Matter of Marshall Farms USA, Tax Appeals Tribunal, August 4, 1988; Matter of Chaipis, Tax Appeals Tribunal, November 3, 1988).

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<sup>1</sup>Pursuant 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.

As a final point, we observe that the Division has not shown that it has suffered any prejudice as a result of the 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). Even assuming that counsel for the Division did not receive the notice of exception sent by petitioner on June 7, 1989, it is evident that the Division was put on notice of petitioner's intent to pursue its exception upon receipt of the Tribunal's acknowledgement on June 30, 1989. It appears that the Division was not prejudiced by the delay present in service here, and the Division has not made any assertions to the contrary. 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