

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
O'KEH CATERERS CORPORATION : **ORDER AND OPINION**
for Revision of Determinations or for Refund : **DTA No. 806875**
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1984 :
through August 31, 1987. :

On July 16, 1992, petitioner O'Keh Caterers Corporation, 1594 South Park Avenue, Buffalo, New York 14220, appearing by Steven G. Wiseman, Esq., made a motion to the Tax Appeals Tribunal to strike the brief in opposition filed by the Division of Taxation and preclude oral argument by the Division of Taxation with regard to petitioner's exception to the determination of the Administrative Law Judge filed in this matter. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

ORDER

Upon reading the Notice of Motion dated the 10th day of July 1992, the Affirmation in Support filed therewith, and the Affirmation in Opposition of the Division of Taxation dated the 3rd day of August 1992, and due deliberation having been had thereon,

NOW, upon the motion of O'Keh Caterers Corporation, petitioner, it is
ORDERED that said motion be and the same is hereby denied.

OPINION

Petitioner seeks to have the brief of the Division of Taxation (hereinafter the "Division"), filed in opposition to petitioner's exception to the determination of the Administrative Law Judge in this matter, stricken from the record and oral argument by the Division precluded because the brief was not timely filed or served. The Division opposes the motion, arguing that

because a brief is not a document required to be filed and there was no harm or prejudice to petitioner, its brief should be accepted and oral argument allowed.

The Division is correct in its assertion that the Tribunal has held the failure to timely serve an exception on the opposing party is excusable, provided that an exception was timely filed with the Tribunal (Matter of Cor Bros. Serv. Sta., Tax Appeals Tribunal, February 8, 1990; Matter of Sabel, Tax Appeals Tribunal, November 30, 1989). Therefore, the date the Division filed its brief with the Tribunal is the operative date for purposes of reviewing the issue presented in this case. Having been granted an extension of time to file its brief, the Division's brief was due on July 3, 1992. The brief was received by the Office of the Secretary to the Tribunal on July 6, 1992. As the brief was sent via courier, July 6, 1992 is deemed the date of receipt pursuant to 20 NYCRR 3000.16(a)(1). July 3, 1992 was a Friday and July 6, 1992 was a Monday. The brief was, therefore, one day late.

The Division asserts that the mailing regulations set forth in 20 NYCRR 3000.16 apply only to documents required to be filed, and that a brief is not such a document. However, we determine that it is reasonable for the Tribunal to look to these regulations for guidance when attempting to determine the date upon which any document is filed with the Tribunal.

The important question of first impression presented by this motion is, what is the effect of late-filing a document which is not required to be filed by the Tax Law and, while allowed under 20 NYCRR 3000.11(b)(2), is also not required by the regulation. This is not a case involving a document required to be filed within a certain time frame to confer subject matter jurisdiction (cf., Matter of Marshall Farms USA, Tax Appeals Tribunal, August 4, 1988 [where an exception (the document that confers subject matter jurisdiction on the Tribunal) was dismissed]). Therefore, we will look to the circumstances of the individual case to determine whether the late filing of a brief by a party requires striking the party's brief and/or precluding oral argument.

Based on the facts before us, we simply cannot find that the filing of the brief one day late was so unreasonable that the serious sanctions requested by petitioner are appropriate. The brief of the Division is accepted and the Division is not precluded from presenting its oral arguments in opposition to the exception filed by petitioner. Petitioner is hereby granted until November 25, 1992 to submit its reply brief. Oral argument in this case will proceed as scheduled on December 10, 1992.

DATED: Troy, New York
November 5, 1992

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

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

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