

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
COR BROTHERS SERVICE STATION, INC. :
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1978 through August 31, 1984. :

In the Matter of the Petition :
of :
PETER CORAPI :
OFFICER OF COR BROTHERS SERVICE STATION, INC. : **DECISION**
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1978 through August 31, 1984. :

In the Matter of the Petition :
of :
DOMENICO CORAPI :
OFFICER OF COR BROTHERS SERVICE STATION, INC. :
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1978 through August 31, 1984. :

The Division of Taxation made a motion before the Tax Appeals Tribunal to dismiss the notices of exception filed by petitioners, Cor Brothers Service Station, Inc., Peter Corapi, Officer of Cor Brothers Service Station, Inc. and Domenico Corapi, Officer of Cor Brothers Service Station, Inc., to the Administrative Law Judge's determination dated June 22, 1989 (File Nos. 800930, 801553, 801721, 800928, 801554, 801730, 800929, 801561 and 801719). Petitioners appeared by Eugene T. White, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

The Administrative Law Judge issued a determination on June 22, 1989 with respect to the petition of petitioners, Cor Brothers Service Station, Inc., Peter Corapi, officer, and Domenico Corapi, officer. On July 21, 1989, petitioners filed notices of exception with the Tax Appeals Tribunal. Petitioners also mailed the notices, bearing a meter stamp of July 21, 1989, to Michael B. Infantino, Esq., Senior Attorney at the Law Bureau. The Division avers that it received the Notices of Exception ten days thereafter, on July 31, 1989. Petitioners, however, failed to serve a copy of the notices 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. Petitioners submitted to the Tax Appeals Tribunal a brief dated August 18, 1989 in support of the notices of exception and mailed a copy of the brief to the Law Bureau. On September 20, 1989, The Division filed a letter in lieu of a brief contending, inter alia, that the notices of exception should be dismissed because they were not served in a proper and timely manner.

OPINION

The Division's motion to dismiss petitioners' notices of exception on the ground that petitioners 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 petitioners timely filed their notices of exception with the Secretary to the Tribunal, petitioners failed to timely serve the Division of Taxation and when such service was made the Director of the Law Bureau was not served. We conclude that this defect in service need not result in the dismissal of petitioners' underlying claims before this forum.

We recently addressed the procedural question before us in this matter and held that where the 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]), the Tribunal may, in the exercise of its discretion, excuse the petitioner's failure to timely serve the Director of the Law Bureau (Matter of Macbet Realty Corp., Tax Appeals Tribunal, November 9, 1989; Matter of Herbert Abramowitz, 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,¹ 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). Here, as in Macbet and Abramowitz, petitioners have conferred jurisdiction upon the Tribunal by timely filing the notices of exception within the statutory time period. Consequently, we conclude that petitioners' failure to timely serve the Division of Taxation does not bar petitioners' underlying claims on exception (see, Matter of Macbet Realty Corp., *supra*; Matter of Herbert Abramowitz, *supra*).

The Division further contends that petitioners' notices of exception should be dismissed because the notices were served on an attorney for the Law Bureau rather than the Director of the Law Bureau. We do not agree. Petitioners have conferred subject matter jurisdiction on the Tribunal by initially filing their notices of exception with the Tribunal within the 30-day statutory time period (see, Tax Law § 2007[7]). The receipt by the Law Bureau of the notices of exception

¹CPLR 5515(1) provides in relevant part that "[a]n appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered . . .".

placed it on notice of petitioners' intent to pursue review by the Tribunal of the administrative decision below. In our view, the Division was not prejudiced by the brief delay in service present here, nor has the Division affirmatively asserted that it was harmed in any way as a result of petitioners' service upon the attorney for the Law Bureau rather than upon the Director of the Law Bureau (see, Macbet Realty Corp., supra).

Lastly, contrary to the Division's contention, we find that the notices of exception filed by petitioners satisfy the requirements of 20 NYCRR 3000.11(b) and are sufficient to apprise us of the nature of their claims before this forum. Accordingly, we deny the Division's motion to dismiss petitioners' notices of exception and we will issue a decision on the merits of the exceptions in due course.

DATED: Troy, New York
February 8, 1990

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

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

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