

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PETROLEUM COMBUSTION INTERNATIONAL, INC. :
AND MARTIN CAREY, AS OFFICER :
for Revision of Determinations or for Refunds of Sales and Use :
Taxes under Articles 28 and 29 of the Tax Law for the Period :
December 1, 1976 through August 31, 1978 :

DECISION DTA Nos.
802080/802081
802082/802083

In the Matter of the Petition :
of :
GAS VALUE SERVICE STATIONS, INC. :
AND MARTIN CAREY, AS OFFICER :
for Revision of Determinations or for Refunds of Sales and Use :
Taxes under Articles 28 and 29 of the Tax Law for the Period :
December 1, 1976 through August 31, 1978 :

Corporate petitioners Petroleum Combustion International, Inc. and Gas Value Service Stations, Inc., and Martin Carey, as officer of the corporate petitioners, 5 East 78th Street, New York, New York 10021 filed an exception to the order of the Administrative Law Judge issued on June 6, 1991 denying petitioners' motion to reopen the record and order a continuance so that petitioners could submit additional evidence regarding the issues in question. Petitioners appeared by Maxwell Philipson, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioners did not file a brief on exception, but included an affidavit of petitioner Carey and an affirmation of attorney Philipson in support of their exception. The Division of Taxation filed a letter in lieu of a brief in response to petitioners' exception. Petitioners' request for oral argument was denied.

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

ISSUE

Whether the Administrative Law Judge erred in denying petitioners' motion to reopen the record.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "8" which has been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional findings of fact are set forth below.

The hearing in this matter was commenced on December 11, 1986, before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission,¹ Two World Trade Center, New York, New York. Petitioners were represented at the December 11, 1986 hearing by Edwin M. Mulholland, Esq. The Division of Taxation (hereinafter the "Division") presented two witnesses at the December 11, 1986 hearing: Richard Tortora, an auditor employed by the Division and Richard C. Mackay, an individual involved in the day-to-day operations of Petroleum Combustion International, Inc. and Gas Value Service Stations, Inc. Petitioners' representative elected not to cross-examine the Division's witnesses at that time, but elected instead to wait until the continuation of the hearing to conduct such cross-examination.

Prior to the continuation of the hearing, Mr. Carey terminated his representation by Mr. Mulholland. This termination included Mr. Mulholland's representation of the corporate petitioners. By letter to Mr. Carey dated June 18, 1987, Mr. Mulholland noted that his representation of Mr. Carey and the corporate petitioners was terminated and he advised Mr. Carey to retain new counsel to represent him in this matter. At about the same time, the Tax Appeals Bureau agreed, at Mr. Mulholland's request, to adjourn the continuation of the hearing,

¹This proceeding was commenced pursuant to Tax Law former § 171 under the authority of the former State Tax Commission and the former Tax Appeals Bureau. Effective September 1, 1987 the Tax Commission was abolished and the administrative hearing processes became the responsibility of the Tax Appeals Tribunal and the Division of Tax Appeals (see, L 1987, ch 401).

then scheduled for June 16, 1987, to September 2, 1987 in order for Mr. Carey to retain the services of new counsel. For reasons unrelated to this matter, the hearing scheduled for September 2, 1987 was adjourned to October 29, 1987, and Mr. Carey was so advised by letter, dated July 31, 1987, from Daniel J. Ranalli, Supervising Tax Hearing Officer, Tax Appeals Bureau.

On October 29, 1987 at about 9:15 A.M. (the scheduled date and time for the hearing) Mr. Carey appeared at the offices of the Division of Tax Appeals and requested an adjournment to retain new counsel. Mr. Carey stated that he had been unable to retain new counsel since he terminated Mr. Mulholland on or about June 18, 1987 because of personal financial difficulties and certain health problems of his wife. The Administrative Law Judge denied Mr. Carey's request. Mr. Carey refused to remain present for the hearing. The Administrative Law Judge advised Mr. Carey that the hearing would be continued whether Mr. Carey remained or not and the hearing was so continued.

The hearing was completed on October 29, 1987. The Division again presented the testimony of Richard Mackay. The Division also presented the testimony of Dwight Richard Howe, a handwriting expert. The Division also requested and was granted an opportunity to file a brief by December 17, 1987, but did not do so.

The Administrative Law Judge's determination was issued on July 8, 1988. Said determination was mailed by certified mail to Mr. Carey at 25 Lloyd Haven Drive, Lloyd Harbor, New York 11724, the address listed on Mr. Carey's petitions filed in this matter. Said determination was returned to the Division of Tax Appeals marked "unknown." The Division of Tax Appeals then searched for a better address for Mr. Carey and remailed the determination, again by certified mail, on August 4, 1988 addressed to Mr. Carey at 5 East 78th Street, New York, New York 10021. The determination was subsequently returned to the Division of Tax Appeals as "unclaimed."

On April 3, 1989, Mr. Carey telephoned the Administrative Law Judge and advised that he had not received a determination in this matter. On April 7, 1989 the Administrative Law Judge

mailed a copy of the determination to Mr. Carey at 5 East 78th Street, New York, New York 10021. Mr. Carey received this copy of the determination.

By letter dated November 8, 1989, Maxwell Philipson, Esq., now representing Mr. Carey, wrote to Roberta Moseley Nero, Esq., Secretary to the Tax Appeals Tribunal, seeking "to have the 30 day period for filing an exception waived or excused so that an exception may be filed with the Tax Appeals Tribunal."

We find an additional finding of fact to read as follows:

On December 13, 1990, the Secretary to the Tribunal wrote to Mr. Philipson, informing him that said letter would be deemed an (informal) exception and the postmarked date of November 9, 1989 on said letter would be utilized as the filing date of the exception.

We modify finding of fact "8" of the Administrative Law Judge's order to read as follows:

On January 9, 1991, pursuant to Secretary Moseley Nero's request, petitioners filed a formal Notice of Exception (Form TA-14) in respect to this matter.²

We find an additional finding of fact to read as follows:

On January 15, 1991, Secretary Moseley Nero wrote to Mr. Philipson informing him that the Notice of Exception had been received and that the matter would be held in abeyance, pending the outcome of petitioners' motion to reopen the record which petitioners planned to file with the Supervising Administrative Law Judge.

On March 25, 1991 petitioners filed the instant motion and supporting papers.

We find an additional finding of fact to read as follows:

Since the time petitioners, on July 8, 1991, filed this exception to the Administrative Law Judge's June 6, 1991 order, this Tribunal, on July 23, 1991, issued a Notice of Intent to Dismiss to petitioners regarding their original exception filed November 9, 1989 to the determination of the Administrative Law Judge issued August 4, 1988. The Tribunal advised petitioners at the time the Notice was issued that petitioners had until August 22, 1991 to respond to and/or protest the Notice. No response from petitioners

²The Administrative Law Judge's finding of fact "8" read as follows:

"On January 9, 1991 petitioners filed a Notice of Exception (Form TA-14) in respect of this matter."

This fact was modified to more accurately reflect the record.

ensued. Therefore, on January 30, 1992, the Tribunal issued a decision dismissing petitioner's original exception because it was untimely. Therefore, the only issue before us here is whether or not the Administrative Law Judge should have permitted the record to be reopened to allow petitioners to cross-examine the Division's witnesses and to submit additional evidence.

OPINION

The Administrative Law Judge denied, with prejudice, petitioners' motion to reopen the record of the hearing to allow for the introduction of evidence regarding the matters at issue. In short, the Administrative Law Judge found:

"nothing in the motion papers to support a finding that petitioners had good cause for an adjournment of the October 29, 1987 hearing. [The Administrative Law Judge, therefore, saw] no basis upon which to reconsider [his] previous denial of petitioners' adjournment request and no basis upon which to reopen the record herein" (Order, p. 6).

In particular, the Administrative Law Judge was not persuaded that petitioner Carey exercised due diligence in attempting to locate new counsel during the four-month period between the time his counsel resigned from the case, in June of 1987, and October of 1987, when the hearing was scheduled to and did continue. In addition, the Administrative Law Judge pointed out that petitioners did not comply with the Rules of Practice and Procedure of the Tax Appeals Tribunal regarding the making of adjournment requests in that petitioners did not put their request in writing at least 15 days prior to the scheduled hearing (citing 20 NYCRR 3000.10[b][1]).

The Administrative Law Judge enumerated various other factors which caused him to believe that petitioner Carey was "interested less in fairness than in manipulation" of the system, including: petitioners' lack of effort to open the record prior to the issuance of the determination; the length of time between the issuance of the Administrative Law Judge's determination³ and petitioners' first effort to reopen the record (see, Philipson's November 8, 1991 letter to the

³We note that, although in his order the Administrative Law Judge cites to the date of issuance of the determination as July 8, 1988, due to an oversight of the Division of Tax Appeals in locating petitioners' address (see, Matter of Petroleum Combustion Intl., Tax Appeals Tribunal, January 30, 1992, at footnote "1"), the determination was not issued to petitioners at Mr. Carey's correct address in New York City until August 4, 1988. Therefore, as is clear from our decision dated January 30, 1992, the issuance date of the determination to petitioners was, for all intents and purposes, August 4, 1988. As we held in that decision, however, this does not change the fact that petitioners' exception was untimely in that it was not filed until November 9, 1989, more than a year and two months after it was due.

Secretary of the Tax Appeals Tribunal); and petitioner Carey's claim that the leg injury he sustained in a boating accident in May of 1989 incapacitated him for several months, although he was present at the offices of the Division of Tax Appeals for a hearing in the Matter of Carey (Division of Tax Appeals, Administrative Law Judge Determination, February 15, 1990).

These factors caused the Administrative Law Judge to reach the conclusion that, under the circumstances, to grant petitioners' motion "would surely be a mockery of the administrative process" (Order, p. 7).

On exception, petitioners claim that because they were not granted a continuance of the October 29, 1987 hearing, they were not granted an opportunity "to ensure a complete record before the Administrative Law Judge" (Exception, p. 1). Petitioners ask that the hearing be reopened, and that they be permitted to cross-examine the Division's witnesses and introduce evidence and testimony, "all in the interest of fairness and justice" (Exception, p. 2).

Petitioner Carey, in his affidavit, attempts to refute the Administrative Law Judge's conclusion that insufficient efforts were made by petitioners to obtain new counsel between June and October of 1987, claiming that he made "substantial efforts to obtain counsel," and that he told the Administrative Law Judge on October 29, 1987 that in the past several months he had visited at length with three separate attorneys and one accountant in attempts to secure representation, but that the attorneys wanted \$35,000.00 up front which he could not afford (see, Carey Affidavit filed with Exception, pp. 1-2).

Finally, petitioner Carey states in his affidavit that he protested to the Administrative Law Judge, at the October 29, 1987 pre-trial hearing, that his rights were being prejudiced because it was unjust to expect him to proceed pro se against his will and to require him to cross-examine the State's accountant, Mr. Mackay (see, Carey Affidavit filed with Exception, p. 3). Petitioner Carey notes that:

"several attorneys familiar with tax appeals . . . advised [him] that he should appear at the hearing on October 29, 1987 . . . to request an adjournment, but if an adjournment was not granted, he should not remain at the hearing" (Carey Affidavit filed with motion to reopen the record, p. 2).

In response, the Division requests that the Administrative Law Judge's order be affirmed in all respects. The Division notes that petitioner Carey was never prevented from offering testimony, conducting cross-examination of the Division's witnesses, or submitting documents into evidence at the October 29, 1987 hearing. Further, the Division asks that attorney Philipson's affirmation "neither be sanctioned nor given any weight whatsoever" since it is:

"made without any allegation as to the basis of the affirmant's knowledge, [and] is an improper and inexcusable attempt to introduce alleged evidence for the first time before this Tribunal"
(Division's letter in lieu of brief, p. 2, citations omitted).

We affirm the ruling of the Administrative Law Judge. Further, because the Administrative Law Judge dealt adequately and completely with the issue of whether or not there was a basis for reopening the record, we see no reason to discuss the issue any further. Therefore, we affirm the ruling of the Administrative Law Judge based on his decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Petroleum Combustion International, Inc., Gas Value Service Stations, Inc., and Martin Carey, as officer, is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The notices of determination issued to petitioners on August 4, 1988 are sustained in full.

DATED: Troy, New York
August 27, 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