

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**ROBERT H. AND HANNA H. SABEL** : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1981. :

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The Division of Taxation made a motion before the Tax Appeals Tribunal to dismiss the notice of exception filed by petitioners, Robert H. Sabel and Hanna H. Sabel, to the Administrative Law Judge's determination dated October 20, 1988. Petitioners appeared by Epstein, Becker & Green, P.C. (Rona Klein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

***ISSUE***

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

***FINDINGS OF FACT***

The Administrative Law Judge issued a determination on October 20, 1988 with respect to the petition of petitioners, Robert H. Sabel and Hanna H. Sabel. On October 27, 1988 the Tax Appeals Tribunal granted petitioners' request for an extension of time to file a notice of exception until December 19, 1988. On November 16, 1988 the Tribunal granted the Division of Taxation an extension until December 16, 1988 to file an exception. On December 14, 1988 petitioners filed a notice of exception with the Tax Appeals Tribunal. Petitioners, however, failed to serve a copy 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. On December 19, 1988 the Tax Appeals Tribunal received a notice of exception from the Division

of Taxation; a copy was also served upon petitioners. Subsequently, on or about December 23, 1988, the Law Bureau received correspondence from the Tax Appeals Tribunal which acknowledged the receipt of petitioners' exception papers and contained a copy of petitioners' exception. On January 17, 1989 the Tax Appeals Tribunal received a brief from petitioners in support of their exception and a copy was also served on the Division. On February 21, 1989 the Tax Appeals Tribunal received a brief from the Division in support of its notice of exception. The Division's brief contained a request that petitioners' notice of exception be dismissed for failure to serve a copy of the exception on the Division. On March 27, 1989, pursuant to an extension granted by letter dated March 13, 1989, the Tax Appeals Tribunal received petitioners' brief in opposition to the Division's brief, which addressed the substantive arguments and the request for dismissal. On April 7, 1989 the Tax Appeals Tribunal received petitioners' notice of motion to sever the Division's request to dismiss petitioners' notice of exception from the substantive issues raised in the parties' exceptions. On October 5, 1989, the Tax Appeals Tribunal granted petitioners' motion to sever.

### ***OPINION***

The Division's motion to dismiss petitioners' notice 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 notice of exception with the Secretary to the Tribunal, petitioners failed to simultaneously serve the Director of the

Law Bureau. We conclude that this defect in service need not result in the dismissal of petitioners' underlying claims before this forum.

We have 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 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 Laws 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,<sup>1</sup> 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 notice of exception within the statutory time period. Consequently, we conclude that petitioners' failure to serve the Director of the Law Bureau does not bar petitioners' underlying claims on exception (see, Matter of Macbet Realty Corp., supra; Matter of Herbert Abramowitz, supra).

The Division's reliance on 308 East 79th St. Assoc. v. Chu (Supreme Court, Albany County, Jan. 11, 1989) in support of its motion to dismiss is misplaced. In that case, the Supreme Court dismissed an Article 78 proceeding on the grounds that the court lacked personal jurisdiction over the State Tax Commission due to a defect in service of process and because the taxpayers failed to file the requisite undertaking. This matter is easily distinguishable as subject matter jurisdiction has been conferred on the Tribunal pursuant to the timely filing of petitioners' notice of exception and hence, the Tribunal has the inherent power to cure the defect in service present here (see, Matter of Herbert Abramowitz, supra). Further, it is noted that the Division

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<sup>1</sup> CPLR 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 . . .".

admits in an affidavit included in the record before us that it received from the Tribunal an acknowledgement of petitioners' exception papers and a copy of petitioners' completed exception form on December 23, 1988, less than two weeks after petitioners filed their exception with the Tribunal. Hence, it is clear that the Division can not seriously argue that it has suffered any prejudice as a result of the brief delay present in service here (see, id.).

Accordingly, we deny the Division's motion to dismiss petitioners' notice of exception.

DATED: Troy, New York  
November 30, 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