

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>HERBERT ROUNICK</b>	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law for	:	
the Period October 1, 1980 through December 15, 1980.	:	

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Petitioner Herbert Rounick, 15 West 53rd Street - 38 A/F, New York, New York 10019 brought a motion to dismiss the Division of Taxation's exception with respect to his petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period October 1, 1980 through December 15, 1980 (File No. 803076). Petitioner appeared by Kostelanetz, Ritholz, Tigue & Fink (Jules Ritholz, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

***ISSUE***

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

***FINDINGS OF FACT***

We find the following facts.

The Administrative Law Judge issued his determination on September 7, 1990 granting the petition of Herbert Rounick and canceling the Notice of Deficiency issued to him.

On October 3, 1990, the Division of Taxation requested an extension of time to file an exception to the determination of the Administrative Law Judge. An extension was granted by the Tax Appeals Tribunal until December 7, 1990. On December 7, 1990, the Division of Taxation filed its exception to the Administrative Law Judge's determination.

On December 31, 1990, petitioner filed a motion to dismiss the Division of Taxation's exception because it did not contain the grounds of the exception with references, wherever possible, to the relevant pages of the transcript of hearing and exhibits and was inadequate to apprise petitioner of the nature of the State's claims. The Division of Taxation responded with an affidavit in opposition to the motion to dismiss the notice of exception.

***OPINION***

We deny petitioner's motion to dismiss the notice of exception filed by the Division of Taxation (hereinafter the "Division") because it did not contain the grounds of the exception with references to the relevant pages of the transcript of hearing and exhibits and was inadequate to apprise petitioner of the nature of the State's claim as required by 20 NYCRR 3000.11(b)(1). The procedural rule set forth in that regulation provides as follows:

"The exception shall contain:

"(i) the particular findings of fact and conclusions of law with which the party disagrees;

"(ii) the grounds of the exception, with references, whenever possible, to the relevant pages of the transcript of hearing and exhibits; and

"(iii) alternative findings of fact and conclusions of law. . ." (20 NYCRR 3000.11[b][1]).

We find that the notice of exception filed by the Division satisfies the requirements of 20 NYCRR 3000.11(b)(1) and is sufficient to apprise petitioner of the nature of the Division's claims. The exception clearly lists the findings of fact and conclusions of law with which the Division disagrees. It also sets forth the findings of fact and conclusions of law that the Division is requesting.

Further, we find that the omission by the Division of references to relevant pages of the transcript of hearing and exhibits need not result in the dismissal of the Division's underlying claims before this forum. The Division indicated on its exception that a brief would be filed.

The Division argues, in its affidavit in opposition, that a brief would be a more appropriate place for the references to the transcript and exhibits, and we find this argument persuasive.

In its affidavit in opposition, the Division has raised concerns about petitioner's motion to dismiss the exception. The Division argues that the motion does not conform to the rules of practice in that it contained no notice of motion, no return date and no supporting affidavit. We need not address this issue as the denial of petitioner's motion renders this issue moot

Accordingly, we deny petitioner's motion to dismiss the Division's notice of exception and we will issue a decision on the merits of the exception in due course.

DATED: Troy, New York  
March 28, 1991

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

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

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