

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>Sterling Bancorp</b>	:	ORDER AND OPINION
	:	DTA No. 806271
For Redetermination of Deficiencies or for Refund of	:	
Franchise Tax on Banking Corporations under Article 32	:	
of the Tax Law for the Years 1980 through 1984.	:	

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On May 1, 1995 petitioner Sterling Bancorp, 540 Madison Avenue, New York, New York 10022, filed a motion with the Tax Appeals Tribunal for an order vacating the decision in Matter of Sterling Bancorp (Tax Appeals Tribunal, November 18, 1993). Petitioner further requested that an opportunity for new briefs and for oral argument be provided and that Commissioner Dugan not participate. Petitioner appeared by Roberts & Holland LLP (Carolyn Joy Lee and Glenn Newman, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Paul A. Lefebvre, Esq., of counsel). Commissioner Dugan took no part in any proceedings concerning the present motion.

***ORDER***

Upon reading of the Notice of Motion submitted by petitioner, together with Affirmation in Support, the Affidavit submitted by the Division of Taxation in opposition, and the Reply Affirmation submitted by petitioner and received on June 2, 1995, and due deliberation having been had thereon,

NOW, on the motion of petitioner, it is,

ORDERED that said motion be and the same hereby is granted.

***OPINION***

It is necessary to first set forth what has happened procedurally with this case since the decision of the Tax Appeals Tribunal (hereinafter "Tribunal") on November 18, 1993. Petitioner

filed an Article 78 proceeding with the Supreme Court - Appellate Division, Third Department. On April 3, 1995, the Supreme Court - Appellate Division, Third Department issued a Decision and Order on Motion granting an application to withdraw and discontinue the proceeding. This Decision and Order was premised upon a Stipulation of Withdrawal executed by petitioner's representative and the Attorney General of the State of New York. The relevant provisions of this stipulation provided that: petitioner had 30 days from the entry of the Decision and Order to file a motion with the Tribunal to vacate the previous decision; the Division of Taxation (hereinafter "Division") would consent to the motion; and, if petitioner's motion were denied, petitioner would have four months from the order denying the motion to reinstate its Article 78 proceeding.

On May 1, 1995, petitioner filed a Notice of Motion together with an Affirmation in Support with the Tribunal requesting an order vacating the decision in Matter of Sterling Bancorp (*supra*) and allowing petitioner to file new briefs and again have oral argument on the substantive issues in this case. Petitioner also requests that Commissioner Dugan not participate in the case.

The premise of petitioner's motion is that Commissioner Dugan, who participated in the previous Tribunal decision in this matter, should have disqualified himself since he had been involved with this case in his past position as Deputy Commissioner and Counsel of the Department of Taxation and Finance, the opposing party in the present matter. Petitioner submitted an audit field report indicating that the auditor and petitioner's previous representative had met with Commissioner Dugan concerning this case, and a copy of a letter to Commissioner Dugan from petitioner's previous representative containing a settlement offer in this case. The last date in this submission indicating any involvement of Commissioner Dugan is August 26, 1986. Petitioner notes that:

"[i]n circumstances where a member of this Tribunal had a prior involvement in the case, the member has uniformly recused himself or herself. We believe that had this issue been raised and

Commissioner Dugan been reminded of his participation in the case prior to the Tribunal's consideration of the case, a recusal would have been forthcoming" (Petitioner's Affirmation in Support, pp. 3-4.

The Division, in its Affidavit submitted in opposition to the motion, consents to that part of petitioner's motion asking that the previous Tribunal decision be vacated.<sup>1</sup>

The decision of the Tribunal in this matter, Matter of Sterling Bancorp (*supra*), is hereby vacated. This Tribunal agrees with petitioner's observation that had this matter been brought to the attention of Commissioner Dugan during the previous Tribunal proceedings, he would have recused himself at that time. Commissioner Dugan has recused himself from any participation in the current motion or any further proceedings in this matter.

The contested issue in this motion is what procedure is to be followed upon the decision being vacated. Petitioner has requested that new briefs be filed and that another oral argument be held. Petitioner cites section 14 of the Judiciary Law and 20 NYCRR 100.3(c)(1) in support of its position. Petitioner then states that such rules have been applied to administrative adjudication and, in the instance where a disqualification is based on the previous representation of one of the parties in the current action, the disqualification is jurisdictional.

The Division opposes that part of petitioner's motion and asks that a new decision be issued on the record of the previous proceedings. It is the Division's position that the parties previously had an opportunity to present written and oral argument and that repeating the process merely further delays what has already been a time-consuming case. Also, the Division argues that petitioner has not set forth any circumstances that might require new briefs or oral argument in this case, such as the need to reopen the record or argue new case law. The Division did not respond to petitioner's legal arguments.

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<sup>1</sup>While not specifically mentioned in the Affidavit filed by the Division, it seems apparent that the Division also consents to that part of petitioner's motion requesting that Commissioner Dugan not participate in any future proceedings in this matter.

Section 14 of the Judiciary Law provides:

"[a] judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel" (Judiciary Law § 14).

20 NYCRR 100.3(c)(1) provides:

"[a] judge shall disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned, including, but not limited to circumstances where:

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"(ii) the judge served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it" (20 NYCRR 100.3[c][1]).

The basis for vacating the decision in this matter was the previous involvement of Commissioner Dugan when he was the Deputy Commissioner and Counsel of the Department of Taxation and Finance, one of the parties in the present proceeding.<sup>2</sup> Petitioner states, and the Division does not disagree, that the above statutory and regulatory provisions are applicable to administrative adjudication. Petitioner cited Matter of Beer Garden v. New York State Liq. Auth. (79 NY2d 266, 582 NYS2d 65) in its Affirmation in Support. In Beer Garden, the Court, in discussing section 14 of the Judiciary Law, stated:

"[w]hile we recognize that this provision pertains only to courts of record, the common-law rule of disqualification embodied by the statute has been applied to administrative tribunals exercising quasi-judicial functions" (Matter of Beer Garden v. New York State Liq. Auth., *supra*, 582 NYS2d 65, 70).

Therefore, it is appropriate to apply the above statutory and regulatory provisions together with the case law applicable thereto in the instant matter.

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<sup>2</sup>The difference in terminology, i.e., the difference between the Department of Taxation and Finance and the term currently used, the Division of Taxation, is a result of the legislation establishing the Division of Tax Appeals as an independent division of the Department of Taxation and Finance.

Where the basis of a disqualification is prior appearance as an attorney for one of the parties pursuant to section 14 of the Judiciary Law, the fault is jurisdictional, meaning parties cannot consent to waive the defect, and all proceedings from the time of the disqualification are null and void (see, Matter of Beer Garden v. New York State Liq. Auth., *supra*; Casterella v. Casterella, 65 AD2d 614, 409 NYS2d 548; Matter of Thoms' Trust, 24 AD2d 536, 261 NYS2d 304). In cases before the Division of Tax Appeals, an Administrative Law Judge issues a determination to which either party may file an exception with the Tribunal. It is at the point that an exception is filed that the Tribunal becomes involved in a case, and at such point in this case when the present disqualification occurred. All proceedings after the exception was filed, i.e., the filing of briefs and oral argument, are null and void. New briefs must be filed and oral argument held before the Tribunal can issue its decision in this matter.

NOW, on motion of petitioner, it is

ORDERED, ADJUDGED and DECREED that the motion of petitioner be and the same hereby is granted. The Office of the Secretary to the Tribunal is hereby ordered to establish a briefing schedule upon the issuance of this order and to tentatively schedule this matter for oral argument on the April 1996 Tribunal calendar.

DATED: Troy, New York  
December 4, 1995

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

/s/Donald C. DeWitt  
Donald C. DeWitt  
Commissioner