

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SEBASTIAN AND FLORENCE ANGELICO : ORDER AND OPINION
for Redetermination of a Deficiency or for : DTA No. 807985
Refund of New York State and New York City :
Income Taxes under Article 22 of the Tax Law :
and the New York City Administrative Code for :
the Years 1984 and 1985. :

On July 16, 1992, petitioners Sebastian and Florence Angelico, 6 Poillon Avenue, Staten Island, New York 10312, appearing by Leonard Rosen, C.P.A. made a motion to the Tax Appeals Tribunal (hereinafter the "Tribunal") to dismiss the exception of the Division of Taxation (hereinafter the "Division"), strike the brief in support filed by the Division and preclude oral argument by the Division with regard to the Division's exception to the determination of the Administrative Law Judge filed in this matter. The Division appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

The response of the Division was received on July 28, 1992 which began the Tribunal's six-month time period to issue this order.

ORDER

Upon reading the motion dated the 15th day of July 1992 and the response of the Division dated the 27th day of July 1992, and due deliberation having been had thereon,

NOW, upon the motion of Sebastian and Florence Angelico, petitioners, it is

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

OPINION

Petitioners seek to have the exception of the Division dismissed, the brief of the Division filed in support of its exception to the determination of the Administrative Law Judge in this matter stricken from the record and oral argument by the Division precluded because the brief was not timely filed or served. The Division opposes the motion, arguing that because a brief is not a document required to be filed and a delay of two days is inconsequential, its exception and brief should be accepted and oral argument allowed.

Having been granted an extension of time to file its brief, the Division's brief was due on June 19, 1992. The brief was received by the Office of the Secretary to the Tribunal on June 23, 1992. As the brief was sent via courier, June 23, 1992 is deemed the date of filing pursuant to 20 NYCRR 3000.16(a)(1). June 19, 1992 was a Friday and June 23, 1992 was a Tuesday. The brief was, therefore, two days late.

The question presented by this motion is: what is the effect of late-filing a document which is not required to be filed by the Tax Law and, while allowed under 20 NYCRR 3000.11(b)(2), is also not required by the regulation. This is not a case involving a document required to be filed within a certain time frame to confer subject matter jurisdiction (cf., Matter of Marshall Farms USA, Tax Appeals Tribunal, August 4, 1988 [where an exception (the document that confers subject matter jurisdiction on the Tribunal) was dismissed]). Furthermore, there is at the current time no announced policy of the Tribunal regarding briefs not timely filed.

Petitioners have not provided any arguments that would cause us to modify our decision in O'Keh Caterers wherein we stated:

"[b]ased on the facts before us, we simply cannot find that the filing of the brief one day late was so unreasonable that the serious sanctions requested by petitioner are appropriate" (Matter of O'Keh Caterers Corp., Tax Appeals Tribunal, November 5, 1992).

The only factual difference in the present case is that the brief of the Division is two days, not one day, late. Again, this is not so unreasonable as to allow for the sanctions requested by petitioners.

The exception and the brief of the Division are accepted. Petitioners are hereby granted until July 26, 1993 to submit their brief in opposition. The Division will not be automatically precluded from oral argument. A decision on whether to grant oral argument will be made in accordance with normal Tribunal procedures.

DATED: Troy, New York
June 16, 1993

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

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