

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BUYRITE MOTORS, INC.	:	DECISION
AND ZORY KUSHNER, AS OFFICER	:	DTA Nos. 808234
	:	and 808236
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1984	:	
through November 30, 1986.	:	

The Division of Taxation filed an exception to the order of the Administrative Law Judge issued on December 5, 1991 with respect to the motion of petitioners for a default determination and the motion of the Division of Taxation to dismiss the petitions. Petitioners are Buyrite Motors, Inc. and Zory Kushner, as Officer, 16565 NE 26th Avenue #5F, Miami, Florida 33160-4036. The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Oral argument, at the Division of Taxation's request, was heard on September 10, 1992.

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

ISSUE

Whether petitioners timely filed petitions.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "2," "4" and "6" which have been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

We modify the first paragraph of finding of fact "1" of the Administrative Law Judge's determination to read as follows:

Two petitions were filed on June 5, 1990 and acknowledged by the Division of Tax Appeals on June 13, 1990. The substance of the claims stated in the petition of petitioner Buyrite Motors, Inc. (DTA# 808234) is as follows:¹

- "(a) An examination of the taxpayer's books and records was conducted by the Sales Tax Division.
- (b) The taxpayer's business was the sale of used cars. Each car has an identification number and when registered must be accompanied by an invoice.
- (c) The taxpayer's invoices reflected the price of the car together with trade-in amounts allowed and sales tax amount.
- (d) The penalties are unwarranted based upon the facts.
- (e) The notice issued for the quarter ended November 30, 1985 was not timely issued."

The substance of the complaints stated in the petition of petitioner Zory Kushner (DTA# 808236) is as follows:

"This is an assessment based upon an audit of the books and records of Buyrite Motors, Inc. This taxpayer is alleged to be the responsible officer for collection and payment of sales taxes.

The corporation has protested the assessment and a final determination has not been made.

In addition, the quarter ended 11-30-85 was not assessed timely."

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

On or about June 5, 1991, some 297 days past the due date for filing an answer to petitioners' petitions, the Division of Taxation served an answer on John R. Serpico. The Division had not moved to

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We modified the first paragraph of the Administrative Law Judge's finding of fact "1" by deleting the word "timely" from between the words "two" and "petitions" in the first sentence of the finding of fact.

extend the time to file an answer, nor had it requested an extension from petitioners.²

In its answer, the Division's attorney, Mr. Jenkins, alleged that requests for the audit report and workpapers had been made to the Queens District Office on June 29, 1990, September 24, 1990 and February 28, 1991. He also alleged that he had not received the documents until the end of March 1991.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

By Notice of Motion dated June 21, 1991, John R. Serpico moved for a default determination pursuant to 20 NYCRR 3000.4(a)(4).³

By Notice of Motion dated July 2, 1991, the Division of Taxation moved for an order dismissing the petitions pursuant to 20 NYCRR 3000.5(b)(1)(vi) for failure to state a cause for relief.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

John R. Serpico filed an affirmation in opposition to the Division of Taxation's motion to dismiss.⁴

In addition to the facts found by the Administrative Law Judge, we find the following:

The petitions of Buyrite Motors, Inc. and of Zory Kushner were each signed only by John R. Serpico. Neither petition was

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Finding of fact "2" of the Administrative Law Judge's determination was modified by substituting the name "John R. Serpico" for the words "petitioners' attorney."

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Finding of fact "4" of the Administrative Law Judge's determination was modified by substituting the name "John R. Serpico" for the word "petitioners."

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The Administrative Law Judge's finding of fact "6" read as follows:

"Petitioners did not respond to the motion to dismiss."

We modified finding of fact "6" to reflect the record.

accompanied by a power of attorney authorizing Mr. Serpico to act for the petitioner. In response to each petition, the Division of Tax Appeals

issued a letter dated June 13, 1990, requesting that Mr. Serpico file a power of attorney. Neither petitioner filed a power of attorney in response to this request.

John R. Serpico filed several additional documents purportedly on behalf of petitioners before the Administrative Law Judge issued his order on petitioners' and the Division of Taxation's (hereinafter the "Division") motions; however, none of these documents were accompanied by a power of attorney.

The Division filed an exception to the order issued by the Administrative Law Judge. Petitioners have not in any way responded to the Division's exception, either personally or through Mr. Serpico, i.e., petitioners have not filed any brief in opposition to the Division's exception and did not appear at oral argument.

After the Division's exception was filed with the Tribunal, the Secretary to the Tribunal sent letters dated April 27, 1992, June 12, 1992, June 16, 1992 and June 29, 1992 to John R. Serpico, with copies to petitioners, requesting a properly completed power of attorney form. Two of these letters stressed the importance of filing a proper power of attorney because Mr. Serpico, and not petitioners, executed the petitions filed on petitioners' behalf. No response was received to any of these letters.

The only written response that has been received by the Secretary to the Tribunal from Mr. Serpico was in response to a letter dated June 2, 1992, requesting petitioners' current addresses. By letter dated June 15, 1992 Mr. Serpico stated:

"[y]ou may send correspondence for Buy-Rite in care of my office. The corporation is no longer operating.

"As for Zory Kushner, he was and I believe still represented [sic] by Feldman & Feldman, 249-12 Jericho Turnpike, Floral Park, N.Y. 11001."

As of the date of this decision, no power of attorney has been filed with the Division of Tax Appeals indicating that John R. Serpico was authorized to represent petitioners in this proceeding.

OPINION

With respect to petitioners' motion for a default, the Administrative Law Judge concluded that petitioners did not demonstrate that they were sufficiently prejudiced by the Division's delay in filing its answer to merit dismissal of the action. However, the Administrative Law Judge agreed with petitioners that the delay involved here was inexcusable and found that the Division's behavior rose to the level of systematic and unexplained disregard for the Tribunal's rules of practice that we cautioned in Matter of Macbet Realty Corp. (Tax Appeals Tribunal, May 17, 1990) and Matter of Maggin (Tax Appeals Tribunal, March 8, 1990) would not be accepted. The Administrative Law Judge concluded that the Division's delay was due to bureaucratic inertia and casual indifference to the Tribunal's rules and not due to conditions beyond the Division's control. As a penalty, the Administrative Law Judge ordered that all interest on tax assessed against petitioners be reduced to simple interest, all penalties relating to fraud be abated and all affirmative allegations of fraud be stricken from the Division's answer. Further, the Administrative Law Judge ordered that the Division be precluded from raising the issue of fraud or introducing evidence at the hearing in support of the fraud penalty.

With respect to the Division's motion to dismiss the petitions for failure to state a cause for relief, the Administrative Law Judge held that both petitions adequately stated a cause for relief because each petition specifically disputed the penalties assessed and asserted that the notice for the quarter ending November 30, 1985 was not timely. However, in order to give the Division notice of the subject matter of the controversy, the Administrative Law Judge directed petitioners to file amended petitions within 20 days specifying what errors the Division made on audit and what relief is being requested.

On exception, the Division states that the time period required for filing an answer is not required by statute, but only by regulation, and that it has been recognized, citing Matter of Geary v. Commissioner of Motor Vehicles (92 AD2d 38, 459 NYS2d 494, 496, affd 59 NY2d 950, 466 NYS2d 304), that even statutory time periods imposed on administrative agencies are

directory and not mandatory. Further, the Division argues that petitioners' motion papers do not allege or show facts that justify granting their motion. The Division contends that this case must be decided under the principles of Matter of Cortlandt Nursing Home v. Axelrod (66 NY2d 169, 495 NYS2d 927, cert denied 476 US 1115), and that under these principles the Administrative Law Judge's order was not warranted. The Division also asserts that the Administrative Law Judge should not have considered the issue of systematic delay because this issue was not raised nor supported in the motion papers of petitioner. Further, argues the Division, the phrase "systematic delay" is a term without legal significance because it has not been defined. In addition, the Division argues that even if it had acted unreasonably, the Administrative Law Judge was without any power to impose sanctions against the Division because there is no express statutory authority for sanctions.

Petitioners have not responded to the Division's exception.

Because we find a procedural defect in this matter which raises the question of our jurisdiction to hear it (Tax Law § 2006[5]), we will not address the merits of the parties' arguments. Instead, we will address only this procedural defect.

The Tribunal's regulations provide that an attorney, and certain other types of individuals, "may act as the representative of a taxpayer at all stages of proceedings before the tribunal and administrative law judges, if authorized by a proper power of attorney signed by the taxpayer and filed with the division of tax appeals before or concurrently with such representation . . ." (20 NYCRR 3000.2[a][2]). If a properly completed power of attorney is not obtained at the time a representative begins to act on behalf of a petitioner, questions may subsequently be raised as to whether the representative was in fact authorized to act on behalf of the petitioner (see, Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of Jenkins Covington, N.Y., Tax Appeals Tribunal, November 21, 1991). As we stated in Jenkins Covington, it is obviously desirable to avoid such uncertainty by

obtaining a proper power of attorney as soon as a representative purports to act on behalf of a petitioner.

In the instant case, the uncertainty raised by the absence of a power of attorney is exacerbated by several additional factors. First is the failure of Mr. Serpico and petitioners to respond to the many requests by the Division of Tax Appeals for a properly completed power of attorney. Second, with respect to petitioner Zory Kushner, Mr. Serpico's letter of June 15, 1992 suggests that Mr. Serpico never represented Mr. Kushner. Finally is the fact that Mr. Serpico has failed to make any written response on behalf of either petitioner to the Division's exception or brief on exception and did not appear for oral argument. Together these facts raise substantial questions as to whether Mr. Serpico ever represented either petitioner Buy-Rite or petitioner Kushner (cf., Matter of Jenkins Covington, N.Y., supra [where there was nothing in the record that indicated that the attorney did not represent the petitioner until the petitioner raised the issue after the Tribunal had issued its decision and the time to appeal the decision had expired]). If Mr. Serpico did not represent petitioners, then Mr. Serpico was not authorized to file the petitions on petitioners' behalf and petitioners have failed to file timely petitions (see, Matter of Adamides v. Chu, supra).

Our regulations provided a means to avoid the problem with which we are confronted. Pursuant to 20 NYCRR 3000.3(b), a petition is required to contain certain information when filed. Among the requirements is that an original or a legible copy of the power of attorney be attached to the petition (20 NYCRR 3000.3[b][9]). The regulation also provides that if a petition is not in the form required, the Supervising Administrative Law Judge shall return it to the petitioner together with a statement indicating the petition's defects and providing the petitioner with 30 days to correct the petition (20 NYCRR 3000.3[d]). If the petitioner fails to serve a corrected petition within the time required, the regulation authorizes the Supervising Administrative Law Judge to issue a determination dismissing the petition (20 NYCRR 3000.3[d][2]). Because the failure to attach a properly completed power of attorney to the

instant petitions raised a substantial question as to the facial validity of the petitions, we conclude that the Supervising Administrative Law Judge erred in not following the regulation and returning the petitions to petitioners for correction.⁵ From this conclusion, it follows that the Supervising Administrative Law Judge improperly acknowledged receipt of the petitions in proper form and incorrectly commenced the running of the period for the Division to answer the petition (20 NYCRR 3000.3[c] and 3000.4[a][1]). Therefore, petitioners' motion for a default and the Division's motion for dismissal of the petitions were premature.

Given the specific facts of this case, i.e., petitioners' failure to provide a power of attorney in response to repeated requests, and the additional circumstances that call into question whether Mr. Serpico represents petitioners, we conclude that the most appropriate means to correct the Supervising Administrative Law Judge's failure is to return the petitions to the Supervising Administrative Law Judge so that they can be processed in accordance with the provisions of 20 NYCRR 3000.3(b), (c) and (d). Accordingly, this matter is remanded to the Supervising Administrative Law Judge so that he may return the petitions to petitioners with a statement requesting a properly completed power of attorney from each petitioner. If such powers of attorney are not received within 30 days, the Supervising Administrative Law Judge shall dismiss the petitions. If such powers are received, the Supervising Administrative Law Judge shall acknowledge receipt of the petitions in proper form and the Division's time for filing an answer will begin to run (20 NYCRR 3000.3[c] and 3000.4[a][1]). If the petitions are acknowledged to be in proper form by the Supervising Administrative Law Judge, the processing of this case shall begin anew and all of the prior actions and events in this case shall be disregarded and given no force or effect in any subsequent proceeding involving this matter.

⁵We do not mean to suggest that the Supervising Administrative Law Judge should treat every requirement of 20 NYCRR 3000.3(b) as a basis for dismissing a petition. Clearly, some of the information required by the regulations, e.g., the petitioner's telephone number, is not critical to the facial validity of the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Supervising Administrative Law Judge to be processed in accordance with this opinion.

DATED: Troy, New York
February 18, 1993

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

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

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