

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
NELSON OBUS AND EVE COULSON : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 827736
New York State Personal Income Tax under Article 22 :
of the Tax Law for Years 2012 and 2013. :

On August 22, 2019, the Administrative Law Judge issued a determination denying the petition filed by petitioners and sustaining the notice of deficiency issued by the Division of Taxation (Division) in this matter. On September 19, 2019, petitioners Nelson Obus and Eve Coulson filed an exception to the determination of the Administrative Law Judge. Petitioners and the Division subsequently filed briefs on exception. The oral argument in this matter, originally scheduled for March 26, 2020, was canceled and is currently awaiting rescheduling. Petitioners are appearing by Greenberg Traurig (Glenn Newman, Esq., of counsel). The Division is appearing by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel).

On February 10, 2020, Hodgson Russ LLP appearing pro se (Timothy P. Noonan, Esq., of counsel) filed a notice of motion with the Tax Appeals Tribunal for leave to appear and file an amicus curiae brief and participate in oral argument, together with an affirmation in support of the motion and the proposed amicus curiae brief. The parties were given until March 12, 2020 to respond to the motion. Petitioners filed a response urging that the motion be granted. The Division filed a response requesting that the motion be denied. The 90-day period for the issuance of this order began on March 9, 2020, the date the Division's response was received.

OPINION

Hodgson Russ LLP seeks permission to file an amicus curiae brief and participate in oral argument in this matter based upon the assistance it can provide this Tribunal because of its: (1) depth of knowledge and experience gained from representing numerous similarly situated taxpayers; (2) direct involvement in two particular cases bearing on the outcome of the present matter; and (3) ability to invite this Tribunal's attention to arguments that otherwise might not be considered. Petitioners urge that the motion be granted because the proposed amicus curiae brief raises issues of importance and because the perspective of Hodgson Russ LLP will enlighten this Tribunal. The Division's objections will be addressed below.

The issue of whether to accept a proposed amicus curiae brief is within the discretion of this Tribunal (*see Matter of Std. Mfg. Co.*, Tax Appeals Tribunal, July 11, 1991). There being no rules or regulations governing the filing of amicus curiae briefs in matters before us, in the past we have looked for guidance to the rules regarding the filing of amicus curiae briefs before the Court of Appeals (*Matter of ERW Enters., Inc.*, Tax Appeals Tribunal, October 22, 2018; *Matter of Std. Mfg. Co.*). Such rules require a non-party to obtain permission to file an amicus curiae brief through the filing of a motion (20 NYCRR 500.23). The criteria for granting relief are as follows:

“(4) Criteria. Movant shall not present issues not raised before the courts below.¹ A motion for amicus curiae relief shall demonstrate that:

(i) the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency;

(ii) movant could identify law or arguments that might otherwise escape the Court's consideration; or

¹ In matters before the Tribunal, new issues may be raised for the first time in an amicus curiae brief under certain circumstances (*see Matter of Consol. Edison Co. of New York, Inc.*, Tax Appeals Tribunal, May 28, 1992.)

(iii) the proposed amicus curiae brief otherwise would be of assistance to the Court” (20 NYCRR 500.23 [a]).

The Division asserts that the proposed amicus curiae brief cannot be found to be of any further assistance to this Tribunal because of the public availability of various blogs and articles regarding the issues presented here, and notes in particular those authored by Hodgson Russ LLP. However, in *Matter of Std. Mfg. Co.*, we said:

“We do not find the fact that the proposed amicus curiae has other means available to make the Tribunal and the public aware of its position on the issues presented here to be relevant to a decision on whether to grant amicus curiae relief using the Court of Appeals rules as a guideline.”

In response to that holding, the Division argues that a proposed amicus curiae today has many more means available to it to share information publicly than it would have had at the time of the issuance of *Matter of Std. Mfg. Co.* The Division’s argument misses the point. If the availability of information was not relevant to the issue of whether to grant amicus curiae relief in the past, it does not become relevant just because now there is more information available.

The Division also argues that the acceptance of the proposed amicus curiae brief could lend confusion rather than clarity to the issues, as the arguments in the proposed amicus curiae brief are not based on the entire record. The Division notes that unlike civil court cases where the record of the proceedings is available to the public, the record in Tribunal cases is not available to the public, other than Administrative Law Judge determinations and Tribunal decisions (*see* Tax Law §§ 697 [e]; 2006 [9]). Thus, a proposed amicus curiae is limited to presenting an argument in a brief based solely upon the facts as set forth in the determination of the Administrative Law Judge. While this is true, these circumstances were no different at the time the amicus curiae brief was accepted in *Matter of Std. Mfg. Co.* The Division has not

attempted to distinguish the two cases and we see no reason to do so. The Division does correctly assert that in its response to the amicus curiae brief, it might not be able to address an error therein because it is prohibited from releasing parts of the record that are not available to the public. However, this causes no prejudice to the Division as it may assert errors and direct this Tribunal to those parts of the record that support its assertions.

Accordingly, we find that the proposed amicus curiae brief meets the criteria of 20 NYCRR 500.23 (a) in that it is of assistance to this Tribunal.

Additionally, the Division argues that the proposed amicus curiae brief should be rejected as untimely. The Division points to the current rules of the Court of Appeals for the timing of filing a motion for amicus curiae relief for guidance. Specifically, the Division notes that 20 NYCRR 500.23 (a) (1) (iii) for normal course appeals would be difficult to apply because it utilizes regularly scheduled court sessions in its timing provisions and the Tribunal has no regularly scheduled court sessions. We agree. The Division then urges that the proper rule to follow would be 20 NYCRR 500.23 (a) (2) for appeals selected for review by the alternative procedure, which requires a return date no later than the filing date for the respondent's submission on the appeal. Under this rule, the Division proposes that a motion for amicus curiae relief should have been filed by January 9, 2020, the date the Division's brief in opposition to petitioner's exception was due. The Division argues that as the motion on behalf of Hodgson Russ LLP for amicus curiae relief was filed on February 10, 2020, 45 days prior to the scheduled oral argument, it is prejudiced by lack of an opportunity to respond on the merits, and the motion should be denied. We disagree. While the Court of Appeals timing rule for normal course appeals does not work for the tax appeals exception process, neither does its timing rule for appeals selected for the alternative procedure. Initially, it is noted that there is

no alternative procedure available in the tax appeals exception process. Also, cases selected for the alternative procedure at the Court of Appeals include cases such as those subjected to a limited scope of review, those with narrow issues of law, and other similar cases (20 NYCRR 500.11 [b]). Thus, even if our procedures provided for an alternative procedure similar to that of the Court of Appeals, it would not be available in the present case, which is more in the nature of a normal course appeal. Therefore, on the issue of timeliness, we will continue to follow *Matter of Std. Mfg. Co.*, which looked to the Court of Appeals rule at the time and held that motions for amicus curiae relief must be filed “sufficiently in advance of the argument of the appeal to allow adequate court review of the motion and the proposed brief.” The motion for amicus curiae relief in this case was filed 45 days from the date of the scheduled argument, enough time for us to review the motion and proposed brief (*see Matter of Std. Mfg. Co.* [accepted amicus curiae brief filed 41 days prior to oral argument]). The Division asserts that this does not leave it with an opportunity to respond on the merits. Assuming the oral argument had been held on March 26, 2020, it is most likely that additional time would have been provided to the Division after the oral argument if necessary (*see Matter of Std. Mfg. Co.* [parties not expected to be prepared to comment on the amicus curiae brief at oral argument and given 30 days after oral argument to file written responses to the brief.]). However, as the oral argument was not held and is currently awaiting rescheduling, there is sufficient time to allow for the parties to respond to the merits of the amicus curiae brief should they choose to do so.

Based upon the discussion above, the motion of Hodgson Russ LLP to file an amicus curiae brief is granted.

However, the motion of Hodgson Russ LLP, to appear and participate at oral argument is denied. The issue of whether an amicus curiae be allowed to appear and participate in oral

argument is also within the discretion of this Tribunal (*see Matter of Std. Mfg. Co.*).

In the present case, Hodgson Russ LLP has presented no “extraordinary reasons” for participating in the oral argument (*Matter of 244 Bronxville Assoc.*, Tax Appeals Tribunal, October 1, 1998 [Tribunal requires an amicus curiae to provide extraordinary reasons in order to participate in oral argument, relying on Federal Rules of Appellate Procedure, Rule 29 for guidance]²).

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion of Hodgson Russ LLP to file an amicus curiae brief is hereby granted and its proposed amicus curiae brief is accepted. The motion of Hodgson Russ LLP to appear and be heard at oral argument is denied. The parties will be provided 30 days from the date of this order to file their response on the merits to the amicus curiae brief filed on behalf of Hodgson Russ LLP.

² Although the Federal Rule now provides that an amicus curiae can participate in oral argument only with permission of the court, we will continue to utilize extraordinary reasons as the standard for our review of the question.

DATED: Albany, New York
June 8, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner