

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions
of
**ALBERT R. LEPAGE, FRANCOISE O. LEPAGE,
RONALD A. JALBERT, MARIETTE JALBERT,
AND ANDREW P. BAROWSKY**
for Redetermination of Deficiencies or for Refund of
New York State Personal Income Tax under Article 22
of the Tax Law for the Years 2010, 2011, and 2012.

ORDER
DTA NOS. 828035, 828036,
828037, AND 828038

Petitioners, Albert R. LePage, Francoise O. LePage, Ronald A. Jalbert, Mariette Jalbert and Andrew P. Barowsky filed an exception to the determination of the Administrative Law Judge issued on December 19, 2019. Petitioners and the Division of Taxation (Division) subsequently filed briefs on exception. Oral argument in this matter is scheduled for October 29, 2020. Petitioners are appearing by Jones Day (Dennis Rimkunas, Esq., of counsel). The Division is appearing by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel).

On August 17, 2020, The Business Council of New York, Inc. (Business Council), appearing by Hodgson Russ LLP (Timothy P. Noonan, Esq., of counsel), filed a notice of motion with the Tax Appeals Tribunal for leave to file an amicus curiae brief, together with an affirmation in support of the motion and the proposed amicus curiae brief. The parties were granted until September 18, 2020 to respond to the motion. Petitioners filed a response in support of the motion. The Division filed a response in opposition. The 90-day period for the issuance of this order began on September 16, 2020, the date the parties' responses were received.

OPINION

The Business Council advocates for the interests of its members on policy matters affecting economic development, jobs and the general business climate in New York State. It has more than 2,400 members, including both large and small businesses, local chambers of commerce, and professional and trade associations. The Business Council asserts that its amicus curiae brief will assist this Tribunal because of its position as the leading business organization in New York State.

The substantive dispute in the present matter involves the proper application of the mandatory S corporation election under Tax Law § 660 (i). That provision requires an eligible corporation to elect New York S corporation status if more than 50% of the corporation's federal gross income in the current year is "investment income," a term defined in the statute. Petitioners' exception contests the Administrative Law Judge's interpretation of that term as applied to the present matter.

The Business Council contends that its brief directs the Tribunal's attention to law or arguments that might not otherwise be considered and that its unique perspective provides special assistance in resolving the substantive dispute. Specifically, the Business Council emphasizes the potential ramifications of the Administrative Law Judge's determination, including the loss of preferential tax rates available only to C corporations, and proposes a narrower reading of the relevant statute. The Business Council contends that its interpretation is consistent with the statute's legislative history.

The Division asserts that the proposed amicus curiae brief cannot be of any assistance to this Tribunal because it is premised on policy concerns better addressed to the Legislature. The Division contends that the proposed statutory interpretation in the amicus curiae brief is

contrary to the clear statutory language. The Division also asserts that the proposed amicus curiae brief's main policy concern, the loss of preferential C corporation tax rates for certain incentivized activities, is misguided.

The issue of whether to accept a proposed amicus curiae brief is within the discretion of this Tribunal (*Matter of Std. Mfg. Co.*, Tax Appeals Tribunal, July 11, 1991). Because our Rules of Practice and Procedure (20 NYCRR Part 3000) do not provide for the filing of amicus curiae briefs in matters before us, we look to the rules regarding the filing of amicus curiae briefs before the Court of Appeals for guidance (*Matter of Std. Mfg. Co.*; *Matter of Obus*, Tax Appeals Tribunal, June 8, 2020). Those rules require a non-party to obtain permission to file an amicus curiae brief by filing a motion (22 NYCRR 500.23). The motion must demonstrate that either:

“(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

(iii) the proposed amicus curiae brief otherwise would be of assistance to the Court” (22 NYCRR 500.23 [a] [4]).

We agree that the Business Council is in a unique position to explain the potential consequences of the Administrative Law Judge's determination on its members. Such consequences may be relevant in our construction of the statute in question (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 143). Accordingly, we find that the proposed amicus brief will be of assistance to this Tribunal and we will accept it on that basis.

The Division also contends that the Business Council's amicus curiae brief should be rejected as untimely. The Division proposes that the proper rule for this Tribunal to follow is

the Court of Appeals' rule for amicus curiae motions with respect to appeals selected for review by its alternative procedure (20 NYCRR 500.23 [a] [2]). That rule requires a return date for the motion no later than the filing date for the respondent's submission on the appeal (*id.*). The Division notes that its brief in the present matter was due on May 26, 2020 and asserts, accordingly, that the present amicus curiae motion, filed on August 17, 2020, was late and should be rejected. The Division further asserts that it will not have an opportunity to respond to the merits of the amicus curiae brief prior to the October 29, 2020 scheduled oral argument in this matter and will thus be prejudiced by this Tribunal's consideration of that brief.

As we recently stated in response to a similar argument by the Division, a motion for amicus curiae relief "must be filed 'sufficiently in advance of the argument of the appeal to allow adequate [Tribunal] review of the motion and the proposed brief'" (*Matter of Obus*, quoting *Matter of Std. Mfg. Co.*). In *Matter of Obus* and *Matter of Std. Mfg. Co.*, we determined that amicus motions filed 45 and 41 days, respectively, before oral argument were timely. Here, the motion was filed 73 days before the scheduled oral argument. Furthermore, as the issuance of this order prior to the scheduled oral argument indicates, we have had enough time to review the motion and the proposed brief. We thus reject the Division's argument that the present motion was untimely filed.

We do recognize that the parties should be given an opportunity to respond to the merits of the amicus curiae brief. Given the short period of time between the issuance of this order and the scheduled oral argument, we shall allow the parties 15 days from the scheduled date of oral argument to file written responses to the amicus curiae brief should they choose to do so. The parties may also respond to the amicus brief at oral argument.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion of the

Business Council to file an amicus curiae brief is hereby granted and its proposed amicus curiae brief is accepted. The parties will be provided 15 days from the scheduled date of oral argument to file their responses on the merits of the amicus curiae brief.

DATED: Albany, New York
October 1, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner