

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

SOUTHERN BOULEVARD GIFT PLUS CORPORATION :

DECISION

DTA No. 813607

for Redetermination of a Deficiency/Revision of a Determination :
or for Refund of Sales and Use Taxes under Article(s) 28 and 29
of the Tax Law for the Period Ended November 30, 1989. :

Petitioner Southern Boulevard Gift Plus Corporation, 979A Southern Boulevard, Bronx,
New York 10459, filed an exception to the order of the Administrative Law Judge issued on
May 11, 1995. Petitioner appeared by Charles R. Harary, C.P.A. The Division of Taxation
appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter on
July 12, 1995 stating it would not be filing a brief, which date began the six-month period for the
issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals.

FINDINGS OF FACT

We find the facts as follows.

On October 28, 1994, the Bureau of Conciliation and Mediation Services issued a
Conciliation Order Dismissing Request to petitioner and its representative.

Petitioner filed a petition for revision of a determination of sales and use tax for the period
September 1, 1989 through November 30, 1989 on February 15, 1995.

On March 9, 1995, Frank A. Landers of the Division of Tax Appeals' Petition Intake,
Review and Exception Unit issued a Notice of Intent to Dismiss Petition to petitioner's

representative Charles R. Harary for failure to file a timely petition. The Notice stated that the petition was not mailed until February 15, 1995 or 106 days after the issuance of the Conciliation Order Dismissing Request on November 1, 1994.¹

No response was received from petitioner to this Notice.

A copy of the Notice of Intent to Dismiss Petition was also sent to the Division of Taxation (hereinafter the "Division"). In response, the Division submitted affidavits and documentary evidence establishing that the Conciliation Order Dismissing Request was sent by certified mail to petitioner on October 28, 1994 at petitioner's last known address at c/o Charles R. Harary, CPA, 2625 National Drive, Brooklyn, New York 11234 and to petitioner's representative Charles R. Harary, CPA at 2625 National Drive, Brooklyn, New York 11234. The affidavits submitted by the Division described the customary office practice in preparing and mailing conciliation orders. The documentary evidence consisted of a certified mailing record which lists on page two Southern Boulevard Gift Plus Corporation and Charles R. Harary, CPA as addressees and bears a postmark of October 28, 1994. At the bottom of page two, the page listing petitioner and its representative as the addressees, the number "13" has been filled in as the "Number of Pieces Listed by Sender," and the number "13" has also been filled in as the "Total Number of Pieces Received at Post Office." The page also contains a postal employee's initials further verifying receipt at the post office.

On May 11, 1995, the Administrative Law Judge, sua sponte, ordered that the petition be dismissed with prejudice on the ground that it was not timely filed within the 90-day period prescribed by Tax Law § 170(3-a)(e). The Administrative Law Judge found that the petition was not mailed until February 15, 1995 or 110 days after the Conciliation Order Dismissing Request was issued on October 28, 1994.

¹The Conciliation Order Dismissing Request was actually issued on October 28, 1994. We are unsure of the origin of the November 1, 1994 date contained in the Notice of Intent to Dismiss Petition. However, even if the November 1, 1994 date was used, the petition is still untimely.

Petitioner filed an exception to the order of the Administrative Law Judge dismissing his petition with the Tax Appeals Tribunal.

OPINION

Tax Law § 170(3-a)(e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued.

When the timeliness of the petition is at issue, the Division must establish proper mailing of the Conciliation Order. We find that the Division has met its burden to establish proper mailing of the Conciliation Order Dismissing Request to petitioner on October 28, 1994 by submitting affidavits describing its general mailing procedure and the mailing records which showed that the procedure was followed in this matter.

On exception, petitioner argues that it should be granted leniency because "it took the State of New York about 5 years . . . to notify the taxpayer on the balance due" (Petitioner's exception, p. 1). In this regard, petitioner also argues that penalty and interest must be reduced.

We affirm the order of the Administrative Law Judge. The Conciliation Order Dismissing Request was issued to petitioner on October 28, 1994. The petition in this matter was not filed until February 15, 1995, or 110 days later. Therefore, the petition was not timely filed within the 90-day period.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Southern Boulevard Gift Plus Corporation is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of Southern Boulevard Gift Plus Corporation is dismissed with prejudice.

DATED: Troy, New York
November 30, 1995

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

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

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