

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
COUGAR INTERNATIONAL, INC. : **DECISION**
for Redetermination of a Deficiency/Revision :
of a Determination or for Refund of Sales and :
Use Tax under Articles 28 and 29 of the Tax :
Law for the Period 12/1/82-11/30/85. :

Petitioner, Cougar International, Inc., 600 DeGraw Street, Brooklyn, New York 11217, filed an exception to the order of the Administrative Law Judge issued on December 1, 1988 dismissing its petition for redetermination of a deficiency/revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period December 1, 1982 through November 30, 1985 (File No. 806174). Petitioner appeared by Joseph B. Dayan, Vice-President of Cougar International, Inc. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq. of counsel).

Petitioner did not file a brief. The Division submitted a letter in lieu of a brief, as well as affidavits. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner timely filed its petition for revision of a determination of sales and compensating use tax.

FINDING OF FACTS

We find the facts as follows.

On April 29, 1988, the Bureau of Conciliation and Mediation Services (hereinafter the Bureau) held a conciliation conference upon the request of petitioner.

As a result of this conference, the Bureau issued a conciliation order to petitioner dated July 22, 1988. Affidavits and documentary evidence submitted by the Division of Taxation on exception indicate that the conciliation order was mailed to petitioner on July 22, 1988 at petitioner's last known address at 600 DeGraw Street, Brooklyn, New York 11217.

Petitioner filed a petition for revision of a determination of sales and compensating use tax for the period December 1, 1982 through November 30, 1985. The envelope containing the petition bears a certified mail postmark date of October 21, 1988.

The Administrative Law Judge, sua sponte, ordered that the petition be dismissed with prejudice on the ground that the petition 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 October 21, 1988, or 91 days after the conciliation order was mailed to petitioner on July 22, 1988.

On December 30, 1988, petitioner filed with the Tax Appeals Tribunal an exception to the order of the Administrative Law Judge dismissing its petition.

OPINION

We affirm the order of the Administrative Law Judge.

Tax Law § 170.3-a(e) provides that a conciliation order shall not be binding on the taxpayer if the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is "issued" within the meaning of Tax Law § 170.3-a(e) at the time of its mailing to the taxpayer (Robert G. Wilson & GSA Corp., Tax Appeals Tribunal, July 13, 1989). In the order below, the Administrative Law Judge found that the conciliation order had been mailed to petitioner on July 22, 1988. Petitioner has not challenged that finding. Further, the affidavits and documents submitted by the Division,¹ which are not

¹We recognize that our prior decisions have firmly established that new or additional evidence which was not part of the record before the Administrative Law Judge may not subsequently be submitted for consideration upon review of the case by the Tax Appeals Tribunal (see, Ronnie's Suburban Inn, Inc., Tax Appeals Tribunal, May 11, 1989). In this case, we recognize a limited exception to that rule where the Administrative Law Judge has issued a

disputed by petitioner, confirm that the conciliation order was in fact mailed to petitioner on July 22, 1988. Because petitioner has not presented any evidence disputing or challenging the Administrative Law Judge's finding with regard to the mailing date of the conciliation order, no issue of fact on the timeliness question has been raised requiring a hearing. Accordingly, because petitioner's request for a hearing was not mailed until October 21, 1988 or 91 days later than the date of issuance of the conciliation order, we find that the petition was not timely filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Cougar International, Inc., is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Cougar International, Inc. is denied.

DATED: Troy, New York
February 8, 1990

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

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

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

sua sponte order, thus depriving the parties of an opportunity to present evidence on the issue of timeliness until this stage of the review process.