

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

SPECIAL SERVICE TRANSPORTATION, INC. :

for Redetermination of a Deficiency or for Refund of
Corporation Tax under Article 9 of the Tax Law for the
Period January 1, 1993 to December 31, 1994. :

DECISION
DTA Nos. 816075
and 816076

In the Matter of the Petition :

of :

SPECIAL SERVICE TRANSPORTATION, INC. :

for Redetermination of a Deficiency or for Refund of
Highway Use Tax under Article 21 of the Tax Law for the
Period September 1, 1991 to June 30, 1995. :

Petitioner Special Service Transportation, Inc., 1100 West Smith Road, Medina, Ohio 44256-2443, filed exceptions to the orders of the Administrative Law Judge issued on October 27, 1997. Petitioner appeared by Raese & Strickland, Inc. (Robert L. Strickland, CPA). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Neither party filed a brief in this matter. Oral argument was not requested.

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

ISSUE

Whether petitioner timely filed its petitions following the issuance of the Conciliation Orders.

FINDINGS OF FACT

We find the following facts.

In lieu of a conciliation conference which was scheduled for March 13, 1997, petitioner opted to have these matters determined by correspondence and by Conciliation Orders (CMS Nos. 157564 and 157567), dated May 30, 1997, petitioner's request was denied and the statutory notices were sustained.

On August 29, 1997, the Division of Tax Appeals received a petition seeking a redetermination of a deficiency of tax under Articles 9, 9-A, 13, 13-A, 27, 32 and 33 of the Tax Law for the years 1993 and 1994 (DTA No. 816075) and a petition seeking a redetermination of a deficiency of tax under Article 21 of the Tax Law for the periods September 1, 1991 through June 30, 1995 (DTA No. 816076). The petitions were contained in a Flight-Ready Letter Express envelope which does not bear any date. This envelope was received and in-date stamped by the Division of Tax Appeals on August 29, 1997.

On September 12, 1997, Frank A. Landers of the Division of Tax Appeals' Petition Intake, Review and Exception Unit issued two Notices of Intent to Dismiss Petition to petitioner for failure to file a timely petition in both matters. The Notices stated that the petitions were not filed until August 29, 1997 or 91 days after the issuance of the Conciliation Orders dated May 30, 1997. Following the issuance of the Notices of Intent to Dismiss Petition, the parties were given 30 days to respond. Petitioner failed to respond.

A copy of the Notices of Intent to Dismiss Petition were also sent to the Division of Taxation (hereinafter the "Division"). In response, the Division submitted affidavits and documentary evidence establishing that the Conciliation Orders were sent by certified mail on May 30, 1997 to petitioner at its last known address at 1100 West Smith Road, Medina, OH 44256-2443 and to petitioner's representative Robert L. Strickland, CPA, at Raese & Strickland, Inc., 316 North Court Street, Medina, OH 44256. 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 one Special Services Transp., Inc., which appears twice with certified mailing numbers P482629750 and P482629754, as well as Robert L. Strickland, CPA, which appears twice with certified mailing numbers P482629751 and P482629755. Page one of the certified mailing record bears a postmark of May 30, 1997. At the bottom of page one, the page listing petitioner and petitioner's representative as the addressees for two separate mailings, the number "15" has been filled in as the "Total Number of Pieces Listed by Sender," and the number "15" 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.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge, *sua sponte*, ordered that the petitions be dismissed with prejudice on the ground that they were not timely filed within the 90-day period prescribed by Tax Law § 170(3-a)(e). The Administrative Law Judge found that the petitions were not filed until August 29, 1997 or 91 days after the Conciliation Orders were issued on May 30, 1997.

ARGUMENT ON EXCEPTION

Petitioner concedes that the petitions were not filed until August 29, 1997 due to an error in its calculation of the time that it had within which to file the petitions. Petitioner contends that its filing the petitions one day late in no way prejudices the State of New York and that it would be to the benefit of both parties to have this matter decided on the merits.

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 Orders to petitioner on May 30, 1997 by submitting affidavits describing its general mailing procedure and the mailing record which showed that the procedure was followed in this case.

There is no dispute from petitioner that it filed its petitions outside the 90-day period provided for by Tax Law § 170(3-a)(e). Accordingly, we agree with the conclusion of the Administrative Law Judge that since petitioner failed to file its petitions protesting the Conciliation Orders within 90 days, such petitions were untimely filed and properly dismissed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Special Service Transportation, Inc. are denied;
2. The orders of the Administrative Law Judge are sustained; and

3. The petitions of Special Service Transportation, Inc. are dismissed.

DATED: Troy, New York
June 11, 1998

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner