

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
B & C Getty Service Station	:	DECISION
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1979	:	
through August 31, 1982.	:	

Petitioner, B & C Getty Service Station, 1255 Hempstead Turnpike, Elmont, New York 11003, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1979 through August 31, 1982 (File No. 56329).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 5, 1985 at 1:15 P.M. Petitioner appeared by John B. Amrod, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether B & C Getty Service Station filed a timely petition for a hearing pursuant to section 1138(a)(1) of the Tax Law.

FINDINGS OF FACT

1. On June 27, 1983, the Audit Division, as the result of an audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due

against the petitioner, B & C Getty Service Station ("B & C")¹ for taxes due of \$65,998.00, plus penalty of \$15,013.56 and interest of \$18,073.14, for a total due of \$99,084.70 for the period September 1, 1979 through August 31, 1982. On the same date, the Audit Division issued similar notices against Peter Corsentino and Angelo Bacalocostantis, as officers of B & C. All of the notices were mailed by certified mail on June 27, 1983.

2. On October 30, 1982, Peter Corsentino, vice-president and secretary of B & C, executed a consent extending the statute of limitations for issuing an assessment for sales and use taxes against B & C for the period September 1, 1979 through August 31, 1980 to September 20, 1983.

3. At the hearing, Angelo Bacalocostantis testified that upon receipt in late June or early July of 1983 of the notice issued to B & C he immediately turned it over to petitioner's accountant, Elias Loukas, with instructions to the effect that he (Angelo Bacalocostantis) and Mr. Corsentino intended to protest it.

On September 30, 1983, the Tax Appeals Bureau received a petition for a hearing on behalf of B & C. The petition was dated September 27, 1983 and was signed by Angelo Bacalocostantis. The date of the United States postmark stamped on the envelope was September 27, 1983 and the petition was mailed by certified mail.

1 The petitioner's real name is Bacor Automotive Services, Inc. d/b/a B & C Getty Service Station. The Certificate of Registration filed on behalf of petitioner with the Audit Division specified petitioner's business name as B & C Getty Service Station and was signed by Peter Corsentino as owner. The sales and use tax returns filed on behalf of petitioner for the period at issue indicated petitioner's name as B & C Getty Service Station and were signed by Peter Corsentino with titles varying from president to vice president and secretary.

4. By letter dated October 7, 1983, the Tax Appeals Bureau advised petitioner that it had no petition rights in this matter because its petition of September 27, 1983 was mailed 92 days after the date of the notice of determination (June 27, 1983) and, therefore, was not timely.

5. Petitioner contends the phrase "within ninety days after giving of notice of such determination" as used in section 1138(a)(1) of the Tax Law means that a taxpayer has ninety days after receipt of a notice to file a petition for a hearing.

Petitioner further claims that Rule 2103.(b)2 of the New York Civil Practice Law and Rules should apply to section 1138(a)(1) of the Tax Law. Rule 2103.(b)2 provides, in pertinent part, that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period."

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, as follows:

"...Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing..."

B. That section 1147(a)(1) of the Tax Law provides as follows:

"§1147. Notices and limitations of time

(a)(1) Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The

mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice" (emphasis added).


C. That, since September 25, 1983 was a Sunday, petitioner's time to file a petition for a hearing regarding the June 27, 1983 notice expired on September 26, 1983. Petitioner's petition was mailed on September 27, 1983 and was, therefore, not timely. As there are specific provisions in the Tax Law regarding the giving of notice, Rule 2103.(b)2 of the New York Civil Practice Law and Rules is not dispositive.

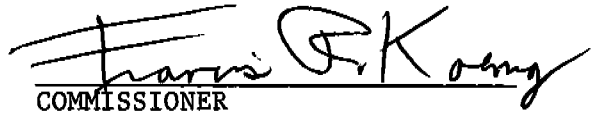
D. That the petition of B & C Getty Service Station is hereby denied.


DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER