STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WHITE ARROW SERVICE STATIONS, INC.	:	DECISION DTA No. 806940
for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Year 1987.	:	

Petitioner White Arrow Service Stations, Inc., 2131 Walden Avenue, Buffalo, New York 14225 filed an exception to the determination of the Administrative Law Judge issued on June 27, 1991 with respect to its petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the year 1987.

Petitioner appeared by Samuel H. Borenkind, Esq. and Morris A. Mondschein, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner filed a memorandum of law in support of its exception. The Division of Taxation submitted a letter in opposition. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether petitioner established that its diesel motor fuel tax return was timely filed.

II. Whether petitioner established reasonable cause for the abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and we make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

Petitioner, White Arrow Service Stations, Inc., filed a Return of Tax on Diesel Motor Fuel for the month of October 1987. The return was signed by Philip Hasselback as vice-president and dated November 20, 1987. It bore a Division of Taxation receipt stamp date of November 30, 1987. The return was accompanied by a check, dated November 20, 1987, payable to the New YorkState Tax Commission. The check was drawn in the amount of $47,343.70, the tax shown due on the accompanying motor fuel tax return. The earliest date stamped on the back of the check is November 30, 1987 from Norstar Bank of Upstate New York. The check is imprinted with a stamp from another bank dated December 1, 1987.

The envelope which was used to mail the return bears an illegible marking. A legible postmark, dated November 27, 1987, Buffalo, NY, is located next to the illegible marking.

The Division of Taxation issued a Notice and Demand for Payment of Tax Due Under Diesel Tax Law, dated February 4, 1988, to petitioner, White Arrow Service Stations, Inc. The notice assessed penalty of $4,734.37, plus interest of $70.09, for a total amount due of $4,804.06. The notice, which was issued because of petitioner's late filing of a tax return, explained that petitioner's diesel tax return for the period October 1987 was received on November 30, 1987.

Petitioner's motor fuel tax returns were prepared by its vice- president, Philip Hasselback. It was Mr. Hasselback's practice to place the date on the return and, on the same day, take the return to the Post Office on William Street in Buffalo, New York. Mr. Hasselback made a point of getting the return to the Post Office before 10:30 P.M. on the last day permitted for filing because if he was not there by that time the return might be dated the next day.

At the hearing, Mr. Hasselback testified that he personally took the return for the period October 1987 to the main Post Office in Buffalo before 10:30 P.M. on November 20, 1987.

We make the following additional finding of fact:

> Mr. Hasselback also testified that it was his practice to take the tax returns to the post office before 10:30 P.M., "[b]ecause if it isn't there before 10:30, the way they handle the mail, they usually pull on the other side of the drop slot, they pull the bags away and it can get lost before they put the next bag in or it could wind up on

> the next day. Things have happened, not with these returns before that I know of, but with other mail that has been delayed."

Petitioner presented a series of cancelled checks in order to establish that a substantial period of time elapses between when a check is received by the Division and when it is presented to petitioner's bank according to the stamp on the back of the check. These checks, which accompanied timely returns, disclose the following:

Date of Check	Date Check Presented to Petitioner's Bank
December 19, 1988	January 11, 1989
February 20, 1989	March 7, 1989
March 20, 1989	April 5, 1989
March 20, 1989	April 10, 1989
March 20, 1989	April 10, 1989
April 20, 1989	May 2, 1989
September 18, 1989	October 3, 1989

Petitioner's check register statements and cancelled checks are no longer available because Mr. Hasselback's basement was flooded and the individuals who cleaned up inadvertently threw the items out. Petitioner has the cancelled check relating to the return in issue because, when he was told there was a problem with the return, the check was set aside.

On November 20, 1987, the date the check for the October 1987 motor fuel tax was drafted, petitioner's bank balance was sufficient to satisfy the outstanding liability for motor fuel tax.

Other than the current matter, there has only been one other instance where New York State asserted that a return from petitioner was not timely filed. That incident occurred more than five years ago and ultimately resulted in the conclusion that no penalty would be assessed.

The United States Postal Service has no way of affirming or denying that petitioner's envelope was deposited on November 20, 1987.

Petitioner was given a period of time after the hearing to ask the United States Postal Service to interpret the markings on the face of the envelope. In a letter dated July 13, 1990, the following explanation was provided:

> "It appears this letter required additional processing because the 17-cent stamp, when applied, covered the preprinted Facing Identification Mark (FIM). The addressee preprinted this FIM along with a barcode representing their ZIP+4 to allow the Postal Service to identify and separate this mail for direct processing on bar code sorters.
>
> Because the FIM was covered by your stamp, it was directed to our automation operation where a barcode was sprayed over the preprinted barcode.
>
> It is my opinion that when it arrived at the Albany Mail Processing Center, the bar code could not be clearly read and had to be sorted through mechanized equipment, where the mail is read by a human being who keys in the ZIP Code from the mail.
>
> While I cannot give you exact timeframes for the processing of this particular piece of mail, I hope this information will be helpful to you."

OPINION

The Administrative Law Judge determined that petitioner failed to establish that its motor fuel tax return was timely filed pursuant to Tax Law § 289-d since the only legible marking on the envelope containing the return was a postmark that fell outside the prescribed filing period. In addition, the Administrative Law Judge found that petitioner failed to establish reasonable cause justifying the abatement of penalties for the late filing.

On exception, petitioner argues that the evidence establishes that the tax return was timely filed. Specifically, petitioner claims that the illegible marking on the envelope is a postmark and that the United States Postal Service admits that there was an indefinite delay in processing. Petitioner asserts that in view of the ambiguities concerning the markings on the envelope, the Postal Service's admitted processing delay, and the testimony of petitioner's vice president that he timely mailed the return, petitioner has established that the return was timely filed. In the alternative, petitioner asserts that penalty be waived on the grounds that any delay in filing was due to reasonable cause and not due to willful neglect.

In response, the Division of Taxation (hereinafter the "Division") requests that the Administrative Law Judge's determination be sustained.

We affirm the determination of the Administrative Law Judge.

The motor fuel tax is imposed and administered in accordance with Article 12-A of the Tax Law. Tax Law § 287(1) requires distributors to file motor fuel tax returns for a particular month on or before the 20th day of the succeeding month stating the "fuel imported, manufactured or sold by such distributor in the state during the preceding calendar month . . . ." A distributor or other person who fails to file a return or pay any tax within the prescribed time is subject to a penalty of ten percent of the amount of the tax reported (Tax Law § 289-b[1][a]).

Tax Law § 289-d(1) sets forth the general rule governing the mailing of returns and other documents and provides, in pertinent part:

> "Except as otherwise provided in this subdivision, if any return, claim, statement, notice, application or other document required to filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by the United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subdivision shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, or for making the payment, including any extension granted for such filing or payment, and only if such document or payment was deposited in the mail, postage prepaid, properly addressed to the tax commission, bureau, office, officer or person with which or with whom the document is required to be filed or to which or to whom such payment is required to be made" (emphasis supplied).

The "timely mailing" rule of Tax Law § 289-d is further qualified by former 20 NYCRR 413.3(a)(2)(iii)(a)[1] which provides:

> "If the postmark on the envelope or wrapper containing the document or payment is made by the United States Postal Service, such postmark must bear a date stamped by the United States Postal Service which is within the prescribed period or on or before the prescribed date for filing and paying. If the postmark stamped by the United States Postal Service on the envelope or wrapper does not bear a date which falls within the prescribed period or on or before the prescribed date for filing and paying, the document or payment will not be considered to be timely filed, or paid, regardless of when the envelope or wrapper is deposited in the mail. Accordingly, the sender assumes the risk that the envelope or wrapper will bear a postmark date stamped by the United States Postal Service within the prescribed period or on or before the prescribed date for filing and payment. . . . Furthermore, if the postmark made by the United States Postal Service on the envelope or wrapper containing the document or payment is not legible, the person who or which is required to file or pay has the burden of proving when the postmark was made" (emphasis supplied).

In addition, Tax Law § 289-d(1) provides that if the taxpayer sent such document by United States registered mail (or certified mail as prescribed by regulation), such registration is prima facie evidence of delivery. Where the taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the postal service (see, Matter of Sipam Corp., Tax Appeals Tribunal, March 10, 1988).

Tax Law § 289-d is patterned after Internal Revenue Code § 7502, "Timely Mailing Treated As Timely Filing And Paying" (see, Matter of Harron's Elec. Serv., Tax Appeals Tribunal, February 19, 1988). It is, therefore, helpful to look to the Federal courts' interpretation of § 7502 for guidance. These courts have consistently held that where a legible postmark appears on the envelope, the postmark conclusively establishes the date of mailing and no evidence that the petition was in fact mailed on some other day will be allowed (Shipley v. Commissioner, 572 F2d 212, 214 [9th Cir 1978]; Drake v. Commissioner, 554 F2d 736, 738 [5th Cir 1977]).

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[1]For the period at issue, similar regulatory language for the general rule that timely mailing is treated as timely filing is found in former 20 NYCRR 410.3(a)(2)(iii); repealed, filed March 14, 1988, effective April 4, 1988.

In this case, petitioner contends that the envelope which contained the return was postmarked twice. Petitioner argues that the illegible marking on the return is in fact the original postmark, and that petitioner should be allowed to offer evidence aliunde to establish the actual mailing date. The United States Tax Court has interpreted the mailing rules of Internal Revenue Code § 7502 and the regulations promulgated thereunder[2] and has held that testimony or other evidence may be used to establish the date of an illegible postmark (see, Mason v. Commissioner, 68 TC 354 [1977]; Novak v. Commissioner, 36 TCM 1169 [1977]). These Tax Court decisions are distinguishable from the case at issue because there, each envelope in question bore solely an illegible postmark. In contrast, petitioner seeks to disavow the legible postmark date stamped on the envelope and desires to establish a mailing date within the prescribed period through the use of extrinsic evidence.

Even if this inquiry was appropriate, we are unable to conclude that the illegible markings on the envelope are in fact the original postmark. In support of its contention that the envelope was postmarked a second time, petitioner has proffered into evidence a letter from the United States Postal Service. This letter states that a barcode was sprayed over the preprinted barcode; however, there is no indication from the United States Postal Service that the envelope was postmarked a second time. Since petitioner has failed to prove that the illegible markings qualify as a postmark,[3] we are required by the Tax Law to determine matters of timely filing based upon the legible postmark that appears on the envelope in question (Tax Law § 289-d). The date of that postmark is beyond the prescribed period for filing.

The scheme of the Tax Law and the regulations thereunder place the responsibility for procuring a timely postmark on the taxpayer. Considering this responsibility, we are not unmindful of the circumstances under which the envelope containing the return was transmitted.

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[2]26 CFR 301.7502-1 is similar in scope and content to the New York regulations discussed herein.

[3]Assuming arguendo that petitioner was able to show that markings on the envelope qualify as a postmark, petitioner has not shown that such postmark was within the prescribed statutory period.

Petitioner's vice president testified that he chose to mail the return by regular United States mail on the evening of the last day for filing based on his understanding that if he delivered the document to the post office before a certain time in the evening, it would be postmarked that day, and not the next day. Such a decision cannot help but raise the specter of timeliness problems (see, Drake v. Commissioner, 554 F2d 736, 739). Petitioner assumed "the risk that the envelope or wrapper will bear a postmark date stamped by the United States Postal Service within the prescribed period or on or before the prescribed date for filing . . ." (former 20 NYCRR 413.3[a][2][iii][a]).[4] Unfortunately for petitioner, a postmark with the prescribed period failed to materialize. Accordingly, since the one postmark on the envelope conclusively establishes a mailing date after the prescribed date for filing, the return "will not be considered timely filed . . . regardless of when the envelope or wrapper was deposited in the mail" (former 20 NYCRR 413.3[a][2][iii][a]).

Finally, petitioner argues that the delay in filing the diesel motor fuel tax return was due to reasonable cause and not due to willful neglect. Petitioner contends that in view of the testimony of its vice president that he timely mailed the return, the Postal Service's admitted processing delay, and the fact that the Division processed and collected the payment within the same time frame as payments concededly timely made, such circumstances establish reasonable cause justifying the abatement of penalties. We disagree.

Tax Law § 289-b(1)(a) provides that "a distributor or other person who or which fails to file a return or to pay any tax within the time required by [Article 12-A] shall be subject to a penalty" on the amount of the tax due. Moreover, "if the tax commission [now the Commissioner of the Department of Taxation and Finance], determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all or part of such penalty" (Tax Law § 289-b[1][c]). The existence of reasonable cause or willful neglect must be determined on a case by case basis in light of all the circumstances specific to the taxpayer in

[4]Former 20 NYCRR 410.3(a)(2)(iii) contains similar language.

question including whether the taxpayer exercised ordinary business care and prudence (see, United States v. Boyle, 469 US 241, 244 [1985]; Haywood Lumber & Mining Co. v. Commissioner, 178 F2d 769, 770 [2d Cir 1950]; Matter of LT & B Realty v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121, 122 [3d Dept 1988]; Matter of Norwest Bank Intl., Tax Appeals Tribunal, May 3, 1990). Further, the burden is on the taxpayer to demonstrate that a penalty was improperly assessed (Matter of LT & B Realty v. New York State Tax Commn., supra).

Petitioner argues that it has established reasonable cause and the absence of willful neglect for the late filing and payment because the return was mailed by petitioner's vice president on the day it was due and any delay was caused by the United States Postal Service. In addition, petitioner asserts that since the payment was processed in the same time frame as other timely payments, the Division was not injured by any delay that might have occurred.

We do not agree that petitioner has established reasonable cause and the absence of willful neglect justifying the abatement of the assessed penalty. Petitioner's vice president testified that petitioner's practice of mailing its returns on the evening of the last day they were due was based on his opinion that this would result in the envelope containing the return being postmarked on the same day. This opinion was not based on information solicited by petitioner from the Postal Service, but rather, on anecdotal information gathered by petitioner's vice president. Nor has petitioner presented any evidence that its vice president's opinion was, in fact, correct. In our view, this testimony is insufficient to establish that petitioner's course of action was reasonable.

We also do not agree that the fact that the Division processed and collected the payment within the same time frame as previous timely payments constitutes reasonable cause justifying abatement of the penalty. Petitioner has cited no support for the view that in evaluating whether a taxpayer's actions were reasonable and not willfull neglect the determinative factor is whether the Division has been harmed by those actions. Tax Law § 289-b(1)(a) requires the imposition of a penalty if a return is not filed or payment is not made by a specific date. The purposes of the

penalty are to encourage the timely filing of returns and payment of taxes and to punish those failing to comply. As the penalty provisions are intended to control and influence the behavior of the taxpayer, the Division's actions in processing the payment clearly have no relevance. It is petitioner's conduct which must be evaluated. If the payment has been processed later than other payments (or earlier, for that matter), this would have not made petitioner's actions in taking the return and payment to the post office on the evening of the last day it was due any more or less reasonable. In our view, petitioner has not shown that its actions were reasonable and the penalty should be upheld.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner White Arrow Services Stations, Inc. is in all respects denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of White Arrow Services Stations, Inc. is denied; and

4. The Notice and Demand for Payment of Tax Due under Diesel Tax Law, dated February 4, 1988, is sustained.

DATED: Troy, New York
March 19, 1992

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

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

Dissenting Opinion in the Matter of the Petition of

WHITE ARROW SERVICE STATIONS, INC.

John P. Dugan (dissenting):

I respectfully dissent and would reverse the determination of theAdministrative Law Judge.

Where a distributor of motor fuel fails to timely file a return ortimely pay any tax due, penalty may be imposed unless it is shown that suchfailure was due to reasonable cause and not due to willful neglect (Tax Law§ 289-b[c]; 20 NYCRR 416.3[a]).

The facts in this case, while not sufficient to prove timely filing ofthe return, show to a person of ordinary prudence and intelligence that the late filing was due to reasonable cause and not due to willfulneglect.[5] Specifically, petitioner has shown reasonable cause for the late filing by showing: (1) that petitioner's vice president, Mr.Phillip Hasselback, who prepared the returns for petitioner, followed his normal practice and personally took the return to the post office in Buffaloon the last date for filing, November 20, 1987; (2) that he took it there prior to 10:30 P.M., a time which from his past experience indicated would result in it being postmarked on that date; and (3) it appears that the failure of the envelope containing the return to be postmarked on November 20, 1987 was due to the placement of the stamp on the envelope which required "additional processing" by the post office.[6]

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[5]The Division's regulations delineate specific grounds which "exemplify" reasonable cause and conclude with the following: "Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause" (20 NYCRR 416.3[5]).

[6]I recognize that the November 27, 1987 postmark would appear to controvert the fact that petitioner took the return to the post office on November 20, 1987. However, while the Postal Service has no way of affirming or denying that petitioner's envelope was deposited on November 20, 1987, the letter from Janet Ruhl, Consumer Affairs Representative for the Postal Service, indicates that the return required "additional processing" in Buffalo because of the manner in which the petitioner applied a 17-cent stamp. While Ms. Ruhl indicates she cannot give "exact timeframes for the processing of the particular piece of mail," it can reasonably be inferred that the additional processing resulted in the return being postmarked on November 27, 1987, rather than November 20, 1987, the day it was taken by Mr. Hasselback to the post office.

I also find petitioner's compliance record and the fact that the check which accompanied the return was drafted on November 20, 1987 supportive ofpetitioner's assertion that penalty should be waived.[7]

DATED: Troy, New York
March 19, 1992

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

[7]In determining whether reasonable cause exists, all of the facts and circumstances alleged as a basis for reasonable cause may be taken into account including a taxpayer's compliance record with respect to all of the taxes imposed pursuant to the Tax Law (20 NYCRR 416.3[b]).