

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LONG HAUL TRUCKING, INC.	:	DETERMINATION
	:	DTA NO. 818058
for Redetermination of a Deficiency or for Refund of	:	
Corporation Tax under Article 9 of the Tax Law for the	:	
Years 1991 through 1994.	:	

Petitioner, Long Haul Trucking, Inc., 6600 Jansen Avenue NE, Albertville, Minnesota 55301, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1991 through 1994.

The Division of Taxation appearing by Barbara G. Billet, Esq. (Nicholas A. Behuniak, Esq., of counsel) brought a motion on January 24, 2001 for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or file a petition with the Division of Tax Appeals within 90 days of the issuance of the notices of deficiency. The Division of Taxation submitted a Notice of Motion and the affidavit of Nicholas A. Behuniak, Esq., with attachments, including the affidavits of Geraldine Mahon and James Baisley, in support of its motion. Petitioner, by its representative, Michael J. Nichols, CPA, filed a letter in response to the motion as permitted by February 26, 2001, which date began the 90-day period for issuance of this determination.

Upon review of the pleadings, and the affidavits and documents submitted in support of the motion of the Division of Taxation, and the letter of Mr. Nichols in opposition thereto, Gary

R. Palmer, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation has shown that it is entitled to a determination granting summary determination in its favor on the ground that the material facts presented show petitioner's request for a conciliation conference with the Bureau of Conciliation and Medication Services was untimely.

FINDINGS OF FACT

1. The Division of Taxation ("Division") purportedly issued to petitioner, Long Haul Trucking, Inc., two notices of deficiency, each dated November 1, 1996, and identified by Assessment ID numbers L012840340 and L012840341. Each notice asserted a deficiency of franchise tax, additional franchise tax or additional temporary metropolitan transit business tax surcharge plus penalty and interest due for the years 1991 through 1994. Notice number L012840340 asserted a deficiency of \$342.00, penalty in the sum of \$342.00 and \$104.36 in interest for a total of \$788.36. Notice number L012840341 asserted a deficiency of \$14,078.00, penalty in the sum of \$3,519.50 and \$3,915.03 in interest for a total of \$21,512.53.

The notices of deficiency were each addressed to petitioner as follows, "Long Haul Trucking, Inc., 5640 Mackenzie Ave PO Bx 167, Albertville, MN 55301-0167." Each notice has been made part of the record herein. Each notice states, "A field audit of your records has disclosed an additional tax due." Issued with each notice was a document dated November 1, 1996 from the New York State Department of Taxation and Finance, Audit Division-Buffalo D.O.-FACCTS to petitioner at the above Albertville, Minnesota address, which stated, "Our records indicate that a power of attorney is on file for tax matters at issue in the enclosed

document. Therefore, a copy of the document has been forwarded to your legal representative:

David J. Anderson, CPA
David J. Anderson & Co.
2415 Annapolis Ln, Suite 110
Minneapolis, MN 55441”

The notice then asked that the Tax Compliance Division be notified immediately at the address indicated if the power of attorney was no longer in effect.

2. Petitioner filed a Request for Conciliation Conference dated August 15, 2000, which request had two notice numbers set forth thereon that are unrelated to this proceeding (L017376392 and L017376393). This request along with a letter to the Bureau of Conciliation and Mediation Services (“BCMS”) from Michael J. Nichols, CPA of even date were in-dated by BCMS on August 21, 2000. In his letter Mr. Nichols requested a conciliation conference by telephone for the two unrelated notices referenced above, and in the last paragraph of his letter, Mr. Nichols stated,

There are two other assessments that are also worthy of consideration for penalty abatement for all of the same reasons detailed in the attached correspondence. They are assessments numbered L-012840341-5 and L-012840340-6.

3. A Conciliation Order Dismissing Request, dated September 8, 2000, was issued by BCMS, bearing notice numbers L012840341, L017376392 and L012840340 and the following explanation:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on November 1, 1996, and January 31, 2000, but the request was not received until August 21, 2000, or in excess of 90 days, the request is late filed.

Petitioner filed a timely petition with the Division of Tax Appeals in protest of the

conciliation order. The petition set forth notice numbers L012840340 and L012840341 and contested penalties in the amount of \$4,054.56.

4. The Division submitted the affidavits of Geraldine Mahon, an employee of the Division familiar with the preparation of notices of deficiency by the Division's CARTS Control Unit, who describes the routine office procedures used by the Division to prepare such notices for mailing, and James Baisley, Chief Mail Processing Clerk of the Mail Processing Center of the Division since 1994, who was fully familiar with the operations and procedures of the Mail Room (now known as the Mail Processing Center), and whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of the notices in issue, and describe how such procedures were followed in this case.

5. The general process for issuing and mailing notices of deficiency in 1996 began with the computer generation of the notices of deficiency by the CARTS Control Unit as well as the generation of a listing of taxpayers to whom notices of deficiency were sent by certified mail on a particular day, hereinafter referred to as the Certified Mail Record ("CMR"). In October of 1996 it was the regular practice of tax technicians in the Fuel, Alcohol, Cigarette, Carrier Tax Section ("FACCTS") to receive notices of deficiency and CMRs for manual review and verification of the names and addresses of the taxpayers who were listed on the CMRs. Following the review by FACCTS, a clerical staff person put the notices of deficiency into individual windowed envelopes. The CMR was then wrapped around the envelopes after which the envelopes and CMR were sent to the Mail Processing Center for postage and mailing. A certified control number was assigned to each notice and listed on the CMR. In this

case, certified control numbers P 911 204 286 and P 911 204 287 were assigned, respectively, to notice numbers L012840340 and L012840341 which were to be mailed to petitioner.

Certified control numbers P 911 204 284 and P 911 204 285 were assigned, respectively, to notice numbers L012840340 and L012840341 which were to be mailed to David J. Anderson, CPA, petitioner's representative in 1996. These certified control numbers appear on the CMR next to the notice numbers to which they correspond.

The notices of deficiency were picked up by an employee of the Division's Mail Processing Center and delivered to a branch of the United States Postal Service ("USPS") in Albany, New York (in this case the Colonie Center Branch of the USPS). Each page of the CMR is a separate and individual CMR for the items listed on that page only and contains spaces to record the total pieces received at the post office for the items on that page. The CMR for the notices of deficiency mailed on October 29, 1996 to petitioner and to Mr. Anderson consisted of one page, and the notices mailed to petitioner at 5640 Mackenzie Avenue, P.O. Box 167, Albertville, MN 55301-0167 on October 29, 1996, were listed on this page as were the notices mailed to David J. Anderson, CPA at 2415 Annapolis Lane, Suite 110, Minneapolis, MN 55441. The total number of pieces listed on the CMR was four.

On the bottom of the CMR a postal employee affixed a USPS postmark from the Colonie Center Branch of the USPS in Albany, New York, bearing the date of October 29, 1996, wrote the number of pieces received as "4," circled the number "4" and initialed the CMR. The Division's employee specifically requested the postal employees to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record.

The Division's Mail Processing Center returned a copy of the CMR to the Division with the postmark affixed showing the date of mailing, which is retained as a permanent record. The CMR was kept by the Division in the regular course of its business.

6. The Division submitted, in support of its motion, the first pages of petitioner's Forms MT-903, Highway Use Tax Returns, one dated October 24, 1996 pertaining to the reporting period of September 1, 1996 through September 30, 1996, and the other dated November 12, 1996, pertaining to the reporting period October 1, 1996 through October 31, 1996. The MT-903s set forth petitioner's address as 5640 Mackenzie Ave PO Bx 167, Albertville, MN 55301-9779.

SUMMARY OF THE PARTIES' POSITIONS

7. Mr. Nichols, petitioner's current representative, in his letter in response to the Division's motion dated January 24, 2001, explains that he was retained in 1997 to replace Mr. Anderson, petitioner's previous representative, because petitioner was dissatisfied with the timeliness of Mr. Anderson's work. Mr. Nichols next posits that it is because the Division's auditor corresponded solely with Mr. Anderson rather than the corporation that the appeal and settlement were not completed in a timely manner.

8. The Division asserts that it has shown that it duly delivered properly addressed and posted notices of deficiency to the Colonie Center Branch of the U.S. Postal Service in Albany, New York on October 29, 1996 for delivery of each notice to petitioner and its representative. Because no request for a conciliation conference or a petition protesting the notices was filed within 90 days of the October 29, 1996 date of mailing of the notices, the Division of Tax Appeals now lacks jurisdiction to hear this matter on the merits, and the petition must,

therefore, be dismissed.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. It is the contention of the Division that it is entitled to summary determination in its favor because petitioner failed to file a timely request for a conciliation conference or petition for a tax appeals hearing. The laws addressing the issuance and mailing of notices of determination and deficiency and the procedures to timely protest the same follow.

Tax Law § 1081(a) authorizes the Division of Taxation to issue a notice of deficiency to a taxpayer if a return required under Article 9 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1081(b), as in effect during the period in issue, such notice “shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the tax commission a petition under section [1089].” As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

C. Tax Law § 1081(a) provides that a notice of deficiency shall be mailed by certified or registered mail to the taxpayer “at its last known address in or out of this state.” The Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered into the custody of the United States Postal Service (*Matter of Air Flex Custom*

Furniture, Tax Appeals Tribunal, November 25, 1992). Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz, supra*).

The required proof of mailing is two-fold: first, there must be proof of the Division’s standard procedure for issuance of notices provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Geraldine Mahon and James Baisley in support of its position that the notices of deficiency were issued to petitioner on October 29, 1996, and such affidavits contain sufficient proof to establish the standard procedure of the Division for issuing such notices (*see, Matter of Roland, supra*). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains the names and addresses of the taxpayers to whom the notices were issued, the assessment numbers of the notices and the certified control numbers assigned to the notices.

Second, the Division established that the general issuance procedure was followed on October 29, 1996 in the generation and mailing of petitioner’s notices of deficiency. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the CMR, show the total number of pieces received by the USPS, and the postmark on the CMR, in turn, shows the date of mailing as October 29, 1996 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

Finally, it is noted that the figure “4” on the bottom of the October 29, 1996 CMR, signifying the total number of pieces of mail involved, has been circled and a Postal Service

employee has initialed next to the figure. As in *Matter of Roland (supra)*, the postal employee circled this figure to indicate the number of pieces of mail received by the USPS on October 29, 1996. In addition, and unlike the situation in *Roland*, the affiant, Mr. Baisley, states the basis of his knowledge for this proposition. The Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. In this case the postal employee both wrote the number "4" and then circled it to indicate the number of pieces of mail received. This additional fact provides the element found to be lacking in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has established that both notices of deficiency were mailed on October 29, 1996 to petitioner and to its representative.

Furthermore, the Division has established that it mailed the notices to petitioner on October 29, 1996 at its last known address, which address was acquired from two Forms MT-903, Highway Use Tax Returns, filed by petitioner, just before and just after the date of mailing of the notices.

Accordingly, petitioner was required to file his request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of October 29, 1996, or no later than January 27, 1997. Since the request was not delivered until August 21, 2000, it is time barred and the Division of Tax Appeals lacks jurisdiction to consider the merits of this case.

D. Inasmuch as there are no material and triable issues of fact, and the Division has carried its burden of proving proper mailing, the Division of Taxation's motion for summary

determination is granted as to Notices of Deficiency L012840340 and L012840341, each dated November 1, 1996.

E. Accordingly, the petition of Long Haul Trucking, Inc. is dismissed.

DATED: Troy, New York
April 05, 2001

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE