

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEW YORK BUILDERS SUPPLY CORP.	:	ORDER
	:	DTA NO. 819010
for Revision of a Determination or for Refund of Tax	:	
on Fuel Use under Article 21-A of the Tax Law for the	:	
Period April 1, 1997 through June 30, 2000.	:	

Petitioner, New York Builders Supply Corp., 545 West 28th Street, New York, New York 10001-5508, filed a petition for revision of a determination or for refund of tax on fuel use under Article 21-A of the Tax Law for the period April 1, 1997 through June 30, 2000.

On June 7, 2002, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On June 17, 2002, petitioner, through its representative, Bernard M. Deutsch, CPA, submitted a letter and documents in opposition to dismissal. On July 3, 2002, the Division of Taxation, by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. After due consideration of the documents submitted, Arthur S. Bray, Administrative Law Judge, issues the following order.

ISSUE

Whether petitioner filed a timely petition following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. Petitioner, New York Builders Supply Corp. (“New York Builders”), filed highway use tax returns for the periods July 1, 2001 through September 30, 2001 and October 1, 2001 through December 31, 2001. In each instance, petitioner listed its address as 545 West 28th Street, New York, New York 10001-5508.

2. The Division of Taxation (“Division”) issued a Notice of Determination (assessment number L-020497328) to petitioner, dated January 17, 2002, which asserted a deficiency of fuel use tax in the amount of \$2,980.42 plus interest in the amount of \$1,084.92 for a balance due of \$4,065.34. The notice listed petitioner’s address as 545 West 28th Street, New York, New York 10001-5508.

3. New York Builders filed a petition, dated May 4, 2002, with the Division of Tax Appeals. The U.S. Postal Service postage-paid stamp on the envelope which bore the petition was also dated May 4, 2002. The petition was received by the Division of Tax Appeals on May 6, 2002. It lists petitioner’s address as 545 West 28th Street, New York, New York 10001-5508 and states that the address of petitioner’s representative is 28 Irving Drive, Woodbury, New York 11797.

4. On June 7, 2002, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner with a copy to the Division of Taxation. The notice states:

You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

Pursuant to § 528(a) of the Tax Law, a petition must be filed within thirty days from the date a Notice of Determination is issued.

The Notice of Determination was issued on January 17, 2002 but the petition was not filed until May 4, 2002 or one hundred and seven days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments regarding the proposed dismissal.

5. In response to the Notice of Intent to Dismiss, the Division submitted affidavits from two Division employees, Daniel LaFar and Geraldine Mahon. The affidavit of Geraldine Mahon attests to the regular procedures followed by the Case and Resource Tracking System (“CARTS”) with respect to the processing of statutory notices prior to their shipment to the Division’s Mechanical Section for mailing. The affidavit of Daniel LaFar attests to the regular procedures followed by the Mail Processing Center for delivering outgoing certified mail to branches of the U.S. Postal Service. Findings of fact “6” through “13” are taken, in whole or in part, from their affidavits.

6. As part of Ms. Mahon’s regular duties she supervises the processing of notices of deficiency and determination prior to their mailing. She receives a computer printout referred to as the “certified mail record.” Each of the notices is predated with the anticipated date of mailing and is assigned a certified control number which is recorded on the certified mail record.

7. The certified mail record pertaining to the mailing at issue consisted of 14 fan-folded (connected) pages and included the notice issued to New York Builders on January 17, 2002. The certified mail record has all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by Ms. Mahon.

8. Attached to Ms. Mahon’s affidavit, as exhibit “A,” is a copy of the original certified mail record issued by the Division on January 17, 2002. The certified mail record includes

notice L 020497328 issued to New York Builders. There are 11 entries on each page with the exception of page 14 which contains 5 entries. Portions of the certified mail record have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

9. In the upper left hand corner of the first page of the certified mail record the date January 7, 2002 was manually changed to January 17, 2002. The original date of January 7, 2002 was the date that the certified mail record was printed. The certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Department's Mechanical Section. The handwritten change of the date from January 7, 2002 to January 17, 2002 was made by personnel in the Department's Mail Processing Center. This change was made in order to ensure that the date on the certified mail record conformed with the actual date that the statutory notices and the certified mail record were delivered to the U.S. Postal Service.

10. Each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. In this instance a Postal Service representative initialed or signed each page of the certified mail record and affixed a postmark to each of the 14 pages.

The second page of the certified mail record indicates that notice number L 020497328 was sent to New York Builders by certified mail using control number 7104 1002 9739 0066 4360. The notice number corresponds with the one printed on the notice issued to petitioner on January 17, 2002. Further, page 10 of the certified mail record indicates that a copy of the notice

of determination, numbered L 020497328, was sent to petitioner's representative, Bernard Deutsch, at 28 Irving Drive, Woodbury, New York 11797 using certified control number 7104 1002 9739 0066 5251. In the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail. The procedures followed and described are the normal and regular procedures of the CARTS control unit.

11. As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered the certified mail record and a copy of each of the notices. On its face, the information on the certified mail record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR NON-PRESORT MAIL." The upper right-hand corners of the pages are consecutively numbered. The upper left-hand corner of each page contains the printed date of "01/07/02." On the first page, this date was crossed out and a new date of "1/17/02" was written above the original printed date. Each of the pages contains columns labeled "Certified No.," "Reference No.," "Name of Addressee, Street and P.O. Address," "Postage," "Fee" and "RR Fee." Certified numbers are listed in a vertical column on the left side of each page. Page 2 contains an entry which sets forth petitioner's name and address, notice number L 020497328 and certified control number 7104 1002 9739 0066 4360. The notice number corresponds with the one found on the notice which is attached to the affidavit of Ms. Mahon. Page 10 contains an entry which sets forth the representative's name and address, the same notice number as the one adjacent to petitioner's name and certified control number 7104 1002 0066 5251. On page 14, the "total pieces and amounts listed" is stated to be 148. Also, the number 148 is circled

adjacent to the statement “total pieces received at post office.” In addition, the total fee of \$310.80 is consistent with the mailing of 148 pieces of mail at a fee of \$2.10. A stamp of “January 11, 2002” from the Colonie Center Branch of the United States Postal Service appears on each page of the certified mail record which accompanied the affidavit of Geraldine Mahon. Initials are handwritten near the stamp on each page.

12. As exhibits, the Division offered copies of the notices of determination, dated January 17, 2002, which were mailed to petitioner and its representative. The notices list assessment number L 020497328 and state that the total amount due is \$4,065.34.

13. The affidavit of Daniel B. LaFar, the Principal Mail and Supply Clerk in the Division’s mail and supply room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service (“USPS”). After the Mail Processing Center receives mail from an area designated for “Outgoing Certified Mail,” a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail room clerk checks the first and last pieces of certified mail set forth on the certified mail record against the information listed on the certified mail record. He also performs a random review of 30 or fewer pieces of certified mail by checking the envelopes against the information on the certified mail record. Upon completing the review of the certified mail record and envelopes, a member of the mail room staff delivers them to a branch of the USPS in Albany. The postal employee affixes a postmark and his or her signature or both to the certified mail record as an indication of receipt by the USPS. The certified mail record becomes the Division’s record of receipt by the USPS for the items of certified mail. In this case a USPS employee initialed pages 1 through 14 of the certified mail record, affixed a postmark to each page of the certified mail record, and circled the

total number of pieces of certified mail received. Mr. LaFar explained in this affidavit that the Mail Processing Center has requested that the USPS “either circle the number of pieces received or indicate the number of pieces received by writing the number of pieces on the mail record.” In the ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

SUMMARY OF PETITIONER’S POSITION

14. In response to the Notice of Intent to Dismiss, petitioner’s representative states that the audit took place over a period of many months and that, during this period of time, he met with the auditor a few times and sent him many documents through the mail. Petitioner’s representative did not hear from the auditor for at least two months after he submitted the last information. Shortly after receiving the notice, he called the auditor and asked why there was additional tax due. The auditor replied that he did not have the file but he would attempt to get it. On April 25, 2002, the auditor told petitioner’s representative that the reason for the assertion of additional tax was that the bills which were submitted for gasoline purchased for one of petitioner’s trucks in New Jersey did not list the truck number and, as a result, credit was not given for the tax paid. The auditor also stated that he could not change the audit and that petitioner would have to appeal.

15. Petitioner’s representative states that the reason the petition was late was because he was attempting to conclude the case with the auditor. According to petitioner’s representative, petitioner has about six trucks and purchases all of the fuel it uses from one of two gasoline stations: one in New York or one in New Jersey. It is submitted that each of these stations charges all of the appropriate taxes. Petitioner’s representative also states that it is not possible

that his client operated trucks without paying tax for fuel, and he wishes to prove that the gasoline purchased at the New Jersey station was for a truck that traveled into New Jersey.

CONCLUSIONS OF LAW

A. A petition contesting a notice of determination of fuel use tax must be filed within 30 days after the date of mailing of the notice (Tax Law § 524[e]). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 30 days of the issuance of a notice of determination (***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

B. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of two Division employees, Geraldine Mahon and Daniel LaFar, provide adequate proof of the Division's standard mailing procedure for the mailing of statutory notices like the one mailed to petitioner and his representative by certified mail. The affidavits generally describe the various stages of producing and mailing notices and, in addition, attest to the authenticity and accuracy of the copies of the Notice of Determination and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Mahon and LaFar affidavits were followed with respect to the Notice of

Determination issued to petitioner. Petitioner's name and address appear on page two of the certified mail record which bears a USPS date stamp of January 17, 2002. In addition, the name and address of petitioner's representative appears on page 10 of the certified mail record which also bears a USPS date stamp of January 17, 2002. There are 148 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated that he received 148 items for mailing. In short, the Division established that it mailed the Notice of Determination to petitioner and its representative by certified mail on January 17, 2002.

The envelope containing the petition bears a postmark of May 4, 2002. In accordance with 20 NYCRR 3000.22(b), the Division of Tax Appeals treated this date as the date of filing of the petition. Accordingly, it is found that the petition was filed more than 30 days after the mailing of the Notice of Determination.

In this case, petitioner's representative has not challenged the Division's position that the petition was not filed within the 30-day time period. Rather, petitioner's representative contends that the delay in filing was caused by the failure of the auditor to promptly respond to an inquiry as to why the notice was issued. Although petitioner's desire for an explanation of why the notice was issued is understandable, it does not extend the strict statutory time period for filing a petition. Since the petition was not mailed to the Division of Tax Appeals within the statutory 30-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Notice of Determination.

C. The petition of New York Builders Supply Corp. is dismissed with prejudice.

DATED: Troy, New York
August 15, 2002

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE