

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>HAULING FREIGHT LINES, INC.</b>	:	DETERMINATION
	:	DTA NO. 819123
for Revision of a Determination or for Refund of Fuel Use	:	
Tax under Article 21-A of the Tax Law for the Period	:	
January 1, 2000 to December 31, 2000.	:	

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Petitioner, Hauling Freight Lines, Inc., 8588 Erie Road, Angola, New York 14006-9618, filed a petition for revision of a determination or for refund of fuel use tax under Article 21-A of the Tax Law for the period January 1, 2000 to December 31, 2000.

The Division of Taxation, by its representative Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated December 11, 2002, seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Pursuant to section 3000.5(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal petitioner had 30 days to file a response to the motion. Petitioner, appearing *pro se*, did not file a response. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules began on January 10, 2003. Based upon the motion papers, the affidavits submitted therewith and all pleadings and documents submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly dismissed petitioner's request for a conciliation conference as untimely filed.

***FINDINGS OF FACT***

1. The Division of Taxation ("Division") issued Notice of Determination number L-020849520-4, dated May 6, 2002, assessing additional fuel use tax in the amount of \$6,257.47, plus penalty and interest, of \$687.92 and \$1,001.20, respectively, totaling \$7,946.59 for the period January 1, 2000 through December 31, 2000. The notice is addressed to petitioner, Hauling Freight Lines, Inc., 8588 Erie Rd., Angola, NY 14006-9618.

2. Petitioner filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services ("BCMS") dated May 21, 2002, and dated stamped as received by BCMS on June 10, 2002. A copy of the mailing envelope shows the request was mailed on June 6, 2002, as indicated by the postmark of the United States Postal Service ("USPS"). By a Conciliation Order dated June 21, 2002, BCMS dismissed petitioner's request as late filed.

3. In order to establish the date and method of mailing of the subject Notice of Determination, the Division introduced the affidavit of Geraldine Mahon, who is employed as the Principal Clerk in the Division's Case and Resource Tracking System ("CARTS") Control Unit. Ms. Mahon's duties include supervising the processing of notices of deficiency and determination such as the one at issue herein. Ms. Mahon's affidavit describes the general or regular process involved in the computer generation of notices and the subsequent mailing of such notices. More specifically, Ms. Mahon's affidavit describes the computer preparation of notices of determination to include the simultaneous preparation of a certified mailing record. The certified mailing record is a computer-generated document entitled "Assessments

Receivable, Certified Record for Non-Presort Manual Mail" consisting, in this case, of one page. The certified mailing record lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number.

4. Each computer-generated notice of determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the certified mailing record under the heading "Certified No." The affidavit describes the certified mailing record as carrying an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial date on the certified mailing record is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case page one of the certified mailing record lists an initial date of April 25, 2002, which has been manually changed to May 6, 2002.

5. Attached as an exhibit to Ms. Mahon's affidavit in this case is the one-page certified mailing record listing, *inter alia*, the notice at issue herein. The certified mailing record in this case lists consecutive seven control numbers. Each such certified control number is assigned to an item of mail listed on the single page of the certified mailing record. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The certified mailing record herein lists seven items of mail corresponding to the seven certified control numbers listed thereon and there are no deletions from the list.

6. Information regarding the notice of determination at issue is contained on the single page of the certified mailing record. Specifically, corresponding to certified control number

7104 1002 9739 0089 5948 is notice number L020849520. Along with such entry is a listing of petitioner's name and address, which is identical to that listed on the subject notice of determination. It is noted that the notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the certified mailing record for purposes of compliance with statutory privacy requirements.

7. The certified mailing record bears a USPS stamp dated May 6, 2002. A Postal Service employee affixed a USPS stamp dated May 6, 2002 to page one, circled the number "7" next to "Total Pieces and Amount Listed" and initialed the certified mailing record.

8. Appearing immediately beneath the "Total Pieces and Amount Listed" listing is the confirmatory listing "Total Pieces Received At Post Office." No information appears after this listing.

9. The Mahon affidavit notes finally that the Division does not request, demand or retain return receipts from certified or registered mail.

10. The Division also submitted the affidavit of Daniel B. LaFar, who is employed as a Principal Mail and Supply Clerk in the Division's Mail Processing Center. Mr. LaFar's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the United States Postal Service. The LaFar affidavit provides that after a notice is placed in the Mail Processing Center's "Outgoing Certified Mail" basket, a staff member weighs and seals each envelope and affixes postage and fee amounts thereon. A mail processing clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mailing record. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and the associated certified mailing record to one of the various branch offices of the USPS located in the Albany, New York area. There a postal employee

accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and his signature or initials to the certified mailing record, indicating receipt of the mail listed on the certified mail record and of the certified mail record itself. The USPS has also been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. In this case the postal employee circled the "total pieces" figure to indicate that seven pieces were received by the Postal Service. In the ordinary course of business a Mail Processing Center employee picks up the certified mailing record from the Postal Service on the following day and returns the certified mailing record to the originating office (CARTS Control) within the Division.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 510 authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where the Division determines that there is a deficiency of fuel use tax.<sup>1</sup> This section further provides that the mailing of such a notice "shall be presumptive evidence of the receipt of same by the person to whom addressed." Additionally, the Tax law provides that such a determination will conclusively fix such tax unless the taxpayer files a petition with the Division of Tax Appeals seeking revision of the determination within 30 days of the mailing of the notice of determination (Tax Law § 528). Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to this provision, then, petitioner had 30 days from the issuance of the subject notice to file a request for a conciliation conference.

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<sup>1</sup> Tax Law § 510 is incorporated by reference in Article 21-A governing fuel use, in Tax Law § 528.

B. If the timeliness of a petition or a request for a conciliation conference is in issue, the Division bears the burden of establishing proper mailing of the notice of determination (*Matter of Katz*, Tax Appeals Tribunal, November 14, 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 such notices by one with knowledge of the relevant procedures, and there must be proof that the standard procedure was followed in the particular instance in question (*Matter of Katz, supra*; see also, *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Once this burden is met, a presumption of proper mailing arises (*Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111, 112). If, on the other hand, the Division fails to affirmatively carry its burden and the date of mailing is not established, the statutory time period is not triggered and the petition will be deemed timely filed (*Matter of Katz, supra*; *Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

C. 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 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 Certified Mail Record 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 the single page of the certified mail record which bears a USPS date stamp of May 6, 2002. There are seven certified mail control numbers listed on the Certified Mail Record, and the USPS employee who initialed the same indicated that seven items were received for mailing. In short, the Division

established that it mailed the Notice of Determination to petitioner by certified mail on May 6, 2002.

The envelope containing the request for conciliation conference bears a USPS postmark of June 6, 2002, which is deemed to be the date of filing (20 NYCRR 4000.7[a][ii]). Accordingly, it is found that the request for conference was filed more than 30 days after the mailing of the Notice of Determination.

D. In this case, although petitioner contends the mailing was timely, it claims that any delay that may have taken place was not intentional. Rather, petitioner states that in good faith the power of attorney appointing a representative and the request for conference were both dated May 21, 2002, and any delay in filing was caused by the failure of petitioner's representative. Although petitioner's explanation is plausible, it does not extend the strict statutory time period for filing a request for a conciliation conference. Since the request was not mailed to BCMS within the statutory 30-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Notice of Determination.

E. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party.

F. In the instant matter there are no material issues of fact. Further, petitioner did not respond to the Division's motion for summary determination. Accordingly, pursuant to the foregoing discussion and section 3000.9(b)(1) of the Rules, the Division of Taxation is entitled to summary determination in this matter.

G. The Division's motion for summary determination is hereby granted and the petition of Hauling Freight Lines, Inc. is dismissed.

DATED: Troy, New York  
April 10, 2003

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE