

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HONDU AMERICAN TRUCKING, INC. :
for Revision of a Determination or for Refund of : **DETERMINATION**
Tax on Petroleum Businesses Under Article : **DTA NO. 821887**
13-A and Tax on Fuel Use under Article 21A of :
the Tax Law for the Period January 1, 2003 :
through March 31, 2006. :

Petitioner, Hondu American Trucking, Inc., filed a petition for revision of a determination or for refund of tax on petroleum businesses under Article 13-A and fuel use tax under Article 21-A of the Tax Law for the period January 1, 2003 through March 31, 2006.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed March 21, 2008, seeking summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5; 3000.9(a)(i) and 3000.9(b). Petitioner, appearing by its president, Maria A. Flores, had 30 days, or until April 21, 2008, to respond to the motion. Petitioner did not file a response to the motion, and thus the 90-day period for issuance of this determination commenced on April 21, 2008. After due consideration of the documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a timely petition for a hearing before the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Hondu American Trucking, Inc., a Notice of Determination, dated October 26, 2006. The Notice of Determination, bearing assessment identification number L-027666288-2 was addressed to “Hondu American Trucking Inc., 151 19th ST, Brooklyn, NY 11232-1013,” and assessed additional tax on petroleum businesses under Tax Law Article 13-A and fuel use tax under Tax Law Article 21-A for the quarterly periods ended March 31, 2003 through March 31, 2006, plus penalty and interest.

2. Petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) challenging the foregoing notices and requesting a conciliation conference with respect thereto. The request is signed by petitioner’s president, Maria Flores, and is hand-dated July 2, 2007. The envelope in which the request was mailed carried a United States Postal Service (USPS) postmark dated July 5, 2007 and was stamped as received by BCMS on July 9, 2007.

3. BCMS issued to petitioner a conciliation order dated July 27, 2007, dismissing the conciliation conference request. The order stated, in part:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on October 26, 2006, but the request was not mailed until July 5, 2007, or in excess of 90 days, the request is late filed.

4. Notices of determination, such as the one at issue herein, are computer-generated by the Division’s Computerized Case and Resource Tracking System (CARTS) Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record

(CMR). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number

5. Each notice of determination is predated with its anticipated mailing date, is assigned a certified control number and lists the name and address of the taxpayers to whom the notice is being issued. The initial printing date on the CMR in this case was manually changed at the time of mailing by Division personnel to October 26, 2006, in order to conform to the actual date of mailing.

6. The certified control number assigned to each notice, as appearing on the CMR, also appears on the front of a separate one-page "Mailing Cover Sheet," which is generated by CARTS for each notice. Each Mailing Cover Sheet also bears, on its front, a bar code, the taxpayer's mailing address and a return address for the Division.

7. After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staff member in the Mail Processing Center affixes appropriate postage and thereafter delivers the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or initials, or both, to the CMR. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control Unit.

8. In the instant case, the notice issued to petitioner appears on the CMR. The CMR is, as generated in this instance, a 29-page, fan-folded computer-generated document, having all pages connected when the document was delivered into the possession of the USPS and remaining connected when the postmarked document was returned after mailing. The CMR lists 312 certified control numbers, each having been assigned to an item of mail listed on the 29 pages of

the CMR. Corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. Each of the pages of the CMR contains eleven entries, with the exception of the last page (page 29), which contains four entries. The names, addresses and other identifying information with regard to taxpayers other than petitioner have been redacted from the CMR so as to preserve the confidentiality of the information relating to other taxpayers.

9. Information regarding the Notice of Determination issued to petitioner was contained on page 14 of the CMR relating to the notice numbered L-027666288, and shows No. 7104 1002 9730 1459 6687 as the corresponding certified mailing number, and petitioner's name and the address "151 19th ST, Brooklyn, NY 11232-1013" appear in the column opposite the subject notice number.

10. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated October 26, 2006, and the initial "J" representing the postal employee's, verifying receipt of the items.

11. The last page of the CMR, page 29, contains a preprinted entry of "312" corresponding to the heading "Total Pieces and Amounts." Appearing directly beneath this preprinted entry and corresponding to the heading "Total Pieces Received At Post Office" is the handwritten number "312," followed by the initial "J," representing the Postal Service employee's accepting receipt of the items. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the verification of the "312," all contribute to the analysis of whether the pieces listed the CMR were received at the post office.

12. The facts set forth above in Findings of Fact 4 through 11 were established through the affidavits of Patricia Finn Sears and James Steven VanDerzee. Ms. Sears is employed as a Supervisor in the Division's CARTS Control Unit and her duties include supervising the

processing of notices of determination. Mr. VanDerzee is employed as a Mail and Supply Supervisor in the Division's Mail Processing Center, and his duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

13. The address on the subject Notice of Determination was the same as the address given on petitioner's Form IFTA-100 (IFTA Quarterly Fuel Use Tax Return) as filed with the Division on or about July 26, 2006, requesting that petitioner's license be cancelled.

14. In its petition, petitioner stated that it moved to Indiana in May 2006 and "called in September of 2006 and changed the address"; however, petitioner has not submitted any evidence of the purported call, or to whom such notification was provided.

15. Petitioner neither responded to this motion, nor offered any arguments or evidence to support a claim that it filed any protest against the notice at issue within the requisite period of time, i.e., 90 days after its issuance.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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 (20 NYCRR 3000.9[b][1]).

B. Here, petitioner offered no arguments or evidence to counter the Division's motion regarding the issue of the timeliness of petitioner's protest, and petitioner is therefore deemed to have conceded that no question of fact requiring a hearing on such issue exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984]). Specifically, since petitioner presented no evidence to contest the facts alleged in the Sears and VanDerzee affidavits, those facts may, consequently, be deemed admitted (*see Kuehne & Nagel v. Baiden* at 544, 369 NYS2d at 671 [1975]; *Whelan v.*

GTE Sylvania, 182 AD2d 446, 582 NYS2d 170, 173 [1st Dept 1992]). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 288(1)(a); (5) (as made applicable by Tax Law § 315[a]), and Tax Law § 510 (as made applicable by Tax Law § 528[a]) respectively, authorize the Division to issue a notice of determination to a taxpayer where a return required by Article 13-A of the Tax Law or by Article 21-A of the Tax Law is not filed or, if a return is filed, is incorrect or insufficient. The Tax Law further provides (by reference to Tax Law § 1138[a][1]) that such a notice shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state. In this case, the record is clear that the address listed on the subject Notice of Determination was petitioner's last known address, as provided on petitioner's fuel use tax return in July 2006.

D. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination or, alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the notice of determination (*see* Tax Law § 1138[a][1]; § 288[5]; § 315[a]; § 170[3-a][a]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry must focus on the issuance (i.e., mailing) of the notice (*see Matter of Novar TV & Air Conditioner Sales and Service, Inc.*, Tax Appeals Tribunal, May 23, 1991). 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*, Tax

Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced, and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerzee, two Division employees involved in and possessing knowledge of the process of generating and mailing notices of determination. The Division also presented sufficient documentary proof, in the form of a CMR pertaining to the subject notice, to establish that the Notice of Determination in issue was mailed to petitioner on October 26, 2006.

G. Petitioner’s request for conciliation conference was filed on July 5, 2007, a date which falls more than 90 days after the October 26, 2006 date of mailing of the Notice of Determination in issue. The request was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 288[a][5]; § 315[a]; § 170[3-a][a]; 20 NYCRR 3000.3[c]).

H. The Division of Taxation’s motion for summary determination is granted and the petition of Hondu American Trucking, Inc. is hereby dismissed.

DATED: Troy, New York
July 10, 2008

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE