

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
BATAVIA COAL & OIL, INC.	:	DECISION
	:	DTA No. 812716
for a Hearing with Regard to a Bond Required	:	
to be filed under Articles 12-A and 13-A of	:	
the Tax Law.	:	

Petitioner Batavia Coal & Oil, Inc., 4028 West Main Street, Batavia, New York 14020, filed an exception to the determination of the Administrative Law Judge issued on May 20, 1994. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition. The six-month period to issue this decision began on August 4, 1994, the date by which petitioner could have submitted a reply brief. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner timely filed its petitions with the Division of Tax Appeals.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Batavia Coal & Oil, Inc. is a registered New York State diesel motor fuel distributor.

The Division of Taxation ("Division") issued two notices of proposed bond increase, dated March 28, 1994, which informed petitioner that, for purposes of Articles 12-A and 13-A

of the Tax Law, performance bonds were required in order to allow petitioner to maintain licenses issued pursuant to those articles.

Each of these notices stated that:

"New York State Tax Regulations require that the security must be filed within thirty (30) days of the date of this letter.

* * *

"You have a right to protest this decision within seven (7) days of the date of this letter by written petition, (petition form attached)"

Petitioner filed two petitions with the Division of Tax Appeals, dated April 6, 1994 and signed by Bruce Scofield, president, by U.S. Postal Service First Class Certified Mail. On the petitions, petitioner's representative was listed as George Cary, P.O. Box 393, Fairport, New York 14450. The U.S. Postal Service postage paid stamp is dated April 6, 1994. The petitions were received by the Division of Tax Appeals on April 8, 1994.

Petitioner is seeking revision of the determinations that increase the amount of bond or security required under Articles 12-A and 13-A of the Tax Law. The first petition challenges the increase in security of \$125,000.00 in accordance with Tax Law § 283.4. That petition states, inter alia, that: (1) bonding is not possible due to the current tax lien which ties up all the security; and (2) "financing is currently being arranged that could free up the necessary assets to provide either bonding or using alternate security." The petition also raises the question of whether or not the new Federal regulations, effective January 1994, which require terminal operators to collect fuel taxes should be taken into account when assessing the bonding requirement.

The second petition contests the increase of the petroleum business tax security from \$0.00 to \$265,000.00 in accordance with Tax Law § 302(c). That petition states, inter alia, that: (1) a lien has been filed giving the State of New York security; (2) a deferred payment agreement has been in place since November 1993; (3) payments under the payment agreement have been timely; and (4) all cash flow is going to pay tax. Petitioner also asserts that at the time when the payment agreement was put in place, the issue of security bonding or alternate security was not discussed. Petitioner contends that "bonding is not possible due to the tax lien which in turn ties up any assets that could be used for alternate security." Petitioner also asserts that it is in the process of arranging financing that could settle the tax liability.

By letter dated April 12, 1993, the Division of Tax Appeals acknowledged receipt of the petitions deemed to be in proper form. On or about April 12, 1993, the petitions were forwarded to the Division for an answer.

On April 19, 1994, the Division filed a motion to dismiss the petitions on the ground that the Division of Tax Appeals lacks subject matter jurisdiction (20 NYCRR 3000.5[b][1][ii]):

"in that the petitions were filed more than seven (7) days after the issuance of a Notice of proposed bond increase and the Division of Tax Appeals has no jurisdiction to hear such petitions."

Included in the Division's motion papers were affidavits of Christine T. Bowen, Theresa Darling and Daniel B. LaFar, copies of the two letters (notices) dated March 28, 1994, copies of two returned postal receipts (green cards) and copies of the T.T.T.B./F.A.C.C.T.S.-TCU Postal Form 3877 certified mail record for March 28, 1994.

Christine T. Bowen is a Tax Technician I in the Bond Registration Unit of the Transaction and Transfer Tax Bureau - Fuel, Alcohol, Cigarette and Carrier Tax Section ("Bond Registration Unit") of the Division. Her affidavit sets forth the custom and practice in the preparation and mailing of letters (notices) in the Bond Registration Unit and, in particular, the procedure followed in the preparation and mailing of the two letters allegedly sent to petitioner.

In her affidavit, Ms. Bowen stated that as part of her regular duties, she caused two letters to be prepared and she signed each letter on that date. In addition, she indicated that she caused each of the letters to be prepared for certified mailing to the addressee, Batavia Coal & Oil, Inc.

Ms. Bowen explained that Theresa Darling, a keyboard specialist employed by the Division in the Bond Registration Unit, typed each of these letters for her. After typing them, she returned them to Ms. Bowen who, after signing each of them, "placed each letter in a separate window envelope so that the name and address of the taxpayer was visible through the window." Ms. Bowen further explained that she attached a certified mail return receipt ("green card") to each envelope and gave the envelopes to Ms. Darling. Ms. Bowen indicated that Ms. Darling listed each envelope on a Postal Form 3877 certified mail record ("CMR"). She also indicated that all of the certified mail envelopes listed on the CMR were wrapped in two copies of the CMR and a rubber band was placed around them, forming a package. Ms. Bowen further explained that the package of certified mail envelopes and certified mail records was then picked up by an employee of the Division's mailroom.

Attached to Ms. Bowen's affidavit as Exhibits "A" and "B" are copies of the two letters which she asserts were prepared for and signed by her on March 28, 1994. Typed at the end of each of these letters was "CERTIFIED MAIL" and the certified article number assigned to that letter (P 647 745 463 and P 647 745 464, respectively). Ms. Bowen's affidavit also references Exhibits "C" and "D", copies of the two returned postal receipts Form PS 3811 (green cards) which she asserts she affixed to each of the envelopes and which show receipt of the envelopes by petitioner/addressee on March 30, 1994. The certified article numbers on the letters correspond to the certified article numbers on the returned postal receipts PS 3811's (green cards). Attached to Ms. Bowen's affidavit as Exhibit "E" is a copy of the one-page Postal Form 3877 CMR, prepared by Ms. Darling, containing a list of certified envelopes allegedly issued by the Bond Registration Unit on March 28, 1994.

The Postal Form 3877 mailing record submitted contains the following: the date (3-28-94) is listed in the upper left corner; the name and address of sender is listed as State of New York, Dept. of Taxation & Finance, T.T.T.B./F.A.C.C.T.S.-TCU, State Campus - Bldg. #8-855, Albany, N.Y.; and the certified mail box is checked in the column marked "Indicate type of mail." Postal Form 3877 lists in table form for each item sent the article number, the name and address of the addressee, the postage, fees, charges and remarks. Although the form contains 15 lines, there are only 6 entries. Lines 4 and 5 contain entries which pertain to petitioner. The information listed on line 4 of the CMR is P 647 745 463, Batavia Coal and Oil, Inc., Attn: Bruce Scofield, Pres., 4028 W. Main St., Batavia, NY 14020, under Remarks: "BND/REQ". The information listed on line 5 of the CMR is P 647 745 464, Batavia Coal and Oil, Inc., Attn: Bruce Scofield, 4028 W. Main St., Batavia, NY 14020, under Remarks: "LTR". Across the bottom of the page are spaces for total number of pieces listed by sender, the number of pieces received by the post office and the name of the post office's receiving employee. Review of the bottom of the Postal Form 3877 CMR indicates that the number "6" is typed in the sender space, a written "6" is in the "received at post office" space and that the postal representative's signature is illegible. This CMR is date stamped March 28, 1994 by the Albany, New York

Roessleville Branch of the United States Postal Service, although the postmark is somewhat faint and slightly illegible.¹

Theresa Darling is a keyboard specialist in the Bond Registration Unit. Her affidavit sets forth the custom and practice in the preparation and mailing of letters (notices) in the Bond Registration Unit and, in particular, the procedure followed in the preparation and mailing of the two letters allegedly sent to petitioner.

In her affidavit, Ms. Darling stated that as part of her regular duties, she typed two letters for signature by Christine T. Bowen, Tax Technician I, who is also employed in the Bond Registration Unit. In addition, she indicated that she assisted in the preparation of each letter for certified mailing to the addressee, Batavia Coal & Oil, Inc.

Ms. Darling explained that after she had typed the letters, she returned them to Ms. Bowen, "who placed each letter in a separate window envelope and attached a certified mail receipt (green card) to each envelope." Ms. Bowen then returned the envelopes to Ms. Darling who indicated that she listed each envelope on the CMR, wrapped all the certified mail envelopes listed on the CMR in two copies of the mailing record and placed a rubber band around them, forming a package. Ms. Darling further explained that the package of certified mail envelopes and CMRs was then picked up by an employee of the Division's mailroom. Exhibits "A" through "E" attached to Ms. Darling's affidavit are copies of exactly the same Exhibits "A" through "E" attached to Ms. Bowen's affidavit.

Daniel B. LaFar is employed as a Principal Mail and Supply Clerk in the Division's mailroom. Mr. LaFar's duties include the supervision of mailroom staff in delivering outgoing Division mail to branch offices of the U.S. Postal Service. Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business, and which allegedly were followed, in particular, on March 28, 1994.

Mr. LaFar noted that each business day (Monday through Friday), a member of the mailroom staff picks up mail to be delivered to the U.S. Postal Service from a basket marked

¹The date of March 28, 1994 is clear; "Roessleville BR." is somewhat faint as it "USPO"; the remainder of the postmark is illegible.

"Certified Mail" located in the Division's Bond Registration Unit at 855 Central Avenue, Albany, New York, brings it to the Division's mailroom and places it in a basket marked "Outgoing Certified Mail". After a notice is placed in the "Outgoing Certified Mail" basket in the mailroom, a member of the staff weighs and seals each envelope, postage and fees are affixed and the postage and fee amounts are recorded on the CMR. A mailroom clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. A member of the mailroom staff delivers the stamped envelopes to the Roessleville Branch of the U.S. Postal Service in Albany, New York. The postal employee affixes a postmark and/or his or her signature to the CMR indicating receipt by the post office. After the CMR has been signed and/or stamped by the U.S. Postal Service, it is returned the following day to the originating office within the Division (here, the Bond Registration Unit).

The LaFar affidavit affirms that on March 28, 1994, an employee of the mailroom picked up two pieces of mail addressed to Batavia Coal and Oil, Inc., c/o Bruce Scofield, President, 4028 W. Main St., Batavia, NY 14020 from the Division's Bond Registration Unit, 855 Central Avenue, Albany, New York and brought it to the Division's mailroom to be weighed, sealed, have postage and fees affixed and for further delivery to the U.S. Postal Service. His affidavit further affirms that on March 28, 1994, an employee of the mailroom delivered two sealed, postpaid envelopes for delivery by certified mail addressed to Batavia Coal and Oil, Inc., c/o Bruce Scofield, President, 4028 W. Main St., Batavia, NY 14020 to the Roessleville Branch of the U.S. Postal Service in Albany, New York.

Petitioner did not respond to the Division's motion papers.

OPINION

The Administrative Law Judge found that the Division met its burden to establish proper mailing of the notices (to increase the bond or other security) to petitioner on March 28, 1994 by submitting affidavits describing its general mailing procedure and the mailing records which showed that the procedure was followed in this matter. The Administrative Law Judge also found that petitioner received the notice as evidenced by the "certified postal receipt" (green

card) and the Division may rely on this receipt "as confirmation that petitioner received the notice (Matter of Mareno v. State Tax Commn., 144 AD2d 114, 534 NYS2d 453)" (Determination, conclusion of law "F").

The Administrative Law Judge further found that petitioner did not file its petitions with the Division of Tax Appeals until April 6, 1994. The Administrative Law Judge then determined that the petitions were not filed within seven days from the date the notice of increase in bond or other security was issued and, therefore, dismissed the petitions as untimely.

On exception, petitioner makes the following assertions: the notice was not timely received by it, its petition was timely filed, the mailings were not timely mailed, it had requested an opportunity to examine Ms. Bowen, Ms. Darling and Mr. LaFar, the Division's presumption is inadequate and that its petition should be granted. Petitioner also asserts that it "did not have adequate time to obtain bond or other security" and "registrant has not had a hearing to review increase in the amount of the bond" (Exception, p. 1).

In response, the Division argues that the Administrative Law Judge correctly found that the notices of increase in bond or other security were properly mailed and that "the Division is entitled to the presumption of receipt provided by section 289-d(2) . . . since the presumption was not rebutted, disputed or denied by the petitioner" (Division's brief in opposition, p. 4). The Division requests that the exception be denied and the Administrative Law Judge's determination be sustained.

We affirm the determination of the Administrative Law Judge for the reasons stated in said determination. Petitioner has not made any legal arguments or submitted any documentation to substantiate its claims. Without a timely petition having been filed, this Tribunal has no jurisdiction over the matter and cannot address petitioner's assertion that it did not have time to obtain bond or other security.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Batavia Coal & Oil, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed; and
3. The petitions of Batavia Coal & Oil, Inc. are dismissed.

DATED: Troy, New York
February 2, 1995

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

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