

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>PEGASUS TRANS EXPRESS, LLC</b>	:	DECISION
	:	DTA NO. 822356
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, 2003 to December 31, 2006.	:	

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Petitioner, Pegasus Trans Express, LLC, filed an exception to the determination of the Administrative Law Judge issued on February 5, 2009. Petitioner appeared by Richard Minton, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioner timely filed its request for a conciliation conference with the Division of Taxation.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except for finding of fact "2," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The Division of Taxation ("Division") issued Notice of Determination No. L-029741615, dated February 25, 2008, assessing additional fuel use tax due in the amount of \$105,805.07, plus penalty and interest, for the period January 1, 2003 through December 31, 2006. The notice is addressed to petitioner, Pegasus Trans Express, LLC, 160-37 13<sup>th</sup> Avenue, Whitestone, New York 11357. A copy of this notice was also issued to petitioner's then-representative, Tony Stronchek, 1900 Texas Avenue, P.O. Box 100, Bridge City, Texas 77611.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"), hand-dated as signed on May 19, 2008.<sup>1</sup> By a Conciliation Order Dismissing Request (CMS No. 224174) dated June 6, 2008, BCMS dismissed petitioner's request as late filed. In turn, petitioner challenged this dismissal by filing a petition with the Division of Tax Appeals. The petition is dated as signed on June 19, 2008, the envelope in which the petition was contained bears a United States Postal Service ("USPS") postmark dated June 23, 2008, and the petition is date-stamped as received by the Division of Tax Appeals on June 25, 2008.<sup>2</sup> The Division of Taxation brought a motion dated October 10, 2008, seeking dismissal of the petition or summary determination in its favor pursuant to sections 3000.5, 3000.9(a)(1)(i) and

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<sup>1</sup> The file contains no evidence to show how the request was filed (e.g., by mail, delivery service, etc.). However, the Division has not challenged that the request was filed on the date set forth on its face (i.e., May 19, 2008). Since this is the earliest date on which the request could be claimed to have been filed, such May 19, 2008 date is accepted as the date of filing.

<sup>2</sup> The petition lists no representative for petitioner and is signed by Virginia R. Centrillo as "Taxpayer or Taxpayer's Representative." An attached letter lists Ms. Centrillo as petitioner's president. Subsequent correspondence dated June 26, 2008 advised that Ms. Centrillo is a member of Pegasus Trans Express, LLC.

3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Petitioner did not file a response to the motion.<sup>3</sup>

In order to establish the date and method of mailing of the subject Notice of Determination, the Division introduced the affidavit of Patricia Finn Sears, who is employed as a Supervisor in the Division's Case and Resource Tracking System ("CARTS") Control Unit. Ms. Finn's duties include supervising the processing of notices of deficiency and determination such as the one at issue herein. Ms. Finn'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. Finn's affidavit describes the computer preparation of notices of determination to include the simultaneous preparation of a mailing cover sheet with mailing and return addresses and a bar code for each notice, as well as the preparation of a certified mailing record ("CMR"). The CMR is a computer-generated document entitled "Certified Record for Presort Mail-Assessments Receivable" consisting, in this case, of 13 pages. 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.

Each computer-generated notice of determination is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." Ms. Finn's affidavit describes the CMR as carrying an initial date (the date of its printing) in its upper left 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

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<sup>3</sup> We modify this fact to more accurately reflect the record.

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.

Attached as an exhibit to Ms. Finn's affidavit is the 13-page CMR listing the notice at issue herein. The CMR lists 11 certified control numbers on each of its first 12 pages and two such numbers on its final (13<sup>th</sup>) page. Each certified control number is assigned to an item of mail listed on the CMR. 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 CMR herein lists 134 items of mail corresponding to the 134 certified control numbers listed thereon and there are no deletions from the list. In this case, page one of the CMR lists an initial date of "20080441700," which represents the year (2008), the 44<sup>th</sup> day of the year (February 13) and the military time of day (5:00 P.M.). Consistent with the regular process described in Ms. Finn's affidavit, this preprinted date has been manually changed to February 25, 2008.

Information regarding the notice of determination at issue is contained on pages 6 and 13 of the CMR. At page 6, corresponding to certified control number 7104 1002 9730 0598 6398, is notice number L029741615, followed by petitioner's name and address, which is identical to that listed on the subject notice of determination, on petitioner's Highway Use Tax Return for the period ended December 31, 2007 (i.e., the last return filed prior to issuance of the subject notice), as well as on the request and on the petition. At page 13, corresponding to certified control number 7104 1002 9730 0598 7067, is notice number L029741615, followed by petitioner's then-representative's name and address, which is identical to that listed for petitioner's then-representative, Tony Stronchek.

The Division also submitted the affidavit of James Steven VanDerZee, who is employed as a Principal Mail and Supply Clerk in the Division's Mail Processing Center. Mr. VanDerZee's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the United States Postal Service. The VanDerZee affidavit states that after a notice of deficiency is placed in the Mail Processing Center's "Outgoing Certified Mail" basket, a staff member places the statutory notices and any associated documents into an envelope and seals, weighs and affixes postage and fee amounts to each such piece of correspondence to be mailed. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR for such items, and also performs a random review of the same information for up to 30 pieces of mail included in the particular mailing. 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, where a Postal Service employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and his signature or initials to the CMR, indicating receipt of the mail listed on the CMR and of the CMR 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 the ordinary course of business, a Mail Processing Center employee picks up the CMR from the Postal Service on the following day and returns the CMR to the originating office (CARTS Control) within the Division.

Each page of the CMR in this case, including its final page, bears a USPS stamp dated February 25, 2008, and the initials of the Postal Service employee receiving custody of the CMR

and items listed thereon for mailing. The preprinted number "134," located on the final page of the CMR next to the legends "Total Pieces and Amounts" and "Total Pieces Received At Post Office" and indicating the number of items being mailed, has been circled as requested.

In further proof of the mailing and delivery of the subject notice to petitioner, and to its then-representative, the Division provided the affidavit of Heidi Corina. Ms. Corina is employed as a Legal Assistant in the Division's Office of Counsel. Ms. Corina prepared and filed with the USPS a USPS Form 3811-A concerning both petitioner and petitioner's then-representative with respect to the mailing of the subject notice. USPS Form 3811-A is utilized by the mailer of an item, via registered, certified, insured or express mail, to obtain from the USPS whatever delivery information the USPS has concerning the particular item. In response to the Division's filing of the two forms 3811-A, the USPS confirmed that the item bearing certified mail number 7104 1002 9730 0598 6398 (pertaining to petitioner) was delivered as addressed on February 27, 2008, and that the item bearing certified mail number 7104 1002 9730 0598 7067 (pertaining to petitioner's then-representative) was delivered as addressed on February 28, 2008. In each instance, the information provided by the USPS to the Division per form 3811-A also included the scanned signature image of the recipient of delivery of the item mailed.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that pursuant to Tax Law § 510, the mailing of a Notice of Determination of fuel use tax to a taxpayer provides "presumptive evidence of the receipt of same by the person to whom addressed." Further, the Administrative Law Judge observed that unless a taxpayer files a petition with the Division of Tax Appeals seeking revision of the determination or files a request for a conciliation conference with BCMS

within 30 days of the mailing of the Notice of Determination, the tax will be conclusively fixed (*see*, Tax Law § 528).

The Administrative Law Judge pointed out that where 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 by demonstrating proof of a standard procedure for the issuance of such notices and proof that the standard procedure was followed in the particular instance in question. If this burden is met, a presumption of proper mailing arises. However, if the Division fails to carry its burden and the date of mailing is not established, the petition or request will be deemed timely filed.

The Administrative Law Judge concluded that based on the affidavits of two Division employees, there was adequate proof of the Division's standard mailing procedure for the mailing of the statutory notices at issue herein, as well as proof that the Division mailed the Notice of Determination to petitioner and to petitioner's then-representative by certified mail on February 25, 2008.

The Administrative Law Judge found that, since petitioner's Request for Conciliation Conference was filed on May 19, 2008, a date which falls far more than 30 days beyond the February 25, 2008 date of issuance of the Notice of Determination, petitioner's challenge to the notice was not filed with BCMS within the statutory 30-day period and the Division of Tax Appeals was precluded from hearing petitioner's challenge to the Notice of Determination.

The Administrative Law Judge determined that there were no material issues of fact in this matter and the Division was entitled to summary determination in its favor. Accordingly, the Administrative Law Judge dismissed the petition of Pegasus Trans Express, LLC.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that the person who signed for the delivery of the Notice of Determination was not a member or an employee of petitioner and was not authorized to accept such a delivery. Petitioner asserts that the person who signed the receipt did not advise petitioner of the Notice until late June 2008. Petitioner further asserts that when one of its members inquired of the auditor as to when the Notice was being mailed, he was advised that it had been mailed on February 25, 2008. However, the auditor also advised petitioner that it had 90 days within which to request a redetermination of that Notice. Petitioner maintains that, relying on this advice, it signed a Request for Conciliation Conference on May 19, 2008, which date was within 90 days of the mailing of the Notice. Petitioner claims that it did not receive a copy of the Division's motion for summary determination and, therefore, was unable to respond to it.

Petitioner maintains that despite the statutory presumption of receipt of a properly mailed notice of determination, petitioner did not actually receive the notice within 30 days of its mailing. Petitioner argues that its failure to file a timely request for conciliation conference within the statutory period of 30 days is only a procedural requirement. As a result, petitioner believes that this situation should be viewed as an application to reopen a default judgment in order to allow a hearing on the merits of petitioner's claim. Petitioner claims that its failure to timely file a request for conciliation conference was excusable; that it has a meritorious position, in that there are material issues of fact in this matter concerning the conduct of the audit that must be resolved; and that petitioner does not owe the tax assessed. The failure to reopen this matter, petitioner maintains, would be a miscarriage of justice.



***OPINION***

In this proceeding, the sole issue before us is whether or not the Administrative Law Judge properly determined that the Division of Tax Appeals lacks jurisdiction to entertain the merits of petitioner's claim. As petitioner failed to timely file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or, alternatively, file a petition with the Division of Tax Appeals, we have no jurisdiction to consider petitioner's challenge to the Notice of Determination.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that demonstrate that the Administrative Law Judge's determination is incorrect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Pegasus Trans Express, LLC is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Pegasus Trans Express, LLC is dismissed with prejudice.

DATED: Troy, New York  
November 25, 2009

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner