

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
BATAVIA COAL & OIL, INC.	:	DETERMINATION 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 two petitions for a hearing with regard to a bond required to be filed under Articles 12-A and 13-A of the Tax Law.

On April 19, 1994, the Division of Taxation by its representative, William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel), filed a motion to dismiss the petitions of Batavia Coal & Oil, Inc., pursuant to 20 NYCRR 3000.5(b)(ii) on the ground that the Division of Tax Appeals lacks subject matter jurisdiction. The Division of Taxation's motion is supported by the affidavit of Donald C. DeWitt, Esq., sworn to the 19th day of April, 1994; the affidavit of Christine T. Bowen, sworn to the 18th day of April, 1994, with attachments thereto; the affidavit of Theresa Darling, sworn to the 19th day of April, 1994, with attachments thereto; and the affidavit of Daniel B. LaFar, sworn to the 19th day of April, 1994. Petitioner did not respond to the Division of Taxation's motion papers. Now, upon the motion papers, affidavits, pleadings and other documents submitted, Winifred M. Maloney, Administrative Law Judge, issues the following determination.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals.

FINDINGS OF FACT

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

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

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 "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.

CONCLUSIONS OF LAW

A. Tax Law § 289-d(2) provides that:

"Any notice authorized or required under this article may be given by mailing it to the person for whom it is intended, in a postpaid envelope addressed to such person at the address given by him in his application for registration as a distributor or in the last return filed by him under this article or, if no application or return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of its receipt by the person to whom addressed. Any period of time, which is determined according to the provisions of this article, for the giving of notice shall commence to run from the date of mailing of such notice."

B. Tax Law § 283(6)(b)(i) provides that:

"In the event that the commissioner determines that an increase in the amount of the bond or other security filed by a registrant is required to secure the liability of such registrant, such bond increase or other security increase must be filed by such registrant within thirty days from the day the notice and demand thereof has been given by the commissioner. If the registrant fails to (A) file such increase in the amount of bond or other security within such period or (B) make timely application for a hearing with particular respect to the amount of the increase of such bond or other security, the commissioner shall cancel or suspend the registration of such registrant."

C. Tax Law § 283(6)(b)(ii) provides, in pertinent part, that:

"The registrant may apply to the division of tax appeals for a hearing to review an increase in the amount of the bond or other security required to be filed by making application therefor within seven days of the day that the notice and demand for an increase is given by the commissioner, provided, the division of tax appeals may, by regulation, for the causes stated therein, extend such period to a period not exceeding fifteen days from the day such notice and demand is given"

D. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that:

"The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of those time limitations . . ." (20 NYCRR 3000.3[c]).

E. Where the timeliness of a protest is at issue, the Division bears the burden of proof to

demonstrate the proper mailing of the documents protested (in this case, the notices to increase the bond or other security) which begins the running of the seven-day statutory period (see, Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; see also, Cataldo v. Commissioner, 60 TC 522). The Division may prove such mailing by offering evidence as to its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing of the particular document in question (see, Matter of Air Flex Custom Furniture, supra; Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra; see also, Cataldo v. Commissioner, supra).

F. The Division has established through the affidavits of Mss. Bowen and Darling and Mr. LaFar that the notices of increase in bond or security were issued and sent by certified mail on March 28, 1994 to petitioner. In addition, the Division has submitted a copy of the Bond Registration Unit CMR Postal Form 3877 for March 28, 1994 and the returned postal receipts PS 3811's (green cards) showing receipt by addressee on March 30, 1994 as proof of mailing.

I find that this CMR is a properly completed Postal Form 3877. This one-page CMR lists for each notice the certified number, name and address of petitioner, the date, postmark and signature of a postal employee acknowledging receipt. As the Tribunal noted in Matter of Montesanto (Tax Appeals Tribunal, March 31, 1994):

"As we discussed in Katz and Clark, a properly completed Form 3877 is highly probative evidence that the notice was sent to the address specified because it contains on one page the name and address of the taxpayer, the taxpayer's representative, the date, postmark and the signature of a Postal Service employee acknowledging receipt."

Also, in Matter of Air Flex Custom Furniture (supra), the Tribunal noted:

"A properly completed Postal Service Form 3877 represents direct documentary evidence of the date and the fact of mailing (see, Coleman v. Commissioner, 94 TC 82; Wheat v. Commissioner, T.C. Memo 1992-268, 63 TCM 2955; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). Moreover, exact compliance with the Form 3877 procedures reflects compliance with the Division's own procedures and raises a presumption of official regularity in favor of the Division (see, Wheat v. Commissioner, supra)."

In further support of its proof of mailing, the Division has submitted two returned postal receipts PS 3811's (green cards). It has been held that as proof of mailing the Division can rely on the "certified postal receipt" (green card) as confirmation that petitioner received the notice (Matter of Mareno v. State Tax Commn., 144 AD2d 114, 534 NYS2d 453). The Division has established March 28, 1994 as the date of mailing of the two notices of increase in bond or security to petitioner.

G. Since the Division has proven it mailed the two notices, it is entitled to the presumption of receipt by the person to whom it was addressed (see, Tax Law § 289-d[2]; Engel v. Lichterman, 95 AD2d 536, 467 NYS2d 642, 643) unless petitioner rebuts the presumption by showing it did not receive the notices. Petitioner does not dispute the dates of the two notices or deny that it received the notices.

H. As noted in Conclusion of Law "C", where a notice of increase in the amount of bond or other security has been properly mailed (as the Division has shown in this matter), a petition must be filed with the Division of Tax Appeals within seven days from the date the notice of increase in amount of bond or other security is issued. The petitions herein were filed with the Division of Tax Appeals on April 6, 1994. The last day on which petitioner could have timely filed a petition with the Division of Tax Appeals was April 4, 1994. Accordingly, the petitions were not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case.

I. That the petitions of Batavia Coal & Oil, Inc. are dismissed.

DATED: Troy, New York
May 20, 1994

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE