

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SIBLING FUEL COMPANY, INC.	:	DETERMINATION
	:	DTA NO. 815031
for Revision of Determinations or for Refund of Motor	:	
Fuel Tax under Article 12-A of the Tax Law and Tax	:	
on Petroleum Businesses under Article 13-A of the Tax	:	
Law for the Period March 1, 1991 to April 30, 1993.	:	

Petitioner, Sibling Fuel Company, Inc., 1241 Zerega Avenue, Bronx, New York 10462, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law and tax on petroleum businesses under Article 13-A of the Tax Law for the periods March 1, 1991 to April 30, 1993.

On October 7, 1996 and October 18, 1996, respectively, petitioner, by its representative, Fligel, Brint & Co. (Andrew J. Cassara, CPA) and the Division of Taxation by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by August 8, 1997, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to Sibling Fuel Company, Inc. (“petitioner”) a Notice of Determination dated May 1, 1995 (Assessment L-010290908) asserting additional motor fuel tax due under Tax Law Article 12-A in the amount of \$25,498.20, plus penalty and interest, for a total assessment of \$40,017.95.

The Division issued a second Notice of Determination (Assessment L-010315506), dated May 4, 1995, asserting additional petroleum business tax due under Tax Law Article 13-A in the amount of \$1,925.91, plus penalty and interest for a total assessment of \$3,014.72.

2. On November 8, 1995 the Bureau of Conciliation and Mediation Services (“BCMS”) received a request for a conciliation hearing on Assessments L-010290908 and L-010315506. Petitioner’s request, dated and mailed November 1, 1995, apologized for the lateness of the request and expressed a desire to present information pertaining to the assessments.

3. In response to petitioner’s request, BCMS issued a Conciliation Order addressing both assessments, dated February 23, 1996, which stated the following:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on May 1, 1995 and May 4, 1995, but the request was not received until November 8, 1995, or in excess of 90 days, the request is late filed.

“The request filed for a Conciliation Conference is denied.”

4. Petitioner timely filed a petition challenging the conciliation order and asserting error in the Division’s assessment of motor fuel and petroleum business taxes. The Division’s answer asserts that petitioner must prove its protest of the assessments was timely in order to have the merits of such assessments reviewed.

5. In support of its position, the Division submitted into evidence the following: the Division's answer to the petition; affidavits of Geraldine Mahon, Carl Moeske and James Baisley, employees of the Division; copies of the Division's certified mail records dated May 1, and May 4, 1995; microfiche copies of the notices of determination for Sibling Fuel Company, Inc.; a copy of correspondence dated November 1, 1995 requesting a conciliation conference on both assessments; and a copy of the envelope containing petitioner's request for conciliation conference.

6. Geraldine Mahon is the principal clerk of the Case and Resource Tracking System ("CARTS") Control Unit of the Division. In her affidavit, Ms. Mahon described the Division's general procedure for processing notices of deficiency and determination prior to shipment to the Division's mechanical unit for mailing. She explained how she receives a computer printout entitled Assessments Receivable, Certified Record for Zip+4 Minimum Discount Mail, also referred to as the "certified mail record", and the corresponding statutory notices, each predated with the anticipated date of mailing and a certified control number. The certified mail record for the block of notices issued on May 1, 1995 and May 4, 1995, including the notices of determination issued to Sibling Fuel Company, Inc., 1241 Zerega Avenue, Bronx, New York 10462-5421 consisted of 46 and 30 fan-folded (connected) pages, respectively.

All of the certified control numbers which appear in both certified mail records run consecutively and there is only one deletion on the record for May 1, 1995, on page 15. Each page of the May 1, 1995 record consists of 11 entries with the exception of page 46 which contains 1 entry, and each page of the May 4, 1995 record contains 11 entries with the exception of page 30 which bears 8 entries.

Ms. Mahon indicated that the original dates printed on the certified mail record, “4/20/95” and “4/25/95”, respectively, were the dates that the certified mail was printed and that it was manually changed to “5-1-95” and “5-4-95”, respectively, on page 1 in both records, by personnel in the Division’s mail room to conform to the actual date that the notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

Attached to Ms. Mahon’s affidavit for each record as Exhibit “A”, are the 46 and 30 pages of the certified mail records containing a list of the notices allegedly issued by the Division on May 1 and May 4, 1995, respectively, which, she asserts bear the information relating to petitioner’s notices and are true and accurate copies of such records. Page 11 of the May 1 certified mail record contains certified control number P 911 010 236, addressed to petitioner, Sibling Fuel Company Inc., 1241 Zerega Ave., Bronx, NY 10462-5421, and page 12 of the May 4 record contains certified control number P 911 011 013, addressed to petitioner in the identical manner as the May 1 record. The certification and notice numbers match those on the microfiche copies of the notices of determination issued to petitioner. All 46 pages of the May 1 certified mail record bear the print date of “04/20/95” changed manually on the first page to “5-1-95”. All 30 pages of the May 4 certified mail record bear the print date of “04/25/95”, changed manually on the first page to “5-4-95”. Many of the 46 and all of the 30 pages are date stamped May 1 and May 4, 1995, respectively, by the Colonie Center Branch of the United States Postal Service. Date stamps which appear only in partial form in the May 1 record are covered by the redaction of portions of Exhibit A, which was done to preserve the confidentiality of information relating to other taxpayers. Ms. Mahon’s affidavit explained that the print date for certified mail records is approximately 10 days prior to the mail date in order to give sufficient time to manually review the notices and to process them for postage by the Division’s Mechanical Section. She stated that

the handwritten change of date was made by personnel in the Division's mail room who changed the date to conform to the actual date that the notices and the certified mail record were delivered into the possession of the U.S. Postal Service. Ms. Mahon's affidavit explained that, in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail.

On page 46 of the May 1 certified mail record the amount listed opposite "Total Pieces and Amounts Listed" is crossed out, and replaced by "495" across from "Total Pieces Received at Post Office" with initials appearing below such designation. On page 30 of the May 4 record, "327" appears across from "Total Pieces and Amounts Listed" and a handwritten, circled "327" appears opposite "Total Pieces Received at Post Office", next to which appears a signature.

7. The Division also included the affidavit of Carl Moeske, a Computer Programmer analyst in the Division's Information Systems Management Bureau. As a part of his regular duties, Mr. Moeske oversees the daily computer operations of the Division's computer system which stores information and generates printed documents including statutory notices, such as notices of determination. He stated that it is the Division's regular business practice to retain microfiche copies of statutory notices for the purposes of reducing paper usage and the amount of personnel resources devoted to the filing of hard copies of these statutory notices. Mr. Moeske explained the manner in which microfiche copies of statutory notices are generated and retained by the Division.

Attached to each of Mr. Moeske's affidavits, as Exhibit "A", were documents which he determined, after examination thereof, were true and accurate microfiche copies of the notices of determination issued on May 1 and May 4, 1995 to petitioner. Also attached to the affidavits, as Exhibit "B", were copies of the notices of determination, generated by the CARTS system, which

were sent to other taxpayers and microfiche copies of the notices of determination in the present matter. The microfiche copies were marked up and numerically cross-referenced to the hard copy to illustrate that the microfiche copies were unformatted copies of the hard copies of the notices of determination. Attached as Exhibit "C" to both affidavits was a copy of the overlay, i.e., the blank form upon which the hard copies were printed. The purpose of this exhibit was to show why the words "KEEP THIS NOTICE FOR YOUR RECORDS", which were preprinted on both the first and second pages of the form, do not appear on the microfiche copy.

Mr. Moeske's conclusion in each case was that, based upon his review, with the exception of certain computer codes, the content of the microfiche copies of the notices of determination contain all the information printed on the hard copy.

8. The affidavit of James Baisley, Chief Mail Processing Clerk, whose duties include the overall supervision of the entire Mail Processing Center staff, including those responsible for the delivery of outgoing mail to branches of the United States Postal Service, stated that after a notice is placed in the "Outgoing Certified Mail" basket in the mail room, a member of the staff weighs and seals each envelope and affixes postage and fee amounts thereto. A mailroom clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mail record. Next, a member of the mailroom staff delivers the stamped envelopes to the Colonie branch of the United States Post Office in Albany, New York. A U.S. Postal Service representative affixes his or her initials or signature and/or a U.S. Postal Service postmark to a page or pages of the certified mail record. In the present matter, the Postal Service representative initialed page 46 of the May 1 record, and another representative signed page 30 of the May 4 record, each circling the amount of "Total Pieces Received at Post Office" to indicate that this was the total number of pieces actually received at the post office. This procedure is

followed at the request of the Division's mailroom. In the ordinary course of business and pursuant to the practices and procedures of the mail and supply room, the certified mail record is picked up at the post office on the following day and is delivered to the originating office by a member of Mr. Baisley's staff.

Mr. Baisley stated that he reviewed the affidavit of Geraldine Mahon as well as the certified mail record and the notices of determination and could determine that, on May 1 and May 4, 1995, employees of the mail and supply room delivered mail addressed to Sibling Fuel Company, Inc., 1241 Zerega Ave., Bronx, NY 10462-5421 to the Colonie Center Branch of the United States Postal Service in Albany, New York in sealed postpaid envelopes for delivery by certified mail. He could also determine that a member of the staff obtained a copy of the certified mail records with the postmarks delivered to and accepted by the post office on May 1, 1995 and May 4, 1995 for the records of the Division's CARTS Control Unit. Mr. Baisley's affidavits stated that the regular procedures comprising the ordinary course of business for the staff of the mail and supply room were followed on May 1 and May 4, 1995, respectively, with respect to the notices of determination at issue herein.

9. The Division provided a copy of the Tax Field Audit Record bearing an entry indicating that prior to the issuance of the notices of determination in issue, petitioner's former accountant whose power of attorney was on file during the audit, was no longer representing petitioner. Thus, the Division mailed the subject notices of determination to petitioner alone.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner concedes that the request for a conciliation conference was submitted beyond the allowable time frame. Petitioner had hired an accountant to handle the audit which it believed formed the basis of the assessments in issue. During the audit of petitioner's records, the

relationship between petitioner and its accountant deteriorated, and upon what petitioner believed to be the conclusion of the audit, the accountant was dismissed. Petitioner believed any liability in connection with the audit was paid, and in the event that was untrue, petitioner was not properly advised by the former accountant. In addition, during the same time frame (early 1995), petitioner's office manager was involved in a serious auto accident and was out on extended sick leave, which contributed to the confusion with the notices in issue. Once advised by the Division that one avenue of protest was to request a conciliation conference, petitioner did so immediately; however, it acted 90 and 94 days late for the respective notices issued on May 1 and May 4, 1995.

11. The Division maintains that petitioner did not file a timely request for a conciliation conference and, thus, is not entitled to have the merits of its case considered.

CONCLUSIONS OF LAW

A. Tax Law, article 12-A, § 288(2), provides as follows:

“The state tax commission may determine the amount of tax due at any time if such distributor (i) has not registered as required by this article, (ii) fails to file a return, (iii) files a willfully false or fraudulent return with intent to evade the tax”

Tax Law § 288(5), provides in pertinent part:

“Any determination made pursuant to this section shall finally and irrevocably fix the tax unless the distributor against whom it is assessed shall, within ninety days after the giving of notice of such determination, petition the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion, shall redetermine the same.”

Tax Law, article 13-A, § 315(a) states that the provisions of Article 12-A apply to the administration and procedure with respect to the tax imposed under Article 13-A in the same manner and with the same force and effect as if the language of Article 12-A had been incorporated in full into Article 13-A, except to the extent of any inconsistency.

B. The taxpayer has the option of protesting notices by requesting a conciliation conference in lieu of filing a petition for hearing if the 90-day period to petition for a hearing has not elapsed (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]). If a taxpayer fails to file a petition or a request for a conciliation conference protesting the statutory notice, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. 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 of determination) which begins the running of the 90-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, *aff'd* 499 F2d 550, 74-2 US Tax Cas ¶ 9533). 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 Montesanto*, Tax Appeals Tribunal, March 31, 1994; *Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993; *Matter of Air Flex Custom Furniture*, *supra*; *Matter of Katz*, *supra*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, *supra*; *see also, Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111; *Cataldo v. Commissioner*, *supra*).

D. As noted in Conclusion of Law "C", the required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question.

The Division submitted the affidavits of Geraldine Mahon, James Baisley and Carl Moeske, employees of the Division who are familiar with the procedures followed by the Division in issuing and mailing statutory notices, as well as a copy of the Division's certified mail records dated May 1 and May 4, 1995, microfiche copies of the notices of determination in issue, a copy of the request for the conciliation conference and a copy of the envelope in which such request was mailed.

Mr. Moeske's affidavit explains that it is the Division's regular business practice to retain microfiche copies of statutory notices and further outlines the manner in which microfiche copies of statutory notices are generated and retained by the Division. Mr. Moeske's explanation was sufficient to establish that a valid Notice of Determination did exist and was issued in this case (*cf.*, *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *annulled on other grounds sub nom New York State Dept. of Taxation and Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326, 573 NYS2d 140 [where the Division offered no evidence of the existence or issuance of the statutory notice]).

The affidavit of Ms. Mahon identifies the general office practices and procedures followed by the CARTS Control Unit in the preparation of the notices of determination and certified mail records. Mr. Baisley's affidavit sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business. Together the affidavits of Ms. Mahon and Mr. Baisley contain sufficient proof to establish the standard procedures of the Division for issuing notices of determination (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains

the name and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified control number assigned to the notice.

Second, the Division established that the general issuance procedures were followed on May 1 and May 4, 1995 in the generation and mailing of petitioner's notices. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail records, show the total number of pieces received by the United States Postal Service, and the postmarks on the certified mail records, in turn, show the dates of mailing as May 1 and May 4, 1995, respectively (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

In this case, the certified mail records, on page 11 of the May 1 record and on page 12 of the May 4, 1995 record, contained petitioner's name and address, as well as the certified control numbers, the same numbers which appear on the microfiche copies of the notices of determination. A U.S. Postal Service postmark setting forth the date of mailing, in the case of the May 1 record, was affixed to many of the 46 pages of the certified mail record, and appears clearly on page 11, where petitioner's name and address are listed. A U.S. Postal Service postmark setting forth the date of mailing, in the case of the May 4, 1995 record, was affixed to each and every page of the certified mail record. It is observed that the certified mail record used by the Division contains most of the significant elements of Postal Service Form 3877 and serves the same purposes of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient.

In the case of each of the certified mail records, circled amounts of 495 and 327, respectively, appear on the last page of the record across from "Total Pieces Received at the Post

Office”, and these have been identified as indicating that these were the number of pieces of mail received by the Postal Service. Unlike the situation in *Matter of Roland (supra)*, the Division’s affiant herein states the basis of his knowledge, i.e., that the Division’s Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the postal service by either circling the number or writing the number on the certified mail record. This provides a fact which was absent in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has met its burden of proof on the question of actual mailing in this case. Since petitioner’s request for a conciliation conference was untimely, and the Division has shown proper mailing, the merits of petitioner’s case cannot be addressed.

E. The petition of Sibling Fuel Company, Inc. is hereby dismissed.

DATED: Troy, New York
February 5, 1998

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE