

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**PEGASUS TRANS EXPRESS, LLC** : DETERMINATION  
for Revision of a Determination or for Refund of : DTA NO. 822356  
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 a petition 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. The Division of Taxation, by its representative Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated October 10, 2008, seeking dismissal of the petition or summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Pursuant to section 3000.5(b) of the Rules of Practice and Procedure, petitioner had 30 days to file a response to the motion. Petitioner, appearing by Virginia Centrillo, Member, did not file a response, and the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules began on November 10, 2008. Based upon the motion papers, the affidavits submitted therewith and all pleadings and documents filed in this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly dismissed petitioner's request for a conciliation conference as untimely filed.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued Notice of Determination number 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.

2. 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>

3. 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.

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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.

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.

4. 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 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.

5. 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 2 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.

6. 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.

7. 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.

8. 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.

9. 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.

### *CONCLUSIONS OF LAW*

A. Tax Law § 510 authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where the Division determines that there is a deficiency of fuel use tax.<sup>3</sup> This section further provides that the mailing of such a notice "shall be presumptive evidence of the receipt of same by the person to whom addressed." Additionally, the Tax Law provides that such a determination will conclusively fix such tax unless the taxpayer files a petition with the Division of Tax Appeals seeking revision of the determination within 30 days of the mailing of the notice of determination (Tax Law § 528). Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to this provision, then, petitioner had 30 days from the issuance of the subject notice to file a request for a conciliation conference.

B. If 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 (*Matter*

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<sup>3</sup> Tax Law § 510 is incorporated by reference in Article 21-A, governing fuel use tax, via Tax Law § 528.

*of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of such notices by one with knowledge of the relevant procedures, and there must be proof that the standard procedure was followed in the particular instance in question (*Matter of Katz*; see also, *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Once this burden is met, a presumption of proper mailing arises (*Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111, 112 [1976]), on the other hand, the Division fails to affirmatively carry its burden and the date of mailing is not established, the statutory time period is not triggered and the petition or Request will be deemed timely filed (*Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*).

C. The affidavits of two Division employees, Patricia Finn Sears and James Steven VanDerZee, provide adequate proof of the Division's standard mailing procedure for the mailing of statutory notices such as that at issue herein. The affidavits generally describe the various stages of producing and mailing notices and, in addition, attest to the authenticity and accuracy of the copies of the Notice of Determination and the CMR submitted as evidence of actual mailing. Careful review of these documents submitted by the Division confirms that the general mailing procedures described in the Finn and VanDerZee affidavits were followed with respect to the Notice of Determination issued to petitioner and to petitioner's then-representative. Petitioner's name and address, as well as that of petitioner's then-representative, appear on the noted pages of the CMR which bears a USPS date stamp of February 25, 2008. Thus, the Division has established that it mailed the Notice of Determination to petitioner and to petitioner's then-representative by certified mail on February 25, 2008. This fact of mailing is further

corroborated by the information confirming subsequent delivery, as provided via USPS Form 3811-A (*see* Finding of Fact 9).

D. Petitioner's Request for Conciliation Conference was filed on May 19, 2008 (*see* Finding of Fact 2), a date which falls far more than 30 days beyond the February 25, 2008 date of issuance of the Notice of Determination. Petitioner, who did not respond to the subject motion, has provided no claim or information that any protest against the notice was filed at point prior to such May 19, 2008 date. Accordingly, petitioner's challenge to the notice was not filed with BCMS within the statutory 30-day period, and the Division of Tax Appeals is precluded from hearing petitioner's challenge to the Notice of Determination.

E. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party. In the instant matter there are no material issues of fact. Further, petitioner did not respond to the Division's motion for summary determination. Accordingly, pursuant to the foregoing discussion and section 3000.9(b)(1) of the Rules, the Division of Taxation is entitled to summary determination in this matter.

F. The Division's motion for summary determination is hereby granted and the petition of Pegasus Trans Express, LLC. is dismissed.

DATED: Troy, New York  
February 5, 2009

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE