

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
WESTERN ARIES CONSTRUCTION, LLC	:	ORDER
and for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the period April 1, 2004 through December 31, 2007, and for Revision of a Determination or for Refund of Tax on Petroleum Businesses Under Article 13-A and Tax on Fuel Use under Article 21-A of the Tax Law for the Periods April 1, 2004 through December 31, 2006 and April 1, 2007 through December 31, 2007.	:	DTA NOS. 823394 AND 823395

Petitioner, Western Aries Construction, LLC, filed petitions for revision of a determination or for refund of Highway Use Tax under Article 21 of the Tax Law for the period April 1, 2004 through December 31, 2007, and for revision of a determination or for refund of tax on petroleum businesses under Article 13-A and tax on fuel use under Article 21-A for the periods April 1, 2004 through December 31, 2006 and April 1, 2007 through December 31, 2007.

On January 22, 2010, the Division of Tax Appeals issued to petitioner two notices of intent to dismiss petitions pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the Division of Tax Appeals does not have jurisdiction to hear the matters. Petitioner, appearing by Kresses & Piasecki Legal (Brandon Piasecki, Esq., of counsel), and the Division of Taxation, appearing by Daniel Smirlock, Esq., (John E. Matthews, Esq., of counsel) submitted responses to the notices of intent to dismiss petitions by April 26, 2010, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3000.9[a][4]). After due consideration of the

documents and arguments submitted by the parties and the pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed timely petitions with the Division of Tax Appeals following the issuance of conciliation orders.

FINDINGS OF FACT

1. Petitioner, Western Aries Construction, LLC, filed timely requests for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of determination L-030774238-3 and L-030911039-2. On each request for conciliation conference, petitioner's preprinted address was listed as 2919 Birch Avenue, Niagara Falls, New York 14305-2209.

2. After a conciliation conference held on July 22, 2009, BCMS issued two conciliation orders to petitioner. The first Conciliation Order (CMS No. 277938), dated September 11, 2009, recomputed Notice of Determination L-030774238 to tax due of \$1,230.23 plus interest and penalty. The second Conciliation Order (CMS No. 227342), dated September 11, 2009, denied petitioner's request and sustained Notice of Determination L-030911039.

3. Petitioner filed two petitions with the Division of Tax Appeals seeking administrative hearings to review the conciliation orders dated September 11, 2009. The petitions were dated December 10, 2009, and were received by the Division of Tax Appeals on December 14, 2009. The envelope in which the petitions were mailed indicates that it was sent by United States Postal Service (USPS) Certified Mail and reflects the date of mailing as "DEC 11, 09."

4. On January 22, 2010, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued to petitioner two notices of intent to dismiss petitions. Each Notice of Intent

to Dismiss Petition indicates that the Conciliation Order appeared to have been issued on September 11, 2009 and the petition appeared to have been filed on December 11, 2009, or 91 days later.

5. In response to the issuance of the notices of intent to dismiss petitions, the Division of Taxation (Division) submitted the affidavit of its representative, John E. Matthews, Esq., along with the affidavits of James Steven VanDerZee and Robert Farrelly, both employees of the Division. The Division also submitted copies of petitioner's petitions and a copy of the envelope in which they were sent to the Division of Tax Appeals, copies of petitioner's requests for conciliation conference sent to BCMS, a copy of the certified mail record (CMR) containing a list of the conciliation orders issued by the Division on September 11, 2009, and copies of the subject September 11, 2009 conciliation orders.

6. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of orders by the USPS, via certified mail, and confirmation of the mailing through receipt by BCMS of a postmarked copy of the CMR.

7. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

8. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet

that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

9. The AFP Unit also produces a computer-generated CMR entitled "CERTIFIED RECORD FOR PRESORT MAIL - BCMS CERT LETTER." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then places the cover sheet, cover letter and conciliation order into a three-windowed envelope.

11. On each page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and also stamps "MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT."

12. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "09/11/09" is written in the upper right corner of each page of the CMR.

13. The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Division's Mail Processing Center, which is responsible for delivering the CMR, along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

14. Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR which contains a list of the conciliation orders issued by the Division on September 11, 2009. This CMR lists 51 computer-printed certified control numbers. There are no deletions from the list. Each certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number and the name and address of the addressee.

15. Information regarding the conciliation orders issued to petitioner is contained on page five of the CMR. Specifically, corresponding to certified control numbers 7104 1002 9730 1514 6201 and 7104 1002 9730 1514 6218, respectively, are reference/CMS numbers 000227342 and 000227938, respectively, along with petitioner's name and address as preprinted on petitioner's requests for conciliation conference.

16. The affidavit of James Steven VanDerZee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the name and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

17. In this particular instance, the postal employee affixed a postmark dated September 11, 2009 of the Stuyvesant Plaza branch of the USPS to each page of the five-page CMR. On page

five, the postal employee also wrote his or her initials and wrote the number “51” near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

18. Mr. VanDerZee states that the CMR is the Division’s record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division’s Mail Processing Center, the CMR is picked up at the post office by a member of Mr. VanDerZee’s staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

19. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner on September 11, 2009.

20. In response to the issuance of the notices of intent to dismiss petitions, petitioner submitted the sworn statement of its owner, Wieslaw Walawender, and attached documents. Mr. Walawender claims there are numerous defects in the Division’s mailing evidence, and, therefore, the notices of intent to dismiss petitions should be withdrawn and hearings on the merits of the petitions should be scheduled. First, Mr. Walawender asserts that BCMS failed to adequately inform petitioner of its rights because the cover letters accompanying the conciliation orders referenced Tax Law § 170(3-a) instead of Tax Law § 170(3-a)(e), and in its paraphrasing of the applicable section, BCMS has changed the meaning of the statute. Specifically, Mr. Walawender maintains that BCMS changed the word “after” to “from” in its explanation of time

period in which to file a petition with the Division of Tax Appeals following the issuance of the conciliation orders. He further maintains that “after” and “from” have different meanings with respect to the measurement of time. He argues that the time period for filing a petition should not begin until the taxpayer has received a legal notification of the issuance of the conciliation order that satisfies the rules regarding the means of service of process, to wit: the taxpayer signs the PS Form 3811 and receives the conciliation order (certified mail) from the USPS employee. Second, Mr. Walawender contends that the mailing procedure is defective because there is no affidavit of the person who actually delivers the orders to the post office, i.e., no affidavit of service. Lastly, Mr. Walawender claims that the CMR is defective because there is no verifiable signature of the postal employee who could be identified or an affidavit from such person stating that the initials on the CMR are his or hers.

CONCLUSIONS OF LAW

A. A petition contesting notices of determination of tax on petroleum businesses due or highway use tax due must be filed within 90 days after the date of mailing of the notices (Tax Law § 288[5]; § 315[a]; § 510). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (*see* Tax Law § 170[3-a][a]). A petition contesting notices of determination of tax on fuel use due must be filed within 30 days after the date of mailing of the notices (Tax Law § 528[a]). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 30 days (*see* Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its

mailing to the taxpayer (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*see Matter of Cato; Matter of DeWeese*).

B. Where a taxpayer files petitions, but the timeliness of the petitions is at issue, the Division has the burden of proving proper mailing of the conciliation orders (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered to the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). The Division is not required to produce employees who personally recall the mailing of each individual conciliation order. Rather, the act of mailing may be proven by evidence of the Division's standard mailing procedure, corroborated by direct testimony or documentary evidence of actual mailing (*e.g. Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Air Flex Custom Furniture; Matter of Novar TV & Air Conditioner Sales & Serv.*). The United States Tax Court, interpreting provisions of the Internal Revenue Code analogous to those at issue herein, has decided that a properly completed Postal Service Form 3877 or its counterpart "represents direct documentary evidence of the date and fact of mailing" of the assessment (*Wheat v. Commr.*, 63 TCM 2955, 2957 [1992] *citing Magazine v. Commissioner*, 89 TC 321, 324 [1987]). "Exact compliance with the Form 3877 mailing procedures raises a presumption of official regularity in favor of [the Internal Revenue Service]" (*Wheat v. Commr.*, 63 TCM at 2958, *citing United States v. Zolla*, 724 F2d 808, 810, 84-1 US Tax Cas ¶ 9175 [9th Cir 1984], *cert denied* 469 US 830, 83 L Ed 2d 59 [1984]). When

the Internal Revenue Service (IRS) is entitled to a presumption of official regularity, the burden of going forward is shifted to the taxpayers, and to prevail, they must affirmatively show that the IRS failed to follow its established procedures. If there is no fully completed Form 3877, the IRS may still prove, by documentary or direct evidence, the fact and date of mailing. However, it would not be entitled to the presumption of official regularity.

The Tax Appeals Tribunal has also held that a properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing, shows the Division's compliance with its own procedures and creates a presumption of official regularity in favor of the Division (*Matter of Air Flex Custom Furniture*). As with the IRS, a failure to comply precisely with the Form 3877 mailing procedure need not be fatal to the Division's case "if the evidence adduced is otherwise sufficient to prove mailing" (*Coleman v. Commr.*, 94 TC 82, 91[1990]). Further, the Tax Appeals Tribunal has found that a properly completed certified mail record is substantively the same as the Postal Service Form 3877 (*see Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

C. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Robert Farrelly and James Steven VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders.

D. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject conciliation orders were mailed as addressed to petitioner on September 11, 2009. Specifically, this document lists certified control numbers with corresponding names and addresses and bears U.S. Postal Service postmarks dated September 11, 2009. Additionally, a postal employee wrote "51" near the total pieces received heading and initialed the CMR to

indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

E. It is noted that the arguments raised by petitioner's owner in his sworn statement have been considered and rejected. BCMS is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170[3-a]; 20 NYCRR 4000.1[c]). As noted above, a conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Cato; Matter of DeWeese*). The cover letter that accompanied each conciliation order apprised petitioner of the 90-day time frame for filing a petition following issuance of the conciliation order.

F. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the orders were properly mailed when they were delivered into the custody of the USPS on September 11, 2009, and it is this date which commenced the 90-day period within which protests had to have been filed. Ninety days after the September 11, 2009 date of mailing was December 10, 2009, and in order to be considered timely, petitioner's protests had to have been filed on or before such date. Petitioner's protests were not filed until they were mailed on December 11, 2010, or one day late. Unfortunately, as a matter of law, the Division of Tax Appeals has no jurisdiction to address the merits of petitioner's protests (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

G. The petitions of Western Aries Construction, LLC are hereby dismissed.

DATED:Troy, New York
July 22, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE