

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RJ VALENTE GRAVEL, INC.	:	DETERMINATION
	:	DTA NO. 826878
for Revision of a Determination or for Refund of	:	
Motor Fuel Tax, Tax on Petroleum Businesses, and	:	
Sales and Use Taxes under Articles 12-A, 13-A, 28	:	
and 29 of the Tax Law for the Years 2010 and 2011.	:	

Petitioner, RJ Valente Gravel, Inc., filed a petition for revision of a determination or for refund of motor fuel tax, tax on petroleum businesses, and sales and use taxes under Articles 12-A, 13-A, 28 and 29 of the Tax Law for the years 2010 and 2011.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in Albany, New York, on April 27, 2016, at 10:30 A.M., with all briefs to be submitted by November 11, 2016, which date commenced the six-month period for issuance of this determination. Petitioner appeared by the Zappone & Fiore Law Firm (Joseph W. Zappone, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq., (Brian D. Evans, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly denied petitioner's claims for refund upon the basis, and to the extent, that such claims were filed after the expiration of the applicable periods of limitation specified under Tax Law Articles 12-A, 13-A, 28 and 29.

FINDINGS OF FACT

1. During the period at issue, petitioner, RJ Valente Gravel, Inc., was engaged in the business of excavation and operation of gravel pits. The substantive basis underlying this matter involves petitioner’s claim for refunds of taxes paid upon its purchases and subsequent use of non-highway diesel motor fuel or residual petroleum products directly in the production of tangible personal property for sale by mining or extracting (i.e., excavation and operation of gravel pits).

2. On or about May 21, 2014, petitioner, by its counsel, contacted the Division of Taxation (Division) to inquire about the status of certain refund requests pertaining to the years 2010 and 2011. On May 23, 2014, the Division advised petitioner’s counsel that it had no record of refund requests having been filed by petitioner for the years 2010 and 2011.

3. On May 27, 2014, petitioner’s counsel hand-delivered to the Division six requests seeking refunds of diesel motor fuel tax, petroleum business tax, and sales and use taxes for the years 2010 and 2011, as follows:

Tax Type	Form No. ¹	Claim No.	Filing Period	Refund Claimed
Article 12-A	FT-946/1046	FT14050701	01/01/10 - 12/31/10	\$5,812.45
Article 13-A	AU-630	FT14050702	01/01/10 - 12/31/10	\$10,600.34
Articles 28 & 29	FT-500	FT14050703	01/01/10 - 12/31/10	\$14,676.78
Article 12-A	FT-946/1046	FT14050698	01/01/11 - 12/31/11	\$9,546.85
Article 13-A	AU-630	FT14050699	01/01/11 - 12/31/11	\$18,059.00
Articles 28 & 29	FT-500	FT14050700	01/01/11 - 12/31/11	\$31,759.42

¹ Form FT-946/1046 is a Motor/Diesel Motor Fuel Tax Refund Application pertaining to tax under Tax Law Article 12-A, Form AU-630 is an Application for Reimbursement of the Petroleum Business Tax pertaining to tax under Tax Law Article 13-A, and Form FT 500 is an Application for Refund of Sales Tax Paid on Petroleum Products pertaining to tax under Tax Law Articles 28 and 29.

4. The Division reviewed the foregoing refund applications, and by letters dated July 18, 2014, advised petitioner that its claims for the year 2010 had been denied in full, and that its claims for the year 2011 had been granted in part and denied in part. For the year 2011, petitioner's Article 12-A claim (FT14050698) was granted in the amount of \$6,247.84 leaving the balance claimed (\$3,299.01) denied, its Article 13-A claim (FT14050699) was granted in the amount of \$11,909.95 leaving the balance claimed (\$6,149.05) denied, and its Articles 28 and 29 claim (FT14050700) was granted in the amount of \$24,906.33, leaving the balance claimed (\$6,853.09) denied. Checks dated July 19, 2014 were issued to petitioner for the foregoing amounts of refund granted. In sum, the amounts of refund claimed by petitioner, but disallowed by the Division and remaining at issue herein are:

Year	Claim Number	Amount Claimed	Amount Allowed	Amount Disallowed
2010	FT14050701	\$5,812.45	\$0.00	\$5,812.45
2010	FT14050702	\$10,600.34	\$0.00	\$10,600.34
2010	FT14050703	\$14,676.78	\$0.00	\$14,676.78
2011	FT14050698	\$9,546.85	\$6,247.84	\$3,299.01
2011	FT14050699	\$18,059.00	\$11,909.95	\$6,149.05
2011	FT14050700	\$31,759.42	\$24,906.33	\$6,853.09
Total	-----	\$90,454.84	\$43,064.12	\$47,390.72

5. Upon receipt of a claim for refund, the Division's standard protocol is to stamp the claim form with the date of receipt and to assign a refund claim tracking number (claim number) to the claim. That claim number consists of two letters assigned to designate the type of tax (here "FT" for Fuel Tax), followed by eight digits signifying, respectively, the last two digits of the year of receipt of the claim (here "14" for the year 2014), the two digits of the month of receipt of

the claim (here “05” or the month of May), and four additional digits randomly assigned to identify the particular claim.

6. The Division’s published instructions (FT-946/1046-I, AU-630-I, and FT-500-I) pertaining to each of the three different refund application forms involved herein specify, under “Where to File,” as follows:

“Mail your completed application and supporting documents to:

NYS Tax Department
Fuel Tax Refund Unit
PO Box 5501
Albany NY 12205-0501.”

7. The record includes the Division’s submission of an individual certification for each of the specific taxes (Diesel Excise Tax, Petroleum Business Tax, and Sales Tax on Fuels) and years (2010 and 2011) in question. Each certification is dated April 21, 2016, and attests that a search of the Division’s records for the relevant periods for RJ Valente Gravel, Inc., revealed no claims for refund were found prior to the claims submitted (by hand delivery) on May 27, 2014.

8. Petitioner’s president and owner, Roderick J. Valente, explained that the refund applications and supporting documents were assembled by petitioner’s Clerk of the Works, Kristin DeAngelus. The applications were signed by Mr. Valente, and were placed within a large box (banker’s box), together with the supporting documents. Mr. Valente noted that previous claims of this type had been prepared and filed by an outside firm, for a fee of 25% of the amount of the resulting refund, that this was the first instance where the claims were prepared “in-house,” and that he relied on Ms. DeAngelus timely file the refund claims at issue with the Division.

9. Photocopies of the relevant refund applications bear the signature of Mr. Valente, and the handwritten date “6/21/12” is affixed thereafter, indicating the claims were signed on that

date.² The first page of each of the photocopies of Form FT-500 for the years 2010 and 2011 reflects what appears to be a handwritten “post-it” or “sticky note,” stating “Fuel Tax Refund, Full copy of everything sent.” Each note, presumably photocopied as attached to the copies of the applications kept with petitioner’s records by petitioner’s Clerk of the Works, reflects the initials “kd” (presumably for Kristin DeAngelus), and the handwritten date “6/26/12.” Mr. Valente testified that these notes indicate to him that the refund applications and accompanying substantiating documents were mailed to the Division on June 26, 2012.

10. As described above, the refund applications contained within the banker’s box together with the accompanying substantiating documentation, were allegedly mailed to the Division on or about June 26, 2012. The record includes no evidence concerning the method of mailing by which the claims and substantiation were submitted, or specifying the particular address to which the mailing was sent, or describing the actual (physical) act of mailing.

11. The record includes an inquiry letter from petitioner, signed by Ms. DeAngelus and dated January 21, 2014. This letter is addressed “NYS OSC Department, NY State Campus, Building 8, Albany, NY 12242,” and requests that an “official complaint” be opened as “how our refund has been handled thus far.” The third sentence of the second paragraph of this letter references an audit of petitioner’s “refund,” and states “[s]ince our original paperwork was delivered on June 12, 2013, I am requesting that an inquiry be made on our behalf on recouping the interest due and owed on our refund amount.” This letter does not specify any particular refund period to which it pertains, and does not include or reference any refund claim number.

² The Form FT-946/1046 for the year 2010 does not bear the handwritten 6/21/2012 date, presumably as the result of oversight at the time the application was signed by Mr. Valente.

The letters “OSC” in the address listed on the letter appears to be a reference to the Office of the State Comptroller.

12. The parties agree that the dollar amounts of the refunds as calculated by petitioner are not in dispute, and that the substantive basis upon which each refund claim is premised (*see* Finding of Fact 1) is likewise not in dispute. The parties further agree that the sole basis for the refund denials (for all of 2010 and for a portion of 2011, as detailed above) was the Division’s conclusion that petitioner’s refund claims had not been filed within the applicable periods of limitation for each of the tax types at issue. Specifically, the Division maintains that it has no record of receipt of any of the noted applications having been filed at any time before their hand-delivery by petitioner’s counsel on May 27, 2014.

CONCLUSIONS OF LAW

A. At issue in this matter is the timeliness of petitioner’s claims for refund (reimbursement) of fuel tax (Tax Law Article 12-A), tax on petroleum businesses (Tax Law Article 13-A), and sales and use taxes (Tax Law Articles 28 and 29).

B. Under Tax Law § 315, the fuel tax provisions of Tax Law Article 12-A are made applicable to the administration of the petroleum businesses tax provisions of Tax Law Article 13-A. In turn, under Tax Law § 289-f and § 315, the provisions of Tax Law Article 12-A and Article 13-A are jointly administered with the sales and use tax provisions of Tax Law Articles 28 and 29.

C. Tax Law § 289-c(3)(c) provides, with respect to fuel tax (Article 12-A) and tax on petroleum businesses (Article 13-A), that claims for refund (reimbursement) thereof must be filed within three years from the date of purchase of the fuel with respect to which the refund is sought.

D. Tax Law § 1136(b) provides that a sales and use tax return is due 20 days after the close of the (relevant) taxable period covered by such return. In turn, Tax Law § 1137(a) and (e)(1) provide that sales and use taxes are payable on the due date for the filing of the relevant sales and use tax return. Tax Law § 1139(a) and 20 NYCRR 534.2 provide that claims for refund of sales and use taxes must be filed within three years after the date on which the tax was payable.

E. In this case, the Division maintains that petitioner's claims for refund were not filed until May 27, 2014 (*see* Finding of Fact 3). Applying the foregoing periods of limitation to such filing date, the Division determined that petitioner's Articles 12-A and 13-A claims would be timely only for periods beginning on (or after) May 27, 2011, and that its Articles 28 and 29 claims would be timely only for periods beginning on (or after) June 20, 2011 (i.e., 20 days after the due date for the filing of the sales and use tax return due for the quarterly period ended May 31, 2011). Hence, the Division granted a portion of the refunds claimed for 2011, consistent with the foregoing dates, and denied the refunds pertaining to periods prior to such dates (*see* Finding of Fact 4).

F. Petitioner alleges that a large banker's box containing the refund claims, together with relevant documentation in support thereof, was mailed to the Division by Ms. DeAngelus on June 26, 2012. As such, petitioner asserts that the claims were filed well within the noted periods of limitation and were therefore timely. Unfortunately, the record includes no proof establishing that the claims were, in fact, mailed on June 26, 2012, as asserted, or on any other particular date. In this regard, there is no evidence that petitioner followed any particular method or regular process in sending mail, nor is there any direct testimony as to the method by which the refund claims at issue in this matter were allegedly mailed. More to the point, in this case the

Division maintains the refund claims simply were not received at any point in time prior to their hand-delivery on May 27, 2014. The Division notes, in this regard, the individual certifications it provided attesting that no such claims were found upon a search of the Division's records for the same (*see* Finding of Fact 7).

G. Tax Law §§ 289-d and 1147(a)(2) both provide that the use of certified or registered mail with respect to the filing of documents with the Division, including (as here) refund claims, “within a prescribed period or on or before a prescribed date,” “[s]hall be prima facie evidence that such document was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed.” There is no evidence, however, that the refund claims were filed using a method of mailing that allowed for the confirmation of both the fact and date of such mailing, from which petitioner would be entitled to a presumption that the items mailed were delivered in due course thereafter. In *Matter of Sipam* (Tax Appeals Tribunal, March 10, 1988), the Tax Appeals Tribunal addressed the issue of proof of mailing when filing tax documents. In *Sipam*, petitioner used ordinary (first class) mail, rather than certified or registered mail, to file its petition with the Division of Tax Appeals, and the petition was not received within the statutory time frame. The Tribunal stated that the “[u]se of registered mail is prima facie evidence that the document was delivered. Where a taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the postal service *or that the document may not be delivered at all.*” (italics added) (*Matter of Sipam*; *Matter of Harron’s Electric Service*, Tax Appeals Tribunal, February 19, 1988; *see also Deutsch v. Commissioner of Internal Revenue*, 599 F2d 44 [2d Cir 1979]; *Miller v. United States*, 784 F2d 728 [6th Cir 1986]). In short, the use of registered or certified mailing essentially allows a taxpayer to avoid the risks of mishandling, late delivery, or nondelivery of time-sensitive items (*see Matter of*

Sipam).³ Here, the record includes no evidence to establish that the documents in question were delivered to the Division prior to May 27, 2014. There is no claim or evidence that petitioner used certified or registered mailing with respect to the refund claims at issue, nor is there any evidence of the specific address used by petitioner in making its claimed mailing.⁴ It is well established that testimony alone, though forthright and sincerely given, is insufficient to support a conclusion that petitioner has met the burden of proving that the refund claims in question were filed within the time periods required by the relevant statutes (*see Matter of Sipam*). In sum, the record contains no evidence of petitioner's asserted mailing of the refund claims on June, 26, 2012. Unfortunately for petitioner, the allegation of such mailing is insufficient to establish the same. Consequently, petitioner's claim of timely filing succumbs to the risk of nondelivery.

H. Given the foregoing, petitioner has not established the filing of the refund claims at any point in time prior to May 27, 2014, and it is this date from which the timeliness of the claims must be evaluated. In turn, the Division correctly determined that such claims were timely only for a portion of the periods for which refunds were sought. The Division granted petitioner's claims only to the extent the same were timely, and properly disallowed the balance of the refunds claimed (*see* Finding of Fact 4).

³ Registered or certified mailing allows an expedient method to establish both physical delivery of the item allegedly mailed into the custody of the USPS and, via return receipt cards or the use of USPS Form 3811-A, subsequent delivery information (or confirmation) with respect to the item.

⁴ Petitioner points to the January 21, 2014 letter of inquiry by Ms. DeAngelus in support of the assertion that the subject claims had been filed at some prior point in time (*see* Finding of Fact 11). Careful review of this letter reveals that it addresses itself to "original paperwork... delivered on June 12, 2013." Given petitioner's assertion that the claims at issue herein were filed by mail on June 26, 2012, this letter would appear to be concerned with a different claim than those at issue herein. In addition, this letter speaks of a "claim in process," yet there is no claim number or other identifying information on the letter. Finally, the address listed on the letter differs from the address specified with respect to refund claims (*compare* Findings of Fact 6 and 11). In sum, this letter provides little support for the assertion that the claims in issue had been filed with or received by the Division at some prior point in time.

I. The petition of RJ Valente Gravel, Inc., is hereby denied, and the Division's July 18, 2014 denials of petitioner's refund claims are sustained.

DATED: Albany, New York
May 4, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE