STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GOODE DELIVERY, LLC	:	DETERMINATION DTA NOS. 827451 AND 827470
for Revision of Determinations or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period July 1, 2013 through June 30, 2015.	:	

Petitioner, Goode Delivery, LLC, filed petitions for revision of determinations or for refund of highway use tax under article 21 of the Tax Law for the period July 1, 2013 through June 30, 2015.

On May 14, 2017 and May 25, 2017, respectively, petitioner, appearing by James Goode, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Frank Nuara, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs pursuant to 20 NYCRR 3000.12. Petitioner failed to submit a response by the due date of October 13, 2017, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly determined additional highway use tax due from petitioner for the period in issue, together with penalty and interest.

II. Whether the Division of Taxation properly imposed penalties pursuant to Tax Law § 512 for the period in issue.

FINDINGS OF FACT

The Division of Taxation (Division) submitted 26 proposed findings of fact. The following proposed facts have been incorporated into this determination: 1, 4, 6, 7 through 12, and 14 through 18. The following proposed facts have been included but modified to more completely and accurately reflect the record: 2, 3, 5, 13, 19 through 21, 23 and 24. The following proposed facts have not been included in the Findings of Fact, however the same content is contained in the opening paragraph of this determination and its title page: 22, 25, and 26.

1. Goode Delivery, LLC (petitioner) is a Texas based business engaged in trucking and hauling various loads to locations throughout the United States, including over the public roads of New York State.

2. Petitioner was issued a citation by the New York State Department of Transportation (NY DOT) on April 13, 2015, for operating a vehicle in Orange County, New York, in violation of Tax Law § 1815, for failure to display a New York highway use tax decal. In the normal course of business, NY DOT contacted the Division and provided it with a copy of the citation.

3. According to the Division's records, petitioner's vehicle did not have a highway use tax certificate of registration (COR) on the date of the violation.

4. Petitioner failed to file tax returns required by the highway use tax pursuant to article 21 of the Tax Law.

5. The Division issued a letter to petitioner, dated September 15, 2015, explaining that petitioner must: 1) apply for a COR and decal for all of its vehicles; 2) file highway use tax returns for any previous periods during which petitioner's vehicles traveled in New York State;

and 3) pay the $2,000.00 penalty due for operating a vehicle in New York State without proper registration.

6. Petitioner did not respond to the Division's September 15, 2015 correspondence.

7. In light of petitioner's failure to respond to the Division, and the determination that petitioner had not filed a return and paid the applicable highway use tax, the Division was forced to estimate the highway use tax owed by petitioner, using the records available to the Division.

8. New York State is a participating member of the International Fuel Tax Agreement (IFTA).

9. IFTA allows a motor carrier to report to a single base jurisdiction all the fuel use taxes that it owes to the various IFTA member jurisdictions.

10. IFTA returns for each carrier from every jurisdiction are made available to New York State through a computer program called the IFTA Clearinghouse.

11. Through the IFTA Clearinghouse, the Division ascertained that petitioner traveled 5,354 miles in New York State during the period July 1, 2013 through June 30, 2015.

12. Referencing the citation issued to petitioner by NY DOT on April 13, 2015, the Division ascertained that the Gross Vehicle Weight Rating (GVWR) of petitioner's vehicle was 80,000 pounds.

13. Since petitioner did not register its vehicle with New York State, it is standard protocol at the Division to accept the GVWR as the gross weight when determining the highway use tax owed. The GVWR and the definition of gross weight under the tax law are very similar and, according to the Division, often result in almost identical weights. In addition, when a carrier registers its vehicle with New York State, the carrier is responsible for supplying the gross weight of the vehicle and usually provides the GVWR to satisfy this requirement.

14. The United States Department of Transportation (US DOT) keeps records on each motor carrier registered with it, including what each carrier transports, through a public website hosted by the Safety and Fitness Electronic Records System (SAFER).

15. Through SAFER, the Division looked up petitioner's US DOT number and determined that petitioner's vehicles transport general freight, metal sheets, metal coils, metal rolls, poles, beams, lumber building materials, machinery, large objects, intermodal construction, oilfield equipment, utilities, agricultural supplies, farm supplies and construction materials.

16. Since petitioner failed to file highway use tax returns, the Division could not discern: (a) the ratio of laden to unladen miles traveled in New York State; (b) whether petitioner had accumulated the miles reported to IFTA on the Thruway in New York State; (c) petitioner's heaviest laden and unladen truck and tractor; and (d) specifically what type of load petitioner was transporting through New York State.

17. In order to determine the highway use tax owed by petitioner, the Division utilized schedule 1, table 1 on Form MT-903-MN,[1] whereby a vehicle with a gross weight of 80,000 pounds incurs highway use tax at a rate of $0.0546 per every laden non-Thruway mile. The Division calculated that petitioner owed $292.35 in highway use tax, plus penalty and interest for the audit period of July 1, 2013 through June 30, 2015.

18. The Division issued notice of determination L-043962832, dated November 19, 2015, to petitioner assessing additional highway use tax for the period July 1, 2013 through June 30, 2015, in the amount of $292.35, plus penalty and interest.

19. The Division also issued notice of determination L-043941077, dated November 17, 2015, to petitioner assessing a penalty under Tax Law § 512 (1) (e) in the amount of $2,000.00

[1] Schedule 1, table 1 was selected by process of elimination, based upon the absence of information from petitioner that would have been required for the use of other tables and rates on the Form MT-903.

for the tax period ending on April 30, 2015, for petitioner's operation of a motor vehicle in New York State without a required certificate of registration or a highway use tax decal.

20. Petitioner filed timely petitions in this matter protesting both notices. The Division filed timely answers to both petitions in response.

SUMMARY OF THE PARTIES' POSITIONS

21. In its petition, petitioner maintains that the $2,000.00 penalty for failure to possess a certificate of registration or highway use decal and the highway use tax assessment should both be abated since New York State does not have port of entry notifications alerting carriers to its highway use tax requirements, as do other states. Since New York State failed to notify the company of its highway use tax requirements, petitioner believes it should be relieved of the liabilities imposed.

22. The Division maintains it properly determined the additional highway use tax due from petitioner for the period in issue, together with penalty and interest, particularly in light of its assertion that petitioner failed to establish by clear and convincing evidence that the audit methodology resulted in unreasonably inaccurate results or that the amount of highway use tax was erroneous. The Division further argues that it properly imposed penalties pursuant to Tax Law § 512 against petitioner for the period in issue.

CONCLUSIONS OF LAW

A. Tax Law § 503 imposes a tax, known as the highway use tax, for the privilege of operating any vehicular unit, as defined by Tax Law § 501 [1] [c] [3], upon the public highways of New York State. This tax is a "weight-distance" tax, imposed and computed based upon the mileage traveled on New York State public highways at a tax rate determined by the gross weight of the vehicular unit. The Division ascertained that petitioner traveled 5,354 miles in New York State during the period in issue through the IFTA Clearinghouse, and that the GVWR of

petitioner's vehicle was 80,000 pounds from the NY DOT citation issued to petitioner. Since petitioner did not file highway use tax returns, the Division did not have certain information available to it, such as the data born by a registration for the vehicles, a gross weight other than that provided by the NY DOT, the details of the type of cargo transported, and whether the miles driven were on or off the Thruway, the tax calculation performed by the Division was based upon the only facts available to it. Given the limited information the Division was able to obtain, it calculated a reasonable approximation of the highway use tax due for the period in issue (***see*** Tax Law §§ 503, 503-b; 20 NYCRR 481.2; 20 NYCRR 481.12).

B. A presumption of correctness attaches to a properly issued statutory notice (***see Matter of Atlantic & Hudson Ltd. Partnership***, Tax Appeals Tribunal, January 30, 1992). Once notices of determination were issued to petitioner, it bore the burden of proof to demonstrate that the basis for the assessments was unreasonable or that the amount of tax assessed was incorrect (***Matter of Micheli Contr. Corp. v New York State Tax Commn.***, 109 AD2d 957 [3d Dept 1985]). Petitioner waived its right to a hearing in this matter and agreed to have this controversy determined on submitted evidentiary documents. Petitioner did not respond to the submission schedule with any documents, arguments, evidence or a brief. Petitioner failed to introduce evidence that would support either the unreasonableness of the assessment or the incorrectness of the tax assessed. Therefore, petitioner is deemed to have submitted to the presumption of correctness. Accordingly, the highway use tax assessment is upheld.

C. Before operating a motor vehicle on New York State's public highways, a carrier must obtain a highway use tax permit and sticker for each vehicular unit based on and reflecting the maximum gross weight of each such vehicular unit (Tax Law § 502; 20 NYCRR 472.1 [b]). The required highway use tax permits and stickers, as issued, shall be valid until revoked, suspended or surrendered (***id.***). Carriers may be required to possess decals as evidence that a carrier has a

valid certificate of registration for each motor vehicle operated on the public highways of New York State, and such decals are valid until they expire, are revoked, suspended or surrendered (Tax Law § 502 [6] [a]). There is no evidence presented by petitioner that it had properly registered its vehicles and acquired a highway use permit, sticker or decal as required by New York.

D. Tax Law § 512 (1) (a) provides for the imposition of a penalty where any person fails to file a return or to pay any highway use tax due within the time required by Tax Law article 21. Tax Law § 512 (1) (c) provides that the penalties may be abated if the failure or delay was due to reasonable cause and not willful neglect. The burden of establishing that the actions were based upon reasonable cause and not willful neglect, sufficient to abate penalties, rests with petitioner and is an onerous task (***see Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993; ***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978 [3d Dept 1993]). In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds, as well as a catchall provision, which provide for a finding of reasonable cause based upon any ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for the failure or delay in paying, thereby demonstrating an absence of willful neglect (20 NYCRR 2392.1 [d] [5]).

In addition to the penalty for failure to file or to pay the tax due, Tax Law § 512 (1) (e) imposes a penalty in the following circumstance:

> ". . . any person who fails to obtain a certificate of registration or decal as required under this article shall, after due notice and an opportunity for a hearing, for a first violation be liable for a civil fine not less than five hundred dollars but not to exceed two thousand dollars and for a second or subsequent violation within three years following a prior finding of violation be liable for a civil fine not less than one thousand dollars but not to exceed three thousand five hundred dollars."

The Division imposed the maximum penalty, $2,000.00, for what appears to be petitioner's first violation in the highway use tax area, for the failure to obtain a certificate of registration or decal as required under article 21.

E. Petitioner's argument that New York State does not have ports of entry that mimic other states' manner of notification does not meet the reasonable cause standards to completely abate the penalties, absent more. Had petitioner set forth additional information about its effort to ascertain the highway use requirements in New York State prior to the carrier's trip, there may have been grounds to consider penalty abatement. However, no additional information about any efforts was presented. Petitioner was a carrier who transported across state lines and had knowledge that different states had a variety of requirements. Petitioner simply did not acquire the knowledge to operate properly in New York, even if petitioner's complaint that New York State does not provide the information in as obvious a manner as other states is true. The Division, however, had the discretion to impose a penalty of $500.00 for a first time violation, and this amount seems more in line with the failure in this matter. Having not followed New York highway use tax requirements, the $2,000.00 penalty for failure to register pursuant to Tax Law § 512 (1) (e) is modified to $500.00. The penalty imposed for failure to pay the highway tax pursuant to Tax Law § 512 (1) (a) is upheld.

F. The petition of Goode Delivery, LLC is granted to the extent that the notice of determination dated November 17, 2015 is modified in accordance with Conclusion of Law E, but is otherwise sustained, and the petition is denied as to the notice of determination dated November 19, 2015, which is hereby sustained.

DATED: Albany, New York
April 5, 2018

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE