

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HARVEST TRANS	:	ORDER
	:	DTA NO. 828426
	:	
for Revision of Determinations or for Refund of	:	
Highway Use Tax under Article 21 of the Tax Law for	:	
the Periods Ending March 31, 2013, September 30, 2014	:	
and September 30, 2015.	:	

Petitioner, Harvest Trans, filed a petition for revision of determinations or for refund of highway use tax under article 21 of the Tax Law for the periods ending March 31, 2013, September 30, 2014 and September 30, 2015.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel), brought a motion on May 13, 2019, seeking an order dismissing the petition or summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) (1) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Vincent Frammigen, its Director of Safety, did not reply to the motion that was due on June 12, 2019, which date began the 90-day period for issuance of this order. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of notices of determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) brought a motion on May 13, 2019 for an order dismissing the petition or for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of notices of determination (notices), dated July 14, 2017, and bearing assessment identification numbers L-046828723 and L-046829167 (notices). The notices are addressed to petitioner, Harvest Trans Inc, 575 Avenue P, Newark, NJ 07105-4837.

2. On October 27, 2017, the Division of Tax Appeals received a petition protesting the notices. The envelope containing the petition does not bear any postmark from the United States Postal Service (USPS).

3. In support of the motion and to show proof of proper mailing of the notices, the Division provided, along with an affidavit of Brian D. Evans, the following with its motion papers: (i) an affidavit, dated May 6, 2017, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 14, 2017; (iii) an affidavit, dated May 7, 2019, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the notice, assessment #L-046828723, mailed to petitioner with the associated mailing cover sheet; (v) a copy of the petition; and (vi) a copy of petitioner's highway use tax and automotive fuel carrier consolidated certificate of registration, form TMT-7.1, dated May 8, 2017.

4. The affidavit of Deena Picard, who has been in her current position since February 2006 and Acting Director of MAPS since May 2017, sets forth the Division's general practice

and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. It is noted that her affidavit was signed and notarized prior to the issuance of the notices in this case.

5. The affidavit of Fred Ramundo, a supervisor in the Division's mail room, describes the mail room's general operations and procedures. Mr. Ramundo has been in this position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. Each page of the CMR in exhibit "A" of the Picard affidavit contains a USPS postmark of July 14, 2017. On page 15, corresponding to "Total Pieces and Amounts," is the preprinted number 158 and next to "Total Pieces Received At Post

Office” is the handwritten entry “158.” There is a set of initials or signature on page 15.

According to the Ramundo affidavit, one piece of certified mail was mailed to petitioner on July 14, 2017, as claimed. The affidavit is silent as to which assessment number is associated with the one piece of certified mail issued to petitioner.

CONCLUSIONS OF LAW

A. Tax Law § 510 (1) authorizes the Division to issue a notice of determination for additional highway use tax due. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (*see* Tax Law §510 [1]). The 90-day statutory time limit for filing a petition is strictly enforced (*see e.g. Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003). This is because, absent a timely protest, a statutory notice, to which protest rights attach, becomes fixed and final and the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. The Division brought this present motion for an order to dismiss the petition as untimely pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, as a motion for summary determination in its favor pursuant to 20 NYCRR 3000.9 (b). Since this matter involves the timely filing of a petition, this instant motion shall be treated as one for an order to dismiss.

C. Where, as here, the timeliness of a taxpayer’s petition is in question, the initial inquiry is whether the Division has carried its burden of demonstrating the date and fact of mailing the subject statutory notices to petitioner’s last known address (*see Matter of Katz*, Tax Appeals

Tribunal, November 14, 1991). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

D. The Division has not offered proof sufficient to establish the mailing of the statutory notices. Primarily, the affidavit submitted by Ms. Picard was sworn to prior to the issuance date of the notices at issue and, thus, cannot provide a basis for the CMR postmarked on July 14, 2017. Moreover, there are two statutory notices at issue, yet the CMR addresses only one notice. Lastly, the Ramundo affidavit states that he can attest to one piece of certified mailing that was issued to petitioner, yet nowhere in the affidavit did he indicate which notice he knows was issued. Therefore, the Division has not proven either the date or fact of mailing.

E. The Division of Taxation's motion for an order to dismiss is denied and a hearing will be scheduled in due course.

DATED: Albany, New York
September 5, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE