

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition : DETERMINATION/ORDER
of : TAT (H) 04-42 (RP)
ALLIED PROPERTIES, LLC :
:

Schwartz, A.L.J.:

Upon the motion of the Commissioner of Finance ("Commissioner" or "Respondent") of the City of New York ("City"), dated May 11, 2005, under Section 1-05(b)(1)(vii) of the City Tax Appeals Tribunal's ("Tribunal") Rules of Practice and Procedure ("Tribunal Rules") for an order dismissing the petition and the revised petition of Allied Properties, LLC ("Petitioner") on the grounds that neither was timely filed;¹ the May 11, 2005 Affirmation in Support of the Motion to Dismiss by Assistant Corporation Counsel Martin Nussbaum, Esq., and the exhibits submitted therewith including the affidavits of Duncan Riley, James W. Horne and Shawn Homes; the Affirmation in Opposition to the Motion to Dismiss by Israel Grossman, Esq., representative of Petitioner, and the exhibits submitted therewith including the affidavit of Sara Frankel; and the July 20, 2005 Reply Affirmation in Support of Motion to Dismiss, the following determination/order is issued.

¹As the revised petition relates back to and amends the petition, this motion will be treated as a motion to dismiss the petition, as revised.

ISSUE

Whether the petition, as revised, should be dismissed because it was filed more than ninety days after the mailing of the conciliation decision.

FINDINGS OF FACT

1. The Commissioner issued a Notice of Determination to Petitioner dated August 22, 2003 (the "Notice of Determination") asserting a Real Property Transfer Tax ("RPTT") deficiency in the principal amount of \$225,930.96, plus interest (calculated to September 21, 2003) of \$50,985.50 and penalty of \$40,667.46, for a total amount due of \$317,583.32.

2. On October 21, 2003, the City Department of Finance (the "Department") received a two-page power of attorney dated October 15, 2003 for Petitioner (the "Power of Attorney") in which Petitioner named Israel Grossman, Esq. as its representative. The Power of Attorney was on the standard power of attorney form, Form PCA-1, used by the Department and the New York State Department of Taxation and Finance. The first page of the Power of Attorney shows Mr. Grossman's address as "Pension Solutions 420 Lexington Avenue" with no suite number, city, state or zip code. The acknowledgment on the second page of the Power of Attorney is notarized by Evelyn Dubov, notary public and contains Ms. Dubov's signature, as notary. In the box labeled "name of witness" is the name Israel Grossman. The address of the witness is shown as "420 Lexington Avenue #1400, N.Y. N.Y. 10170." The Power of Attorney was sent to the Department in a manila envelope with a return address of Israel Grossman, Esq., 420 Lexington Avenue, Suite 1400, New York, NY 10170.

3. On October 29, 2003, the Department received a manila envelope with a return address of Israel Grossman, Esq., 420 Lexington Avenue, Suite 1400, New York, NY 10170. The envelope contained a cover letter from E. Dubov dated October 27, 2003 with a letterhead bearing an address of Pension Solutions, 420 Lexington Avenue, Suite 1400, New York, NY 10170. The cover letter references an enclosed power of attorney and states that "the entity is requesting a Conciliation Conference." It also states "[s]hould you require further assistance, kindly contact Israel Grossman, Esq." Also in the envelope was a Request for Conciliation Conference dated October 27, 2003 (the "Request"). The name and address of the taxpayer's representative is stated on the Request as "Israel Grossman, Esq., 420 Lexington Avenue, #1400, New York NY 10170." The envelope also contained pages 1 and 3 of the Notice of Determination and a copy of the Power of Attorney.

4. The Director of the Department's Conciliation Bureau issued a proposed resolution dated June 16, 2004 (the "Proposed Resolution"). The Proposed Resolution indicates that a conciliation conference was held on March 1, 2004, and that Israel Grossman, Esq. was present at the conference. The Proposed Resolution contains a place for the taxpayer to either agree with the Proposed Resolution, consent to its terms and waive any further rights to protest, or disagree with the Proposed Resolution, not consent to its terms and not waive any further rights to protest. Mr. Grossman signed the portion of the form indicating that the taxpayer disagreed with the Proposed Resolution, dated that signature 10/15/04 and mailed the Proposed Resolution back to the Department on or about October 15, 2004. On the Proposed Resolution, in the section of the form below Mr. Grossman's signature is a pre-printed note stating as follows:

If you disagree with the proposed resolution, the Conciliation Bureau will issue a decision discontinuing conciliation with respect to the above matter. To receive a hearing in the New York City Tax Appeals Tribunal on the statutory notice issued by the New York City Department of Finance, you **must file a petition with the Tribunal within 90 days from the date of the service of that decision.**
THIS IS NOT A PETITION FORM.

5. The Commissioner issued a decision (the "Conciliation Decision") dated August 6, 2004 discontinuing the conciliation proceeding.

6. Petitioner filed a petition that was received by the Tribunal on December 22, 2004 (the "Petition"). The Petition was signed by Mr. Grossman but was not accompanied by a power of attorney indicating that he was authorized to represent Petitioner. The Petition was also not accompanied by the Notice of Determination and the Conciliation Decision. Petitioner was given until February 25, 2005 to submit a revised petition in proper form with the necessary accompanying documents which, if received by that date, would be deemed filed on the date the Petition was filed. Petitioner filed such revised petition (the "Revised Petition") and provided the missing attachments, including the Conciliation Decision, by February 25, 2005.

7. The Petition contained a USPS postmark of December 21, 2004, well in excess of ninety days following the August 6, 2004 date on the Conciliation Decision.

8. As evidence of the mailing of the Conciliation Decision, Respondent submitted a copy of the front² of a USPS Form 3800, Certified Mail Receipt, (the "Certified Mail Receipt") and the front and back of a USPS Form 3811, Domestic Return Receipt, (the "Domestic Return Receipt"). The Certified Mail Receipt shows the name and address of Israel Grossman, Esq., 420 Lexington Ave., #1400, New York, NY 10170. The Certified Mail Receipt contains pre-printed article number 7099 3220 0007 2106 0426 on the left side. In the box labeled "Article Sent" are the hand-written notations "JWH Conciliation Bureau Allied Properties LLC." The Certified Mail Receipt contains a round USPS stamp bearing the date "Aug 9 2004," and the words "Brooklyn [illegible]cipal Sta. USPS." The front of the Domestic Return Receipt is addressed to NYC Dept. of Finance, Conciliation Bureau, 345 Adams St., 3rd Fl., Brooklyn, N.Y. 11201, Attn: James W. Horne. The back of the Domestic Return Receipt in the "Article Addressed to" box, contains the address of "Israel Grossman, Esq. 420 Lexington Ave. #1400, New York, N.Y. 10170." The number 7099 3220 0007 2106 0426 is handwritten in the Article Number box on the Domestic Return Receipt. The signature on the Domestic Return Receipt is "E. Dubov" with a check in the box for "agent." The date of delivery box has the handwritten notation "8/10/04." The Service Type box contains a check mark indicating that the service was Certified Mail. The Domestic Return Receipt contains a round USPS stamp bearing the date "Aug 10 2004" and the words "New York NY Grand Central Sta USPS." On the very bottom of the Domestic Return Receipt are the handwritten words "Allied Properties LLC."

9. Respondent submitted the affidavits of three Department employees: Duncan Riley, Director of the Department's Conciliation

² Official notice is taken of the fact that the back of USPS Form 3800 just contains pre-printed instructions about Certified Mail.

Bureau, James W. Horne, a Senior Conciliator in the Department's Conciliation Bureau, both of whom are located at 345 Adams Street, Brooklyn, New York and Shawn Homes a mail clerk for the Department, who is located at 210 Joralemon Street, Brooklyn, New York. Each individual was employed by the Department at his respective office on August 9, 2004.

10. Mr. Riley attested to the routine practice and procedure of the Department's Conciliation Bureau which were in effect on August 9, 2004, for preparing and mailing conciliation decisions.³ Mr. Riley attested that the routine practice and procedure consisted of several steps. Matters that are in Conciliation may be discontinued for a number of reasons, including that the taxpayer disagrees with the Proposed Resolution of the Conciliator or does not execute a consent and waiver within 15 days of the issuance of the Proposed Resolution. When the taxpayer transmits his/her disagreement or fails to respond to a Proposed Resolution, the Conciliator handling the case prepares a conciliation decision and has the conciliation decision signed by the Director of the Conciliation Bureau. Then, the Conciliator prepares an envelope to transmit the conciliation decision to the taxpayer. The Conciliator also prepares a Form 3800, Receipt for Certified Mail and a Form 3811, Domestic Return Receipt.⁴ On both the Form 3800 and the Form 3811, the Conciliator indicates that the Conciliation Bureau is the source of the form. Once the Forms 3800 and 3811 are prepared, the Conciliator examines them carefully to ensure that

³ When the term "conciliation decision" appears in lower case letters, it refers to any conciliation decision. When the term appears with initial capital letters, it refers to the Conciliation Decision dated August 9, 2004 that was issued to Petitioner.

⁴ Where the terms "Certified Mail Receipt" or "Domestic Return Receipt" are used, they refer to the specific forms that were used by the Conciliation Bureau when mailing the Conciliation Decision. When the terms "Form 3800" or "Form 3811" are used, they refer to any such forms.

the name and address of the taxpayer are present, legible and identical on all pieces. The Conciliator checks to ensure that the pre-printed Article Number on the Form 3800 matches the Article Number written on the USPS Form 3811. Finally, the Conciliator places the conciliation decision in the envelope, seals it, affixes the Forms 3800 and 3811 in the appropriate locations (front and back) on the envelope and then places the completed piece of mail in the Conciliation Bureau's outgoing mail box reserved for this purpose on the third floor of 345 Adams Street, Brooklyn, New York. Once each day, certified envelopes, prepared by the individual Conciliators of the Conciliation Bureau are picked up from the Conciliation Bureau's outgoing mail box on the third floor and are brought to the mail room on the first floor of 345 Adams Street, Brooklyn, New York for further processing and mailing. Within two days of preparation, pick-up and mailing, the mail room would return the Form 3800 to the Conciliation Bureau. After the Form 3800 has been returned, it is placed in the file folder dedicated to that particular matter. Within five to ten days after mailing, the Form 3811 is returned to the Conciliation Bureau by the mail room. The Form 3811 is also placed in the file folder dedicated to that particular matter. After the Form 3811 is returned to the Conciliator, the file is given to Mr. Riley. He then reviews the file to be sure that the above procedures were followed correctly and that there is a signed Form 3811 from the Petitioner [sic] before he files the folder in his records for safekeeping.

11. Mr. Riley attested that the Certified Mail Receipt found in Petitioner's file was addressed to "Israel Grossman, Esq., 420 Lexington Ave., #1400, New York, NY 10170" and contained Article Number 7099 3220 0007 2106 0426, and was mailed from the Conciliation Bureau on August 9, 2004. The Certified Mail Receipt indicates that the envelope was taken to the USPS Office located at

the Brooklyn Municipal Building on Joralemon Street where a USPS clerk acknowledged receipt of the envelope by stamping the Certified Mail Receipt with a postmark of August 9, 2004. The Certified Mail Receipt was returned to the Conciliation Bureau and filed in the folder for the Petitioner in accordance with standard Conciliation Bureau procedures.

12. Mr. Riley attested that the Domestic Return Receipt found in Petitioner's file was addressed to "Israel Grossman, Esq., 420 Lexington Ave. #1400, New York, N.Y. 10170," contained Article Number 7099 3220 0007 2106 0426, and was returned to the Conciliation Bureau, 345 Adams St., 3rd Floor, Brooklyn, NY, Attn: James W. Horne. The signature line contained the signature of E. Dubov, with a check in the box for Agent. Mr. Riley attested that E. Dubov is the same person who mailed a letter to the Real Property Transfer Tax Unit dated October 27, 2003 enclosing a Power of Attorney for Israel Grossman, Esq. and stating that "the entity is requesting a conciliation conference." That letter bears the heading address of Pension Solutions, 420 Lexington Avenue, Suite 1400, New York, N.Y. 10170, which is the same address as that of Israel Grossman, Esq. In addition, E. (Evelyn) Dubov is the individual who notarized Israel Grossman's Power of Attorney. The signature of E. Dubov on the letter, the notarization, and the Domestic Return Receipt all appear substantially similar. Mr. Riley stated that the "Receipt Date" line (line 7)⁵ indicates a receipt date of 8/10/04. An examination of the postmark on the front of the Domestic Return Receipt shows a postmark returning the Domestic Return Receipt to the Conciliation Bureau on August 10, 2004 from the Grand Central Station branch of the USPS, New York, N.Y. This

⁵ This appears to be an error, although it is not material. There is no "Receipt Date" or line 7 on Form 3811. Rather, Form 3811 contains line C, "Date of Delivery." On the Domestic Return Receipt, the "Date of Delivery" box contained the hand-written notation, "8/10/04."

Domestic Return Receipt was returned to the Conciliation Bureau and was filed in the folder for Allied Properties [sic], LLC in accordance with standard Conciliation Bureau procedures.

13. Mr. Riley also attested, based upon the above and a review of the file, that the Conciliation Decision was prepared and mailed in accordance with the above described procedure.

14. Mr. Horne attested to the routine office practice and procedure followed by him when mailing any conciliation decision, and, based on his personal knowledge, the procedures followed when mailing the Conciliation Decision. Mr. Horne attested that matters that are in Conciliation may be discontinued for a number of reasons. One of the reasons is that the taxpayer disagrees with the Proposed Resolution of the Conciliator or does not execute a consent and waiver within 15 days of the issuance of the Proposed Resolution. After more than 30 days had passed without a response from the Petitioner to the Proposed Resolution, Mr. Horne prepared the Conciliation Decision and had it signed by Mr. Riley. Once Mr. Riley signed it, Mr. Horne prepared an envelope to transmit the Conciliation Decision to the taxpayer. In addressing the envelope, Mr. Horne used the name and address information provided to him by the taxpayer's representative during the course of the conciliation process. In this particular case, it was Israel Grossman's address, as submitted on his Request and Power of Attorney which was 420 Lexington Ave., #1400, New York, New York 10170. In addition to preparing the envelope, Mr. Horne prepared the Certified Mail Receipt and the Domestic Return Receipt. On each form, he indicated that the Conciliation Bureau was the source of the form to enable the mail room personnel to return the receipts to him after they had been processed by the USPS. He also noted the name of the Petitioner, Allied Properties, LLC, for his ease of filing when the

forms were returned from the post office. Once the Certified Mail Receipt and Domestic Return Receipt were prepared, he examined them carefully to ensure that the name and address of the taxpayer were present, legible and identical on all items. He then checked to ensure that the pre-printed Article Number on the Certified Mail Receipt matched the number written on the Domestic Return Receipt. Finally, he placed the Conciliation Decision in the envelope, sealed it, affixed the Certified Mail Receipt and the Domestic Return Receipt in the appropriate locations on the envelope and then placed the completed piece of mail into the Conciliation Bureau's outgoing mail box reserved for this purpose on the third floor of 345 Adams Street, Brooklyn, New York.

15. Mr. Horne also attested that certified envelopes prepared by the individual conciliators of the Conciliation Bureau are picked up from the Conciliation Bureau's outgoing mail box on the third floor and are brought to the mail room on the first floor of 345 Adams Street, Brooklyn, New York, for further processing and mailing. The mail room would normally return the Form 3800 to the Conciliation Bureau. After the Form 3800 has been returned, it is placed in the file folder dedicated to the particular matter to which it relates. The Form 3811 is normally returned to the Conciliation Bureau by the mail room. This form is also placed in the file folder dedicated to that particular matter

16. Mr. Horne also attested that both the Certified Mail Receipt and Domestic Return Receipt were returned to the Conciliation Bureau and filed in Petitioner's file by him. The Certified Mail Receipt that was returned to the Conciliation Bureau was addressed to Israel Grossman, Esq., 420 Lexington Ave. #1400, New York, NY 10170, and contained Article Number 7099 3220 0007 2106 0426. This Certified Mail Receipt indicates that the envelope was

taken to the USPS office located at the Brooklyn Municipal Building on Joralemon Street where a USPS clerk acknowledged receipt of this envelope by stamping the Form 3800 with a postmark of August 9, 2004. The Domestic Return Receipt that was returned to the Conciliation Bureau by the USPS was addressed to Israel Grossman, Esq., 420 Lexington Ave. #1400, New York, NY 10170, contained Article Number 7099 3220 0007 2106 0426, and was returned to Conciliation Bureau, 345 Adams St., 3rd Floor, Brooklyn, NY, Attn: James W. Horne. The signature line contained the signature of E. Dubov, with a check in the box for Agent. Mr. Horne also attested that E. Dubov is the same party who mailed a letter to the Real Property Transfer Tax Unit dated October 27, 2003 enclosing a Power of Attorney for Israel Grossman, Esq. and stating that "the entity is requesting a conciliation conference." Mr. Horne also attested that that letter bears the heading address of Pension Solutions, 420 Lexington Avenue, Suite 1400, New York, N.Y. 10170, which is the same address as that of Israel Grossman, Esq. Mr. Horne also attested that E. (Evelyn) Dubov is the individual who notarized the Power of Attorney for Petitioner and that the signature of E. Dubov on the letter, the notarization, and the Domestic Return Receipt all appear substantially similar. The Receipt Date line⁶ indicates 8/10/04. An examination of the postmark on the front of the Domestic Return Receipt shows a postmark returning the Domestic Return Receipt to Conciliation on August 10, 2004 from the Grand Central Station branch of the USPS, New York, N.Y.

17. Mr. Homes attested that he is a Mail Clerk for the Department whose office base is 210 Joralemon Street, Brooklyn, New York. The duties of Mail Clerks for the Department include mailing of conciliation decisions to taxpayers from the Conciliation Bureau

⁶ See, Fn. 5, *supra*.

at 345 Adams Street, Brooklyn, New York. Mr. Homes attested to the routine office practice and procedure followed by the Department when mailing any conciliation decision. He attested that once each day, at approximately 3:00 P.M., certified envelopes prepared by the individual conciliators of the Conciliation Bureau are picked up from the outgoing mail box on the third floor of 345 Adams Street. Each envelope is checked at the time of pick up to ensure that it has affixed to it a Form 3800 and Form 3811. A further check is also made to ensure that the Article Number on the Form 3800 and the Article Number on line 4a of the Form 3811 are identical. Mr. Homes then also checks to ensure that the name and address on the front of the envelope as well as the name and address on the Form 3800 and Form 3811 all match. He then weighs the individual mail pieces and applies the proper postage. The envelopes so processed are then set aside for transportation later in the day to the USPS office at the Municipal Building on Joralemon Street, Brooklyn, New York. At approximately 4:00 P.M., Mr. Homes would take the individual Certified Mail pieces, together with any bundled mail (those envelopes bound in a USPS Form 3877, mail manifold) to the USPS office at the Municipal Building on Joralemon Street, Brooklyn, New York. There he would give the bundles of mail to a USPS clerk who, in his presence, would process the bundled mail and then examine each separate (unbundled) mail piece, ensure the correct postage was applied and then stamp each individual receipt. The USPS clerk would then hand back both the postmarked mail manifolds and the postmarked individual mail receipts [Forms 3800] to him. Mr. Homes would bring these back to the respective units at 345 Adams Street, Brooklyn, New York. He then places the individual postmarked receipts [Forms 3800] in the mail slot for the Conciliation Bureau and those receipts would be delivered to the Conciliation Bureau in the regular course of business. After delivery, when the Form 3811 is returned from the Post Office, he then places the Form 3811 in

the mail slot for the Conciliation Bureau and those receipts would be delivered to the Conciliation Bureau in the regular course of business.

18. Mr. Holmes also attested that the Certified Mail Receipt indicates that the envelope was taken to the USPS office located at the Brooklyn Municipal Building at Joralemon Street where a USPS clerk acknowledged receipt of this envelope by stamping the Certified Mail Receipt with a postmark of August 9, 2004. Mr. Holmes further attested that the postmark on the Domestic Return Receipt indicates that it was postmarked on August 10, 2004 from the Grand Central Station branch of the USPS.

19. Mr. Grossman stated in his affirmation that Petitioner never received the Conciliation Decision until February 22, 2005 when the Tribunal advised him that a copy could be requested from the Conciliation Bureau and it was then received for the first time.

20. Mr. Grossman stated that in December 2003 he relocated his offices from Suite 1400 to Suite 1435 at 420 Lexington Avenue. He stated that Suite 1400 is owned and leased by New York Life Insurance Company against whose partner he has an outstanding arbitration that has not yet been resolved. Suite 1435 is a separate office rented by Pension Solutions from a third party.

21. Mr. Grossman also stated that E. Dubov is neither the employee nor agent of Petitioner or of himself. She is a "senior citizen independent contractor" who made herself available to any individual in the offices of New York Life or otherwise for secretarial services or notarization services.

22. Mr. Grossman submitted an affidavit of Sara Frenkel dated May [illegible] 2005 in which she affirmed:

During the past year I have been asked to go to the mailroom of New York Life Insurance Company Room which is on the 15th Floor of 420 Lexington Avenue to retrieve mail that may have been incorrectly addressed to Israel Grossman at Pension Solutions which had formerly been in the New York Life office in room 1400.

The first time I went to retrieve incorrectly addressed mail, after a search a stack full of junk and other mail was provided.

The next time I went to retrieve mail I was told there was no mail being held and a subsequent time I was told that mail was sent back and was no longer retained.

For the past several months, there is no way of knowing whether mail sent to Suite 1400 addressed to Israel Grossman, Esq. is returned or discarded. The only thing that is certain is that mail wrongly addressed to Israel Grossman, Esq., Suite 1400 is not delivered to or available to be picked up by Israel Grossman, Esq.

23. Mr. Grossman also affirmed that Petitioner first mailed the disagreement with the Proposed Resolution as well as what he characterizes a "timely petition" to the Conciliation Bureau on or about October 15, 2005 indicating a correct address. However, there is no indication in the record that Mr. Grossman mailed anything other than the the disagreement with the Proposed Resolution, which clearly states on that form that it is not a petition, and which was mailed to the Conciliation Bureau and not to the Tribunal.

CONCLUSIONS OF LAW

The timely filing and service of a petition is a jurisdictional prerequisite to Tribunal review of a taxpayer's disagreement with a notice of determination. City Charter §170(a). Under City Charter §170(a) and Code §11-2107, for a petition to be timely filed, it must be filed with the Tribunal within ninety days of the latter of the mailing of (1) the protested notice of determination, or, (2) if a conciliation conference was requested and held, within ninety days from the mailing of a conciliation decision or the date of the Commissioner's confirmation of the discontinuance of the conciliation proceeding. Where a petition is not timely filed, such notice of determination becomes an assessment of the amount of tax asserted therein. Code §11-2107.

It is not disputed that the Conciliation Decision was dated August 6, 2004. The filing date of the Petition under 20 RCNY § 1-17(a) is the postmarked date of December 21, 2004 which date is substantially beyond the ninety-day period. Accordingly, if the Conciliation Decision was properly mailed on August 6, 2004, the Tribunal does not have subject matter jurisdiction over the Petition.

When the timeliness of a petition is at issue, the Commissioner has the burden of proving proper addressing and mailing of the document whose mailing starts the running of the 90 day period for filing and serving a petition (in this instance, the Conciliation Decision). See, *Matter of Goldman & Goldman, P.C.*, TAT(E) 02-12(CR) (City Tribunal, March 24, 2005), citing *Matter of 2981 Third Avenue, Inc.* TAT(E) 93-2092(RP) (City Tribunal, June 14, 1999); *Matter of Novar TV & Air Conditioning Sales & Service, Inc.*, (New York State

Tax Appeals Tribunal, May 23, 1991); Matter of William and Gloria Katz, (New York State Tax Appeals Tribunal, November 14, 1991).

The Certified Mail Receipt and the Domestic Return Receipt indicate that the Conciliation Decision was addressed to Israel Grossman, Esq. 420 Lexington Avenue #1400, N.Y., N.Y. 10170. This is the address on the Power of Attorney that Mr. Grossman filed with the Conciliation Bureau and was the return address on the envelope that contained the request for a conciliation conference. Mr. Grossman asserts that he moved his office from Room 1400 to Room 1435 in December 2003. Although he appeared at a Conciliation Conference in March 2004, he did not notify the Conciliation Bureau until October 15, 2005 that he moved his office down the hall. Accordingly, the Conciliation Bureau properly addressed the Conciliation Decision to Petitioner's representative at the address he had provided them.

A conciliation decision is deemed to be mailed when it is delivered to the custody of the USPS for mailing. *Matter of Goldman & Goldman, P.C., supra, citing Matter of 2981 Third Avenue, supra; citing Matter of Novar, supra.* Section 11-2116.a of the Code does not require actual receipt by a taxpayer and specifically provides, in relevant part, that the:

mailing of [any notice required under the RPTT provisions of the Code] shall be presumptive evidence of the receipt of same by the person to whom addressed. Any period of time which is determined according to the provisions of this chapter by the giving of notice shall commence to run from the date of mailing of such notice.

However, "the presumption of delivery does not arise unless and until sufficient evidence of mailing has been proffered." *Matter of Goldman & Goldman, P.C., supra, citing Matter of Katz, supra.*

Thus, the Department must establish when it mailed the Conciliation Decision by: "(1) offer[ing] proof of a standard procedure used for the issuance of the relevant document by one who has knowledge of the relevant procedure; and (2) offer[ing] proof that the standard procedure was followed in the case at issue." *Matter of Goldman & Goldman, P.C., supra*, citing *Matter of 2981 Third Avenue, supra*.

Respondent met the two tests set forth above. The affidavits of Mr. Riley and Mr. Horne established the Department's procedures for preparing conciliation decisions for mailing and the Department's procedures for mailing those conciliation decisions. Both Mr. Riley and Mr. Horne attested that the Conciliation Decision was prepared for delivery to the USPS for certified mailing in accordance with these procedures. In addition, Mr. Homes attested to the Department's procedures for mailing conciliation decisions and attested that those procedures were followed with respect to the Conciliation Decision.

A properly completed Form 3800 represents direct documentary evidence of the date and the fact of mailing. *Matter of Air Flex Custom Furniture, Inc.*, DTA No. 807-485, (New York State Tax Appeals Tribunal, November 25, 1992). Cf., *Matter of Goldman & Goldman, P.C., supra*, citing *Matter of Charla Bikman*, TAT(E) 98-73(UB) (City Tax Appeals Tribunal, August 16, 2001), citing *Wheat v. Commissioner*, T.C. Memo 1992-268. Here, the Certified Mail Receipt contains the hand-written notation "JWH Conciliation Bureau Allied Properties LLC" in the "Article Sent" box. Both the Certified Mail Receipt and the Domestic Return Receipt contains Article Number 7099 3220 0007 2106 0426. Both the Certified Mail Receipt and the Domestic Return Receipt indicate that the article was addressed to Israel Grossman, Esq., 420 Lexington Ave., #1400, New York, NY 10170. The Certified Mail Receipt contains a round USPS stamp

bearing the date "Aug 9 2004," and the words "Brooklyn [illegible] pical Sta. USPS."

A properly completed Form 3800, like a properly completed mail manifold, "raises a presumption of official regularity" in favor of the Department. *Matter of Air Flex Custom Furniture, Inc., supra*; *Matter of Goldman & Goldman, P.C., supra*, citing *Matter of Charla Bikman, supra*, citing *Wheat, supra*; citing *United States v. Zolla*, 724 F.2d 808, 810 (9th Cir. 1984), cert. denied, 469 U.S. 830 (1984), rehearing denied, 469 U.S. 1067 (1984). While the postmark stamp was partially illegible in that the specific USPS station in Brooklyn was not entirely legible, the postmark of Aug 9, 2004 was legible and the portion of the USPS station that was legible indicated that the item was mailed in Brooklyn. This Certified Mail Receipt in conjunction with the affidavit of Mr. Homes makes it clear that the Conciliation Decision was mailed on August 9, 2004 from the USPS office at the Brooklyn Municipal Building to Israel Grossman, Esq. 420 Lexington Ave. #1400, New York, N.Y. 10170. The affidavits of Mr. Riley, Mr. Horne and Mr. Homes combined with the Certified Mail Receipt and the Domestic Return Receipt constitute direct evidence that the Department's procedures were followed in this case. *Matter of Goldman & Goldman, P.C., supra*, citing *Matter of 2981 Third Avenue, supra*.

Petitioner asserts that it has rebutted the presumption of receipt. In Mr. Grossman's affirmation he stated that Petitioner first received the Conciliation Decision on February 22, 2005 when the Tribunal advised him that a copy of the Conciliation Decision should be requested from the Conciliation Bureau. However, Petitioner must do more than merely deny receipt in order to rebut the presumption of receipt. *Matter of Goldman & Goldman, Inc., supra*, citing *Matter of T.J. Gulf, Inc. v. New York State Tax*

Commission, 124 A.D.2d 314 (3rd Dept. 1986). Petitioner must show that the Department's "routine office practices were not followed or that those practices were performed so carelessly that it would be unreasonable to assume that the [Conciliation Decision] was mailed." *Id.* Alternatively, Petitioner must show that the USPS failed to comply with its own requirements for delivery of certified mail. *Matter of Goldman & Goldman, Inc., supra, citing Matter of Ruggerite, Inc. v. State Tax Commission*, 97 A.D.2d 634 (3rd Dept. 1983), *aff'd*, 64 N.Y.2d 688 (1984). Petitioner might also be able put forth other proof that would serve to rebut the presumption; however, merely denying receipt is not sufficient.

Mr. Grossman stated that in December 2003 he relocated his offices from Suite 1400 to Suite 1435 at 420 Lexington Avenue. He stated that Suite 1400 is owned and leased by New York Life Insurance Company against whose partner he has an outstanding arbitration that has not yet been resolved. Suite 1435 is a separate office rented by Pension Solutions from a third party.

The signature on the Domestic Return Receipt indicates that the Conciliation Decision was actually received by E. Dubov. E. Dubov is the same individual who signed the cover letter that accompanied the Power of Attorney and requested a conciliation conference. Evelyn Dubov is also the person who notarized Petitioner's signature on the Power of Attorney. Mr. Grossman a stated that E. Dubov is neither the employee nor agent of Petitioner or of himself. She is a "senior citizen independent contractor" who made herself available to any individual in the offices of New York Life or otherwise for secretarial services or notarization services. Mr. Grossman provides no explanation for why Evelyn Dubov, who according to Mr. Grossman was an independent contractor who provided services to anyone, when presented with a piece of certified mail addressed to

Mr. Grossman would sign for it and not give it to him rather than merely advising the letter carrier that his office was now down the hall.

Mr. Grossman submitted an affidavit of Sara Frenkel dated May [illegible] 2005 to establish that he was having difficulty receiving his mail. See, Finding of Fact #22. However, Petitioner fails to explain what Sara Frankel's position is or the basis for her knowledge of the events described in her affidavit. Moreover, such vaguely described events may well have occurred after the actual receipt of the Conciliation Decision on August 10, 2004. For example, the May 2005 affidavit of Sara Frenkel describes two instances "during the past year" when she went to retrieve mail. No dates are given for these events, so they could have occurred any time in the nine months following August 10, 2004 when the Conciliation Decision was delivered and prior to May, 2005 when the affidavit was executed. Furthermore, the description of events "for the past several months" from May 2005 would most certainly be long after the receipt date of August 10, 2004.

If, in fact, Mr. Grossman was having a problem receiving his mail, this would be all the more reason to notify the Department where he had a matter pending, of the change in his suite address. He provides no indication that at any time prior to October 15, 2004, he notified the Department of this change. He also does not assert that he notified the USPS of a change of suite number in his address. It is also noted that although Mr. Grossman asserted that after December 2003 he was not reliably receiving mail addressed to him at Suite 1400, he must have received notice of the Conciliation Conference that was held in March 2004 since he attended that conference. In addition, since Mr. Grossman sent his disagreement with the Proposed Resolution dated June 16, 2004 back to the

Department (albeit quite late), it is clear that he must also have received the Proposed Resolution. Mr. Grossman's assertions simply are not sufficient to overcome either the presumption of receipt or the fact in this case of actual receipt.

Petitioner asserts that it "first mailed the disagreement with the Proposed Conciliation Decision as well as a timely Petition appealing such proposed determination with the Conciliation Bureau on or about October 15, 2004 (indicating a correct address) and subsequently with the N.Y. City Tax Appeals Tribunal." However, the record indicates that all Petitioner mailed on or about October 15, 2004 was the disagreement with the Proposed Conciliation Decision, a document that, on its face, clearly states "THIS IS NOT A PETITION FORM." In addition, petitions must be filed with the Tribunal, not with the Conciliation Bureau. City Charter §170(a). Accordingly, the mailing of a disagreement with the Proposed Decision to the Conciliation Bureau did not constitute the filing of a petition with the Tribunal.

ACCORDINGLY, IT IS CONCLUDED THAT as the Petition, as revised, was filed more than ninety days after the mailing of the Conciliation Decision on August 9, 2004, the Petition, as revised, is untimely filed. The Petition, as revised is hereby dismissed as this Tribunal lacks jurisdiction to hear it.

It is so ordered.

DATED: January 18, 2006
New York, New York

MARLENE F. SCHWARTZ
Administrative Law Judge