

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

In the Matter of the Petition

Of

**ISLAND EQUITIES REALTY &
ASSET MANAGEMENT, LLC**

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: **DISMISSAL DETERMINATION**
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: **TAT (H) 07-19 (RP)**
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Murphy, A.L.J.:

Upon the May 12, 2008 motion of the Commissioner of Finance ("Respondent") of New York City ("City") to dismiss the Petition for Hearing of Island Equities Realty & Asset Management, LLC ("Petitioner") as not being timely filed ("Motion"); the May 9, 2008 Affirmation of Assistant Corporation Counsel Martin Nussbaum, Respondent's representative, and exhibits annexed thereto; the February 12, 2008 Affidavit of Duncan Riley; and the absence of any reply from Petitioner's manager/officer, Kirk McLeod; the following Findings of Fact and Conclusions of Law are found.

FINDINGS OF FACT

1. On May 17, 2006, the Commissioner issued a Notice of Determination asserting a Real Property Transfer Tax deficiency against Petitioner for a November 11, 2003 transfer of real property located at 1627 St. John's Place, Brooklyn, New York (Block 1381/Lot 58, Kings County). The principal deficiency asserted was \$4,488.75, plus interest calculated to June 16, 2006 of \$922.86, for a total due of \$5,411.61. The Notice was addressed to Petitioner at 4209 Farragut Road, Brooklyn, NY 11203.

2. On June 1, 2006, the Commissioner received from Petitioner a Request for Conciliation Conference dated May 27, 2006. Petitioner's address on the Request was 4209 Farragut Road, Brooklyn, N.Y. 11203. A Conciliation Conference was scheduled for August 7, 2006 before Respondent's Conciliation Bureau ("Conciliation Bureau") and a Conciliator was assigned. Petitioner failed to appear at the scheduled Conciliation Conference. On September 12, 2006 Respondent issued to Petitioner a Conciliation Decision ("Conciliation Decision") discontinuing the Conciliation proceeding. The Conciliation Decision was signed by Duncan C. Riley, Director of the Conciliation Bureau.

3. As evidence of mailing the Conciliation Decision, Respondent submitted a copy of the front of a United States Postal Service ("USPS") Form 3800 Certified Mail Receipt ("Form 3800") and a copy of the front and back of a USPS Form 3811 Domestic Return Receipt ("Form 3811"). The Form 3800 is addressed to Petitioner at 4209 Farragut Road Brooklyn, New York 11203, and bears the pre-printed Article Number 7006 0810 0003 0779 5816. The Form 3800 bears the notation "Conciliation Bureau" in the box "Official Use" and indicates a postage of \$4.64. The Form 3800 also contains a round USPS stamp which bears the date "Sep 25 2006" and the words "BROOKLYN [illegible] STA."

4. The front of the Form 3811 is addressed to NYC Department of Finance, Conciliation Bureau, 345 Adams Street, 3rd Floor, New York, N.Y. 11202, Attn: Lai F. Tang as "sender." The back of the Form 3811 indicates that the "Article" is addressed to Petitioner at 4209 Farragut Road Brooklyn, New York 11203, Attn: Kirk A. McLeod. Box 3 of the completed Form 3811 indicates a "Certified" "Service Type." This Form bears a handwritten "Article Number" 7006 0810 0003 0779 5816. In the section of the Form 3811 that

includes the instructions "Complete This Section on Delivery," the form bears an illegible signature in box "A." The back of the Form 3811 contains a round USPS stamp which bears the date "Sep 27, 2006" and indicates the "USPS [Illegible] Station Brooklyn NY 11203."

5. Respondent also submitted the affidavit of Duncan D. Riley, the Director of the Conciliation Bureau. Mr. Riley attested to the routine office practice and procedures of the Conciliation Bureau with respect to the discontinuance of conciliation proceedings and the issuing of conciliation decisions, and affirmed that these practices and procedures were in effect on September 25, 2006 and were followed with respect to the preparation and mailing of the Conciliation Decision.

6. Mr. Riley attested that where a taxpayer fails to appear at a scheduled Conciliation Conference, it is the procedure of the Conciliation Bureau to prepare a conciliation decision for the signature of the Director of the Conciliation Bureau and to transmit the signed decision to the taxpayer. The Conciliator prepares the envelope for mailing the signed decision. The Conciliator also prepares a Form 3800 and a Form 3811, indicating on each Form that the source of the information is the Conciliation Bureau. The Conciliator examines the prepared forms and verifies that each bears the correct name and address of the taxpayer. He or she also verifies that the Form 3800 pre-printed Article Number matches the article number handwritten on the Form 3811. The decision is placed in the prepared envelope, the envelope is sealed and the USPS Forms are affixed to the envelope in the appropriate locations (front and back). The prepared envelope is placed in an outgoing mailbox reserved for the purpose of transmitting conciliation decisions that is located on the third floor of

Respondent's offices at 345 Adams Street, Brooklyn, New York. Respondent's personnel retrieves the prepared envelope and brings it to the mail room on the first floor of that building. From the mail room, the envelope is taken to a USPS Office for mailing. Following mailing at the USPS office, the stamped Form 3800 is returned to the Conciliation Bureau where it is placed in the folder dedicated to the matter. Subsequently, the Form 3811, is returned to the Conciliation Bureau from the mailroom and placed in the folder dedicated to the matter. This procedure was in effect on and after September 25, 2006.

7. Mr. Riley also attested to the preparation and mailing of the Conciliation Decision. The Conciliation Decision was prepared for mailing according to the established procedures. An envelope was addressed to Petitioner at 4209 Farragut Road, Brooklyn, NY 11203 and the Forms 3800 and 3811 were prepared. The returned Form 3800 establishes that an employee of the Department took the envelope to the USPS Office located at the Brooklyn Municipal Building, Joralemon Street, Brooklyn, New York. A USPS Postal Clerk acknowledged receipt of the envelope by stamping the Form 3800 with a USPS postmark of September 25, 2006. This receipt was returned to the Conciliation Bureau and filed in the Conciliation Bureau's folder pertaining to Petitioner. The prepared Form 3811, which was returned to the Bureau from the Brooklyn 11203 USPS Branch, establishes that the Conciliation Decision was delivered to Petitioner. The prepared Form 3811 bore a USPS postmark of September 27, 2006, and contained an illegible signature¹ in the box provided for signed receipt acknowledgment. The prepared Form 3811 was filed in the Bureau folder pertaining to Petitioner.

¹ Mr. Riley attests that the signature on the Form 3811 is that of Petitioner's representative, Mr. McLeod. While it is essentially an illegible signature, it does resemble Mr. McLeod's signature on the Petition.

Petitioner does not deny receipt of the Conciliation Decision.

8. Petitioner mailed a Petition, dated December 11, 2006, to the City Office of Corporation Counsel, protesting the Notice of Determination and requesting a hearing ("Petition"). Petitioner's address on the Petition was 4209 Farragut Road, Brooklyn N.Y. 11203. The envelope containing the Petition bears a USPS postal stamp of December 27, 2006, and was received by the Corporation Counsel on December 28, 2007, in excess of ninety (90) days after the September 25, 2006 mailing of the Conciliation Decision.

9. Petitioner did not mail a copy of the Petition to the Tax Appeals Tribunal. On June 13, 2007, Corporation Counsel telephoned the Tribunal and inquired as to the status of this matter. The representative was informed that the Tribunal had no record of having received the Petition. On June 15, 2007, the Chief Administrative Law Judge requested in writing that Corporation Counsel provide the Tax Appeals Tribunal with a copy of the Petition.

CONCLUSIONS OF LAW

The timely filing of a petition is a jurisdictional prerequisite to a taxpayer obtaining administrative review of a statutory notice issued by the Department of Finance. City Charter §§168(a) and 170(a); City Administrative Code ("Code") §11-2107. A petition protesting a Conciliation Decision is timely if it is: (1) filed with the Tribunal within ninety days of the proper mailing of the Conciliation Decision; and (2) served on Respondent within the same time period. Code §11-2107. A petition filed more than ninety days from the mailing of the Conciliation Decision is not timely. When a Petition is not timely filed, the Notice of

Determination becomes an assessment of the amount of tax asserted as due therein. Code §11-2107.

Where the timeliness of a petition is at issue, the Commissioner has the burden of proving the proper addressing and mailing of the document which starts the running of the ninety-day period for filing and serving a petition; in this case, the Conciliation Decision. See, *Matter of Goldman & Goldman, P.C.*, TAT(E)02-12(CR) (NYC Tax Appeals Tribunal, March 24, 2005); *Matter of Samuel Heyman*, TAT(E)93-1577(RP) (NYC Tax Appeals Tribunal, August 1, 2001); *Matter of Novar TV & Air Conditioning Sales & Service, Inc.* (NYS Tax Appeals Tribunal, May 23, 1991); *Matter of William and Gloria Katz* (NYS Tax Appeals Tribunal, November 14, 1991). A conciliation decision is deemed to be properly mailed when it is delivered to the custody of the USPS for mailing. See, *Novar, supra*; *Goldman & Goldman, P.C., supra*. Code §11-2107 does not require actual receipt by the taxpayer, and a properly addressed Conciliation Decision which is properly mailed is valid regardless of whether it is actually received. *Matter of Kenning v. State Tax Comm.*, 72 Misc.2d 929 (S.Ct. Albany County, 1971), aff'd, 43 A.D. 2d 815 (3rd Dept., 1973), appeal dismissed, 34 N.Y.2d 653 (1974).

Respondent submitted proof establishing the proper mailing of the Conciliation Decision to Petitioner on September 25, 2006. Respondent established a standard procedure for mailing conciliation decisions and demonstrated that this procedure was followed in the mailing of the Conciliation Decision to Petitioner. *Matter of Novar, supra*; *Matter of Katz, supra*. The date-stamped USPS Form 3800 confirms that the Decision was delivered to the USPS for mailing and was mailed on September 25, 2006, entitling Respondent to the presumption of official regularity in issuing the

Conciliation Decision. *Coleman v. Commissioner*, 94 T.C. 82 (1990); *Wheat v. Commissioner*, 63 T.C.M. 2955 (1992). Respondent also submitted proof of Petitioner's actual receipt of the Conciliation Decision, e.g., the signed returned prepared USPS Form 3811, and Petitioner does not dispute having received the Conciliation Decision.

Petitioner served a Petition on Respondent on December 27, 2006, more than ninety days after the Conciliation Decision was mailed, and did not timely file a Petition protesting the Conciliation Decision to the Tax Appeals Tribunal.

ACCORDINGLY, IT IS CONCLUDED THAT the Conciliation Decision was properly and timely mailed and that the Petition was not timely filed and served. Therefore the Tribunal does not have jurisdiction to hear this matter. Code §11-2107. Respondent's motion is granted and the Petition is dismissed with prejudice.

DATED: December 4, 2008
New York, New York

ANNE W. MURPHY
Administrative Law Judge