

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

In the Matter of the Petition	:	<u>DETERMINATION/ORDER</u>
	:	
of	:	TAT(H) 09-23(UB)
	:	
E-LO SPORTSWEAR, LLC	:	
	:	

Murphy, A.L.J.:

Upon the motion of the Commissioner of Finance ("Commissioner" or "Respondent") of the City of New York ("City"), dated February 16, 2010, pursuant to Section 1-05(b)(1)(ii) and (b)(1)(vii) of the City Tax Appeals Tribunal's ("Tribunal") Rules of Practice and Procedure ("Tribunal Rules") for an order dismissing the Petition of E-Lo Sportswear, LLC ("Petitioner") on the grounds that it was not timely filed; the February 16, 2010 Affirmation in Support of the Motion to Dismiss ("Affirmation") by Assistant Corporation Counsel Martin Nussbaum, Esq. and the exhibits submitted therewith which include the March 26, 2009 Conciliation Decision issued in this matter, and the February 11, 2010 affidavit of Duncan Riley, Director of the City Department of Finance ("Department") Conciliation Bureau ("Conciliation Bureau"), and exhibits thereto, the October 30, 2010 correspondence from Petitioner's representative, the following order is issued.

ISSUE

Whether the Petition filed by E-LO Sportswear, LLC should be dismissed as untimely because it was filed more than ninety days after the Conciliation Decision was mailed.

FINDINGS OF FACT

1. The Commissioner issued Petitioner E-Lo Sportswear LLC a Notice of Determination on March 11, 2008 ("Notice") asserting an Unincorporated Business Tax ("UBT") deficiency for the 2004 tax year in the base tax amount of \$66,380.00, plus interest (calculated to March 3, 2008) of \$20,506.39, for a total amount due of \$86,886.39.

2. On June 10, 2008, Respondent's Conciliation Bureau received a Request for Conciliation Conference from Petitioner (the "Request"). The Request was dated June 5, 2008, and was filed by Petitioner's representative, Harvey Feldman, CPA. Mr Feldman's address stated on the Request was 16898 Knightsbridge Lane, Delray Beach Florida 33484.

3. A Conference before the Conciliation Bureau was scheduled for March 16, 2009. Petitioner and/or Mr. Feldman failed to appear at that scheduled Conference.

4. A Conciliation Decision ("Conciliation Decision") dated March 26, 2009, was issued to Petitioner, discontinuing the proceeding as a result of Petitioner's failure to appear. The Decision was signed by Duncan Riley as Conciliation Bureau Deputy Director.¹

5. Petitioner filed a Petition dated June 1, 2009, which was received by the Tribunal on July 6, 2009. Respondent moved to dismiss the Petition as untimely filed.

¹Mr. Riley is currently Director of the Conciliation Bureau.

6. 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 Harvey H. Feldman, CPA, 16898 Knightsbridge Lane, Delray Beach, FL 33484. A pre-printed article number, 7003 3110 0003 4912 3562, appears on the left side of the receipt. In the "Official Use" box is the hand-written notation "From: Conciliation Bureau Re: E-Lo Sportswear Ltd JWH." The Form 3800 contains a round USPS stamp bearing the date "Mar 26 2009" and the words "Municipal Station USPS 11201." The front of the Form 3811 is addressed to Mr. Feldman at the same address. The number 7003 3110 0003 4912 3562 is handwritten in the "Article Number" box. The Form 3811 bears an illegible signature² and identifies the recipient as "H. Feldman." The Date of Delivery is handwritten as "4/17/09." The "Service Type" is identified as Certified Mail. Handwritten words "E-Lo Sportswear LLC" appear on the bottom of the form. The back of the Form 3811 lists the following: NYC Dept. of Finance, Conciliation Bureau, 345 Adams St., 3rd Fl., Brooklyn, N.Y. 11201, Attn: James W. Horne.

7. Respondent also submitted the February 11, 2010 affidavit of Mr. Riley. Mr. Riley attested that on the date of his affidavit he was employed by the Department as Director of the Conciliation Bureau with offices located at 345 Adams Street.

8. Mr. Riley attested to the Conciliation Bureau's routine practices and procedure for preparing and mailing Conciliation

² The signature which appears on the USPS Form 3811 compares favorably to that on the Petition and on the Request for Conciliation Conference.

Decisions in effect on March 26, 2009. He stated that these routine practices and procedures consisted of the following several steps.

9. When a taxpayer fails to appear for a scheduled Conciliation Conference, the Conciliator handling the case prepares a Conciliation Decision for the signature of the Director of the Conciliation Bureau. The Conciliator also prepares an envelope to transmit the Conciliation Decision to the taxpayer. Finally, the Conciliator prepares a USPS Form 3800 and a USPS Form 3811 with respect to the Conciliation Decision. On each of these Forms, the Conciliator indicates that the Conciliation Bureau is the source of the form.

The Conciliator examines the prepared USPS Forms 3800 and 3811 carefully to ensure that the name and address of the taxpayer are present, legible and identical on all pieces. The Conciliator also checks to ensure that the pre-printed Article number on the USPS Form 3800 matches the number written on the USPS Form 3811.

Finally, the Conciliator places the Conciliation Decision in the envelope, seals it, and affixes the USPS Forms 3800 and 3811 to the envelope in the appropriate locations.

The Conciliator places this completed piece of mail into the Conciliation Bureau's outgoing mailbox reserved for this purpose, which is located on the third floor of 345 Adams Street, Brooklyn, New York. Once each day, certified mail envelopes prepared by the individual Conciliators are picked up from the Conciliation Bureau's outgoing mailbox and brought to the Department's mail room located on the first floor of 345 Adams Street, Brooklyn, NY for further processing and mailing.

Within two days of preparation, pick-up and mailing, the mail room returns the Form 3800 to the Conciliation Bureau. The returned Form 3800 is placed in the Department file folder dedicated to the particular matter. Within five to ten days after mailing, the USPS Form 3811 is returned to the Conciliation Bureau by the mail room, and is also placed in the file folder dedicated to the particular matter. After the USPS Form 3811 is returned, the file is given to Mr. Riley, for his review.

10. Mr. Riley further attested that a Form 3800 which bears a USPS date and location stamp establishes that the item was taken to the USPS Office and that the postmark stamp indicates that the USPS acknowledged receipt of the item on the date specified.

11. Mr. Riley attested that the standard procedures for preparing and mailing the Conciliation Decision to Petitioner were followed. He stated that the Form 3800 included in Petitioner's file was addressed to "Harvey Feldman, CPA, 16898 Knightsbridge Lane, Delray Beach, FL 33484," that the receipt indicated on its face Article Number 7003 3110 0003 4912 3562, and that it was mailed from the Conciliation Bureau on March 26, 2009. Based on his review of the Form 3800 pertaining to this matter, Mr. Riley attested that the envelope containing the Conciliation Decision prepared with respect to Petitioner was taken to the USPS Office located at the Brooklyn Municipal Building on Joralemon Street. He further stated that a USPS clerk acknowledged receipt of the envelope by stamping the Form 3800 with a USPS postmark of March 26, 2009. The Form 3800 was returned to the Conciliation Bureau and filed in the folder for the Petitioner in accordance with standard Conciliation Bureau procedures.

12. Mr. Riley further attested that the Form 3811 included in Petitioner's file was addressed to "Harvey H Feldman, CPA, 16898 Knightsbridge Lane, Delray Beach, FL 33484," Article Number 7003 3110 0003 4912 3562, and was returned to the Conciliation Bureau, 345 Adams St., 3rd Floor, Brooklyn, NY 11201. He attested that the Form 3811 signature line "2-A" contains a signature in script with the printed name of H. Feldman in line "2-B. He further stated that the "Receipt Date"³ line "2-C" indicates a receipt date of 4/17/09. Mr. Riley attests that the Form 3811 was returned to the Conciliation Bureau and was filed in the folder for E-Lo Sportswear, LLC. in accordance with standard Conciliation Bureau procedures.

13. Based upon his review of the file, it is Mr. Riley's opinion that the Conciliation Decision issued to Petitioner was prepared and mailed in accordance with the above described procedure on March 26, 2009.

14. The envelope containing the Petition received by the Tax Appeals Tribunal on July 6, 2009, bears a USPS postmark of July 3, 2009, and the words "Vanderbilt Beach Branch, Naples, Fl. 34107." The envelope indicates that it was sent by USPS Certified Mail, Return Receipt Requested, under article number 7001 2510 0004 5560 4314. The address listed on the upper lefthand corner is: "Harvey H Feldman, 16898 Knightsbridge Lane, Delray Beach, Florida 33484." The envelope is addressed to "Chief Administrative Law Judge, NYC Tax Appeals Tribunal, Administrative Law Judge Division, The Municipal Building, One Centre Street, Suite 2450, New York, NY 10007." The envelope indicates that postage of \$6.15 was paid on July 3, 2009, at Naples, Fl, 34108. The envelope containing the

³This is a non-material misstatement. There is no line for "Receipt Date" on Form 3811. Rather, line 2-C of Form 3811 contains the language "Date of Delivery."

Petition served on Corporation Counsel, a copy of which was included in the motion papers, contains the same information.

15. The Petition protests the substantive basis for the Notice of Determination issued Petitioner, and does not address Petitioner's failure to appear at the scheduled Conference. Attached to the Petition are a copy of the Conciliation Decision and of the Notice of Determination and related schedules.

16. The Petition was mailed on July 3, 2009, a date in excess of ninety days following the March 26, 2009 date of the Conciliation Decision.

CONCLUSIONS OF LAW

The timely filing and service of a petition is a jurisdictional prerequisite to Tribunal review of a taxpayer's protest of a Notice of Determination. City Charter §170(a). A petition protesting a Notice of Determination asserting a UBT deficiency is timely filed when it is filed with the Tribunal within ninety days of the latter of the mailing of (1) the protested notice of determination, or, where a conciliation conference was held, (2) within ninety days from the mailing of a conciliation decision or from the date of the Commissioner's confirmation of the discontinuance of the conciliation proceeding. City Charter §170(a); Code §11-529(b). Where a petition is not timely filed, the notice of determination becomes an assessment of the amount of tax asserted. Code §§11- 521(b), 522.

The proper mailing of a Conciliation Decision starts the running of the 90-day period for a taxpayer to file and serve a petition. The Conciliation Decision issued to Petitioner is dated

March 26, 2009. A timely Petition of this Decision therefore must have been filed within ninety days of March 26, 2009, or on or before June 24, 2009. However, the Petition, postmarked July 3, 2009, was filed beyond ninety days after the date of the Conciliation Decision. If it is established that the Conciliation Decision was properly mailed on March 26, 2009, the Tribunal does not have subject matter jurisdiction over the Petition. *Matter of Goldman & Goldman, P.C.*, TAT(E) 02-12(CR) (City Tax Appeals Tribunal, March 24, 2005.)

Where the timeliness of a petition is at issue, Respondent has the burden of proving proper addressing and mailing of the document - in this case the Conciliation Decision - to start the running of the ninety-day period for filing and serving a Petition. *Matter of Goldman & Goldman, P.C.*, *supra*. See, also, *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 Conciliation Decision was properly addressed to Petitioner on March 26, 2009. *Massie v. Commissioner of Internal Revenue*, TC Memo 1995-173 (United States Tax Court, April 17, 1995). The USPS Forms 3800 and 3811 establish that the Conciliation Decision was properly addressed to Petitioner's authorized representative, Harvey H. Feldman, CPA, at 16898 Knightsbridge Lane, Delray Beach, Fl. 33484, the address Mr. Feldman provided on Petitioner's June 5, 2008 Request for a Conciliation Conference. This is also the address provided by Mr. Feldman on the Petition and on the Power of Attorney appointing him as Petitioner's representative.

A conciliation decision is deemed properly mailed when it is delivered to the custody of the USPS for mailing. *Matter of Novar*,

supra; *Matter of Katz, supra*. See, also, *Matter of Allied Properties, LLC*, TAT(H)04-42(RP) (City Administrative Law Judge Determination, January 18, 2006). The Code does not require actual receipt by a taxpayer. A properly addressed Conciliation Decision which is properly mailed is valid regardless of whether it is actually received. *Matter of Kenning v. State Tax Commission*, 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).

To establish when Respondent mailed the Conciliation Decision, the Bureau must: "(1) offer proof of a standard procedure used for the issuance of [the petitionable document] by one who has knowledge of the relevant procedure; and (2) offer proof that the standard procedure was followed in the case at issue." *Matter of 2981 Third Avenue, Inc.*, TAT(E) 93-2092 (City Tax Appeals Tribunal, June 14, 1999).

The affidavit of Mr. Riley explains the Department's standard practices and procedures for preparing and mailing Conciliation Decisions. Upon review of Petitioner's file, Mr. Riley attested that the Conciliation Decision was prepared for delivery, and was delivered to the USPS for certified mailing in accordance with these practices and procedures.

A properly completed Form 3800 represents direct documentary evidence of the date and the fact of mailing. *Matter of Goldman & Goldman P.C., supra*. (USPS Form 3877); *Matter of Air Flex Custom Furniture, Inc.*, DTA No. 807-485, (New York State Tax Appeals Tribunal, November 25, 1992) (USPS Form 3877); *Matter of Allied Properties, LLC, supra*. (Form 3800). The Form 3800 included in the Conciliation Bureau file is properly completed, stating Mr. Feldman's address, and containing a hand-written notation

identifying the matter, "JWH Conciliation Bureau Re: E-Lo Sportswear LLC." The form bears a USPS postal stamp dated March 26, 2009 and the words "Municipal Station USPS 11201" which confirm that the item was mailed in Brooklyn on that date. The affidavit of Mr. Riley combined with the properly completed Forms 3800 and 3811 constitute direct evidence that the Department's procedures were followed in this case. *Matter of Goldman & Goldman, P.C., supra.*

Respondent has established that the Decision was properly addressed and mailed on March 26, 2009. Petitioner does not dispute receipt of the Notice, and only very broadly asserts that it disputes the date the Petition was filed. Receipt of the Notice is confirmed by Mr. Feldman's signature on the Form 3811. Therefore, the Petition postmarked July 3, 2009, more than 90 days after the mailing of the Conciliation Decision, is untimely.

ACCORDINGLY, IT IS CONCLUDED THAT as the Petition mailed on July 3, 2009 and received on July 6, 2009, was untimely filed, the Tribunal lacks jurisdiction to hear the Petition and the motion to dismiss the Petition is granted in accordance with 20 RCNY § 1-05(b) (ii), (vii).

It is so ordered.

DATED: December 13, 2010
New York, New York

ANNE W. MURPHY
Administrative Law Judge