

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

In the Matter of the Petition

of

1465-69-71 Bushwick Ave LLC

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**AMENDED
DETERMINATION**

TAT (H) 14-14 (RP)

Bunning, A.L.J.:

Upon the motion of the Commissioner of Finance (Respondent) of the City of New York (City), dated December 16, 2014, under Section 1-05(b) (1) (vii) of the City Tax Appeals Tribunal (Tribunal) Rules of Practice and Procedure (20 RCNY) (Rules) for an order dismissing the Petition for Hearing of 1465-69-71 Bushwick Ave LLC (Petitioner) on the grounds that the Petition was not timely filed, the Affirmation in Support of Motion to Dismiss of Amy H. Bassett, Esq., Assistant Corporation Counsel, and the exhibits submitted therewith, filed December 16, 2014; the Affirmation in Opposition of Barry R. Feerst, Esq., and the exhibits submitted therewith filed February 6, 2015; and the Reply Affirmation in Support of Motion to Dismiss of Amy H. Bassett, Esq., and exhibits submitted therewith, filed February 19, 2015, the following Amended Determination is issued.

ISSUE

Whether the Petition should be dismissed as untimely because it was filed more than 90 days after the mailing of the Conciliation Decision.

FINDINGS OF FACT

Respondent issued a Notice of Determination to Petitioner dated April 17, 2012 asserting Real Property Transfer Tax due in

the principal amount of \$106,860.57, interest through May 16, 2012 of \$18,651.00, and penalty of \$7,480.24, for a total amount due of \$132,991.81, as a result of the March 24, 2010 transfer of real property located in the Borough of Brooklyn, Block 3457, Lots 5, 6, and 7.

Petitioner filed a request for a conciliation conference with Respondent's Conciliation Bureau, dated June 19, 2012. It was accompanied by a power of attorney (Form POA-1) dated June 19, 2012 naming Harry Hirschfeld as its representative.

On April 18, 2013, Duncan D. Riley, the Director of the Conciliation Bureau, issued a conciliation decision discontinuing the proceeding as a result of the failure of the taxpayer or its representative to appear at the scheduled conciliation conference. It permitted the taxpayer 30 days in which to file a written application showing a reasonable excuse for the failure to appear, in which case the decision would be withdrawn.

By letter dated May 8, 2013, Petitioner's current representative, Barry R. Feerst, made that written application. This was accompanied by a power of attorney (Form POA-1) of the same date naming him as Petitioner's representative, and listed his address as "194 South 8th Street, Brooklyn, NY 11211." The earlier conciliation decision was withdrawn.

On March 14, 2014, Mr. Riley issued a second conciliation decision to Petitioner discontinuing the conciliation proceeding (Conciliation Decision). The issue in this case is whether this document was properly mailed. The Conciliation Decision states that it was issued "as a result of the taxpayer's or their duly authorized representative's failure to execute and return the

Conciliation Bureau's Proposed Resolution dated December 16, 2013." The Conciliation Decision informed Petitioner of its right to file a petition with the Tribunal within 90 days of the date of service of the Conciliation Decision. This Conciliation Decision was mailed to Mr. Feerst at the address listed on the May 8, 2013 power of attorney, "194 South 8th Street, Bkln¹, New York, 11211."

Thereafter, on July 1, 2014, Mr. Feerst, faxed a second power of attorney (Form POA-1) dated July 1, 2014 to Mr. Riley, again naming himself as Petitioner's sole representative. His affidavit explains that he did this at Mr. Riley's request in order to obtain information from the Conciliation Bureau².

Petitioner filed the Petition, protesting the Notice of Determination. The Petition was signed by Barry R. Feerst, who was identified as Petitioner's representative. The Petition was accompanied by a copy of the July 1, 2014 power of attorney naming Mr. Feerst as Petitioner's representative. The Petition was dated July 7, 2014, was mailed under cover of letter dated July 9, 2014, in an envelope postmarked July 9, 2014, and was received by the Tribunal on July 10, 2014.

The Tribunal issued an Acknowledgement and Request for Information on July 18, 2014. It stated that the Petition appeared not to have been timely filed and directed the parties to provide

¹The Conciliation Decision was mailed to "Bkln" and the address on the power of attorney was stated to be "Brooklyn." This made no difference and the Conciliation Decision was mailed to the representative's address listed on the power of attorney.

²It is not clear why this second power of attorney was necessary. It differed from the first power of attorney Mr. Feerst supplied to the Conciliation Bureau in that it provided the name of Mr. Feerst's firm and provided the date of the transfer, rather than just the year. Mr. Feerst's address was the same on both powers of attorney.

all evidence relative to the mailing within 60 days. It also directed Respondent to file an answer to the Petition or move to dismiss the Petition for lack of jurisdiction within 90 days.

On August 13, 2014, Respondent submitted to the Tribunal a copy of the Conciliation Decision, a copy of the return receipt, showing mailing to Barry R. Feerst, Barry R. Feerst & Assoc., 194 South 8th Street, Brooklyn, New York, 11211, a copy of the USPS.com tracking information showing mailing on March 14, and delivery on March 15, 2014 of an item with the same tracking number as the return receipt. Petitioner did not respond to the Tribunal's request for information.

Respondent filed its Answer on October 14, 2014. The Answer raised as an affirmative defense that the Petition was filed more than 90 days after the Conciliation Decision was mailed, and attached copies of the certified mailing documents to show mailing and receipt by attorney Feerst.

On December 16, 2014, Respondent filed a motion to dismiss the Petition on the grounds that it was untimely filed. The motion was supported by the affidavit of Amy Bassett, Esq., with exhibits, including the affidavit of Duncan Riley describing the mailing of the Conciliation Decision.

Mr. Riley was employed by Respondent in his current position at the Conciliation Bureau on March 14, 2014. He attested to the Conciliation Bureau's routine practice for preparing and mailing conciliation decisions. Once the conciliation decision is signed by the Director of the Conciliation Bureau, the Conciliator prepares an envelope to transmit it to the taxpayer. The Conciliator also prepares a United States Postal Service (USPS)

Form 3800, Receipt for Certified Mail, and a USPS Form 3811, Domestic Return Receipt. The Conciliator notes the source of the forms as the Conciliation Bureau on both forms.

Mr. Riley attested that the Conciliator then examines the forms to ensure that 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 USPS Form 3800 matches the number written on the USPS Form 3811.

Mr. Riley's affidavit stated that the Conciliator places the conciliation decision in the envelope, seals it, and affixes the USPS forms in the appropriate locations (front and back) on the envelope and then places the completed piece of mail into the Conciliation Bureau's outgoing mail box at 345 Adams Street, Brooklyn, New York. Within two days of preparation, pick-up, and mailing, the mail room returns the USPS Form 3800 to the Conciliation Bureau, where it is placed in the file folder for that matter. Within five to ten days after mailing, the USPS Form 3811 is returned to the Conciliation Bureau and also placed in the file folder.

Mr. Riley's affidavit attached the USPS Form 3811 addressed to Barry R. Feerst at Barry R. Feerst & Assoc, "194 South 8th Street, Bklyn, NY 11211," Article Number 7099 3220 0007 2105 5019 which was returned to Duncan D. Riley at the Conciliation Bureau at 345 Adams Street - Third Floor, Brooklyn, NY 11201. The form shows the signature of an unidentified individual at Mr. Feerst's office signing for the Conciliation Decision. Finally, the affidavit states that Mr. Riley does not have the Form 3800, but the attached tracking information printed from USPS.com for this item of mail shows that it arrived at the USPS facility in New York, NY 10199,

was sent from the Department of Finance on March 14, 2014, and was delivered on March 15, 2014. Mr. Riley concludes that the Department's mailing procedures were followed in this matter.

In opposition, Petitioner filed the affirmation of attorney Feerst, which makes two arguments. It argues first that Respondent waived the ability to move to dismiss the Petition because the motion was not filed within 90 days of the Tribunal's Acknowledgement and Request for Information. It argues second that the mailing of the Conciliation Decision was defective because it was mailed to the Petitioner's representative, and not to Petitioner.

Respondent filed a reply affirmation on December 19, 2014, arguing that the Conciliation Decision may properly be mailed to a representative named in a power of attorney, that mailing was proven, and that the Petition was filed more than 90 days after the Conciliation Decision was mailed, and so must be dismissed.

Ninety days from March 14, 2014 is June 12, 2014. The Petition was mailed in an envelope postmarked on July 9, 2014, and received by the Tribunal on July 10, 2014.

CONCLUSIONS OF LAW

The timely filing and service of a petition is a jurisdictional prerequisite to the Tribunal's review of a taxpayer's petition seeking redetermination of a tax deficiency asserted by Respondent in a Notice of Determination (City Charter § 170(a); *Matter of TBY Four Seasons Fruit & Vegetable Market Inc.*, TAT (E) 93-12 (GCT) [City Tax Appeals Tribunal, November 17, 1993].) In cases where a conciliation conference was requested,

the petition must be filed within 90 days of the date of the mailing of the conciliation decision (City Charter § 170(a); City Administrative Code § 11-2107).

The Conciliation Decision was dated March 14, 2014. The Petition was mailed in an envelope bearing a postmark of July 9, 2014, which is more than 90 days after that date of the Conciliation Decision. Accordingly, if the Conciliation Decision was properly mailed on March 14, 2014, the Petition was not timely filed and the Tribunal does not have subject matter jurisdiction over it.

Respondent has the burden of proving that the Conciliation Decision was properly addressed and mailed (*Matter of Goldman & Goldman, P.C.*, TAT(E) 02-12 (CR) [City Tax Appeals Tribunal, March 24, 2005]).

City Administrative Code § 11-2116(a) (governing real property transfer tax) provides in pertinent part:

Any notice authorized or required under the provisions of this chapter may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him or her pursuant to the provisions of this chapter in any application made by him or her The mailing of such notice shall be presumptive evidence of the receipt of the 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.

Petitioner does not contest the mechanics of the mailing of the Conciliation Decision, or suggest that its representative did not receive it. Instead, Petitioner argues that (1) the Tribunal's

Acknowledgement and Request for Information limited the time in which Respondent could file this motion, and (2) that the Conciliation Decision must be mailed to the Petitioner, so that mailing only to its representative was ineffective. Neither argument succeeds.

First, the Tribunal's Acknowledgement and Request for Information did not limit the time in which the motion to dismiss could be filed to within 90 days after the date it was issued. Instead, it provided that Respondent had 90 days to file an answer and "[i]f within such ninety day period Respondent moves to dismiss the Petition for lack of jurisdiction, the time Respondent has to answer the Petition will be extended to thirty (30) days from the resolution of such motion."

There is no limitation on Respondent's filing the motion to dismiss in this matter. Instead, Respondent was directed to either answer or move to dismiss within the 90-day period. Respondent filed its Answer within the 90-day period, raising as an affirmative defense lack of subject matter jurisdiction due to the late-filed petition. It then moved to dismiss. It was free to proceed this way under the Tribunal's Rules. There was no waiver. Indeed, Tribunal Rules § 1-05(b) provides that "[i]n no event shall a failure by the commissioner of finance to make such a motion [to dismiss where the petition has not been timely filed] be deemed a waiver of any defense." Further, subject matter jurisdiction is reviewable at any time because the Tribunal, being a body of limited jurisdiction, has no power to proceed if the Petition is not timely filed (City Charter § 170(a); *TBY Four Seasons Fruit & Vegetable Market*).

The second issue is whether the Conciliation Decision was properly mailed because it was mailed to Petitioner's authorized representative and not to Petitioner. In this case, the request for conciliation conference was filed by a prior representative. Mr. Feerst then filed a second power of attorney, which invalidated the first, making Mr. Feerst the taxpayer's sole representative.

Box 5 of the Form POA-1 signed on May 8, 2013 provides for the sending of statutory notices and other communications where a power of attorney is in effect. The form provides that notices will be sent to the first named representative, unless the taxpayer designates a different representative, or no representative. The instructions conclude, "If you do not want notices and certain other communications to go to any representative, enter None on the line above." The taxpayer left the line blank, indicating that notices would go to Mr. Feerst, the only representative named on the power of attorney.

Petitioner points to no rule that requires that the Conciliation Decision be sent to the taxpayer when a power of attorney is in effect, and none was found. Instead, Petitioner relies on New York State decisions interpreting New York State Tax Law § 681(a) regarding the mailing of a State notice of deficiency in income tax cases (*Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929 [Sup. Ct. Albany County, 1972], *aff'd*, 43 AD2d 815 [3d Dept 1973], *appeal dismissed* 34 NY2d 653 [1974]; *Matter of MacLean v. Procaccino*, 53 AD2d 965, 966 [3d Dept 1976]). However, Tax Law § 681(a) specifically requires that a notice of deficiency be mailed by registered or certified mail to the taxpayer at his or her last known address.

In contrast, the relevant City provision dealing with the mailing of conciliation decisions is Administrative Code § 11-2116(a)³. It states that “[a]ny notice authorized or required under the provisions of this chapter may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person”

Where a taxpayer provides Respondent with a power of attorney in which no indication is given that notices are to be sent to the taxpayer rather than the representative, it was reasonable for Respondent to send the Conciliation Decision to the authorized representative without also sending it to the taxpayer. This Tribunal has approved such mailing in the past (*Matter of E-Lo Sportswear, LLC*, TAT (H)09-23(UB) [City Tax Appeals Tribunal, December 13, 2010]; *Matter of Allied Properties, LLC*, TAT(H)04-42(RP) [City Tax Appeals Tribunal, January 18, 2006]).⁴ The Conciliation Decision was properly mailed on March 14, 2014. The Petition was mailed on July 9, 2014, more than 90 days thereafter, is therefore untimely. The Tribunal does not have jurisdiction in this matter.

³The only other provisions which might be relevant are 19 RCNY § 38-07, dealing with conciliation decisions, and City Administrative Code § 11-2107, governing determinations of real property transfer tax. However, these provisions do not specify a means of mailing, but instead state that the 90 days to file a petition with the Tribunal run from the mailing of the conciliation decision.

⁴Tribunal Rules § 1-23(e)(2) provides that the “[d]eterminations of administrative law judges shall not be considered precedent, nor shall they be given any force or effect in other proceedings in this tribunal.” These decisions are cited here merely to demonstrate that the issue has been resolved in a similar fashion in other cases.

For these reasons, Respondent's motion is granted and the Petition is dismissed as untimely.

IT IS SO ORDERED.

Dated: March 16, 2015
New York, New York

David Bunning
Administrative Law Judge