

NEW YORK CITY TAX APPEALS TRIBUNAL  
ADMINISTRATIVE LAW JUDGE DIVISION

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In the Matter of the Petition	:	DISMISSAL
	:	DETERMINATION
of	:	
	:	TAT(H)17-9(RP)
Alex McNaughton	:	
	:	

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Bunning, A.L.J.:

Petitioner Alex McNaughton (Petitioner) filed a petition for hearing dated May 31, 2017 (Petition) with the New York City (City) Tax Appeals Tribunal (Tribunal), contesting a conciliation decision upholding a notice of determination imposing City real property transfer tax (RPTT). On March 21, 2019, the City Commissioner of Finance (Respondent) moved to dismiss the Petition pursuant to Tribunal Rules of Practice and Procedure (20 RCNY or Tribunal Rules) §1-05(b)(1)(ii), asserting that the Tribunal lacks jurisdiction over the subject matter of the Petition because it was filed before the jurisdictional document - the Conciliation Decision - was issued. Respondent also filed a memorandum of law. Petitioner filed a response on April 26, 2019. Respondent filed a reply affirmation on May 6, 2019. A further telephone conference was held on May 16, 2019.

Petitioner represented himself. Respondent was represented by Andrew G. Lipkin, Esq., Senior Counsel with the City's Law Department.

For the reasons stated below, Respondent's motion is granted and the Petition is dismissed for lack of jurisdiction.

## ISSUE

Whether the Tribunal has jurisdiction to hear a petition which was filed before the conciliation decision was issued.

## FINDINGS OF FACTS

The Petition, received by the Tribunal on June 2, 2017, alleges that it contests a conciliation decision issued on March 24, 2017 (Conciliation Decision). No conciliation decision was attached. On June 7, 2017, the Tribunal issued a Notice to Correct Petition, requesting a copy of the Conciliation Decision. Petitioner responded with a letter dated June 12, 2017, enclosing a copy of a Proposed Resolution of the Respondent's Conciliation Bureau dated March 24, 2017. Petitioner had signed the Proposed Resolution on April 14, 2017, and returned it as disagreed.

On December 6, 2018, the Tribunal wrote to Petitioner, requesting that he send a copy of the Conciliation Decision, rather than the Proposed Resolution. Petitioner responded by sending documents on December 18, 2018, which did not include the Conciliation Decision. On December 20, 2018, the Tribunal again wrote to Petitioner to request a copy of the Conciliation Decision, and on January 4, 2019, issued a Calendaring Notice setting a telephone status conference for February 21, 2019 at 10:00 a.m.

On January 14, 2019, Respondent's counsel submitted a copy of the Conciliation Decision issued in this matter, dated June 20, 2017, which is after the date the Petition was received by the Tribunal (June 2, 2017).

At the telephone conference held on February 21, 2019, Respondent's counsel stated that he had a copy of a certified

mail receipt for the Conciliation Decision, signed by Petitioner. A further telephone conference was set for March 6, 2019. At that conference, the parties agreed to proceed by a motion to dismiss the Petition for lack of jurisdiction.

On March 21, 2019, Respondent moved to dismiss the Petition for lack of jurisdiction, on the ground that it was untimely because it was filed before the Conciliation Decision was issued. The motion was supported by the affirmation of Respondent's counsel, Andrew G. Lipkin, with exhibits, and the affidavit of Duncan D. Riley, Director of Respondent's Conciliation Bureau, describing the mailing of the Conciliation Decision.

Mr. Riley averred that he was employed in his current position at the Conciliation Bureau when the Conciliation Decision was mailed. Conciliation decisions are issued when the taxpayer disagrees with the Conciliation Bureau's proposed decision or fails to respond to it. He attested to the Conciliation Bureau's routine practice for preparing and mailing conciliation decisions. Once the conciliation decision is signed by the Director, the conciliator (the individual who conducted the conciliation) 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.

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. The conciliator places the conciliation decision in the envelope,

affixes the USPS forms, and places it into the outgoing mailbox reserved for this purpose. Once each day, the certified mail envelopes are picked up from the Conciliation Bureau's outgoing mailbox on the third floor of 345 Adams Street and brought to the mailroom at 210 Joralemon Street for further processing and delivery to a branch of the USPS, where the USPS Form 3800 is postmarked by the Postal Service. Mr. Riley's affidavit attached the Form 3800, addressed to Petitioner, which was postmarked June 20, 2017.

Mr. Riley's affidavit states that 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. If and when the USPS Form 3811 is returned to the Conciliation Bureau, it is also placed in the file folder.

Mr. Riley's affidavit attached the USPS Form 3811 addressed to Petitioner at the same address listed on the Petition, and bearing Article Number 7016 3010 0000 3286 2155. The form shows it was postmarked by the Postal Service in the city in which Petitioner lives on June 23, 2017, and contains Petitioner's signature signing for receipt the Conciliation Decision. Mr. Riley also attaches tracking information for this mailing, showing delivery to the U.S. Postal Service on June 20, 2017, and delivery to the Petitioner on June 23, 2017. Mr. Riley concludes that the Department's mailing procedures were followed in this matter.

#### **POSITIONS OF THE PARTIES**

Respondent argues that the Tribunal's jurisdiction is limited and that a petition filed before the issuance of a jurisdictional document - either a notice of determination or a

conciliation decision - is premature and confers no jurisdiction on the Tribunal.

Petitioner does not deny receiving the Conciliation Decision, but argues that it was not sent in a timely manner, having been sent 91 days after the Proposed Resolution. Petitioner contends that the authorities cited by Respondent involve other jurisdictions or late-filed petitions, rather than petitions that are premature. Finally, Petitioner argues that there was no substantive change between the Proposed Resolution and the Conciliation Decision, so there was no reason to wait for the issuance of the Conciliation Decision, and that no prejudice will result to Respondent or the Conciliation Bureau if the case is heard on the merits.

Respondent replies that the petition must be filed within 90 days from the issuance of the Conciliation Decision, as is clearly stated on both that document and the proposed resolution. Respondent contends that Petitioner could have refiled the Petition after the Conciliation Decision was issued to invoke the Tribunal's jurisdiction.

#### **DISCUSSION**

Respondent has moved to dismiss the Petition pursuant to Tribunal Rules §1-05(b)(1)(ii), which provides that Respondent may move to dismiss the petition on the ground that the Tribunal lacks jurisdiction over the subject matter of the Petition.

The jurisdiction of the Tribunal is limited. It is constrained by both the Charter of the City of New York (City Charter) and the applicable provisions of the Administrative Code (Code).

Section 170.a of the City Charter provides in relevant part that in cases where a conciliation conference was requested and not discontinued, a proceeding is commenced in the Tribunal by filing a petition "within ninety from the mailing of the conciliation decision . . . ." City Charter §170.a also provides that the Tribunal "shall not extend the time limitations for commencing a proceeding for any petitioner failing to comply with such time limitations."

The relevant statute, Code §11-2107, dealing with RPTT cases, such as this one, similarly provides that a notice of determination of additional RPTT

"shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after the giving of notice of such determination, or, if the commissioner of finance has established a conciliation procedure pursuant to section 11-124 of the code and the taxpayer has requested a conciliation conference in accordance therewith, within ninety days from the mailing of a conciliation decision . . . both (1) serves a petition upon the commissioner of finance and (2) files a petition with the tax appeals tribunal for a hearing . . . ."

Failure to file the petition within this 90-day period deprives the Tribunal of subject matter jurisdiction. The issue of subject matter jurisdiction cannot be waived and must be resolved before consideration of the substantive issues raised in the petition (*Matter of TBY Four Seasons Fruit & Vegetable Market Inc.*, TAT No. [E] 92-12 [City Tax Appeals Trib., Appeals Division, 1993]).

In this case, the Petition was filed before the Conciliation Decision was issued. Therefore, it was not filed

within 90 days from the mailing of the Conciliation Decision as is required for jurisdiction. A petition filed before the jurisdictional predicate of a notice of determination or a conciliation decision has "no legal significance." (*Matter of Marun Fashion & Sportswear, Inc.*, TAT No. 91-0925 [City Tax Appeals Trib., Appeals Division, 1998] [decided under the rules of Respondent's former Hearings Bureau]).

The decision of the New York State Tax Appeals Tribunal in *Matter of Winners Garage Inc. et al.*, DTA Nos. 823312 and 823313 (St. Tax Appeals Trib., 2010) is instructive.<sup>1</sup> In that case, the petitions were dismissed where they were filed before the statutory notices of deficiency were issued. The State Tax Appeals Tribunal, relying on several prior cases, explained that review of a non-final document "would be premature and meaningless" if "the assessment was only a proposed one, subject to change under the internal procedures within" the tax authority. (*Id.*, citing *Matter of Yeghukian*, DTA Nos. 802957 and 802958 St. Tax Appeals Trib., 1990; see also, *Matter of Ramesh Sawlani*, DTA No. 811357, TSB-D-95[42]S [St. Tax Appeals Trib., 1995], holding that a petition filed before the issuance of a conciliation decision must be dismissed as premature.)

Similarly, where the conciliation decision rather than a notice of determination is the statutory notice, the petition must be filed within 90 days after the issuance of that decision. If it is filed before the conciliation decision is issued, or more than 90 days after, the Tribunal lacks

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<sup>1</sup> City Charter §170.d provides that the Tribunal "shall follow as precedent the prior precedential decisions of the [T]ribunal . . . the New York State Tax Appeals Tribunal or any federal or New York state court or the U.S. Supreme Court insofar as those decisions pertain to any substantive legal issues currently before the [T]ribunal." The relevant New York State and City provisions are substantively the same.

jurisdiction (*See, e.g., Matter of Just Born, Inc.*, TAT [E] 93-456 [GC] [City Tax Appeals Trib., Appeals Division, 1998] [noting that the first petition had been dismissed where it was filed before a notice of determination was issued]. Where a petitioner elects to proceed by conciliation conference, a petition is premature until the conciliation proceeding is concluded by a conciliation decision or a confirmation of discontinuance. There is not concurrent jurisdiction for a matter to be both in conciliation and in the Tribunal (*Matter of F. Kashanian Rug Corp.*, TAT[H]97-4 [CR] [City Tax Appeals Trib., ALJ Division, 1997]; *Matter of Cynthia Scott-Seymour*, TAT[H]94-1260 [UB] [City Tax Appeals Trib., ALJ Division, 1994]).<sup>2</sup>

Petitioner's arguments, while logical and reasonable, cannot overcome the jurisdictional requirements set forth in the City Charter and Code. In particular, the City Charter specifically prohibits the Tribunal from extending the time limitations for filing a petition. For these reasons, an administrative law judge lacks the power to determine a case where the petition is not timely filed.

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<sup>2</sup>"Determinations issued by administrative law judges shall not be cited, shall not be considered as precedent nor given any force or effect in any other proceedings conducted by the tribunal or in any judicial proceedings conducted in this state." (City Charter §168.d.) These cases are not cited as precedent, and are not binding here, but are mentioned to show the practice of the Administrative Law Judge Division of the Tax Appeals Tribunal in these circumstances, relying on the relevant provisions of the City Charter and the Code, cited above.



Accordingly, Respondent's motion is granted and the  
Petition is dismissed as untimely.

IT IS SO ORDERED.

Dated: July 11, 2019  
New York, New York

                                /s/                                  
David Bunning  
Administrative Law Judge