

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>GEORGE AND EDITH MAIMAN</b>	:	DECISION
for Redetermination of a Deficiency or for	:	DTA No. 813407
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and Chapter 17, Title 11 of the	:	
Administrative Code of the City of New York for	:	
the Year 1990.	:	

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Petitioners George and Edith Maiman, 3280 Nostrand Avenue, Brooklyn, New York 11229, filed an exception to the order of the Administrative Law Judge issued on March 2, 1995. Petitioners appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter on May 3, 1995 stating it would not be filing a brief, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Francis R. Koenig took no part in the consideration of this decision.

***ISSUE***

Whether petitioners timely filed a petition following the issuance of a conciliation order.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

A conciliation conference was held in the above matter on June 16, 1994, and by Conciliation Order (CMS No. 132887) dated August 19, 1994, petitioners' request was denied and the statutory notice sustained.

On November 20, 1994, petitioners filed a petition with the Division of Tax Appeals, contesting a total of \$1,645.49 for the year 1990.<sup>1</sup>

On December 29, 1994, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition, pursuant to Tax Law § 170.3-a(e), on the basis that a petition must be filed within 90 days from the date a conciliation order is issued. The Notice of Intent to Dismiss indicates that the Conciliation Order in this case was issued on August 19, 1994, but that the petition was not filed until November 20, 1994, or 93 days later.

Pursuant to 20 NYCRR 3000.5(b)(5), following the issuance of the Notice of Intent to Dismiss Petition, the parties are afforded 30 days within which to submit documents and comments with regard to said notice. Petitioners responded in a timely fashion by submitting a letter, dated January 11, 1995 and postmarked January 12, 1995. In turn, the Division of Taxation ("Division") timely filed its documents in support of dismissal on January 27, 1995.

As proof of mailing of the Conciliation Order to petitioners, the Division submitted affidavits made by Joseph Chyrywaty and Daniel B. LaFar, employees of the Division, together with a copy of the certified mail record containing a list of the conciliation orders allegedly issued by the Division on August 19, 1994, including one addressed to petitioners (Exhibit "A") and a copy of the Conciliation Order (CMS No. 125106) dated August 19, 1994 (Exhibit "B").

The affidavit of Joseph Chyrywaty, Supervisor of Tax Conferences in the Division's Bureau of Conciliation and Mediation Services ("BCMS"), sets forth the Division's general procedure for preparing and mailing out conciliation orders, which culminates in the orders being sent by certified mail by the United States Postal Service ("USPS") with BCMS receiving confirmation of the mailing via receipt of a postmarked copy of the certified mail record.

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<sup>1</sup>This amount was gleaned from petitioners' petition, and reflects an apparent typographical error overstating the amount at issue by \$2.00. That is, the Consolidated Statement of Tax Liabilities attached to the petition specifies liability for 1990 to total \$1,643.49 (consisting of tax [\$266.88], interest [\$605.26] and penalty [\$1,601.12], minus payment credit [\$829.77]).

Mr. Chyrywaty's affidavit describes the computerized preparation of conciliation orders and the preparation of a certified mail record, the record listing those taxpayers to whom conciliation orders are being sent by certified mail on a given day. A certified control number is assigned to each conciliation order listed on the certified mail record. According to Mr. Chyrywaty, each page of a certified mail record is a separate certified mail record for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender"

and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to sign.

Mr. Chyrywaty attests to the truth and accuracy of the copy of the five-page certified mail record attached to his affidavit (see, Exhibit "A"), which contains a list of the conciliation orders allegedly issued by the Division on August 19, 1994, including, on page two, an order addressed to petitioners, George and Edith Maiman, at 3280 Nostrand Avenue, #411, Brooklyn, New York 11229-3742. The certified control numbers run consecutively throughout the five pages of the certified mail record and Mr. Chyrywaty states that there were no deletions from the mail record. Each of the five pages of the certified mail record submitted is date stamped August 19, 1994 by the Roessleville branch of the USPS in Albany, New York and each contains a postal employee's signature verifying receipt as well. At the bottom of page two, the page on which petitioners' certified number is listed, the number "13" has been filled in as the "Number of Pieces Listed by Sender," and the number "13" has also been filled in as the "Total Number of Pieces Received at Post Office," indicating no deletions from the record.

Attached to Mr. Chyrywaty's affidavit as Exhibit "B" is a copy of the Conciliation Order (CMS No. 132887), dated August 19, 1994, regarding notice number L007622654, which denied petitioner's request and sustained the Notice of Deficiency.

The affidavit of Daniel B. LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff

in the ordinary course of its business of delivering outgoing certified mail to branch offices of the USPS. Mr. LaFar states that the certified mail record is the Department of Taxation and Finance's record of receipt by the Roessleville Branch of the USPS for pieces of certified mail, in that the mail record contains a USPS postmark and/or the signature of the postal employee who received the mail record and the pieces of certified mail from the Division. The certified mail record is retrieved from the USPS by a member of Mr. LaFar's staff the day after it is delivered there.

Mr. LaFar asserts that the staff's regular procedures were followed in mailing the piece of certified mail in question to petitioner on August 19, 1994.

In contrast to the foregoing petitioners submitted a letter, dated January 11, 1994, asking that the petition be considered timely. Petitioners base their request on the fact that in October 1994 petitioner George Maiman lost his job, leaving him demoralized and, as the result of looking for a new job and attending to related matters, distracted and unable to pay attention to many details of day-to-day living.

Petitioners admit that although the 90-day period for filing a petition expired on November 17, 1994, the petition herein was not mailed until November 20, 1994. In this regard, petitioner George Maiman explains that when he saw on the Conciliation Order that a petition had to be filed within 90 days of the date of the order, he "oversimplified the deadline calculation" by basing the same on a three-month (rather than 90-day) expiration date of November 19, 1994.<sup>2</sup>

### ***OPINION***

The Administrative Law Judge found that petitioners admitted mailing their petition on November 20, 1994, which date was not within the 90-day period for filing a petition after the conciliation order had been issued.

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<sup>2</sup>Petitioners noted that since November 19, 1994 was a Saturday, they believed they had until Monday, November 21, 1994 to file a petition. In fact, Mr. Maiman noted (and it is undisputed) that the petition was mailed on Sunday, November 20, 1994, from a post office open on such date.

In this regard, the Administrative Law Judge stated that when the timeliness of the petition is at issue, the Division must establish proper mailing of the conciliation order. The Administrative Law Judge found that the Division met its burden to establish proper mailing of the conciliation order to petitioners on August 19, 1994. First, the Administrative Law Judge found that the affidavits submitted by the Division describing the stages of the order generation and mailing process provide adequate proof of the Division's standard mailing procedure. Second, the Administrative Law Judge found that the mailing records submitted by the Division establish that its standard mailing procedure was followed in this matter.

The Administrative Law Judge noted that the certified mail record lists the following certified number, Z181282767, for the conciliation order addressed to George and Edith Maiman; however, that certified number does not appear on the conciliation order itself nor is it referred to in the affidavits. The Administrative Law Judge found, however, that:

"(1) the Conciliation Order is dated August 19, 1994 and the certified mail record contains 'Conciliation Orders Issued August 19, 1994'; (2) petitioners do not dispute the claimed date of issuance of the Conciliation Order; (3) the 'presumption of official regularity' is at work here; [footnote omitted] and (4) petitioners have not challenged the presumption of official regularity by the introduction of any evidence to the contrary, together, offer sufficient corroboration to tie the Conference Order in question to the certified mail record, and thus, to the August 19, 1994 issuance date" (Determination, conclusion of law "H").

The Administrative Law Judge next found that while petitioner George Maiman's job termination may have affected his ability to focus on this matter, this cannot excuse his failure to file a timely petition and, further, the Division of Tax Appeals is not empowered to grant such an extension of time to file a petition.

On exception, petitioners repeat their argument that they believed they had calculated the 90-day period correctly when they used a three-month period rather than 90 days. Petitioners ask for compassion in considering this matter due to the mitigating factor of petitioner George Maiman's loss of his job and the resulting distress and devastation.

We affirm the determination of the Administrative Law Judge for the reasons stated in said determination. The petition in this matter was not filed within 90-days of the issuance of the Conciliation Order and we cannot, as petitioners urge, simply accept the petition as timely filed.

As noted by the Administrative Law Judge, petitioners are not without a remedy here. They may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If petitioners' request for a refund is denied, they may then proceed with another petition requesting a hearing (see, Matter of Rosen, Tax Appeals Tribunal, July 19, 1990).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of George and Edith Maiman is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of George and Edith Maiman is dismissed.

DATED: Troy, New York  
October 12, 1995

/s/John P. Dugan  
John P. Dugan  
President

/s/Donald C. DeWitt  
Donald C. DeWitt  
Commissioner