

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**LEISER AND LILLIAN SCHWIMMER** : DECISION  
 : DTA NO. 821432  
for Redetermination of a Deficiency or for Refund of New :  
York State and New York City Personal Income Taxes :  
under Article 22 of the Tax Law and the Administrative :  
Code of the City of New York for the Years 1999 and 2000. :

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Petitioners, Leiser and Lillian Schwimmer, filed an exception to the order of the Administrative Law Judge issued on June 14, 2007. Petitioners appeared by Cohen, Estis & Associates, LLP (Ronald J. Cohen, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation did not file a brief in opposition. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioners filed a timely petition with the Division of Tax Appeals 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.

Petitioners, Leiser and Lillian Schwimmer, filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of Notice of Deficiency L-024849992, pertaining to the years 1999 and 2000.

Petitioners’ request for conference listed the following as their address:

287 Wallabout Street, 2R  
Brooklyn, New York 11406-4356

Petitioners’ request for conference also listed the following as their representative’s name and address:

Ronald J. Cohen, Esq.  
Cohen, Estis & Associates, LLP  
40 Matthews Street, Suite 203  
Goshen, New York 10924

Ronald J. Cohen, Esq., appeared at the conciliation conference held on November 15, 2005 on behalf of petitioners. During the course of the conciliation conference, petitioners advised the Division of Taxation (“Division”) of a change in their address to 266 Keap Street, Apt. 2R, Brooklyn, New York 11211.

BCMS subsequently issued a Conciliation Order to petitioners (CMS No. 208411), dated April 28, 2006, which denied petitioners’ request and sustained the statutory notice (Notice number L-024849992).

On November 21, 2006, the Division of Tax Appeals received a petition in this matter. The envelope in which the petition was sent by certified mail bears a machine metered (Pitney Bowes) postmark dated November 16, 2006. The petition was signed on July 26, 2006 by petitioners’ representative. In the cover letter which accompanied this petition, James P. Ryan, Esq., an associate in the law firm of Cohen, Estis & Associates, LLP, requested verification of

receipt by the Division of Tax Appeals of the petition purportedly filed by the law firm on July 26, 2006.

On November 24, 2006, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals sent a letter to petitioners' representative, Mr. Cohen, which noted that the power of attorney needed the representative's signature, the petition needed an original signature, and the petition appeared to be filed late since the Conciliation Order was issued on April 28, 2006 and the petition was not filed until November 16, 2006. Petitioners were given 30 days to respond.

On January 26, 2007, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, which stated that the petition would be dismissed for the reasons noted in the letter of November 24, 2006. The parties were given 30 days to submit written comment on the proposed dismissal.

By letter dated February 1, 2007, the Division acknowledged receipt of the Notice of Intent to Dismiss Petition and stated that since the petition submitted did not include the required signature, the Division was in agreement with the proposed dismissal. The Division also stated that the petition was filed more than 90 days from the date the Conciliation Order was issued and proof of mailing could be provided if necessary.

On February 27, 2007, the law firm of Cohen, Estis & Associates submitted Ronald J. Cohen's affidavit in opposition to dismissal of the petition. The cover letter accompanying this affidavit stated that all original documents, including the petition and the power of attorney, were forthcoming under separate cover.

By letter dated March 2, 2007, the Petition Intake, Review and Exception Unit, gave both parties until March 16, 2007 to submit documentation substantiating their respective positions.

On March 16, 2007, in response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of its representative, John E. Matthews, Esq., along with the

affidavits of James Steven Vanderzee and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioners' petition filed with the Division of Tax Appeals on November 16, 2006 and the envelope in which it was mailed, a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on April 28, 2006, a copy of the subject April 28, 2006 Conciliation Order and a copy of a check from petitioners, dated April 18, 2006, which was directed to the Division to pay 2005 income tax.

The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the United States Postal Service ("USPS"), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

The name, mailing address, order date and BCMS number for each Conciliation Order to be issued are electronically sent to the Division's Advanced Function Printing Unit ("AFP Unit"). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control bar code.

The AFP Unit also produces a computer-generated CMR entitled "CERTIFIED RECORD FOR PRESORT MAIL - BCMS CERT LETTER." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The

certified control numbers are recorded on the CMR under the heading "CERTIFIED NO." The BCMS numbers are recorded on the CMR under the heading "REFERENCE NO." and are preceded by three zeroes. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

The clerk, as part of her regular duties, associates each cover sheet, Conciliation Order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter and Conciliation Order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

The "TOTAL PIECES AND AMOUNTS" is indicated on the last page of the CMR. On the last page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas," and also stamps "MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT."

The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "4/28/06" is written in the upper right corner of each page of the CMR.

The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Division's Mail Processing Center, which is responsible for delivering the CMR along with the envelopes containing the cover sheets, covering letters and conciliation orders to the USPS.

A piece may be "pulled" for a number of reasons including, but not limited to, a discrepancy in the name or address. A piece of mail so "pulled" will be segregated from the

remaining group of orders for correction or issuance at another time. In this case, a review of the CMR indicates that three pieces of mail were pulled. Two pulled pieces are listed on page one of the CMR and one pulled piece is listed on page two of the CMR. A line was placed through the entries for these taxpayers by the clerk after the orders were pulled.

Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR attached to his affidavit, which contains a list of the conciliation orders issued by the Division on April 28, 2006. This CMR lists 39 certified control numbers and as noted there are three deletions, two on page 1 and one on page 2, from the list for a total of 36 pieces. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number and the name and address of the addressee.

Information regarding the Conciliation Order issued to petitioners is contained on page 2 of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1179 1597 is reference/CMS number 000208411, along with the following address:

Leiser & Lilian [sic] Schwimmer  
266 Keap Street, Apt. 2R  
Brooklyn, NY 11211

Information regarding the copy of the Conciliation Order issued to petitioners' representative is also contained on page 2 of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1179 1535 is reference/CMS number 000208411, along with the following address:

Ronald J. Cohen  
40 Matthews Street - Suite 203  
Goshen, NY 10924

The affidavit of James Steven Vanderzee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the name and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and signs or initials the CMR indicating receipt by the post office.

In this particular instance, the postal employee affixed a postmark dated April 28, 2006 to each page of the four-page CMR. The postal employee also wrote his or her initials and the number "36" near the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page 4 of the CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the mail record, indicating that 36 pieces of mail were actually received.

The CMR is the Division's record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR was picked up at the post office by a member of Mr. Vanderzee's staff on the following day after its initial delivery and was then delivered to the originating office, in this case BCMS. The CMR was maintained by BCMS in the regular course of business.

Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Vanderzee stated that on April 28, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Leiser & Lillian Schwimmer, 266 Keap Street, Apt. 2R, Brooklyn, NY 11211 and a piece of certified mail addressed to Ronald J. Cohen, 40 Matthews Street - Suite 203, Goshen, NY 10924 to a branch of the USPS in Albany, New York in sealed postpaid envelopes for delivery by certified mail. He stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on April 28, 2006 for the records of BCMS. Mr. Vanderzee stated that the procedures described in his affidavit were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to petitioners on April 28, 2006.

A review of the CMR indicates that the handwritten notation "unclaimed - remailed 5/22/06" appears next to the names of Leiser and Lillian Schwimmer on page 2 of the CMR. In his affidavit, Mr. Farrelly states that it is BCMS policy to remail by regular mail any orders returned by the Postal Service.

The record includes a copy of a check, dated April 18, 2006, written on petitioners' Bank of America personal checking account, which check was directed to the Division to pay 2005 income tax. On the face of this check, petitioners' address was listed as 266 Keap St., Apt. 2-R, Brooklyn, NY 11211-7311.

On March 13, 2007, in response to the issuance of the Notice of Intent to Dismiss Petition, petitioners submitted a petition bearing the original signature of Ronald J. Cohen, petitioners' representative, dated March 13, 2007, and an original power of attorney, dated February 27,

2007, by which petitioners appointed Ronald J. Cohen, Esq., to appear as their representative before the Division of Tax Appeals in connection with the proceeding involving Notice of Deficiency L-024849992.

In response to the issuance of the Notice of Intent to Dismiss petition, petitioners also submitted the affidavit of Ronald J. Cohen, which affidavit was made in support of Cohen, Estis & Associates, LLP's timely preparation and mailing of Leiser and Lillian Schwimmer's petition.

***THE ORDER OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge found that where the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order. The Division must prove a standard procedure used by it for the issuance of conciliation orders by one with knowledge of the relevant procedures. It must also prove that the standard procedure was followed in the particular instance in question. Based on the affidavits of two of its employees submitted in support of the Notice of Intent to Dismiss Petition, the Administrative Law Judge concluded that the Division had established that it mailed the conciliation order to petitioners and their representative by certified mail on April 28, 2006 at their last known addresses. Since the petition was filed with the Division of Tax Appeals on November 21, 2006, the Administrative Law Judge observed that this date was well past the statutory 90-day period, within which a petition must be filed. As a result, the Administrative Law Judge concluded that the petition was not timely filed and the Division of Tax Appeals was without jurisdiction to entertain the merits of petitioners' case.

The Administrative Law Judge noted, with respect to the preparation of petitioners' petition, that Ronald J. Cohen, Esq.'s affidavit explains the reason for his inability to secure proof in admissible form, i.e., an affidavit from Mr. Marc Caren, Esq. attesting to his alleged

timely preparation of petitioners' petition. The Administrative Law Judge determined, however, that with respect to the alleged timely filing of petitioners' petition, that Mr. Cohen's affidavit merely contains conclusory hearsay from an unidentified source, and, as such, is without evidentiary significance or probative value. Therefore, the Administrative Law Judge found that petitioners submitted no credible evidence that they filed their petition within the time required, i.e., by July 27, 2006.

The Administrative Law Judge asserted that petitioners failed to directly challenge the Division's proof of mailing of the Conciliation Order with any credible evidence. Therefore, the Administrative Law Judge concluded that petitioners failed to meet their burden of proof.

#### ***ARGUMENTS ON EXCEPTION***

On exception, petitioners argue that they are innocent bystanders to a petition that their counsel tried to submit and which they honestly believe was submitted based on all of the evidence. Further, petitioners argue that they are being denied the opportunity to prove by direct evidence the fact of their compliance with all procedures that would have resulted with the mailing of the petition.

Petitioners argue that there is an unusual factor here, in that they have a disgruntled "of counsel" attorney who left the firm, relocated and apparently believed that he no longer had a professional duty to communicate at a hearing because it was inconvenient and not worth his effort to testify. Petitioners also argue that the Tribunal has subpoena powers, which it must use to require Mr. Caren's testimony, and that he must be subjected to examination by petitioner's counsel.

It is the Division's contention that the Administrative Law Judge correctly decided the relevant issues and that the order should be affirmed for the reasons stated therein.

**OPINION**

Tax Law § 170(3-a)(e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued.

A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*see, Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170[3-a][e]). When the timeliness of the petition is at issue, the Division must establish proper mailing of the conciliation order (*see, Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). We find that the Division has met its burden to establish proper mailing of the conciliation order to petitioners and to petitioners’ representative on April 28, 2006 by submitting affidavits describing its general mailing record, which showed that the procedure was followed in this case (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Petitioners’ petition was not filed until November 21, 2006, which is 117 days late. The law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition (*see, Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003). Therefore, we affirm the conclusion of the Administrative Law Judge, that because petitioners failed to file their petition protesting the conciliation order within 90 days of its issuance, such petition was untimely filed and properly dismissed.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Leiser and Lillian Schwimmer is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Leiser and Lillian Schwimmer is dismissed.

DATED: Troy, New York  
March 20, 2008

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

/s/ Robert J. McDermott  
Robert J. McDermott  
Commissioner