

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

LEISER AND LILLIAN SCHWIMMER : ORDER
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. :

Petitioners, Leiser and Lillian Schwimmer, 266 Keap Street, Apt. 2R, Brooklyn, New York 11211, filed a petition 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.

On January 26, 2007, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On March 15, 2007, petitioners, by Cohen, Estis & Associates, LLP (Ronald J. Cohen, Esq., of counsel) submitted an affidavit and other documents in opposition to dismissal. On March 16, 2007, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted affidavits and other documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on March 16, 2007. After due consideration of the documents and arguments submitted by the parties, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. 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.

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

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

3. 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

4. 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.

5. 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).

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.”

19. 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.

20. 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.

21. 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.

22. 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 3 deletions, 2 on page 1 and 1 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.

23. Information regarding the Conciliation Order issued to petitioners is contained on page two 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

24. Information regarding the copy of the Conciliation Order issued to petitioners' representative is also contained on page two 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

25. 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.

26. 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.

27. 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.

28. 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.

29. A review of the CMR indicates that the handwritten notation "unclaimed - remained 5/22/06" appears next to Leiser and Lillian Schwimmers' name on page two 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.

30. 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.

31. 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.

32. 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 Leisure and Lillian Schwimmer's petition.

CONCLUSIONS OF LAW

A. Tax Law § 2008 provides that all proceedings in the Division of Tax Appeals shall be commenced by the filing of a petition with the Division of Tax Appeals protesting any written notice of the Division of Taxation which has advised the petitioner of a tax deficiency or other notice which gives a person the right to a hearing in the Division of Tax Appeals.

B. In response to the Notice of Intent to Dismiss Petition, petitioners submitted a petition bearing the original signature of Ronald J. Cohen, their 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. These documents constitute a corrected petition (*see*, 20 NYCRR 3000.3[b][7]; [9]).

C. While a corrected petition is deemed to have been filed at the time the original petition was filed (20 NYCRR 3000.3[d][1]), the original petition must be filed within the statutory time limits for filing of a petition (20 NYCRR 3000.3[c]). There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the Conciliation Order in this case and the underlying Notice of Deficiency would be binding upon petitioners unless they filed a timely petition with the Division of Tax Appeals. A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals, which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Cato, supra; Matter of DeWeese, supra*).

D. Where, as here, the timeliness of a taxpayer’s protest against a conciliation order is in question, the initial inquiry is on the mailing of the conciliation order because a properly mailed conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id; Matter of*

Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id*; *see also*, *Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517).

E. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the subject Conciliation Order to petitioners at their last known address (*see, e.g., Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Robert Farrelly and James Steven Vanderzee, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioners and to their representative, by certified mail, on April 28, 2006, the date appearing on the CMR. The affidavits generally describe the various stages of producing and mailing orders and, in addition, attest to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing

procedures described in the Farrelly and Vanderzee affidavits were followed with respect to the order issued to petitioners.

F. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on April 28, 2006, and it is this date which commenced the 90-day period within which a protest had to have been filed. Ninety days after the April 28, 2006 date of mailing was July 27, 2006, and in order to be considered timely, petitioners' protest had to have been filed on or before such date. Petitioners' protest was not filed until it was mailed on November 16, 2006, or 112 days late. As a matter of law, the Division of Tax Appeals has no jurisdiction to address the merits of petitioners' protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

G. In support of petitioners' position that their representative filed their petition within the time required, i.e., by July 27, 2006, they submitted their representative's affidavit. In his affidavit, Mr. Cohen states that, as managing partner of the law firm of Cohen, Estis & Associates, LLP, he has direct knowledge that Mark Caren, as of counsel to that law firm, timely prepared the petition of Leiser and Lillian Schwimmer. Mr. Cohen avers that Mr. Caren advised him that the petition was provided to the law firm's receptionist for timely mailing. Mr. Cohen asserts that he questioned the receptionist who stated that she had no prejudice to mailing Mr. Caren's work and that in the usual course of business his work got mailed the same as all others. Mr. Cohen further avers that Mr. Caren has relocated his professional practice to California and is distant and unable to provide any further support for the facts of mailing of petitioners' petition other than to state that he initiated the process. I find Mr. Cohen's affidavit to be

insufficient to prove that petitioners filed their petition within the time required, i.e., by July 27, 2006. With respect to the preparation of petitioners' petition, Mr. Cohen's affidavit explains the reason for his inability to secure proof in admissible form, i.e., an affidavit from Mr. Caren attesting to his alleged timely preparation of petitioners' petition. However, with respect to the alleged timely mailing (filing) of petitioners' petition, Mr. Cohen's affidavit merely contains conclusory hearsay from an unidentified source, and, as such, is probatively valueless and without evidentiary significance (*see, Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595, 598; *Jabs v. Jabs*, 221 AD2d 704, 633 NYS2d 616, 617). Therefore, petitioners submitted no credible evidence that they filed their petition within the time required, i.e., by July 27, 2006.

In addition, petitioners have failed to directly challenge the Division's proof of mailing of the Conciliation Order with any credible evidence. Therefore, it must be concluded that petitioners have failed to meet their burden of proof.

H. The petition of Leiser and Lillian Schwimmer is dismissed.

DATED: Troy, New York
June 14, 2007

Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE