

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MARIA GUZMAN</b>	:	ORDER
	:	DTA NO. 824658
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 New York City	:	
Administrative Code for the Year 2008.	:	

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Petitioner, Maria Guzman, 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 year 2008.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, dated January 4, 2012, on the ground that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition was untimely filed. The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), submitted a letter dated January 9, 2012 in support of the proposed dismissal. Petitioner, appearing pro se, submitted a post-deadline response dated March 6, 2012 in opposition to the proposed dismissal. The 90-day period to issue this order commenced on February 3, 2012. Based upon the pleadings in this matter and the documents submitted by both the Division of Taxation and petitioner, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

## ***ISSUE***

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

## ***FINDINGS OF FACT***

1. On October 5, 2011, petitioner, Maria Guzman, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review an Account Adjustment Notice dated September 16, 2009, denying her refund claim for the tax year 2008.

2. On January 4, 2012, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent indicates that the relevant statutory notice was apparently issued on September 16, 2009, but that the petition was not filed until October 5, 2011, or two years and nineteen days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted a letter from its representative stating:

The Division is in receipt of the Notice of Intent to Dismiss the petition in the above referenced matter. Since the petitioner did not protest the notice of disallowance within two years, the Division is in agreement with the proposed dismissal.

The Division offered no additional documents with its letter.

## ***CONCLUSIONS OF LAW***

A. There is a two-year statutory time limit for filing a petition following the issuance of a notice of disallowance (Tax Law § 689[c]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the two-year time limit (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006, ***confirmed*** 50 AD3d 1187, 854 NYS2d 593 [2008]).

B. Where, as here, the timeliness of a taxpayer's petition following the issuance of a statutory notice is in question, the initial inquiry focuses on the mailing of the notice because a properly mailed notice 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; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 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.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). When a notice is found to have been properly mailed by the Division to a petitioner's 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).

C. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices 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; Matter of Novar TV & Air Conditioner Sales & Serv.*).

D. In this case, the Division has offered absolutely no proof of its standard mailing procedures or that those procedures were followed with the subject notice. Instead, the Division solely submitted a one-paragraph letter from its representative containing an unsubstantiated conclusory statement. Thus, the Division has failed to establish the date of mailing of the notice at issue (*see Matter of Park City Builders of New York, Inc.*, Tax Appeals Tribunal, March 25, 2010).

E. The Notice of Intent to Dismiss Petition dated January 4, 2012 is withdrawn and the Division of Taxation shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York  
April 5, 2012

/s/ Herbert M. Friedman, Jr.  
ADMINISTRATIVE LAW JUDGE