

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JASON PRIESTER** :  
 : DETERMINATION  
 : DTA NO. 829868  
for Redetermination of Deficiencies or for Refund of New  
York State Personal Income Tax under Article 22 of Tax :  
Law for Years 2017 and 2018. :  
:

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Petitioner, Jason Priester, filed a petition for redetermination of deficiencies or for Refund of New York State personal income tax under article 22 of Tax Law for years 2017 and 2018.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated October 1, 2020, on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition did not appear to have been filed in a timely manner. The parties were given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension, until December 17, 2020 to respond to said notice. The Division of Taxation, appearing by Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel) submitted documents in support of dismissal. Petitioner did not submit a response by December 17, 2020, which date triggered the 90-day deadline for issuance of this determination. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of notices of deficiency.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Jason Priester, notices of deficiency bearing assessment numbers L-049811003 and L-049815855 each dated July 3, 2019, for the years 2017 and 2018. Additionally, a notice and demand bearing assessment number L-049815855 was issued to petitioner on October 21, 2019.

2. On February 26, 2020, a petition protesting assessment numbers L-049811003 and L-049815855 was received by the Division of Tax Appeals. Attached to the petition were notice of deficiency number L-049811003 and notice and demand number L-049815855. The envelope in which the petition was mailed does not bear a USPS postal mark indicating when the petition was mailed.

3. On October 1, 2020, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued a notice of intent to dismiss petition (notice of intent) to petitioner, on the basis that the petition did not appear to be timely filed. The notice of intent indicated that notice of deficiency number L-049811003 was issued on July 3, 2019, but the petition was not filed until February 26, 2020, or in excess of (90) days later. Furthermore, as the petition had also been filed in protest of a notice and demand, it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition.

4. In response to the issuance of the notice of intent, the Division submitted among other documents: (i) an affirmation, dated December 10, 2020, of Colleen McMahon, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated October 29, 2020, of

Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated November 2, 2020, of Susan Saccocio, Manager of the Mail Room of the Department of Taxation and Finance; (iv) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked July 3, 2019; (v) a copy of the notices of deficiency, dated July 3, 2019 together with associated mailing cover sheets; and (vi) a copy of the petitioner’s IT-201 for the tax year 2018.

5. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor since February 2006, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs and is familiar with the Division’s Case and Resource Tracking System (CARTS), and the Division’s past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division’s general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of July 3, 2019. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page.

6. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and the taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled “Certified No.” The CMR lists each notice in the order the notices are

generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Address, Street, and PO Address."

7. The July 3, 2019 CMR consists of 17 pages and lists 239 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated July 3, 2019 to each page of the CMR, wrote the number "239" next to the heading "Total Pieces Received at Post Office" on page 17, and initialed or signed the first and last page of the CMR.

8. Page 15 of the CMR indicates that two notices with a certified control numbers, 7104 1002 9735 4973 8149 and 7104 1002 9735 4973 8156, with reference numbers L-049811003 and L-049815855, were mailed to petitioner at 778 BAYVIEW AVE APT BSMT, AMITYVILLE, NY 11701-2048. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit B, bears this certified control numbers and petitioner's name and address as noted.

9. The affidavit of Susan Saccocio, a manager in the Division's mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the "Outgoing Certified Mail" area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each

statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amount on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, each page of the CMR attached to the Picard affidavit as Exhibit A contains a USPS postmark dated July 3, 2019. In addition, she attests that the USPS employee's initials or signature appear on the last page of the CMR. According to Mr. Saccocio, the affixation of the postmarks and the USPS employee's initials indicates that all 239 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on July 3, 2019.

10. According to the Picard and Saccocio affidavits, the notices were mailed to petitioner on July 3, 2019, as claimed.

11. Petitioner did not submit a response to the notice of intent.

### ***CONCLUSIONS OF LAW***

A. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (see Tax Law § 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a

conciliation conference with BCMS “if the time to petition for such hearing has not elapsed” (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996).

B. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

C. A motion for summary determination may be granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

D. Where, as here, the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation conference 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 (*see id.*).

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 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.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Ms. Saccocio, Division employees involved in and possessing knowledge of the process of generating reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*).

G. The Division has also presented sufficient documentary proof, i.e., a properly completed CMR to establish that the notices of deficiency were mailed as addressed on July 3, 2019. Further, petitioner's address on the subject notices of deficiency, the corresponding mailing cover sheet and the CMR all conform with the address listed on petitioner's IT-201 for the tax year 2018. This was the last return filed prior to the issuance of the notices. It is thus concluded that the Division properly mailed the notices of deficiency on July 3, 2019, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (see Tax Law § 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS "if the time to petition for such hearing has not elapsed" (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late

are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996).

H. The petition also includes a notice and demand, assessment number L-049815855 dated October 21, 2019. The notice and demand protested by petitioner here does not give rise to hearing rights (*see* Tax Law § 173-a [2]).

I. In sum, the Division has established that notices of deficiency L-049811003 and L-049815855 were properly mailed to petitioner at his last known address on July 3, 2019. Having established that the notices of deficiency were properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not received until February 26, 2020, a date that falls beyond 90 days after the date of issuance of the notice of determination. Accordingly, the petition is untimely, and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

J. The petition of Jason Priester is dismissed.

DATED: Albany, New York  
March 11, 2021

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