

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**DAWNE M. WILLIAMS**  
for Redetermination of a Deficiency or for Refund of  
Personal Income Tax under Article 22 of the Tax Law  
and the Administrative Code of the City of New York  
for the Year 2019.

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DETERMINATION  
DTA NO. 830304

Petitioner, Dawne M. Williams, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2019.

On February 22, 2022, the Division of Taxation, by Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel), filed a motion seeking to have the petition dismissed or, in the alternative, granting summary determination in the above-captioned matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Omar Folkes, enrolled agent, did not respond to the motion. The 90-day period for issuance of this order commenced on March 24, 2022. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jessica DiFiore, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notice of deficiency L-051591243.

***FINDINGS OF FACT***

1. Petitioner, Dawne M. Williams, timely filed a 2019 New York resident income tax return, form IT-201 (2019 return), providing an address in Riverhead, New York.

2. The Division of Taxation (Division) issued petitioner notice of deficiency L-051591243 for tax year 2019 on August 12, 2020. The notice is addressed to petitioner at the same Riverhead, New York, address.

3. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) regarding notice L-051591243 on December 19, 2020. Petitioner provided the same Riverhead, New York, address on her request as was on the notice and her 2019 return. BCMS dismissed petitioner's request as untimely by conciliation order dismissing request (conciliation order) number 000325935, dated January 15, 2021. The order provided that petitioner requested a conciliation conference more than 90 days after notice L-051591243 was issued.

4. Petitioner timely appealed the conciliation order by filing a petition with the Division of Tax Appeals on February 2, 2021. In her petition, petitioner states that she is requesting a conciliation conference because of a paperwork mistake. She stated that she has lived in Flanders, New York, since September 2018, but her previous residence continues to be leased in her name. She stated that on the original return for 2019, her accountant did not record her move from New York City to Long Island, New York, where she presently resides. Petitioner attached

to the petition, in relevant part, the conciliation order, the request for conciliation conference, an amended resident income tax return, IT-201-X, for tax year 2018, and a statement of proposed audit change for tax year 2019. The address on the amended return is the same address to which the notice was issued.

5. The Division filed its answer to the petition, affirmatively alleging, among other things, that petitioner's challenge to notice L-051591243 was untimely because she failed to file a request for a conference with BCMS or a petition with the Division of Tax Appeals within 90 days of its issuance.

6. On February 22, 2022, the Division filed a motion seeking the dismissal of the petition or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9 (a) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. In support of the motion, the Division provided the following documents: (i) an affirmation of Colleen M. McMahon, Esq., dated February 22, 2022; (ii) an affidavit of Deena Picard, sworn to on September 23, 2021; (iii) a certified mail record (CMR) entitled "Certified Record for – DTF-962-F-E – Not of Def Follow Up" postmarked August 12, 2020; (iv) a copy of notice L-051591243 with its associated mailing cover sheet; (v) an affidavit of Susan Saccocio, sworn to on September 24, 2021; (vi) a copy of the first page of petitioner's request for conciliation conference for notice L-051591243, dated December 18, 2020; (vii) a copy of the conciliation order dismissing request for notice L-051591243; and (viii) a copy of petitioner's 2019 return.

7. Ms. McMahon, an attorney in the Office of Counsel of the Division, asserts in her affirmation that petitioner's 2019 return was filed on March 21, 2020, and that this was the last return filed before the Division issued notice L-051591243. She also avers that the notice was issued to petitioner's last known address in Riverhead, New York.

8. Deena Picard has been the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS) since May 2017. She is also a Data Processing Fiscal Systems Auditor 3 and has held that position since February 2006. In performing her duties for both positions, Ms. Picard has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of deficiency. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Picard's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices.

9. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number for each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

10. Each batch of notices is accompanied by a CMR. The CMR lists each notice in the order the notices are generated in the batch. The certified control number is listed on the CMR under the heading entitled "Certified No." The statutory notice numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address." Each CMR and associated batch of statutory notices are forwarded to the mail room together.

11. All pages of the CMR are banded together when the documents are delivered to the Division's mail room and remain so when returned to the Division. 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.

12. Here, the CMR for the notices issued by the Division on August 12, 2020, including notice L-051591243, consists of 121 pages with certified control numbers and corresponding assessment numbers, names, and addresses. Each of the pages consists of 12 to 15 entries except for page 121 which consists of 11 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.

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 is manually changed on the first and last page of the CMR to the actual date of mailing. In the instant case, the actual mailing date as handwritten on the first and last page of the CMR was "8/12." A USPS representative affixed a postmark, dated August 12, 2020, to each page of the CMR, wrote "1,657" on page 121 next to the heading "Total Pieces and Amounts 1,657," and initialed the page.

13. Page 93 of the CMR indicates that notice L-051591243 with certified control number 7104 1002 9735 0061 2419 was mailed to petitioner at her Riverhead, New York, address. The corresponding mailing cover sheet, attached to the Picard affidavit with the notice as exhibit "B," bears this certified control number, petitioner's name, and her address as stated above.

14. Ms. Picard avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on August 12, 2020.

15. Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures in her affidavit as they relate to statutory notices. Ms. Saccocio has been a manager in the mail room since 2017. As a mail room manager, Ms. Saccocio is knowledgeable regarding past and present office procedures as they relate to statutory notices. Ms. Saccocio's official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the United States Post Office.

16. The mail room receives statutory notices with their mailing cover sheets that are ready for mailing in an "Outgoing Certified Mail" area. The mail room also receives the corresponding CMR for each batch of notices. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet in a windowed envelope. That staff member then weighs, seals, and places postage on each envelope. A clerk then checks the first and last pieces of certified mail against the information contained on the CMR. A clerk will also perform a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information listed 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 writes his or her initials or signature on the CMR, indicating receipt by the post office. The mail room also 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

17. Ms. Saccocio avers that each page of the CMR in exhibit “A” of the Picard affidavit contains a postmark of August 12, 2020, and that a USPS employee initialed or signed page 121 of the CMR and wrote the total number of pieces of certified mail received. A review of the CMR confirms this assertion.

18. Based on her review of the affidavit of Ms. Picard and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Saccocio stated that on August 12, 2020, an employee of the mail room delivered one piece of certified mail addressed to petitioner at her Riverhead, New York, address in a sealed postpaid envelope for delivery. She also stated the CMR delivered to the USPS on August 12, 2020, was returned to the Division. Ms. Saccocio attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on August 12, 2020.

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

A. The Division brings this motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or a motion for summary determination under section 3000.9 (b). As the petition in this matter was filed within 90 days of the conciliation order (*see* finding of fact 4), the Division of Tax Appeals has jurisdiction over the petition and a motion for summary determination is the proper motion for relief if petitioner’s request for conciliation conference was untimely (*see Matter of Kallianpur*, Tax Appeals Tribunal, May 29, 2019).

B. A motion for summary determination “shall 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” (20 NYCRR 3000.9 [b]). A motion for

summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (*see* 20 NYCRR 3000.9 [c]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, demonstrating there are no material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, however, the opposing party must set forth evidentiary proof establishing the existence of a material issue of fact that requires a trial of the action (*see id.*).

C. Petitioner did not respond to the Division's motion and thus, has presented no evidence to contest the facts alleged in the affidavits submitted therewith. Accordingly, such facts may be deemed admitted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

D. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals or a request for conciliation conference with BCMS (*see* Tax Law §§ 681 [b]; 689 [b]; 170 [3-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 date 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). This is because, absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a petitioner's request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of

demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furn.*, Tax Appeals Tribunal, November 25, 1992). To meet its burden, the Division must show it has a standard mailing procedure for the issuance of statutory notices by one with knowledge of the relevant procedures and that the procedure was followed in this instance (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). Where a notice of deficiency of personal income tax is properly mailed, it is valid whether or not it is actually received (*see Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019).

F. In this case, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on August 12, 2020. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see e.g. Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

G. The Division issued notice L-051591243 to petitioner's last known address. "A taxpayer's last known address shall be the address given in the last return filed by him, unless subsequent to the filing of such return the taxpayer shall have notified the [Division] of a change of address" (Tax Law § 691 [b]). Petitioner's address as provided on her 2019 return is the same as what is shown on notice L-051591243 (*see finding of fact 2*). Accordingly, the Division has

