

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>FRANCIS MUHUMUZA</b>	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of Tax Law for Years 2017 through 2020.	:	DTA NO. 830664

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Petitioner, Francis Muhumuza, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of Tax Law for years 2017 through 2020.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated August 26, 2022. The Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted documents in support of the dismissal. Petitioner, appearing pro se, did not submit a response by September 26, 2022, 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.

***ISSUES***

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

II. Whether the Division of Tax Appeals has jurisdiction over the remainder of the petition.

***FINDINGS OF FACT***

1. Petitioner filed a petition that was hand delivered to the Division of Tax Appeals on September 20, 2021.

2. The petition protested personal income tax deficiencies for the years 2017 through 2020. It did not include or identify the disputed notices, however.

3. On October 1, 2021, a written request was made by the Division of Tax Appeals to petitioner to provide additional information and documentation. The written request stated in sum that he needed to provide the statutory notices offering appeal rights for the tax years 2017 to 2020.

4. On October 5, 2021, the Division of Tax Appeals was provided with a copy of: (i) a notice of deficiency for the year 2018, bearing assessment number L-051517737, that was issued to petitioner by the Department of Taxation and Finance on July 29, 2020; and (ii) a notice and demand for payment due for the year 2020, bearing assessment number L-054109458, that was issued to petitioner by the Department of Taxation and Finance on August 10, 2021.

5. The petition did not include any other notices.

6. On October 5, 2021, the Division of Tax Appeals informed petitioner, in writing, that it did not have a statutory notice for the years 2017 or 2019.

7. To date, petitioner has not provided a statutory notice for the years 2017 or 2019.

8. On August 26, 2022, 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 and it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition.

9. In response to the issuance of the notice of intent, the Division submitted among

other documents: (i) an affirmation, dated September 20, 2022, of Christopher O'Brien, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated September 8, 2022, of Marianna Denier, Principal Administrative Analyst and Director of the Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated September 13, 2022, of Susan Ramundo, Manager of the Mail Room of the Department of Taxation and Finance; (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 29, 2020; (v) a copy of the notice of deficiency, dated July 29, 2020 together with associated mailing cover sheets; and (vi) a copy of the petitioner's IT-203 for the tax year 2018.

10. The affidavit of Marianna Denier, who has been in her current position since August 2022, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier 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 29, 2020. 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.

11. 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.”

12. The July 29, 2020, CMR consists of 510 pages and lists 6,791 certified control numbers along with corresponding assessment numbers, names, and addresses. A USPS representative affixed a postmark, dated July 29, 2020, to each page of the CMR, wrote the number “6,791” next to the heading “Total Pieces Received at Post Office” on page 510, and initialed or signed the first and last page of the CMR.

13. Page 98 of CMR indicates that a notice with certified control number 7104 1002 9735 0045 0493, with reference number L-051517737, was mailed to petitioner at 2151 MORRIS AVE APT 110 BRONX NY 10453-2509. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit “B,” bears these certified control numbers and petitioner’s name and address as noted.

14. The affidavit of Susan Ramundo, 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 Denier affidavit as Exhibit "A" contains a USPS postmark dated July 29, 2020. In addition, she attests that the USPS employee's initials or signature appear on the last page of the CMR. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee's initials indicates that all 6,791 articles of mail listed on the July 29, 2020, CMR, including the article addressed to petitioner, was received by the USPS for mailing on July 29, 2020.

15. According to the Denier and Ramundo affidavits, the notice was mailed to petitioner on July 29, 2020, as claimed.

16. The petitioner did not submit a response to the notice of intent to dismiss the petition.

### ***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. Denier and Ms. Ramundo, 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 notice of deficiency was mailed as addressed on July 29, 2020. Further, petitioner's address on the subject notice of deficiency, the corresponding mailing cover sheet and the CMR all conform with the address of 2151 Morris Ave Apt 110 Bronx NY 10453-2509, which is listed on petitioner's IT-203 for the tax year 2018. This was petitioner's last known address prior to the issuance of the notice. It is thus concluded that the Division properly mailed the notice of deficiency on July 29, 2020, 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]). As noted, the 90-

day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced.

H. In sum, the Division has established that the notice of deficiency, L-051517737 was properly mailed to petitioner at his last known address on July 29, 2020. Having established that the notice of deficiency was 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 filed until September 20, 2021, a date that falls beyond 90 days after the date of issuance of the notice of deficiency. 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).

I. Additionally, the petition in this case did not include a required statutory notice or conciliation order for the tax years 2017 and 2019 and, therefore, fails to present a notice for which the Division of Tax Appeals has jurisdiction (*see* Tax Law § 2008). Thus, as petitioner failed to attach a notice for 2017 and 2019 contemplated by Tax Law § 2008, the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition and dismissal is warranted (*see* 20 NYCRR 3000.3 [d]; 3000.9 [a] [4] [i]; *see Matter of Richardson*, Tax Appeals Tribunal, November 17, 2022).

J. Finally, the notice and demand for the year 2020 bearing assessment number L-054109458 protested by petitioner here does not give rise to hearing rights (*see* Tax Law § 173-a [2]).



K. The petition of Francis Muhumuza is dismissed.

DATED: Albany, New York  
December 22, 2022

/s/ Herbert M. Friedman  
SUPERVISING ADMINISTRATIVE LAW JUDGE