

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ADEKUNLE YUSUFF** : **DETERMINATION**  
 : **DTA NO. 830852**  
for Redetermination of a Deficiency or for Refund of New :  
York State Personal Income Tax under Article 22 of the :  
Tax Law for the Year 2020. :

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Petitioner, Adekunle Yusuff, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2020.

On June 2, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The Division of Taxation, appearing by Amanda Hiller, Esq. (Amy Seidenstock, Esq., of counsel), submitted documents in support of dismissal. Petitioner did not respond to the motion by August 17, 2023, which date began the 90-day period for the issuance of this determination. After due consideration of the documents submitted, Donna M. Gardiner, 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 a notice of deficiency.

***FINDINGS OF FACT***

1. On February 25, 2022, petitioner, Adekunle Yusuff, filed a petition with the Division of Tax Appeals protesting a notice of deficiency, bearing assessment number L-053876474, dated September 7, 2021, for the year 2021 (notice).<sup>1</sup>

2. On June 2, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition.<sup>2</sup> The notice stated, in sum, that it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition on the basis that the petition did not appear to be timely filed. The notice of intent to dismiss petition stated that the notice was issued on September 7, 2021, but the petition was not filed until February 25, 2022, or in excess of 90 days later.

3. In response to the issuance of the notice of intent to dismiss petition, the Division of Taxation (Division) states that the notice was issued to petitioner electronically pursuant to Tax Law § 35. The Division submitted documents in support of dismissal that include: (i) an affirmation, dated August 1, 2023, of Amy Seidenstock, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated June 27, 2023, of Shelby Jacobsen, a Taxpayer Services Specialist 4 and a manager in the External Communication Unit of the Division; (iii) a copy of the Division's Online Services (OLS) Account Terms and Conditions for Individuals; (iv) a screenshot of petitioner's OLS account summary to "Manage Email;" (v) a screenshot of petitioner's OLS "View Online Services Account;" (vi) correspondence from the Division to

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<sup>1</sup>The petition was filed in the name of Adekunle and Kehinde Yusuff and it protested a separate notice of deficiency, bearing assessment number L-054716506, for the tax year 2019. As that protest appeared to be timely filed, the petition was severed and the protest for tax year 2019 was assigned DTA number 831205. The notice for the tax year 2020 was issued to petitioner, Adekunle Yusuff, individually and, thus, this determination addresses him.

<sup>2</sup>On November 7, 2022, a notice of intent to dismiss petition was issued based upon the fact that the petition was not in proper form. In response to the notice of intent to dismiss petition, petitioner supplied two notices of deficiency and, consequently, the initial notice of intent to dismiss petition was rescinded.

petitioner confirming petitioner's creation of an OLS account; (vii) a screenshot of petitioner's OLS account "OTC tpid results" user ID history; (viii) the subject notice dated September 7, 2021; (ix) a copy of petitioner's "Event Management Transaction Log" within the e-Manages Process for an Integrated Revenue Enterprise (e-MPIRE); (x) a screenshot of petitioner's OLS account summary; (xi) the Division's printout of "Delivery Details by Template ID;" and (xii) the Division's printout of electronic message delivery status.

4. The affidavit of Shelby Jacobsen sets forth the Division's general practice and procedure for the processing and delivery of taxpayer specific electronic communications, including electronic statutory notices. Ms. Jacobsen has held her current position since May 2018. As part of Ms. Jacobsen's regular duties, she manages the processing and delivery of taxpayer specific electronic communications. Taxpayers may open an OLS account and request electronic communication of their tax-related documents from the Division. The OLS system allows a taxpayer to authorize the Division to send an email alert to their chosen external email address advising the taxpayer to check their OLS account for any message in the Message Center section. The Message Center is a secure section within OLS where a taxpayer can view electronic correspondence from the Division. Taxpayers choose which email service they would like to receive through OLS by clicking on check boxes in the Manage Email section of their OLS account, with options including emails for bills and related notices and other notifications. The Division acknowledges when an online account has been created by sending correspondence to the taxpayer confirming the taxpayer's creation of an OLS account.

5. The Division's OLS Account Terms and Conditions for Individuals provides that in consideration of a taxpayer's use of an OLS account, the taxpayer agrees to receive the indicated tax-related documents and communications electronically and agrees that the Division will not use physical (postal) mail to provide the communications. The Division instead sends an email

that alerts the taxpayer to sign on to his or her OLS account to access the information. The taxpayer further agrees to provide an updated email address and periodically check for new account activity.

6. In the “manage email” section of an OLS account, an account holder must affirmatively opt-in to receiving tax bills and related statutory notices via electronic communication by checking a box labeled “Bills and Related Notices – Get emails about your bills.” The account holder must then click on the “Save” button to register, which records the account holder’s authorization to receive same electronically. Immediately above the save button is an acknowledgment section which provides:

“By selecting one or more of the choices above and clicking **Save**:

- I agree to receive tax bills and similar account notices electronically at my online services account.
- I understand that I will no longer receive those communications via physical (postal) mail.
- I understand that my right to challenge bills received through my online services account is the same as that for paper bills.”

7. Petitioner opened an OLS account with the Division on February 23, 2014 under his name, taxpayer identification number, and user identification number, using a Logon ID of “kun\*\*\*ing” and an email address of [kun\\*\\*\\*ing@\\*\\*\\*.com](mailto:kun***ing@***.com). Petitioner’s OLS account for this user identification number and email address remains active to date.

8. In the “manage email” section of petitioner’s OLS account described in finding of fact 6, petitioner checked the boxes labeled “Bills and Related Notices – Get emails about your bills” and “Other Notifications – Get emails about refunds, filings, payments, account adjustments, etc.”

9. On February 26, 2014, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account on February 23, 2014, under the username of “kun\*\*\*ing.”

10. The Division's advanced function presentation (AFP) system initiates billing printouts. The AFP system uses the Division's DZ4010Z retrieve view data (RVD) program. The RVD program verifies email eligibility based on the internal taxpayer ID, tax type and billing form. The RVD program uses internal taxpayer ID, user ID, email address, and email eligibility to determine authorization to receive electronic communications through OLS.

11. When a statutory notice is scheduled to be issued to a taxpayer under this procedure, the AFP system generates a mail file of the electronic statutory notices. The AFP system stores the file of the electronic statutory notices and the verified email address from the RVD program until the issuing date is reached. On the issuing date, email alerts are sent to the external email address associated with the recipient's OLS account and the message is displayed in the OLS message center. The email alerts are delivered through a third-party vendor, GOVDelivery. GOVDelivery provides the Division delivery status information that the Division stores and reports advising of every email sent on behalf of the Division, with a status of "D" for delivered or "U" for undelivered.

12. The statutory notice is stored in a message file until the issuing date. On the issuing date, the notice is posted on a secure database for viewing by the taxpayers in their message center upon logging in to the OLS. The statutory notice is viewable in the message center section of the taxpayer's OLS account.

13. On September 7, 2021, the Division posted a message stating, "You have a new liability due" to petitioner's OLS account and sent a corresponding email alert to petitioner's email address of [kun\\*\\*\\*ing@\\*\\*\\*.com](mailto:kun***ing@***.com). A screenshot of petitioner's OLS account summary indicating the posting of these messages is in the record. Also, on September 7, 2021, the Division posted a notice of deficiency, assessment number L-053876474, to petitioner's OLS account, which was stored in his OLS message center.

14. The Division maintains delivery information of email alerts in the delivery details by template ID (delivery details). The delivery details relevant to the present case indicate that the Division sent an email alert to petitioner at his email address of [kun\\*\\*\\*ing@\\*\\*\\*.com](mailto:kun***ing@***.com) on September 7, 2021, with APL Tracking ID MG090720218314892. The delivery details indicate the status of the email sent to petitioner on September 7, 2021 as “D” (delivered).

15. Ms. Jacobsen avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division’s External Communication Unit on September 7, 2021.

16. Petitioner did not respond to the notice of intent to dismiss 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 the Division’s Bureau of Conciliation and Mediation Services (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). 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 (Tax Law § 681 [b]; *see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

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.

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]).

C. It is well established that where the timeliness of a taxpayer’s protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of issuance of the relevant statutory notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). These standards are based on a statute requiring that a notice of deficiency be mailed in order to be properly issued (*see* Tax Law § 681 [a]).

D. The subject notice in this case was issued electronically. The furnishing of notices by such means of communication is authorized by Tax Law § 35, which provides:

“Notwithstanding any other provision of New York state law, where the department has obtained authorization of an online services account holder, in such form as may be prescribed by the commissioner, the department may use electronic means of communication to furnish any document it is required to mail per law or regulation. If the department furnishes such document in accordance with this section, department records of such transaction shall constitute appropriate and sufficient proof of delivery thereof and be admissible in any action or proceeding.”

Although the means by which notices of deficiency of personal income tax are properly issued differ under Tax Law §§ 35 and 681 (a), the Division’s burden to show that it had a standard procedure for issuing notices and that such procedure was followed in a particular

instance remains (*see Matter of Urrego*, Tax Appeals Tribunal, July 12, 2018; *Matter of Perez*, Tax Appeals Tribunal, November 12, 2015). More specifically, where a statutory notice is issued pursuant to Tax Law § 35, the Division must demonstrate its standard procedures for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders, and that such procedures were followed in the particular instance (*id.*).

The evidence shows that petitioner opened an OLS account on February 23, 2014 under his name, taxpayer identification number, and use identification number, using a logon ID of “kun\*\*\*ing” and an email address of [kun\\*\\*\\*ing@\\*\\*\\*.com](mailto:kun***ing@***.com). On February 26, 2014, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account under the username of “kun\*\*\*ing.” Moreover, the evidence also establishes that petitioner authorized the Division to send notices electronically by checking the relevant boxes in the “manage email” section of his OLS account, thereby indicating his agreement to receive email regarding bills, notices and other notifications. Pursuant to the Division’s OLS account terms and conditions for individuals, by providing such electronic communication authorization, the taxpayer agrees to receive the indicated documents and communications electronically and agrees that the Division will not use postal mail to provide these communications.

The Division has also offered proof sufficient to establish that the statutory notice was furnished to petitioner by means of electronic communication on September 7, 2021 to his OLS account with an alert sent to his last known email address. The Division’s records show that an email alert was sent to petitioner’s email address and the notice of deficiency was posted to petitioner’s OLS account and stored in his OLS message center on September 7, 2021. The email alert sent to petitioner’s email address advised him that “you have a new liability due,” thereby alerting him to view the statutory notice posted in the message center of his OLS



account. The Division's records further show the delivery status of the September 7, 2021 email as "D" (delivered).

E. Therefore, it is determined that the Division has presented sufficient records to establish that it furnished the subject notice of deficiency on September 7, 2021, by use of electronic means of communication pursuant to Tax Law § 35, and that the records presented constitute sufficient proof of delivery thereof. Petitioner had 90 days to either file a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals (Tax Law §§ 170 [3-a] [a]; 681 [b]) in protest of the notice. Petitioner filed his petition on February 25, 2022, or well in excess of the 90-day statutory time frame. Thus, the petition is untimely, and the Division of Tax Appeals is without jurisdiction to consider the merits.

F. The petition of Adekunle Yusuff is dismissed.

DATED: Albany, New York  
November 9, 2023

/s/ Donna M. Gardiner  
SUPERVISING ADMINISTRATIVE LAW JUDGE