

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>PAULETTE D. WILSON</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 831368</b>
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 2019.	:	

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Petitioner, Paulette D. Wilson, 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 2019.

On September 27, 2024, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). By letter, dated October 15, 2024, the date by which the parties could file responses to the notice of intent to dismiss petition was extended to December 12, 2024. On November 6, 2024, the Division of Taxation, appearing by Amanda Hiller, Esq. (Roy Diehl, Esq., of counsel), submitted affidavits and other documents in support of dismissal. Petitioner, appearing pro se, did not respond to the notice of intent to dismiss petition by December 12, 2024, which date commenced 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 March 27, 2023, the Division of Taxation (Division) issued to petitioner, Paulette D. Wilson, a notice of deficiency for tax year 2019, bearing assessment identification number L-057687400 (notice). The notice was addressed to petitioner at an address in Flushing, New York.

2. On July 7, 2023, petitioner filed a petition with the Division of Tax Appeals in protest of the notice.

3. On September 27, 2024, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition stated, in sum, that it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition because the petition did not appear to be timely filed. The notice of intent to dismiss petition stated that the relevant notice of deficiency was issued on March 27, 2023, but the petition was not filed until July 7, 2023, a date that is beyond 90 days from the issuance of the notice.

4. In response to the notice of intent to dismiss petition, the Division submitted the following: (i) an affirmation of Roy Diehl, Esq., an attorney in the Division's Office of Counsel, dated November 5, 2024; (ii) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS), sworn to on October 15, 2024; (iii) a copy of pages 1, 38, and 79 of a "CERTIFIED RECORD FOR - DTF-962-F-E - Not of Def Follow Up DTF-963-F-E - Not of Det Follow Up" (CMR), postmarked March 27, 2023; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioner; (v) an affidavit of Justin Lombardo, a manager of the Division's mail room, sworn to on October 15, 2024; (vi) an affidavit of Beth Levy, a Legal Assistant 1 in the Division's Office of Counsel, sworn to on October 15, 2024; (vii) a request for delivery

information/return receipt (United States Postal Service [USPS] form 3811-A) and the USPS response to such request, dated October 10, 2024; (viii) a copy of petitioner's form IT-201-X, New York State amended resident income tax return, for tax year 2019 (2019 return), filed on September 9, 2022, listing the same Flushing, New York, address for petitioner as that shown on the notice.

5. Mr. Diehl asserts in his affirmation that the Flushing, New York, address was petitioner's last known address when the notice was issued.

6. Ms. Denier's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices. She has served as the Director of MAPS since July 2022 and a Principal Administrative Analyst since August 2022. Prior to this position, Ms. Denier was a Supervisor of Administrative Analysis from July 2019 through August 2022. In performing her duties, Ms. Denier has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of deficiency. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Denier is familiar with the Division's past and present procedures as they relate to statutory notices.

7. 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 of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with its accompanying mailing cover sheet and any enclosures referenced in the body of that notice, is a discrete unit within the batch of notices.

8. Each batch of statutory notices is accompanied by a CMR. The CMR lists each notice in the order it is generated in the batch. The certified control numbers are 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 P.O. ADDRESS." Each CMR and associated batch of statutory notices are forwarded to the mail room together. 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 after mailing. 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.

9. The CMR for the batch of statutory notices to be issued on March 27, 2023, including the notice addressed to petitioner, allegedly consisted of 79 pages. The Division included with its submission only page "1" (the first page of the CMR), page "38" (the page of the CMR on which information pertaining to petitioner appears) and page "79" (the last page of the CMR). Each of these three pages includes in its upper left corner a preprinted date that is approximately 10 days in advance of the anticipated mailing date. Appearing in the upper right corner of pages 1 and 79 is the handwritten date "3/27/23." Following the Division's general practice, the date on the first and last page of the CMR was manually changed to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. Each of the foregoing three pages includes a USPS postmark, dated March 27, 2023. Ms. Denier noted that the copy of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

10. Page 38 of the CMR indicates that a notice with certified control number 9207 1041 0029 7350 597214 and reference number L 057687400 was mailed to petitioner at the Flushing, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit with a copy of the notice as exhibit “B,” bears this same certified control number and petitioner’s name and address as noted.

11. Appearing on page 79 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS,” next to which is the preprinted number “1,010.” Immediately beneath this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE.” A USPS postmark, dated March 27, 2023, appears on this page and illegible numbers. Page 79 lacks initials or a signature.

12. Ms. Denier states that the notice was mailed on March 27, 2023, as indicated by the CMR, as well as the USPS postmark on pages 1, 38 and 79 of the CMR.

13. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on March 27, 2023.

14. The affidavit of Mr. Lombardo, a manager of the Division’s mail room since 2016 and currently an Associate Administrative Analyst whose duties include managing the mail room staff, attested to the mail room’s general operations and procedures as they relate to statutory notices. As a manager of the Division’s mail room, Mr. Lombardo is knowledgeable regarding past and present office procedures as they relate to statutory notices.

15. The mail room receives statutory notices 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 batch of notices and associated mailing cover sheets and operates a machine that puts each notice and its mailing cover sheet into 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 listed on the CMR 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 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.

16. A USPS employee affixes a postmark and writes his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. 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. Mr. Lombardo avers that each page of the CMR contains a postmark. A review of the CMR confirms the presence of a postmark on pages 1, 38 and 79. There is not a signature or initials on page 79. Additionally, the USPS employee who received the CMR wrote an illegible number next to the pre-printed number on the line for "TOTAL PIECES AND AMOUNTS." There was also another illegible number written next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE."

18. Mr. Lombardo attests that, based on his review of the Denier affidavit and attached exhibits and his personal knowledge of the mail room procedures, on March 27, 2023, an employee of the mail room delivered to the USPS one piece of certified mail addressed to petitioner at her Flushing, New York, address in a sealed postpaid envelope for delivery by

certified mail. He also states that the CMR delivered to the USPS on March 27, 2023, was returned to the Division. Mr. Lombardo further attests that the procedures described in his 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 March 27, 2023.

19. Ms. Levy's affidavit details the filing of USPS form 3811-A in this matter. As part of her duties, Ms. Levy prepares USPS form 3811-A, or asks the Division's mail room staff to make such requests on behalf of her office. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS for a mailing made by registered, certified, insured or express mail. In this instance, Ms. Levy filed USPS form 3811-A seeking delivery information for the article bearing certified control number 9207 1041 0029 7350 5972 14 and mailed by the Division on March 27, 2023, to petitioner at her Flushing, New York, address. The USPS response to the request confirmed that the article, bearing this certified control number and addressed to petitioner, was delivered on April 1, 2023, at 2:53 p.m., to an address in "Flushing, NY 11365." The USPS response shows the scanned image of the recipient's signature and printed name and address below the recipient's signature.

20. Attached to the Levy affidavit as exhibit "A" is the Division's USPS form 3811-A for article number 9207 1041 0029 7350 5972 14. Exhibit "B" to the Levy affidavit is the USPS response to the Division's request indicating delivery of that article to petitioner's address.

21. Petitioner did not file a response to the Division's motion.

### ***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 conciliation conference with BCMS “if the time to petition for such a 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 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 (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In the present matter, the petition appears to have been filed beyond the 90-day period. Accordingly, the Division of Tax Appeals issued a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. In *Matter of Victory Bagel Time* (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. Where, as here, the timeliness of a protest to a notice of deficiency is at issue, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard



procedure used by the Division for issuing statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedure was followed with respect to the notice here (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. If it is found that the notice has been properly mailed by the Division to petitioner's last known address by certified or registered mail, petitioner then has the burden of proving that a timely protest of the notice was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. The Division has introduced sufficient proof of its standard mailing procedure through the affidavits of Ms. Denier and Mr. Lombardo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*). However, the submission of a partial or truncated CMR is insufficient to establish that the Division's standard mailing procedure was followed here (*see Matter of Ankh-Ka-Ra Sma-Ntr*, Tax Appeals Tribunal, April 14, 2016; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). The Division's proof further fails to establish that its standard mailing procedure was followed here because the USPS employee who received the CMR wrote an illegible entry next to both the "TOTAL PIECES AND AMOUNTS" and "TOTAL PIECES RECEIVED AT POST OFFICE" headings. Additionally, the USPS employee neither initialed nor signed the last page of the CMR as requested by the Division (*see* finding of fact 16). Thus, the mailing evidence fails to establish that the notice was properly mailed on March 27, 2023, and the period within which to file a protest did not commence as of such date.

F. An inadequacy in the mailing evidence for a notice may be overcome by evidence of delivery of that notice to the taxpayer (*see Matter of Coleman*, Tax Appeals Tribunal, June 8, 2020; *Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing of a notice, the 90-day period for protesting that notice is tolled and commences when the taxpayer actually receives it (*see Matter of Coleman; Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011; *Matter of Riehm v Tax Appeals Trib.*, 179 AD2d 970, 971 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), unless issuing that notice would then be precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v Tax Commn.*, 68 NY2d 891, 893 [1986], *rev'd* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

G. Notwithstanding the deficiencies in the mailing evidence, the Division has established, via the Levy affidavit and accompanying USPS form 3811-A and response, that the notice was mailed by certified mail and delivered to and accepted at petitioner's last known address on April 1, 2023 (*see* finding of fact 19). As a result, the time within which to protest the notice began on the date of actual receipt, i.e., April 1, 2023, and a timely protest of the notice had to be filed within 90 days of that date (*see Matter of Coleman; Matter of Stickel*). However, the petition was not filed until July 7, 2023, more than 90 days from the delivery of the notice. Accordingly, the petition was not timely filed and the Division of Tax Appeals is without jurisdiction to consider its merits.

H. The petition of Paulette D. Wilson is dismissed.

DATED: Albany, New York  
March 6, 2025

/s/ Donna M. Gardiner  
SUPERVISING ADMINISTRATIVE LAW JUDGE