

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DENISE PALERMO</b>	:	DETERMINATION
	:	DTA NO. 829531
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 2013.	:	

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Petitioner, Denise Palermo, 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 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion on June 26, 2020, for summary determination in its favor pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

Accompanying the motion was an affirmation of Maria Matos, Esq., and annexed exhibits.

Petitioner, appearing pro se, did not respond to the motion by her response date of July 27, 2020, which date commenced the 90-day period to issue this determination. Based upon the motion papers and documents submitted, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

***ISSUE***

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

***FINDINGS OF FACT***

1. On August 20, 2019, petitioner, Denise Palermo, filed a petition with the Division of Tax Appeals protesting notice of deficiency (notice), assessment number L-046022573, dated March 20, 2017.

2. The Division of Taxation (Division) states that the notice was issued to petitioner electronically pursuant to Tax Law § 35.

3. In support of dismissal and to prove the issuance of the notice under protest, the Division submitted, among other documents, the following: (i) an undated affirmation of Maria Matos, Esq.; (ii) an affidavit, dated June 24, 2020, of Monica Amell, a Taxpayer Services Specialist 3 and Team Lead of the Registration and Account Services Bureau Account Update 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 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 March 20, 2017; (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 Monica Amell sets forth the Division's general practice and procedure for the processing and delivery of taxpayer specific electronic communications, including electronic statutory notices. Ms. Amell previously was Team Lead of the External

Communication Unit of the Division from June 2013 through May 2019. As part of Ms. Amell's duties, she managed the processing and delivery of taxpayer specific electronic communications and the monitoring of reports to determine the electronic status of email alerts referring to statutory notices. 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 can 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 May 8, 2013 under her name, taxpayer identification number, and user identification number, using a Logon ID of “den\*\*\*mo” and an email address of [den\\*\\*\\*mo@\\*\\*\\*.com](mailto:den***mo@***.com). Petitioner’s OLS account for this user identification number and email address remains active to date.<sup>1</sup>

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 May 14, 2013, the Division sent an acknowledgment to petitioner, confirming her creation of the OLS account on May 8, 2013, under the username of “den\*\*\*mo.”

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.

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<sup>1</sup> The user identification and email address are partially redacted to preserve confidentiality.

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 March 20, 2017, 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 [den\\*\\*\\*mo@\\*\\*\\*.com](mailto:den***mo@***.com). A screenshot of petitioner's OLS account summary indicating the posting of these messages is in the record. Also, on March 20, 2017, the Division posted a notice of deficiency, assessment number L-046022573, to petitioner's OLS account, which was stored in her 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 her email address of [den\\*\\*\\*mo@\\*\\*\\*.com](mailto:den***mo@***.com) on March 20, 2017, with APL Tracking ID MG032020174533298. The delivery details indicate the status of the email sent to petitioner on March 20, 2017 as “D” (delivered).

15. Ms. Amell avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division’s External Communication Unit on March 20, 2017.

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

A. Although the Division filed a motion for summary determination pursuant to 20 NYCRR 3000.9 (b), where the timeliness of a petition is at issue, the proper vehicle is a motion to dismiss under 20 NYCRR 3000.9 (a). Therefore, the instant motion will be treated as such.

The standard of review on a motion to dismiss is the same as that for a summary determination motion (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). A motion for summary determination is properly 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]).

B. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a notice of deficiency (*see* Tax Law §§ 681 [b]; 170 [3-a] [a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

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.*).

In this case, the Division has proven, through the affidavit of Ms. Amell and the documentary evidence attached, its standard procedures for establishing OLS accounts, obtaining authorization from the OLS account holders for electronic communications, and sending notices

electronically to OLS account holders, and that the standard procedures were followed in this particular instance.

The evidence shows that petitioner opened an OLS account on May 8, 2013 under her name, taxpayer identification number, and use identification number, using a logon ID of “den\*\*\*mo” and an email address of [den\\*\\*\\*mo@\\*\\*\\*.com](mailto:den***mo@***.com). On May 14, 2013, the Division sent an acknowledgment to petitioner, confirming her creation of the OLS account under the username of “den\*\*\*mo.” 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 her OLS account, thereby indicating her 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 March 20, 2017 to her OLS account with an alert sent to her 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 her OLS message center on March 20, 2017. The email alert sent to petitioner’s email address advised her that “you have a new liability due,” thereby alerting her to view the statutory notice posted in the message center of her OLS account. The Division’s records further show the delivery status of the March 20, 2017 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 March 20, 2017 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 her petition on August 20, 2019, 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. Accordingly, the petition of Denise Palermo is dismissed.

DATED: Albany, New York  
October 22, 2020

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE