

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
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<b>LON G. VON HURWITZ</b>	:	DETERMINATION
	:	DTA NO. 830450
for Redetermination of Deficiencies 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 Periods Ending June 30, 2018, December 31,	:	
2018, March 31, 2019, June 30, 2019, and September	:	
30, 2019.	:	

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Petitioner, Lon G. Von Hurwitz, filed a petition for redetermination of deficiencies 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 periods ending June 30, 2018, December 31, 2018, March 31, 2019, June 30, 2019, and September 30, 2019.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion, on November 16, 2021, for dismissal of the petition or for summary determination in its favor pursuant to sections 3000.5 and 3000.9 (a) (1) and (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 his response date of December 16, 2021, 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 his request for conciliation conference with the Bureau of Conciliation and Mediation Services after the issuance of notices of deficiency.

***FINDINGS OF FACT***

1. Petitioner, Lon G. Von Hurwitz, filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS) on April 12, 2021. The subject of the request was the following notices of deficiency (notices): assessment number L-049912721, dated May 30, 2019, assessment number L-050185159, dated July 10, 2019, assessment number L-051249733, dated February 10, 2020, assessment number L-051249734, dated February 10, 2020, and assessment number L-051249735, dated February 10, 2020.

2. On April 30, 2021, BCMS issued to petitioner a conciliation order dismissing request (conciliation order), CMS No. 329087, that dismissed the request as untimely filed since the request was filed in excess of 90 days from the date of the notices.

3. On May 17, 2021, petitioner filed a timely petition with the Division of Tax Appeals protesting the conciliation order.

4. The Division of Taxation (Division) states that the notices were issued to petitioner electronically pursuant to Tax Law § 35.

5. In support of dismissal and to prove the issuance of the notices under protest, the Division submitted, among other documents, the following: (i) an affirmation dated November 15, 2021 of Maria Matos, Esq.; (ii) an affidavit, dated November 12, 2021, of Shelby Jacobsen, a Taxpayer Services Specialist 4 and manager of 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 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 notices dated May 30, 2019, July 10, 2019, and February 10, 2020; (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.

6. 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 been manager of the External Communication Unit of the Division since May 2018. As part of Ms. Jacobsen's duties, she manages 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.

7. 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.

8. 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."

9. Petitioner opened an OLS account with the Division on March 7, 2019 under his name, taxpayer identification number, and user identification number, using a Logon ID of "Lvo\*\*\*tz"

and an email address of lvo\*\*\*tz@\*\*\*.com. Petitioner's OLS account for this user identification number and email address remains active to date.<sup>1</sup>

10. In the "manage email" section of petitioner's OLS account described in finding of fact 8, 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."

11. On March 12, 2019, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account on March 7, 2019, under the username of "lvo\*\*\*tz."

12. 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.

13. 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.

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

14. 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.

15. On May 30, 2019, July 10, 2019, and February 11, 2020,<sup>2</sup> 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. A screenshot of petitioner's OLS account summary indicating the posting of these messages is in the record. Also, the following notices were posted to petitioner's OLS account, which was stored in his OLS message center: on May 30, 2019, the Division posted notice of deficiency, assessment number L-049912721, on July 10, 2019, the Division posted notice of deficiency, assessment number L-050185159, and on February 10, 2020, the Division posted notices of deficiency, assessment numbers L-051249735, L-051249733, and L-051249734.

16. 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 on: May 30, 2019, with APL Tracking ID MG053020197856876; July 10, 2019, with APL Tracking ID MG071020199768235; and February 11, 2020, with APL Tracking IDs MG021120209788468, MG021120209788514 and MG021120209788517. The delivery details for all five emails indicate the status of the email sent to petitioner on May 30, 2019, July 10, 2019, and February 11, 2020 as "D" (delivered).

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<sup>2</sup> In her affidavit, Ms. Jacobsen states that email alerts are generated on the issuance date of the notices. In this case, the notices of deficiency, dated February 10, 2020, appear in petitioner's Event Management Transaction Log on February 10, 2020, but the email alerts were not generated until February 11, 2020. For purposes of this determination, it is presumed that the issuance date is the date of the email alert, i.e., February 11, 2020.

17. 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 May 30, 2019, July 10, 2019, and February 11, 2020.

### **CONCLUSIONS OF LAW**

A. Although the Division filed a motion to dismiss the petition or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b), it is noted that the petition herein was timely filed with the Division of Tax Appeals. Therefore, the question of the timeliness of petitioner's request for conciliation conference is properly the subject of a motion for summary determination.

Pursuant to the Rules of Practice and Procedure of the Tax Appeals Tribunal, such a motion 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 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]).”

Petitioner did not respond to the Division's motion for summary determination and, thus, he has presented no evidence to contest the facts as alleged in the affidavits submitted therewith.

Accordingly, such facts may be deemed admitted (*Matter of Perez*, Tax Appeals Tribunal, November 12, 2015, citing *Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

B. There is a 90-day statutory time limit for filing a request for a conciliation conference following the issuance of a notice of deficiency (*see* Tax Law § 170 [3-a] [a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition where the taxpayer filed a request for conciliation conference beyond the 90-day time limit (*see Matter of Perez; see also 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 notices (*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 notices in this case were 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*). 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. Jacobsen 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 March 7, 2019, under his name, taxpayer identification number, and user identification number, using a logon ID of “lvo\*\*\*tz” and an email address of lvo\*\*\*tz@\*\*\*.com. On March 13, 2019, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account under the username of “lvo\*\*\*tz.” 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 notices were furnished to petitioner by means of electronic communication on May 30, 2019, July 10, 2019, and February 11, 2020 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 notices of deficiency were posted to petitioner’s OLS account and stored in his OLS message center on May 30, 2019, July 10, 2019, and February 11, 2020. The email alerts sent to petitioner’s email address advised him that “you have a new liability due,” thereby alerting him

to view the statutory notices posted in the message center of his OLS account. The Division's records further show the delivery status of the May 30, 2019, July 10, 2019, and February 11, 2020, emails as "D" (delivered).

E. Therefore, it is determined that the Division has presented sufficient records to establish that it furnished the subject notices of deficiency on May 30, 2019, July 10, 2019, and February 11, 2020, 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 file a request for conciliation conference with BCMS (Tax Law § 170 [3-a] [a]) in protest of the notices. Petitioner filed his request on April 12, 2021, or well in excess of the 90-day statutory time frame. Thus, the request was untimely and properly dismissed by BCMS, and the Division of Tax Appeals is without jurisdiction to consider the merits of the petition.

F. Accordingly, the motion for summary determination by the Division of Taxation is granted and the petition of Lon G. Von Hurwitz is denied.

DATED: Albany, New York  
March 10, 2022

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE