STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GREGG M. REUBEN	:	DECISION DTA NO. 827466
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 1, 2013 through August 31, 2013, and December 1, 2013 through May 31, 2014.	:	

Petitioner, Gregg M. Reuben, filed an exception to the determination of the Administrative Law Judge issued on April 19, 2018. Petitioner appeared by Ballon, Stoll, Bader & Nadler, PC (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jessica DiFiore, Esq., and Osborne K. Jack, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a letter reply brief. Oral argument was heard on February 28, 2019, in Albany, New York, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the notices of determination were not properly and timely issued to petitioner, and are therefore invalid and void.

II. Whether petitioner was properly determined to be a person under a duty to collect and remit sales and use taxes, pursuant to Tax Law §§ 1131 (1) and 1133 (a), on behalf of WH

Parking Mgmt., LLC.

III. Whether, if so, petitioner has nonetheless established facts and circumstances sufficient to negate his liability for failing to have collected and remitted taxes, or to warrant reduction or abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 10, 55 and 56 to more accurately reflect the record. As so modified, the Administrative Law Judge's findings of fact appear below.

1. Petitioner, Gregg M. Reuben, created Alliance Parking Services, LLC (Alliance Parking) in September 2003. However, Alliance Parking did not begin operating parking facilities in the New York City metropolitan area until January 2007.

2. Alliance Parking had two members: (i) petitioner, who owned 99% of the limited liability company (LLC); and (ii) Gregg M. Reuben, Inc., that owned the remaining 1%. Gregg M. Reuben, Inc., was an S corporation, of which petitioner was the sole shareholder.

3. During the periods at issue, petitioner, through Alliance Parking, was engaged in the business of operating 25 to 30 parking facilities in the New York City metropolitan area through "single-purpose entities." Petitioner created the entities and "the family tree of companies." WH Parking Mgmt., LLC (WH Parking) was one of the entities created by petitioner that was underneath Alliance Parking.

4. Alliance Parking was the sole member of WH Parking.

5. On February 8, 2010, petitioner, as organizer, filed the articles of organization of WH Parking with the New York State Department of State (Department of State). On February 5,

2010, WH Parking electronically filed an application to register for a sales tax certificate of authority (COA), form DTF-17, with the Division. On this COA, petitioner's e-mail address was listed as WH Parking's business e-mail address, and he was listed as the sole responsible person of WH Parking. In February 2012, WH Parking's limited liability company biennial statement was submitted to the Department of State, Division of Corporations. Petitioner signed this biennial statement as member.

6. According to petitioner, WH Parking was set up to manage the parking facility at 4320 Broadway, New York, New York, a freestanding garage with about 300 parking spaces. WH Parking began managing that parking facility in 2010.

7. For almost 20 years prior to beginning operating parking facilities through Alliance Parking, petitioner had been employed by large and mid-size companies that were engaged in the business of operating parking facilities. Petitioner testified that he "understood how the facilities themselves should be managed in terms of setting up the operating controls, the appropriate levels of staffing, pricing strategies, marketing strategies, and all of the garage and facility level."[1]

8. In January 2007, Alliance Parking managed one parking facility. By 2010, Alliance Parking had grown to operating over 30 parking facilities. Among all of the entities, Alliance Parking had about 200 employees.

9. According to petitioner, Alliance Parking's offices were initially located in his

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[1] The transcript of the proceeding in ***Matter of Gregg M. Reuben*** (Division of Tax Appeals, February 15, 2018) is included in the record as the Division's exhibit "Y." Issues in that matter included, among others, whether petitioner was properly determined to be a person under a duty to collect and remit sales and use taxes, pursuant to Tax Law §§ 1131 (1) and 1133 (a), on behalf of 12 different limited liability companies, each of whose sole member was Alliance Parking.

apartment. However, as its business grew, Alliance kept moving its offices to different locations. At some point, Alliance Parking built offices within WH Parking's Broadway garage. In either late 2013 or early 2014, Alliance Parking moved its office site to a larger location at 270 West 60th Street.

10. As Alliance Parking grew, petitioner hired administrative staff to perform accounting services, including accounts payable and accounts receivable functions. Petitioner also hired Yagal Vainroov and Michael Matsoukatidis, Alliance Parking's two vice presidents of operations. 11. In 2009, petitioner hired Kwesi Bovell, as Alliance Parking's comptroller and chief financial officer (CFO). Mr. Bovell was tasked by petitioner with developing accounting systems for Alliance Parking. Mr. Bovell's duties also included paying vendors, managing payroll, and preparing monthly financial statements for the owners of each garage that Alliance Parking managed.

12. During its early years, Alliance Parking utilized outside payroll services, either ADP or Paychex. However, in or about 2013, Alliance Parking's payroll processing was changed so as to be handled in-house, at the request and under the direction of Mr. Bovell. Petitioner stated that he was "very concerned" about this move, but that he agreed to Mr. Bovell's request.

13. An outside accounting firm was retained to prepare annual financial statements and income tax returns for Alliance Parking and WH Parking and in connection therewith to provide review, but not an audit level examination of Alliance Parking's business. While income tax preparation and filing matters were handled by the accounting firm, sales tax accounting, reporting and payment functions were kept in-house, under the direction of Mr. Bovell.

14. According to petitioner, Mr. Bovell was directly in charge of preparing and filing the

sales tax returns, and paying the tax due thereon. Petitioner was the sole authorized signatory on the bank accounts of Alliance Parking and WH Parking. However, Mr. Bovell was authorized to use petitioner's electronic signature and signature stamp, and did so for sales tax filings and payments, as well as for other payments.

15. Petitioner relied upon Mr. Bovell to handle financial matters for Alliance Parking. Because of his knowledge and experience in the area of operating parking facilities, petitioner focused on the operational matters of Alliance Parking, including "growing the business," by obtaining new operating locations, and "engaging in strategic partnerships." Petitioner did not open or review bank statements, and he never looked at the mail unless somebody specifically brought it to his attention. With regard to tax and other financial matters, petitioner stated that:

> "[m]y litmus test in terms of making sure that the i's were being dotted and had [sic] the t's were being crossed was maybe too simple, but I figured as long as our landlords were getting paid, our clients were receiving financial statements with their remittances, hence our landlords, our employees were getting paid, payroll was being met, our vendors were being paid, I assumed all systems were running as they should be because I knew if the landlords didn't get paid, they were going to call me. I was the client contact with all of the people - - with all the landlords who owned the garages that we were managing on their behalf, so I would get a call right away. If a vendor didn't get paid, I had contacts with a lot of the vendors. They would usually call me. . . . So for many years, I just operated that so long as everybody was getting paid and we always had money to open up new locations and expand, everything should be going well."

16. In the months following the change to in-house payroll processing, petitioner determined that there were serious problems with Alliance Parking's business. Petitioner became unsatisfied with Mr. Bovell's attempts to explain the reasons for the problems, and he discharged Mr. Bovell sometime in April 2014.

17. Sometime after Mr. Bovell was discharged, petitioner hired an unnamed bookkeeping firm to prepare and file sales tax returns for WH Parking, and to assist in the preparation of the

monthly financial statements for owners of the garages.

18. On April 7, 2014, WH Parking late-filed a partial remit New York State and Local Quarterly Sales and Use Tax Return, form ST-100, for the period December 1, 2013 through February 28, 2014. On this sales and use tax return, WH Parking reported gross sales or services in the amount of $363,674.00, and calculated sales and use taxes due of $50,222.48, less a vendor collection credit of $200.00, for a total amount due of $50,022.48. Although petitioner's printed name, e-mail address and title of "Member" appear in Step 9 of 9 on page 4 of this return, petitioner testified that the illegible signature written on the "Signature of taxpayer" line in Step 9 of 9 was not his signature.

19. WH Parking timely filed a non-remit sales and use tax return for the period March 1, 2014 through May 31, 2014. On this return, WH Parking reported gross sales or services in the amount of $352,834.00, and calculated sales and use taxes due of $50,143.00, less a vendor collection credit of $200.00, for a total amount due of $49,943.00. Although petitioner's printed name, e-mail address and title of "Member" appear in Step 9 of 9 on page 4 of this return, petitioner testified that he did not handwrite the initials "GMR" that appear on the "Signature of taxpayer" line in Step 9 of 9. WH Parking, on this return, also indicated that this was its final return because the business was sold or discontinued due to a "sold lease." The exact date that WH Parking discontinued business is not part of the record.

20. On August 13, 2014, WH Parking late-filed a non-remit sales and use tax return for the period June 1, 2013 through August 31, 2013. On this return, WH Parking reported gross sales or services in the amount of $484,357.00, and calculated sales and use taxes due of $69,486.00, for a total amount due of $69,486.00. Petitioner's name, e-mail address and title of

member were handwritten in Step 9 of 9 on page 4 of this return. Petitioner testified that he did not handwrite the initials "GMR" that appear on the "Signature of taxpayer" line in Step 9 of 9 of this return.

21. On its New York State partnership return, form IT-204, for tax year 2013, Alliance Parking reported gross receipts in the amount of $14,257,630.00, and ordinary income of $709,636.00. This return was electronically filed by Alliance Parking's outside accounting firm on or about September 9, 2014.

22. Petitioner continued his own attempts to ascertain the reasons for the financial difficulties facing Alliance Parking. However, Alliance Parking and petitioner did not have the financial means to remain in business, and began to wind down operations in late 2014.

23. Petitioner hired an accounting firm, WeiserMazars, LLP, to perform a forensic accounting of Alliance Parking's business. In a letter dated July 27, 2015, WeiserMazars stated that:

> "It is our understanding that during a period of about one and a half (1½) years, [Mr. Bovell] prepared sales and use tax returns and issued tax-payment checks for each of the separate LLCs. Unbeknownst to [petitioner], . . . many of those returns and/or payments were never remitted and the funds for the taxes are missing."

24. Petitioner did not have the funds to continue the forensic accounting process to completion, and the engagement of WeiserMazars was terminated.

25. Petitioner retained an attorney who conducted his own examination into the operations of Alliance Parking, including Mr. Bovell's role therein. Testimony at the hearing, and allegations set forth in the complaint filed in a civil action brought on behalf of petitioner and Alliance Parking against Mr. Bovell, on April 17, 2017, in New York County Supreme Court

(Index No. 652049/2017), basically set forth a scenario where Mr. Bovell diverted or siphoned money from Alliance Parking to himself. The methods described and allegedly employed by Mr. Bovell included:

a) opening multiple bank accounts, unbeknownst to petitioner, in Alliance Parking's name, or in the name of other entities, to which merchant services accounts (credit card payment terminals located in various parking facilities) were linked, such that customers' credit card payments for parking were deposited to the linked bank accounts and thus diverted to Mr. Bovell;

b) setting up false accounts, including hiring fictitious employees, such that the number of employees was inflated and by which wages and other payments to such phantom employees could be diverted to Mr. Bovell; and

c) preparing tax returns, including sales and use tax returns, but not filing and/or remitting the amounts due thereon.

26. None of the financial statements or reports prepared by the outside accounting firm hired by Alliance Parking are part of the record in this matter. In addition, the civil complaint filed against Mr. Bovell had not been answered as of the date of the hearing held in this matter, and none of the documentation allegedly supporting the causes of action listed in the complaint has been included in the record in this matter. Furthermore, there is no claim or evidence that law enforcement has been contacted to pursue criminal prosecution against Mr. Bovell.

27. The Division issued to petitioner, at "555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247," three notices of determination, each dated October 3, 2014, assessing sales tax due, as follows:

Assessment ID number	Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Assessment Payments/Credits	Current Balance Due
L-041978311	08-31-13	$66,177.88	$10,657.4	$13,202.51	0.00	$90,037.85

L-041978312	05-31-14	$50,142.62	$2,771.52	$ 7,019.94	0.00	$59,934.08
L-041978313	02-28-14	$50,222.48	$3,360.07	$ 7,385.26	$ 16,006.06	$44,961.75

The mailing cover sheets of notices of determination L-041978311, L-041978312 and L-041978313 bore certified control numbers 7104 1002 9730 0282 9759, 7104 1002 9730 0282 9766 and 7104 1002 9730 0282 9773, respectively. Each of these notices of determination was issued to petitioner upon the Division's assertion that he was determined to be an officer or responsible person of WH Parking. Penalties were assessed against petitioner, as an officer or responsible person of WH Parking, on these notices because WH Parking: a) failed to file a sales tax return; b) filed sales tax returns late and failed to remit the taxes due thereon; or c) filed a sales tax return with respect to which additional tax was due but was not remitted.

28. The Division issued to petitioner, a notice of determination, L-042249602, dated December 2, 2014, assessing sales and use taxes due in the amount of $3,308.57, plus penalty and interest, for the period June 1, 2013 through August 31, 2013. The notice is addressed to "REUBEN-GREGG M 555 W 59TH ST APT 31D NEW YORK NY 10019-1247." The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0330 4408. This notice was issued to petitioner upon the Division's assertion that he was determined to be an officer or responsible person of WH Parking. Penalties were assessed against petitioner on this notice because WH Parking filed the sales tax return late and failed to remit the taxes due thereon.

29. The Division issued two assessments, L-041978311 and L-042249602, to petitioner for the period June 1, 2013 through August 31, 2013 because there were two corresponding assessments issued to WH Parking. Initially, WH Parking was assessed an estimated amount of tax due for the period June 1, 2013 through August 31, 2013 after it failed to timely file its sales and

use tax return for that period. Thereafter, WH Parking filed a sales and use tax return for the period June 1, 2013 through August 31, 2013 showing more tax due than had been initially estimated and assessed. The Division issued to WH Parking a second assessment for the additional amount due, less what was previously assessed, for the period June 1, 2013 through August 31, 2013, based upon its late-filed return for such period.

30. Petitioner's representative, Norman R. Berkowitz, Esq., filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of determination L-042249602, L-041978311, L-041978312 and L-041978313. Mr. Berkowitz hand-dated and signed the request on December 9, 2015. The reasons given on the request for protesting the four listed notices included, among others, that the notices were not received by the taxpayer, and that the notices were not mailed in accordance with Tax Law § 1147. Attached to the request was a "consolidated statement of tax liabilities" (form DTF-967) dated October 6, 2015, issued to petitioner, that listed a number of statutory notices including the four notices being protested by the request. On this request, petitioner's address is listed as 555 West 59th Street, Apt. 31-D, New York, NY 10019. The envelope in which the request was sent by United States Postal Service (USPS) certified mail bore illegible postmarks. BCMS received the request on December 14, 2015.

31. On December 31, 2015, BCMS issued a conciliation order dismissing request (dismissal order) to petitioner. Bearing CMS No. 268839 and referencing notice numbers L-041978311, L-041978312, L-041978313 and L-042249602, the dismissal order determined that petitioner's protest was untimely and stated, in part:

> "The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on October 3, 2014 and December

> 2, 2014, but the request was not received until December 14, 2015, or in excess of 90 days, the request is late filed."

32. On February 1, 2016, the Division of Tax Appeals received a petition seeking revision of four notices of determination L-041978311, L-041978312, L-041978313 and L-042249602. The envelope in which the petition was sent by certified mail bears a USPS metered stamp dated January 27, 2016. There is no dispute that the petition was filed within 90 days after the December 31, 2015 issuance of the dismissal order, and constitutes a timely challenge thereto. Petitioner's petition lists his address as 555 West 59th Street, Apt. 31-D, New York, NY 10019. Petitioner, in this petition, asserted that: notwithstanding his status as principal owner and chief executive officer of WH Parking, he was thwarted by various others from carrying out his duties through no fault of his own and should not be liable as a "responsible person" pursuant to Tax Law § 1131; he should not be liable for any penalties since his actions were based upon reasonable cause and not willful neglect; and "[t]he appropriate and required Notices were not served" on him "in accordance with Tax Law § 1147 and are therefore invalid and void."

33. On June 27, 2016, the Division brought a motion seeking an order dismissing the petition or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9 (a) (1) (i) and 3000.9 (b), with respect to only notice of determination L-042249602. Petitioner, through his representative, filed a letter in opposition to the Division's motion on July 13, 2016. The Administrative Law Judge treated the Division's motion as one for summary determination and denied the motion without prejudice by an order dated October 20, 2016. In denying the Division's motion, the Administrative Law Judge found that while the mailing procedures were both established and properly followed, the Division did not prove mailing of notice of determination L-042249602 to petitioner's last known address.

34. At the hearing, to prove mailing of notices of determination L-042249602, L-041978311, L-041978312, and L-041978313, the Division submitted the following:

a) for notice of determination L-042249602: (i) the affidavit, dated May 20, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS), and annexed exhibits; and (ii) an affidavit, dated May 24, 2016, of Bruce Peltier, store and mail operations supervisor in the Division's mail room;

b) for notices of determination L-041978311, L-041978312, and L-041978313: (i) the affidavit, dated June 12, 2017, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of MAPS, and annexed exhibits; and (ii) the affidavit, dated June 12, 2017, of Mary Kate Koslow, a head mail and supply clerk and supervisor in the Division's mail room; and

c) for all four notices of determination, an affidavit, dated May 18, 2017, of Lori Schettine, a Taxpayer Services Specialist III in the Division's Office of Processing and Taxpayer Services, Enterprise Services Bureau (ESB), and annexed exhibits.

Notice L-042249602

35. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the 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 predated with the anticipated date of mailing. Each page of the CMR lists an initial production 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 pages of the CMR in the present case to the actual mailing date of "12/2/14." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. 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.

36. 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 taxpayer mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading "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 Addressee, Street, and P.O. Address."

37. The December 2, 2014 CMR relevant to notice of determination L-042249602 consists of 35 pages and lists 381 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 35, which contains seven entries. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. A USPS employee initialed or signed and affixed a postmark, dated December 2, 2014, of the Colonie Center, New York, branch of the USPS to each page of the CMR and wrote and circled the number "381" on page 35 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE." Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 381.

38. Page two of the CMR indicates that a notice of determination, assigned certified control number 7104 1002 9730 0330 4408 and reference number L-042249602, was mailed to "REUBEN-GREGG M," at 555 West 59th St., Apt 31D, New York, NY 10019-1247, i.e., the same address listed on the notice of determination. The corresponding mailing cover sheet, attached to the Nagengast affidavit as "Exhibit B," bears this certified control number and petitioner's name and address as noted above.

39. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. That staff member then weighs, seals and places postage and fee amounts on each envelope. The first and last pieces of mail listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee affixed a postmark dated December 2, 2014 to each page of the CMR and initialed or signed on page 35. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, the USPS employee complied with this request by writing and circling the number "381" on the last

page of the CMR.

40. Mr. Peltier's affidavit states that the CMR is the Division's record of receipt, by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

41. According to both the Nagengast and Peltier affidavits, a copy of notice of determination L-042249602 was mailed to petitioner on December 2, 2014, as claimed.

Notices L-041978311, L-041978312, and L-041978313

42. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with 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. In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together when the documents are delivered into the possession of the USPS and remain so 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.

43. 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 taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying mailing cover sheet, is the first sheet in the unit.

44. The CARTS-generated CMR for each batch of notices lists each statutory notice in the order the notices are generated in the batch. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address." Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together.

45. Each statutory notice is, as noted, predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. The CMR lists in its upper left corner the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR is conformed to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

46. The affidavit of Mary Kate Koslow, a supervisor in the Division's mail room since April 2010 and currently a head mail and supply clerk, describes the mail room's general operations

and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." Ms. Koslow confirms that a mailing cover sheet precedes each notice and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. That staff member then weighs, seals and places postage and fee amounts on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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 also 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. The CMR is the Division's record of receipt, by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Ms. Koslow's staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

47. The CMR relevant to notices of determination L-041978311, L-041978312 and L-041978313 consists of 22 pages and lists 236 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20142691700." Appearing in the upper right corner of the first and last pages of the CMR is the handwritten date of "10/3/14," reflecting the manual

change made by Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS.

48. A postal employee affixed a USPS postmark to every page of the October 3, 2014 CMR, but it is illegible on pages 18 through 22 of the CMR. All pages of the CMR include 11 such entries, with the exception of page 22, which contains five entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

49. Page 3 of the October 3, 2014 CMR indicates that notices of determination with certified control numbers 7104 1002 9730 0282 9759, 7104 1002 9730 0282 9766 and 7104 1002 9730 0282 9773, and reference numbers L- 041978311, L-041978312 and L-041978313, respectively, were mailed to "REUBEN-GREGG M," at 555 West 59th St., Apt 31D, New York, NY 10019-1247, i.e., the same address listed on each notice of determination. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit "B," bear these certified control numbers and petitioner's name and address as noted above.

50. Appearing on page 22 of the October 3, 2014 CMR is the preprinted heading "TOTAL PIECES AND AMOUNTS," to the right of which appear preprinted columns headed "PIECES," "POSTAGE," "FEE @ 3.30," and "RR FEE @ .00." These columns reflect the preprinted number of pieces of mail on this CMR, here 236, as well as the postage and fee amounts for such pieces, $162.00 and $778.80, respectively. The preprinted postage amount of $162.00 is circled. Immediately below this heading is the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE," which is blank. The aforementioned illegible USPS postmark, and the initials or

signature of the USPS employee appear below and to the right of the circled preprinted postage amount.

51. The affidavit of Lori Schettine, a Tax Services Specialist III in the Division's ESB Office of Processing and Taxpayer Services since November 2012, describes the general practice and procedure for creating and maintaining an online services (OLS) account. Ms. Schettine has been employed by the Division for approximately 32 years, and has held numerous positions within the Division, including with its Office of Information Technology Services. Her current responsibilities include supervising the Account Summary and Online Services section of the ESB.

52. Since 2006, the Division has offered OLS accounts to provide New York State taxpayers with a secure portal to access their tax information and a number of Division-supported web applications. To set up an OLS account, a taxpayer is required to visit the Division's website and click on the link "create account" for online services for individuals. Once a taxpayer has chosen to create an OLS account, he or she is asked to input his or her social security number (SSN), and first and last name. The taxpayer is then required to authenticate his or her identity, which can be done via one of two methods: an assessment ID or a shared secret from a recently filed return. To create an account using an assessment ID, the taxpayer must enter the assessment ID from a notice issued to him or her. To create an account using a shared secret, the taxpayer must enter a specific dollar amount from a previously filed New York State income tax return, such as federal adjusted gross income. Once all information is verified, the taxpayer is then directed to the terms and conditions.

53. The taxpayer must agree to the terms and conditions of an OLS account prior to activating his or her account. These terms and conditions have been updated various times

throughout the existence of the OLS system.[2] Among other things, these terms and conditions require the taxpayer "to provide true, accurate, current and complete information" and "to maintain and update this information to keep it true, accurate, current and complete." The taxpayer also agrees "that your username and password are to be used by you exclusively for the purposes of your own Online Services Account and no other." The terms and conditions also include a statement that:

> "DTF may change these Terms and Conditions of Use at any time. You are responsible for checking these terms periodically for changes. If you continue to use an Online [Services] Account after we post changes, you are signifying your acceptance of the new terms."

54. Once the taxpayer agrees to the terms and conditions, the account will be created. The taxpayer must provide the first and last name of the person creating the account, a telephone contact number, and an email address. The taxpayer will also be directed to create a username and password. A notice confirming creation of the OLS account will be sent to the individual's address of record via USPS, as well as an e-mail to the e-mail address entered during the account's creation. Once an individual has created an account, he or she can access numerous online services offered by the Division, such as individual change of address, submitting payments, and responding to Division notices. An individual also has the ability to disable his or her OLS account at any time.

55. An update of a taxpayer's address of record may be done within the taxpayer's OLS account using the change of address web service. Once logged into his or her account, from the account summary page, a taxpayer can view the mailing address the Division currently has on file. To change the address, the taxpayer can either click on the "change of address" link in the services

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[2] Attached as exhibit "1" to Ms. Schettine's affidavit is a copy of Version 10 of the Division's Online Services Account - Terms and Conditions for Individuals.

menu or click on the link next to his or her current address that says "edit," and then input the updated information. The taxpayer is then required to certify that the provided information is complete and that he or she is authorized to report the change. Next, the taxpayer must submit the change. The exhibit attached to the Schettine affidavit indicates a statement located above the submit link that advises the taxpayer that the new address information will be used "for communications and notices between DTF [the Division] and the taxpayer and mail addressed to the taxpayer at the address provided will be sufficient notice to the taxpayer for all purposes, unless DTF is subsequently provided with a different address for the taxpayer." Once any changes are submitted, the taxpayer receives a confirmation page, and the new address is displayed at the bottom of the account summary page.

56. When an address is changed in a taxpayer's OLS account, an internal email is automatically generated. This e-mail includes the taxpayer's name and ID as well as the updated information. It also includes the terminology "Environment: PROD" that means the change was made using the change of address web service from within the taxpayer's account. Lastly, the address change is automatically updated in the taxpayer's e-MPIRE account address summary tab with the source of "WEB ADR CHG (N9)" indicating that the address change was initiated through the change of address web service. The taxpayer's e-MPIRE account summary tab will be used by the Division to determine the taxpayer's address for all mailings.

57. Ms. Schettine avers that on November 15, 2012, an OLS account was created for petitioner using the email address XXXXXXXXXXXXXXX.com and the telephone number 917-XXX-XXXX.[3] She further avers that to create this account, petitioner was required to follow all of

[3] Petitioner's email address and telephone number have been redacted for confidentiality purposes.

the steps set forth in findings of fact 52 through 54, including authentication of his identity via one of the outlined methods, and agreement to the terms and conditions in effect in November 2012.

58. Ms. Schettine attests that the creation of petitioner's account was confirmed by e-mail as well as via a notice dated November 20, 2012 sent by USPS to Gregg M. Reuben at 4320 Broadway, New York, NY 10033,[4] his address of record at the time of the notice. This notice, issued by OPTS - SAT - eServices Management, stated, in pertinent part, as follows:

> "[T]hank you for creating an online account with the New York State Department of Taxation and Finance. This letter is to confirm that on 11/15/2012 you or your authorized representative created an account through our Web site to use the applications provided through Online Services for your own account.
>
> Your username, XXXXXXXXXXXXXXX.COM, used in conjunction with the password selected when creating your account will allow you to log in to Online Services. Please retain this letter for future reference."

59. Ms. Schettine, in her affidavit, states that on October 15, 2013, petitioner's address was updated in his e-MPIRE account to 555 West 59th Street, Apt. No. 32D, New York, NY 10019, based upon petitioner's electronically filed Form IT-201 for the year 2012. Ms. Schettine further states that on November 13, 2013, an address change was made through petitioner's OLS account updating his address of record from "555 West 59th St Apt. No. 32D, New York, NY 10019" to "555 West 59th St Apt. No. 31D, New York, NY 10019." When this address change was made, an internal e-mail was automatically generated showing the address change and the code "Environment: PROD," indicating the address change was made through petitioner's OLS account using the change of address web service.

60. Attached as exhibit "4" to Ms. Schettine's affidavit is a copy of a one-page email, dated

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[4] Attached as exhibit "3" to Ms. Schettine's affidavit is a copy of the notice dated November 20, 2012. A copy of this notice is also in the record as petitioner's exhibit "18."

November 13, 2013, at 10:08 a.m., from IADR.EmailUtility to tax.sm.OTC.applications.IADR regarding a "Change of Address application - Individual - PROD" for "REUBEN-GREGG." On this November 13, 2013 e-mail, the following code appears "Environment: PROD," along with petitioner's "New physical [and] mailing address of 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247, US," as well as new contact information (i.e., telephone numbers). When petitioner's address was updated through the OLS system, his address was automatically updated in the e-MPIRE system to reflect these changes.

61. Attached as exhibit "5" to Ms. Schettine's affidavit is a two-page e-MPIRE printout document, dated "11/02/2016 at 11:05:13" containing an "Address Summary" for petitioner's taxpayer identification number, petitioner's name, and an "Address" in Hoboken, New Jersey. This document shows petitioner's address change history, including the change made on November 13, 2013, updating petitioner's address to 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247, reflected on petitioner's address summary tab as sequence #028. Review of the "Address Details" section of the e-MPIRE address summary indicates that the change of address to 555 W 59TH ST **APT 31D**, NEW YORK, NY 10019-1247, address sequence number 028, was initiated through "WEB ADR CHG (N9)," i.e., the change of address web service (emphasis added).

62. The record includes petitioner's resident income tax return for the year 2013 that was electronically filed on or about October 2, 2014. This return was the last return filed by petitioner prior to the issuance of notices of determination L-042249602, L-041978311, L-041978312 and L-041978313, and it lists petitioner's address as 555 West 59th Street, ***Apt. No. 32D***, New York, NY 10019 (emphasis added). Ms. Schettine, in her affidavit, states that on October 10, 2014, petitioner's address was updated in his e-MPIRE account to 555 W 59th St Apt 32D, New York,

NY 10019, based upon petitioner's electronically filed form IT-201 for the year 2013, dated October 2, 2014. She further states that on October 27, 2014, an address change was made through petitioner's OLS account, updating his address of record from "555 West 59th St Apt. No. 32D, New York, NY 10019" to "555 West 59th S Apt. No. 31D, New York, NY 10019." When this address change was made, an internal e-mail was automatically generated showing the address change and the code "Environment: PROD," indicating the address change was made through petitioner's OLS account using the change of address web service.

63. Attached as exhibit "6" to Ms. Schettine's affidavit is a copy of a one-page email, dated October 27, 2014 at 10:49 a.m., from IADR.EmailUtility to tax.sm.OTC.applications.IADR regarding a "Change of Address application - Individual - PROD" for "REUBEN-GREGG." On this October 27, 2014 e-mail, the following code appears "Environment: PROD," along with petitioner's "New physical [and] mailing address of 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247," as well as new contact information (i.e., telephone numbers). When petitioner's address was updated through the OLS system, his address was automatically updated in the e-MPIRE system to reflect these changes.

64. Attached as exhibit "7" to Ms. Schettine's affidavit is a two-page e-MPIRE printout document, dated "11/02/2016 at 11:04:27" containing an "Address Summary" for petitioner's taxpayer identification number, petitioner's name, and an "Address" in Hoboken, New Jersey. This document shows petitioner's address change history, including the change made on October 27, 2014, updating petitioner's address to 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247, reflected on petitioner's address summary tab as sequence #030. Review of the "Address Details" section of the e-MPIRE Address Summary indicates that the change of address to 555 W 59TH ST

APT 31D, NEW YORK, NY 10019-1247, address sequence number 030, was initiated through "WEB ADR CHG (N9)," i.e., the change of address web service (emphasis added). This was the last known address of record prior to the issuance of notice of determination L-042249602. Further review of the "Address Summary" indicates that petitioner's address was not changed again until December 9, 2015. 65. Ms. Schettine, in her affidavit, avers that the Division's Office of Processing and Taxpayer Services has not received any notification or information that petitioner's OLS account "should be modified or discontinued."

66. In support of his position that the notices of determination were not properly and timely issued to him, petitioner submitted a copy of the Administrative Law Judge's order dated October 20, 2016 (***see*** finding of fact 33).

67. Petitioner testified that he did not recall either creating an online services account through the Division's website on November 15, 2012 or receiving the notice, dated November 20, 2012, from the Division's OPTS-SAT-V services management confirming the creation of an online services account. He also testified that he did not authorize anyone to open an online services account on his behalf.

68. Petitioner testified that he never resided at the 4320 Broadway, New York, New York, address listed on the notice, dated November 20, 2012. He further testified that if he applied for any form, he would not use the 4320 Broadway, New York, New York, address as his address.

69. After reviewing the notice, dated November 20, 2012, petitioner admitted that the username, XXXXXXXXXXXXXXX.COM, stated therein (***see*** finding of fact 58), was his e-mail address.

70. Petitioner testified that he did not recall ever notifying the Division that he had moved

from the address that he used on his tax return. He further testified that he did not recall ever receiving the four notices of determination at issue.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by reviewing the statutory law relevant to the issuance of notices of determination. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the notice by mailing the notice to the taxpayer's last known address using registered or certified mail. The Administrative Law Judge found that the Division must establish its standard mailing procedure and that its procedure was followed in this specific case in order to meet this burden. With respect to notice of determination L-042249602, the Administrative Law Judge concluded that the Division introduced adequate proof of its standard mailing procedure through the affidavits of Ms. Nagengast and Mr. Peltier and she determined that those affidavits, along with the properly completed CMR, established that such procedure was followed on the date in question. In response to petitioner's contention that he never created an OLS account and that the subject notice was not mailed to his last known address as required, the Administrative Law Judge found that the evidence submitted by the Division established that petitioner did create an OLS account on November 15, 2012 and that he did indicate a change of address to that account on October 27, 2014. She thus determined that the Division had established proper mailing of the subject notice to petitioner's last known address and that petitioner's denial, without substantiation, was insufficient to rebut the presumption of receipt. The Administrative Law Judge determined that, since the request for conciliation conference was received beyond the 90-day period of limitation, BCMS had properly dismissed the request. She further determined that the Division of Tax Appeals may not consider the merits of

petitioner's protest, given the late filing of the request.

With respect to notices of determination L-041978311, L-041978312, and L-041978313, the Administrative Law Judge determined that the Division had introduced adequate proof of its standard mailing procedure through the affidavits of Ms. Picard and Ms. Koslow; however, the relevant CMR was not properly completed and thus did not constitute adequate documentary evidence of both the fact and date of mailing. The Administrative Law Judge noted that where proof of proper mailing is absent, the 90-day period for challenging the notice is tolled until actual notice of the assessment is received by the taxpayer. In this case, the Administrative Law Judge noted that petitioner had denied receiving the actual notices, but submitted a request for conciliation conference and included a consolidated statement of tax liabilities, dated October 5, 2015, which listed the three subject notices of determination. Since the exact date of the mailing of the notices of determination could not be established, petitioner was allowed to address both the timeliness of petitioner's protest and the underlying merits of the assessment.

Next, the Administrative Law Judge reviewed the Tax Law provisions relating to the liability for sales tax due and the definition of persons responsible to collect sales tax. She found that petitioner owned 99% of Alliance Parking[5], individually, and 1% of Alliance as the sole shareholder of Gregg M. Reuben, Inc., the only other member of Alliance. The Administrative Law Judge determined that petitioner, consequently, was per se personally liable for the sales and use taxes due herein by virtue of his status as a member of Alliance with a 99% ownership interest. She determined that petitioner was also liable for the sales and use taxes due herein as a person under a duty to act by virtue of his ownership and active management of Alliance and, in turn, WH Parking.

[5] Alliance Parking will be referred to as "Alliance" throughout the remainder of this decision.

The Administrative Law Judge rejected petitioner's argument that even if he had the authority to act, his failure to have done so resulted from the actions of Mr. Bovell and should be excused. The Administrative Law Judge found that petitioner delegated the responsibility to file sales and use tax returns and remit the taxes due to Mr. Bovell, but that he failed to take appropriate steps to determine whether the required sales tax returns were being filed, or whether the taxes due were being paid. Further, she found no evidence that petitioner lacked authority to access the records of the business, himself, or was otherwise precluded from ensuring that the taxes in question were remitted. The Administrative Law Judge determined that it was petitioner's choice to focus his attention on other business matters and that he could not absolve himself of his duty to act, or of the consequences of his failure to have done so.

The Administrative Law Judge also determined that the facts in this matter do not support abatement of penalties. Specifically, she found that it was not reasonable for petitioner to delegate to Mr. Bovell the responsibilities to file sales and use tax returns and remit the taxes due and then rely entirely upon Mr. Bovell to execute those responsibilities without exercising any oversight or having appropriate mechanisms in place to ensure that such responsibilities were being carried out.

The Administrative Law Judge thus dismissed the petition with respect to notice of determination L-042249602, denied the petition in all other respects and sustained notices of determination L-041978311, L-041978312, and L-041978313.

ARGUMENTS ON EXCEPTION

Petitioner claims that he was not a member of WH Parking and, therefore, cannot be held strictly liable for the taxes due. He further maintains that, even if it is determined that he had the authority to act, he cannot be deemed a responsible person under a duty to act standard because he

was thwarted in carrying out his obligations to collect and remit by the actions of Mr. Bovell and through no fault of his own. Petitioner contends that the evidence shows that he took the proper steps to determine that the required returns were being filed and that the taxes due were being paid by retaining a certified public accounting firm to prepare financial statements and provide reports, none of which disclosed unfiled sales tax returns or unpaid sales taxes. Petitioner claims that there is reasonable cause to abate penalties. He contends that his delegation of responsibilities was reasonable. He maintains that he was acting in good faith and that he reasonably relied on his accountant's advice, but that the massive embezzlement of the funds of Alliance and its related entities kept the accountants and himself from uncovering the sales tax irregularities.

Finally, petitioner contends that notices of determination numbers L-041978311, L-041978312, and L-041978313 were not mailed in accordance with Tax Law § 1147 before the statute of limitations expired and, therefore, are invalid and void. He further maintains that his last known address was that reported on the last New York personal income tax return filed by him at the time that notice of determination number L-042249602 was issued. This is the West 59th Street, Apartment 32D address. Since that notice of determination was mailed to petitioner at the West 59th Street, Apartment 31D address, petitioner argues that this notice was also not mailed in accordance with Tax Law § 1147 and is void. Petitioner contends that the record lacks credible evidence to show that petitioner created an OLS account or that he gave notice to the Division through the OLS account of a change in his address after his 2012 and 2013 New York returns were filed.

The Division asserts that the Administrative Law Judge correctly determined that petitioner is strictly liable for the sales and use taxes due from WH Parking and correctly upheld the

imposition of penalties against petitioner. The Division claims that petitioner failed to provide any evidence, regardless of the alleged deceitful actions of his employee, that he lacked authority to access the records of the business to confirm its financial circumstances or to institute systems to ensure compliance with the business's financial obligations. It contends that petitioner's alleged reliance upon the advice of its accountant is not reasonable cause to waive penalties.

Finally, the Division maintains that the Administrative Law Judge correctly determined that BCMS properly dismissed the request for conciliation conference regarding notice of determination L-042249602 and that petitioner was entitled to a hearing on the merits regarding notices of determination L-041978311, L-041978312, and L-041978313. The Division did not specifically address petitioner's contention that he never created an OLS account and never changed his address using that account, but it argues that the Administrative Law Judge correctly decided the relevant issues in this matter.

OPINION

We note that the petition in this matter was filed with the Division of Tax Appeals within 90 days of the issuance of the conciliation order dismissing petitioner's request for a conciliation conference and, as such, the Division of Tax Appeals has jurisdiction over the petition (***see*** Tax Law §§ 170 [3-a] [a], [e] and 2006 [4]; ***Matter of Novar TV & Air Conditioner Sales & Serv., Inc.***, Tax Appeals Tribunal, May 23, 1991).

Tax Law § 1138 (a) (1) authorizes the Division to mail notices of determination to a person or persons liable for the collection or payment of tax at his or her last known address using certified or registered mail (***see also*** Tax Law § 1147 [a] [1]). The mailing of a notice of determination is presumptive evidence of the receipt of that notice by the person to whom it is addressed (***id***). The

Division is entitled to rely on the address listed on the last return filed with the Division as the last known address, unless the taxpayer has clearly informed the Division of a change of address (***Matter of Brager***, Tax Appeals Tribunal, March 23, 1996; ***see also Matter of Garitta***, Tax Appeals Tribunal, February 21, 2017; ***Matter of Toomer***, Tax Appeals Tribunal, August 14, 2003; Tax Law § 1147 [a] [1]). With certain exceptions not relevant here, such notice shall be an assessment of the amount due, plus interest and penalties, unless the person files a petition for hearing with the Division of Tax Appeals within 90 days from the date of the mailing of the notice (Tax Law § 1138 [a] [1]). A person also has the option of commencing an administrative challenge to such notice by filing a request for a conciliation conference with BCMS "if the time to petition for such a hearing has not elapsed" (Tax Law § 170 [3-a] [a]). The statutory time limit for the filing of a petition or a conciliation conference request is strictly enforced (***see e.g. Matter of Am. Woodcraft, Inc.***, Tax Appeals Tribunal, May 15, 2003 [petition filed one day late dismissed]). If a protest is not filed within the 90-day statutory period, the notice of determination becomes a fixed and final liability, leaving the Division of Tax Appeals without jurisdiction to consider the substantive merits of the protest (Tax Law § 1138 [a] [1]; ***see e.g. Matter of Garitta***).

Where, as here, the timeliness of a taxpayer's request for a conciliation conference is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (***Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and 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; ***Matter of Katz***). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (***Matter of Balan***, Tax Appeals Tribunal, October 27, 2016; ***Matter of Western Aries Constr.***, Tax Appeals Tribunal, March 3, 2011).

With respect to notice of determination L-042249602, we agree with the conclusion of the Administrative Law Judge that the Division has introduced adequate proof of its standard mailing procedure through the affidavits of its employees, Ms. Nagengast and Mr. Peltier, and the attached CMR, dated December 2, 2014. The Nagengast and Peltier affidavits together with the mail cover sheet and the CMR establish the Division's standard mailing procedure for conciliation orders and that such procedure was followed in this instance. As noted above, a properly completed CMR constitutes highly probative evidence of the fact and date of mailing (***Matter of Balan)***.

On exception, petitioner contends that the notices were not mailed in compliance with Tax Law § 1147 (a) and are, therefore, invalid and void. He argues that there is no credible evidence that petitioner created an OLS account and used that account to change his address after the filing of his 2012 and 2013 New York State income tax returns. We agree with the Administrative Law Judge's conclusion that the Division has presented sufficient evidence to establish that it used petitioner's last known address when it mailed the subject notice to him on December 2, 2014. Specifically, through the affidavit of Ms. Schettine and the documents attached thereto, the Division has shown that it has a standard process by which a taxpayer may create an OLS account. The Division has shown that there are safeguards in place to prevent the creation of an erroneous account (***see*** finding of fact 52) and that a taxpayer must affirmatively agree to certain terms and

conditions in order to create and use such an account (***see*** finding of fact 53). Among such terms and conditions, the online account holder must agree to provide information that is accurate and up-to-date (***id.***). Changing one's address of record is a service available through an OLS account and the Division has shown that there is a standard process by which online account holders may change their address (***see*** findings of fact 54, 55). When an account holder changes his or her address, he or she is advised that the Division will use that new address for communications and notices between the Division and the taxpayer (***see*** finding of fact 55). We find, again through the affidavit of Ms. Schettine and the documents attached thereto, that the Division has established that those standard processes were followed when petitioner's OLS account was created on November 15, 2012. We note that the Division's evidence includes a copy of a letter confirming the creation of his account addressed to petitioner at his address of record at the time, 4320 Broadway, New York, NY 10033, and Ms. Schettine's statement that the creation of the account was also confirmed in an email to petitioner's email address of record (***see*** finding of fact 59).

We also find that the Division has established that those standard processes were followed when petitioner's address was updated using his OLS account on November 13, 2013 and October 27, 2014. This finding is based on the Schettine affidavit; the internal email notifications generated by petitioner's request, both indicating by the code "PROD" that the source of the requested change was petitioner's OLS account; and the listing of these address changes in the address summary record with the code "WEB ADR CHG (N9)," indicating that the change was made through the change of address service in the OLS account (***see*** findings of fact 59 through 64). By these change requests, petitioner notified the Division that the 555 West 59th Street, Apartment 31D address was his correct address. This was petitioner's address of record with the Division at the time the subject

notice of determination was mailed on December 2, 2014. That notice was thus mailed to petitioner at his last known address as defined in Tax Law §§ 1138 (a) and 1147 (a).

We disagree with petitioner's contention that there is no credible evidence in the record to show that he created the OLS account or that he gave notice to the Division through the OLS account of a change in his address after his 2012 and 2013 returns were filed. Pursuant to the foregoing discussion, we find that the Division has made a prima facie showing that petitioner did create an OLS account on November 15, 2012 and that he did initiate changes of address to that account on November 13, 2013 and October 27, 2014. While petitioner contends that he never resided at 4320 Broadway, New York, NY 10033, the address to which the confirmation letter was sent, and that he would not have used that address to create the OLS account, the Division has submitted documentary evidence along with the Schettine affidavit that demonstrates that the 4320 Broadway address was petitioner's address of record with the Division for a period of time in 2012, including November 15, 2012.

Having found that the Administrative Law Judge correctly determined that the Division bore its burden of demonstrating proper mailing of notice of determination L-042249602, we note that such a showing gives rise to a presumption of receipt of the notice by the person to whom it is addressed (***see*** Tax Law § 1147 [a] [1]), at which point it is incumbent upon petitioner to put forth proof to rebut the presumption. Here, petitioner testified that he did not recall either creating an OLS account on the Division's website on November 15, 2012, or receiving the notice confirming the creation of the account (***see*** finding of fact 67). Petitioner also testified that he did not recall ever notifying the Division that he had moved from the address used on his tax returns (***see*** finding of fact 70). He further testified that he did not recall ever receiving the four notices of

determination at issue (***id.***). Other than his testimony, petitioner failed to introduce any competent evidence in support of his case. Petitioner did admit that the username to create the OLS account was, in fact, his email address (***see*** finding of fact 69). Additionally, we note that both petitioner's request for conciliation conference in this matter, dated December 9, 2015, and the petition, dated January 27, 2016, include the 555 West 59th Street, Apartment 31D address as petitioner's address at the time of filing those documents. As such, petitioner's rebuttal must be rejected, as his mere denials and vague failure to recollect without substantiation in the form of evidentiary proof are not sufficient to overcome the statutory presumption of receipt (***see Matter of T.J. Gulf v New York State Tax Commn.***, 124 AD2d 314 [3d Dept 1986]). Given petitioner's untimely protest, we are precluded from addressing petitioner's substantive argument that he is not liable for the tax assessed in notice of determination L-042249602 (***Matter of Garitta***).

Turning next to notices of determination L-041978311, L-041978312, and L-041978313, we agree with the conclusion of the Administrative Law Judge that the Division has introduced adequate proof of its standard mailing procedure through the affidavits of Ms. Picard and Ms. Koslow, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (***Matter of Balan***). We also agree with the Administrative Law Judge's conclusion that the October 3, 2014 CMR is flawed and, thus, inadequate to establish that notices of determination L-041978311, L-041978312, and L-041978313 were mailed as addressed to petitioner on that date. As determined by the Administrative Law Judge, there is no legible postmark on the last page of the CMR offered by the Division. The CMR is further flawed insofar as it failed to verify the total number of pieces of mail received at the USPS for mailing on the date of its alleged issuance. Specifically, the stamped instruction to the USPS

employee to hand-write the total number of pieces of mail and initial on the CMR was not completed. Completion of this instruction confirms that the Division did not withhold any articles of mail from the multi-piece mailing and, in turn, establishes which specific pieces of mail were in fact delivered into the custody of the USPS for mailing on a specific date. The CMR, therefore, was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (***see Matter of Kayumi***, Tax Appeals Tribunal, June 27, 2019).

In addition to the conclusions of the Administrative Law Judge regarding the flaws in the CMR, we find that the subject notices of determination were not mailed to petitioner's "last known address." The record reflects that petitioner's resident income tax return for the year 2013 was electronically filed on or about October 2, 2014. That return was the last return filed by petitioner prior to the issuance of notices of determination L-041978311, L-041978312, and L-041978313. That return lists petitioner's address as 555 West 59th Street, Apt. 32D, New York, NY 10019 (***see*** finding of fact 62). The subject notices were mailed on October 3, 2014 to the 555 West 59th Street, Apt. 31D address which, apparently, was still the petitioner's address of record in the Division's files. According to the Schettine affidavit, petitioner's address was updated in his e-MPIRE account to the 555 West 59th Street, Apt. 32D address on October 10, 2014, 8 days after the filing of the 2013 return. Schettine further states that, thereafter, on October 27, 2014, petitioner's address was changed through the OLS account back to the 555 West 59th Street, Apt. 31D address (***id***.). Thus, for a brief period of time between October 2, 2014 and October 27, 2014, petitioner's last known address was the 555 West 59th Street, Apt. 32D address.

Under such circumstances where the Division has failed to establish the fact and date of mailing, and where the Division has failed to establish that a statutory notice was mailed to

petitioner's last known address, it has been held that the 90-day period for filing a petition or request for conciliation conference does not commence and the presumption of receipt does not attach (***id.***; ***see Matter of Stickel***, Tax Appeals Tribunal, April 7, 2011; ***Matter of Riehm v Tax Appeals Trib. of State of N.Y.***, 179 AD2d 970, 971 [3d Dept 1992], ***lv denied*** 79 NY2d 759 [1992], ***rearg denied*** 80 NY2d 893 [1992]). However, other evidence establishing the date of actual receipt of the notice, thereby commencing the 90-day period within which to bring a protest thereof, can overcome the Division's failure to prove the fact and date of mailing of the statutory notice in the flawed CMR (***Matter of Kayumi***). The Division offered no such evidence of receipt here (***see e.g. Matter of Rywin***, Tax Appeals Tribunal, April 24, 2008; ***Matter of Chin***, Tax Appeals Tribunal, December 3, 2015; ***see also Matter of Agosto v Tax Commn. of State of N.Y.***, 68 NY2D 891, 893 [1986], ***revg*** 118 AD2d 894 [3d Dept 1986]).

In this case, as the Administrative Law Judge found, petitioner filed a request for conciliation conference in protest of notices L-041978311, L-041978312, and L-041978313 on December 14, 2015. Attached to that request was a consolidated statement of tax liabilities, dated October 6, 2015, issued to petitioner, on which a number of statutory notices, including notices L-041978311, L-041978312, and L-041978313, were listed. As we have previously held, where a petitioner has received notice of the tax liability, but the fact and date of mailing of the statutory notice has not been established, or where the statutory notice may not have been mailed to petitioner's last known address, petitioner is entitled to a hearing to challenge the assessment of tax due (***Matter of Stickel***; ***see also Matter of Brager***). Here, petitioner received actual notice of the assessment in the consolidated statement of tax liabilities, dated October 6, 2015, which date triggered the 90-day period within which to bring a protest (***Matter of Stickel***). As petitioner's

request for a BCMS conference fell within 90 days of the earliest date of actual notice of the assessment, we agree with the Administrative Law Judge that petitioner was entitled to a hearing on the underlying merits of the assessments. We note that the Division agrees with the Administrative Law Judge on this point.

We reject petitioner's contention that the mailing of the subject notices was not in compliance with Tax Law § 1147, thereby rendering them ineffective and void. The Division has, through the affidavits of Ms. Picard and Ms. Koslow, adequately established its standard procedure for mailing notices of determination. The position of this Tribunal has been consistent that where the Division has offered proof of its standard mailing procedure, but cannot establish the fact and date of mailing to a petitioner's last known address in a particular case, the proper remedy is not to cancel the assessment, but to view the petitioner's application as timely filed and to require a hearing on the merits (***Matter of Brager***). Here, as stated above, the 90-day statutory period of limitations was tolled until such time as petitioner received actual notice of the assessments. We note that, since the relevant sales and use tax returns were filed less than three years before petitioner received actual notice of the assessments, the three-year limitations period within which the Division may assert an assessment of additional sales and use tax has not been exceeded (***see*** findings of fact 18, 19, 20; Tax Law § 1147 [b]; ***see also Matter of Riehm***).

Turning to the merits of the underlying assessments and petitioner's contentions that he is not personally liable for the sales and use tax due and that penalties should be abated, we affirm the determination of the Administrative Law Judge.

Tax Law § 1133 (a) imposes personal liability for sales and use taxes upon all individuals that may be considered persons required to collect such taxes (***see Matter of Franklin***, Tax Appeals

Tribunal, May 14, 2015).

Tax Law § 1131 (1) defines "persons required to collect tax" to include, *inter alia*:

> "every vendor of tangible personal property or services; . . . any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article; *and any member of a partnership or limited liability company*" (emphasis added).

Thus, as correctly noted by the Administrative Law Judge, Tax Law § 1131 (1) imposes strict or per se liability for the collection of taxes on members of partnerships and members of LLCs (***see Matter of Franklin***; ***see also Matter of Santo***, Tax Appeals Tribunal, December 23, 2009). The critical question is whether the sales and use tax liabilities of WH Parking are liabilities of Alliance, as the sole member of that LLC and, if so, whether petitioner, as a member and 99% owner of Alliance, is personally liable for the sales and use tax due. Petitioner contends that he cannot be held strictly liable for the tax due because he was not a member of WH Parking.

The record in this matter shows that petitioner was engaged in the business of operating parking lots and garages in the New York City area, including the parking garage operated by WH Parking. Each parking facility was operated as a separate LLC. Accordingly, WH Parking was a "vendor" as defined by Tax Law § 1101 (b) (8) [6] and was therefore a person required to collect tax under Tax Law § 1131 (1). As plainly stated in the statute, the term "persons required to collect

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[6] Tax Law § 1101 (b) (8) (i) defines "vendor" to include:

"(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

"(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article, ..."

tax" also includes any member of a limited liability company. Alliance was the sole member of WH Parking. Accordingly, it follows that Alliance is also, by statutory definition, such a person and is, therefore, liable for the tax due on behalf of WH Parking (***see*** Tax Law §§ 1131 (1) and 1133 (a); ***Matter of Franklin***; ***Matter of Santo***). Continuing with the analysis, Alliance had two members: petitioner, who owned a 99% share of Alliance, individually, and Gregg M. Reuben, Inc., an S corporation with petitioner as its sole shareholder, which owned the remaining 1% share (***see*** finding of fact 2). Consequently, by virtue of their status as members of an LLC, petitioner and Gregg M. Reuben, Inc., are also "persons required to collect tax" and, therefore, share joint and several liability for the tax due herein pursuant to Tax Law §§ 1131 (1) and 1133 (a) (***see Matter of Santo***; ***Matter of Franklin***; ***see also Matter of Marchello***, Tax Appeals Tribunal, April 14, 2011 [Tax Law § 1133 (a) creates joint and several liability for unpaid sales tax]; ***see also Matter of Hammerman***, Tax Appeals Tribunal, August 17, 1995 [finding that sole shareholder and president of corporation is personally liable for tax due from partnership where corporation was a member of the partnership]).

We disagree with petitioner's argument on exception that a finding of strict liability would be the contrary to the intention of the Legislature when it created the limited liability company statute in 1994. When presented with questions of statutory interpretation, the courts have held that the statutory text is the clearest indicator of legislative intent and unambiguous language should be construed to give effect to its plain meaning (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]). The text of Tax Law § 1131 (1) unambiguously includes "any member of a partnership or limited liability company" within the definition of "persons required to collect sales tax" (***see Matter of Boissiere and Krystal***, Tax Appeals Tribunal, July 28, 2015). The Legislature

amended the definition of persons required to collect tax in Tax Law § 1131 (1) to specifically include any member of an LLC at the same time that it created the limited liability company statute (L 1994, ch 576; ***Matter of Boissiere and Krystal***). At that time, it also amended Tax Law § 1131 (1) to impose responsible person liability under the "duty to act" standard upon any employees or managers of an LLC. We note that the Legislature could have made LLC members responsible persons under the "duty to act" standard, as it did with LLC managers and employees, but it chose not to. That legislative choice supports the legislative intent reflected in the statute's unambiguous language (***Matter of Boissiere and Krystal***).

Although it is not necessary for the purposes of determining petitioner's liability for the tax due given our conclusion above, we agree with the determination of the Administrative Law Judge that petitioner is also a person responsible under the duty to act standard of Tax Law § 1131 (1). As the Administrative Law Judge noted, the factors relevant in reaching a determination as to whether an individual is a person under a duty to act are well established:

> "Whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (***Matter of Cohen v State Tax Commn.***, 128 AD2d 1022 [1987]). We look to various factors in making this factual determination. The holding of corporate office is one such factor, but is not determinative (***see Chevlowe v Koerner***, 95 Misc 2d 388 [1978]). 'Generally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act' (20 NYCRR 526.11 [b] [2]). Other relevant factors include authority to hire and fire employees, authority to sign corporate checks and status as a stockholder (***see***, ***e.g.***, ***Matter of Ippolito v Commissioner of N.Y. Dept. of Taxation and Fin.***, 116 AD3d 1176 [2014]; ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990). 'What must be considered is petitioner's authority and responsibility to exercise control over the corporation, not his actual assertion of such authority (citations omitted)' (***Matter of Coppola v Tax Appeals Trib. of State of N.Y.***, 37 AD3d 901 [2007])" (***Matter of Kieran***, Tax Appeals Tribunal, November 13, 2014).
>
> The facts here reveal that petitioner owned and managed Alliance, which, as the sole

member, owned and managed the affairs of WH Parking. Petitioner established WH Parking and the other individual LLCs as his business was expanding and, at all times, he played a significant, active and ongoing role in the business. He signed the certificates of authority and is listed as the organizer for WH Parking (***see*** finding of fact 5). He filed the certificates of authority to register as a sales tax vendor for WH Parking and listed himself as the sole responsible person (***id.***).

In addition, petitioner was responsible for maintaining the financial books and records of Alliance; he was the sole authorized signatory on the bank accounts for Alliance and WH Parking, although Mr. Bovell was authorized to use petitioner's electronic signature (***see*** finding of fact 14); he signed or had authority to sign checks for Alliance; he signed or had authority to sign sales and use tax returns for Alliance and WH Parking; he hired and fired employees; and he hired or engaged outside vendors for goods and services, including retention of an accounting firm. In view of these facts, petitioner clearly was a responsible person who was under a duty to act for Alliance, as well as WH Parking.

Petitioner contends that he cannot be deemed a responsible person under a duty to act because Mr. Bovell thwarted his ability to know, or learn, of the nonfiling of returns and the nonpayment of sales and use taxes, among other liabilities. To prevail on this argument, petitioner was required to establish by clear and convincing evidence that he was not a responsible person under a duty to act, or that he had the necessary authority to act, but was thwarted by others in carrying out his duties through no fault of his own (***see Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998). It is well established that one cannot absolve himself of liability by simply delegating authority to a subordinate, or by disregarding his duty and leaving it to someone else to discharge (***see Blodnick v New York State Tax Commn.***, 124 AD2d 437 [3d Dept 1986]). Petitioner thus cannot prevail by simply shifting blame to Mr. Bovell.

The evidence reflects that petitioner delegated all financial responsibilities, including the obligation to file sales and use tax returns and remit the taxes due thereon, to Mr. Bovell, and that he relied entirely upon that subordinate to execute those responsibilities. Petitioner testified that he directed his attention to operating the facilities and expanding the growth of the business (***see*** finding of fact 15). There is no evidence that, notwithstanding the assertedly deceitful actions of Mr. Bovell, petitioner lacked authority to affirmatively access the records of the business so as to confirm its financial circumstances, or to institute systems to ensure compliance with requisite financial obligations to which the business was subject. There is no evidence of any specific instance where Mr. Bovell prevented petitioner from asserting his supervisory and oversight authority. Although Mr. Bovell may have attempted to hide his scheme, there is no evidence that it could not have been uncovered with the exercise of ordinary due diligence, which is actually what happened when petitioner began looking into the reasons for the business's cash shortage. We have found exceptions to liability where the corporate officer proved that he was precluded from acting on behalf of the corporation by the acts of another (***see e.g. Matter of Moschetto***, Tax Appeals Tribunal, March 17, 1994; ***Matter of Turiansky***, Tax Appeals Tribunal, January 20, 1994). Petitioner, however, has failed to meet his burden of showing such preclusion here. Unfortunately, the fact that petitioner's employee abused his position of trust and allegedly created a scheme to embezzle funds from the business does not lead to a conclusion that petitioner was precluded from assuring that the taxes in question were remitted based on this record.

We also reject petitioner's contention that the Administrative Law Judge erred by sustaining the penalties imposed upon him for the nonfiling of returns and underpayment of tax. Although the Division has the authority to waive penalties, petitioner bears the burden of establishing that the failure to pay tax "was due to reasonable cause and not due to willful neglect" (Tax Law § 1145 [a]

[1] [iii]; ***see Matter of Coppola***; ***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992; ***confirmed*** 193 AD2d 978 [3d Dept 1993]).

Petitioner contends that the alleged embezzlement occurred through no fault of his own, but we cannot agree. Petitioner hired Mr. Bovell and was responsible for his actions (***see Matter of Marchello***). Petitioner made the choice to focus his attention on other aspects of the business, thereby leaving Mr. Bovell unsupervised and allowing him to perpetuate his seemingly criminal scheme. Although petitioner did retain an accounting firm to prepare financial statements, Mr. Bovell was able to manipulate the books so as to conceal his fraud from the accountants. Mr. Bovell was given near total control over all financial matters. There is no evidence of a system of internal controls being put in place to reduce the risk of improper behavior. Other than questioning Mr. Bovell and receiving his assurances, there is no evidence that petitioner took any affirmative steps to determine whether the required returns were being filed, or whether the taxes due were, in fact, being paid until he became aware of a problem. This is not a situation where petitioner was prevented from exercising his authority to properly supervise his subordinate; rather he trusted his employee and simply neglected to do so. Indeed, petitioner's actions taken after discovering the embezzlement underscore his ability to assume the financial responsibilities of the business and control his employees; he terminated Mr. Bovell's employment and hired an outside firm to prepare and file sales and use tax returns for WH Parking (***see*** findings of fact 16, 17).

Finally, petitioner asserts that he relied on the fact that his accountants failed to uncover Mr. Bovell's wrongdoing. We note that reasonable reliance upon the advice of an accountant or tax professional does not, in and of itself, provide "reasonable cause" for the abatement of penalties (***see Matter of LT & B Realty Corp. v New York State Tax Commn.***, 141 AD2d 185 [3d Dept 1988]). The outside accountant firm retained by petitioner prepared annual financial statements and

handled income tax preparation and filing matters for Alliance and WH Parking. It did not, however, provide an audit-level examination (***see*** finding of fact 13). Further, the accounting firm was not responsible for filing sales and use tax returns and ensuring that sales and use taxes were paid. That responsibility remained solely with Mr. Bovell. Finally, we note that petitioner failed to offer in evidence any of the financial statements or reports prepared by the accounting firm in support of his claim of reasonable cause (***see*** finding of fact 26). Based on the facts before us, we agree with the Administrative Law Judge that there is no basis for modifying the assertion of penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gregg M. Reuben is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Gregg M. Reuben is dismissed with respect to notice of determination L-042249602, dated December 2, 2014, and is denied in all other respects;

4. The notices of determination L-041978311, L-041978312, and L-041978313, dated October 3, 2014, are sustained.

DATED: Albany, New York
August 27, 2019

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner