STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANDREW CARLSON	:	DECISION DTA NO. 828491
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2004 through November 30, 2010.	:	

Petitioner, Andrew Carlson, filed an exception to the determination of the Administrative Law Judge issued on May 21, 2020 and the order of the Administrative Law Judge issued December 13, 2018. Petitioner appeared by Duke, Holzman, Photiadis & Greens, LLP (Gary Kanaley, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie Scalzo, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in Albany, New York on October 29, 2020, 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 Division of Taxation properly issued notices of determination to petitioner by electronic means.

II. Whether a bulk sale purchaser's responsible person can be held liable for the unpaid sales tax debts of the seller when the purchaser fails to comply with the bulk sale filing notifications.

III. Whether petitioner can establish that the amounts asserted due from him as a responsible person of two bulk sale transferees should be reduced or canceled based upon his contention that the business assets were transferred for no consideration and that their fair market value was reduced because they were encumbered by federal tax liens.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge in the May 21, 2020 determination and the December 13, 2018 order. Findings of fact 1 through 23 of the determination appear below as numbered therein. Findings of fact 17 through 28 of the order have been renumbered and appear below as findings of fact 24 through 35. Findings of fact 25 through 30 of the determination have been renumbered and appear below as findings of fact 36 through 41. To avoid repetition and non-pertinent procedural findings, we have not restated findings of fact 24 and 30 of the determination and findings of fact 1 through 16 and 29 of the order.

1. On November 20, 2012, Best Wings LLC (Best Wings) filed two notifications of sale, transfer, or assignment in bulk, form AU 196.10 (bulk sale notifications), reporting that it purchased the business assets of The Village Casino (the Casino) from Carlson Food Enterprises, Inc. (Carlson) and the business assets of the Wing City Grille (Wing City) from Car Kid Development, Inc. (Car Kid). Steven Carlson owned both Carlson and Car Kid. Both bulk sale notifications were signed by petitioner, Andrew Carlson, as managing member of Best Wings. Petitioner is Steven Carlson's son.

2. The Casino bulk sale notification listed a total sales price of $249,500.00 and indicated that Best Wings assumed liabilities of $28,000.00 and paid sales tax of $2,921.75 on equipment. This bulk sale notification indicated that the sale occurred on May 4, 2008.

3. The Wing City bulk sale notification listed a total sales price of $145,700.00 and indicated that Best Wings assumed liabilities of $140,000.00 and paid sales tax of $4,437.65 on equipment. This bulk sale notification indicated that the sale occurred on June 13, 2008.

4. In 2008, 2009 and 2010, Best Wings was a limited liability corporation that elected to be taxed as a partnership. Best Wings' 2008 New York State partnership return indicates that Best Wings began business on May 9, 2008. It listed its principal business activity as a restaurant. The partnership returns also indicate that petitioner owned a 75% interest in Best Wings and was its managing member. Steven Van Ness owned the remaining 25%.

5. On its 2008 partnership return, Best Wings reported gross sales of $2,131,225.00 and listed $293,872.00 "due from Carlson" on its balance sheet as of the end of the tax year. There is no indication as to whether this amount was due from petitioner, petitioner's father, or from Carlson.

6. On its 2009 partnership return, Best Wings reported gross sales of $2,958,883.00, and listed assets of $356,998.00 due from "related companies" at the end of the tax year on its balance sheet.

7. On its 2010 partnership return, Best Wings reported gross sales of $3,008,504.00. Best Wings' balance sheet at the end of the 2010 tax year listed other assets of $630,297.00. The balance sheet reflected $452,884.00 of liabilities consisting of accounts payable ($329,030.00), mortgages, notes and bonds payable in less than one year ($87,798.00), and other current liabilities ($36,056.00).

8. On his 2010 and 2011 personal income tax returns, petitioner reported the business activities of the Wing City Grille, LLC, on a federal schedule C. Gross sales of $630,509.00, $1,942,467.00 and $1,627,743.00 were reported during 2010, 2011 and 2012, respectively. The

record does not indicate if this limited liability company had any relation to the Wing City Grille business purchased by Best Wings from Car Kid in 2008.

9. In 2011, petitioner reported Best Wings' earnings on a federal schedule C.[1] In that year, petitioner reported $1,657,610.00 in gross sales from Best Wings.

10. On February 11, 2013, the Division issued a notice of determination to Best Wings asserting tax due in the amount of $328,391.53, representing the outstanding sales tax owed to the Division by Carlson. The notice informed Best Wings that it was liable as a bulk sale purchaser for taxes determined to be due in accordance with sections 1141 (c) and 1138 (a) (3) of the Tax Law. Also, on February 11, 2013, the Division issued a notice of determination to Best Wings as bulk sale purchaser for $303,355.00, representing the outstanding sales tax owed by Car Kid to the Division.

11. On December 19, 2012, Professional Hospitality LLC (Professional) filed a bulk sale notice reporting that it purchased the business assets associated with the Casino from Best Wings in a bulk sale that took place January 1, 2011. The total sales price was listed as $249,500.00. The bulk sale notice indicated that Professional assumed liabilities of $28,000.00 and paid sales tax of $2,921.75 on equipment. The bulk sale notice was signed by petitioner as managing member of Professional. Professional's reported mailing address, telephone number, trade name, and business location are identical to that of Best Wings d/b/a, the Casino.

12. Professional's sales activities were reported on petitioner's federal schedule C. Specifically, gross sales of $1,375,768.00, $1,365,379.00, and $1,287,324.00 were reported for 2011, 2012 and 2013, respectively. Petitioner also amortized goodwill of $203,000.00 on Professional's federal schedule C forms commencing in April 2012.

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[1] The record is silent as to when, and how, petitioner obtained David Van Ness' membership interest in Best Wings.

13. Also on December 19, 2012, Great Food Great Fun LLC (Great Food) reported that it purchased the business assets associated with Wing City from Best Wings in a bulk sale that took place on February 10, 2012, for a total sales price of $145,700.00. This bulk sale notice indicated that Great Food assumed liabilities of $140,000.00 and paid sales tax of $4,437.65 on equipment. This bulk sale notice was signed by petitioner as managing member of Great Food. Great Food's reported mailing address, telephone number, trade name, and business location are identical to that of Best Wings d/b/a Wing City.

14. Great Food's business activities were reported on a federal schedule C. Specifically, gross sales of $1,540,078.00 and $1,242,282.00 were reported for 2012 and 2013, respectively. Petitioner also amortized goodwill of $81,040.00 on Great Food's federal schedule C forms commencing in April 2012.

15. On petitioner's 2012 federal form 4562 for "all business activities," petitioner listed, among other assets, $57,260.00 in "used restaurant equip – S. Carlson, and $37,700.00 of "used restaurant equip."

16. On February 4, 2013, the Division issued a notice of claim to purchaser to both Professional and Great Food.

17. On March 14, 2013, the Division issued a notice of determination to Professional as bulk sale purchaser and a notice of determination to Great Food, as bulk sale purchaser, for the sales tax owed by Best Wings to the Division. Each notice asserted tax due of $640,172.97 consisting of the following:

i. $8,426.44 for the period ending November 30, 2010 (notice number L-037600814);
ii. $328,391.53 as bulk sale purchaser of assets from Carlson;
iii. $303,355.00 as bulk sale purchaser of assets from Car Kid.

18. Best Wings filed requests for conciliation conferences with the Bureau of Conciliation

and Mediation Services (BCMS) appealing the notices issued to it referred to in finding of fact 10. On June 21, 2013, Best Wings executed two consents settling these notices. The consents adjusted the notices to reflect the sales amounts reported on the bulk sales notifications. Both consents were signed by petitioner on behalf of Best Wings.

19. On July 2, 2015, the Division issued notice of determination L-043291618 to petitioner, as a responsible person of Great Food, asserting $395,200.00 for sales taxes determined to be due in accordance with Tax Law §§ 1138 (a), 1131 (1), and 1133.

20. On July 9, 2015, the Division issued notice of determination L-043328199 to petitioner, as a responsible person of Professional, asserting tax due of $395,200.00, for sales taxes determined to be due in accordance with Tax Law §§ 1138 (a), 1131 (1), and 1133.

21. On March 27, 2017, the Division reduced Professional's sales tax assessment to $249,500.00 and Great Food's sales tax assessment to $145,700.00.

22. On July 24, 2017, both Professional and Great Food filed for Chapter 11 bankruptcy. The bankruptcy filings were signed by petitioner as sole member of both Professional and Great Food.

23. By conciliation order dated September 15, 2017, BCMS reduced the notices of determination issued to petitioner in accordance with amounts consented to by Best Wings, and the corresponding adjustments made to the assessments of Professional and Great Food, as follows: (a) as a responsible person of Professional, notice L-043328199 was reduced to $249,500.00; and (b) as a responsible person of Great Food, notice L-043291618 was reduced to $145,700.00.

24. The notices of determination at issue herein (notices L 043291618 and L 043328199) were issued to petitioner electronically. The Division submitted the affidavit of Monica Amell,

which sets forth its general practice and procedure for the processing and delivery of taxpayer-specific electronic communications, including electronic statutory notices. Ms. Amell has been Team Lead of the External Communication Unit of the Division since June 2013. As part of Ms. Amell's duties, she manages the processing and delivery of taxpayer-specific electronic communications. Taxpayers may open an Online Services (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 its chosen external email address advising the taxpayer to check its 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.

25. Petitioner opened an OLS account with the Division on July 23, 2012 under his name, taxpayer identification number and user identification number, using a Logon ID of "a***5***" and an email address of "f**f****@***.com." Petitioner's OLS account for this user identification number and email address remains active to date.[2]

26. On July 26, 2012, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account on July 23, 2012 under the username of "a***5***."

27. 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 that by providing

[2] The user identification and email address are partially redacted to preserve confidentiality.

electronic communication authorization, 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.

28. In the OLS system, an account holder must affirmatively opt-in to receive 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 and record 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 these 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."

29. On November 22, 2013, petitioner affirmatively opted to receive tax bills and related statutory notices electronically by checking the box labeled "Bills and Related Notices - Get emails about your bills" in his OLS account and saving that authorization.

30. 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.

31. 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, formerly GOVDelivery (now Granicus). 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.

32. 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.

33. On July 2, 2015 and July 9, 2015, the Division posted messages stating, "You have a new liability due" to petitioner's OLS account and sent corresponding email alerts to petitioner's email address of f**f****@***.com. Also, on July 2, 2015 and July 9, 2015, the Division posted notices of determination L-043291618 and L-043328199, respectively, to petitioner's OLS account, which were stored in a secure database.

34. The Division maintains delivery status 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 email alerts to petitioner at his email address of f**f****@***.com on July 2, 2015, with APL Tracking IDs MG070220157788064, and on July 9, 2015 with APL Tracking IDs MG070920157922858. The Delivery Details indicate the status of the emails sent

to petitioner on July 2, 2015 and July 9, 2015 as "D" (delivered).

35. Ms. Amell avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division's External Communication Unit on July 2, 2015 and July 9, 2015.

36. On November 21, 2017, petitioner filed a petition with the Division of Tax Appeals challenging the notices of determination. The petition alleged that: (i) petitioner never consented to electronic service of notices, so issuance of the notices was never properly effectuated; (ii) a responsible person of an entity cannot be held liable for the entity's sales tax liabilities as a bulk sale transferee; and (iii) both the consideration and the fair market value of the business assets transferred to Best Wings and subsequently transferred by Best Wings to Professional and Great Food was zero.

37. After issue had been joined, petitioner filed a motion for summary determination on the issues raised in the petition. The Division filed its response and cross-moved for summary determination. In his reply to the Division's motions for summary determination, petitioner submitted four "revised" bulk sale notifications each indicating the consideration on the transfers to be zero. None of the notifications were signed nor were they ever filed with the Division's bulk sale unit. By order dated December 13, 2018, the Division was granted summary determination on the issue of whether the notices of determination were properly issued to petitioner and on the issue of whether a responsible person of a bulk sale transferee could be held responsible for the transferor's outstanding sales tax liabilities. Both parties' motions were denied as to the consideration and the fair market value of the assets transferred on the bulk sales.

38. A hearing was held on the remaining issue on July 24, 2019. At the hearing, petitioner

submitted the affidavit of his representative, Gary Kanaley. Mr. Kanaley researched the federal tax liens of Car Kid and Carlson filed by the Internal Revenue Service in the Chautauqua County Clerk's office. Mr. Kanaley submitted certified copies of federal tax liens filed against Carlson as follows:

Assessment Date	Lien Filing Date	Amount
7/30/01	12/11/07	$38,179.90
10/8/07	12/11/07	$63,656.13
7/2/07	12/11/07	$8,955.18

Mr. Kanaley submitted certified copies of federal tax liens filed against Car Kid, as follows:

Assessment Date	Lien Filing Date	Amount
9/24/07	1/25/08	$46,979.61
9/24/07	1/25/08	$2,492.70
12/3/07	2/21/08	$26,274.11
8/29/11	1/23/12	$3,004.12
2/14/11	1/23/12	$4,180.35
3/24/08	1/23/12	$8,579.74
6/2/08	1/23/12	$8,377.93

39. Attached as an exhibit to the Kanaley affidavit were computations utilizing the federal tax lien information obtained by Mr. Kanaley made by an unnamed accountant from the accounting firm Lawlor and Witkowski. This exhibit purports to detail the updated amount of Carlson's and Car Kid's federal tax liens on the day the underlying business assets were transferred to Professional and Great Food. According to a summary sheet prepared that incorporates updated penalty and interest calculations, the federal tax liens against Carlson

totaled $229,681.62 on the date Carlson's business assets that had been previously transferred to Best Wings were transferred to Professional. Likewise, the summary sheets indicate that the federal tax liens against Car Kid totaled $190,633.96 on the date its assets were subsequently transferred to Great Food. Mr. Kanaley's affidavit with attached exhibits was admitted into evidence over the objection of the Division's representative. The Division's representative objected because the individual or individuals who performed such calculations were not identified and there was no indication as to whether payments had been made on the liens. The record was held open for Mr. Kanaley to provide a certification from the individual who performed the calculations. Mr. Kanaley was instructed that if anything other than a certification was submitted, those documents would be returned.

40. Following the hearing, Mr. Kanaley submitted what purports to be an affidavit from Lawrence M. Lawler, CPA attesting that he performed the calculations referred to in finding of fact 39. Although the document does not constitute an affidavit as it lacks a jurat, Mr. Lawler signed the document, subject to penalties of perjury and certified that the contents were true to the best of his knowledge and belief. Nonetheless, Mr. Lawler acknowledged that the original calculations were inaccurate as they did not take into account payments that had been applied to Carlson's and Car Kid's federal tax liens and he did not realize that the lien amounts included penalty and interest when the initial calculations were made. Mr. Lawler attached revised calculations based upon Internal Revenue Service account transcripts provided to his firm for Carlson and Car Kid and corrected the duplication his original calculations contained. These revised calculations have not been accepted, because, as noted, the record was held open for the sole purpose of a certification being provided.

41. Petitioner did not appear and testify at the hearing in this matter; no contracts of sale

documenting the transfer of assets by Car Kid and Carlson to Best Wings, and then from Best Wings to Great Food and Professional, were entered into evidence; nor were any appraisals setting forth the appraised value of the transferred assets on the transfer dates entered into evidence.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the statutory and regulatory provisions and case law related to summary determination proceedings. The Administrative Law Judge determined that the bare affirmation from an attorney who demonstrates no personal knowledge of the facts lacks evidentiary value and that petitioner's unsworn statements were insufficient to eliminate any material issues of fact. The Administrative Law Judge thus denied petitioner's motion for summary determination. The Administrative Law Judge next determined that the evidence submitted by the Division established that it had properly issued the notices of determination to petitioner by use of electronic means of communication and granted the Division's motion on that issue.

The Administrative Law Judge then rejected petitioner's argument that the Division is not authorized to issue a notice of determination for the seller's outstanding sales tax liabilities to the responsible person of a purchaser that fails to timely file a bulk sale notification. He determined that petitioner, as a managing member of both Professional and Great Food, was a responsible person for each of those two limited liability companies and, pursuant Tax Law § 1133 (a), was under a duty to act with respect to compliance with any requirement of article 28, including the bulk sale notification requirements. He found that, since neither Professional nor Great Food had timely complied with the bulk sale notification requirements, petitioner became personally liable for the outstanding sales tax obligations accruing to those entities as a result of those failures.

Accordingly, the Administrative Law Judge granted summary determination in the Division's favor on that issue.

Finally, the Administrative Law Judge determined that there was a lack of evidence in the record and that facts were in dispute regarding the purchase price and fair market value of the assets transferred by Best Wings. He denied the motion and cross motion and ordered a hearing on that issue.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

After reviewing the relevant legal requirements with respect to bulk sale transactions, the Administrative Law Judge determined that petitioner failed to establish that the business assets of Carlson and Car Kid were transferred to Best Wings and then subsequently transferred to Professional and Great Food for no consideration. He found the fact that petitioner had claimed deductions for amortized goodwill on his federal schedule C forms for the transferred entities contradicted his allegation as to the amount of consideration paid for the assets.

The Administrative Law Judge further determined that petitioner had failed to establish the fair market value of the business assets on the respective dates of transfer. He did not accept into evidence petitioner's submission of revised calculations and amounts for the federal tax liens after the hearing had concluded and the record had closed. He found that petitioner's assertion that the fair market value of the business assets was reduced by the federal tax liens to be undermined by the values ascribed to them in the bulk sale notifications filed by Best Wings, Professional and Great Food, which petitioner signed. The Administrative Law Judge determined that petitioner failed to establish that the federal tax liens would be effective against the subject business assets after they had been transferred to the purchasers, since there was no indication that the liens were filed with the New York Secretary of State. The Administrative

Law Judge concluded that petitioner failed to establish that the notices of determination, as modified, should be further reduced or canceled and denied the petition.

ARGUMENTS ON EXCEPTION

Petitioner alleges on exception, as he did below, that the Division failed to properly serve the notices of determination. He contends that he did not consent to receive statutory notices electronically through his OLS account and, therefore, the assessments must be canceled. Petitioner asserts that a notice of determination is not a "bill or related notice," because at the time of mailing, it is not yet an assessment. Alternatively, petitioner argues that the Division failed to demonstrate that it followed its standard procedures for the OLS system because it did not exclusively use electronic means to issue notices of determination to petitioner. Petitioner alleges that between the date that the OLS account was created and the mailing date of the subject notices, the Division mailed other notices of determination, bills, and notifications of collection activity to petitioner through the US mail. Petitioner, therefore, alleges that he had no expectation that the notices would be sent electronically and claims that the Division should be equitably estopped from claiming that the notices were properly issued.

Petitioner further alleges that the Administrative Law Judge erred in determining that the Tax Law allows the Division to assess a bulk sales tax liability against a responsible person of a purchasing or transferee entity. Petitioner contends that bulk sale liability is neither a "collected tax" nor a "sales tax liability," but is merely a requirement to hold purchase funds in escrow until the Division clears them to be transferred to the seller. Petitioner contends that neither Best Wings, Great Foods, Professional, nor petitioner were ever under a duty to collect the sales tax that is claimed due by the Division. Petitioner further asserts that no consideration was given for the assets transferred and, even if there had been consideration, that money does not become a

"tax" for which petitioner may be liable under article 28. Petitioner argues that the Division's own regulations draw distinctions between general sales tax liabilities and the bulk sale provisions. He claims that the bulk sale regulations fail to mention either liability for a responsible person of a purchasing entity or a statute of limitation in which to assess such responsible person. He asserts that a bulk sale notification is not a return, yet the Division claims to have three years from the date that form is filed to assess a responsible person individually.

Petitioner contends that there was no payment of consideration between the purchasers and the sellers in these bulk sale transactions and, therefore, he claims that the Division's assessment must be limited to the fair market value of the assets transferred. Petitioner contends that BCMS accepted the amounts petitioner reported on the bulk sale notifications as the fair market value of the assets transferred. Specifically, petitioner claims that the assets transferred had gross fair market values of $145,700.00 and $249,500.00, respectively, as stated on those forms for each transaction. Petitioner contends that those amounts were based on an appraisal obtained by petitioner and provided to the Division and that they do not take into account the amount of federal tax liens on the assets. He claims that the fair market value of the assets is greatly reduced by the encumbrances held by the IRS. Further, he alleges that the Division's tax warrants do not enjoy a priority over the federal tax liens even if the federal tax liens are not filed with the New York Secretary of State. According to petitioner, that is because Best Wings, Professional and Great Food were merely transferees of the assets of Carlson and Car Kid and they do not qualify as purchasers. Therefore, petitioner argues that the liens did indeed attach to the assets transferred and that the IRS could foreclose on the assets to satisfy the liens. Petitioner

contends that there was no consideration for the assets and that the assessments are erroneous since they do not reflect the reduced value due to the existence of the federal tax liens.

The Division argues that the order and determination of the Administrative Law Judge should be affirmed without modification. The Division contends that petitioner authorized the Division to issue notices of determination electronically and that it properly issued the notices of determination at issue. It argues that a notice of determination notifies the recipient of a tax amount asserted due by the Division, which is a "bill or related notice" to which petitioner consented electronic delivery.

The Division further argues that it was proper to assert tax against petitioner as a responsible person of the purchasers. The Division contends that, as a responsible person, petitioner was under a duty to act for each purchaser in complying with the requirements of article 28, including the bulk sale requirements. Therefore, the Division argues that petitioner is properly held personally liable for the purchasers' bulk sales liabilities. The Division asserts that, since the purchaser's liability in a bulk sale transaction is limited to the greater of fair market value or consideration transferred, petitioner was required to prove both the amount of consideration paid for, and the fair market value of, the assets transferred to purchasers. Since petitioner did not present any evidence for either element at the hearing, the Division argues that petitioner failed to establish that the liabilities asserted were not properly calculated. It further argues that petitioner failed to establish that the purported federal tax liens were effective against the business assets transferred in order to reduce their fair market value.

OPINION

The present matter first came before the Administrative Law Judge as a motion for summary determination brought by petitioner and cross motion for summary determination brought by the

Division pursuant to 20 NYCRR 3000.9 (b). The Administrative Law Judge issued an order in which two of the issues presented for summary determination were decided. Thereafter, an evidentiary hearing was conducted, and a determination was issued regarding the remaining issue. Petitioner takes exception to both the order and the determination.

A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9 [b] [1]). Such a motion is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). Thus, the movant for summary determination "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], citing ***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where a material issue of fact is arguable (***Glick & Dolleck v Tri-Pac Export Corp.***, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***Gerard v Inglese***, 11 AD2d 381 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim' . . . " (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992] quoting ***Zuckerman v City of New York***, 49 NY2d at 562).

The first of the two issues decided on summary determination relates to petitioner's

allegation that the Division improperly served the notices by means of electronic communication and, therefore, that they must be canceled. It is well established that where, as here, the proper issuance of a statutory notice 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 notice or conciliation order (***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). The foregoing evidentiary standards are premised on statutes requiring that a notice of deficiency or determination be mailed in order to be properly issued (e.g. Tax Law § 1138 [a] [1]). In the present matter, however, the subject notices 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."[3]

Although the means by which notices of determination are properly issued differs under Tax Law §§ 35 and 1138 (a) (1), 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 (***Matter of Urrego***, Tax Appeals Tribunal, July 12, 2018). More specifically, where a statutory notice is issued under Tax Law § 35, we agree with the Administrative Law Judge that the Division must

[3] There are two sections 35 of the Tax Law. The section relevant here is titled "Use of electronic means of communication." The other section 35 contains provisions for the economic transformation and facility redevelopment program tax credit and is not relevant here.

establish its standard procedures for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders (***id.***). The Division must also show that such procedures were followed in the particular instance (***id.***).

We agree with the Administrative Law Judge that the Division has proven, through the affidavit of Monica Amell and the documentary evidence attached thereto, its standard procedures for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders. We also agree with the Administrative Law Judge that the Division has established through the affidavit and documentary evidence that the standard procedures were followed in this particular instance.

Specifically, the evidence shows that petitioner or someone acting on his behalf opened an OLS account on July 23, 2012 under his name, taxpayer identification number, and user identification number, using a logon ID name of "a***5***" and an email address of f**f****@***.com." On July 26, 2012, the Division sent an acknowledgment by US mail to petitioner confirming his creation of the OLS account under the username of "a***5***."

The evidence also establishes that on November 22, 2013, petitioner authorized the Division to send notices electronically by checking the box "Bills and Related Notices" within his OLS account, which indicated his agreement to receive tax bills, notices, and other notifications by email. Pursuant to petitioner's authorization for electronic communication, petitioner agreed to receive tax bills and account notices electronically rather than by US mail.

The Division has also offered proof sufficient to establish that the statutory notices were furnished to petitioner by means of electronic communication on July 2, 2015 and July 9, 2015, to his OLS account with alerts sent to his email address. Specifically, the Division's records

show that two email alerts were sent to petitioner's email address and the two subject notices of determination were posted to petitioner's OLS account and stored in his OLS Message Center on July 2, 2015 and July 9, 2015. 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 those emails as "D" (delivered).

Based on the foregoing, we conclude, as did the Administrative Law Judge, that the Division has presented sufficient evidence to establish that it furnished the subject notices of determination on July 2, 2015 and July 9, 2015, respectively, using an electronic means of communication pursuant to Tax Law § 35, and that the records presented constitute appropriate and sufficient proof of delivery thereof (***id.***).

It is undisputed that an OLS account exists for petitioner and that the notices were sent by the Division and delivered to his account on the dates alleged by the Division, although petitioner alleges he did not learn of them until after the period of limitations to respond had expired. Further, petitioner does not dispute that he consented to receive bills and related notices by electronic communication instead of by US mail. Petitioner's claim, in essence, is that a notice of determination is not a "Bill or Related Notice" but, instead, is a statutory notice with formal protest rights, which is distinguished from an ordinary bill. He claims that he did not consent to receive statutory notices by electronic communication and, therefore, the service of the notices was improper and should be canceled. He alleges that the acknowledgement page for consent to electronic delivery did not define "Bills and Related Notices," nor did it provide documents that were included in that definition. He argues that a statutory notice logically cannot be a bill since at the time of mailing, it is not yet an assessment.

Petitioner further contends that, even if a notice of determination is considered a bill or related notice, the Division failed to follow its own procedures in this case because it did not exclusively use electronic means to issue notices of determination to petitioner. Petitioner claims that the Division sent other notices of determination, bills, and notifications of collection activity to him through the US mail between the date that the OLS account was created and the date of the subject notices. Petitioner, therefore, alleges that the Division failed to regularly follow its standard protocol for the OLS system and should be equitably estopped from claiming that the notices were properly issued.

The Division argues that a notice of determination notifies the recipient of an amount due to the Division, which is a "Bill or Related Notice" for which petitioner consented to receive by electronic delivery. The Division asserts that when petitioner agreed to receive "Bills and Related Notices" through electronic means, he acknowledged that his protest rights for bills and notices received through the OLS account were the same as for paper bills. The Division asserts that such acknowledgement would be meaningless if "Bills and Related Notices" were not statutory notices and could not be protested.

We find that, in plain language, a notice of determination is a tax bill or statement of tax due that is issued by the Division for purposes of the OLS system as described herein and Tax Law § 35. Petitioner has provided no authority for his assertion that such notices do not properly fall under the category of "Bills and Related Notices." Specifically, the record shows that at the time petitioner authorized the Division to send notices electronically, the OLS system terms and conditions listed "Notice of Determination Series" under the category of "Bills and Related Notices" that could be sent to individual users of the OLS system. Pursuant to those terms and conditions, by providing electronic communication authorization, petitioner agreed to electronic

receipt of the documents and communications listed under "Bills and Related Notices" and agreed that the Division would not use US mail to provide those communications.

As the movant for summary determination, it was incumbent upon petitioner to come forward with evidence demonstrating his entitlement to judgment as a matter of law on this issue. Petitioner, however, failed to present any authority for his assertions, or any testimony or documentary evidence in support of his allegations that the Division failed to follow its protocols and procedures in issuing the subject notices. As we concluded above, the Division has established that it followed its standard procedures for issuing the subject notices by means of electronic communication and that its records demonstrate proof of delivery.

We would also point out that petitioner here has not been prejudiced in that he is currently exercising his due process rights to challenge the subject notices (***see Matter of Henry Street Deli***, Tax Appeals Tribunal, February 21, 2017). The record shows that the Division failed to provide copies of the subject notices to petitioner's attorney who had a valid power of attorney on file. In such cases, we have held that where the notice is technically proper in other respects, but an attorney with proper power of attorney was not served, the limitations period for petitioner to respond will be tolled until the attorney has been served (***id.***). Here, recognizing that petitioner's attorney was not served, petitioner was given additional time to file a request for conciliation conference, which he filed with BCMS, and he is now further pursuing his protest rights at the Division of Tax Appeals and Tax Appeals Tribunal. Petitioner has been given a fair opportunity to challenge the accuracy and legal validity of his tax obligation and has not shown any prejudice due to his unsubstantiated claims of improper service.

Next, we turn to the second issue addressed by the Administrative Law Judge on the motion for summary determination. The Administrative Law Judge rejected petitioner's argument that

the Division is not authorized to issue a notice of determination for a seller's outstanding tax obligation to the responsible person of a purchasing entity that fails to comply with the bulk sale requirements. As noted, the tax in question here is derived from the successive transfers of the business assets of Wing City and the Casino from Carlson and Car Kid, respectively, to Best Wings and then the transfer of the assets of Best Wings to Professional and Great Food. Steven Carlson owned both Carlson and Car Kid. Petitioner is Steven Carlson's son. Initially, we note that Best Wings failed to comply with the bulk sale notification prior to the purchase of the Casino and Wing City. Likewise, neither Professional nor Great Food complied with the bulk sale notification requirement prior to the purchase of the Casino and Wing City from Best Wings. Petitioner was the managing member of Best Wings, Professional and Great Food.

Petitioner argues that there is no statutory authority for holding the responsible person of a purchasing entity liable for the sales tax liabilities of a selling or transferring entity. Petitioner contends that a bulk sale liability is neither a "collected tax" nor a "sales tax liability." He asserts that Tax Law § 1141 (c) merely provides that consideration for the transfer of assets be held in escrow until the purchaser receives clearance from the Division to release the funds to the seller. Petitioner claims that no consideration was given for the transfer of assets and, even if there had been consideration, such funds would not become "tax" under article 28 but would have simply been used to satisfy an outstanding liability of the seller. He asserts that the person required to collect tax is limited to the seller, and that neither Best Wings, Great Foods, nor Professional were ever under a duty to collect the sales tax that is allegedly owed. Petitioner argues that the bulk sale regulations fail to mention either liability of a responsible person of a purchasing entity or a statute of limitation in which to assess such responsible person. He asserts that a bulk sale notification is not a return, yet the Division claims to have three years

from the date the form is filed to assess a responsible person individually. For the following reasons, we disagree with petitioner's arguments.

Tax Law § 1141 (c) requires the purchaser in a bulk sale transaction to give notice of such sale to the Division at least 10 days before taking possession of, or making payment for, the business assets of a selling company. Upon receipt of a timely notice of sale, the Division is required to inform the purchaser of any potential claims for sales and use taxes that may still be owed by the seller of the business (***see*** 20 NYCRR 537.0 [c] [3]). The liability of a purchaser in the context of bulk sale is a derivative liability (***see*** 20 NYCRR 537.3 [b] [2]). Notwithstanding that fact, the sales tax liability of the purchaser, transferee or assignee is "assessed and enforced in the same manner as the liability for any tax imposed by article 28 of the Tax Law" (Tax Law § 1141 [c]). Tax Law § 1141 (c) provides "in unequivocal terms" that a purchaser who fails to withhold funds from the seller or fails to give proper and timely notice of a bulk sale to the Division, becomes personally liable for the payment of the seller's unpaid sales and use taxes (***see Harcel Liqs. v Evsam Parking***, 48 NY2d 503, 507 [1979]; ***see*** 20 NYCRR 537.4 [a] [1]). The liability of the purchaser is limited to the greater of the purchase price or the fair market value of the business assets sold or transferred (***see*** 20 NYCRR 537.4 [a] [1]; 537.4 [c]). Contrary to petitioner's assertions, Tax Law § 1141 (c) not only imposes a first priority right and lien on the consideration transferred from purchaser to seller, it also makes a non-compliant purchaser in a bulk sale transaction personally liable for the payment of the taxes due and owing from the seller to the extent of the purchase price or fair market value of the assets transferred. In so doing, it allows the Division to preserve its "indisputable right to collect taxes which could otherwise be extinguished by the simple expedient of a taxpayer transferring its assets" (***Harcel Liqs. v Evsam Parking*** at 507; ***see Spandau v United States of Am.***, 73 NY2d 832 [1988]).

Petitioner's arguments notwithstanding, Professional and Great Food, as purchasers and transferees of the assets of Best Wings became personally liable for the sales tax due from Best Wings, limited to the purchase price or fair market value of the business assets sold, whichever is higher (20 NYCRR 537.0 [c] [2]).

Petitioner's liability for the sales tax due derives from his position as the managing member of Professional and Great Food. Tax Law § 1133 (a) provides that " . . . every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article" (***see Matter of Franklin***, Tax Appeals Tribunal, May 14, 2015).

Tax Law § 1131 (1) defines "persons required to collect tax" or "person required to collect any tax imposed by this article" to include, inter alia:

> "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).

The Tax Appeals Tribunal has consistently interpreted the foregoing language as imposing strict liability upon members of a limited liability company for sales tax liabilities (***see Matter of Boissiere and Krystal***, Tax Appeals Tribunal, July 28, 2015; ***see also Matter of Franklin***; ***Matter of Santo***, Tax Appeals Tribunal, December 23, 2009). Petitioner, as the managing member and sole owner of the limited liability companies at the center of this dispute, was thus a person required to collect tax under Tax Law § 1131 (1).

Contrary to petitioner's assertions, neither the Tax Law, nor our decisions, support his position that a responsible person for a limited liability company is not personally liable for the

company's derivative sales tax obligations resulting from a bulk sales transaction. As stated above, Tax Law § 1141 (c) specifically permits the Division to pursue liability for failure to comply with the bulk sale provisions in the same manner as the liability for tax under article 28 and that is precisely what the Division is doing. Furthermore, an unprotested purchaser liability under Tax Law § 1141 (c) is an assessment of tax (Tax Law § 1138 [a] [3] [A]). Here, the notices of determination issued to Professional and Great Food arising from the bulk sale went unprotested and thus became final assessments. As petitioner was a responsible person of Professional and Great Food, he is personally liable for the tax assessed by the Division against those limited liability companies (Tax Law §§ 1133 [a], 1131 [1]); ***see Matter of Reuben***, Tax Appeals Tribunal, August 27, 2019; ***Matter of Laschever***, Tax Appeals Tribunal, March 23, 1989; ***Matter of J & L Home Improvement Corp.***, Tax Appeals Tribunal, August 1, 1991).

Petitioner's reliance upon ***Matter of Giorgi*** (State Tax Commission, September 19, 1980), for the proposition that the responsible person of a purchaser in a bulk sale transaction is not liable for the sales tax obligations of the seller is misplaced. First, we note that decisions of the former State Tax Commission are not binding precedent (***Matter of Campaniello***, Tax Appeals Tribunal, July 21, 2016). Second, even if precedential, ***Giorgi*** is distinguishable. In ***Giorgi***, the Division had filed notices against the petitioner after he had assigned the contract to purchase the business to the ultimate purchaser. There is no indication that the notices were filed against the petitioner as a responsible person and the Tax Commission did not analyze or consider the issue of whether the petitioner was a responsible person of the ultimate purchaser.

In support of his contention that Tax Law § 1141 (c) does not provide for responsible officer liability, petitioner notes that the bulk sale regulations fail to mention a statute of limitations in which to assess such a responsible officer. Petitioner did not, however, affirmatively raise a

statute of limitations defense (***Adamides v Chu***, 134 AD2d 776, 778 [3d Dept 1987], ***lv denied*** 71 NY2d 806 [1988]). Hence, petitioner did not establish a prima facie statute of limitations violation as required (***see Matter of Kropf***, Tax Appeals Tribunal, March 21, 1991) and the Division did not have the opportunity to respond thereto. Accordingly, we do not address that issue here.

Next, we turn to the issues of consideration, if any, the fair market value of the assets transferred, and whether that value was reduced by the existence of federal tax liens. The notices of determination issued to petitioner as a responsible person of Professional and Great Food each asserted tax due of $395,200.00. On March 24, 2017, the Division reduced Professional's sales tax assessment to $249,500.00 and Great Food's sales tax assessment to $145,700.00, the amount reported as the total sales price in the respective bulk sale notifications signed by petitioner (***see*** findings of fact 11 and 13). Thereafter, by conciliation order, dated September 15, 2017, BCMS reduced the notices of determination issued to petitioner in accordance with the adjustments made to the assessments of Professional and Great Food in the amounts of $249,500.00 and $145,700.00, respectively (***see*** finding of fact 23). As noted, neither Professional nor Great Food protested the assessments made against them.

Petitioner argues that the Division's ability to pursue Best Wings, Professional and Great Food must be limited to the amount of consideration paid for the assets, or fair market value of the assets transferred, after application of the federal tax liens to those assets. On exception, petitioner alleges that there was no payment of fair consideration for the transfer of assets: (1) between Steven Carlson's entities (Carlson and Car Kid) and Best Wings, or (2) between Best Wings and Professional or Great Food; and that the fair market value of the assets was greatly

reduced by the federal tax liens. Petitioner has the burden to prove these allegations (***Matter of Hammerman***, Tax Appeals Tribunal, August 17, 1995).

As discussed above, Tax Law § 1141 (c) and the accompanying regulations provide for a maximum amount of tax liability that may transfer to the purchaser of assets in a bulk sale transaction who fails to properly notify the Division of the sale and withhold the funds from the seller (***see*** 20 NYCRR 537.4 [a] [1]; 537.4 [c]). In order to meet his burden of proof, petitioner must establish that maximum limit by proving the purchase price and the fair market value of the assets transferred to Professional and Great Food by Best Wings (***see Matter of Ultimat Security, Inc.,*** Tax Appeals Tribunal, May 31, 2012).

At the hearing, petitioner did not present testimony or other evidence, such as a contract or closing statement, in order to establish that the purchase price of the business assets differed from that reported on the bulk sale notifications. There is nothing in the record to substantiate petitioner's claim that the business assets of Carlson and Car Kid were transferred to Best Wings and then to Professional and Great Food for no consideration. Moreover, petitioner's assertion that no consideration was paid for the assets is contradicted not only by the bulk sale notifications, but also by petitioner's deductions for amortized goodwill on his federal schedule C forms for the transferee entities. As to the impact of tax liens on the purchase price, it is well-established that payment or assumption of outstanding debt or liens constitutes consideration paid by a bulk sale purchaser (***Matter of O'Brien***, Tax Appeals Tribunal, March 19, 1992).

The same lack of evidence must also result in petitioner's failure to establish the fair market value of the assets transferred. Independent, third party information regarding the value of the assets is particularly necessary where, as here, the record shows that the transaction between Carlson and Car Kid and Best Wings was arranged between two related business owners, Steven

Carlson and his son, petitioner Andrew Carlson. Furthermore, petitioner was the managing member of both seller and purchaser in the transactions between Best Wings and Professional and Great Food. Yet, there were no appraisals, purchase invoices, or any form of third-party information submitted as to the fair market value of the assets when they were transferred. Petitioner, instead, relies on the values listed in the bulk sale notifications and argues that those amounts should be reduced by the amount of the federal tax liens to arrive at fair market value. Petitioner alleges that the federal tax liens are superior to the tax warrants issued by the Division and are an encumbrance on, and serve to reduce the fair market value of, the business assets transferred. However, the Administrative Law Judge did not accept petitioner's federal tax lien calculations, which were submitted after the record had closed (***see*** findings of fact 39 and 40). Finally, petitioner's argument with respect to the federal tax liens is undermined by his consent to the assessments based on the amount listed in the bulk sale notifications, the claimed existence of such federal tax liens not withstanding (***see*** finding of fact 18).

Even assuming that petitioner established the amount of the federal tax liens and that such liens have a bearing on the value of the assets, petitioner must establish the fair market value against which to apply the liens. As discussed, however, petitioner offered no evidence to support any change to the total sales prices as reported in the bulk sale notifications. Accordingly, in the absence of evidence to establish the purchase price and fair market value of the business assets transferred, petitioner has failed to meet his burden of proof to show by clear and convincing evidence that the amount of tax assessed was erroneous (***see Matter of Ultimat Security, Inc.***).

Finally, petitioner has submitted additional documentary evidence along with his reply brief on exception, well after the date by which all comments and evidence were to have been

submitted and after the issuance of the determination by the Administrative Law Judge. We have held that to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties can submit additional evidence after the record is closed, there is neither definition nor finality to the process (***see Matter of Saddlemire***, Tax Appeals Tribunal, June 14, 2001; ***Matter of Emerson***, Tax Appeals Tribunal, May 10, 2001; ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). Therefore, in the interests of maintaining a process that is both defined and final, the additional documentation submitted by petitioner has not been considered by this Tribunal.

Based on the foregoing, petitioner has not established that the notices of determination, as modified by the September 15, 2017 conciliation order, should be further reduced or canceled.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Andrew Carlson is denied;

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

3. The petition of Andrew Carlson is denied; and

4. The notices of determination dated July 2, 2015 and July 9, 2015, as modified by the conciliation order dated September 15, 2017, are sustained.

DATED: Albany, New York
April 29, 2021

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner