

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**GREGG M. REUBEN** : DETERMINATION  
for Revision of Determinations or for Refund of Sales : DTA NO. 827466  
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. :  
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Petitioner, Gregg M. Reuben, filed a petition 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.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on June 14, 2017 at 11:06 A.M., in New York, New York, with all briefs to be submitted by October 19, 2017, which date began the six-month period for issuance of this determination. 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., of counsel).

***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***

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.”<sup>1</sup>

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

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

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<sup>1</sup> 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.

ultimately fired 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. Over the next few months, 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 sometime in 2015, Alliance Parking ceased its business operations.

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 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 Section 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 undersigned 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 undersigned 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 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.<sup>2</sup> 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 5 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

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<sup>2</sup> This CMR was attached as exhibit "A" to Ms. Picard's affidavit.

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 their account. These Terms and Conditions have been updated various times throughout the existence of the OLS system.<sup>3</sup> 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

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<sup>3</sup> 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.

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 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. 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.<sup>4</sup>

57. Ms. Schettine avers that on November 15, 2012, an OLS account was created for petitioner using the email address XXXXXXXXXXXXXXXXXXXX.com and the telephone number 917-

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<sup>4</sup> In paragraph 12 of Ms. Schettine's affidavit, she stated that "[t]he e-MPIRE account summary tab will be used by the [Division] to determine the taxpayer's address for all mailings, including Notices of Deficiency." This is an inconsequential proof reading error.

XXX-XXXX.<sup>5</sup> She further avers that to create this account, petitioner was required to follow all of 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,<sup>6</sup> 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, XXXXXXXXXXXXXXXXXXXX.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.

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<sup>5</sup> Petitioner's email address and telephone number have been redacted for confidentiality purposes.

<sup>6</sup> 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.”

60. Attached as exhibit “4” to Ms. Schettine’s affidavit is a copy of a one-page email, dated 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 undersigned 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, XXXXXXXXXXXXXXXX.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.

***CONCLUSIONS OF LAW***

A. Tax Law §§ 1138 (a) (1) and 1147 (a) (1) govern the issuance of a notice for the assessment of sales and use tax liability against an individual. Tax Law § 1138 (a) (1) provides:

“A notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state . . . . After ninety days from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing, or unless the commissioner of his own motion shall redetermine the same.”

Tax Law § 1147 (a) (1) provides:

“Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of [article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.”

B. Petitioner contends that the Division did not issue the subject notices of determination in compliance with Tax Law § 1147 before the statute of limitations expired, and therefore the notices are invalid and void. He claims that the notices were not addressed to “his last known address” at the time they were mailed, so as to be considered “properly mailed.” Petitioner asserts that his 2013 resident income tax return electronically filed on October 2, 2014 listed his address as 555 West 59th Street, Apt. **32D**, New York, New York 10019. However, the address listed on each of the subject notices of determination was 555 West 59th Street, Apt. **31D**, New York, New York 10019.

C. The initial inquiry under the foregoing statutory framework is whether the Division has carried its burden of demonstrating proper issuance of the notice being challenged by mailing the same, by certified or registered mail, to petitioner's last known address (Tax Law § 1138 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A statutory notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of a statutory notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

D. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id*; *see also Matter of Ruggerite, Inc. v State Tax Commission*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

E. Turning first to notice of determination L-042249602, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). Further, the Division has also presented sufficient documentary

proof, i.e., the CMR, to establish that notice of determination L-042249602 was mailed by certified mail addressed to petitioner on December 2, 2014. That is, the documents establish that the general mailing procedures described in the affidavits were followed with respect to notice of determination L-042249602 issued to petitioner. Petitioner's name and address, as well as the numerical information of the notice, appear on and correspond to such information as set forth on the CMR, each page of which bears a USPS date stamp of December 2, 2014 and the initials of the USPS employee. There are 381 certified mail control numbers listed on the CMR for December 2, 2014, and the USPS employee who initialed the CMR indicated by writing and circling the number "381" next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE" that 381 items were received for mailing. The CMR has thus been properly completed, and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

F. The only remaining issue is whether notice of determination L-042249602 was addressed to petitioner at "his last known address" at the time it was mailed, so as to be considered "properly mailed." The Division contends that petitioner notified it of a change to his address to include "Apt. 31D" through an address change made by him via his OLS account on October 27, 2014. As such, the Division maintains that notice of determination L-042249602 was properly issued to petitioner at his last known address of record, i.e., 555 West 59th St. Apt. 31D, New York, NY 10019-1247. Petitioner argues there is no credible evidence that he actually created an OLS account on November 15, 2012. He contends that the notice dated November 20, 2012 confirming the opening of an OLS account was not addressed to him at his home address, but was addressed to him at WH Parking's Broadway garage address, which such notice petitioner denies ever receiving.

Petitioner further argues that he never gave notice to the Division through the OLS account of a change in his address after his 2013 New York return was filed.

G. As noted previously, Tax Law § 1138 (a) (1) calls for mailing to a person's "last known address in or out of this state," and Tax Law § 1147 (a) (1) further calls for mailing to "the address given in the last return filed by him pursuant to the provision of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable."

The Division has established that notice of determination L-042249602 was mailed to petitioner's last known address of record, 555 West 59th Street, Apt. 31D, New York, NY 10019. The affidavit of Ms. Schettine, who supervises the Account Summary and Online Services section of the ESB, adequately describes the procedures used by a taxpayer to create an online services account through the Division's public website and, thereafter, to access numerous online services such as individual change of address, submitting payments, and responding to Division notices. I note that there are safeguards in place to prevent the creation of an erroneous account (*see* findings of fact 52 and 54) and that a taxpayer must agree to the Division's 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.*). Ms. Schettine's affidavit also sets forth the procedures for requesting a change of address in a taxpayer's online services account via the change of address web service in the Division's online services system, the internal email used by the Division to reflect such an update, and the confirmation that the address change was automatically updated in the taxpayer's e-MPIRE account on the individual's address summary tab with a source of "WEB ADR CHG (N9)" (*see* findings of fact 55 and 56). The record clearly shows that an online services account was created for petitioner via the

Division's web site on November 15, 2012 (*see* finding of fact 58). It also shows that on October 15, 2013, 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 2012, dated October 9, 2013 (*see* finding of fact 59). Additionally, the record shows that change of address requests were made through petitioner's online services account on November 13, 2013 and October 27, 2014. Specifically, a change of address to 555 West 59th Street, Apt. 31D, New York, NY 10019, was made via the change of address web service from within his account on November 13, 2013 (*see* findings of fact 59 - 61). The record also indicates 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 (*see* finding of fact 62). It also indicates that on October 27, 2014, an address change was made via the change of address web service from petitioner's online services account updating his address of record from 555 West 59th St., Apt. 32D, New York, NY 10019 to 555 West 59th St., Apt. 31D, New York, NY 10019 (*see* findings of fact 62 - 64). This was petitioner's last known address prior to the issuance of notice of determination L-042249602 on December 2, 2014.

With respect to petitioner's contention that there is no credible evidence that he created the OLS account or that he gave notice to the Division through the OLS account of a change in his address, it is rejected. Petitioner vaguely testified that he could not recall either creating an OLS account or receiving the notice, dated November 20, 2012, confirming the creation of such OLS account. However, he admitted the username supplied to create the OLS account was his e-mail address. He also testified that he was unable to recall ever notifying the Division that he had moved from the address that he used on his tax return. Pursuant to the foregoing discussion, I find that the

Division made a prima facie showing 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.

H. The Division has thus established proper mailing of notice of determination L-042249602 to petitioner's last known address (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). While petitioner has the right to rebut this presumption, such rebuttal must consist of more than simply the denial of receipt (*see Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011). At the hearing, petitioner testified that he did not recall ever receiving the notice of determination. Such denial is not sufficient to rebut the presumption (*see Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011).

I. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals or, alternatively, a request for conciliation conference with BCMS (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a] [a]). As relevant here, there is a 90-day statutory time limit for filing such a protest, as measured from the date of mailing (*id.*). The record establishes that notice of determination L-042249602 was issued on December 2, 2014, and that the request for conciliation conference was received on December 14, 2015, a date beyond the 90-day period of limitations. BCMS thus properly dismissed such request. Furthermore, given the late-filed request, the Division of Tax Appeals may not consider the merits of petitioner's protest of notice of determination L-042249602. (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

J. Turning next to notices of determination L-041978311, L-041978312, and L-041978313, the Division has introduced adequate proof of its standard 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 (*see Matter of Victory Bagel Time*).

K. Here the Division cannot rely on the October 3, 2014 CMR to establish that notices of determination L-041978311, L-041978312 and L-041978313 were mailed as addressed to petitioner on October 3, 2014. There are a number of flaws in the CMR. First, there is no legible postmark on the last page of the CMR, page 22. In addition, there is no evidence of the total number of pieces received at the post office on the last page of the CMR. The “Total Pieces Received at Post Office” line on page 22 is blank. Contrary to the Division’s contention, the circling of the amount of postage listed on page 22 by the USPS employee does not establish the total number of pieces of certified mail received at the post office. As such, it is impossible to determine the number of pieces of mail received at the post office.

In sum, the CMR was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

L. Absent proof of proper mailing, the 90-day period for filing either a request for conciliation conference or a petition is tolled until such time as actual notice of the assessment is received by the taxpayer (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest would have commenced, unless issuance of the notice was precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v Tax Commission of the State of New York*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990; *Matter of Ruggerite, Inc. v State Tax Commn.*). Here, petitioner denied receiving notices of determination L- 041978311, L-041978312 and L-041978313. It is noted that petitioner filed his request for

conciliation conference in protest of notices of determination 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. The Tax Appeals Tribunal has held that where a petitioner has received notice of the tax liability, but the exact date of mailing of the notice of determination cannot be established, the petitioner is entitled to a hearing to challenge the assessment of tax due (*see Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). In this proceeding, the parties were allowed to address both the timeliness of petitioner's protest of the notices of determination and the underlying merits of the assessments.

M. Tax Law § 1133 (a) provides that “every person required to collect any tax imposed by this article [article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article.”

N. Tax Law § 1131 (1) defines a “person required to collect any tax imposed by this article” to include:

“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).

O. As noted above, Tax Law § 1131 (1) clearly states that any member of a limited liability company is a “person required to collect any tax imposed by this article” and, as provided in Tax Law § 1133 (a), a member of a limited liability company “shall be personally liable for the tax imposed, collected or required to be collected under this article.” The Tax Law contains no factors to qualify or limit the liability imposed upon members of limited liability



companies. In *Matter of Santo* (Tax Appeals Tribunal, December 23, 2009), the Tribunal stated:

“Petitioner was a member of a limited liability company and, as with members of a partnership, such members are subject to per se liability for the taxes due from the limited liability company. . . . Since Tax Law § 1131(1) imposes strict liability upon members of a partnership or limited liability company, all that is required to be shown by the Division for liability to obtain is the person’s status as a member.”

P. Petitioner was a member of Alliance Services, an LLC. He owned 99% of that entity individually, and owned the remaining 1% of that entity as the sole shareholder of Gregg M. Reuben, Inc., an S corporation that was the only other member of Alliance Services (*see* finding of fact 2). Alliance, in turn, was the sole member of WH Parking, an LLC (*see* finding of fact 4). By virtue of his status as a member of Alliance, an LLC that was, in turn, the sole member of WH Parking, petitioner was properly subject to assessment, and was per se personally liable, pursuant to Tax Law §§ 1133 (a) and 1131 (1), for the sales and use taxes due herein (*see Matter of Santo; see also Matter of Eugene Boissiere and Jason Krystal*, Tax Appeals Tribunal, July 28, 2015; *Matter of Franklin*, Tax Appeals Tribunal, May 14, 2015).<sup>7</sup>

Q. Given the foregoing, it is not necessary, for purposes of determining petitioner’s liability for the taxes in question, to further inquire into the particulars of petitioner’s

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<sup>7</sup> Recognizing that the statutory scheme, with its imposition of strict, per se, liability “can result in harsh consequences for certain partners and members who have no involvement in or control of the business’s affairs,” the Division issued TSB-M-11 (17) S to provide some relief to certain limited partners and certain LLC members. The Division’s policy eliminates the collection of penalties from the eligible individual, and reduces liability relative to the percentage of profits or losses received by the eligible individual. In order for an LLC member to qualify for such relief, that member must demonstrate that:

- (1) the member owns less than a 50% interest in the LLC; and
- (2) the member was not under a duty to act for the LLC in complying with the Tax Law.

In light of petitioner’s ownership interest as a member of Alliance, and of Alliance’s ownership interest as the sole member of WH Parking, as well as petitioner’s position of responsibility and duty to act with regard to the business, he is not eligible for the relief afforded under TSB-M-11 (17) S.

involvement in the business of Alliance, or of WH Parking. In fact, petitioner did not address or refute the Division's position that he was, and is, per se liable for the taxes at issue. However, such inquiry is relevant and necessary in order to address the question of abatement of the penalties assessed against petitioner, inasmuch as the same may be reduced or eliminated upon a showing of reasonable cause sufficient to overcome their imposition (*see* Tax Law § 1145 [e]).<sup>8</sup>

R. Petitioner's primary contention is that Mr. Bovell, rather than he, should be held as the responsible person under a "duty to act." In this vein, petitioner argues that the obligation to file returns and pay taxes on behalf of Alliance and WH Parking, as required, was delegated to Mr. Bovell, whose acceptance of those obligations rendered him a responsible person under a duty to act. In turn, petitioner argues that the allegedly deceitful actions engaged in by Mr. Bovell left petitioner unable to learn that required returns were not being filed, and taxes due were not being paid, and suffices as reasonable cause sufficient to excuse petitioner from any duty he was under.

S. As to petitioner's first argument, and notwithstanding that Mr. Bovell, in addition to petitioner, appears to have been under a duty to act, it is well settled that Tax Law § 1133 (a) creates joint and several liability for unpaid sales and use taxes, including penalties imposed in connection therewith (*see Matter of Milne*, Tax Appeals Tribunal, February 17, 2005; *Matter of Wendel*, Tax Appeals Tribunal, February 3, 2000). Moreover, petitioner's argument that even if he was under a duty to act, his failure to have done so resulted from the actions of Mr. Bovell,

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<sup>8</sup> As described, petitioner was one of two members of Alliance, which was, in turn, the sole member of WH Parking whose sales and use tax liabilities have been assessed against petitioner as a person under a duty to collect and remit, per Tax Law §§ 1131 (1) and 1133 (a). In fact, petitioner owned 100% of Alliance, as an individual member holding a 99% interest therein, coupled with his status as the sole shareholder of the S corporation member that held the remaining 1% interest in Alliance (*see* Conclusion of Law P). Assuming, arguendo, that the intervening ownership of WH Parking by Alliance, itself an LLC, precludes the imposition of strict, per se liability against petitioner, on the basis that he was not directly a member of WH Parking, he nevertheless remains subject to the liabilities in question as a person under a duty to collect and remit via his ownership and management of Alliance (and, in turn, of WH Parking), as described fully hereinafter (*see* conclusions of law R through W).

and should be excused, is unavailing under the facts of this case.

T. The factors relevant in reaching a determination as to whether an individual is a person under a duty to act in assuring the collection and remittance of sales and use taxes under Tax Law articles 28 and 29 include, but are not limited to, the authority to sign checks, responsibility for managing the entity and maintaining its books, and the ability to hire and fire employees (*see Ippolito v Commissioner of New York State Dept of Taxation and Fin.*, 116 AD 3d 1176 [3d Dept 2014]). These factors 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).

U. The facts here reveal that petitioner not only owned Alliance, which in turn owned WH Parking, but that he created and built the business of Alliance through numerous “single-purpose entities,” one of which was WH Parking. At all times, petitioner played an active and ongoing role in the business. His authority included the hiring and firing of employees, and the hiring or engagement of outside vendors of goods and services, including retention of accounting and bookkeeping firms (*see* findings of fact 10, 11, 13 and 17). He filed the

certificate of authority for WH Parking, and listed himself as the sole responsible person thereon. He was the sole authorized signatory on the bank account of WH Parking, and clearly had authority to sign documents, including checks and tax returns. He set up new operating LLCs in conjunction with expanding the business, and he was fully involved, as noted, in “growing the business” by hiring staff (including Mr. Bovell) as needed, entering into new deals with new parking facilities, and engaging in strategic partnerships. Petitioner testified that the employees, vendors, clients and landlords with whom Alliance and WH Parking did business would come to him if there was a problem, because he had relationships with those people (*see* finding of fact 15). In view of these facts, petitioner was clearly a person under a duty.

V. As noted, petitioner seeks to place responsibility for the difficulties and ultimate demise of the business, and responsibility for the attendant unpaid sales and use tax liabilities, including accompanying penalties, upon Mr. Bovell. He argues that Mr. Bovell thwarted petitioner’s ability to know, or learn, of the non-filing of returns and the nonpayment of sales and use taxes, among other liabilities. On this score, it is well established that one cannot absolve himself of liability by simply delegating authority to a subordinate, or by “disregarding their duty and leaving it to someone else to discharge” (*Ippolito* at 1177). In this case, the evidence reflects that petitioner simply delegated all financial responsibilities, including the obligation to file sales and use tax returns and remit the taxes due thereon, to Mr. Bovell, and relied entirely upon that subordinate to execute those responsibilities. Petitioner did this without thereafter exercising any real oversight or having any mechanisms in place to ensure that such responsibilities were being carried out. This was simply not a reasonable delegation, and does not provide cause to support waiver of penalties.

W. There is no evidence that petitioner took any steps to determine whether required

returns were being filed, or whether the taxes due were, in fact, being paid. Petitioner stated that he directed his attention to the operational aspects of the facilities, and to continuing the growth of the business, and admitted that he didn't look at the mail unless someone brought it to his attention (*see* finding of fact 15). There is no evidence of a system of checks and balances being put in place with respect to financial matters, including the payment of the taxes at issue.

Although petitioner was "very concerned" about moving payroll functions in-house, allegedly at the request of Mr. Bovell, there is no evidence that he took any steps to allay those concerns (*see* finding of fact 12). Rather, petitioner chose to simply rely upon the absence of complaints from clients, vendors and others to alert him to any financial problems (*see* finding of fact 15). There is no evidence that, notwithstanding the allegedly 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. The record clearly shows that petitioner chose to delegate full responsibility for financial matters, and to place his trust in one individual to carry out the obligations attendant thereto, while focusing his own attentions on other areas of the business. Simply and casually questioning the person to whom such duties are entrusted, and receiving assurances of compliance from that person, without more, does not constitute reasonable care and attention in confirming that the delegated duties were being carried out. Unfortunately, the fact that petitioner's judgment and trust was apparently misplaced does not lead to a conclusion that petitioner was precluded from assuring that the taxes in question were remitted, or support a conclusion that petitioner's choice to entrust Mr. Bovell with such significant responsibilities, without any real oversight or affirmative acts to ensure that the same were being properly carried out, constituted a reasonable delegation of the authority that petitioner clearly possessed

and was under a duty to carry out. In short, petitioner's choice to focus his attention on other business matters does not absolve him of his duty to act, or of the consequences of his failure to have done so.

X. Taxpayers seeking abatement of penalties face an onerous task in establishing that non-filing, non-payment, late filing or late payment giving rise to their imposition was due to reasonable cause. "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation" (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992; *affd* 193 AD2d 978 [3d Dept 1993]). The facts in this matter do not support abatement of penalties.

Y. The petition of Gregg M. Reuben is dismissed with respect to notice of determination L-042249602, dated December 2, 2014, and denied in all other respects; and notices of determination L- 041978311, L-041978312 and L-041978313, dated October 3, 2014, are sustained.

DATED: Albany, New York  
April 19, 2018

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE