

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CORNERSTONE KITCHEN CABINETS, INC.** : DETERMINATION  
for Revision of Determinations or for Refund of Sales : DTA NO. 827893  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period March 1, 2011 through May 31, 2015; for :  
Redetermination of Deficiencies or for Refund of :  
Corporation Franchise Tax under Article 9-A of the Tax :  
Law for the Fiscal Years Ended September 30, 2012 :  
through September 30, 2014; and for Redetermination of :  
Deficiencies or for Refund of New York State Personal :  
Income Tax under Article 22 of the Tax Law for the :  
Periods ended December 31, 2013 and June 30, 2014. :  
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Petitioner, Cornerstone Kitchen Cabinets, Inc., 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 period March 1, 2011 through May 31, 2015; for redetermination of deficiencies or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended September 30, 2012 through September 30, 2014; and for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the periods ended December 31, 2013 and June 30, 2014.

On December 2, 2016, then Supervising Administrative Law Judge Daniel J. Ranalli issued to petitioner a notice of intent to dismiss petition pursuant to Tax Law § 2006(4) on the basis that the petition did not appear to be timely filed with respect to Notice of Determination

L-044065778-5, and that the required statutory notices were not included with the petition (20 NYCRR 3000.3[b][8]). On February 8, 2017, upon extension, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel) submitted an affidavit and accompanying documents, including other affidavits, in support of the proposed dismissal of the petition. Petitioner, appearing by Scott Burgwin, CPA, did not submit a written response to the proposed dismissal of the petition.<sup>1</sup> Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on February 17, 2017. After due consideration of the affidavits, documents and arguments submitted, and all pleadings filed, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to address the merits of the petition.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Cornerstone Kitchen Cabinets, Inc., Notice of Determination number L-044065778-5, dated December 3, 2015, which asserted sales and use tax penalties due in the total amount of \$71,000.00 for the period March 1, 2011 through November 30, 2014. This notice is addressed to "CORNERSTONE KITCHEN CABINETS, INC., 68 FOREST AVE UNIT 2, LOCUST VALLEY, NY 11560-1736." The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0681 0630.

2. Petitioner filed a petition with the Division of Tax Appeals. The petition is dated as

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<sup>1</sup> On January 20, 2017, Mr. Burgwin left a voicemail message for the Petition Intake Section of the Division of Tax Appeals, in which he indicated that he had spoken with the Division of Taxation's representative, Mr. O'Brien, who was still gathering information. Mr. Burgwin further indicated that he was not ignoring the Petition Intake Section and would get back to the same after again speaking with Mr. O'Brien. No further response was received from Mr. Burgwin.

signed on June 24, 2016. The envelope in which the petition was mailed bears a United States Postal Service (USPS) metered stamp dated June 27, 2016. The petition and envelope are date stamped as received by the Division of Tax Appeals on July 5, 2016. Petitioner's address is listed on the petition as "68 Forest Ave, Locust Valley NY 11560." Although Patricia Magner signed petitioner's petition, her title was not listed on the petition.<sup>2</sup>

3. Page one of the foregoing petition indicates (by checked boxes) that petitioner seeks "a redetermination of a deficiency/revision of a determination" of "sales and compensating use taxes (Articles 28 and 29)." No notice/assessment number is listed on page one of the petition. However, the petition, at page two, lists the amount of tax determined and contested as \$71,000.00. Petitioner did not allege that the Commissioner of Taxation and Finance made any errors or assert any facts in the petition. On page three of the petition, neither box was checked regarding a Conciliation Conference. Attached to the petition were copies of Notice of Determination number L-044065778-5 and a Consolidated Statement of Tax Liabilities, dated June 16, 2016, that reflected a sales tax liability (assessment L-044065778-5) subject to collection, and sixteen assessments issued because returns/reports for the listed periods had not been filed for the following tax types: corporation (three assessments), sales (seven assessments), and withholding (six assessments).

4. The Petition Intake Section of the Division of Tax Appeals responded to the petition by a letter, dated July 13, 2016, advising petitioner, among other things, that if all assessments listed on the consolidated statement attached to its petition were being contested, then withholding tax and corporation tax must be added to the Tax Law articles involved on page one of the petition

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<sup>2</sup> On January 3, 2017, Ms. Magner, as president of Cornerstone Kitchen Cabinets, Inc., executed the power of attorney appointing Mr. Burgwin as the corporation's representative in this matter.

and copies of all assessments listed on such consolidated statement must be submitted. The letter noted that it was petitioner's responsibility to submit such documents, and provided information to petitioner as to how to obtain copies thereof to be furnished to the Division of Tax Appeals. Petitioner failed to provide the requested information and documents.

5. Subsequently, by letter dated October 5, 2016, the Petition Intake Section made a final request for information and documents, including, among other things, copies of all assessments listed on the consolidated statement, i.e., corporation tax assessments L-042258143-5, L-042258196-2 and L-042309479-2; sales and use tax assessments L-041811752-5, L-041811753-4, L-042302824-6, L-042586450-1, L-042841705-7, L-043378195-9 and L-043814006-1; and withholding tax assessments L-041009147-2, L-042146717-5, L-042930855-7, L-043466389-4, L-044456021-2 and L-044762780-8.

6. On December 2, 2016, Daniel J. Ranalli, then Supervising Administrative Law Judge of the Division of Tax Appeals, responded to the petition by issuing a notice of intent to dismiss petition (notice of intent) to petitioner and the Division of Taxation. The notice of intent provides, in part, as follows:

“Pursuant to § 2006(4) of the Tax Law, a petition must be filed within ninety (90) days from the date a statutory notice, such as a notice of determination, is issued. Additionally, pursuant to § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, where the petition is not in the form required by this section, the supervising administrative law judge shall promptly return it to the petitioner together with a statement indicating the requirements with which the petition does not comply, and extend to the petitioner an additional thirty (30) days within which to file a corrected petition with the supervising administrative law judge.

In this case, the Notice of Determination under protest, L-044065778-5, was issued to petitioner on December 3, 2015. However, the petition was not filed with the Division of Tax Appeals until June 27, 2016, or two hundred and seven (207) days later. As such, the Division of Tax Appeals is without jurisdiction to hear the merits of the petition.

Additionally, in conformity with § 3000.3(b)(8) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, and in order to establish timeliness, the petition shall contain a copy of the order of conciliation issued or other statutory notice being protested. In this case, a Consolidated Statement of Tax Liabilities appears to have been issued on June 16, 2016 containing the assessment numbers L-042258143, L-042258196, L-041811752, L-041009147, L-041811753, L-042302824, L-042146717, L-042586450, L-042309479, L-042841705, L-043378195, L-043814006. Petitioner did not include the required statutory notices and, therefore, with respect to those assessments, the petition does not appear to have been timely-filed.”<sup>3</sup>

Under the notice of intent, petitioner was afforded a period of 30 days within which to file a corrected petition (i.e., provide the requisite statutory documents affording the right to a hearing), and provide written comments on the proposed dismissal of the petition.

**Assessment IDs L-041811752-5 and L-041811753-4**

7. In response to the notice of intent, the Division provided copies of two notices of estimated determination, each addressed to petitioner, both dated August 27, 2014, bearing assessment numbers L-041811752-5 and L-041811753-4, and asserting sales and use tax due for the periods ended November 30, 2013 and February 28, 2014, respectively. In order to prove proper mailing of the foregoing notices of estimated determination, the Division provided the following documents: (i) an affidavit, dated February 8, 2017, of Christopher O’Brien, Esq., in support of dismissal; (ii) an affidavit, dated January 30, 2017, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division’s Management and Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated February 3, 2017, of Melissa Kate Koslow, a head mail and supply clerk and a supervisor in the Division’s mail room; (iv) the two-page “Certified Record For - DTF-965-E - Not of Est Determination” (CMR) for August 27, 2014; (v)

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<sup>3</sup> The consolidated statement also listed withholding tax assessments L-042930855-7, L-043466389-4, L-044456021-2 and L-044762780-8 that have been assigned a different DTA number and are proceeding as a separate matter (*see* DTA No. 827757).

copies of notices of estimated determination L-041811752-5 and L-041811753-4, and their respective associated mailing cover sheets; and (vi) a copy of petitioner's address summary from the Division's e-MPIRE database.

8. The affidavit of Ms. 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 date that is approximately 10 days in advance of the anticipated date of mailing. In addition, as described by Ms. Nagengast, generally 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 the Division. 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.

9. 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 and appropriate enclosures, is a discrete unit within the batch of notices, and the mailing cover sheet is the first sheet in the unit.

10. The CARTS-generated CMR for each batch of notices lists each statutory notice in the

order in which the notices are generated in the batch. The certified control numbers for the notices are also listed on the CMR under the heading "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 P.O. Address." Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together.

11. 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).

12. The affidavit of Ms. 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. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee

amounts on the envelopes. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes to a branch of the USPS in the Albany, New York, area for mailing. A USPS employee then affixes his or her initials or signature and a USPS postmark to a page or pages of the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. 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 mail room, each CMR is picked up at the post office by a staff member on the following day after its initial deliver and is then delivered back to the Division for storage and retention in the regular course of its business.

13. The CMR for the batch of notices to be issued on August 27, 2014, includes the notices of estimated determination addressed to petitioner herein, bearing assessment numbers L-041811752-5 and L-041811753-4. The CMR consists of two cut sheet pages, page 1 of the CMR includes 14 entries and page 2, the last page of the CMR, includes 6 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 are not involved in this proceeding. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20142330635." Appearing in the upper right corner of the first and last pages of the CMR is the handwritten date "8/27/14," 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.

Each page of the CMR includes a USPS postmark dated August 27, 2014. Page one of the CMR indicates that notices of estimated determination assigned certified control numbers 7104 1002 9735 1942 7639 and 7104 1002 9735 1942 7646, and reference numbers L-041811752 and L-041811753, respectively, were mailed to “CORNERSTONE KITCHEN CABINETS, INC.” at the 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736 address listed thereon. The corresponding mailing cover sheets attached to the Nagengast affidavit as “exhibit B,” bear these certified control numbers and petitioner’s name and address as noted.

14. Appearing on page two of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS” and the preprinted number “20.” Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” to the right of which is the handwritten number “ 20 .” The initials of the USPS employee appear directly below the handwritten number. The aforementioned USPS postmark, dated August 27, 2014, appears in the bottom right corner directly above the stamped ”POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” Thus, page 2 of the CMR indicates that a total of 20 pieces of certified mail were delivered into the custody of the USPS on August 27, 2014. Ms. Koslow states, based upon her review of the Nagengast affidavit and the exhibits attached thereto, and her personal knowledge of the procedures of the mail room, that on August 27, 2014, an employee delivered two pieces of certified mail addressed to petitioner, in Locust Valley, New York, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of mail to petitioner on August 27, 2014.

15. Attachment five to Mr. O'Brien's affidavit is petitioner's address summary from the Division's e-MPIRE database that shows the address of "68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736" was updated via the USPS National Change of Address (NCOA) database effective December 21, 2013. This was petitioner's last known address prior to the issuance of the subject notices of estimated determination.

**Assessment IDs L-042258143-5 and L-042258196-2**

16. In response to the notice of intent, the Division provided copies of two notices of estimated deficiency, each addressed to petitioner, and allegedly issued on December 8, 2014, bearing assessment numbers L-042258143-5 and L-042258196-2, and assessing corporation franchise tax due for the fiscal years ended September 30, 2012 and September 30, 2013, respectively. In order to prove mailing of the foregoing notices of estimated deficiency, the Division provided the following documents: (i) an affidavit, dated February 8, 2017, of Christopher O'Brien, Esq., in support of dismissal; (ii) an affidavit, dated January 30, 2017, of Mary Ellen Nagengast; (iii) an affidavit, dated February 3, 2017, of Melissa Kate Koslow; (iv) the 26-page CMR for December 8, 2014; (v) copies of notices of estimated deficiency L-042258143-5 and L-042258196-2, and their respective associated mailing cover sheets; and (vi) a copy of petitioner's address summary from the Division's e-MPIRE database.

17. The Division's general practice and procedure for processing statutory notices, as set out in the affidavit of Ms. Nagengast in Findings of Fact 8 through 11, is incorporated by reference as if fully set forth here. The Division's general operations and procedures in its mail room, as set forth in the affidavit of Ms. Koslow in Finding of Fact 12, are also incorporated by reference as if fully set forth here.

18. The CMR for the batch of notices to be issued on December 8, 2014 includes the

notices of estimated deficiency addressed to petitioner herein, assessment numbers L-042258143-5 and L-042258196-2. The CMR consists of 26 cut sheet pages, including page 19, the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time “run” listing of “20143351700.” Appearing in the upper right corner of the first and last pages of the CMR is the handwritten date “12/8/14,” 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. Each page of the CMR includes a USPS postmark dated December 8, 2014. All pages of the CMR include 11 entries, with the exception of page 26, on which one entry appears. 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 are not involved in this proceeding. Page 19 of the CMR indicates that notices of estimated deficiency assigned certified control numbers 7104 1002 9730 0332 1382 and 7104 1002 9730 0332 1399, and reference numbers L-042258143 and L-042258196, respectively, were mailed to “CORNERSTONE KITCHEN CABINETS, INC.” at the 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736 address listed thereon. The corresponding mailing cover sheets attached to the Nagengast affidavit as “exhibit B,” bear these certified control numbers and petitioner’s name and address as noted.

19. Appearing on page 26 of the 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 for this CMR, here 276, as well as the postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT

POST OFFICE,” next to which appears the circled handwritten number “276.” The area below and to the right of this heading reflect the initials of the USPS employee and the aforementioned USPS postmark dated December 8, 2014. In fact, these same initials and USPS postmark appear on each page of the CMR. Thus, page 26 of the CMR indicates that a total of 276 pieces of mail were delivered into the custody of the USPS on December 8, 2014. Ms. Koslow states, based upon her knowledge of the Nagengast affidavit and the exhibits attached thereto, and upon her personal knowledge of the procedures of the mail room, that on December 8, 2014, an employee delivered two pieces of certified mail addressed to petitioner, in Locust Valley, New York, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of mail to petitioner on December 8, 2014.

20. Attachment five to Mr. O’Brien’s affidavit is petitioner’s address summary from the Division’s e-MPIRE database that shows the address of “68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736” was updated via the USPS NCOA database effective December 21, 2013. This was petitioner’s last known address prior to the issuance of the subject notices of estimated deficiency.

**Assessment ID L-042302824-6**

21. In response to the notice of intent, the Division provided a copy of the Notice of Estimated Determination, addressed to petitioner, and allegedly issued on December 19, 2014, bearing assessment number L-042302824-6, assessing sales and use tax due for the period ended May 31, 2014. In order to prove proper mailing of the foregoing notice of estimated

determination, the Division provided the following documents: (i) an affidavit, dated February 8, 2017, of Christopher O'Brien, Esq., in support of dismissal; (ii) an affidavit, dated January 30, 2017, of Mary Ellen Nagengast; (iii) an affidavit, dated February 3, 2017, of Melissa Kate Koslow; (iv) the three-page CMR for December 19, 2014; (v) a copy of Notice of Estimated Determination L-042302824-6, and the associated mailing cover sheet; and (vi) a copy of petitioner's address summary from the Division's e-MPIRE database.

22. The Division's general practice and procedure for processing statutory notices, as set out in the affidavit of Ms. Nagengast in Findings of Fact 8 through 11, is incorporated by reference as if fully set forth here. The Division's general operations and procedures in its mail room, as set forth in the affidavit of Ms. Koslow in Finding of Fact 12, are also incorporated by reference as if fully set forth here.

23. The CMR for the batch of notices to be issued on December 19, 2014 includes the notice of estimated determination addressed to petitioner herein, assessment number L-042302824-6. The CMR consists of three cut sheet pages, including page two, the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20143472200." Appearing in the upper right corner of the first and last pages of the CMR, is the handwritten date "12/19/14," 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. Each page of the CMR includes a USPS postmark dated December 19, 2014. Page one of the CMR includes 12 entries, page two includes 13 entries, and page three includes 8 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 are not involved in this proceeding. Page two of the CMR indicates that Notice of Estimated Determination assigned certified control number 7104 1002 9735 2254 5351, and reference number L-04302824 was mailed to "CORNERSTONE KITCHEN CABINETS, INC." at the 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736 address listed thereon. 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.

24. Appearing on page three of the CMR is the preprinted heading "TOTAL PIECES AND AMOUNTS" and the preprinted number "33." Immediately below this heading is the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE," to the right of which is the circled handwritten number "33." The aforementioned USPS postmark, dated December 19, 2014, appears in the bottom right corner directly above the stamped "POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas." The initials of the USPS employee also appear next to the USPS postmark on page three of the CMR. In fact, these same initials and USPS postmark appear on each page of the CMR. Thus, page three of the CMR indicates that a total of 33 pieces of certified mail were delivered into the custody of the USPS on December 19, 2014. Ms. Koslow states, based upon her review of the Nagengast affidavit and the exhibits attached thereto, and upon her personal knowledge of the procedures of the mail room, that on December 19, 2014, an employee delivered a piece of certified mail addressed to petitioner, in Locust Valley, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of mail to petitioner on December 19, 2014.

25. Attachment five to Mr. O'Brien's affidavit is petitioner's address summary from the Division's e-MPIRE database that shows the address of "68 Forest Ave., Unit 2, Locust Valley, NY 11560-1760" was updated via the USPS NCOA database effective December 21, 2013. This was petitioner's last known address prior to the issuance of the subject notice of estimated determination.

**Assessment ID L-042309479-2**

26. In response to the notice of intent, the Division provided a copy of the notice of estimated deficiency, addressed to petitioner, and allegedly issued on December 23, 2014, bearing assessment number L-042309479-2 and assessing corporation franchise tax due for the fiscal year ended September 30, 2014. In order to prove proper mailing of the foregoing notice of estimated deficiency, the Division provided the following documents: (i) an affidavit, dated February 8, 2017, of Christopher O'Brien, Esq., in support of dismissal; (ii) an affidavit, dated January 30, 2017, of Mary Ellen Nagengast; (iii) an affidavit, dated February 3, 2017, of Melissa Kate Koslow; (iv) the sixteen-page CMR for December 23, 2014; (v) a copy of Notice of Estimated Deficiency L-042309479-2, and the associated mailing cover sheet; and (vi) a copy of petitioner's address summary from the Division's e-MPIRE database.

27. The Division's general practice and procedure for processing statutory notices, as set out in the affidavit of Ms. Nagengast in Findings of Fact 8 through 11, is incorporated by reference as if fully set forth here. The Division's general operations and procedures in its mail room, as set forth in the affidavit of Ms. Koslow in Finding of Fact 12, are also incorporated by reference as if fully set forth here.

28. The CMR for the batch of notices to be issued on December 23, 2014 includes the

notice of estimated deficiency addressed to petitioner herein and includes assessment number L-042309479-2. The CMR consists of 16 cut sheet pages, including page 10, the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20143501700." Appearing in the upper right corner of the first and last pages of the CMR, is the handwritten date "12/23/14," 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. Each page of the CMR includes a USPS postmark dated December 23, 2014. All pages of the CMR include 11 entries with the exception of page 16, on which 8 entries appear. 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 are not involved in this proceeding. Page 10 of the CMR indicates that notice of estimated deficiency assigned certified control number 7104 1002 9730 0334 9119, and reference number L-042309479 was mailed to "CORNERSTONE KITCHEN CABINETS, INC." at the 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736 address listed thereon. 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.

29. Review of this 16-page CMR indicates that the USPS employee initialed or signed and affixed a postmark, dated December 23, 2014, of the Colonie Center, New York, branch of the USPS to each page of the CMR. On the last page, the USPS employee circled the preprinted number "173" next to the heading "TOTAL PIECES AND AMOUNTS." Thus, page 16 of the CMR indicates that a total of 173 pieces of mail were delivered into the custody of the USPS on December 23, 2014. Ms. Koslow states, based upon her knowledge of the Nagengast affidavit

and the exhibits attached thereto, and upon her personal knowledge of the procedures of the mail room, that on December 23, 2014, an employee delivered a piece of certified mail addressed to petitioner, in Locust Valley, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of mail to petitioner on December 23, 2014.

30. Attachment five to Mr. O'Brien's affidavit is petitioner's address summary from the Division's e-MPIRE database that shows the address of "68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736" was updated via the USPS NCOA database effective December 21, 2013. This was petitioner's last known address prior to the issuance of the subject Notice of Estimated Deficiency.

**Assessment ID L-042586450-1**

31. In response to the notice of intent, the Division provided a copy of the Notice of Estimated Determination, addressed to petitioner, and allegedly issued on March 17, 2015, bearing assessment number L-042586450-1, assessing sales and use tax due for the period ended August 31, 2014. In order to prove proper mailing of the foregoing notice of estimated determination, the Division provided the following documents: (i) an affidavit, dated February 8, 2017, of Christopher O'Brien, Esq., in support of dismissal; (ii) an affidavit, dated January 30, 2017, of Mary Ellen Nagengast; (iii) an affidavit, dated February 3, 2017, of Melissa Kate Koslow; (iv) the two-page CMR for March 17, 2015; (v) a copy of notice of estimated determination, L-042586450-1 and the associated mailing cover sheet; and (vi) a copy of petitioner's address summary from the Division's e-MPIRE database.

32. The Division's general practice and procedure for processing statutory notices, as set out in the affidavit of Ms. Nagengast in Findings of Fact 8 through 11, is incorporated by reference as if fully set forth here. The Division's general operations and procedures in its mail room, as set forth in the affidavit of Ms. Koslow in Finding of Fact 12, are also incorporated by reference as if fully set forth here.

33. The CMR for the batch of notices to be issued on March 17, 2015 includes the notice of estimated determination addressed to petitioner herein, assessment number L-042586450-1. The CMR consists of two cut sheet pages, including page one, the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20150700635." Appearing in the upper right corner of the first and last pages of the CMR is the handwritten date "3/17/15," 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. Each page of the CMR includes a USPS postmark dated March 17, 2017. Page one of the CMR includes 14 entries, and page two the last page of includes 5 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 are not involved in this proceeding. Page one of the CMR indicates that notice of estimated determination assigned certified control number 7104 1002 9735 2278 8635, and reference number L-042586450 was mailed to "CORNERSTONE KITCHEN CABINETS, INC." at the 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736 address listed thereon. 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.

34. Review of this two-page CMR indicates that a USPS employee initialed or signed and affixed a postmark, dated March 17, 2015, of the Colonie Center, New York, branch of the USPS to each page of the CMR. On the last page, page two, the USPS employee circled the preprinted number “19” next to the heading “TOTAL PIECES AND AMOUNTS.” Thus, page two of the CMR indicates that a total of 19 pieces of mail were delivered into the custody of the USPS on March 17, 2015. Ms. Koslow states, based upon her knowledge of the Nagengast affidavit and the exhibits attached thereto, and upon her personal knowledge of the procedures of the mail room, that on March 17, 2015, an employee delivered a piece of certified mail addressed to petitioner, in Locust Valley, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of mail to petitioner on March 17, 2015.

35. Attachment five to Mr. O’Brien’s affidavit is petitioner’s address summary from the Division’s e-MPIRE database that shows the address of “68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736” was updated via the USPS NCOA database effective December 21, 2013. This was petitioner’s last known address prior to the issuance of the subject notice of estimated determination.

**Assessment ID L-043378195-9**

36. In response to the notice of intent, the Division provided a copy of the notice of estimated determination, addressed to petitioner, and allegedly issued on July 21, 2015, bearing assessment number L-043378195-9, assessing sales and use tax due for the period ended February 28, 2015. In order to prove proper mailing of the foregoing notice of estimated

determination, the Division provided the following documents: (i) an affidavit, dated February 8, 2017, of Christopher O'Brien, Esq., in support of dismissal; (ii) an affidavit, dated January 30, 2017, of Mary Ellen Nagengast; (iii) an affidavit, dated February 3, 2017, of Melissa Kate Koslow; (iv) the 1,260 page CMR for July 21, 2015; (v) a copy of Notice of Estimated Determination L-043378195-9, and the associated mailing cover sheet; and (vi) a copy of petitioner's address summary from the Division's e-MPIRE database.

37. The Division's general practice and procedure for processing statutory notices, as set out in the affidavit of Ms. Nagengast in Findings of Fact 8 through 11, is incorporated by reference as if fully set forth here. The Division's general operations and procedures in its mail room, as set forth in the affidavit of Ms. Koslow in Finding of Fact 12, are also incorporated by reference as if fully set forth here.

38. The CMR for the batch of notices to be issued on July 21, 2015 includes the notice of estimated determination addressed to petitioner herein and includes assessment number L-043378195-9. The CMR consists of 1,260 cut sheet pages, including page 812, the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20151960635." Appearing in the upper right corner of the first and last pages of the CMR, is the handwritten date "7/21/15," 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. Each page of the CMR includes a USPS postmark dated July 21, 2015. A varying number of entries appear on each page of the CMR. 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 are not involved in this

proceeding. Page 812 of the CMR indicates that Notice of Estimated Determination assigned certified control number 7104 1002 9735 2433 4106, and reference number L-043378195 was mailed to “CORNERSTONE KITCHEN CABINETS, INC.” at the 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736 address listed thereon. 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.

39. Review of this 1,260-page CMR indicates that a USPS employee affixed a postmark, dated July 21, 2015, of the USPS Albany, New York, General Mail Facility to each page of the CMR. Appearing on the last page of the CMR, is the preprinted heading “TOTAL PIECES AND AMOUNTS” and the preprinted number “16,533,” next to which the handwritten number “16533 [sic]” appears on a preprinted line. Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” next to which the initials of the USPS employee appear on a preprinted line. The aforementioned USPS postmark, dated July 21, 2015, appears above the stamped ”POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” Thus, page 1,260 of the CMR indicates that a total of 16,533 pieces of certified mail were delivered into the custody of the USPS on July 21, 2015. Ms. Koslow states, based upon her knowledge of the Nagengast affidavit and the exhibits attached thereto, and upon her personal knowledge of the procedures of the mail room, that on July 21, 2015, an employee delivered a piece of certified mail addressed to petitioner, in Locust Valley, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces

of mail to petitioner on July 21, 2015.

40. Attachment five to Mr. O'Brien's affidavit is petitioner's address summary from the Division's e-MPIRE database that shows the address of "68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736" was updated via the USPS NCOA database effective December 21, 2013. This was petitioner's last known address prior to the issuance of the subject notice of estimated determination.

**Assessment ID L-044065778-5**

41. In order to prove proper mailing of the foregoing notice of determination, the Division provided the following documents: (i) an affidavit, dated February 8, 2017, of Christopher O'Brien, Esq., in support of dismissal; (ii) an affidavit, dated January 30, 2017, of Mary Ellen Nagengast; (iii) an affidavit, dated February 3, 2017, of Melissa Kate Koslow; (iv) the 23-page CMR for December 3, 2015; (v) a copy of notice of determination L-044065778-5, and the associated mailing cover sheet; and (vi) a copy of petitioner's address summary from the Division's e-MPIRE database.

42. The Division's general practice and procedure for processing statutory notices, as set out in the affidavit of Ms. Nagengast in Findings of Fact 8 through 11, is incorporated by reference as if fully set forth here. The Division's general operations and procedures in its mail room, as set forth in the affidavit of Ms. Koslow in Finding of Fact 12, are also incorporated by reference as if fully set forth here.

43. The CMR for the batch of notices to be issued on December 3, 2015 includes the notice of determination addressed to petitioner herein and includes assessment number L-044065778-5. The CMR consists of 23 cut sheet pages, including page 12, the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left

corner the preprinted year/day/time “run” listing of “20153291700.” Appearing in the upper right corner of the first and last pages of the CMR, is the handwritten date “12/3/15,” 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. Each page of the CMR includes a USPS postmark dated December 3, 2015. All pages of the CMR include 11 entries with the exception of page 23, on which three entries appear. 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 are not involved in this proceeding. Page 12 of the CMR indicates that Notice of Determination assigned certified control number 7104 1002 9730 0681 0630, and reference number L-044065778 was mailed to “CORNERSTONE KITCHEN CABINETS, INC.” at the 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736 address listed thereon. 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.

44. Review of the 23-page CMR indicates that the USPS employee initialed or signed and affixed a postmark, dated December 3, 2015, of the Colonie Center, New York branch of the USPS to each page of the CMR. Appearing on the last page of the CMR, is the preprinted heading “TOTAL PIECES AND AMOUNTS” and the preprinted number “245.” Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” to the right of which is the handwritten number “245.” The aforementioned USPS postmark dated December 3, 2015 appears directly above the stamped “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The initials or signature of the USPS employee also appear below the USPS postmark on page 23 of the CMR. Thus, page 23 of the

CMR indicates that a total of 245 pieces of certified mail were delivered into the custody of the USPS on December 3, 2015. Ms. Koslow states, based upon her knowledge of the Nagengast affidavit and the exhibits attached thereto, and upon her personal knowledge of the procedures of the mail room, that on December 3, 2015, an employee delivered a piece of certified mail addressed to petitioner, in Locust Valley, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of mail to petitioner on December 3, 2015.

45. Attachment five to Mr. O'Brien's affidavit is petitioner's address summary from the Division's e-MPIRE database that shows the address of "68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736" was updated via the USPS NCOA database effective December 21, 2013. This was petitioner's last known address prior to the issuance of the subject notice of determination.

**Assessment ID L-042841705-7**

46. In response to the notice of intent, the Division provided a copy of the notice of estimated determination, addressed to petitioner, and allegedly issued on May 1, 2015, bearing assessment number L-042841705-7, assessing sales and use tax due for the period ended November 30, 2014. In order to prove proper mailing of the foregoing notice of estimated determination, the Division provided the following documents: (i) an affidavit, dated February 8, 2017, of Christopher O'Brien, Esq., in support of dismissal; (ii) an affidavit, dated February 7, 2017, of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel; (iii) an affidavit, dated January 30, 2017, of Mary Ellen Nagengast; (iv) an affidavit, dated February 3, 2017, of Melissa Kate Koslow; (v) a Request for Delivery Information /Return Receipt After Mailing

(USPS Form 3811-A) and USPS response thereto; (vi) pages numbered “1”, “560” and “885” from the CMR for May 1, 2015; (vii) a copy of notice of estimated determination, L-042841705-7, and the associated mailing cover sheet; and (viii) a copy of petitioner’s address summary from the Division’s e-MPIRE database.

47. The Division’s general practice and procedure for processing statutory notices, as set out in the affidavit of Ms. Nagengast in Findings of Fact 8 through 11, is incorporated by reference as if fully set forth here. The Division’s general operations and procedures in its mail room, as set forth in the affidavit of Ms. Koslow in Finding of Fact 12, are also incorporated by reference as if fully set forth here.

48. The CMR for the batch of notices to be issued on May 1, 2015, including that addressed to petitioner herein, allegedly consisted of 885 cut sheet pages. As noted, the Division included herein only page “1” (the first page), page “560” (the page on which information pertaining to petitioner appears) and page “885” (the last page) from the CMR. Each of these three pages includes in its upper left corner the preprinted year/day/time “run” listing of “20151152200.” Appearing in the upper right corner of the pages 1 and 885 is the handwritten date “5/1/15,” 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. Each of the foregoing three pages includes a USPS postmark, dated May 1, 2015, of the USPS Albany, New York, General Mail Facility. Page 1 includes 12 entries, page 560 includes 15 entries, and page 885 includes three 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 are not involved in this proceeding. Page 560 of the CMR indicates that notice of estimated

determination assigned certified control number 7104 1002 9735 2393 3270, and reference number L-042841705 was mailed to “CORNERSTONE KITCHEN CABINETS, INC.” at the 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736 address listed thereon. 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.

49. Appearing below the three entries on page 885 of the CMR, is the preprinted heading “TOTAL PIECES AND AMOUNTS” and the preprinted number “11,756,” next to which the handwritten number “11756 [sic]” appears on the preprinted line. Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” next to which the initials of the USPS employee appear on the preprinted line. According to Ms. Nagengast, the affixation of postmarks and the Postal Service employee’s initials indicate that all 11,756 articles of mail listed on the CMR including the article addressed to petitioner were received by the USPS on May 1, 2015. According to both the Nagengast and Koslow affidavits, a copy of the subject notice of estimated determination was mailed to petitioner on May 1, 2015, as claimed.

50. Attachment five to Mr. O’Brien’s affidavit is petitioner’s address summary from the Division’s e-MPIRE database that shows the address of “68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736” was updated via the USPS NCOA database effective December 21, 2013. This was petitioner’s last known address prior to the issuance of the subject notice of estimated determination.

51. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel, details her filing of USPS Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS Form 3811-A commences a process by which post-mailing,

return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed Form 3811-A seeking information for the item mailed by the Division under certified 7104 1002 9735 2393 3270 on May 1, 2015 from the USPS Albany, New York, General Mail Facility to “Cornerstone Kitchen Cabinets, Inc.” at 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736. In response, the USPS confirmed delivery of the certified mail item at the noted address on May 4, 2015 at 11:08 A.M.

**Assessment ID L-043814006-1**

52. In response to the notice of intent, the Division provided a copy of the notice of estimated determination, addressed to petitioner, and allegedly issued on October 19, 2015, bearing assessment number L-043814006-1, assessing sales and use tax due for the period ended May 31, 2015. In order to prove proper mailing of the foregoing notice of estimated determination, the Division provided the following documents: (i) an affidavit, dated February 8, 2017, of Christopher O’Brien, Esq., in support of dismissal; (ii) an affidavit, dated February 7, 2017, of Heidi Corina; (iii) an affidavit, dated January 30, 2017, of Mary Ellen Nagengast; (iv) an affidavit, dated February 3, 2017, of Melissa Kate Koslow; (v) a Request for Delivery Information /Return Receipt After Mailing (USPS Form 3811-A) and USPS response thereto; (vi) pages numbered “1,” “512” and “825” from the CMR ; (vii) a copy of notice of estimated determination, L-043814006-1, and the associated mailing cover sheet; and (viii) a copy of petitioner’s address summary from the Division’s e-MPIRE database.

53. The Division’s general practice and procedure for processing statutory notices, as set out in the affidavit of Ms. Nagengast in Findings of Fact 8 through 11, is incorporated by reference as if fully set forth here. The Division’s general operations and procedures in its mail

room, as set forth in the affidavit of Ms. Koslow in Finding of Fact 12, are also incorporated by reference as if fully set forth here.

54. The CMR for the batch of notices to be issued on October 19, 2015, including that addressed to petitioner herein, allegedly consisted of 825 cut sheet pages. As noted, the Division included herein only page “1” (the first page), page “512” (the page on which information pertaining to petitioner appears) and page “825” (the last page) from the CMR. Each of these three pages includes in its upper left corner the preprinted year/day/time “run” listing of “20152832200.” Appearing in the upper right corner of the pages 1 and 825 is the handwritten date “10/19/15,” 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. Each of the foregoing three pages includes a USPS postmark, dated October 19, 2015, of the USPS Albany, New York, General Mail Facility. Page 1 includes 12 entries, page 512 includes 14 entries, and page 825 includes four 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 are not involved in this proceeding. Page 512 of the CMR indicates that notice of estimated determination assigned certified control number 7104 1002 9735 2685 8181, and reference number L-043814006 was mailed to “CORNERSTONE KITCHEN CABINETS, INC.” at the 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736 address listed thereon. 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.

55. Appearing below the four entries on page 825 of the CMR, is the preprinted heading “TOTAL PIECES AND AMOUNTS” and the preprinted number “10,842.” Immediately below

this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” next to which the handwritten number “10,842” appears on the preprinted line. According to Ms. Nagengast, the affixation of postmarks and the USPS employee’s initials indicate that all 10,842 articles of mail listed on the CMR including the article addressed to petitioner were received by the USPS on October 19, 2015. According to both the Nagengast and Koslow affidavits, a copy of the subject notice of estimated determination was mailed to petitioner on October 19, 2015, as claimed.

56. Attachment five to Mr. O’Brien’s affidavit is petitioner’s address summary from the Division’s e-MPIRE database that shows the address of “68 Forest Ave., Unit 2, Locust Valley, NY 11560-1760” was updated via the USPS NCOA database effective December 21, 2013. This was petitioner’s last known address prior to the issuance of the subject notice of estimated determination.

57. The affidavit of Ms. Corina details her filing of USPS Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS Form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed Form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9735 2685 8181 on October 19, 2015 from the USPS Albany, New York, General Mail Facility to “Cornerstone Kitchen Cabinets, Inc.” at 68 Forest Ave., Unit 2, Locust Valley, NY 11560-1736. In response, the USPS confirmed delivery of the certified mail item on October 21, 2015 at 11:18 A.M. to “68 Forest Ave” in “Locust Valley, NY 11560.” The USPS response bears the illegible signature of the recipient.

58. In addition to the 11 assessments described above, the consolidated statement,

attached to the petition, also listed withholding tax assessment numbers L-042146717-5 and L-041009147-2. In response to the notice of intent, the Division provided copies of such assessments dated November 10, 2014 and April 18, 2014.<sup>4</sup> The Division points out that each of such assessments was issued as a notice and demand. Review of the assessments reveals the following: notice of failure to file return and demand for payment of penalty due, dated November 10, 2014 and bearing assessment number L-042146717-5, assessed withholding tax penalty in the amount of \$1,000.00 for the quarter ended June 30, 2014; and notice of failure to file return and demand for payment of penalty due, dated April 18, 2014 and bearing assessment number L-041009147-2, assessed withholding tax penalty in the amount of \$1,000.00 for the quarter ended December 31, 2013. Each of these notices and demands was issued because petitioner failed to file a Quarterly Combined Withholding Wage Reporting and Unemployment Insurance Return, Form NYS-45. The Division notes that under Tax Law § 173-a, there are no hearing rights attached to a notice and demand and therefore, the protests of notices L-042146717 and L-041009147 should be dismissed.

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

A. This matter proceeds by way of a notice of intent to dismiss petition, under 20 NYCRR 3000.3(d)(1), upon the bases that: a) the petition was untimely with respect to notice of determination L-044065778 assessing sales and use tax penalties against petitioner; and b) that the petition did not include copies of statutory notices giving rise to the right to a hearing, as required under 20 NYCRR 3000.3(b)(8), with respect to corporation tax assessments L-042258143, L-042258196 and L-042309479; sales and use tax assessments L-041811752,

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<sup>4</sup> Mr. O'Brien's affidavit incorrectly lists the issuance dates of assessments L-042146717 and L-041009147 as May 1, 2015 and October 19, 2015, respectively.

L-041811753, L-042302824, L-042586450, L-042841705, L-043378195 and L-043814006; and withholding tax assessments L-041009147, and L-042146717. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination, and this matter shall proceed under that standard.

B. 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]).

C. In response to the subject notice of intent, the Division provided copies of notice of determination L-044065778, dated December 3, 2015; notices of estimated determination L-041811752 and L-041811753, each dated August 27, 2014; notice of estimated determination L-042302824, dated December 19, 2014; notice of estimated determination L-042586450, dated March 17, 2015; notice of estimated determination L-043378195, dated July 21, 2015; notice of estimated determination L-042841705, dated May 1, 2015; and notice of estimated determination L-043814006, dated October 19, 2015, together with its evidence that the same were properly issued to petitioner by certified mail on such dates. A taxpayer is entitled to protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such a notice (Tax Law §§ 1138[a]; 2006[4]). In response to the subject notice of intent, the Division also provided copies of notices of estimated deficiency L-042258143 and L-042258196, each dated December 8, 2014; and notice of estimated deficiency L-042309479, dated December 23, 2014. If a taxpayer fails to file a tax return

required under Article 9-A of the Tax Law, the Commissioner of Taxation and Finance is authorized to estimate the taxpayer's New York State tax liability from any information in its possession and to mail a notice of deficiency to the taxpayer by certified or registered mail at the taxpayer's last known address (Tax Law § 1081[a]). Such a notice becomes an assessment of tax unless a petition is filed with the Division of Tax Appeals within 90 days from the date of mailing (Tax Law § 1081[b]). Except for a limited exception, not pertinent here, the Division of Tax Appeals may entertain only those petitions which are filed within the 90-day period (Tax Law § 1089[b]).

As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). It is well established that statutory time limits for filing either a petition or a request for a conciliation conference are strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a statutory notice, to which protest rights attach, becomes fixed and final and, consequently, BCMS and the Division of Tax Appeals are without jurisdiction to consider the substantive merits of the protest (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document

was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing is produced and the burden of demonstrating proper mailing rests with the Division (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. The Division may meet its burden of proving proper mailing by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). The evidence required of the Division in order to establish proper mailing is two-fold:

“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*).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast 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*).

G. The Division has also presented sufficient documentary proof, i.e., properly completed CMRs, to establish that notices were mailed as addressed on the following dates: (a) notice of determination L-044065778 mailed on December 3, 2015 (*see Findings of Fact 43 and 44*); (b) notices of estimated determination L-041811752 and L-041811753 mailed on August 27, 2014 (*see Findings of Fact 13 and 14*); (c) notice of estimated determination L-042302824 mailed on December 19, 2014 (*see Findings of Fact 23 and 24*); (d) notice of estimated determination L-042586450 mailed on March 17, 2015 (*see Findings of Fact 33 and 34*); and (e) notice of

estimated determination L-043378195 mailed on July 21, 2015 (*see* Findings of Fact 38 and 39). Further, petitioner's address on the subject notice of determination and notices of estimated determination L-041811752, L-041811753, L-042302824, L-042586450 and L-043378195, the corresponding mailing cover sheets, and respective CMRs all conform with the address on the USPS NCOA database. As such, the address used satisfies the "last known address" requirement (*see* Tax Law §§ 1138[a][1]; 1147[a][1]; Findings of Fact 15, 25, 35, 40 and 45). It is thus concluded that the Division properly mailed the notice of determination on December 3, 2015, notices of estimated of estimated determination L-041811752 and L-041811753 on August 27, 2014, notice of estimated determination L-042302824 on December 19, 2014, notice of estimated determination L-042586450 on March 17, 2015, and notice of estimated determination L-043378195 on July 21, 2015, and the statutory 90-day time limit to file either a petition with the Division of Tax Appeals or a request for a conciliation conference commenced on such dates (Tax Law §§ 1138[a][1]; 170[3-a][a]).

H. The 90-day period for filing petitions with respect to the foregoing six notices commenced 90 days after the respective issuance dates of each of such notices (i.e., within 90 days after December 3, 2015 [L-044065778], August 27, 2014 [L-041811752 and L-041811753], December 19, 2014 [L-04230284], March 17, 2015 [L-042586450] and July 21, 2015 [L-043378195]). The petition in this matter was filed on June 27, 2016 (*see* Finding of Fact 2), a date that falls well-beyond the 90-day period of limitations applicable to each of the foregoing notices, and was thus untimely. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest of the six notices of determination (*Matter of Modica; Matter of Lukacs; Matter of Sak Smoke Shop*).

I. The Division also presented evidence of sufficient documentary proof, i.e., properly

completed CMRs, to establish that the subject notices of estimated deficiency were mailed as addressed on December 8, 2014 [notices L-042258143 and L-042258196] (*see* Findings of Fact 18 and 19) and December 23, 2014 [notice L-042309479] (*see* Findings of Fact 28 and 29). Further, petitioner's address on the subject notices of estimated deficiency, the corresponding mailing cover sheets, and respective CMRs all conform with the address on the USPS NCOA database. As such, the address used satisfies the "last known address" requirement (*see* Tax Law § 1081[a]; Findings of Fact 20 and 30 ). Tax Law § 1081(a) does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929 [1972]; *affd* 43 AD2d 815 [3d Dept. 1973], *appeal dismissed* 34 NY2d 667 [1974]; *cf. Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [3d Dept. 1984]. It is thus concluded that the Division properly mailed notices of estimated deficiency L-042258143 and L-042258196 on December 8, 2014, and notice of estimated deficiency L-042309479 on December 23, 2014, and the statutory 90-day time limit to file either a petition with the Division of Tax Appeals or a request for a conciliation conference commenced on such dates (Tax Law § 1089[b]; 170[3-a][a]).

J. The 90-day period for filing petitions with respect to the foregoing three notices of estimated deficiency commenced 90 days after the respective issuance dates of each of such notices (i.e., within 90 days after December 8, 2014 [L-042258143 and L-042258196], and December 23, 2014 [L-042309479]). The petition in this matter was filed on June 27, 2016 (*see* Finding of Fact 2), a date that falls well-beyond the 90-day period of limitations applicable to each of the foregoing notices, and was thus untimely. As a matter of law, the Division of Tax

Appeals lacks jurisdiction to address the merits of petitioner's protest of the three notices of estimated deficiency (*Matter of Modica*; *Matter of Lukacs*; *Matter of Sak Smoke Shop*).

K. With respect to notice of estimated determination L-042841705 and notice of estimated determination L-043814006, the Division's submission of partial (or truncated) CMRs is not sufficient to establish that the Division's standard mailing procedure was followed (*see Matter of Ankh-Ka-Ra Sma-Ntr f/k/a Andre Williams*, Tax Appeals Tribunal, April 14, 2016; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Hence, the proof submitted fails to establish that the notices were properly mailed on May 1, 2015 (L-042841705) and October 19, 2015 (L-043814006), and thus the periods within which a protest could be filed were not triggered as of such dates.

L. An inadequacy in the evidence of mailing, as in Conclusion of Law K, may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing, the 90-day period for filing either a request or a petition is tolled until such time as the taxpayer actually receives the notice (*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 will commence (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is 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 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

M. Notwithstanding the described evidentiary failure with regard to the mailing of notices of estimated determination L-042841705 and L-043814006, the Division has nonetheless

established, via the Corina affidavits and the accompanying USPS forms 3811-A and USPS responses thereto, that the notices were mailed by certified mail and were, in fact, thereafter delivered to and accepted by petitioner on May 4, 2015 (L-042841705) and October 21, 2015 (L-043814006) (*see* Findings of Fact 51 and 57). As a result, the period within which to challenge the notices of estimated determination commenced to run on the dates of such actual receipt, i.e., May 4, 2015 and October 21, 2015, respectively, and in order to be timely, a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS, had to have been filed within 90 days thereafter (*see Matter of Agosto; Matter of Rosen*). In turn, 90 days after the May 4, 2015 date of actual receipt of Notice of Estimated Determination L-042841705 was August 3, 2015,<sup>5</sup> and 90 days after the October 21, 2015 date of actual receipt of notice of estimated determination L-043814006 was January 19, 2016. In order to be considered timely, petitioner's protest had to have been filed on or before such dates. Here, the petition was not filed until June 27, 2016 (*see* Finding of Fact 2), a date that falls beyond the statutory periods within which a timely protest had to have been filed. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest of the foregoing notices of estimated determination (*see Matter of Modica; Matter of Lukacs; Matter of Sak Smoke Shop*).

N. As noted, petitioner did not respond to the notice of intent to dismiss petition in any manner, including specifically submitting any challenge or evidence to counter the Division's proof of mailing of the notices as described above.

O. The petition also challenges two notices and demands issued against petitioner based

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<sup>5</sup> 90 days from May 4, 2015 was Sunday, August 2, 2015. Therefore, petitioner had until the next business day, or Monday, August 3, 2015, to file a petition or request for conciliation conference (*see* General Construction Law § 25-a).

upon its failure to file quarterly combined withholding wage reporting and unemployment insurance returns for the quarters ended December 31, 2013 and June 30, 2014 (*see* Finding of Fact 58). The Division of Tax Appeals is authorized to “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . , unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006[4]). The Division is authorized to issue a notice and demand for payment of income tax, including withholding tax, where a taxpayer fails to remit payment for the amount reported due on a return and for penalties arising from a failure to timely file a return and timely remit tax reported due (*see* Tax Law §§ 173-a[2]; 682[a]; 692[b]). Such a notice and demand may not be construed as a notice which gives a person a right to a hearing in the Division of Tax Appeals (*see* Tax Law § 173-a[2]). Accordingly, petitioner is not entitled to a hearing with respect to the notices and demands for payment of withholding tax penalty dated April 18, 2014 and November 10, 2014.

P. The petition of Cornerstone Kitchen Cabinets, Inc. is hereby dismissed.

DATED: Albany, New York  
May 11, 2017

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE