STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THESTREET.COM, INC. (A/K/A THE STREETE, INC.)	:	DETERMINATION DTA NO. 828467
	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of The Tax Law for the Period September 1, 2012 through August 31, 2013.	:	
	:	

Petitioner, TheStreet.com, Inc. (a/k/a The Street, Inc.),[1] filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period September 1, 2012 through August 31, 2013.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, in New York, New York, on December 10, 2019 at 10:30 A.M., with all briefs submitted by May 6, 2020, which date began the six-month period for issuance of the determination. Due to the COVID-19 pandemic, which constitutes good cause, the due date for issuance of this determination was extended by three months, pursuant to 20 NYCRR 3000.15 (e). Petitioner appeared by BDO USA LLP (Nicholas Montorio, Esq., and Janet Bernier, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel).

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[1] TheStreet.com, Inc. changed its name to The Street, Inc. in May 2011.

ISSUES

I. Whether the Division of Taxation properly determined that petitioner's acquisition of The Deal, LLC included the purchase of tangible personal property subject to sales tax.

II. Whether petitioner sustained its burden of proof that portions of its purchase of tangible personal property from The Deal, LLC were excluded or exempt from sales tax.

FINDINGS OF FACT

1. For all periods during the Division of Taxation's (Division's) audit of petitioner, TheStreet.com, Inc. (a/k/a The Street, Inc.) (The Street) was a publicly held corporation with its principal place of business in New York, New York. Petitioner was registered with the Securities Exchange Commission (SEC), and it was publicly traded on NASDAQ.[2]

2. Petitioner is generally in the business of providing its customers with news and information regarding financial markets.

3. At all relevant times, petitioner engaged in the online publishing of business and investment information through numerous subscription products.

4. Beginning in March 2011, petitioner considered an acquisition of a business-to-business subscription products company. After considering nearly 30 possible acquisition targets, petitioner selected The Deal, LLC (The Deal), as its acquisition target.

5. The Deal was founded in 1999 as *The Daily Deal* print newspaper. Over time, The Deal transformed itself into a media company that published sophisticated coverage of the mergers and acquisitions environment, primarily through The Deal Pipeline, a leading digital provider of transactional information services. The Deal provided its products and services through print, online, and in-person platforms.

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[2] The Street was acquired by another entity in August 2019, and it is no longer publicly traded.

6. The Deal, a Delaware limited liability company, had as its sole member, WPPN, L.P. (WPPN or Seller), a Delaware limited liability company. As a single-member limited liability company (SMLLC), The Deal was a disregarded entity for federal and state income tax purposes. The Deal was headquartered in New York, New York.

7. The Deal was an operating business that owned assets, employed individuals, and filed its own sales and use tax returns. The assets owned by The Deal included, among others, property and equipment (Property and Equipment), and internally developed software (Software).

8. On July 6, 2012, petitioner provided Mr. Kevin Worth, who was then the chief executive officer of The Deal, with a Letter of Intent (LOI) indicating petitioner's intent to purchase the assets of The Deal. Subsequently, petitioner's version of the LOI dated July 6, 2012 was rejected; however, petitioner was informed that a transaction could be consummated if, and only if, petitioner purchased the equity interests of The Deal.

9. On July 10, 2012, petitioner provided Mr. Worth with a revised LOI indicating that petitioner intends to acquire "all the outstanding equity, and right to acquire equity, of The Deal, LLC . . ., from the [Seller], free and clear of all claims, liens and encumbrances." Petitioner and The Deal signed the revised LOI dated July 10, 2012.

10. Petitioner, as Buyer, and WPPN, as Seller, executed the "Equity Interest Purchase Agreement" (Purchase Agreement) dated "as of September 11, 2012." As its exhibit 3, petitioner submitted an executed copy of the Purchase Agreement that included a table of contents, and an attached 10-page "Exhibit A Certain Defined Terms." [3]

[3] The Purchase Agreement's table of contents listed 7 titled articles, and subsections of the same by page number, and 11 exhibits A through J.

11. The Purchase Agreement, in the recitals, stated that “Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, the Interests and all of Seller’s rights, title and interest in, to and under the LLC Agreement.” Article I, section 1.1 (a) of the Purchase Agreement provided that:

> “Upon the terms and subject to the conditions set forth in this Agreement, Seller shall sell, assign, transfer and deliver to Buyer, and Buyer shall purchase, the Interests and all of Seller’s rights, title and interest in, to and under the LLC Agreement, all of the foregoing free and clear of all Liens, other than Liens created by Buyer or under applicable securities laws, for the purchase price hereinafter set forth in this Article I, and Buyer shall become the sole member of [The Deal].”

The entire agreement of the parties was set forth in article VII, section 7.5 of the Purchase Agreement, which provided as follows:

> “This Agreement and other Transaction Documents (including [The Deal] Disclosure Schedule and Exhibits hereto and thereto) (together with the Confidentiality Agreement, dated as of June 12, 2012 between [The Deal] and Buyer) embody the entire agreement and understanding of the parties hereto and their respective Affiliates with respect to the transactions contemplated hereby and merges in, supersedes and cancels all prior written and oral commitments, arrangements or understandings with respect thereto, including the Letter of Intent, dated as of July 10, 2012, from Buyer to [The Deal], Seller and Wasserstein Capital, L.P, as amended. There are no restrictions, agreements, promises, warranties, covenants or undertakings with respect to the transactions contemplated hereby other than those expressly set forth in this Agreement and the other Transaction Documents.”

12. Section 1.1 (b) of the Purchase Agreement required “[a]s payment for the Interests and all of Seller’s rights, title and interest in, to and under the LLC Agreement,” the buyer to pay and deliver at the closing:

(i) a cash amount equal to the initial closing payment “by wire transfer of immediately available funds in accordance with written instructions provided by Seller prior to the date hereof”; and

(ii) to the escrow agent the cash amount “equal to the Escrow Amount by wire transfer of immediately available funds in accordance with instructions set forth in the Escrow Agreement.”

Section 1.4 of the Purchase Agreement set forth the terms under which any purchase price adjustment was to be made to the initial purchase price based upon the Seller’s estimated closing net worth. The terms of the purchase price allocation were set forth in section 1.5 of the Purchase Agreement that provided:

> "As promptly as practicable after the determination of the Final Purchase Price pursuant to Section 1.4, but no later than 60 days thereafter, Seller and Buyer shall prepare (with assistance as requested from [The Deal]), an allocation schedule allocating the Final Purchase Price among the assets of [The Deal] pursuant to (and to the extent necessary to comply with) applicable Treasury Regulations and the Code (or, if applicable, any similar provision under other Tax Law) (the '**Allocation Schedule**'). In preparing the Allocation Schedule, Seller and Buyer shall be entitled to reasonable access to all relevant books, records and personnel of [The Deal] to the extent such party reasonably requests such information and reasonable access to complete the preparation of the Allocation Schedule. Seller and Buyer and their Affiliates shall report, act and file Tax Returns in all respects and for all purposes consistent with such Allocation Schedule; provided, however, that if Seller and Buyer cannot agree on the Allocation Schedule within such 60-day period, Seller and Buyer and their respective Affiliates may report, act and file Tax Returns in accordance with their own determinations of the proper allocation of the Final Purchase Price among the assets of [The Deal]."

13. The Purchase Agreement also set forth the parties' agreement regarding the title and condition of The Deal's assets in section 2.17. In addition, the parties' respective responsibilities with respect to taxes was set forth in section 5.3 that provided, in relevant part, as follows:

> "(a) The parties hereto acknowledge and agree that for U.S. federal income Tax purposes [The Deal] shall be deemed to have terminated as of the Closing Date and [The Deal's] Taxable year shall close on the Closing Date. Seller will cause to be prepared and timely filed all Tax Returns required to be filed with respect to [The Deal] for any Taxable period ending on or before the Closing Date (any such period, a '**Pre-Closing Period**'). Such Tax Returns will be prepared on a basis consistent with the last Tax Returns filed by [The Deal] unless otherwise required by Law. . . .
>
> (b) Buyer shall cause to be prepared and filed, all Tax Returns of [The Deal] either for Straddle Periods or for Taxable periods beginning after the Closing Date (any such period, a '**Post-Closing Period**'); provided, however, that drafts of any Straddle Period Tax Returns shall be provided to Seller at least 30 days prior to filing, and such Straddle Period Tax Returns shall be subject to Seller's review and approval, which approval shall not be unreasonably withheld or delayed, and Buyer shall cause to be made such revisions to such Straddle Period Tax Returns as are reasonably requested by Seller. Such Straddle Period Tax Returns will be prepared on a basis consistent with the last Tax Returns filed by [The Deal], unless otherwise required by Law. . . ."

14. Pursuant to section 7.15 of the Purchase Agreement, the seller was required to provide a disclosure schedule for The Deal that was to be prepared as follows:

> "[The Deal] Disclosure Schedule to this Agreement shall be arranged in sections and subsections corresponding to the numbered section and lettered subsections of this Agreement. Seller may, at its option, include in [The Deal] Disclosure Schedule items that are not material in order to avoid any misunderstanding, and such inclusion, or any references to dollar amounts, will not be deemed to be an acknowledgement or representation that such items are material, to establish any standard of materiality or to define further the meaning of such terms for purposes of this Agreement. Exceptions and disclosures in each such section and subsection of [The Deal] Disclosure Schedule shall apply to correspondingly numbered section and lettered subsection of this Agreement and shall qualify any representation, warranty, covenant or agreement herein to the extent that the relevance or applicability of such information disclosed to the representation, warranty, covenant or agreement is reasonably apparent on its face."

The record does not include The Deal Disclosure Schedule.

15. In addition to the other requirements set forth in the Purchase Agreement, at the closing: the seller was required to deliver all documents listed in subsection 1.3 (a) (i) through (xvii), including, among other documents, "evidence satisfactory to Buyer of termination of all Debt under the Promissory Notes, including a cancelled copy of each Promissory Note, a General Release from the holders of the Promissory Notes, and termination and release of all Liens under the Promissory Notes" (subsection 1.3 [a] [xiii]). Subsection 1.3 (b) required the buyer to deliver to the Seller: "(i) the Escrow Agreement, duly executed by Buyer; and (ii) the Assignment and Assumption Agreement, duly executed by Buyer."

16. As noted in finding of fact 10, attached to the Purchase Agreement was "Exhibit A" that listed and defined certain terms referenced in various sections and subsections of the Purchase Agreement. The defined terms, among others, included the following:

> (a) "Interests" defined as "the equity interest of a member in [The Deal], including rights to distributions (liquidating or otherwise), allocations, information, to participate in management, and to consent or approve, together with all other rights, benefits and privileges enjoyed by the member (under the Delaware Limited

> Liability Company Act, the LLC Agreement or otherwise) in its capacity as a member of [The Deal]."
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> (b) "LLC Agreement" defined as "the Third Amended and Restated Limited Liability Company Agreement of [The Deal], dated as of October 17, 2001 by and among the Persons listed on the signature page thereto, as amended by the Amendment, together with all exhibits thereto."
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> (c) "Amendment" defined as "that certain Amendment to the LLC Agreement, dated as of September 10, 2012."
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> (d) "Transaction Document" defined as "this Agreement and the other agreements, instruments, certificates and documents contemplated hereby and thereby, including each exhibit and schedule hereto and thereto."
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> (e) "Treasury Regulations" defined as the rules and regulations promulgated under the [Internal Revenue] Code."

17. Petitioner engaged McGladrey LLP (McGladrey) to complete an appraisal of certain intangible and tangible assets of The Deal as of September 11, 2012. The purpose of such engagement was to assist petitioner's management "in determining the fair value of certain intangible and tangible assets of The Deal as of September 11, 2012, in order to comply with Accounting Standards Codification (ASC) 805 (formerly Statement of Financial Accounting Standards [SFAS] No. 141R), *Business Combinations*."[4] In conjunction with the engagement, McGladrey prepared a written valuation summary report, part of which was submitted into the record by petitioner as exhibit 6. Specifically, petitioner's exhibit 6 includes 91 pages of the McGladrey valuation summary report,[5] and a 4-page document headed "The Street, Inc. Acquisition of The Deal, LLC FASB ASC 805 – Allocation of Purchase Price Detailing Listing of

[4] ASC 820-20 (formerly known as SFAS 157) defines fair value as "the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date."

[5] The McGladrey valuation summary report, in the record, includes, among other things, the table of McGladrey's opinion of value of certain intangible and tangible assets of The Deal as of September 11, 2012, descriptions of petitioner and The Deal, and detailed valuation information, as well as appendices A through H, financial schedules 1 through 17, and work papers 1 and 2.

Assets" in the upper left corner and "Exhibit B" in the upper right corner (Capital Asset Value List). Each page of the Capital Asset Value List has 16 headed columns and rows of separately listed assets. The columns' headings include, among others, "CAV Asset Class Description," "Asset Description," "Year Acquired," "Date Acquired," "Cost," "Fair Value," "Life," and "RUL." The 4-page Capital Asset Value List contains 172 separately listed assets under the CAV Asset Description – "Computer Equipment & Software," whose total fair market value is $404,000.00; 9 separately listed assets under the CAV Asset Class Description – "Leasehold Improvements," whose total fair market value is $166,000.00; 4 separately listed assets under the CAV Asset Class Description – "Furniture & Fixtures," whose total fair market value is $133,000.00; and 4 separately listed assets under the CAV Asset Class Description – "Telephone Equipment," whose total fair market value is $26,400.00. The four listed CAV asset classes have a total fair market value in the amount of $729,400.00.

18. Based upon McGladrey's valuation determination, the Property and Equipment owned by The Deal had a fair market value of $729,400.00 as of September 11, 2012. The Property consisted of leasehold improvements, computer equipment and software, furniture and fixtures, and telephone equipment. The "leasehold improvements" consisted of alterations The Deal made to its leased premises in order to customize the office space for its business needs. Specifically, the "leasehold improvements" consisted of construction costs, interior office build-outs, walls, windows, carpeting, electrical wiring for security systems, and other office improvements. The Deal's "leasehold improvement" property had a fair market value of $166,000.00 as of September 11, 2012.

19. Based upon McGladrey's valuation determination, the Software owned by The Deal had a fair market value of $685,000.00 as of September 11, 2012. The Software was internally

developed by employees of The Deal commencing in 2007. The Deal's underlying business intelligence content was supported by the Software, as the Software linked current and historical news to The Deal's underlying transaction content. The Software's relationship to the news content provided additional value to The Deal's customers by enabling enhanced analysis of the underlying data.

20. In accordance with SEC reporting requirements, petitioner filed a form 8-K, reporting, among other event items, its purchase of all the equity interests of The Deal on September 11, 2012, pursuant to the Purchase Agreement.[6]

21. Subsequently, a form 8-K/A was filed "to amend and supplement Item 9.01 of the Original 8-K to include certain historical financial statements of The Deal and certain unaudited pro forma financial information in connection with the Acquisition." Financial statements and unaudited pro forma financial information were filed as exhibits 99.1 and 99.2 to the Form 8-K/A signed by Elisabeth DeMarse, former chair, president and CEO of The Street, on November 19, 2012. Exhibit 99.1 consisted of audited financial statements of The Deal as of and for the years ended December 31, 2011 and 2010, and accompanying notes 1 through 11.[7] Exhibit 99.2 consisted of unaudited pro forma condensed combined financial information of The Street for the nine months ended September 30, 2012 and for the year ended December 31, 2011, giving effect to the Acquisition, and accompanying notes 1 through 3. Note 2 of exhibit 99.2, titled "Purchase Price Allocation," included a table summarizing "the consideration paid and the amounts of the assets

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[6] Petitioner's acquisition of The Deal was reported in the form 8-K under "Item 2.01 Completion of Acquisition or Disposition of Assets." This form 8-K bore the date of September 7, 2012, the date of the earliest event reported; however, it was signed on September 12, 2012 by Thomas Etergino, The Street's then-executive vice president, chief financial officer.

[7] Exhibit 99.1, note 6 listed amounts for "computer equipment," furniture and office equipment, and "leasehold improvements."

acquired and liabilities assumed recognized at the acquisition date." The table listed, among other items, "Property and equipment, net" in the amount of $729,400.00, and "Software" in the amount of $685,000.00.[8] It also listed the total consideration paid in the amount of $5,430,063.00. The last paragraph in Exhibit 99.2, note 2 stated:

> "[The Street] believes the information gathered to date provides a reasonable basis for estimating the fair values of assets acquired and liabilities assumed, but [The Street] is waiting for additional information necessary to finalize those fair values. Thus, the provisional measures of fair value set forth above are subject to change, although such changes are not anticipated to be significant. [The Street] expects to complete the purchase price allocation as soon as practical, but no later than one year from the Acquisition date."

22. As required by paragraph 1.5 of the Purchase Agreement, SEC disclosure requirements, and Generally Accepted Accounting Principles (GAAP), petitioner and Seller allocated $5,430,063.00 of the purchase price to The Deal's assets. Pursuant to the purchase price allocation required by paragraph 1.5 of the Purchase Agreement, petitioner allocated $729,400.00 of the consideration to the Property and Equipment, and $685,000.00 of the consideration to the Software.

23. The Street's form 10-K for the fiscal year ended December 31, 2012 included consolidated statements and the notes related to the same. On pages F-18 and F-19 of the form 10-K, The Street described its acquisition of The Deal as follows:

> "On September 11, 2012, [The Street] acquired 100% of the equity of The Deal, LLC ('The Deal'). The Deal is a digital platform that delivers sophisticated coverage of the mergers and acquisitions environment, primarily through The Deal Pipeline, a leading provider of transactional information services. The purchase price of the acquisition was approximately $5.8 million, of which $0.6 million was placed in escrow pursuant to the terms of an escrow agreement which will be used to secure indemnity obligations for a period of 18 months. Additionally, [The Street] assumed net liabilities approximating $5.0 million. [The Street] believes that the acquisition of The Deal will advance its strategic objectives by increasing both subscribers and content. The Deal's customer base of professionals, including senior-level bankers, law firm partners, private equity partners and hedge fund notables is expected to provide an additional source of recurring revenue with high renewals and attractive margins. These factors contributed to a purchase price in

[8] The "Software" was one of the five "Identifiable intangible assets" listed in the table.

> excess of the fair value of net tangible and intangible assets acquired from The Deal, and as a result, [The Street] recorded $1.7 million of goodwill in connection with this transaction. The goodwill is expected to be deductible over 15 years for income tax purposes."

Page F-19 also included a table summarizing "the consideration paid and the amounts of the assets acquired and liabilities assumed recognized at the acquisition date." This table listed, among other items, "Property and equipment, net" in the amount of $729,400.00"; "Software" in the amount of $685,000.00, with an amortization life of 5 years; "[t]otal identifiable net assets" in the amount of $3,761,440.00; "Goodwill" in the amount of $1,668,623.00; and "[t]otal consideration" paid in the amount of $5,430,063.00.

24. Following the acquisition, The Deal became and remained a SMLLC of petitioner that was treated as a disregarded entity for federal and state income tax purposes for all times during the Division's audit period. The Deal continued providing information services to its customers and filed its own New York State sales and use tax returns on its own behalf.[9]

25. Petitioner files New York State sales and use tax returns on a monthly basis, including during the period covering September 1, 2012 through August 31, 2013.

26. The Division performed a sales and use tax field audit of petitioner for the period December 1, 2011 through February 28, 2014. Initially, auditor Alice Ho was assigned to conduct the review of petitioner's books and records. By appointment letter dated April 28, 2014, the initial audit appointment was scheduled for June 2, 2014 at petitioner's New York, New York, office. An information document request (IDR#1), listing the books and records to be available for review by the auditor at the audit appointment, was attached to the appointment letter.

27. At the June 2, 2014 audit appointment, Ms. Ho met with petitioner's chief accounting officer, Richard Broitman, who continued to be the Division's primary point of contact throughout

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[9] Petitioner sold The Deal to a third-party company in February 2019.

the audit. Records presented at the meeting included petitioner's 2012 federal income tax return; trial balance for the audit period; and sales tax returns for the audit period, with back up worksheets. At the conclusion of the initial appointment, Ms. Ho requested petitioner's subscription sales documentation for the audit period, and the quarterly trial balance for 2013 for selected expense accounts.

28. Subsequently, petitioner provided sales and expense account documentation to the Division for review. A review of the Tax Field Audit Record (audit log) indicates that auditor Dariel Lanfranco accompanied Ms. Ho to several of her field visits in September 2014 and otherwise assisted her on the audit.[10] Subsequently, on November 26, 2014, the audit was transferred to Mr. Lanfranco, who completed the audit.

29. During the audit of petitioner's records, Ms. Ho examined petitioner's sales tax returns filed during the audit period, the sales tax trial balance and gross sales as reported on its federal income tax return. Upon examination of those documents, Ms. Ho determined that the amounts reported on the same did not reconcile. Ms. Ho sent two information document requests that requested, among other things, additional information related to those discrepancies.

30. In response to those information document requests, petitioner informed the Division that the discrepancies could have resulted from the acquisition of The Deal in September 2012. In addition, Mr. Broitman directed the Division to examine petitioner's SEC filings in order to understand the discrepancies. By this point in the audit, Mr. Lanfranco was the assigned auditor and he reviewed the SEC filings. Specifically, Mr. Lanfranco reviewed the SEC form 8-K/A related to petitioner's acquisition of The Deal, and the Purchase Price Allocation set forth in exhibit 99.2, note 2 of the form 8-K/A (exhibit 99.2 Purchase Price Allocation). Based upon his review of

[10] Ms. Ho was Mr. Lanfranco's supervisor.

the exhibit 99.2 Purchase Price Allocation, Mr. Lanfranco concluded that petitioner purchased tangible personal property, consisting of property and equipment in the amount of $729,400.00; and Software in the amount of $685,000.00, from The Deal. Mr. Lanfranco brought this information to petitioner's attention in order to afford it with the opportunity to provide additional information related to his findings. He also requested additional information related to sales, expense purchases, and other fixed assets.

31. Petitioner supplied additional information to Mr. Lanfranco. As part of the audit, Mr. Lanfranco reviewed the Purchase Agreement related to petitioner's acquisition of The Deal. He also reviewed petitioner's general ledger and discovered entries with various associated credits and debits that when reconciled totaled $729,400.00 and included descriptions related to The Deal's Property and Equipment. Mr. Lanfranco then requested the entirety of petitioner's books and records to verify the discovered information. After the entirety of the general ledger was provided to him, Mr. Lanfranco reviewed it and confirmed the entries totaling $729,400.00. He also found an additional related entry for The Deal's Software in the amount of $685,000.00.

32. During petitioner's audit, Mr. Lanfranco simultaneously conducted an audit of The Deal. As part of The Deal's audit, Mr. Lanfranco reviewed its final federal partnership income tax return (form 1065) for the period January 1, 2012 through September 11, 2012.[11] On that form 1065's schedule L, balance sheets per books, Mr. Lanfranco identified that The Deal reported tangible personal property at the beginning of the period, i.e., January 1, 2012, and removed it by the close of the period, i.e., September 11, 2012.

[11] The Street's audit file includes an "efile GRAPHIC print – DO NOT PROCESS As Filed Data -" copy of The Deal's final form 1065 that the Division obtained through its "FedView Servlet." The Deal's final form 1065, prepared by McGladrey, LLP, was signed by Robert Mersten and dated "2013-08-08."

33. Based upon his review of the exhibit 99.2 Purchase Price Allocation, The Deal's final federal partnership income tax return, The Street's general ledger entries, and the Purchase Agreement, Mr. Lanfranco, in his audit summary, noted that:

> "[o]n 9/30/12, The Street recorded the allocations detailed in the SEC filing on to the general ledgers maintained by the company. These assets were recorded on the 'books' of The Street on 9/30/12. These assets, as well as, liabilities and expenses of The Deal, LLC have been reported on the federal income tax returns of The Street and the general ledger as of that date and throughout the audit period. However, for sales tax purposes, The Deal maintains its own ID number and continues to file sales tax return [sic] under its tax ID number."

The auditor further noted that:

> "[t]he initial purchase of the 100% equity interest of The Deal LLC from WPPN, LP by The Street is not subject to tax. However, the subsequent transaction related to transfer of assets which included equipment and software for $729,400 and $685,000 respectively from The Deal to The Street on 9/30/12 is a retail sale of tangible personal property and is subject to sales tax."

34. To determine the sales tax due on the tangible personal property petitioner purchased from The Deal, the auditor added $729,400.00 in Property and Equipment, and $685,000.00 in Software, then multiplied the sum of $1,414,400.00 by the aggregate New York State and County sales tax rate of 8.875% and determined sales tax due in the amount of $125,528.00.

35. During the field audit of petitioner, both its sales and purchase records were requested, reviewed and found to be adequate. The records were reviewed in detail. The detailed review yielded additional taxable sales and use tax liabilities in the areas of sales, recurring expenses, and fixed assets for the period December 1, 2011 through February 28, 2014.[12] The Division discovered additional taxable sales of $440,713.01 and determined additional sales tax due in the amount of $39,113.28. The basis for the additional tax determined to be due "included additional

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[12] On behalf of petitioner, its chief accounting officer executed four consents to extension of time that extended the period of limitations for assessment for tax period(s) December 1, 2011 through November 30, 2013 to December 20, 2016.

subscription revenue not reported" on petitioner's sales tax returns, jurisdictional errors, and disallowed exempt sales. With respect to recurring purchases, selected expense invoices were reviewed for the period December 1, 2012 through February 28, 2013. Additional taxable purchases of $297,015.32 (after an error rate projection) were discovered and additional tax was determined to be due in the amount $26,360.11. In addition, credits related to the disposal/sales of equipment to an individual were discovered, which resulted in additional tax due in the amount of $278.88. With respect to the fixed asset area, additional tax in the amount of $9,311.37 was determined to be due on leasehold improvements and sales of fixed assets for the period September 1, 2012 through August 31, 2013, and additional tax in the amount of $125,528.00 was determined to be due on petitioner's purchase of The Deal's Property and Software for the period September 1, 2012 through November 30, 2012.[13]

36. Subsequently, the Division issued to petitioner two statements of proposed audit change for sales and use tax, each dated September 13, 2016. The first statement of proposed audit change asserted additional tax due in the amount of $65,752.27 plus interest for the period December 1, 2011 through February 28, 2014, with respect to petitioner's sales and recurring expenses. Petitioner agreed with this statement of proposed audit change, and paid the tax and interest asserted due in September 2016. The second statement of proposed audit change asserted additional tax due in the amount of $134,839.37 plus interest for the period September 1, 2012 through August 31, 2013, with respect to petitioner's fixed assets including the tangible personal property purchased from The Deal. Petitioner disagreed with this statement of proposed audit change, explaining that "the expenses relate to the purchase of an intangible interest and capital improvements, both of which are exempt from tax." In September 2016, petitioner remitted the

[13] In the audit summary, the auditor categorized the additional tax due on the fixed assets, including the purchase of The Deal's tangible personal property as use tax.

asserted tax due in the amount of $134,839.37 plus interest of $43,558.63 to the Division. Petitioner paid the asserted tax and interest due under protest for the purpose of stopping the accrual of interest.

37. On October 6, 2016, the Division issued to petitioner a notice of determination asserting additional sales and use taxes due in the amount of $134,839.37 for the period September 1, 2012 through August 31, 2013, plus interest in the amount of $43,558.53, less payments/credits in the amount of $178,397.90, for a zero balance due. The computation section of this notice of determination listed the asserted tax and interest due for each quarter of the tax period September 1, 2012 through August 31, 2013. For the period September 1, 2012 through November 30, 2012, total tax in the amount of $126,582.37, plus interest in the amount of $41,256.08, was asserted as due. The total additional tax asserted as due for the period September 1, 2012 through November 30, 2012 included $125,528.00 in tax asserted as due with respect to petitioner's purchase of tangible personal property from The Deal.

38. A conference was held in the Bureau of Conciliation and Mediation Services on March 13, 2017 and an order was issued on September 1, 2017, sustaining the notice of determination in its entirety.

39. Subsequently, petitioner no longer contested $9,311.37 of the total tax asserted in the notice of determination. However, petitioner continued to contest $125,528.00 of the amount asserted in the notice of determination, which related to sales tax due on petitioner's purchase of tangible personal property from The Deal. By its petition dated November 14, 2017, petitioner protested $125,492.50 of the tax due in the notice of determination.[14] On January 17, 2018, the

[14] For unexplained reasons, petitioner put $125,492.50 in controversy in its petition. However, at the hearing and in its brief agreed that the correct amount in controversy is $125,528.00.

Division submitted an answer to the petition that put the amount of $125,528.00 of the tax due in controversy.

40. At the hearing, the Division introduced into evidence a "Payoff Letter," dated September 11, 2012, that described certain debt obligations owed by The Deal prior to its acquisition by The Street.[15] Provision "2" of this letter stated that:

> "[o]n or about September 11, 2012, all equity interests in [The Deal] will be purchased, and in connection therewith, all such equity interests and all assets of [The Deal] are to be transferred to [The Street] pursuant to the Purchase Agreement (the 'sale')."

41. The Division presented the testimony of the auditor Dariel Lanfranco. Mr. Lanfranco described the performance of the audit and the determinations made therein, including the determination that petitioner purchased tangible personal property from The Deal. He explained how his review of the exhibit 99.2 Purchase Price Allocation, the Purchase Agreement, petitioner's general ledger entries, and The Deal's final federal partnership income tax return led to and supported the determination that petitioner purchased tangible personal property when it acquired The Deal. He explained that the Purchase Agreement referenced a purchase price allocation that was missing from the document and described how he was able to find the missing information in the exhibit 99.2 Purchase Price Allocation. Mr. Lanfranco also explained how petitioner's general ledger showed entries in the same amounts as the tangible personal property allocated on the exhibit 99.2 Purchase Price Allocation and testified that he tied The Deal's final federal partnership income tax return to those general ledger entries. Mr. Lanfranco testified that while auditing The Deal, he requested information related to its fixed assets after September 12, 2012. In response to that

[15] The payoff letter was signed by WPPN and Wasserstein Capital, L.P., and was agreed to and accepted by The Deal and The Street. All the described debt obligations were satisfied by The Street's wire transfer of immediately available funds in an amount equal to the "Initial Purchase Price."

request, Mr. Lanfranco testified that Mr. Broitman informed him that The Deal's fixed assets were recorded in petitioner's books.

42. In his testimony, Mr. Lanfranco also clarified items in his audit summary. In the audit summary, Mr. Lanfranco described the events of the acquisition as petitioner initially purchasing the equity of The Deal followed by a purchase of tangible personal property. However, he testified that petitioner's acquisition of The Deal included tangible personal property, and that these events happened as one related transaction. Mr. Lanfranco also explained how the purchase of tangible personal property was incorrectly categorized as use tax rather than sales tax in the audit summary.

43. As noted in finding of fact 34, the Division calculated its assessment of $125,528.00 by applying the aggregate New York State and County sales and use tax rate of 8.875% to the fair market values of the Property and Equipment, and Software as if petitioner purchased the Property and Equipment, and Software from The Deal. The Division's tax assessment with respect to the Property and Equipment is $64,734.25.[16] In arriving at its assessment, the Division did not examine the different categories of Property and Equipment owned by The Deal and did not consider whether The Deal's leasehold improvements may be excluded from sales taxation. The Division's assessment with respect to the Software is $60,793.75. In arriving at its assessment, the Division did not consider whether the exemption for transfers of internally developed software between affiliated entities would apply.

44. Mr. Lanfranco testified that during multiple discussions between petitioner and the Division, petitioner never claimed an exemption or exclusion from tax for the purchase of the tangible personal property. He explained that, if petitioner had, he would have done research and requested documentation to review any such claim.

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[16] The $64,734.25 tax assessment for the Property and Equipment includes $14,732.50, the sales tax due on the value of the leasehold improvements ($166,000.00 x 0.08875 = $14,732.50).

45. At the hearing, petitioner presented the testimony of Mr. Broitman, who at the time of the hearing had been an employee of The Street for 19½ years. During the audit period, Mr. Broitman was in charge of "the whole accounting group." Mr. Broitman was also directly involved in the audit conducted by the Division. He testified about petitioner's SEC filings and about the internal accounting methodology used by petitioner. With respect to the general purpose of a form 10-K, Mr. Broitman explained that the SEC requires all publicly owned companies to file forms 10-K on which they report "their financial results for the year with footnotes and other explanation as to what transpired over the course of time." He also explained the importance of accurately and truthfully setting forth the facts in the filings and the serious consequences publicly owned companies face if they fail to accurately and truthfully disclose all the facts. Mr. Broitman stated that he is the initial and primary writer of petitioner's form 10-K; however, "other people may edit a few words." With respect to petitioner's form 10-K filing for the fiscal year ended December 31, 2012 (***see*** finding of fact 23), Mr. Broitman testified that in order to accurately describe petitioner's acquisition of The Deal, he was required to enumerate The Deal's assets as part of the whole acquisition rather than merely stating that a transfer of equity occurred. With respect to the form 8-K/A (***see*** finding of fact 21), Mr. Broitman testified that petitioner's internal legal department prepared the form 8-K/A, but his accounting group would have been consulted on the preparation of the financial table set forth in the exhibit 99.2 Purchase Price Allocation. With respect to the internal accounting methodology used by petitioner, Mr. Broitman stated that petitioner maintained one general ledger that included petitioner and several of its subsidiaries, including The Deal. He explained that for profit and loss purposes subaccounts existed for The Street, The Deal and any other entities owned by The Street. Mr. Broitman further explained that The Deal had a separate profit and loss subaccount beginning on September 12, 2012. Mr. Broitman testified that The

Deal's assets were commingled with those of petitioner and its other subsidiaries and were reflected on petitioner's balance sheets.

46. Mr. Broitman testified that the leasehold improvements were in The Deal's office space, "which we subsequently after the acquisition were able to sublet to somebody else." He further testified that the leasehold improvements, and the furniture and fixtures remained in The Deal's office space and "became part of that sublease."

47. At the hearing, petitioner introduced into evidence two documents related to the acquisition. The first document titled "The Deal, LLC's Written Consent of the Sole Member Dated as of September 11, 2012" (Written Consent of Sole Member), and a second document titled "The Deal, LLC Action By Written Consent of the Board of Managers Dated as of September 10, 2012" (Written Consent of Board of Managers). The Written Consent of Sole Member approved "the admission of Buyer as an additional member" of The Deal, effective as of the closing. Resolutions approved and ratified in the Written Consent of Board of Managers, included, among others, the Amendment to The Deal's LLC agreement; The Deal's approval and consent to "the transactions contemplated by the Purchase Agreement, including the sale by Seller to Buyer of all the equity interests of [The Deal] and all of Seller's rights, title and interest in to and under the LLC Agreement;" and the admission of the buyer as an additional member of The Deal. Although both written consents referenced one or more annexed exhibits, none of the referenced exhibits were attached to either of those written consents.

48. The record does not include all "other transaction documents" referenced in the Purchase Agreement.

49. The record does not include The Deal's Third Amended and Restated Limited Liability Company Agreement, dated as of October 17, 2001, and the Amendment to the LLC Agreement, dated as of September 10, 2012.

50. Petitioner submitted 23 proposed findings of fact pursuant to section 3000.15 (d) (6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. All of the proposed findings of fact have been substantially incorporated into this determination, with the exception of: proposed findings of fact 22 and 23 that are rejected as unnecessary to the proceeding; and proposed findings of fact 8, 9, 11, 12, 14, 16 and 20 that are rejected as unsupported by the record. In ruling on petitioner's proposed findings of fact, if any part of a proposed finding of fact is unsupported by the record, the proposed finding of fact has been rejected in its entirety.

CONCLUSIONS OF LAW

A. Tax Law § 1105 (a) imposes sales tax on the receipts from every retail sale of tangible personal property unless otherwise exempt. A "retail sale" is "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . . (Tax Law § 1101 [b] [4] [i] [A]). The term "sale" is defined by Tax Law § 1101 (b) (5) as

> "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor . . . ."

The words "sale," "selling" or "purchase" are defined as "any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration" (20 NYCRR 526.7 [a] [1]). Consideration is defined under the Tax Law regulations as including "monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor" (20 NYCRR 526.7 [b]). Monetary consideration, in turn, "includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay" (***id.***).

The Tax Appeals Tribunal has also applied the common law definition of consideration that "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other" (***see Matter of Hygrade Casket Corp.***, Tax Appeals Tribunal, December 16, 1993, ***confirmed*** 212 AD2d 843 [3d Dept 1995]). Tangible personal property means corporeal personal property of any nature having a material existence and perceptibility to the human senses and includes pre-written software (Tax Law § 1101 [b] [6]; 20 NYCRR 526.8 [a]). Tax Law § 1132 (c) (1) sets forth a presumption that all sales receipts for tangible personal property are subject to tax "until the contrary is established," and sets the burden of proving the contrary upon the person required to collect the tax or its customer (20 NYCRR 532.4 [a] [1]; [b] [1]).

B. At issue is the Division's determination that petitioner purchased tangible personal property subject to sales tax when it acquired The Deal. At audit, the Division determined that petitioner purchased tangible personal property, consisting of Property and Equipment in the amount of $729,400.00 and Software in the amount of $685,000.00, and sales tax in the amount of $125,528.00 was due on the purchase of such tangible personal property. In making its determination, the Division relied upon the Purchase Agreement, the exhibit 99.2 Purchase Price Allocation, petitioner's general ledger entries, and The Deal's final federal partnership income tax return. The Division maintains that those documents record the events that happened at the acquisition and demonstrate petitioner's purchase of the tangible personal property at issue.

C. Despite petitioner's attempt, in its brief, to shift the burden of proof to the Division, petitioner bears the burden of proving by clear and convincing evidence that the amount assessed is erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003; ***Matter of Hygrade Casket Corp.; Matter of CLM Associates, LLC,*** Tax Appeals Tribunal, February 12, 2018, ***confirmed*** 181 AD3d 999 [3d Dept 2020]). Petitioner posits that the form and intent of its acquisition of The Deal was a transfer of the intangible equity interests of a limited liability company. It contends that the legal document that controls the form of the acquisition is the Purchase Agreement. Petitioner maintains that all provisions contained within the Purchase Agreement support its assertion that petitioner acquired the equity interests of The Deal from Seller. With respect to the intent of petitioner and Seller regarding the acquisition, petitioner asserts that the parties' intent to transfer the intangible equity interests of The Deal is evident in the Purchase Agreement, the Letter of Intent, dated July 10, 2012, and the written consents of The Deal's sole member and board of managers. Petitioner further asserts that the record is devoid of any documents indicating that petitioner had any intention of acquiring tangible assets from The Deal. As such, petitioner maintains that the Division erroneously determined that petitioner purchased tangible personal property from The Deal, as part of its acquisition of The Deal from Seller.

D. After careful review of the record, I find that the Division properly determined that petitioner purchased tangible personal property from The Deal. In support of its position, petitioner claims that the Purchase Agreement is the legal document that controls the form of its acquisition of The Deal, i.e., its acquisition of equity interests of The Deal from Seller. A review of the Purchase Agreement does not support petitioner's assertions regarding the acquisition. The entire agreement of the parties is set forth in section 7.5 of the Purchase Agreement, which provides that the Purchase Agreement and other Transaction Documents embody the entire agreement of the parties (petitioner and Seller) and their respective affiliates with "respect to the transactions contemplated hereby and merges in, supersedes and cancels all prior written or oral commitments, arrangements or understandings with respect thereto, including the Letter of Intent, dated as of July 10, 2012" (***see*** finding of fact 11). The language of section 7.5 of the Purchase Agreement is clear, the parties contemplated transactions, not a single transaction as petitioner claims. It is noted that the Purchase Agreement references many documents that are not included in the record (***see*** findings of fact 14, 15, 48, and 49). The record includes only three other documents related to petitioner's acquisition of The Deal. The written consents of The Deal's sole member and board of managers submitted into evidence by petitioner (***see*** finding of fact 47), and the payoff letter submitted into evidence by the Division (***see*** finding of fact 40). A review of provision 2 of the payoff letter indicates that all equity interests in The Deal were to be purchased on or about September 11, 2012, "and in connection therewith, all such equity interests and all assets of [The Deal] are to be transferred to [The Street] pursuant to the Purchase Agreement" (***id.***). It appears that those three documents were some of the closing documents that the seller was required to deliver at the closing pursuant to subsection 1.3 (a) of the Purchase Agreement (***see*** finding of fact 15). The limited documents, in the record, memorializing the acquisition clearly show that petitioner received title to The Deal's assets as part of the acquisition. Petitioner's method of reporting The Deal's assets on its books and records also supports a finding that title to The Deal's assets was transferred to petitioner. Petitioner maintained one general ledger that included petitioner and several of its subsidiaries, including The Deal (***see*** finding of fact 45). The Deal's assets were commingled with those of petitioner and its other subsidiaries and were reflected on petitioner's balance sheets (***id.***). There is also ample proof that The Deal transferred its tangible personal property to petitioner for consideration. The Purchase Agreement, in its section 1.5, provided that the final purchase price was to be allocated among The Deal's assets (***see*** finding of fact 12). During the audit, Mr. Broitman directed the Division to review petitioner's SEC filings related to petitioner's acquisition of The Deal. As noted above, the Division reviewed petitioner's form 8-K/A as part of its audit of petitioner's acquisition of The Deal. In the exhibit 99.2 Purchase Price Allocation of its form 8-

K/A, petitioner included a table summarizing "the consideration paid and the amounts of the assets acquired and liabilities assumed recognized at the acquisition date" (***see*** finding of fact 21). In that table, petitioner reported "Property and equipment, net" in the amount of $729,400.00, and "Software" in the amount of $685,000.00 (***id.***). Petitioner's general ledger showed additions of tangible personal property with descriptions related to its acquisition of The Deal's tangible personal property and in amounts consistent with the exhibit 99.2 Purchase Price Allocation. The Deal's final federal partnership income tax return showing removal of tangible personal property on September 11, 2012, the date of the acquisition, is further evidence of the transfer. The description of petitioner's acquisition of The Deal contained in pages F-18 and F-19 of its form 10-K filed for fiscal year ending December 31, 2012 also supports a finding that consideration was provided for the transfer of The Deal's assets. Petitioner, in its description of the acquisition, stated, among other things, that "[The Street] assumed net liabilities approximating $5.0 million" (***see*** finding of fact 23).

For the foregoing reasons, petitioner failed to carry its burden of proving by clear and convincing evidence that the Division's assessment of sales tax on petitioner's purchase of The Deal's tangible personal property, consisting of Property and Equipment in the amount of $729,400.00 and Software in the amount of $685,000.00, was erroneous (***see*** Tax Law § 1132 (c) (1); ***see also Matter of Hygrade Casket Corp.; Matter of CLM Associates, LLC***).

E. In conclusion of law D, I determined that the Division properly assessed sales tax on petitioner's purchase of The Deal's tangible personal property, consisting of Property and Equipment in the amount of $729,400.00 and Software in the amount of $685,000.00. Petitioner contends that some of its purchase of The Deal's assets should be exempt or excluded from taxation. It is noted that statutes and regulations authorizing exemptions and exclusions from taxation are to be strictly and narrowly construed (***see Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of the State of New York***, 33 NY3d 587 [2019]). Petitioner bears the burden of proving entitlement to the exemption or exclusion (***id.***).

Petitioner claims that the Software in the amount of $685,000.00 should be excluded from the Division's determination of taxable property subject to sales tax. It maintains that the Software at issue is custom software that was internally developed by The Deal's employees to perform specific functions that were specific to The Deal's business operations. While custom software is taxable if it is sold or transferred to a third party, petitioner claims that according to the guidance issued by the Division, NY St Tax Bulletin TB-ST-128, custom software is exempt from tax when resold or transferred directly or indirectly by the purchaser of the software to either: a corporation that is a member of an affiliated group of corporations that includes the original purchaser of the custom software; or a partnership in which the original purchaser of the custom software and other members of the affiliated group have at least a 50% interest in capital or profits (***see also*** Tax Law § 1115 [a] [28]). There is clear and convincing evidence in the record to prove that the Software at issue is in fact custom software. The McGladrey valuation summary includes details regarding this custom software (***see*** finding of fact 19). In addition, the custom software was separately listed in petitioner's form 8-K/A, form 10-K, and general ledger (***see*** findings of fact 21, 23 and 31). As a result of the acquisition, petitioner owned 100% equity interest of The Deal. Since The Deal's custom software, in the amount of $685,000.00, was transferred between affiliates, i.e., subsidiary to owner, the transfer of such custom software is exempt from sales tax pursuant to Tax Law § 1115 (a) (28).

Petitioner also claims that leasehold improvements in the amount of $166,000.00 should be excluded from sales tax. It maintains that New York does not impose a sales tax on the transfer of real property, including leasehold improvements pursuant to Tax Law § 1105. Petitioner asserts that the leasehold improvements consisted of alterations that The Deal made to its leased premises in order to customize the office for its business needs, and those alterations were described in the McGladrey valuation summary report (***see*** finding of fact 18). A review of the McGladrey valuation summary indicates that the leasehold improvements were described as construction costs, interior office build-outs, walls, windows, carpeting, electrical wiring for security systems, and other office improvements (***id.***). The 4-page Capital Asset Value List included with the McGladrey valuation summary contained 9 separately listed assets under the CAV Asset Class Description – "Leasehold Improvements," whose total fair market value was $166,000.00 (***see*** finding of fact 17). Mr. Broitman credibly testified that the leasehold improvements were in The Deal's office space, remained in that office space (along with The Deal's furniture and fixtures), and became part of the sublease of The Deal's office space to a third party (***see*** finding of fact 46). Petitioner has provided clear and convincing evidence of The Deal's leasehold improvements in the amount of $166,00.00, and those leasehold improvements should be excluded from sales tax.

In sum, petitioner has established that the transfer of the following assets from The Deal to petitioner are properly exempt or excluded from sales tax: The Deal's custom software in the amount of $685,000.00, and The Deal's leasehold improvements in the amount of $166,000.00.

F. As noted in finding of fact 37, the Division issued to petitioner a notice of determination asserting sales and use taxes due in the amount of $134,839.37 for the period September 1, 2012 through August 31, 2013, plus interest, less payments/credits in the amount of $178,397.90, for a zero balance due. The computation section of this notice of determination listed asserted tax and interest due for each quarter of the tax period September 1, 2012 through August 31, 2013. For the period September 1, 2012 through November 30, 2012, total tax in the amount of $126,582.37 plus interest was asserted as due. The total tax asserted as due for the period September 1, 2012 through November 30, 2012 included $125,528.00 in tax asserted as due with respect to petitioner's purchase of tangible personal property, totaling $1,414,400.00, from The Deal (***see also*** finding of fact 34). In conclusion of law E, I found that the following assets transferred from The Deal to petitioner are not subject to sales tax: The Deal's custom software in the amount of $685,000.00 and The Deal's leasehold improvements in the amount of $166,00.00. The Division is directed to subtract the sum of $851,000.00 ($685,000.00 plus $166,000.00) from $1,414,400.00, apply the aggregate New York State and County sales tax rate of 8.875% to the difference, and recalculate the sales tax due on the transfer of The Deal's assets to petitioner. Since petitioner paid the tax asserted as due under protest to stop the accrual of interest, the Division is also directed to refund the amount of any overpayment (plus interest) resulting from its recalculation of the sales tax due on the transfer of The Deal's assets to petitioner.

G. The petition of TheStreet.com, Inc. (a/k/a The Street, Inc.) is granted in accordance with conclusions of law E and F, but in all other respects is denied; the notice of determination dated October 6, 2016, as modified in accordance with conclusions of law E and F, is sustained; and the Division is directed to issue a refund of sales tax plus interest, in accordance with conclusions of law E and F.

DATED: Albany, New York
February 4, 2021

_/s/ Winifred M. Maloney________
ADMINISTRATIVE LAW JUDGE