

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
P.S.R.N., INC. :
for Revision of a Determination or Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Year 2007 through 2011. :
DETERMINATION
DTA NOS. 826140
AND 826413

In the Matter of the Petition :
of :
RYAN W. NESSING :
for Revision of a Determination or Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Years 2007 through 2011. :

Petitioners, P.S.R.N., Inc. and Ryan W. Nessing, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the years 2007 through 2011.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in New York, New York, on November 3, 2015 at 10:30 A.M., with all briefs due by May 2, 2016, which date began the six-month period for the issuance of this determination. Petitioner appeared by LRC Group, Inc. (Lawrence R. Cole, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel).

Upon the retirement of Judge Pinto from state service, this mater was reassigned to Daniel J. Ranalli, Supervising Administrative Law Judge, who renders the following determination.

ISSUES

- I. Whether petitioners timely protested the notices of determination in issue.
- II. Whether petitioners are entitled to a refund of sales and use taxes paid during the tax years 2007 through 2011.
- III. Whether the Division of Tax Appeals has jurisdiction to entertain that part of petitioners' petitions that was filed to protest notices and demands.
- IV. Whether petitioner Ryan W. Nessing was a person required to collect and pay over sales and use taxes on behalf of P.S.R.N., Inc., during the period in issue and therefore liable for the tax, penalty and interest due from P.S.R.N., Inc.
- V. Whether petitioners have established reasonable cause for the abatement of penalties asserted on the notices of determination.

FINDINGS OF FACT¹

1. Petitioner Ryan W. Nessing (Nessing) was an employee of H. Parkin Saunders, an interior design business, during the period January 1, 2010 through December 31, 2011 (audit period). During the same period, Nessing was president and a shareholder of petitioner P.S.R.N., Inc. (PSRN), described as a separate and additional purchasing company operated by H. Parkin Saunders. PSRN shared the same address and contact information with H. Parkin Saunders.
2. PSRN was incorporated in September 2005. During the audit period, Nessing signed several sales and use tax returns as president of PSRN and was listed as the sole shareholder on its New York S corporation shareholders' information schedule. Although those forms indicated

¹The findings of fact presented by petitioners in their initial brief are not specifically accepted because they merely address the exhibits introduced at hearing and attempt to characterize those exhibits in the context of argument. In addition, given the overriding issues of whether the petitions were filed timely and whether the refund claim was valid, the findings are found to be without relevance. Further, since petitioners did not indicate they were proposed findings, it is concluded they do not require the treatment specified in the State Administrative Procedure Act § 307(1).

various percentages (either 1 percent or 100 percent) of ownership, Nessing was listed as the sole shareholder for 2010, 2012 and 2013.

3. There is no dispute that Nessing signed checks, tax returns and corporate documents for PSRN or that he was the sole owner and shareholder, as listed on the PSRN S corporation information schedules. However, he never received a salary or any remuneration or capital distribution from PSRN. At the time he became involved with PSRN he was 19 years old with no business background or education and was working for H. Parkin Saunders running errands, folding samples and answering the telephone.

4. Nessing was under the direction and control of Mr. Saunders in all his dealings with PSRN. He was directed to sign checks and other corporate and tax documents by Mr. Saunders. All the business operations of PSRN were handled by Raymond Schneider, Mr. Saunders's personal assistant and bookkeeper.

5. Jeffrey Wilcox, another person who worked at H. Parkin Saunders during the same period as a draftsman, noted that Nessing was hired by H. Parkin Saunders to run errands, fold samples and answer telephones and saw him perform these duties. He noted that Mr. Saunders controlled both H. Parkin Saunders and PSRN and made all decisions for both. In the five years he worked for Mr. Saunders, Mr. Wilcox believed that Mr. Saunders did not delegate duties to his employees, including his personal assistant, Mr. Schneider. Mr. Saunders believed in having complete control. This was evidenced in several documents introduced by petitioners. Mr. Saunders transferred and withdrew money from the PSRN account and directed the bank as to how it was to be disposed; his personal assistant, Mr. Schneider, advised vendors with whom H. Parkin Saunders did business that, as of July 2006, H. Parkin Saunders was operating a separate purchasing company, utilizing the same address and contacts as H. Parkin Saunders; and in a

memorandum dated October 21, 2005, from Mr. Schneider, he informed the Silber Law Firm that Mr. Saunders wanted to be named the Chairman of PSRN with all shares in his name. Mr. Saunders also had Nessing sign a shareholder resolution in February, 2007 that elected Mr. Saunders a director and chief executive officer of PSRN with responsibility over the corporate banking account.

6. Nessing had no knowledge of marketing, made no sales, did no bookkeeping and never joined in corporate decision making.

7. For the four quarters ended August 31, 2010, November 30, 2010, February 28, 2011 and May 31, 2011, PSRN filed sales and use tax returns and did not remit the tax due. All of the returns, except the last, was signed by Nessing as president.

8. The Division of Taxation (Division) issued to PSRN four notices and demands for payment of the tax due as follows:

Period Ended	Notice Number	Date of Notice	Tax Due
8/31/2010	L-035121998-8	12/13/2010	\$17,997.79
11/30/2010	L-035405555-3	2/11/2011	\$11,924.51
2/28/2011	L-035625406-6	4/12/2011	\$11,014.13
5/31/2011	L-036334818-2	7/11/2011	\$7,859.53

In addition to the tax, PSRN was also assessed penalty and interest.

9. On or about February 14, 2014, PSRN and Nessing filed a petition seeking a redetermination or refund of the taxes set forth on the notices and demands set forth in Finding of Fact 8. Specifically, they contest \$48,943.00 and request a refund of \$27,187.00. In addition, petitioners protested notice number L-031121998-8, but this notice was never introduced into the record and was not attached to the petition. After a review of its files, the Division concluded

that the assessment was the result of a typographical error made by petitioners and does not represent a notice of determination or notice and demand issued to petitioners.

10. On or about August 24, 2012, petitioners filed an application for credit or refund of sales and use taxes, form AU-11, requesting a refund in the sum of \$27,182.23 for the period 2007 through 2011. No supporting documentation was attached to the application, which was numbered 2012-08-0772. The explanation provided on the form by petitioners' representative, Lawrence R. Cole, CPA, stated the following:

“Taxpayer was young and naive when the above corporation was put in his name. He was not aware of what his boss did. The State has collected from the taxpayer without due process to determine if in fact Mr. Nessing is personally liable for the tax. This was his first job and did not put any capital in the business. He was being used without knowing or understanding what was being done in his name. The sales generated were as a result of his recently deceased bosses' efforts.”

11. The Division's Transaction Desk Audit Bureau acknowledged receipt of the claim for refund on September 20, 2012 and informed Mr. Cole that the claim had been transferred to the Brooklyn district office for review.

12. On December 2, 2013, the Division sent a Response to Taxpayer Inquiry to petitioners at Nessing's home address, in which the Division informed them that the information provided to substantiate a refund did not justify any adjustment to the tax, penalty and interest set forth on the four notices and demands listed in Finding of Fact 8. The Response did add that petitioners were welcome to offer further substantiation of the claim for refund that the Division would review. The Response noted that the amount due on the notices and demands was \$55,735.77 as of December 12, 2013, after payments or credits of \$24,629.90.

13. By letter dated October 27, 2014, the Division notified petitioners' representative, Lawrence R. Cole, CPA, that the refund claim, number 2012-08-0772, filed on or about August

24, 2012 seeking a refund of \$27,182.23, could not be addressed as of the date of the request.

Relying on the statement in the refund application, the Division noted that the refund claim appeared to be with respect to certain notices of determination that had been issued to Nessing as a person responsible for the collection and payment of sales and use taxes on behalf of PSRN but not protested timely, resulting in fixed and final assessments. The Division further noted that Nessing had not fully paid the amounts asserted in those notices. Since the full amount of the notices had not been paid, the refund application was deferred until such time that they were paid.

14. Finally, in the same October 27, 2014 letter, the Division stated that PSRN was in a similar situation and that since the assessments issued to it had not been fully paid, a refund claim was premature. A consolidated statement of tax liabilities, dated August 19, 2015, listed the four notices and demands listed in Finding of Fact 8 and indicated a current balance due on each of them.

15. Neither petitioners nor the Division have been able to substantiate the dollar amount of the refund claim, \$27,182.23. A search of the Division's records yielded no evidence of payment of this sum, and petitioners were also unable to justify the figure, except to say moneys had been paid and that it was the Division's responsibility to know how much was paid.

16. With respect to petitioner Nessing, the facts indicate that he was assessed as a person responsible for the collection and payment of tax for PSRN, chiefly in reliance on the facts set out in Findings of Fact 1, 2 and 3.

Initially, Nessing filed his petition in the Division of Tax Appeals protesting the same notices and demands issued to PSRN, but amended his petition to correctly protest certain notices of determination issued to him. Although the petition was amended to contest certain

notices of determination issued to Nessing, there is no mention of notice number L-036993365-4.

The other notices that were listed by petitioner, all dated November 29, 2011, were as follows:

Period Ended	Notice Number	Date of Notice	Tax Due
11/30/2010	L-036993364-5	11/29/2011	\$11,924.51
2/28/2011	L-036993363-6	11/29/2011	\$11,014.13
5/31/2011	L-036993362-7	11/29/2011	\$7,859.53
8/31/2011	L-036993361-8	11/29/2011	\$146.63

In addition to the tax, Nessing was also assessed penalty and interest.

17. Through the research of Ms. Cynthia Foster, a tax auditor I with 14 years of experience with the Division and currently working with the Transaction Field Audit Bureau/Field Audit Management with daily access to the Division's assessment records, the Division was able to trace payments made by PSRN and Nessing and the assessments to which they were applied. As a result of the search, it was determined that the following payments had been received and credited towards assessments outstanding against Nessing:

Notice Number	Payment
L-036993364-5	\$2,705.79
L-036993363-6	\$2,705.79
L-036993362-7	\$3,705.79
L-036993361-8	N/A (\$0.00 balance) ²

18. The petition filed with respect to the notices of determination set forth in Finding of Fact 16 was received by the Division of Tax Appeals on February 18, 2014 and stated that the amount of tax determined to be due was \$48,943.00 and that the amount of tax contested was

²Does not appear as an outstanding assessment on the Consolidated Statement of Tax Liabilities dated December 12, 2013.

\$48,943.00 as well. A refund of \$27,187.00 was requested in the petition. As noted in Finding of Fact 10, on or about August 24, 2012, petitioners filed an application for credit or refund of sales and use taxes, requesting a refund in the sum of \$27,182.23 for the period 2007 through 2011. Also as mentioned, no supporting documentation was attached to the application, and the Division deferred action on the application until full payment was received. As of July 29, 2015, Nessing owed additional tax, penalty and interest on four notices, as follows:

Notice Number	Balance Due
L-036993364-5	\$22,011.72
L-036993363-6	\$19,121.25
L-036993362-7	\$9,814.88
L-036993365-4	\$16,091.30

19. As in the case of PSRN, neither the Division nor Nessing was able to substantiate the amount claimed in the refund application.

20. At hearing, the Division renewed a motion to have the matter against Nessing dismissed, or in the alternative, summary determination issued in its favor, for Nessing's failure to timely protest the notices of determination issued to him. The Division asserts that there are no material issues of fact and that a determination should be issued in its favor.

21. As mentioned in Finding of Fact 16, the Division asserts that the four notices petitioned by Nessing were dated and issued on November 29, 2011. To show proof of proper mailing of the notices of determination on November 29, 2011, the Division provided the following: (i) an affidavit, dated October 27, 2015 of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) an affidavit, dated October 27, 2015, of Bruce Peltier, Principal Mail and

Supply Clerk and a supervisor in the Division's mail room; (iii) the 23-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (iv) a copies of the notices of determination dated November 29, 2011, together with associated mailing cover sheets; and (v) other documentation in the record which serves to show Nessing's address.

22. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of deficiency, notices of estimated determination, notices of determination such as the notices of determination at issue herein, and other such notices during the period here in question, involved the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commenced with the CARTS computer-generation of a CMR and corresponding notices. The notices were predated with the anticipated date of their mailing, and each notice was assigned a certified control number. The certified control number for each notice appeared on a separate one-page "Mailing Cover Sheet" generated for each such notice, and that sheet bore a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generated any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, was a discrete unit with the batch of notices. The Mailing Cover Sheet was the first sheet in the unit.

23. The CARTS-generated CMR for each batch of notices listed each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first columnar heading entitled "Certified No." The assessment numbers for the notices appeared under the second columnar heading, entitled "Reference No.," and the names and addresses of the taxpayers were listed under the third columnar heading entitled "Name of Addressee, Street and PO Address." Remaining columnar

headings listed appropriate postage and fee amounts. Each certified mail record and associated batch of statutory notices were forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appeared at the upper right corner of each page of the CMR. All pages were banded together when the documents were delivered to the mail room and remain banded when the postmarked documents were returned to the Division after mailing, unless ordered otherwise.

24. Each statutory notice was predated with the anticipated date of its mailing. In contrast, each page of the CMR listed 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. This CMR listing specifically set forth, at the upper left corner of the CMR, 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," was to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR 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).

25. Under the Division's standard mailing procedures, statutory notices that were ready for mailing were received by the Division's mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch was preceded by its mailing cover sheet and was accompanied by any required enclosures, and each batch included its accompanying CMR. A member of the mail room staff, in turn, operated a machine that put each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet showed through the window. The staff member then weighed, sealed and affixed

postage and fee amounts on the envelopes. A mail processing clerk then checked the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performed 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. Thereafter, a member of the mail room staff delivered the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee was instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR was 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 was picked up at the post office by a staff member on the following day after its initial delivery and was delivered back to the Division for storage and retention in the regular course of its business.

26. The CMR for the batch of notices to be issued on November 29, 2011, including the notices addressed to Nessing, consisted of 23 pages. Each of these pages included in its upper left corner the preprinted year/day/time "run" listing of "20113251700". Appearing in the upper left³ corner of the CMR on pages 1 and 23 was the handwritten date "11/29/11," indicating the manually inserted date of actual mailing. Each of the 23 pages included a stamped date of November 29, 2011, made by the USPS. The CMR listed 252 pieces of mail.

27. In this instance, on pages 5 and 6, certified control numbers 7104 1002 9730 0903 4835 assigned to assessment number L-036993361, 7104 1002 9730 0903 4842 assigned to assessment number L-036993362, 7104 1002 9730 0903 4859 assigned to assessment number

³Paragraph 8 of the Nagengast affidavit stated that the handwritten date of mailing was to be entered by someone in the mail processing center on the right side of the first and last page of the CMR. Here, it was entered on the left side above the Julian date when the CMR was produced.

L-036993363, 7104 1002 9730 0903 4866 assigned to assessment number L-036993364 and 7104 1002 9730 0903 4873 assigned to assessment number L-036993365, were addressed to “Nessing-Ryan W, 222 E 95th Street Apt. 6, New York, NY 10128-4027.”

28. Appearing at the bottom of page 23 of the CMR was the preprinted heading “Total Pieces and Amounts,” to the right of which appeared preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflected the preprinted number of pieces of mail for this CMR, here 252, as well as postage and fee amounts for such pieces of mail. Immediately below this heading was the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number “252” was handwritten and circled. Appearing at the lower right area of page 23 was a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately above this stamped instruction reflected the aforementioned USPS date as well as initials affixed by the postal clerk.

29. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division’s MAPS Bureau, and Bruce Peltier, an employee and Supervisor in the Division’s mail room. Each affiant attested to his or her personal involvement in and familiarity with past and present practices and procedures concerning the preparation and generation of notices such as those at issue herein as well as the subsequent issuance of such notices by mailing.

30. The Division submitted into the record at hearing the New York personal income tax returns for Nessing for the years 2008, 2009 and 2011. Also submitted was a personal check of Mr. Nessing, dated March 17, 2009. Each of these documents listed Nessing’s address, which was identical to the one used by the Division in mailing the notices of determination to him on

November 29, 2011. The same address was used by Nessing on his application for refund herein, dated August 24, 2012.

SUMMARY OF THE PARTIES' POSITIONS

31. Petitioners contend that the notices of determination issued to Nessing were not properly issued and that the Division has not demonstrated that they were mailed on November 29, 2011. Thus, if true, Nessing would be eligible to proceed to the merits of his claim that he was not a person responsible for the collection and payment of sales and use tax on behalf of PSRN. The gravamen of that argument is that Nessing was merely used by others to shield themselves from liability, placing Nessing's name on corporate and tax filings and having him sign those and checks as an officer.

32. Petitioners argue that the Division's failure to issue a refund based on its August 24, 2012 application was in error and that the Division does not know the outstanding liabilities of either PSRN or Nessing.

33. The Division's contentions are three-fold: it contends that PSRN's liabilities were self-assessed when it failed to remit the tax due with its sales and use tax returns filed during the audit period and that the resulting fixed and final assessments had not been fully satisfied; it maintains that Nessing failed to timely protest the notices of determination issued to him and those notices also became fixed and final assessments, which have yet to be paid; and the Division argues that the outstanding and unpaid assessments against both PSRN and Nessing prohibit the payment of a refund until such time that the assessments are fully satisfied.

Assuming arguendo, that the Division of Tax Appeals has jurisdiction to hear the Nessing matter, the Division believes the facts in evidence justify holding him liable for sales and use taxes due from PSRN.

CONCLUSIONS OF LAW

A. The record presents three distinct issues for determination. The first is whether the Division of Tax Appeals has jurisdiction to entertain the petition filed on behalf of PSRN. PSRN petitioned four notices and demands for payment tax due (L-035121998-8, L-035405555-3, L-035625406-6 and L-036334818-2) issued to it following the corporation's filing of sales and use tax returns without payment of the taxes stated to be due thereon. It is well settled that no hearing rights attach to said notices (Tax Law § 173-a[3][a], [c]; *Matter of O'Csay*, Tax Appeals Tribunal, December 11, 2014).

B. The second issue is whether Nessing timely petitioned the notices of determination issued to him on November 29, 2011, i.e., L-036993365-4, L-036993364-5, L-036993363-6, L-036993362-7 and L-036993361-8. Initially, it should be noted that there is nothing in the record to indicate that Nessing ever protested notice number L-036993365-4, and this determination will not address it further.

A party may move to dismiss a petition on the grounds that the Division of Tax Appeals lacks subject matter jurisdiction of the petition (20 NYCRR 3000.9[a][1][i]). Where the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011).

C. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, the petitioner in turn

bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the notices of determination at issue were mailed by certified mail addressed to Nessing on November 29, 2011, establishing that the general mailing procedures described in the affidavits were followed. Petitioner's name and address, as well as the numerical information on the notices, appeared on and corresponded to such information as set forth on the CMR, each page of which bore a USPS date stamp of November 29, 2011, and the initials of the USPS employee. There were 252 certified mail control numbers listed, and the USPS employee who initialed the CMR indicated, by writing and circling the number "252," that 252 items were received for mailing. The CMR was therefore properly completed, and constituted highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995) to Mr. Nessing.

I am aware of the fact that Ms. Nagengast stated in paragraph 8 of her affidavit that a person on the mail staff usually handwrote the actual date of mailing in the upper right hand side of the first and last page, and that in this case the handwritten date of actual mailing, November 29, 2011, was placed on the left side. However, I do not believe this was an error which had any effect on the probative value of the CMR. It in no way compromised the fact that it supported in the strongest manner that the notices were mailed on November 29, 2011. Therefore, I find the

inconsistency to be harmless and inconsequential. (*See Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994.)

Petitioners have raised several other issues they believe compromise the Division's mailing procedures and its compliance with same. I do not believe any of the discrepancies raised are consequential to the point where the date and fact of mailing of the notices has been effectively questioned. Petitioners raised concerns regarding the following: the delivery of the mail to the Postal Service; the total number of items delivered to the post office; mail loss prevention; the nine digits used for assessment numbers on the CMR; the procedure for stuffing envelopes; the statistical sampling of the envelopes; the placement of the CMR with the Postal Service overnight; the circling of the number of pieces received by the Postal Service; and a general assertion that the affidavits of Ms. Nagengast and Mr. Peltier do not demonstrate that the pieces of mail listed on the CMR were received by the Postal Service on November 29, 2011. These concerns were adequately addressed by the affidavits and documents submitted and do not compromise the Division's mailing protocol or its compliance therewith. As stated earlier, any inconsistencies that actually existed were inconsequential.

Each of the notices of determination were addressed to Nessing at 222 E 95th Street Apt. 6, New York, NY 10128-4027. This is the same address used by Nessing on his New York personal income tax returns for the years 2008, 2009 and 2011. It was also the address listed on a personal check dated March 17, 2009 and on the refund application filed herein dated August 24, 2012. The notices of determination were mailed on November 29, 2011, a date within the period defined by these documents. Therefore, the notices were mailed to Nessing's last known address.

D. Nessing filed his petition, dated February 14, 2014, with the Division of Appeals challenging the notices on February 18, 2014. Even if the February 14, 2014 date is utilized, the petition was filed over 26 months after the issuance of the notices of determination, well beyond the 90-day period of limitations for filing said petition. Having determined that the notices were properly issued on November 29, 2011, petitioners bore the burden of proving that a request for conference was filed within 90 days thereof, and have not done so. Therefore, the Division of Tax Appeals lacks jurisdiction in this matter and the petition must be dismissed.

E. The final issue that must be addressed is the validity of the refund claim made by petitioners, jointly, on August 24, 2012. The application requested a refund in the amount of \$27,182.23 for the period 2007 through 2011 and was submitted by petitioners' representative, Mr. Cole. The explanation offered on the form (Finding of Fact 10) was that Mr. Nessing was not a person responsible for the collection and payment of sales and use tax on behalf of PSRN.

Although the form AU-11 itself requires copies of supporting documentation, a requirement that is extensively discussed in the instructions for the AU-11, none was submitted. In fact, the refund amount requested was never explained or justified by petitioners.

On September 20, 2012, the Division acknowledged receipt of the refund application and referred the matter to the Brooklyn District Office. Nothing further transpired until a letter was sent to petitioners on December 2, 2013, in which they were informed that information provided to the Division did not justify any change to the assessments listed. Those assessments were the four notices and demands issued to PSRN, which had a total outstanding balance of \$55,735.77 as of December 12, 2013. After a further review of the refund claim, the Division, in its letter of October 27, 2014, informed Mr. Cole, petitioners' representative, that the refund claim could not be addressed at that time. The October 27, 2014 letter addressed itself to both the notices and

demands and the notices of determination. The Division's reasons stated that neither the notices of determination issued to Nessing nor the notices and demands issued to PSRN had been paid in full and therefore no refund application could be entertained.

Although neither the Division's December 2, 2013 nor the October 27, 2014 responses to the refund application specifically granted or denied the request (Tax Law § 1139[b]), they were clear in their conclusion that petitioners had not submitted adequate documentation to make any adjustment to any of the notices issued to either Nessing or PSRN. Therefore, the application was not in the form specified in the instructions and on the form and the Division was not under a statutory obligation to grant or deny the application since the application was not made in accordance with Tax Law § 1139(a) or 20 NYCRR 534.2. This determination comes to the same conclusion, with an exception for one of the notices.

Initially, it is noted that petitioners have been consistently vague as to the amount they are claiming for refund. In the refund application they seek \$27,182.23, while in their petition it was stated to be \$27,187.00. They have been unable to verify the payments they made on account of the notices in issue and have offered no evidence to challenge the Division's records of said payments. Therefore, it is concluded that the amounts remaining due on the assessments, as verified by the Division, are correct. Since full payment has not been made, petitioners are not entitled to a refund or a hearing on the underlying merits for all notices except notice number L-036993361-8.

Tax Law § 1139(c) provides that a claim for refund shall be filed by the taxpayer within three years from the time the return was filed or two years from the time *the tax* was paid - - not a portion of the tax. Petitioner was required to pay the full amount of the tax assessed on the notices and demands and the notices of determination, the latter not protested timely and

therefore fixed and final assessments, a point underscored by the Tax Appeals Tribunal when it stated that a “taxpayer may protest by payment of *the amount assessed* and by filing a claim for refund of any such amount so paid within two years of the date of payment thereof” (emphasis added) (*Matter of SICA Electrical and Maintenance Corp.*, Tax Appeals Tribunal, February 26, 1998; *see also Matter of Brewsky’s Goodtimes Corp.*, Tax Appeals Tribunal, February 22, 2001; Form AU-11).

In her affidavit, Cynthia Foster, the Tax Auditor I who researched the amounts paid towards all of the notices in issue, stated that payments had been made against several of the notices, with all but one indicating outstanding balances. In the Consolidated Statement of Tax Liabilities issued to Nessing, dated November 2, 2015, the Division’s records showed a current balance due on all outstanding assessments of \$69,142.36. This included an amount due on notice number L-036993365-4, which was not petitioned. The statement indicated total payments made by Nessing, or on his behalf, of \$24,325.90. The amount due on the notices and demands was \$55,735.77 as of December 12, 2013, after payments totaling \$24,262.90.

The conclusion to be drawn from the Division’s submissions is that on November 2, 2015 there were outstanding balances on all the notices in issue, except L-036993361-8, for which full payment had been made. This is deduced from the fact that the consolidated statement of tax liabilities attached to the Foster affidavit did not indicate any record of an outstanding liability for this notice. Therefore, with respect to all notices except L-036993361-8, the Division of Tax Appeals has no jurisdiction and petitioners have no right to a hearing. This is not the case, however, with respect to notice number L-036993361-8. Since the tax, penalty and interest were paid, Nessing has the right to a hearing on the merits, which he was accorded on November 3, 2015.

F. Tax Law § 1133 (a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131 [1]). The question to be resolved is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee.

The determination of whether an individual is a person under a duty to act for a business is based upon a close examination of the particular facts of the case (*see Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [1987]; *Matter of Stacy v State of New York*, 82 Misc2d 181 [1975]; *Matter of Chevlowe v Koerner*, 95 Misc2d 388 [1978]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890 [1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (*see* 20 NYCRR 526.11 [b] [2]). As summarized in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

“[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (*Cohen*

v. State Tax Commn., supra, 513 NYS2d 564, 565; *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Vogel v. New York State Dept. of Taxation & Fin., supra*, 413 NYS2d 862, 865; *Chevlowe v. Koerner*, 95 Misc2d 388, 407 NYS2d 427, 429; *Matter of William D. Barton, supra; Matter of William F. Martin, supra; Matter of Autex Corp., supra*.)”

The evidence in the record shows that petitioner was not an individual who had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee for PSRN.

There is no dispute that Nessing signed checks, tax returns and corporate documents for PSRN or that he was the sole owner and shareholder, as listed on the PSRN S corporation information schedules. However, he never received a salary or any remuneration or capital distribution from PSRN. The real question here is whether, as a very young man with no business background or education, he had any meaningful control of the affairs of the corporation.

Nessing credibly testified that he was under the direction and control of Mr. Parkin Saunders in all his dealings with PSRN. He was directed to sign checks and other corporate and tax documents at Mr. Saunders’s direction. All the business operations of PSRN were handled by Raymond Schneider, Mr. Saunders’s personal assistant and bookkeeper. These facts were buttressed by the testimony of Jeffrey Wilcox, another person who worked at H. Parkin Saunders at the same time as a draftsman, who credibly testified that Nessing was hired by H. Parkin Saunders to run errands, fold samples and answer telephones. He also credibly testified that Mr. Saunders controlled both H. Parkin Saunders and PSRN and made all decisions for both. Mr. Wilcox said that Mr. Saunders did not delegate duties to his employees, including his personal assistant, Mr. Schneider. Everything was done on his direction.

Given this very detailed description of the business operations, it is clear that Nessing was not in a position to have the kind of meaningful control over the business contemplated in *Matter of Constantino* and it is determined that he is not responsible for the sales and use tax due on behalf of PSRN during the period ended August 31, 2011 and the taxes assessed therefor in notice number L-036993361-8.

F. The petition of PSRN is denied and the petition dismissed; the petition of Ryan W. Nessing is granted with respect to Notice of Determination L-036993361-8, dated November 29, 2011, and a refund granted with respect thereto⁴; but the petition of Ryan W. Nessing with respect to Notice of Determinations L-036993364-5, L-036993363-6, L-036993362-7 is dismissed.

DATED: Albany, New York
November 3, 2016

/s/ Daniel J. Ranalli
SUPERVISING ADMINISTRATIVE LAW JUDGE

⁴Any amounts collected from Nessing towards the corporate assessment (L-036334818-2) for the same period, above and beyond the amount paid on the responsible person assessment, if any, should also be refunded.