

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PEAK SECURITY PLUS INC. : ORDER
for Revision of a Determination or for Refund of : DTA NOS. 828664
Sales and Use Taxes under Articles 28 and 29 : AND 828724
of the Tax Law for the period December 1, 2007 :
through November 30, 2013. :

In the Matter of the Petition :
of :
EMMANUEL OSULA :
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 December 1, 2007 through :
November 30, 2013. :

Petitioner, Peak Security Plus Inc., 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 December 1, 2007 through November 30, 2013.

Petitioner, Emmanuel Osula, 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 December 1, 2007 through November 30, 2013.

On August 3, 2018, the Division of Tax Appeals issued to petitioners separate notices of intent to dismiss petition (notices of intent to dismiss), pursuant to 20 NYCRR 3000.9 (a) (4), on

the basis that the petitions did not appear to be timely filed. The parties were given until January 31, 2019, to respond to said notices. On January 23, 2019, the Division of Taxation, appearing by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel), submitted documents in support of dismissal with regard to both motions. On or about January 16, 2019, Emmanuel Osula, submitted a letter in opposition to the notice of intent to dismiss issued to himself, and, as president of petitioner Peak Security Plus Inc., to the notice of intent to dismiss issued to that corporation. The 90-day period for issuance of this order commenced on January 31, 2019, for both proceedings.

After due consideration of the documents submitted, James P. Connolly, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed timely petitions with the Division of Tax Appeals following the issuance of conciliation orders.

FINDINGS OF FACT

1. These proceedings arose out of a sales tax audit of Peak Security Plus Inc. (Peak Security), for the period December 1, 2007 through November 30, 2013 (audit period).
2. As a result of the audit, Peak Security was issued notice of determination number L-044695460, dated May 2, 2016, which asserted additional sales tax due, plus penalty and interest, for the audit period.
3. As a result of the same audit, Peak Security's president, petitioner Emmanuel Osula, was issued notice of determination number L-044718662, dated May 4, 2016, which states that he has been determined to be a responsible person of Peak Security, and which asserts the same

amount of sales tax due as asserted against Peak Security, plus penalty and interest, for the audit period.

4. On July 27, 2016, Richard S. Kestenbaum filed a request for a conciliation conference (request for conference) on behalf of Peak Security relating to number L-044695460 with the Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS). BCMS date-stamped the request for conference as received on August 1, 2016. Mr. Kestenbaum identified himself on the request for conference as Peak Security's representative.

5. On July 28, 2016, Mr. Osula also filed a request for conference with BCMS on behalf of Peak Security in response to the notice of determination issued to the corporation. BCMS date-stamped the request for conference as received on August 1, 2016. Mr. Osula identified Edward Owie, CPA, as Peak Security's representative.

6. BCMS issued a letter to Mr. Osula, dated August 5, 2016, stating that, because the corporation filed a request for a conciliation conference in response to a notice of determination issued to it, the related notice of determination number L-044718662, issued to Mr. Osula as a responsible officer or person of the corporation, was considered to be protested and, as a result, a conciliation conference would be scheduled. The conciliation conference was held on October 17, 2016. Neither Peak Security nor Mr. Osula appeared personally, or by representative, at the conciliation conference.

7. BCMS issued to Peak Security a conciliation default order, CMS No. 271292, dated November 4, 2016.

8. BCMS issued to Mr. Osula a conciliation default order, CMS No. 271303, dated November 4, 2016.

9. On April 10, 2018, Peak Security filed a petition with the Division of Tax Appeals protesting the conciliation default order.¹

10. On May 24, 2018, Mr. Osula filed a petition with the Division of Tax Appeals protesting the conciliation default order.

11. On August 3, 2018, Herbert M. Friedman, Jr., Supervising Administrative Law Judge of the Division of Tax Appeals, issued to Peak Security and Mr. Osula separate notices of intent to dismiss, on the basis that the petitions did not appear to have been timely filed.

12. On August 22, 2018, the Division requested a 45-day extension to respond to each of the notices of intent to dismiss. By separate letters dated August 24, 2018, the Division of Tax Appeals granted all parties an extension until October 18, 2018, to submit a response to the notices of intent to dismiss.

13. On October 17, 2018, the Division submitted separate responses to the two notices of intent to dismiss, which, in each case, included an affirmation of Justine Clarke Caplan, Esq., and several attachments.

14. On November 1, 2018, Mr. Osula, as president of the corporation, submitted a response to the notice of intent on behalf of the corporation. As the response was untimely, the supervising administrative law judge returned the response to Peak Security on November 6, 2018, without consideration.

¹ Peak Security's original petition contained the conciliation default order (CMS number 271303) of Emmanuel Osula, its president. It also referenced notice of determination number L-044718662, which was issued to Mr. Osula as a responsible person for Peak Security and was the subject of CMS number 271303. Peak Security subsequently provided the correct conciliation default order (CMS number 271292), which referenced the notice of determination issued to it, notice number L-044695460.

15. By separate letters dated December 31, 2018, the supervising administrative law judge returned to the Division its submissions in both of the above proceedings, as the affirmations contained therein described attachments that did not match the actual attachments provided. The letter granted both parties a new 30-day period to respond to the notices of intent to dismiss.

16. In response, Mr. Osula submitted separate letters, dated January 16, 2019, in each of these matters, in which, among other things, he denied that he or Peak Security received a copy of the conciliation default order. By letters dated January 23, 2019, the Division again submitted separate responses to the notices of intent to dismiss in the above proceedings, attaching mailing proof in support of its claim that the notices of intent to dismiss should be sustained. Because the Division's mailing proof in the two proceedings differs slightly, the proof submitted in each is separately analyzed below.

DTA No. 828664 (Peak Security)

17. The Division's response to the notice of intent to dismiss issued to Peak Security submitted, among other documents, an affirmation, dated October 17, 2018, of Ms. Clarke Caplan (the Division's affirmation). The Division's affirmation asserts that "[a] copy of the Request for Conciliation Conference filed on July 27, 2016 is attached as Attachment 3." Attachment 3 consists of 11 pages, in the following order: (I) a request for conference signed by attorney Richard S. Kestenbaum on July 27, 2016, and is dated stamped as received by BCMS on August 1, 2016 (Kestenbaum request for conference); (ii) a request for conference signed by Peak Security's president, Emmanuel Osula, on July 28, 2016, and is date stamped as received by BCMS on August 1, 2016, which identifies Edward Owie, CPA, as the representative, next to whose name on the form appears the handwritten notation of "See POA" (Owie request for conference); (iii) a transmittal letter signed by Richard S. Kestenbaum to BCMS, dated July 27,

2018, which states that “[e]nclosed please find a signed Form CMS-1-MN - Request for Conciliation Conference as well as a copy of our New York State Power of Attorney and a copy of the NYS Notice of Determination”; (iv) a copy of notice of determination number L-044695460, which indicates that a copy was mailed to Mr. Owie, as legal representative of Peak Security; (v) an envelope addressed to BCMS bearing a USPS certified label, which shows a partial return address of “Brooklyn, NY 11205,” a telephone number, facsimile number, and partial email address for Peak Security, which is date-stamped as received by BCMS on August 1, 2016; and (vi) an envelope addressed to BCMS, bearing a United States Postal Service (USPS) meter stamp showing a date of July 27, 2016, and showing a return address for Kestenbaum and Mark, which is date-stamped as received by BCMS on August 1, 2016. Both requests for conference indicate that they are protesting the notice of determination issued to the corporation. No copy of a power of attorney form appointing either Mr. Kestenbaum or Mr. Owie is included in attachment 3.

18. Paragraph 5 of the Division’s affirmation states that attachment 5 is the conciliation default order, which was “mailed to Petitioner’s representative, Richard S. Kestenbaum [sic] at his address of record, as provided by the Power of Attorney submitted to [BCMS] with the Request for Conciliation Conference.” The address for Mr. Kestenbaum appearing on the Kestenbaum request for conference includes a suite number that is not found on the address given for him on the power of attorney form in attachment 6. The two addresses are otherwise identical.

19. The Division’s affirmation also includes the following: (i) a copy of the petition; (ii) a copy of the notice of intent to dismiss; (iii) an affidavit, dated October 10, 2018, of Robert

Farrelly, Supervisor of Tax Conferences of BCMS; (iv) a certified mail record (CMR) containing a list of the conciliation orders issued by the Division on November 4, 2016; and (v) an affidavit, dated October 10, 2018, of Fred Ramundo, supervisor of the Division's mail room.

20. In his affidavit, Mr. Farrelly asserts that he has been Supervisor of Tax Conferences or Assistant Supervisor of Tax Conferences for BCMS since October 2002 and, that, as a result, he is knowledgeable about BCMS's procedure for the preparation and mailing of conciliation orders. His affidavit describes that procedure, which culminates in the mailing of conciliation orders by USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

21. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

22. The name, mailing address, order date, and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

23. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS number is recorded under the heading "Reference No."

and is preceded by three zeros (000). The AFP Unit prints the CMR and cover sheets via a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

24. The clerk's regular duties include associating each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope, through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

25. The "Total Pieces and Amounts" is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps "MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner of the last page of the CMR.

26. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "11-4-16" was written in the upper right corner of each page of the CMR and the language described in finding of fact 25 appears on the bottom left corner of each page.

27. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up from BCMS by an employee of the Division's Mail Processing Center.

28. Mr. Farrelly attests to the truth and accuracy of the copy of the six-page CMR, which contains a list of the conciliation orders issued by BCMS on November 4, 2016. The CMR lists 58 certified control numbers. His affidavit asserts that each such certified control number is

assigned to an item of mail listed on the six pages of the CMR and that specifically, corresponding to each listed certified control number is the BCMS number and the name and address of the addressee. A postage and fee column is visible on the last page of the copy of the CMR attached to the Farrelly affidavit.

29. Information regarding the conciliation order issued to Peak Security is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0058 0041 is reference or CMS number 000271292, along with the name of Peak Security and a Clinton Avenue, Brooklyn, New York address for the corporation, which is the same address for the corporation listed on both requests for conference.²

30. Information regarding the conciliation order issued to Mr. Kestenbaum is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0058 0034 is reference number 000271292. The address given for Mr. Kestenbaum on the CMR is an address in Great Neck, New York. The Division contends that the Great Neck, New York, address listed on the CMR is the same address referenced on the request for conference and the power of attorney appointing him to represent Peak Security at BCMS. In fact, the address on the CMR for Mr. Kestenbaum is the same address given for him on the power of attorney, but the address given for Mr. Kestenbaum on the Kestenbaum request for conference, while otherwise the same as the address on the CMR, includes a suite number, which is absent from the address used on the CMR.

31. The affidavit of Fred Ramundo stated that he has been a supervisor in the Division's mail room since December 2013, and that, as a result of that experience, he is familiar with

² The Owie request for conference refers to "Suite B25" as part of Peak Security's address, whereas the Kestenbaum request for conference refers to "Apt. B25" as part of that address.

present and past mail room procedures as relate to BCMS orders. In his affidavit, Mr. Ramundo attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her signature to the CMR indicating receipt by the post office.

32. In this particular instance, the postal employee affixed a postmark dated November 4, 2016, to each page of the six-page CMR. The postal employee also wrote and circled the number "58" and initialed page 6 to indicate the total pieces of mail received at the post office.

33. Mr. Ramundo stated that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Ramundo's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

34. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto, including the CMR, Mr. Ramundo states that on November 4, 2016, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Peak Security, and another piece of mail addressed to Richard S. Kestenbaum, to a branch of the USPS in Albany, New

York, in sealed postpaid envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on November 4, 2016, for the records of the Division. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to Peak Security and Mr. Kestenbaum on November 4, 2016.

35. In response to the notices of intent to dismiss, Mr. Osula submitted a letter dated January 16, 2019, which references both of the above Division of Tax Appeals proceedings. The letter claims that he and Peak Security did not receive correspondence from BCMS relating to the conciliation conference proceedings because the Division did not mail those documents to their last known address. The letter claims that he and the corporation moved to an Atlantic Avenue, Brooklyn, New York, address during the audit, which the Division knew about, because the auditor visited him there during the audit. Attached to the letter is a copy of the first page of a U.S. corporation income tax return for 2015 for Peak Security and signed by Mr. Osula on August 11, 2016, which shows Peak Security's address as 2260 Atlantic Avenue, Brooklyn, New York 11233.

DTA No. 828724 (Emmanuel Osula)

36. The Division's January 23, 2019 response to the notice of intent to dismiss issued to Mr. Osula, included, among other documents: (i) an affirmation, dated October 17, 2018, of Ms. Caplan; (ii) a copy of the petition filed by Mr. Osula; (iii) a copy of the notice of intent to dismiss issued to Mr. Osula; (iv) an affidavit, dated October 10, 2018, of Mr. Farrelly; (v) a CMR

containing the list of conciliation orders issued by the Division on November 4, 2016; (vi) an affidavit of Mr. Ramundo, dated October 10, 2018; and (vii) Mr. Osula's e-FILED IT-201 Resident Income Tax Return for the tax year 2015, filed on February 21, 2016, the last return filed before the Osula notice was mailed to Mr. Osula.³

37. The affidavit of Mr. Farrelly sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the conciliation orders by USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR. The procedure is the same as the procedure described in findings of fact 24 through 27, and the CMR used for the mailing of the conciliation default order to Mr. Osula is the same six-page CMR used in regard to the mailing of that order to Peak Security. Mr. Farrelly attests to the truth and accuracy of the CMR.

38. Information regarding the conciliation default order issued to Mr. Osula is contained on page three of the CMR. Corresponding to certified control number 7104 1002 9730 0058 0058 is reference or CMS number 000271303, along with the name and address of Mr. Osula. The address used for Mr. Osula on the CMR is the same 196 Clinton Avenue, Brooklyn, New York, address as provided for Mr. Osula in his personal income tax return for 2015, which was dated February 15, 2016, and which the Division asserts was the last return filed by him prior to the issuance of the Osula notice of determination. In his response to the notice of intent to

³ The Division also included an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Management Analysis and Project Services Bureau (MAPS) dated October 10, 2018; a completed CMR; a copy of the notice of determination number L-044718662; and, an affidavit of Mr. Ramundo, dated October 10, 2018. These documents were offered to establish proper mailing of the notice of determination issued to Mr. Osula. Because the corporation requested a conciliation conference and Mr. Osula has not challenged issuance of the underlying notice, this determination pertains solely to whether Mr. Osula timely filed a petition after the conciliation order was issued, and these documents were not considered relevant to these proceedings.

dismiss, Mr. Osula did not dispute that the 2015 income tax return was the last New York State income tax return filed by him prior to the issuance of the conciliation default order to him.

39. The affidavit of Mr. Ramundo attached to the Division's response to the Osula notice of intent to dismiss attested to the regular procedures followed by his mail room staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS, and later retrieving the CMR from the USPS, which are the same procedures as set forth in findings of fact 33 through 35, and which involved the same CMR.

40. Based upon his review of the affidavit of Mr. Farrelly in this proceeding (DTA No. 828724), the exhibits attached thereto, and the CMR, Mr. Ramundo avers that on November 4, 2016, an employee of the Mail Processing Center delivered an item of certified mail addressed to Mr. Osula at his Brooklyn, New York, address to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on November 4, 2016, for the records of BCMS. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to Mr. Osula on November 4, 2016.

41. In his response to the notice of intent to dismiss, Mr. Osula submitted a letter dated January 16, 2019, referring to both proceedings in this matter (DTA Nos. 828664 and 828724) that is substantively identical to the letter described in finding of fact 35.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination may be granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

In contrast, the opponent of such a motion “must ... produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

C. Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer at the taxpayer’s last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Victory Bagel Time, Inc.*).

D. Where the timeliness of a taxpayer’s petition following a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly issued (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals

Tribunal, June 20, 2002). As noted above, a conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its proper mailing to the taxpayer (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*; *Matter of Wilson*). An order is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In turn, when an order is found to have been properly mailed by the Division to the taxpayer’s last known address by certified or registered mail, the petitioner bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has met its burden of establishing proper mailing of the conciliation default order and cover letter to Peak Security. Specifically, BCMS was required to mail the conciliation default order to Peak Security at its last known address. As indicated by the CMR, and by the affidavits of Robert Farrelly and Fred Ramundo, Division employees involved

in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue and cover letter were actually mailed to Peak Security by certified mail on November 4, 2016, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copy of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Farrelly and Ramundo affidavits were followed with respect to the conciliation default order issued to Peak Security. The corporation's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of November 4, 2016. There are 58 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "58," that the post office received 58 items for mailing. In short, the Division established that it mailed the order to Peak Security by certified mail on November 4, 2016 (*see Matter of Auto Parts Ctr., Tax Appeals Tribunal, February 9, 1995*).

G. Mr. Osula's letter in response to the notice of intent to dismiss claims that he and Peak Security moved from the 196 Clinton Avenue, Brooklyn, New York, address to an Atlantic Avenue address in Brooklyn and that the Division should have known of that move because the Division's auditors conducted a portion of the audit at the new address. In further support of the claim that he and Peak Security had moved prior to the issuance of the conciliation default order, Mr. Osula attached the first page of Peak Security's federal corporation income tax return (form 1120) for 2015, signed and dated August 11, 2016, which shows the Atlantic Avenue, Brooklyn, New York address and not the 196 Clinton Avenue, Brooklyn, New York, address to which the

conciliation default order was mailed. This argument is rejected. Mr. Osula's letter does not constitute sworn evidence and, thus, has no evidentiary weight in this matter (*see Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). In any case, under Tax Law § 1147 (a) (1), the Division is to send statutory sales tax notices to:

“the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of [article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable [emphasis added].”

Under this provision, the Division was entitled to send the conciliation default order to the 196 Clinton Avenue, Brooklyn, New York, address listed for Peak Security on the request for conference filed on its behalf, since requests for conference are “applications filed . . . pursuant to the provisions of [article 28].” The fact that Peak Security did not receive the order due to its change of address does not render its petition timely here because, as discussed above, a taxpayer's 90-day period to protest a conciliation order starts from the date the order is “issued,” which means the date it was mailed, not the date it is received (Tax Law § 170 (3-a) (e); *see Matter of Wilson*).

H. While the Tax Law does not specifically provide for service of a statutory notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v Frank*, 43 NY2d 168 [1977]).

The Division's affirmation assumes that Richard Kestenbaum was Peak Security's representative at BCMS and asserts that a copy of the conciliation default order was properly mailed to him. It is not at all clear, however, from the Division's submissions herein that Mr. Kestenbaum was Peak Security's representative at BCMS. The problem is that attachment 3 to the Division's affirmation in the Peak Security proceeding (DTA No. 828664), which the affirmation identifies as containing the request for conference filed on July 27, 2016, actually contains *two* requests for conference. One, the Kestenbaum request for conference identifying Mr. Kestenbaum as Peak Security's representative, was signed by Mr. Kestenbaum, and was filed on July 27, 2016. A second, the Owie request for conference, was signed by Peak Security's president, Mr. Osula, was filed on July 28, 2016, and identifies Mr. Owie as Peak Security's representative. The Division's affirmation does not acknowledge that the attachment contains two requests for conciliation conference, let alone explain why the Division believes that the Kestenbaum request for conference is the correct one for determining Peak Security's representative at BCMS.

Confounding matters further, the Division's affirmation does not say that the request for conference in attachment 3 is complete, and it is evident that it is not complete. The Division's affirmation states that attachment 6 to the affirmation is a copy of the power of attorney appointing Mr. Kestenbaum, "which was filed with [BCMS] with the Request for Conciliation Conference." Thus, the Kestenbaum request for conference in attachment 3 does not contain the power of attorney that apparently accompanied it. The failure of the Division to present the Kestenbaum request for conference exactly as it was filed with the Division is significant. It raises a question of fact whether the Owie request for conference also had a power of attorney

attached, which, in appointing Mr. Owie as representative, could have rescinded all previous powers of attorney for Peak Security, including the one authorizing Mr. Kestenbaum to act as representative for the corporation at BCMS. Interestingly, next to Mr. Owie's name on the Owie request for conference is the handwritten notation, "See POA," which suggests that a power of attorney appointing Mr. Owie was attached to that request for conference. Thus, given the unexplained presence of two requests for conference appointing two different representatives for Peak Security at BCMS, it is impossible to know whether, in mailing a copy of the conciliation default order to Mr. Kestenbaum, the Division has properly mailed a copy of such order to Peak Security's correct BCMS representative.

I. Even assuming Mr. Kestenbaum was Peak Security's true representative at BCMS, the Division's mailing proof is insufficient to show that the conciliation default order was mailed to the correct address for Mr. Kestenbaum. The Division claims that the conciliation default order was properly mailed to Mr. Kestenbaum because it was mailed to the address given for him in the Kestenbaum request for conference and the power of attorney appointing him to represent Peak Security. That is not true, however, as the address for Mr. Kestenbaum in the Kestenbaum request for conference included a suite number, which was not included in the address to which the conciliation default order was mailed. Given the conflict in the address for Mr. Kestenbaum in the request for conference versus the power of attorney, the Division should have used the address on the request for conference and not the power of attorney form because the request for conference is an application, while the power of attorney form is not an application, but rather proof that Mr. Kestenbaum had authority to represent Peak Security at BCMS (*see* Tax Law § 1147 [a] [1] [notices are to be mailed to the taxpayer at "the address given in the last return filed

by him pursuant to the provisions of this article or in any application made by him”]). Where a conciliation order is not properly mailed to a petitioner’s representative, the petitioner has 90 days from the date the representative actually receives the conciliation order to protest that order (*see Matter of Kushner*). There is no proof in the record as to when Mr. Kestenbaum actually received the order. Thus, even assuming that Mr. Kestenbaum was Peak Security’s correct representative at BCMS, a question of material fact exists here with regard to when the corporation’s 90-day period for protesting the conciliation default order began. Accordingly, the Division has not shown when Peak Security’s 90-day period for protesting the issuance of the conciliation default order began, and the notice of intent to dismiss issued to Peak Security must be rescinded.

J. Turning to the question of the timeliness of Mr. Osula’s petition, the Division has met its burden of establishing that it properly mailed the conciliation default order to Mr. Osula on November 4, 2016. As indicated by the CMR, and by the affidavits of Mr. Farrelly and Mr. Ramundo, the Division has offered adequate proof to establish the fact that the conciliation default order was actually mailed to Mr. Osula by certified mail on November 4, 2016, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copy of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Farrelly and Ramundo affidavits were followed with respect to the conciliation default order issued to Mr. Osula. His name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of November 4, 2016. There are 58 certified mail control numbers listed on the CMR, and the

USPS employee who initialed the CMR indicated, by circling the number “58,” that the post office received 58 items for mailing. Furthermore, the 196 Clinton Avenue, Brooklyn, New York, address to which the Division mailed the conciliation default order was the proper mailing address for Mr. Osula (*see* finding of fact 38). Mr. Osula contends that he and Peak Security had moved to the Atlantic Avenue address in Brooklyn, New York, prior to the issuance of the notice of determination issued to him, the Division knew about the move, and therefore, the 196 Clinton Avenue, Brooklyn, New York, address was not his proper address for mailing the conciliation default order. This argument is rejected. As discussed above, Mr. Osula’s letter, being unsworn, is not sufficient to prove that he moved from the 196 Clinton Avenue address, as he contends (*see* conclusion of law G). Moreover, even if he had proven the point through admissible evidence, the Division was entitled to rely on the 196 Clinton Avenue address for purposes of mailing the conciliation default order. As discussed above, under Tax Law § 1147 (a) (1), notices required to be provided to a taxpayer under article 28 of the Tax Law must be mailed to the taxpayer:

“at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.”

Because no return is required to be filed by a person determined to be a responsible person of a corporation, any notice required to be mailed to such person must be mailed to “such address as may be obtainable for that person,” which includes the person’s last filed income tax return (*see Matter of Nelloquet Rest., Inc.*, Tax Appeals Tribunal, March 14, 1996). Here, the Division has provided evidence indicating that 196 Clinton Avenue address was the address Mr. Osula provided for himself on his 2015 income tax return. In the absence of any showing by Mr. Osula

that he notified the Division of his change of address, the Division properly used the 196 Clinton Avenue address for mailing the conciliation default order to him.

K. In short, the Division has established that the Osula conciliation default order was properly mailed when it was delivered into the custody of the USPS on November 4, 2016, properly addressed to Mr. Osula at his last known address, and with the requisite amount of postage affixed, and it is this date that commenced the 90-day period within which a protest had to be filed, whether or not he actually received the order (*see* Tax Law § 170 [3-a] [e]; *Matter of Wilson*). Therefore, Mr. Osula's 90-day period for challenging the conciliation default order commenced on November 4, 2016. Given that he did not file his petition with the Division of Tax Appeals until May 24, 2018, or more than 90 days after that date, his filing of the petition does not give him any right to a hearing in this forum.

L. The petition filed by Mr. Osula in this matter is not his only source of hearing rights, however. Whether an officer is a person under a duty to act for a corporation and the amount of the officer's liability, as such, are to be determined in the same manner as those items are determined for the corporation (*see* Tax Law § 1138 [a] [3] [B]). Under that provision, such determination becomes final unless the officer timely files a petition for review with the Division of Tax Appeals, except that:

“[i]f such determination is identical to or arises out of a previously issued determination of tax of the corporation . . . for which such person is under a duty to act, an application filed with the division of tax appeals on behalf of the corporation . . . shall be deemed to include any and all subsequently issued personal determinations and a separate application to the division of tax appeals for a hearing shall not be required.”

This provision “deems a corporate entity's timely protest of a notice of determination to be a timely protest by any of its responsible persons, thus abrogating their need to file individual

protests on their own behalf” (*Matter of Uddin*, Tax Appeals Tribunal, January 18, 2018). This provision is applicable here, given that the notice of determination issued to Mr. Osula arose out of the same audit as gave rise to the notice of determination issued to Peak Security, states that Mr. Osula is being assessed as an officer of Peak Security, and is for the same period and the same amount of tax. Thus, even if Mr. Osula was untimely in filing his own petition in this matter, he would have hearing rights under this provision unless Peak Security’s petition is shown to be untimely. It having been determined above that the Division failed to establish that the corporation’s petition was untimely filed (*see* conclusions of law H and I), Mr. Osula continues to have hearing rights in this matter, and the notice of intent to dismiss also must be rescinded with regard to his petition.

M. The notices of intent to dismiss petition are hereby rescinded. The Division of Taxation shall have 75 days from the date of this order to file its answers in these matters.

DATED: Albany, New York
April 25, 2019

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE