

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
EMIL AKMAN	:
	ORDER
	DTA NOS. 829785 AND
	829850
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	:
March 1, 2015 through November 30, 2018.	:

In the Matter of the Petition	:
of	:
BCL NETWORK LLC	:
	:
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	:
March 1, 2015 through November 30, 2018.	:

Petitioner, Emil Akman, 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 March 1, 2015 through November 30, 2018.

Petitioner, BCL Network LLC, 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 March 1, 2015 through November 30, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), brought a motion in each case, dated June 22, 2021, seeking orders of

dismissal or, in the alternative, granting summary determination in the above-captioned matters pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing pro se, did not respond to the motions. The 90-day period for issuance of this order commenced on July 26, 2021. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners timely protested the notices of determinations issued to them.

FINDINGS OF FACT

1. The Division of Taxation (Division) conducted a limited scope audit of BCL Network LLC's sales, based upon information provided from third-party entities for the period March 1, 2015 through November 30, 2018. On July 8, 2019, the Division issued a statement of proposed audit change for sales and use tax to BCL Network LLC, which asserted tax due in the amount of \$254,276.80, plus penalty and interest, for the period March 1, 2015 through November 30, 2018 (BCL Network LLC's statement of proposed audit change). Documents in the record indicate that a timely disagreement with BCL Network LLC's statement of proposed audit change was filed by Emil Akman on August 15, 2019.

2. Based upon the audit, the Division issued to petitioner, BCL Network LLC, a notice of determination, assessment ID L-050566223, dated September 23, 2019, assessing additional sales and use taxes due in the amount of \$254,276.80, plus penalty and interest, for a total amount due of \$432,611.62 for the period March 1, 2015 through November 30, 2018. This notice was addressed to "BCL NETWORK LLC" at 3346 55TH Street, Woodside, New York

11377-1907. The mailing cover sheet of this notice contains certified control number 7104 1002 9730 0007 4229.

3. The Division issued to petitioner, Emil Akman, a notice of determination, assessment ID L-050598958, dated September 24, 2019, assessing sales and use taxes in the amount of \$254,276.80, plus penalty and interest, for a total amount due of \$432,755.35 for the period March 1, 2015 through November 30, 2018. This notice of determination was issued to Mr. Akman as an officer or responsible person of BCL Network LLC, “for taxes determined to be due in accordance with sections 1138 (a), 1131(1), and 1133 of the New York State Tax Law.” The notice is addressed to “AKMAN-EMIL” at an address in Woodcliff Lake, New Jersey. The mailing cover sheet of this notice contains certified control number 7104 1002 9730 0007 5943.

4. On December 20, 2019, a petition was filed with the Division of Tax Appeals. Page 1 of the petition listed “BCL Network LLC/Emil Akman” as the petitioner, the business identification number as the “Taxpayer ID,” and the notice being challenged as notice of determination, assessment ID: L-050598958. Page 1 of the petition also listed “33 46 55 Street, Woodside, N.Y. 11377” as the address of BCL Network LLC/Emil Akman. The petition was dated and signed by “Emil Akman Pres.” on December 18, 2019 and was received by the Division of Tax Appeals on December 23, 2019. The envelope in which the petition was mailed by certified mail bears a United States Postal Service (USPS) postage paid label dated December 20, 2019. Documents attached to the petition included, among other items, the disagreement with BCL Network LLC’s statement of proposed audit change, dated and signed by Mr. Akman on “8/15/19;” a responsible person questionnaire, form AU-431, for Yevgeniy Klebanov, vice president of BCL Network LLC, dated and signed by Mr. Akman on “8/15/19;” and a notice of determination, assessment ID L-050598958, dated September 24, 2019, issued to Mr. Akman.

Subsequently, the Division of Tax Appeals assigned DTA No. 829785 to the petition of BCL Network LLC/Emil Akin.

5. By letter dated January 14, 2020, the Division of Tax Appeals Petition Intake Section, notified Mr. Akman that the petition of BCL Network LLC/Emil Akman was received. The letter also stated that the petition could not be processed further until the following items were corrected or provided:

a) corrections on page 1 of the petition to reflect only Mr. Akman's name and taxpayer ID, because the petition challenged the notice of determination issued to him;

b) an additional petition in name of BCL Network LLC, along with the notice of determination issued to it; and

c) completion of the conciliation conference section on page 3 of the petition that had been left blank.

The Division of Tax Appeals, in the letter, also requested that the information be "postmarked within 30 days of the date of this letter." In addition, it was requested that DTA No. 829785 be referenced on all correspondence and documents provided.

6. At the suggestion of a Division employee, BCL Network LLC filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). BCL Network LLC's request is signed by Mr. Akman and is dated January 14, 2020. The request, bearing an erroneous fax transmission date of January 22, 2016, was received by BCMS on January 22, 2020. BCL Network LLC's request lists its address as 33-46 55th Street, Woodside, NY 11377. A review of the request indicates that it was filed in response to notice number L-050598958, and a conciliation conference was requested for sales and use taxes for the period March 1, 2015 through November 30, 2018. An attachment A to the request detailed

BCL Network LLC's disagreement with the notice. BCMS assigned CMS No. 318105 to this request. BCMS notations on this request indicate that notice number L-050598958 is for "RPA" and "L-050566223 - for company." Documents in the record also indicate that BCMS photocopied the BCL Network LLC request, then added the handwritten name "Emil Akman RPA" to the name of taxpayer line of the request (Akman responsible person request). BCMS assigned CMS No. 318106 to the Akman responsible person request.

7. On February 7, 2020, BCMS issued a conciliation order dismissing request (CMS No. 000318105) to BCL Network LLC (BCL Network LLC conciliation order), because notice L-050566223 was issued on September 23, 2019 but the request was late filed on January 22, 2020. On the same date, BCMS issued a conciliation order dismissing request (CMS No. 000318106) to Emil Akman (Akman conciliation order), because notice L-050598958 was issued on September 24, 2019 but the request was late filed on January 22, 2020.

8. In response to the Division of Tax Appeals' January 14, 2020 letter, documentation was sent to it by BCL Network LLC on February 13, 2020 and received by the Division of Tax Appeals on February 18, 2020. The envelope in which the documentation was sent by certified mail bears a USPS postage paid label dated February 13, 2020. The documentation submitted included two separate petitions, one in the name of Emil Akman (the Akman petition) and the other in the name of BCL Network, LLC. Notations in the file assigned DTA No. 829785 indicate that a copy of the petition of BCL Network LLC/Emil Akman, date stamped received by the Division of Tax Appeals on December 23, 2019, was also included in the documentation sent to it on February 13, 2020.

9. The Akman petition challenged notice of determination, assessment ID L-050598958, and listed, among other handwritten items, Mr. Akman's name, his taxpayer ID, his Woodcliff

Lakes, New Jersey, address, and DTA No. 829785 on page 1. The petition was hand-dated and signed by Mr. Akman on February 10, 2020. As noted in finding of fact 8, the Akman petition and a copy of the petition of BCL Network LLC/Emil Akman were mailed in the same envelope to the Division of Tax Appeals' attention on February 13, 2020. The Akman petition was date stamped received by the Division of Tax Appeals on February 18, 2020. Attached to the Akman petition was a copy of the Akman conciliation order, dated February 7, 2020. Subsequently, the Division filed its answer in the matter of the petition of Emil Akman on April 22, 2020. In its answer, the Division asserts that Mr. Akman's "request was dismissed by BCMS Conciliation Order No. 00031806, dated 02/07/20, on the basis that the request was late filed outside the 90 days from the statutory notice date." The Division, in its answer, further asserts that Mr. Akman did not timely exercise his appeal right and notice of determination L-050598958 "is therefore fixed and final."

10. As noted in finding of fact 8, a petition in the name of BCL Network LLC (BCL Network LLC petition) was included in the documentation sent by BCL Network LLC to the Division of Tax Appeals on February 13, 2020. The petition was dated and signed by Mr. Akman on February 10, 2020. It was date stamped received by the Division of Tax Appeals on February 18, 2020. The petition lists BCL Network LLC's address as 33-46 55 Street, Woodside, N.Y. 11377. A copy of the BCL Network LLC conciliation order, dated February 7, 2020 was attached to the BCL Network LLC petition. The Division of Tax Appeals assigned DTA No. 829850 to that petition. Subsequently, the Division filed its answer to the BCL Network LLC petition on April 22, 2020. In its answer, the Division asserts that BCL Network LLC's "request was dismissed by BCMS Conciliation Order No. 00031805, dated 02/07/20, on the basis that the request was late filed outside the 90 days from the statutory notice date." The

Division, in its answer, further asserts that BCL Network LLC did not timely exercise its appeal right and notice of determination L-050566223 “is therefore fixed and final.”

11. On June 24, 2021, the Division filed motions seeking orders of dismissal, or, in the alternative, granting summary determination in the matters of Emil Akman and BCL Network, LLC pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

Emil Akman (DTA No. 829785)

12. In support of the motion, the Division provided the following documents: (i) an affidavit, dated June 22, 2021, of Melanie Spaulding, Esq.; (ii) an affidavit, dated June 10, 2021, of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel, involved in making requests to the USPS for delivery information; (iii) a Request for Delivery Information/Return Receipt, U.S. Postal Service, form 3811-A (form 3811-A) and the USPS response to the form 3811-A request; (iv) an affidavit, dated June 3, 2021, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (v) copies of pages “1,” “9,” and “309” of a certified mail record (CMR) entitled “Certified Record for Presort Mail – Assessments Receivable” postmarked September 24, 2019; (vi) a copy of notice of determination, assessment ID L-050598958, dated September 24, 2019 and the accompanying mailing cover sheet; (vii) an affidavit, dated June 9, 2021, of Susan Saccocio, a manager in the Division’s mail room; (viii) copies of the Akman petition and the petition of BCL Network LLC/Emil Akman, date stamped received by the Division of Tax Appeals on February 18, 2020 and December 23, 2019, respectively, and copies of the envelopes in which those petitions were sent to the Division of Tax Appeals on February 13, 2020 and December 20, 2019, respectively; (ix) a copy of the answer in the matter of the

petition of Emil Akman; (x) a copy of the Akman responsible person request and a copy of the first page of notice of determination, assessment ID L-050598958, issued to Mr. Akman; (xi) a copy of the Akman conciliation order; and (xii) a copy of Mr. Akman and his spouse's joint nonresident and part-year resident income tax return form IT-203 for the year 2018, electronically filed on or about September 19, 2019, which lists the same Woodcliff Lake, New Jersey, address for Mr. Akman as that listed on the notice, and the Akman corrected petition. The 2018 income tax return was the last return filed with the Division by Mr. Akman before the notice was issued.

13. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20192601700." Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to "9/24/19." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the

CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

14. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

15. According to the Picard affidavit, the CMR postmarked September 24, 2019 consists of 309 cut sheets pages. Ms. Picard notes that the portion of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She avers that the USPS representative affixed a postmark to each page of the CMR and initialed or signed page 309. Ms. Picard also avers that the total number of statutory notices mailed pursuant to the CMR was 3,397.

16. Attached to the Picard affidavit, as exhibit "A," is a copy of pages 1, 9 and 309 of the CMR issued by the Division on September 24, 2019. Pages 1 and 309 have handwritten entries of "9/24/19" on the top right corners; however, page 9 does not have a similar entry.

17. Page 9 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0007 5943 and reference number L-050598958 was to be mailed to Mr. Akman at the Woodcliff Lake, New Jersey, address listed thereon. The corresponding mailing

cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and Mr. Akman’s name and address as noted above.

18. The affidavit of Susan Saccocio, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Saccocio has been in this position since 2017 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR.

19. Each of the three pages of the CMR in exhibit “A” of the Picard affidavit contain a USPS postmark dated September 24, 2019. On page 309, corresponding with “TOTAL PIECES AND AMOUNTS” is the preprinted number 3,397, and “TOTAL PIECES RECEIVED AT POST OFFICE” is blank. There is a set of initials or a signature on page 309. Ms. Saccocio avers that the affixation of the postmarks and the Postal Service employee’s initials or signature

indicate that a total of 3,397 pieces of mail listed on the CMR, including the piece addressed to Mr. Akman, were delivered to the USPS on September 24, 2019.

20. According to both the Picard and Saccocio affidavits, a copy of the notice of determination was mailed to Mr. Akman on September 24, 2019.

21. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) for the matter of Emil Akman. Form 3811-A is sent to the USPS for mail delivered on or after July 24, 2000. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division bearing certified control number 7104 1002 9730 0007 5943 on September 24, 2019 to "Akman-Emil" at a Woodcliff Lake, New Jersey, address. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 0007 5943 "on September 26, 2019 at 3:20 PM Located in Woodcliff Lake, NJ 07677." The scanned image of the recipient's signature as shown on the USPS response is illegible.¹ The scanned address of the recipient is not the same Woodcliff Lake, New Jersey, address as listed on the notice. The scanned address of the recipient has the correct street name but a different street number.

22. Attached to the Corina affidavit as exhibit "A" is the Division's "Request for Delivery Information/Return Receipt" for article number 7104 1002 9730 0007 5943. Exhibit

¹ In the USPS response, two scanned illegible signatures appear, the second illegible signature is directly beneath the first illegible signature. Because both signatures are illegible, it is impossible to determine whether the signatures correspond with one person's first and last name or correspond with the first and last names of two people.

“B” to the Corina affidavit is the USPS response to the Division’s request indicating delivery of the same article.

23. Melanie Spaulding, an attorney in the Office of Counsel of the Division, avers in her affidavit that attachment 1 to her affidavit is a copy of the petition filed by Mr. Akman, date stamped received by the Division of Tax Appeals on February 18, 2020. Attachment 1 to Ms. Spaulding’s affidavit consists of copies of two petitions and the envelopes in which the petitions were mailed (*see* finding of fact 12 [viii]). Specifically, the Akman corrected petition, mailed on February 13, 2020 and date stamped received by the Division of Tax Appeals on February 18, 2020, and the petition in the name of BCL Network LLC/Emil Akman mailed on December 20, 2019 and date stamped received by the Division of Tax Appeals on December 23, 2019.

24. Petitioner Emil Akman did not respond to the Division’s motion.

BCL Network LLC (DTA No. 829850)

25. In support of the motion, the Division provided the following documents: (i) an affidavit, dated June 22, 2021, of Melanie Spaulding, Esq., the Division’s representative; (ii) an affidavit, dated June 10, 2021, of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel; (iii) a Request for Delivery Information/Return Receipt, U.S. Postal Service, form 3811-A and the USPS response to the form 3811-A request; (iv) an affidavit, dated June 3, 2021, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of MAPS; (v) a certified mail record (CMR) entitled “Certified Record for Presort Mail – Assessments Receivable” postmarked September 23, 2019; (vi) a copy of notice of determination, assessment ID L-050566223, dated September 23, 2019 and the accompanying mailing cover sheet; (vii) an affidavit, dated June 9, 2021, of Susan Saccocio, a manager in the Division’s mail room; (viii) copies of the BCL Network LLC petition and the envelope in which it was mailed; (ix) a copy

of the BCL Network LLC request including the accompanying attachment A, as well as a copy of the first page of notice of determination, assessment ID L-050566223, issued to BCL Network LLC; (x) a copy BCL Network LLC's New York State partnership return form IT-204 for tax year beginning January 1, 2018 and ending on December 31, 2018 (2018 partnership return), electronically filed on September 5, 2019, which lists its address as 33-46 55-TH Street Woodside, New York 11377. The 2018 partnership return was the last return filed with the Division by BCL Network LLC before the notice was issued.

26. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard is familiar with CARTS and the Division's past and present procedures as they relate to statutory notices. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20192591700." Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to "9/23/19." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

27. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

28. The CMR in the present matter consists of 15 pages and lists 162 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 15, which contains 8 entries. Ms. Picard notes that the copy of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a postmark dated September 23, 2019 to each page of the CMR. On the last page of the CMR, the USPS employee handwrote "162" on the line next to the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE," and initialed or signed page 15.

29. Page 9 of the CMR indicates that a notice with certified control number 7104 1002 9730 0007 4229, and reference number L-050566223 was mailed to BCL Network LLC at "3346 55TH ST WOODSIDE NY 11377-1907," the address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit "B," bears this certified control number and BCL Network LLC's name and address as noted.

30. The affidavit of Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures. Ms. Saccocio has been in this position since 2017 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, each of the 15 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of September 23, 2019. On page 15, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 162 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "162," indicating 162 pieces of mail were received by the USPS. There is a set of initials or a signature on page 15.

31. According to the Picard and Saccocio affidavits, copies of the notice were mailed to BCL Network LLC on September 23, 2019, as claimed.

32. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) for the matter of BCL Network LLC. Form 3811-A is sent to the USPS for mail delivered on or after July 24, 2000. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division bearing certified control number 7104 1002 9730 0007 4229 on September 23, 2019 to "BCL Network LLC" at 3346 55th St., Woodside, NY 11377-1907. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 0007 4229 "on October 4, 2019 at 4:19 PM Located in Woodside, NY 11377." The scanned image of the recipient's signature as shown on the USPS response is barely legible initials E A. The scanned address of the recipient is "33-46 55 Street, Woodside."

33. Attached to the Corina affidavit as exhibit "A" is the Division's "Request for Delivery Information/Return Receipt" for article number 7104 1002 9730 0007 4229. Exhibit "B" to the Corina affidavit is the USPS response to the Division's request indicating delivery of the same article.

34. Petitioner BCL Network LLC did not respond to the Division's motion.

CONCLUSIONS OF LAW

A. Tax Law § 1138 (a) (1) authorizes the Division to issue a notice of determination for additional tax or penalties due under articles 28 and 29 of the Tax Law. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law § 1138 [a] [1]). Alternatively, a

taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such hearing has not elapsed” (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). That is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a request for a conciliation conference or a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing the notice to petitioner’s last known address (Tax Law § 1147 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is issued when it is properly mailed, which occurs when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

C. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or

registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id.*; *see also Matter of Ruggerite, Inc. v State Tax Commn.*, 97 AD2d 634, 635 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

D. With respect to notice of determination L-050598958 issued to Mr. Akman, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Ms. Saccocio, the Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). However, the submission of a partial (or truncated) CMR, as here, is not sufficient to establish that the Division's standard mailing procedure was followed (*see Matter of Ankh-Ka-Ra Sma-Ntr f/k/a Andre Williams*, Tax Appeals Tribunal, April 14, 2016; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Hence, that proof alone fails to establish that the notice of determination L-050598958 was properly mailed on September 24, 2019 and, thus, the period within which to file a protest was not triggered as of such date.

E. An inadequacy in the evidence of mailing, as in conclusion of law D, may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing, the 90-day period for filing either a request for conciliation conference or a petition is tolled until such time as the taxpayer actually receives the notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib. of State of N.Y.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a

protest will commence (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereupon (*see Matter of Agosto v Tax Commn. of the State of N.Y.*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

F. To establish that notice of determination L-050598958 was mailed by certified mail and was, in fact, thereafter delivered to and accepted by Mr. Akman, the Division presented the affidavit of Ms. Corina and the accompanying USPS form 3811-A and USPS response thereto (*see* findings of fact 21, 22). As Ms. Corina states, the postal service did deliver a copy of the notice with certified control number 7104 1002 9730 0007 5943 “on September 26, 2019 at 3:20 PM Located in Woodcliff Lake, NJ 07677.” However, the confirmation from the USPS provided an illegible signature of the recipient and a different street number address of the recipient.

Given that the signature of the recipient is illegible and the street number address is different, the Division has not proven actual receipt of notice L-050598958 by Mr. Akman. Therefore, the 90-day period for filing a request for conciliation conference or a petition was tolled. Evidence in the record indicates that Mr. Akman, at the latest, received notice L-050598958 on December 18, 2019, the date on which he signed the petition of BCL Network LLC/Emil Akman.

G. With respect to notice of determination L-050566223 issued to BCL Network LLC, the Picard and Saccocio affidavits submitted by the Division adequately describe the Division’s mailing procedure, as well as the relevant CMR, and thereby establish that the general mailing procedure was followed in this instance (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). BCL Network LLC’s address on the mailing cover sheet and the CMR vary slightly from

the address listed on BCL Network LLC's electronically filed 2018 New York State partnership return (form IT-204), which was the last return filed by BCL Network LLC before notice of determination L-050566223 was mailed, and thus satisfies the "last known address" requirement for the September 23, 2019 notice mailing. The Division removed two hyphens from the address provided on BCL Network LLC's electronically filed 2018 New York State partnership return. The removal of the hyphens was an inconsequential deviation (*see Matter of Rubinos*, Tax Appeals Tribunal, April 3, 2017). The United States Tax Court has held that a deviation in the address used in mailing a notice "is inconsequential where the error is so minor that it would not prevent delivery of the notice (citations omitted)" (*see Lee v C.I.R.*, T.C. Memo 2011-129 [2011]). The deviations between the address the notice was mailed to compared to the address provided on the 2018 partnership tax return BCL Network LLC filed are inconsequential. It should also be noted that the Division, through the affidavit of Heidi Corina, established delivery of the September 23, 2019 notice of determination to BCL Network LLC.

H. It is thus concluded that the Division properly mailed notice of determination L-050566223 to BCL Network LLC on September 23, 2019, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]).

I. As noted in finding of fact 4, a petition in the name of BCL Network LLC/Emil Akman was mailed to the Division of Tax Appeals on December 20, 2019. By letter dated January 14, 2020, the Division of Tax Appeals notified Mr. Akman that the petition of BCL Network LLC/Emil Akman could not be processed further until certain identified items were corrected or provided (*see* finding of fact 5). Specifically, those items included, among others, the sending of a corrected page 1 of the petition with Mr. Akman's name only and his taxpayer

ID, and an additional petition in the name of BCL Network LLC, along with the notice of determination in the name of the business attached to the same (*id.*). The January 14, 2020 letter also stated that the requested items should be “postmarked within 30 days of the date of this letter” to the attention of the Division of Tax Appeals (*id.*). In response to the letter, documentation was sent to its attention on February 13, 2020 and received by the Division of Tax Appeals on February 18, 2020 (*see* finding of fact 8). The documentation submitted included the Akman petition, the BCL Network LLC petition, and a copy of the petition in the name of BCL Network LLC/Emil Akman (*id.*). It is noted that BCL Network LLC’s responding documentation was postmarked within 30 days of the date of the Division of Tax Appeals’ letter. Section 3000.3 (d) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) provides that for purposes of the time limitations for filing a petition, a corrected petition is deemed to have been filed at the time the original petition was filed.

J. It was found in conclusion of law F that the Division failed to prove actual receipt of notice of determination L-050598958 by Mr. Akman and, therefore, the 90-day period for filing a request for conciliation conference or a petition was tolled. It was further found that Mr. Akman, at the latest, received notice L-050598958 on December 18, 2019, the date he signed the petition of BCL Network LLC/Emil Akman. The Akman petition challenging notice L-050598958 is deemed to have been timely filed on December 20, 2019, the date on which the petition of BCL Network LLC/Emil Akman was mailed (20 NYCRR 3000.3 [d]; *see* conclusion of law I).

K. With respect to notice of determination L-050566223 issued to BCL Network LLC on September 23, 2019, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date

(*see* conclusions of law G, H). On December 20, 2019, a petition in the name of BCL Network LLC/Emil Akman was filed with the Division of Tax Appeals. A review of the petition in the name of BCL Network LLC/Emil Akman indicates that the business ID and address were listed on page 1 of the same, and Mr. Akman signed the petition as president. In addition, almost all attachments to the petition related to the business, not Mr. Akman. In response to Ms. Nicholas's January 14, 2020 letter, the BCL Network LLC petition was filed on February 13, 2020, along with the Akman petition and a copy of the petition in the name of BCL Network LLC/Emil Akman. Since the BCL Network LLC petition corrected the petition in the name of BCL Network LLC/Emil Akman filed on December 20, 2019, I find that BCL Network LLC filed a timely challenge to notice of determination L-050566223 on that date (*see* 20 NYCRR 3000.3 [d]). In addition, because notice of determination L-050598958 issued to Mr. Akman, as an officer or responsible person of BCL Network LLC, arose out of notice of determination L-050566223, previously issued to BCL Network LLC, the petition timely filed by BCL Network LLC is deemed to include the notice of determination issued to Mr. Akman (*see* Tax Law § 1138 [a] [3] [B]). The petition of Emil Akman was timely filed as well.

L. The Division of Taxation's motions are denied, and the hearing in the matters of Emil Akman and BCL Network LLC will be scheduled in due course.

DATED: Albany, New York
October 21, 2021

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE