STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **NATHAN UNGER, OFFICER OF ROBERT LANDAU ASSOCIATES, INC.** 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, 1980 through August 31, 1984.	:	DECISION DTA Nos. 805351 and 806353
In the Matter of the Petition of **ROBERT LANDAU, OFFICER OF ROBERT LANDAU ASSOCIATES, INC.** 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, 1980 through August 31, 1984.	:	

Petitioners Nathan Unger, officer of Robert Landau Associates, Inc., c/o Orenstein, Musoff & Orenstein, 635 Madison Avenue, New York, New York 10022, and Robert Landau, officer of Robert Landau Associates, Inc., c/o Kamerman & Soniker, 500 Fifth Avenue, Suite 300, New York, New York 10110, filed exceptions to the determination of the Administrative Law Judge issued on January 28, 1993. Petitioner Nathan Unger appeared by Orenstein, Musoff & Orenstein, P.C. (Wallace Musoff, Esq., of counsel). Petitioner Robert Landau appeared by Kamerman & Soniker, P.C. (Jerome Kamerman and Martin Klein, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael C. Gitter and Deborah J. Dwyer, Esqs., of counsel).

Petitioner Robert Landau submitted a brief and petitioner Nathan Unger submitted a letter adopting the statements and arguments made in petitioner Robert Landau's brief to the extent that they aid petitioner Nathan Unger in securing vacatur of the notices of determination and demand for payment issued to him. The Division of Taxation filed a letter brief in response. Petitioner Robert Landau then filed a reply brief. On September 27, 1993, petitioner Nathan Unger again submitted a letter adopting the statements and arguments made therein to the extent that they aid him in securing vacatur of the notices which began the six-month time period to issue this decision. Oral argument, requested by petitioner Robert Landau, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether it is constitutional to impose personal liability upon an officer, director or employee of a corporation for the corporation's failure to comply with Articles 28 and 29 of the Tax Law.

II. Whether petitioner Nathan Unger was a person required to collect and pay over sales tax on behalf of Robert Landau Associates, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(c) during the period in issue.

III. Whether petitioner Robert Landau was a person required to collect and pay over sales tax on behalf of Robert Landau Associates, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(c).

IV. Whether the audit method was reasonably calculated to determine the sales and use taxes due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Robert Landau Associates, Inc. ("RLA") was founded in 1973 by petitioner Robert Landau as a creative marketing and sales promotion company. The firm developed promotional campaigns as well as provided promotional material to its clients. In or about early 1976, Mr. Landau sold RLA to Kenyon-Eckhart Advertising Agency ("Kenyon-Eckhart"). After the sale, Mr. Landau continued as president of RLA.

In 1978, Mr. Landau reacquired RLA. Since that time and continuing throughout the period in issue, Mr. Landau served as RLA's president, chief executive officer and sole shareholder. When Mr. Landau purchased the company from Kenyon-Eckhart, it had eight to ten people engaged in marketing and one or two people performing bookkeeping. By 1980, the company had grown to about 100 employees of which 80 dealt with customers and 20 were secretaries or bookkeepers. By 1983 the company had grown to approximately 200 employees and had gross sales of approximately $30,000,000.00. During the period in issue, RLA had offices in New York City, Los Angeles, Seattle, Atlanta, Detroit, Dearborn, Georgia and Japan.

On August 16, 1983 the Division of Taxation ("Division") commenced a sales and use tax audit of RLA by scheduling an appointment with RLA's assistant comptroller. On August 22, 1983 the Division mailed a letter to RLA which scheduled an audit appointment on September 19, 1983. The appointment letter stated that the period under audit was December 1, 1980 through August 31, 1983 and requested that the corporation make available all books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records. On August 29, 1984, the Division requested sales tax returns and a general ledger for the purpose of updating the audit through May 31, 1984. RLA did not comply with this request.

On November 14, 1983, an auditor from the Division went to the corporation's premises and was given access to the 1980 and 1981 corporate income tax returns, a sales tax return for one quarterly period and the general ledger for the fiscal year ending October 31, 1982. The auditor was not provided with sales invoices, purchase invoices, exemption certificates or the requested sales tax records. During this visit to RLA, the Division requested that the

corporation make available additional records consisting of all invoices for April 1983, cash disbursements from June through August 1982 and the 1981 and 1982 New York State corporation franchise tax reports. The Division also requested that a 1982 corporation income tax return be reconciled with the general ledger.

At a meeting on December 5, 1983, the corporation presented to the Division its sales invoices and the corporation tax returns. However, they did not provide the reconciliation or the cash disbursement records.

At one juncture during the audit, the auditor proposed applying the taxable ratio arrived at during the previous audit to the gross sales found in the general ledger for the current audit period. This approach was not followed because the assistant comptroller told the auditor that petitioner Nathan Unger rejected the use of the prior audit. The auditor did not make a written notation of the rejection in his log. If the results of the prior audit had been used, the additional sales tax due would have been $51,050.00.

The Division found that the company's records were in very poor condition. For instance, the company was missing the general ledger for the first year of the audit period. In addition, the company could not provide a number of invoices, shipping documents or backup to the sales invoices. Further, the auditor could not tie in the sales reported on the sales and use tax returns with the amounts recorded in the general ledger.

The Division compared those quarters for which the corporation reported its sales on its sales and use tax returns to those sales reflected on its gross billings. The comparison disclosed that the gross billings exceeded the sales by $995,750.00.

During the audit, the Division asked for contracts with RLA's customers but these were not provided. The corporation also made a claim that certain of the corporation's sales were tax exempt. However, the corporation had no exemption certificates, no accessible shipping documents and a very limited description of the services or property involved in the sales which

were tested.[1] The lack of documents led the auditor to ask why the back-up documentation could not be produced. In response, he was told that the items went in and out so quickly that the company did not prepare shipping documents.

The Division attempted to ascertain from RLA's invoices what kind of services or products RLA was providing to its clients. However, the invoices were not sufficient for this purpose because there was no description of what was done. In order to remedy this problem, the Division proposed performing a test on all invoices for April 1983 and requested backup to all such invoices. In conjunction with this proposal, the Division gave Assistant Comptroller Michael Delpezzo an Audit Method Election form which stated, in part, that the Division's representative "has advised that the records available for audit are adequate and sufficient to warrant an audit method that utilizes all records within the audit period." The agreement further provided that in lieu of such an audit, the taxpayer elected to use a representative test period audit method to determine any sales or use tax liability. When the Division gave Michael Delpezzo the test period election form, it was with the understanding that the Division was going to test all of the sales during the month of April 1983 and that all of the invoices needed to perform this test would be available.

The test period agreement was presented to Mr. Unger. Before he signed the document, Eisner & Luban called Mr. Unger and stated that the document should be signed. Further, Mr. Unger was told that the Division was going to use the taxable percentages from the prior audit. On the basis of this representation, Mr. Unger signed the document. Mr. Unger never rejected the proposed audit method. However, before the auditor received the test period agreement back, he told the assistant comptroller that the audit test period would be several days in April 1983 because RLA advised the auditor that it would be an impossible task to provide the backup to all invoices for April 1983.

In January 1984, the Division decided to limit the test to the larger sales during April 1983. The Division asked for the corresponding job jackets and examined the information that

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[1]Certain documents were stored at a warehouse; however, the documents were not reviewed because they were not stored in a manner which would make the documents accessible.

was provided. The Division found that some of the sales were nontaxable advertising commissions. On other transactions, the Division found from the job jackets that RLA was selling tangible personal property.

The particular invoices examined by the Division were dated between April 4, 1983 through April 11, 1983[2] and constituted total sales of $505,350.00. However, due to a transpositional error, the Division considered total sales to be $503,350.35. Of the sales examined, the Division found seven invoices wherein it considered the receipt all or partially taxable. The pertinent information regarding these invoices is as follows:

a) The Division examined invoice number 3639 to "Miller" in the total amount of $109,150.00 and ascertained that the amount included nontaxable consulting fees as well as lithographs and visors for, respectively, $12,500.00 and $675.00. Since RLA did not present any shipping documents showing out-of-state shipments and the Division did not know where the product was being sent, the Division considered the combined amount of $13,175.00 subject to tax.

b) The Division found that two invoices, numbers 3645 and 3640, included a total taxable amount of $40,784.00 for "P.O.P" kits[3] sold to Burger King. The Division determined what a taxable P.O.P. kit was from an examination of the job jackets. During the audit, the auditor was told that some of the Burger King items were given away as promotional items. He was also told that some of RLA's sales were to Burger King corporate headquarters which resold them to their franchises. However, since RLA could not produce the shipping documents to show that the sales reviewed during the audit were those types of shipments, the Division did not give any weight to these contentions.

The Division considered 15 percent of the total to be the amount subject to New York State tax because the Division was familiar with the operation of Burger King and was aware that Burger King had stores in many different areas.

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[2]The workpapers mistakenly listed the dates of the invoices as being in 1984.

[3]Point of purchase kits.

c) The Division ascertained that portions of two invoices, numbers 3643 and 3644, were for the sale of taxable P.O.P. kits to Coca-Cola. The total amount of the two invoices was $77,207.00 and the amount found taxable was $34,167.00. The Division considered 15 percent of the amount found taxable as subject to New York State tax on the basis of its understanding of the relative population of New York versus the other areas where Coca-Cola conducts business.

d) The Division ascertained that two invoices to Nabisco, numbers 3648 and 3658, in the respective amounts of $75,000.00 and $15,000.00, constituted taxable transactions. On the basis of a review of the job jacket, the Division ascertained that $17,928.00 of the invoice for $75,000.00 was for the sale of breadboxes. The balance of the invoice was for the sale of other taxable material. The other invoice to Nabisco was for the sale of 282 Home Hearth packages.

Each of the foregoing invoices was included in the same job jacket. According to this job jacket, one-quarter of the material was being shipped out-of-state. Although it was not listed as a separate item on the sales invoices, the Division allowed an additional 5 percent of the invoice as a shipping charge.

On the basis of the foregoing audit findings, the Division found that total taxable sales during the period of April 4, 1983 through April 11, 1983 were $87,417.60 and that during the same period of time total sales were $503,350.35. The Division then calculated a taxable ratio of .1738 by dividing the taxable sales during the test period by the total sales during the same period.[4]

The Division multiplied the gross billings during the audit period by the taxable ratio of .1738 to determine taxable sales of $16,966,697.00 and tax due of $1,394,066.65. This amount was reduced by the sales tax paid with RLA's sales and use tax returns of $8,278.25 resulting in additional tax due on sales of $1,385,788.40.

The Division prepared a list of RLA's expense purchases for the period January 1982 through December 1982. While preparing the list, the Division found that the corporation

[4]If the correct amount of taxable sales had been used (see, above), the taxable ratio would have been 17.29 percent.

issued resale certificates and did not pay tax when it purchased items such as mechanicals, artwork, photography and topography.

In order to determine the amount of tax due on recurring purchases, the Division examined all of petitioner's invoices during the period January 1982 through December 1982 to find those purchases in which the item was delivered into New York City and no tax was paid. The total purchases were divided by the gross sales per the gross billing records for the same period. The resulting percentage was then multiplied by the gross billings for the audit period. In performing the foregoing analysis, the Division calculated two taxable ratios. A taxable ratio of 3.53 percent was calculated for those items which were taxable at a rate of four percent such as artwork and topography which are entitled to the manufacturer's exemption. The taxable ratio was applied to gross sales to calculate additional taxable purchases of $3,456,214.00 and additional tax due of $138,248.56.

The Division calculated a taxable ratio of .97 percent with respect to those items which were subject to tax at a rate of 8.25 percent. The taxable ratio was applied to gross sales resulting in additional taxable purchases of $1,632,948.00. This, in turn, resulted in additional tax due of $78,036.55.

When the Division performed the foregoing analysis, it examined sales throughout the audit period. Although the Division did not examine every sale, it noticed that petitioner had a continuing set of customers and the nature of the business remained the same.

The Division performed its work on recurring expense items between December 1983 and January 1984. The auditor did not tell any of RLA's employees his conclusion that RLA failed to pay sales tax on recurring expense items until after RLA filed for bankruptcy in September 1984 because RLA's accountant kept postponing the appointment.

In order to conduct its audit of fixed assets, the Division asked for the general ledger and invoices for the entire audit period. RLA responded that it could not locate the general ledger for the period December 1, 1980 through October 31, 1981. In the alternative, RLA requested

that the Division perform a test to calculate the tax due on fixed assets and the Division agreed to this approach. Subsequently, the Division provided RLA with copies of the pages from RLA's cash disbursement book and asked for the invoices to the items entered thereon. The Division also asked for backup to the entries concerning fixed assets in the general ledger. In performing the foregoing analysis, the Division focused upon four accounts: telephone system, N.Y. furniture, fixtures and equipment, N.Y. leasehold improvements and computer equipment.

The Division examined the invoices which were produced and gave RLA credit for those invoices which showed that tax was paid. The corporation was assessed tax on those items for which no backup was available. After the Division made a listing of those items it considered taxable, it divided the amount taxable in each account by the total amount tested. The Division then multiplied the amount in each of the accounts during the audit period by the taxable ratio. On the basis of its review of fixed assets, the Division reached the following conclusions on the four accounts it examined:

Account	Taxable Ratio	Taxable Purchases	Tax Due
Telephone system	.0257	$ 7,465.00	$ 653.89
N.Y. furniture, fixtures and equipment	.5562	391,190.00	31,177.28
N.Y. leasehold improvement	.9078	300,326.00	24,674.84
Computer equipment	.0858	25,305.00	2,087.68
			$58,593.69

The auditor's workpapers show that for the quarters ending February 28, 1982 and May 31, 1982 the auditor calculated additional tax due on furniture, fixtures and equipment of $1,877.95 and $723.36, respectively. The same workpapers also show that for the quarters ending February 28, 1982 and May 31, 1982 RLA made purchases of furniture, fixtures and equipment without paying sales tax of $10,306.50 and $4,853.00, respectively. Applying a tax rate of 8.25 percent, the tax due for the quarter ending February 28, 1982 was $850.29 and the tax due for the period ending May 31, 1982 was $400.37.

The calculation of the taxable ratio on New York furniture, fixtures and equipment included several invoices from Lanier Business Products, Inc. ("Lanier"). At the hearing, petitioner's produced three invoices from Lanier, which were dated within the audit period,

showing that on at least three occasions Lanier collected sales tax. The invoices presented by petitioners were not considered in the audit.

The Division concluded that Robert Landau was responsible for the taxes due from RLA. This determination was based on finding that Mr. Landau was the president of RLA, was authorized to sign RLA's tax returns, was the sole shareholder, had access to RLA's records and was responsible for the daily management of the company. In addition, the Division was told by the attorney for RLA that Mr. Landau was responsible for everything including financial matters but that some of the responsibility for financial affairs was delegated to his chief financial officer.

The Division also determined that Nathan Unger was responsible for the taxes due from RLA. This conclusion was based on the fact that Mr. Unger signed a number of documents. The Division found that Mr. Unger signed a consent to extend the statute of limitations, the power of attorney form authorizing an accounting firm to represent RLA in the sales and use tax audit for the period December 1, 1980 through November 30, 1983 and an agreement for the Division to conduct a test period audit. The Division also found that Mr. Unger signed the following tax returns: sales tax returns for the quarters ending August 31, 1980, November 30, 1980 and February 28, 1981; corporation franchise tax return for the fiscal year ending February 28, 1981; and corporation franchise tax return for the fiscal year ending October 31, 1982.

On the basis of the foregoing audit, the Division issued two notices of determination and demands for payment of sales and use taxes due dated December 20, 1984 to, respectively, Robert Landau and Nathan Unger, as officers of Robert Landau Associates, Inc. The first notice assessed sales and use taxes for the period December 1, 1980 through May 31, 1984 in the amount of $1,512,600.86 plus interest of $339,452.58 for a total amount due of $1,852,053.44. The second notice assessed tax for the period June 1, 1984 through August 31, 1984 in the amount of $148,066.34 plus interest of $3,737.19 for a total amount due of $151,803.53. Each of the notices explained that, as an officer, each of the individual petitioners, respectively, was

personally liable for the taxes determined to be due from RLA. The notices also stated that the tax had been estimated or determined in accordance with section 1138 of the Tax Law.

The Division issued notices of determination and demands for payment of sales and use taxes due, dated December 20, 1984, to, respectively, Robert Landau and Nathan Unger, which assessed sales and use taxes for the quarters ending February 29, 1984 and August 31, 1984 in the amount of $4,992.12, plus penalty of $499.22 and interest of $299.54, for a total amount due of $5,790.88. Among other things, the notices bore the following explanation:

> "Because a Sales and Use Tax Return was not received, this amount has been determined due based on the average taxable sales as reported on previous returns filed. Upon receipt of the required tax return, this amount will be amended accordingly.
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> "This tax has also been determined by Notice Nos. D8405264601 and D8412018822 dated 5/21/84 and 11/27/84, against Robert Landau Associates, Inc., which is now in an arrangement and of which the taxpayer is an officer."

At the hearing, the Division explained that the foregoing notices had been superseded by the audit.

The Division also issued notices of determination and demands for payment of sales and use taxes due, dated May 15, 1985, to, respectively, Robert Landau and Nathan Unger, which assessed sales and use taxes for the period September 1, 1984 through November 30, 1984 in the amount of $2,496.06 plus penalty of $224.64 and interest of $120.43 for a total amount due of $2,841.13. The notice set forth the following explanation:

> "Because a Sales and Use Tax Return was not received, this amount has been determined due based on the average taxable sales as reported on previous returns filed. Upon receipt of the required tax return, this amount will be amended accordingly.
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> "This tax has also been determined by Notice No. D8503036379 dated 2/27/85, against Robert Landau Associates, Inc., which is now in bankruptcy and of which the taxpayer is an officer."

No evidence was offered at the hearing to show how the foregoing assessment was calculated.

Robert Landau filed a petition dated March 15, 1985 which challenged sales and use tax assessments dated December 20, 1984 for the period December 1, 1980 through August 31, 1984 in the amount of $1,665,659.32 in tax due. The petition included copies of the assessments which assessed tax of $1,512,600.86 and $148,066.34. Robert Landau also filed a petition with the Division of Tax Appeals dated November 21, 1988 which challenged the assessment of tax for the period December 1, 1980 through August 31, 1984. The petition included copies of the notices which assessed tax in the amount of $1,512,600.86, $148,066.34 and $4,992.12.

Nathan Unger filed a petition dated March 19, 1985 which stated that the tax in question is for the year or period "1981 through 1984". The petition listed the date of the assessment as December 20, 1984 and listed the amount of tax as $1,665,659.92. The petition included copies of the notices which assessed tax of $1,512,600.86, $148,066.34 and $4,992.12. Nathan Unger also filed a petition with the Division of Tax Appeals dated March 8, 1988 which stated that the tax in question was for the period December 1, 1980 through August 31, 1984. The date of the assessment is listed as December 30, 1987 and the amount of tax is listed as $1,665,659.20.

In 1979 the Division conducted a sales and use tax audit of RLA. During this audit, RLA was represented by Eisner & Luban. The major areas of adjustment made as a result of the audit concerned expense purchases and tax collected but not remitted. No adjustment was made for the failure to charge tax or collect tax. As a result of the audit, the Division found that tax was due in the amount of $32,842.96. After the audit, Mr. Unger told Mr. Landau that the audit went well and Mr. Landau was left with the impression that RLA was fulfilling its sales tax obligations.

The audit at issue herein was also handled by Eisner & Luban. At one juncture, Mr. Landau directed Mr. Unger to execute a power of attorney authorizing Eisner & Luban to represent RLA during the audit in issue. On June 6, 1984 Mr. Unger signed the power of attorney form as senior vice-president.

Eisner & Luban was authorized to call upon any employee of RLA for assistance with the audit without contacting Mr. Unger first. In accordance with this authority, Eisner & Luban obtained the assistance of Assistant Comptroller Michael Delpezzo. Eisner & Luban did not ask Mr. Unger for his help during the audit and Mr. Unger never met with the sales tax auditor in this case. Mr. Unger did not know that records which were requested by the auditor were not supplied and no one asked Mr. Unger for help in producing records for the sales tax audit. Mr. Unger first learned that the audit resulted in a finding that tax was due when he got the notice.

As noted, Robert Landau was the president of RLA during the period in issue. In this position, Mr. Landau was authorized to approve everything. Generally, Mr. Landau concerned himself with selling and maintaining client accounts. This involved resolving questions concerning the content, appearance and quality of the presentations. His duties also included deciding which clients would be solicited as well as negotiating and signing contracts on behalf of RLA.

Mr. Landau had the right to hire and fire employees. However, he never hired below the level of president of a division.

Mr. Landau was a signatory on the corporate checking account. Nevertheless, he only signed checks from time to time and not in the regular course of business.

RLA's sales and use tax returns were prepared by RLA's accounting department. Mr. Landau did not sign the sales and use tax returns, resale or exemption certificates.

Mr. Landau was not involved in the sales tax audit and, during the audit at issue herein, the auditor neither spoke with nor saw Mr. Landau. Prior to receiving the notices, Mr. Landau did not know that sales tax was not being properly charged. Mr. Landau never instructed the accounting department or the purchasing department not to charge or pay sales tax. He did not know that the Division was alleging that sales taxes were not properly paid until after the audit and after RLA filed for bankruptcy.

Petitioner Nathan Unger was born on July 29, 1955. In or about January 1978, Mr. Unger received a bachelor of arts degree from Queens College. In March 1978 Mr. Unger began his first full-time employment at the age of 22 with RLA. At this time RLA was a subsidiary of Kenyon-Eckhart.

Mr. Unger's employment interview was conducted by Ira Worthman who was the comptroller of RLA. Mr. Landau was also in attendance. During this interview, Mr. Unger noted that it was his first full-time job after college.

Upon commencing his employment, Mr. Unger performed basic bookkeeping duties. This consisted of drawing checks and making entries in ledgers.

Mr. Landau chose to retain Mr. Unger when RLA became independent of Kenyon-Eckhart. When he made this decision, Mr. Landau did not inquire into Mr. Unger's professional background. Rather, Mr. Landau relied on the advice of the chief financial officer of Kenyon-Eckhart who had told Mr. Landau how competent and capable Mr. Unger was.

Mr. Unger continued to perform bookkeeping services until January 1979 at which time Mr. Landau promoted Mr. Unger to comptroller of RLA. As comptroller, Mr. Unger was responsible for maintaining RLA's books and filing its tax returns. At the time Mr. Landau offered Mr. Unger the position, Mr. Landau explained that it was understood that Mr. Unger did not have the experience to handle the job. However, Mr. Landau told Mr. Unger that he did not need to be concerned because a senior partner from the accounting firm of Eisner & Luban would be available to guide Mr. Unger through each step of the process.

For an extended period of time, Eisner & Luban reviewed Mr. Unger's work on a daily basis in RLA's offices. Eisner & Luban explained the procedures to be followed in the accounting department for invoices, how to set up reports and what the reports should look like. In addition, Eisner & Luban dictated the procedures to be followed in sales tax, which were followed at all times, and made the determination as to which sales were deemed taxable. Upon being told that RLA was informed by its clients that the materials that RLA was processing

were for resale, Eisner & Luban advised RLA to obtain resale certificates. Later, Eisner & Luban checked to insure that RLA actually received the resale certificate.

Mr. Unger held the title of comptroller until January 1981. At that time Mr. Landau felt that, because of the growth that the company was experiencing, a different person was needed to handle the finances of the company. Therefore, Mr. Landau hired a gentlemen by the name of Larry Albert to serve as chief financial officer.

When Mr. Albert was hired in January 1981, Mr. Unger became vice-president of marketing services. In this capacity, Mr. Unger coordinated promotional campaigns and tried to make sure that the schedule for production and shipping was followed. In his new position, Mr. Unger reported to Mr. Albert.

Mr. Albert held the position of chief financial officer for about a year and a half. Thereafter, the position of chief financial officer was filled by Nicholas Gilles. In or about December 1983 Mr. Gilles' employment with RLA ended and Mr. Unger became chief financial officer.

Mr. Albert and subsequently Mr. Gilles supervised the comptroller of RLA during the period that they held the position of chief financial officer. When Mr. Unger became chief financial officer, he also supervised RLA's comptroller. In his position, Mr. Unger was responsible for RLA's bookkeeping and accounting. He was also responsible for RLA's taxes and tax returns.

When he was first employed, Mr. Unger did not have check-signing authority. Later, when he became comptroller, he was authorized to sign checks with another corporate officer of RLA. In or about the end of 1983 or early 1984, Mr. Unger's signature alone became sufficient to draw funds on RLA's checking account. Mr. Unger did not draft checks without Mr. Landau's permission or authorization.

During the period that Mr. Unger was vice-president of marketing services, he was occasionally asked to sign various documents, including tax returns, pertaining to RLA's financial affairs. This occurred when the person who was supposed to sign the document was

unavailable. Either Eisner & Luban or someone in the accounting department would ask Mr. Unger to sign in this instance because of Mr. Unger's prior involvement in RLA's accounting. When Eisner & Luban asked Mr. Unger to sign a return, he did so without reviewing the document first.

When RLA was having a shortage of cash, Mr. Unger and Mr. Landau reviewed a list of suppliers or vendors to decide who would get paid. During this process, Mr. Unger advised Mr. Landau as to which supplier was calling for payment and why he should pay one person over another. At the hearing, Mr. Landau could not recall ever disagreeing with Mr. Unger. However, Mr. Landau always had the final say over who would get paid.

When he first began working as comptroller, Mr. Unger had the authority to hire employees. He also had the authority to fire employees after consulting with the personnel department. When he was engaged in marketing services, Mr. Unger was working with the heads of other departments. He could not have fired these people without permission. The record does not disclose Mr. Unger's authority to hire and fire after he became chief financial officer.

When Mr. Unger first began working for RLA he was paid approximately $10,000.00 a year. After a year, his salary became approximately $12,500.00 a year. At some juncture, his salary became $20,000.00. RLA's Corporation Franchise Tax Report for the fiscal year ended October 31, 1982 reports that Mr. Unger's compensation was $52,292.00. RLA's Corporation Franchise Tax Report for the fiscal year ended October 31, 1983 listed Mr. Unger's compensation as $100,000.00. Mr. Unger was given a substantial increase in salary by Mr. Landau so that Mr. Unger would be able to purchase a home.

For a period of about one year, Mr. Unger kept track of Mr. Landau's personal checkbook. Pursuant to a power of attorney, Mr. Unger drafted checks to pay bills which were supplied by Mrs. Landau.

At the hearing, Mr. Landau testified that RLA developed promotional campaigns for Miller Brewing Company and for Burger King Corporation for which it was paid a monthly

creative and consulting services fee of $300,000.00 each during the years under audit. Mr. Landau also testified that the services which RLA rendered on behalf of Nabisco Brands, Inc. consisted of creating packaging for dog biscuits which Nabisco sold to supermarkets. Lastly, Mr. Landau averred that RLA arranged for the manufacture of promotional items which Burger King Corporation sold to its franchisees. Mr. Landau did not offer any documentary evidence to support these assertions.

At the time of the hearing, RLA's records were stored in thousands of boxes in a warehouse. It would cost from $50,000.00 to $75,000.00 to assemble the records in a manner which would permit access to particular documents.

In accordance with subdivision 1 of section 307 of the State Administrative Procedure Act, the following proposed findings of fact have been accepted to the extent set forth in the determination: "1", "2", "3", "8", "9", "10", "11", "12", "14", "15", "16", "17", "18", "19", "20", "21", "22", "23", "24", "25", "31", "32", "34", "33", "35", "36", "37", "38", "39", "40", "41" and "44". In making these findings, several points may be noted. The record shows that the auditor examined the job jackets pertaining to the invoices issued to Miller Brewing Company, Burger King Corporation and Nabisco Brands, Inc. in determining the nature of the transactions. Petitioners have not presented sufficient evidence to warrant findings which are inconsistent with the transactions found in the job jackets. It is also noted that the fact that it would require a major undertaking in order to gain access to RLA's records cannot relieve petitioners of the need to sustain the burden of proof.

Proposed findings of fact "4", "5", "6", "7", "13", "26" through "30", "42 and "43" are not fully supported by the record.

OPINION

In the determination below, the Administrative Law Judge held that a responsible officer of a corporation may be held liable for the sales tax owed on the corporation's purchases (citing Matter of Laschever, Tax Appeals Tribunal, March 23, 1989) and that because Mr. Landau was

the sole shareholder and President of RLA and had authority over all aspects of the corporation's existence, he was a person required to collect tax (citing Matter of Roncolato, Tax Appeals Tribunal, August 15, 1991). In addition, the Administrative Law Judge held that Mr. Unger was not responsible for taxes due from the corporation during his tenure as comptroller and later as vice-president of marketing services, but that he was responsible during his tenure as chief financial officer of RLA during the period December 1, 1983 through August 31, 1984.

The Administrative Law Judge refused to address petitioners' argument that the penalties assessed for failure to comply with Articles 28 and 29 constitutes an excessive fine in violation of the Eighth Amendment of the United States Constitution, stating that the jurisdiction of the Division of Tax Appeals does not include addressing whether a statute is constitutional on its face.

With respect to the propriety of the audit performed by the Division, the Administrative Law Judge held that: (1) because the Division failed to make a specific request for records for the period June 1, 1984 through August 31, 1984, its resort to external indices was improper and cancelled the assessments for this period; (2) for the other periods at issue, because RLA did not maintain and present to the Division a complete set of books and records, the Division properly resorted to the use of external indices, and the use of this method was proper without RLA's consent; (3) the Division was justified in abandoning the use of an error rate derived from a prior period audit as a means of assessing the period at issue in light of RLA's rejection of this method; (4) the test period audit did not lack a rational basis due to the Division's reduction of days examined from 30 days to 6; (5) the record does not support petitioners' contention that invoice number 3640 was omitted from the audit; (6) the testimony of Mr. Landau was not enough to establish that a sale was for resale without evidence of how the purchaser used the items; and (7) the Division's treatment of consulting fees as taxable was proper in the absence of evidence that they were non-taxable.

Finally, the Administrative Law Judge found that petitioners accurately identified errors in the calculation of tax due on furniture, fixtures and equipment, as well as a transpositional error, and directed the Division to recalculate the amount of tax due.

On exception, petitioner[5] makes the following arguments: 1) there is no statutory basis for imposing personal liability upon an officer, director or employee of a corporation for the corporation's compensating use taxes; 2) imposition of personal liability for a corporation's failure to comply with Articles 28 and 29 of the Tax Law is unconstitutional; in the alternative, 3) personal liability for unpaid sales and use taxes may only be imposed upon such officers, directors or employees of a corporation who are under a duty to act for such corporation in complying with the requirements of the Tax Law; and 4) the audit methodology used by the Division was erroneous, arbitrary and capricious and lacked a rational basis.

With respect to the validity of the Division's audit methodology, petitioner makes essentially the same arguments made to the Administrative Law Judge.

In response to petitioners' argument that section 1133(a) applies only to those required to collect, rather than pay a tax, the Division states that case law does not support such a distinction. Although petitioner correctly states that the Tax Appeals Tribunal has the jurisdiction to determine the constitutionality of a taxing statute as applied, his argument challenges the constitutionality of section 1133(a) on its face, and should, therefore, not be considered. Petitioner's contention that RLA maintained adequate books and records is not supported by the facts. As to petitioners' argument that they were not under a duty to act for the corporation with respect to sales tax matters, the Division responds to Mr. Landau's position first, stating:

> "[to hold that] a sole shareholding drawing a $600,000 salary cannot be held personally liable for sales tax, but a clerk who fills out and mails the form

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[5] Mr. Unger submitted no legal arguments in support of his position, but merely adopted the statements and arguments of Mr. Landau to the extent they aid Mr. Unger in reducing the assessment issued to him (see, Mr. Unger's letters received May 27, 1993 and September 27, 1993). For purposes of clarity, all references to "petitioner" apply only to Mr. Landau. However, Mr. Landau's arguments will be considered with respect to Mr. Unger's liability and any resulting decrease in Mr. Unger's liability will be noted accordingly.

> can be [was] surely not the intention of §1131 and §1133" (Division's letter brief, p. 5).
>
> As to Mr. Unger, the Division responds:
>
> "[w]e also believe the ALJ's analysis of Mr. Unger's responsibility is correct. The ALJ notes in Conclusion P, that Mr. Unger's initial involvment [sic] was not sufficient to incur personal liability. However, for the period December 1, 1983 through August 31, 1984, Mr. Unger was chief financial officer. He had the responsibility of comptroller, and could issue checks. This is sufficient to find that he was under a duty to act for the corporation . . ." (Division's letter brief, p. 5).

In responding to the other issues raised by petitioner, the Division relies upon the determination of the Administrative Law Judge.

We will first address petitioner's assertion that there is no statutory basis for imposing personal liability upon an officer, director or employee of a corporation for the corporation's compensating use taxes. As summarized by the Administrative Law Judge in the determination below:

> "in Matter of Laschever (Tax Appeals Tribunal, March 23, 1989) the Tax Appeals Tribunal determined that a responsible officer of a corporation was liable for sales tax due on the corporation's purchases. In reaching this conclusion, the Tribunal noted that, pursuant to Tax Law § 1131(1), the terms 'persons required to collect tax' or 'persons required to collect any tax imposed by this article' are defined as including an officer of a corporation who is under a duty to act for the corporation in complying with any requirement of Article 28 of the Tax Law. When a corporation purchases tangible personal property or services, it is a customer within the meaning of Tax Law § 1131(2). Further, when a customer fails to pay the tax to the person required to collect the same, the customer is directed to file a return and pay the tax directly (Tax Law § 1133[b]). It follows from the foregoing provisions that a responsible officer of a corporation is liable for the sales tax due on the corporation's purchases" (Determination, conclusion of law "C," emphasis added).

Based on our holding in Matter of Laschever (supra), we find petitioner's assertion, that the word "collect" in section 1133(a) must be limited to its plain meaning, is without merit.

We now address petitioner's assertions that he was not a person under a duty to comply with the requirements of the Tax Law during the years at issue. 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:

> "any officer, director, or employee of a corporation or of a dissolved corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 28] . . ." (Tax Law § 1131[1]).

It has been held that corporate office does not, per se, impose sales tax liability upon an officeholder (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427). Rather, whether a person has a duty to collect sales tax must be determined based on an examination of the particular facts of each case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; 20 NYCRR 526.11[b][2]). "The 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" (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; see, Matter of Roncolato, supra). Generally, a person who is responsible for the corporation's management is under a duty to act (20 NYCRR 526.11[b][2]). Under the facts of this case, it is clear that petitioner, in his role as President of RLA, had the requisite authority and, therefore, a duty to act for RLA in complying with the requirements of Article 28 (Tax Law § 1131[1]). Petitioner does not disagree with this conclusion.[6] Rather, he asserts that merely finding the existence of a duty is insufficient to find personal liability under section 1133(a), stating:

> "the logical next inquiry must be made -- was the duty carried out? And if the duty was carried out in a reasonable manner, then liability cannot be imposed. Thus, in the instant case, there must be a finding of not only authority, but also a dereliction of duty, and that did not occur" (Petitioner's reply brief, p. 2)".

Tax Law § 1133(a) imposes personal liability upon those persons falling within the definition of a "person required to collect the tax" imposed by Article 28. Section 1131(1) simply states that when an officer, director or employee possesses a duty to act for the corporation in complying with this Article, he or she falls within this definition. After one is

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[6]Petitioner states that the "[t]he president of a company clearly has a duty to ensure the collection of the tax, but that does not transform him into an insurer, who must personally underwrite the errors of his employees, and pay the tax out of his own pocket" (Petitioner's reply brief, p. 3, emphasis in original).

found to have such a duty, the analysis is complete. Because section 1131(1) does not explicitly require that a breach of duty occur for liability to be imposed,

nor have the courts read such a requirement into this provision,[7] we similarly decline to do so here.

In support of his position, petitioner analogizes to Federal withholding tax cases, which he claims invariably "show a finding of dereliction of duty, or conscious effort to avoid the duty by the chief executive, leading to the imposition of the penalty" (Petitioner's reply brief, p. 3). We find the analogy to be inappropriate in this instance. The discussion of this subject in Federal cases arises from the statutory requirement that the person's failure be "willful" (see, 26 USC § 6672[a]; Hochstein v. United States, 900 F2d 543, 90-1 USTC ¶ 50,205, cert denied ___ US ___ [June 15, 1992]). However, there is no comparable requirement under Tax Law § 1131(a) which must exist for liability to be imposed.

Petitioner, citing Vogel v. New York State Dept. of Taxation & Fin. (98 Misc 2d 222, 413 NYS2d 862), asserts that the "responsibility for the running of a business may be divided among individuals and consequently, only those individuals responsible for collecting sales tax would be charged with the duty to collect sales tax and [be] subject to personal liability" (Petitioner's brief, p. 7). We find petitioner's reliance on Vogel to be unfounded. In that case, the issue was whether a corporate officer who was not involved in the operation and management of the corporation may be held personally liable for the unpaid sales taxes owed by the corporation. Because petitioner, as President of RLA, was involved in the operation and management of RLA, the holding in Vogel is not applicable here.

Petitioner next argues that the imposition of personal liability upon a director, officer or employee for a corporation's failure to pay sales tax is unconstitutional as applied because it

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[7]Petitioner cites Matter of Blodnick v. New York State Tax Commn. (124 AD2d 437, 507 NYS2d 536), where, in holding two petitioners liable as responsible officers, it was found that as sole officers and shareholders of the corporation, they demonstrated a "complete dereliction of their duties." Petitioner apparently cites this case as support for his argument that a "dereliction of duty" finding is a prerequisite for imposing liability. However, the Appellate Division appeared to mention this fact only to illustrate the principle that "'corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge' (Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 708, 451 NYS2d 301)" (Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d 536, 538).

denies taxpayers due process and constitutes an excessive fine in violation of the Eighth Amendment of the United States Constitution. Despite petitioner's characterization of these arguments as attacking the constitutionality of section 1133(a) as it is applied, we agree with the Administrative Law Judge that these arguments instead assert that this provision is unconstitutional on its face. Because the jurisdiction of the Tribunal, as stated in its enabling legislation, does not encompass such a challenge, we will not consider this argument (Matter of Fourth Day Enters., Tax Appeals Tribunal, October 27, 1988).

We now turn to petitioner's argument that the audit methodology used by the Division was erroneous, arbitrary and capricious and lacked a rational basis. Because the Administrative Law Judge correctly and adequately addressed petitioner's arguments in the determination below, and we have considered petitioner's criticisms of the Administrative Law Judge's conclusions and find them to be without merit, we affirm based on the determination of the Administrative Law Judge. However, we will comment on petitioner's testimony that RLA received monthly consulting fees of $300,000.00 each from Burger King and Miller which were not subject to sales tax.

Petitioner testified that these monthly payments were received until the end of 1983, when the payments became larger and less frequent (Tr., p. 308). Assuming that these receipts were not subject to sales tax, the fact that none of these payments were included in the six-day test period could significantly overstate the error rate calculated by the Division. However, petitioner's testimony classifying these receipts merely as payment for consulting services is insufficient to establish that they were not subject to sales tax, as petitioner provided no information regarding the specific nature of these services. Such detail is necessary in order to accurately determine whether services are subject to sales tax (see, Tax Law § 1105[c][1]; 20 NYCRR former 527.3[a], [b]). Therefore, it has not been shown that the Division erred in applying the error rate derived from the six-day test period to these receipts.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of petitioners Nathan Unger, officer of Robert Landau Associates, Inc., and Robert Landau, officer of Robert Landau Associates, Inc., are denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Nathan Unger, officer of Robert Landau Associates, Inc. and Robert Landau, officer of Robert Landau Associates, Inc. are granted to the extent indicated in conclusions of law "HH" and "II" of the Administrative Law Judge's determination, but such petitions are otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination and demand for payment of sales and use taxes due, dated December 20, 1984, in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York
March 24, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner