

STATE OF NEW YORK
DIVISION OF TAX APPEALS

| | | |
|---|---|-----------------|
| In the Matter of the Petitions | : | |
| of | : | |
| BAGEL NOOK, INC. | : | DETERMINATION |
| AND LEO VITTORIO, AS OFFICER | : | DTA NOS. 802190 |
| | : | AND 802391 |
| for Revision of Determinations or for Refund | : | |
| of Sales and Use Taxes under Articles 28 and 29 | : | |
| of the Tax Law for the Period June 1, 1980 | : | |
| through August 31, 1984. | : | |

Petitioners, Bagel Nook, Inc. and Leo Vittorio, as officer, 574 Third Avenue, New York, New York 10016, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through August 31, 1984.

A hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals Two World Trade Center, New York, New York, on March 28, 1989 at 1:15 P.M., was continued at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 13, 1991 at 1:15 P.M., and was concluded at the same location on January 28, 1992 at 1:15 P.M., with all briefs to be submitted by January 8, 1993. Petitioners appeared by Davidoff & Malito, Esqs. (Matthew Feigenbaum, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether, for the period at issue, the Division of Taxation properly determined additional sales and use taxes due from Bagel Nook, Inc.

II. Whether petitioner Leo Vittorio was, pursuant to the provisions of Tax Law §§ 1131(1) and 1133(a), a person required to collect sales and use taxes on behalf of Bagel Nook, Inc. and, as such, was properly held to be personally liable therefor.

FINDINGS OF FACT

Pursuant to a field audit of Bagel Nook, Inc. ("Bagel Nook") which commenced in February 1983, the Division of Taxation ("Division"), on March 20, 1985, issued two notices of determination and demands for payment of sales and use taxes due to Bagel Nook as follows:

| <u>Period</u> | <u>Tax</u> | <u>Penalty</u> | <u>Interest</u> | <u>Total Due</u> | |
|-------------------|------------|----------------|-----------------|------------------|--------------|
| 6/1/80 - 11/30/83 | | \$123,246.78 | \$30,073.80 | \$52,409.39 | \$205,729.97 |
| 12/1/83 - 8/31/84 | | 22,072.48 | 2,870.27 | 2,080.33 | 27,023.08 |

On the same date, the Division issued notices of determination, for the identical periods and in the identical amounts, to Leo Vittorio, as officer of Bagel Nook.

Previously, consents extending the period of limitation for assessment of sales and use taxes, all of which bore what purported to be the signature of Leo Vittorio, as vice-president, were executed as follows:

| <u>Date Executed</u> | <u>Period Extended</u> | <u>Date for Assessment</u> |
|----------------------|------------------------|----------------------------|
| 9/9/83 | 6/1/80 - 8/31/80 | 12/20/83 |
| 12/9/83 | 6/1/80 - 11/30/80 | 3/20/84 |
| 3/6/84 | 6/1/80 - 2/28/81 | 6/20/84 |
| 5/24/84 | 6/1/80 - 5/31/81 | 9/20/84 |
| 8/23/84 | 6/1/80 - 8/31/81 | 12/20/84 |
| 12/7/84 | 6/1/80 - 11/30/81 | 3/20/85 |

The auditor met with petitioners' representatives, Richard Stein and Matthew Feigenbaum, at which time he orally requested books and records to perform an audit of Bagel Nook. The auditor requested cash register tapes, guest checks, cash receipts and disbursements journals, bank statements and other records pertaining to sales and use tax liabilities for the audit period.

Records made available included sales tax returns and related worksheets, Federal income tax returns and related worksheets, cash receipts and disbursements journals, purchase invoices, general ledger and monthly bank statements. No register tapes, guest checks or other original source documents were provided. Based upon the lack of original source documents to verify the vendor's sales, the auditor determined that Bagel Nook's records were insufficient for the performance of a detailed audit.

The auditor compared sales per returns with sales per cash receipts and found them to be in agreement. An examination of the cash receipts journal indicated that deposits were substantially greater than reported sales, which discrepancy the vendor attributed to loans and exchanges. The auditor analyzed reported sales and found them to be "quite low for this type of establishment."¹

Bagel Nook had no fixed asset acquisitions during the audit period. However, for a major repair costing \$10,492.00, the vendor was unable to substantiate that tax thereon had been paid, so tax in the amount of \$865.59 was assessed.

Bagel Nook's purchase of paper products was analyzed for the sales tax quarter ended August 31, 1982 (purchases for each month through May 1983 were transcribed; records for the period June 1, 1983 through August 31, 1984 were not available) wherein it was determined that 36% of such paper products (napkins, stirrers, straws and plastic utensils) were subject to tax. The auditor applied this percentage to total paper supplies purchased

for the audit period, resulting in additional purchases subject to tax in the amount of \$78,623.00. Tax of \$6,427.23 was, therefore, assessed on these paper product purchases.

To analyze Bagel Nook's sales, the auditor decided to utilize an observation test. Initially, the auditor attempted to perform an observation test on May 9, 1984, but the assistant manager would not permit it. Through subsequent conversations with Mr. Feigenbaum, the auditor was advised that someone could be at the premises to assist the auditors on a Monday or Tuesday. An observation test was performed on August 2, 1984. The primary auditor (Lance Sonners) and another auditor (George Berkowitz) performed the audit from 7:00 A.M. until 5:00 P.M., at which time two other auditors conducted the audit until midnight. Total sales observed (7:00 A.M. until 12:00 midnight) were in the amount of \$2,331.98, with taxable sales of \$1,470.77, representing a taxable percentage of 63%.

¹It should be noted that the auditor testified that he had no prior experience in auditing bagel restaurants, although he stated that he had audited many restaurants.

A second observation test was performed on October 16, 1984, between the hours of 7:00 A.M. and 4:00 P.M. Total sales for this period were observed to be \$1,532.04, with taxable sales in the amount of \$1,262.54. In order to determine taxable sales for the time period 4:00 P.M. until 12:00 midnight, the auditor divided gross sales per observation on October 16, 1984 from 7:00 A.M. until 4:00 P.M. (\$1,532.04) by gross sales per observation on August 2, 1984 from 7:00 A.M. until 4:00 P.M. (\$1,792.48), with the result being 85.47%. Gross sales observed on August 2, 1984 from 4:00 P.M. until 12:00 midnight (\$539.50) were multiplied by this percentage to get projected gross sales of \$461.11. On August 2, 1984, from 4:00 P.M. until 12:00 midnight, taxable sales represented 77.16% of gross sales. Accordingly, projected gross sales of \$461.11 was multiplied by 77.16% to arrive at projected taxable sales of \$355.79 for October 16, 1984 from 4:00 P.M. until 12:00 midnight. Gross sales for October 16, 1984 were, therefore, projected to be \$1,993.15 (\$1,532.04 + \$461.11) and taxable sales were projected to be \$1,618.33 (\$1,262.54 + \$355.79), a taxable percentage of approximately 81%.

The auditor then averaged gross sales for the two observations ($\$2,331.98 + \$1,993.15 = \$4,325.13$ divided by 2 = \$2,162.57) and, likewise, averaged taxable sales ($\$1,470.77 + \$1,618.33 = \$3,089.10$ divided by 2 = \$1,544.55) and the percentage of taxable sales was found to be 71.42% ($\$1,544.55$ divided by $\$2,162.57$).

Bagel Nook reported gross sales, for the quarter ended August 31, 1984, in the amount of \$105,825.00. By dividing this figure by the number of days in the quarter (92), average reported gross sales per day were determined to be \$1,150.00. Reported gross sales per day (\$1,150.00) were then subtracted from the average gross sales per day per the observation tests (\$2,163.00) with the result (\$1,013.00) being the increase in gross sales per day. The percentage increase in gross sales was, therefore, found to be 88.09% ($\$1,013.00$ divided by $\$1,150.00$).

Gross sales reported for the audit period (\$2,208,109.00) were then multiplied by 88.09% and the result, when added to reported gross sales, was projected gross sales of \$4,153,233.00. To determine taxable sales, projected gross sales were multiplied by the aforementioned

average taxable percentage of 71.42% to arrive at taxable sales in the amount of \$2,966,239.00 for the audit period. Reported taxable sales of \$1,275,268.00 were subtracted therefrom, leaving additional taxable sales of \$1,690,971.00 which, when multiplied by the applicable tax rate (8 or 8¼%), resulted in additional tax due of \$138,026.44.

Tax due on sales (\$138,026.44) was added to tax due on paper product purchases (\$6,427.23) and tax due on non-recurring expenses (\$865.59) to arrive at total tax due for the audit period in the amount of \$145,319.26 which was the amount assessed in the notices of determination issued by the Division to each petitioner (see, Finding of Fact "1").

At the hearing, the auditor testified that there were two cash registers, one which was used mostly for nontaxable items and the other which was used totally for taxable items. This testimony was based upon his observations and also upon what he was told by the manager. The figures (for taxable and nontaxable) were obtained from examining cash register readings rather than from an item-by-item analysis of each sale made during the observation test. The cash register readings were made by Mr. Sonners, Mr. Berkowitz and by several other auditors who assisted during the two days of observation.

The auditor never inquired as to the hours of operation of Bagel Nook, but used the hours of 7:00 A.M. until 12:00 midnight because these were the hours during which an observation was made on August 2, 1984. The periodic breakdown was as follows:

| <u>Time</u> | <u>% Taxable (8/2/84)</u> | <u>% Taxable (10/16/84)</u> |
|---------------------------------------|-------------------------------|---------------------------------|
| 7:00 A.M. - 11:30 A.M. (breakfast) | 52 | 70 |
| 11:30 A.M. - 2:00 P.M. (lunch) | 65 | 92 |
| 2:00 P.M. - 4:00 P.M. (mid-afternoon) | 52 | 83 |
| 4:00 P.M. - 8:00 P.M. (dinner) | 73 | not observed |

The auditor testified that Leo Vittorio was assessed because he signed the sales tax returns, as vice-president, on behalf of Bagel Nook. The return for the quarter ended November 30, 1980 contained the signature of Leo Vittorio, President. In addition, he stated that he was informed by Barry Sholemson, Bagel Nook's accountant, that Leo Vittorio was the only officer of the corporation.

Petitioner Leo Vittorio testified that he and his wife came up with the idea of putting together a deli with a bagel store and, in 1972, he opened the first Bagel Nosh at 21st Street and 3rd Avenue in New York City. Soon after, other Bagel Nosh stores opened at 76th Street and 1st Avenue and at 38th Street and 3rd Avenue.

Leo Vittorio stated that a long-time friend, Tom Quinn, operated these stores and, in or about 1973, formed the corporation, Bagel Nosh, Inc. It was Mr. Vittorio's belief that Tom Quinn's wife was the sole shareholder of Bagel Nosh, Inc., while Tom Quinn, in essence, ran the company. Mr. Vittorio admitted, however, that he was issued shares and became an officer in Bagel Nosh, Inc.

Mr. Vittorio testified that, in or about 1973, he "wanted to get away from New York State and go to Florida," although he provided no explanation therefor. He stated that he went to Florida and "put up some Bagel Nosh units there." From 1973 until approximately 1979, he traveled around the country finding new locations for Bagel Nosh franchises and helping the new franchisees to get started. During that time, he resided in Miami, Florida.

In 1979, Leo Vittorio decided to return to New York and, at that time, he became president of Bagel Nosh, Inc. and a 50% owner therein. He became responsible for the operations area of Bagel Nosh, Inc., i.e., selling franchises (locating sites, supervising construction, approving franchisees) and, after the store opened, training employees and providing initial in-store supervision. During its peak, there were approximately 58 or 59 Bagel Nosh franchises throughout the United States and Leo Vittorio spent the majority of his time in the Bagel Nosh, Inc. offices and overseeing the operations of these franchisees.

Leo Vittorio testified that the Bagel Nook store, which opened in 1975, was a franchisee of Bagel Nosh, Inc. and that Bagel Nook was owned by Tom Quinn. Mr. Vittorio stated that Tom Quinn was its sole shareholder, but, at some point, Quinn made him an officer (vice-president) and gave him check-signing authority. At the hearing held on June 23, 1991, he stated that he received no salary from Bagel Nook until 1987; however, at the hearing held on January 28, 1992, he amended his answer by stating that he received a salary from Bagel Nook

from the beginning of 1984 until 1990, when Bagel Nook ceased operation.

Mr. Vittorio stated that while Tom Quinn owned Bagel Nook, he did not operate it. A manager was hired to oversee the store's day-to-day operation. In 1980, Tom Quinn began going to Europe for extended periods and, in 1982, he left the United States permanently to reside in France. When Mr. Quinn left, he did not want Bagel Nook's checks signed by anyone who could take money from the business. Therefore, he made Leo Vittorio an officer (vice-president) and gave him check-signing authority.

Mr. Vittorio testified that a signature stamp was prepared and that he authorized the store manager (Yehia was the manager during the audit period) to use the stamp on Bagel Nook checks. He stated that he did not review the checks for amounts, payees, etc., but permitted the stamp to be used so bills could be paid and the business could remain operative. His only involvement with the business, he contends, was in his capacity with Bagel Nosh, i.e., he investigated complaints and spoke to the manager about quality control and would, on occasion, recommend the discharge of certain employees although the final decision rested with the manager.

Leo Vittorio received approximately \$300.00 to \$400.00 per week as salary from Bagel Nook in 1984 and, by 1986 or 1987, his salary was increased to approximately \$800.00 per week. He stated that, in or about 1987, his involvement with Bagel Nook increased and that he began dealing with employees on a more frequent basis.

After Tom Quinn left the United States, he showed little or no interest in Bagel Nosh, Inc. because the business was declining steadily. As for Bagel Nook, Mr. Vittorio does not know what, if any, contacts Quinn maintained with the store manager.

At the hearing held on June 23, 1991, the Division's representative, during his cross examination of Leo Vittorio, showed Mr. Vittorio various documents containing what appeared to be his signature. The following is a list of such documents and Mr. Vittorio's response to questions from the Division's representative as to whether the signature was, in fact his:

Exhibit

Document

Vittorio's Signature

| | | |
|---|-------------------------------------|--|
| B | Corp. Power of Attorney | No; later changed to yes |
| C | Indiv. Power of Attorney | No; later changed to yes when attorney pointed to acknowledgement |
| D | Consents (6) | Nos. 2, 3, 5 & 6 - Yes Nos. 1 & 4 - Maybe |
| K | Sales Tax Returns (7) | No |
| L | Payroll Checks | Pg. 1 - No (was stamped) Pg. 3 - 3 checks - Yes for last check on page |
| N | Sales Tax Returns (6) | No |
| O | Sales Tax Registration | No |
| Q | Application for Extension (Federal) | Maybe |
| R | Signature at Hearing | Yes |

Following the June 23, 1991 hearing, the Division's representative sought permission from the Administrative Law Judge (such permission was granted) to have a forensic scientist from the New York State Police examine all of the exhibits which contained what appeared to be the signature of Leo Vittorio (both the documents which Mr. Vittorio admitted bore his signature and documents which he either denied or was unsure contained his signature).

The report of Dwight R. Howes, Forensic Scientist III, was admitted into evidence as Exhibit "S". Mr. Howes' qualifications and experience are set forth in the report. In his opinion, the Certificate of Registration (Exhibit "O") was not signed by Leo Vittorio, but that he did sign sales tax returns (Exhibit "K") for the period September 1, 1980 through August 31, 1981. Because of similar characteristics between the known signatures of Leo Vittorio and the signatures on the questioned consents (Exhibit "D"), checks (Exhibit "L"), sales tax returns for the period September 1, 1983 through August 31, 1984 (Exhibit "N") and the Application for Extension (Exhibit "Q"), Mr. Howes feels that, in all probability, Mr. Vittorio executed these documents. As for sales tax returns for the period September 1, 1981 through August 31, 1983, while Mr. Howes could not eliminate Leo Vittorio from having executed the documents, there were some discrepancies which he could not account for.

Barry Shoemson, C.P.A., who was the comptroller for Bagel Nosh, Inc. from 1974 through a portion of 1982, was responsible for the financial and accounting aspects of the franchising operations and the financial supervision of the franchise stores. In the course of his duties, he reviewed the operations of Bagel Nook, one of the franchisees. After he left his

employment with Bagel Nosh, Inc., he became the outside accountant for Bagel Nook.

Mr. Sholemson testified that Leo Vittorio was responsible for the operations area of Bagel Nosh, Inc. after returning to New York in 1979.

Mr. Sholemson stated that the sole shareholder of Bagel Nook was Tom Quinn. During the audit period, Bagel Nook's manager, Yehia, sent weekly sales reports to Bagel Nosh, made bank deposits, ordered supplies and made decisions with respect to the hours of operation and what was sold. He assumes that Yehia hired and fired employees, although he does not know that for certain. He also does not know how many shares of stock in Bagel Nook were issued or how many were held by Tom Quinn nor does he know who, on behalf of Bagel Nook, executed the franchise agreement. Mr. Sholemson would visit the store once per month to reconcile bank statements, prepare and write up receipts and disbursements and prepare the required tax returns.

He testified that Bagel Nook did not use guest checks and that register tapes for the audit period could not be located. Mr. Sholemson stated that he normally took averages in making projections (sales tax returns) and that the figure of 53 to 54% was used. He prepared the sales tax returns and he "believes" that the manager signed them. Franchise tax reports were signed by either Yehia or by Leo Vittorio.

SUMMARY OF THE PARTIES' POSITIONS

The position of petitioners (Bagel Nook and Leo Vittorio) may be summarized as follows:

- (a) With respect to the method of assessment and the results thereof:
 - (1) An estimate was not warranted since the auditor stated that it was solely the absence of register tapes which caused him to deem Bagel Nook's records inadequate;
 - (2) The auditor did not make a sufficient investigation of available records before resorting to an estimate;
 - (3) The auditor admitted that he had never audited a bagel restaurant before

and, as a result, he failed to take into consideration any of the following:

(A) the difference in sales on weekdays (when both observations were performed) and weekends (when nontaxable sales were much greater); and

(B) seasonal differences (less nontaxables in summer because people are on vacation; also much higher sales in summer and early fall due to better weather);

(4) Because the results of the two days observed varied greatly, the auditor should have observed more days rather than simply averaging the two days;

(5) The auditors were not present after 4:00 P.M. on October 16, 1984 and using percentages obtained from the August 2, 1984 observation for the time period thereafter (until midnight) did not produce a reasonable result.

(b) With respect to the assessment against Leo Vittorio, as officer of Bagel Nook:

(1) Leo Vittorio received no dividends or stock options, had no knowledge of corporate affairs and did not hire or fire employees;

(2) Leo Vittorio authorized the use of his signature stamp on checks and signed certain returns only to keep the business operating in the absence of Tom Quinn;

(3) The store manager, Yehia, was told by Barry Sholemsen the amounts owed for sales tax and, pursuant to his instructions, Yehia wrote out the checks and sent them to the Division to pay Bagel Nook's sales tax liabilities. In addition, Yehia collected the funds on behalf of Bagel Nook and deposited them into the bank accounts;

(4) Leo Vittorio's only activities with Bagel Nook consisted of occasional visits, in his capacity as an officer of Bagel Nosh, Inc., to assure that the franchisee was operating properly and to investigate complaints about Bagel Nook which were made to Bagel Nosh, Inc.

The position of the Division may be summarized as follows:

(a) No register tapes, guest checks or other source documents were provided to verify the vendor's method of reporting; therefore, resort to estimated audit method was justified;

(b) Leo Vittorio's testimony with respect to documents signed on behalf of Bagel Nook and with respect to his involvement with the business was inconsistent;

(c) Leo Vittorio signed tax returns and authorized his signature (by means of a signature stamp) to be placed on checks. While he testified that he did not review the checks and had no knowledge of the content of the returns, he had the authority which he delegated to the manager and/or the accountant. In addition, he had the title of vice-president (he also used the title of president on one return) and received a salary from Bagel Nook. Therefore, he was properly held to be a person responsible for the collection and remittance of sales and use taxes on behalf of Bagel Nook.

CONCLUSIONS OF LAW

A. Tax Law § 1135(a)(1) provides that:

"[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately."

Admittedly, Bagel Nook produced no cash register tapes or guest checks to verify the amount of sales reported on its sales tax returns. The Division is entitled to request source documents and, absent such source documents, the Division may resort to external indices to estimate tax (see, Matter of Club Marakesh v. Tax Commn. of State of New York, 151 AD2d 908, 542 NYS2d 881, 883, lv denied 74 NY2d 616, 550 NYS2d 276; Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552; Matter of Pizza Works, Tax Appeals Tribunal, March 21, 1991).

Where the records of the taxpayer are insufficient or inadequate to permit an exact computation of the sales and use tax due, the Division is authorized to estimate the tax liability on the basis of external indices (Tax Law § 1138[a][1]; see, Matter of Ristorante Puglia, Ltd. v.

Chu, 102 AD2d 348, 478 NYS2d 91; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451). However, the methodology selected must be reasonably calculated to reflect the taxes due (Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869; Matter of Ristorante Puglia, Ltd. v. Chu, supra) but since the taxpayer's failure to maintain records prevents exactness, exactness in the outcome of the audit method is not required (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, lv denied 44 NY2d 645, 406 NYS2d 1025; Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, affd 44 NY2d 684, 405 NYS2d 454; Matter of Lefkowitz, Tax Appeals Tribunal, May 3, 1990). While it is true that "[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist" in each case (Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219), certain limitations have been placed on this principle. It is necessary that the record contain sufficient evidence to allow the trier of fact to determine whether the audit has a rational basis (Matter of Grecian Sq. v. New York State Tax Commn., supra) and, further, that the record contain specific information identifying the external index employed by the Division in estimating the taxpayer's liability (Matter of Fashana, Tax Appeals Tribunal, September 21, 1989). The burden then rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Surface Line Operators Fraternal Org. v. Tully, supra).

B. The courts have consistently upheld the use of the observation test as a valid audit method, even where the observation period is relatively short (see, Matter of Vebol Edibles v. Tax Appeals Tribunal, 162 AD2d 765, 557 NYS2d 678, lv denied 77 NY2d 803, 567 NYS2d 643 [two-day observation test]; Matter of Club Marakesh v. Tax Commn. of State of New York, supra [one-day observation test]; Matter of Meskouris Bros. v. Chu, supra [two-day observation test]).

Petitioners contend that the results of the Division's two-day observation test contain

several flaws (see, Paragraph 11[a]) and they maintain that, because a disparity existed between the sales (gross and taxable) recorded on the two days observed, the Division should have performed further observations. However, the fact that a longer test period might have given a better picture of Bagel Nook's business and thus its tax liability does not satisfy petitioners' burden of proof (see, Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, affd 44 NY2d 684, 405 NYS2d 454).

Petitioners may well be correct in pointing out that an observation test performed on a weekend or during the winter months might have produced a different result. However, no documentation as to weekday versus weekend sales or summer (or early fall) sales versus winter sales was produced to refute the Division's observation tests. The Division is not required to select the most accurate audit method, but merely a rationally based one, which it has done (see, Matter of Grecian Sq. v. New York State Tax Commn., supra). It must be found, therefore, that the two-day observation test performed (and the averaging of the results obtained on each of the days of observation) was a reasonably employed audit method and, absent clear and convincing evidence to the contrary, the results obtained therefrom must be sustained.

C. Tax Law § 1133(a) provides that:

"every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article."

Tax Law § 1131(former [1]), in effect for the years at issue, provided as follows:

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

In Matter of Ianniello (Tax Appeals Tribunal, November 25, 1992), the Tribunal stated:

"In determining whether an individual is personally liable under section 1131(1), consideration must be given to all the facts in each case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; see also, 20 NYCRR 526.11[b][2]). The pivotal question is whether the individual had or could have had sufficient

authority and control over the affairs of the corporation. A variety of factors are considered in resolving this question such as the individual's status as an officer; the individual's knowledge of and control over the financial affairs of the corporation; the authority to write checks on behalf of the corporation; the authority to hire and fire employees; the preparation, filing and signing of tax returns for the corporation; and the individual's economic interest in the corporation (Matter of Cohen v. State Tax Commn., *supra*, 513 NYS2d 564, 565; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536; Matter of Constantino, *supra*). The factual determination demands a consideration of all the surrounding circumstances and involves more than the matching of the traditional indicia of responsibility to an officer's surface acts."

The testimony of Leo Vittorio, as to his involvement in the affairs of Bagel Nook, must, at best, be categorized as vague and somewhat evasive. He initially denied signing most of the documents set forth in Finding of Fact "9" then, when the Division's representative indicated that he intended to have a handwriting expert analyze the signatures, Mr. Vittorio stated that it was possible that he could have signed any or all of the documents.

Mr. Vittorio stated that he authorized the preparation of a signature stamp to be used by Bagel Nook's manager on company checks to pay bills, salaries, taxes, etc., but that he did not review the checks as to payee or amount. Both Mr. Vittorio and Bagel Nook's accountant, Barry Shoemson, attempted to place all of the responsibility for the day-to-day operation of the business on the manager (Yehia), yet the manager was neither an officer nor shareholder nor did he possess check-signing authority. By authorizing the use of the signature stamp, it appears that Leo Vittorio attempted to delegate and/or discharge his duties. However, as the courts have pointed out on numerous occasions, a corporate official responsible as a fiduciary for tax revenues cannot absolve himself merely by disregarding his duty and leaving it to someone else to discharge (see, Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538; Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 451 NYS2d 301).

Leo Vittorio was an officer of Bagel Nook, having been designated as such by the owner, Tom Quinn. He possessed check-signing authority and did sign corporate checks (despite his testimony that the signature stamp was used, it is clear that checks [Exhibit "L"] in payment of Bagel Nook's sales tax liability were individually signed). He signed sales tax returns on behalf

of Bagel Nook. He received a salary from Bagel Nook. In his position with Bagel Nosh, Inc., he made recommendations concerning operations and employees. In conclusion, Leo Vittorio's testimony that he was not involved in the financial operation of Bagel Nook must be rejected for lack of credibility and it must, therefore, be found that he was personally liable (pursuant to Tax Law §§ 1131[1] and 1133[a]) for the collection and payment of sales and use taxes on behalf of Bagel Nook.

D. The petitions of Bagel Nook, Inc. and Leo Vittorio, as officer, are denied and the notices of determination and demands for payment of sales and use taxes due issued to petitioners by the Division on March 20, 1985 are sustained.

DATED: Troy, New York
July 1, 1993

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE