

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JEFFREY W. DONAHUE, :
OFFICER OF BED CITY - :
MANHATTAN, 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, 1987 :
through February 29, 1988. :

In the Matter of the Petition :
of :
JEFFREY W. DONAHUE, :
OFFICER OF BOULEVARD BED CITY :
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 September 1, 1987 :
through May 31, 1988. :

808743

DETERMINATION
DTA NOS. 808741,
808742 AND

In the Matter of the Petition :
of :
JEFFREY W. DONAHUE, :
OFFICER OF WESTCHESTER :
BED CITY, 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, 1987 :
through February 29, 1988. :

In the Matter of the Petition :
of :
JEFFREY DONAHUE, :
OFFICER OF SLEEP CENTERS CORP. :
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, 1988 :
through February 28, 1989. :

In the Matter of the Petition :
of :
JEFFREY W. DONAHUE, OFFICER OF :
FASHIONS IN BEDDING OF QUEENS, 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 Periods September 1, 1987 :
through May 31, 1988 and December 1, 1988 :
through February 28, 1989. :

Petitioner Jeffrey W. Donahue, officer of Bed City - Manhattan, Inc., 4164 Saltwater Boulevard, Tampa, Florida 33615, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1987 through February 29, 1988.

Petitioner Jeffrey W. Donahue, officer of Boulevard Bed City, 4164 Saltwater Boulevard, Tampa, Florida 33615, 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 September 1, 1987 through May 31, 1988.

Petitioner Jeffrey W. Donahue, officer of Westchester Bed City, Inc., 4164 Saltwater Boulevard, Tampa, Florida 33615, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1987 through February 29, 1988.

Petitioner Jeffrey W. Donahue, officer of Sleep Centers Corp., 4164 Saltwater Boulevard, Tampa, Florida 33615, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1988 through February 28, 1989.

Petitioner Jeffrey W. Donahue, officer of Fashions in Bedding of Queens, Inc., 4164 Saltwater Boulevard, Tampa, Florida 33615, 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 periods September 1, 1987 through May 31, 1988 and December 1, 1988 through February 28, 1989.

A consolidated hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 12, 1993 at 9:45 A.M. The Division of Taxation filed its brief on August 27, 1993. In a letter dated September 23, 1993, petitioner was given until October 13, 1993 to serve and file his brief which started the six-month period for issuing this determination. Petitioner filed his brief on October 13, 1993. Petitioner appeared by Joseph A. F. Valenti, Esq. The Division of Taxation appeared by William F. Collins, Esq. (John E. Matthews, Esq., of counsel).

ISSUES

I. Whether the execution of consents to the fixing of tax due pursuant to Tax Law § 1138(c) bars petitioner from challenging certain notices of determination and demands for payment of sales and use taxes due.

II. Whether petitioner was a person required to collect and pay over sales and use taxes on behalf of Bed City - Manhattan, Inc., Boulevard Bed City, Westchester Bed City, Inc., Sleep Centers Corp., and Fashions in Bedding of Queens, Inc.

III. Whether petitioner has established that the Division of Taxation improperly applied payments submitted by petitioner in contravention of an alleged agreement between petitioner and the Division of Taxation.

FINDINGS OF FACT

Bed City - Manhattan, Inc., Boulevard Bed City, Westchester Bed City, Inc., Sleep Centers Corp., and Fashions in Bedding of Queens, Inc. were retail establishments which sold mattresses and bedding supplies.

In or about August or early September 1986, Bed City Shops, Inc. ("Bed City Shops") was formed with the intention of dissolving a number of corporations, including the foregoing corporations, and merging them into Bed City Shops as one operating entity. Petitioner, Jeffrey W. Donahue, was hired by Jeremiah Crowley in September 1986 to be the chief financial officer of Bed City Shops. Petitioner also held the title of secretary- treasurer. In this position, petitioner was responsible for maintaining the books. He also arranged financing, hired staff and negotiated with creditors.

At the time petitioner became associated with Bed City Shops, Mr. Crowley was the majority shareholder and held 51 or 52 percent of the outstanding stock. Mr. Crowley also served as president. The other investors, consisting of petitioner, his brother, Denny, and Mr. Albanese, split the remaining 48 or 49 percent. Initially, petitioner invested \$100,000.00 in Bed City Shops. At some juncture, petitioner loaned the corporation an additional \$20,000.00.

Petitioner and Mr. Crowley had three goals with respect to the future of Bed City Shops. The immediate goal was to consolidate the operations of at least 10 small operating companies into one corporation. The second goal was to make the business profitable. Lastly, petitioner and Mr. Crowley sought to gain a dominant position in the tri-state bedding market.

Petitioner's only responsibility for the stores other than Bed City Shops was to see that they continued to function properly.

The revenues from the various corporations flowed into one of four bank accounts of Bed City Shops. Petitioner's office, in turn, paid rent, electricity, telephone and wages of the employees of the various corporations on a continuing basis. Petitioner could pay any bill for any corporation on any of the accounts.

Generally, petitioner conferred with Mr. Crowley before paying bills. However, petitioner paid bills such as those for telephone without approval from Mr. Crowley. He also would have paid a tax bill without approval if it were only for a few hundred dollars.

Mr. Crowley did not sign any checks and he did not put his name on any official documents.

Petitioner provided the information which was used by an accounting firm to prepare the tax returns of Bed City Shops. An accounting firm also prepared the tax returns of the other corporations. Petitioner signed the latter returns.

Petitioner was not an officer or employee of any corporation other than Bed City Shops. He did not receive any compensation from corporations other than Bed City Shops. The other corporations had a chief financial officer, although petitioner does not know who that was.

Petitioner performed functions for corporations other than Bed City Shops because he was directed to do so by Mr. Crowley. Further, petitioner had invested his life savings in Bed City Shops and he was concerned about the various corporations insofar as their ability to pay bills.

Petitioner was never able to get the other corporations dissolved and brought into one operating entity because liabilities kept appearing and petitioner could not determine what was occurring.

One day a Tax Compliance Agent, Mr. Sam Mazen, appeared at petitioner's office and informed petitioner that a significant amount of taxes were due. It is petitioner's understanding that the liability arose because the prior owner of the various corporations did not file or pay New York State sales tax during the first three quarters of 1986. This was the first time petitioner learned of the prior liabilities of the various corporations. At this point, petitioner began paying the taxes due. According to petitioner, after several months he stated to Mr. Mazen that the liabilities were not the responsibility of Bed City Shops and that the payments were damaging the business. Petitioner testified that thereafter he and Mr. Mazen agreed that future payments would be applied to the liability of Bed City Shops. It was purportedly understood that any payments from the first quarter of 1987 forward would be

applied to a current liability or a liability that may have accrued during the final quarter of 1986. Petitioner's agreement with Mr. Mazen was never reduced to writing.

There were occasions when Mr. Mazen would call petitioner on the telephone to arrange a meeting. During these conversations, Mr. Mazen would tell petitioner what was expected. Thereafter, petitioner and Mr. Crowley would confer before the meeting with Mr. Mazen. There were also occasions when petitioner spoke to Mr. Crowley while Mr. Mazen waited in another location. During these meetings, Mr. Crowley would tell petitioner which bills to pay and which liabilities to postpone. However, there were instances where he did not do what he was told because he felt that it would jeopardize Bed City Shops' position.

At the hearing, petitioner reviewed a record prepared by Mr. Mazen which recorded the receipt of funds and showed how the balances were applied. When petitioner first saw how the payments were applied, he was stunned because it was his understanding that after the end of 1986, the Division of Taxation ("Division") would apply all future payments to liabilities that were incurred after September 5, 1986. Each of the liabilities to which petitioner objects were incurred prior to petitioner becoming an officer of Bed City Shops. Petitioner specifically objects to the Division's application of the following payments.

WESTCHESTER BED CITY, INC. - ID# 13-2982941C

S8612190101 Field Audit 6/1/83-5/31/86

<u>PAYMENTS</u>	2/28/89	\$20,000.00
	4/6/89	2,500.00
	4/11/89	2,500.00
	4/21/89	2,500.00
	4/28/89	2,500.00
	5/3/89	2,500.00
	5/10/89	2,500.00
	5/23/89	2,500.00
	5/16/89	2,500.00
	6/6/89	2,500.00

D8612074411 6/1/86-8/31/86

<u>PAYMENTS</u>	11/12/87	\$15,000.00
	11/23/87	4,840.87

FASHIONS IN BEDDING OF QUEENS, INC. - ID# 11-2214473

D8603310224 9/1/85-11/30/85

<u>PAYMENTS</u>	12/12/86	\$ 4,707.61
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D8605192849 12/1/85-2/28/86

<u>PAYMENTS</u>	2/4/87		\$ 2,768.37
	2/6/87	2,768.37	
	2/9/87	2,768.37	
	2/13/87	2,768.37	
	2/11/87	2,768.37	
	2/16/87	2,768.37	
	5/7/87		68.67

S8609117243 3/1/86-5/31/86

<u>PAYMENTS</u>	2/20/87		\$ 4,967.37
	2/25/87	4,967.37	
	2/27/87	4,967.37	
	3/3/87	4,967.37	
	3/5/87	4,967.37	
	3/6/87	4,967.37	
	5/4/87		295.15

S8704060977 6/1/86-8/31/86

<u>PAYMENTS</u>	11/12/87		\$15,000.00
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BED CITY MANATTAN INC. - ID# 13-2877640

D8604015563 9/1/85-11/30/85

<u>PAYMENTS</u>	11/7/86		\$ 5,450.60
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D8609117431 3/1/86-5/31/86

<u>PAYMENTS</u>	11/12/87		\$14,883.31
	12/11/87		9,274.13
	1/28/88		80.82

BOULEVARD BED CITY - ID# 13-3117918

D8604017987 9/1/85-11/30/85

<u>PAYMENTS</u>	11/17/86		\$ 2,736.68
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D8605215222 12/1/85-2/28/86

<u>PAYMENTS</u>	12/17/86		\$ 3,000.00
	1/14/87		2,392.71
	1/14/87	2,392.71	
	1/14/87	2,392.71	
	1/22/87	2,392.71	
	1/26/87	2,392.71	
	1/28/87	2,392.71	
	2/20/87		53.83

D8609122251 3/1/86-5/31/86

<u>PAYMENTS</u>	11/12/87	\$15,000.00
	12/8/87	7,251.67
	1/28/88	31.96

SLEEP CENTERS CORP. - ID# 13-2797610

D8605211727 12/1/85-2/28/86

<u>PAYMENTS</u>	11/17/86	\$ 2,564.57
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The Division offered as an exhibit a document consisting of 11 pages of photocopied checks signed by petitioner. All of the checks were made payable to the order of either the New York State Tax Commission or New York State Sales Tax.

Virtually all of the checks designated a particular assessment and a specific taxable period. At the hearing, petitioner was unable to identify the handwriting in the memo area on certain checks. Petitioner explained that when he signed a check, the memo section was not filled out. However, sometimes petitioner would fill in the memo section and other times the memo section would be completed by the bookkeeper. Generally, the memo section was completed in the office of Bed City Shops before Mr. Mazen's departure.

Of the 11 pages of photocopied checks offered by the Division, petitioner identified 11 checks on which he drafted a memorandum on the face of the check. Pertinent information shown on the face of the checks is as follows:

(a) Petitioner signed a check dated November 14, 1986 on the account of "Sleep Centers Corp./Bed City". The check was made payable to the order of the New York State Tax Commission in the amount of \$2,799.92. The check lists two assessments, one for the quarter ended August 1985 in the amount of \$63.24 and one for the quarter ended November 1985 in the amount of \$2,736.68.

(b) Petitioner signed a check dated January 9, 1987 in the amount of \$2,614.96 payable to the order of the "N.Y.S. Tax Commission". The check was drawn on the account of Sleep Centers, Inc. and designated the quarter ended February 28, 1986.

(c) Petitioner drew a check dated November 11, 1987 in the amount of \$961.35

payable to the order of "N.Y. State Sales Tax". The check was drawn on the account of Sleep Centers Corp. Special Tax Account and listed the quarter ended November 30, 1985 and a particular assessment.

(d) Petitioner drew a check dated January 6, 1987 payable to the order of "N.Y.S. Tax Commission" in the amount of \$2,614.96. The check was drawn on the account of (Bed City) Sleep Centers, Inc. and listed an assessment number and the quarter ended "2/28".

(e) Petitioner drew a check dated January 7, 1987 on the account of (Bed City) Sleep Centers, Inc. payable to the order of the "N.Y.S. Tax Commission". The check was in the amount of \$2,614.96 and listed an assessment number and the quarter ended "2/28".

(f) Petitioner drew a check dated September 18, 1987 payable to the order of "N.Y. State Sales Tax" in the amount of \$6,463.61. The check was drawn on the account of Sleep Center Corp. (Bed City) Credit Card Account. The check listed an assessment number and the quarter ended "8/86".

(g) Petitioner drew a check dated February 17, 1988 payable to the order of "N.Y. State Sales Tax" in the amount of \$5,000.00. The check was drawn on the account of (Bed City) Sleep Centers, Inc. and listed an assessment number and the quarter ended "8/86".

(h) Petitioner drew a check dated February 24, 1988 payable to the order of "N.Y. State Sales Tax" in the amount of \$6,502.44. The check was drawn on (Bed City) Sleep Centers, Inc. and listed an assessment number and the quarter ended "8/86".

(i) Petitioner drew a check dated February 29, 1988 payable to the order of "N.Y. State Sales Tax" in the amount of \$5,000.00. The check was drawn on (Bed City) Sleep Centers, Inc. It listed an assessment number and the quarter ended "8/86".

(j) Petitioner drew a check dated November 14, 1986 payable to the order of "N.Y.S. Tax Commission". The check was drawn on Sleep Centers Corp./Bed City Main Account in the amount of \$6,658.89. The check designated two assessment numbers and the quarters ending November 1985 and February 28, 1986.

(k) Petitioner drew a check on the account of (Bed City) Sleep Centers, Inc. in the amount of \$5,450.60 payable to the order of "N.Y. State Tax Commission". A portion of the date of the check is obscured. However, it is clear that the check was drawn in 1986. The check listed an assessment number and the quarter ended November 1985.

At the hearing, petitioner acknowledged that there were occasions when, at the request of Mr. Mazen, he would draft a check for payment of "small amounts" of taxes due in prior years.

In addition to the checks wherein petitioner acknowledged completing the explanation section on the check, the record includes numerous other checks which delineate the assessment and period to which the payment is directed. For example, one such check was drawn on the account of (Bed City) Sleep Centers, Inc. in the amount of \$6,443.86 and made payable to the order of "New York State Sales Tax". The check was dated January 8, 1988, lists an assessment number and designates the quarter ended August 1986. There is a second check dated January 15, 1988 payable to "NYS Sales Tax" in the amount of \$6,443.86. This check designates the same assessment number as the check dated January 8, 1986 and also lists the quarter ending August 1986.

Petitioner did not examine the checks when they were returned from the bank because he did not have any reason to think that they would not be applied in accordance with the purported agreement with Mr. Mazen.

In a letter dated December 2, 1987, petitioner proposed a modification of Bed City Shops' relationship with the Division. The letter provided, in part, as follows:

"Dear Mr. Mazen,

"A year has passed since the full extent of Bed City's tax liability became clear. Since then, over 400,000.00 has been paid to reduce that liability and the company has been filing and paying on a timely basis it's [sic] ongoing obligation to the State. We are justly proud of this achievement... But it came at great cost to the company, and I am not talking about dollars only.

"The large payments to the State and other taxing authorities combined with C.O.D. payments to many of our vendors has put a terrible strain on cash flow, so much so that it has become increasingly difficult to operate the business properly. It is doubly frustrating given the fact that all the balance due was incurred prior to

our takeover in September of 1986.

"I do not think that, at this point, anyone can seriously question our integrity and our willingness to pay off the remaining balance. That payoff will be structured around our long term plan for financing the company, which has two stages. The first, obtaining a sizable Bank Loan, has already been accomplished. The second, attracting long term equity interest in the company, is in it's [sic] initial stage. It is critical that these potential equity 'players' see a stable situation from a fiscal standpoint in general and a tax standpoint in particular. This means, in my view, an agreement with the State providing \$5000.00 per month on the old balance and maintaining a current position with our ongoing liability. This does two things. It shows potential investors that we have a working relationship with the State and it provides a workable arrangement, from a cash flow view, that the company can handle without again putting a severe strain on our finances. When the company obtains its equity partner, the remaining balance would be paid. I would put a six months to a year timetable on that investment."

In or about late December 1986, petitioner spoke to Mr. Crowley regarding petitioner's concerns pertaining to his liability and the structure of the associated corporations. Petitioner was worried because he was signing checks for corporations and he did not know who was involved. Mr. Crowley responded that his attorney and accountant were working on straightening the matter out and merging the corporations into one.

Petitioner continued to raise the foregoing matter with Mr. Crowley for the next 18 months. Eventually, petitioner concluded that he had no choice but to resign from the company. In September 1988, petitioner terminated his employment.

After petitioner left his employment, he was contacted by Mr. Crowley who said that New York State was demanding a significant amount of money. In response, petitioner sent Mr. Crowley \$80,000.00 which were proceeds from the sale of petitioner's home. It was petitioner's understanding that the money would be used to pay taxes. However, petitioner never received an accounting of these funds and, to the best of petitioner's knowledge, the money was not used for taxes.

In or about June 1989, Bed City filed a petition under Chapter 11 of the Bankruptcy Act. At this time, petitioner was working for a mid-size paging company in Florida.

The Division issued a series of notices of determination and demands for payment of sales and use taxes due which assessed sales and use taxes against petitioner as follows:

- (a) The Division issued a Notice of Determination and Demand for Payment of Sales

and Use Taxes Due, dated October 13, 1989, which assessed sales and use taxes for the quarter ended February 28, 1988 in the amount of \$10,025.32, plus penalty of \$2,087.08 and interest of \$2,073.82, for a total amount due of \$14,906.22. The notice stated that petitioner was liable individually and as an officer of Bed City - Manhattan, Inc.

(b) The Division issued a series of notices of determination and demands for payment of sales and use taxes due which assessed sales and use taxes as follows:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
11/30/87	\$ 0.00	\$1,866.62	\$ 121.71	\$ 1,988.33
2/28/88	16,925.56	4,739.13	3,501.18	25,165.87
5/31/88	11,837.82	3,709.39	2,344.98	17,892.19

Each of the foregoing notices explained that petitioner was liable individually and as an officer of Boulevard Bed City.

(c) The Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated October 13, 1989, to petitioner which assessed sales and use taxes for the quarter ended February 28, 1988 in the amount of \$15,671.72, plus penalty of \$4,405.20 and interest of \$3,249.64, for a total amount due of \$23,326.56. The notice explained that petitioner was liable individually and as an officer of Westchester Bed City, Inc.

(d) The Division issued notices of determination and demands for payment of sales and use taxes due, dated October 13, 1989, to petitioner which assessed sales and use taxes as follows:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
2/28/88	\$ 0.00	\$1,012.84	\$ 0.00	\$ 1,012.84
2/28/89	8,452.16	1,520.64	771.56	10,744.36

The notices explained that petitioner was liable individually and as an officer of Sleep Centers Corp.

(e) The Division issued notices of determination and demands for payment of sales and use taxes due, dated October 13, 1989, to petitioner which assessed sales and use taxes as follows:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
11/30/87	\$19,857.03	\$6,160.10	\$5,072.29	\$31,089.42
2/28/88	23,481.55	6,805.93	5,126.45	35,413.93
5/31/88	0.00	1,163.05	0.00	1,163.05
2/28/89	14,323.73	2,555.63	1,285.10	18,164.46

The notices explained that petitioner was liable individually and as an officer of Fashions in Bedding of Queens, Inc.

In April 1990, petitioner went to New York to meet with Mr. Crowley to ask about Bed City Shops' operation and obtain an accounting. In the conversation which followed, petitioner was denied access to either the company's general manager or accountant. After petitioner returned to Florida, he wrote Mr. Crowley a letter outlining his concerns and asking for an accounting, and again for access to the company's general manager or accountant. Petitioner did not receive a response to this letter.

In December 1990, Bed City Shops' warehouse, which contained the assets of the company, was robbed and all the assets of the company were lost. The company's insurance lapsed just prior to the theft. Several days later, Bed City Shops filed a petition under Chapter 7 of the Bankruptcy Law.

At the time of the foregoing events, there was an outstanding bank debt of \$600,000.00.

In 1990, Mr. Crowley and Mr. Albanese filed petitions for personal bankruptcy. Petitioner's brother, Dennis Donahue, also filed for personal bankruptcy. Initially, a bank moved to oppose the bankruptcy petition of Dennis Donahue. However, the opposition was later withdrawn.

It is petitioner's opinion that the assets of Bed City Shops would have been sufficient to pay a significant portion of the outstanding liability. According to petitioner, Bed City Shops was required to maintain a balance of inventory of \$500,000.00. Petitioner never received an explanation of why some of the liabilities, such as the ones involved herein, were not paid.

Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services on the notices in issue. The conciliation conference on the notices which assessed petitioner as a responsible officer of Sleep Centers Corp. and Fashions in Bedding of

Queens, Inc. was held on May 11, 1990 in Westchester, New York.

According to the Report of Tax Conference, petitioner stated that he was a responsible officer of each of the foregoing corporations until October 7, 1988 when he obtained a new job in Tampa, Florida. It was petitioner's position that he should not be held responsible on the notices which assess tax for the quarter ended February 28, 1989. The conciliation conferee accepted petitioner's position and found him to be a responsible officer except for two notices because of petitioner's resignation from Bed City Shops and the related corporations.

Petitioner received five separate consent forms in the mail. Each of the consent forms was accompanied by a separate letter in a distinct envelope. Three of the consent forms sustained the notices which assessed petitioner as a responsible officer of, respectively, Bed City - Manhattan, Inc., Boulevard Bed City and Westchester Bed City, Inc.

The consent form which concerned the notices which assessed petitioner as an officer of Sleep Centers Corp. set forth the taxpayer identification number, the notice, assessment or file number, and the date of the notice. The following sentence then appeared:

"The final disposition of the Deficiency or Determination at issue as described above is acceptable to me based on the following computation. . . ."

The consent form then set forth two columns which were headed by an assessment number. Below one assessment number, an amount is shown due for penalty. The same amount is listed across from the word "TOTAL". Below the second assessment number, the word "cancelled" appears across from the words "Tax", "Penalty" and "Interest".

After the computation, the form stated:

"I hereby agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the above notice."

The consent was signed by petitioner and is dated June 19, 1990.

The consent which concerned the notices which assessed tax against petitioner as an officer of Fashions in Bedding of Queens, Inc. was drafted using the same format as the prior consent form. The only significant difference is that the latter consent form listed amounts due under three notice numbers and stated the word "Cancelled" under one assessment number in

spaces designated for tax, penalty and interest. This consent was also signed by petitioner and dated June 19, 1990.

Petitioner received each of the consents in the mail. Upon receiving the forms, he spoke to someone in Albany for instructions on what to do with the forms. Petitioner was told that if he did not want to be assessed on the three consents which sustained the assessments, he should not sign the consents.

Petitioner was also told that if he wanted certain assessments cancelled, he should sign the other two consents. Petitioner thought he had to sign the two consents in order to get the benefit of the cancellations. According to petitioner, he did not realize that by signing the consents he was also agreeing to certain assessments. Petitioner maintains that it was never his intent to agree that he owes tax.

Petitioner read each of the consents before two of them were signed. He was not represented by a lawyer or accountant at this stage of the proceeding.

SUMMARY OF PETITIONER'S POSITION

In his brief, petitioner argues that he was not a responsible officer of the five corporations which were the subject of the notices. It is petitioner's position that he was duped into performing functions for five corporations without reference to his role as chief financial officer of Bed City Shops. Petitioner maintains that Mr. Crowley manipulated him into contributing money and then treated him as a lackey. Petitioner submits that Mr. Crowley perpetrated a fraud on him and that petitioner abandoned his position as soon as he was able to find other employment. Petitioner notes that he sent Mr. Crowley the proceeds from the sale of his home for the purpose of paying taxes. However, petitioner never discovered what was done with the money. Petitioner also points out that the assets in the Bed City Shops warehouse were "cleaned out" and all of the assets of the corporation disappeared.

Petitioner maintains that, with respect to the corporations other than Bed City Shops, he never had any real authority, never received any compensation, and he was never an officer or employee. In fact, those corporations had their own financial officers. According to petitioner,

he was trapped in a situation where he was required to perform functions as a cover for Mr. Crowley, who was the only responsible person.

Petitioner next argues that the consents signed by him should not be binding. It is argued that petitioner was not represented by counsel or given any advice with respect to the Tax Law. Petitioner maintains that it was his intent not to agree to the taxes, but to agree to the cancellations. This argument concludes that petitioner did not understand the true meaning of his actions and did not make a knowing and informed waiver of his right to contest the four notices which were sustained.

Lastly, petitioner argues that the Division improperly allocated payments made after the agreement between petitioner and Mr. Mazen. Petitioner notes that Mr. Mazen refused to appear at the hearing despite being subpoenaed and despite a representation that he would appear.

According to petitioner, the notations on the checks, which were in handwriting that petitioner did not recognize, were made by Mr. Mazen when he decided how the checks were to be allocated. Petitioner submits that Mr. Mazen departed from the agreement on numerous occasions without the concurrence of petitioner, in violation of the agreement.

Petitioner concludes that because Mr. Mazen refused to appear and produce all of the records relating to these transactions, it would be appropriate for the Tribunal to order Mr. Mazen to produce all of the documents in the possession of the Division relating to these transactions and that the Tribunal order that a review be made. In the alternative, the Tribunal should exclude documentary evidence offered by the Division and all testimony relating to or derived from the documents.

In response, the Division submits that the consents signed by petitioner prevent him from challenging the underlying notices of determination. The Division also argues that petitioner was a "de facto" responsible officer and that the Division did not improperly allocate payments to the prior assessments of the corporation.

CONCLUSIONS OF LAW

A. The impact of the consents signed by petitioner presents a threshold question.¹ If the signed consents are binding, petitioner may not challenge the notices of determination to which the consents pertain. Tax Law § 1138(c) provides as follows:

"A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

B. In this case, petitioner acknowledged that he read the consents. On their face, the documents are clearly drafted and do not require any special expertise to understand. The notices which are being sustained show amounts due. The notices which are cancelled clearly say cancelled. Under these circumstances, it is difficult to accept the premise that an individual who is sufficiently sophisticated to be a chief financial officer

would not understand the significance of what he was signing. In this regard, it is noted that the instructions which petitioner received from someone in Albany were correct.

C. Assuming that petitioner was under a misunderstanding as to the impact of signing the consent forms, the only circumstances that petitioner has established is a unilateral mistake of fact. This condition alone is not sufficient to set aside the consents (see, Quigley v. Internal Revenue Service, 289 F2d 878). Accordingly, petitioner became bound pursuant to Tax Law

¹At the hearing, petitioner's representative stated that the same petitions were filed on behalf of Sleep Centers Corp. and Fashions in Bedding of Queens, Inc. as were filed on behalf of the other corporations (Tr., pp. 15, 18). The Division did not voice any objection to petitioner's raising the issue of the validity of the consents (Tr., p. 16). Although the matter is not entirely free from doubt, it is concluded that by directing the reader to "SEE ATTACHED" in the space on the petitions for notice/assessment number and then appending the Request for Conciliation Conference, which objected to the notices which assessed tax as an officer of Fashions in Bedding of Queens, Inc. and Sleep Centers Corp., the petitions are sufficiently broad to constitute challenges to the notices pertaining to Fashions in Bedding of Queens, Inc. and Sleep Centers Corp. It is also noted that the petitions refer to CMS numbers 102341 through 102435 which include Fashions in Bedding of Queens, Inc. and Sleep Centers Corp.

§ 1138(c) to the terms of the consents. The remainder of this determination will only address petitioner's responsibility for the taxes due from Bed City - Manhattan, Inc., Boulevard Bed City and Westchester Bed City, Inc.

D. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

E. The resolution of whether a person is responsible to collect and remit sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State, 82 Misc 2d 181, 183, 368 NYS2d 448). The decision of the Tax Appeals Tribunal in Matter of Autex Corp. (Tax Appeals Tribunal, November 23, 1988) offers a useful summary of the factors which are considered in determining whether a corporate officer is under a duty to act for a corporation in complying with the requirements of Article 28. These factors include:

"[W]hether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[B][2]).

"Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Blodnick v. State Tax Commn., 124 AD2d 437); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Commn., 128 AD2d 1022, 1023); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. NY Tax & Finance, 98 Misc 2d 222, 225-226); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 391). Within closely held corporations, 'an officer's knowledge of the corporate affairs and his benefits received from corporate profits (are) extremely important considerations' (Vogel v. NY Tax & Finance, supra, at 226)." (Matter of Autex Corp., supra.)

F. Judged by the forgoing standards, the record clearly establishes petitioner's liability for

the taxes in issue. Petitioner was authorized to sign the tax returns of the corporations involved herein and he made a practice of performing this function. The record also discloses that petitioner held the title of chief financial officer of Bed City Shops, Inc. and that, in this position, he was the recipient of the corporate revenues and was responsible for paying the respective corporate obligations. Further, although petitioner may have conferred with respect to larger bills, the record is clear that it was petitioner's practice to pay routine bills on his own authority.

G. On the basis of the foregoing, the fact that petitioner did not have an official title with the corporations in issue is of no consequence. It has been recognized that where an individual controls a corporation, the lack of an official title does not prevent a person from being held responsible for taxes (see, Matter of Ianniello, Tax Appeals Tribunal, September 25, 1992).

H. The only issue which remains is whether petitioner has established that the Division misapplied the payments received from petitioner.

I. Initially, two points warrant attention. First, the liabilities which Mr. Mazen was seeking to collect on were the liabilities of the respective corporations. Therefore, the fact that the Division sought to collect on debts which arose prior to petitioner's employment was proper. Secondly, it is recognized that when a taxpayer directs that a check be applied to a particular sales tax liability, he is generally entitled to have the check applied as directed (see, Matter of Myer, Tax Appeals Tribunal, May 17, 1990).

J. The evidence presented herein is not sufficiently clear to show that the Division violated an agreement on the application of payments. Initially, it is noted that contrary to the argument of petitioner's representative, the memo section on the checks was generally completed by petitioner or someone in petitioner's office (Tr., p. 82). The question arises why there was a directive on how to apply the checks if there already was an agreement on how the payments would be allocated. If there was an agreement, the Division would have been in the untenable position of having to choose between either following the directive on the checks or the agreement with Mr. Mazen. It is also unexplained why petitioner made at least several large

payments after December 1986 of liabilities which arose prior to September 1986 if there was an agreement not to do so. The discrepancy between petitioner's letter of December 2, 1987 (Finding of Fact "22") and his testimony is also troubling. The letter, which petitioner signed, clearly indicates that Bed City Shops made a continuing effort to satisfy the tax liabilities which arose prior to September 1986.

K. In view of the discrepancy between the testimony, the checks and the letter of December 2, 1987, it is concluded that petitioner has not established the existence of an agreement which was violated by the Division.

L. At the hearing, petitioner's representative was concerned that the check dated January 15, 1988 (Finding of Fact "20") was not acknowledged on Mr. Mazen's accounting. On the record presented, it is not possible to conclude that the Division failed to give credit for this payment. It is possible that the total payment of \$6,443.86 was broken up and applied to two or more assessments. In this event, the total payment of \$6,443.86 would not appear on Mr. Mazen's schedule.

M. The petitions of Jeffrey W. Donahue, officer of Bed City - Manhattan, Inc., Boulevard Bed City, Westchester Bed City, Inc., Sleep Centers Corp. and Fashions in Bedding of Queens, Inc., are denied and the notices of determination and demands for payment of sales and use taxes due are sustained, together with such penalty and interest as may be lawfully due.

DATED: Troy, New York
March 10, 1994

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE