

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JAMES W. JOHNSON** :  
for Revision of a Determination or for Refund of Sales : DETERMINATION  
and Use Taxes under Articles 28 and 29 of the Tax Law : DTA NO. 816518  
for the Period September 1, 1994 through August 31, 1996.:

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Petitioner, James W. Johnson, 458 West 49<sup>th</sup> Street, Apt. 4, New York, New York 10019, 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, 1994 through August 31, 1996.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on February 22, 1999 at 10:30 A.M., with all briefs to be submitted by July 16, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Jeffrey I. Lasky, CPA. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Andrew S. Haber, Esq., of counsel).

***ISSUE***

Whether petitioner, as a corporate secretary and treasurer, shareholder and employee, was a person required to collect tax under Tax Law § 1131(1) so that he is personally liable for sales tax determined due from a Greenwich Village restaurant for the period September 1, 1994 through August 31, 1996.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”), by its Tax Compliance Division - Metropolitan District Office, issued eight notices of determination, each dated March 17, 1997, against petitioner, James W. Johnson, as an officer or responsible person of Cottonwood Cafe of Manhattan, Inc., asserting tax, penalty and interest as follows:

Assessment ID	Sales Tax Quarter Ending	Tax Asserted Due	Interest	Penalty	Pay-ments/ Credits	Total Asserted Due
L-013248125-5	11/30/94	\$7,320.17	\$1,676.51	\$1,813.91	\$2,034.92	\$8,775.67
L-013248124-6	02/28/95	8,896.35	2,401.53	2,668.83	-0-	13,966.71
L-013248122-8	05/31/95	6,036.03	1,401.06	1,810.80	-0-	9,247.89
L-013248123-7	08/31/95	7,513.79	1,468.29	2,028.58	-0-	11,010.66
L-013248121-9	11/30/95	8,015.78	1,284.00	1,923.67	-0-	11,223.45
L-013248120-1	02/29/96	4,706.00	594.67	988.26	-0-	6,288.93
L-013248119-1	05/31/96	4,045.00	375.42	728.10	-0-	5,148.52
L-013248118-2	08/31/96	101.00	46.44	335.69	-0-	483.13

2. The amounts of sales and use tax asserted due in the eight notices of determination represented the tax reported due by Cottonwood Cafe of Manhattan, Inc. (“Cottonwood Cafe”) on its respective quarterly sales tax returns. The Division accepted taxable sales as reported by Cottonwood Cafe during the period at issue. However, tax reported due was not, in fact, paid by the Cottonwood Cafe, and checks written on its corporate account to the Department of Taxation and Finance in payment of the sales and use tax were dishonored. Thirteen of these dishonored corporate checks were written on a corporate checking account which the Cottonwood Cafe maintained with The Chase Manhattan Bank, N.A. Petitioner, James W. Johnson, signed nine of these thirteen dishonored checks as follows:

Check Number	Date of check	Amount	Signer on behalf of Cottonwood Cafe
1100	12/20/94	\$3,660.00	Petitioner
1101	12/20/94	3,660.00	Petitioner
1214	03/20/95	3,000.00	Petitioner
1215	03/20/95	3,000.00	Petitioner
1216	03/20/95	2,835.65	Petitioner
1340	06/20/95	4,000.00	David Zinsser
1341	06/20/95	4,000.00	David Zinsser
1429	09/20/95	2,513.79	Petitioner
1430	09/20/95	2,500.00	Petitioner
1431	09/20/95	2,500.00	Petitioner
1521	12/19/95	8,015.78	Petitioner
2048	06/20/95	2,000.00	David Zinsser
2049	06/20/95	2,000.00	David Zinsser

Prior to the period at issue, the Cottonwood Cafe maintained a corporate account with Chemical Bank, and petitioner signed a corporate check dated June 20, 1993 on this account in payment of sales and use tax, which was also dishonored. In addition, David Zinsser signed two checks each dated March 20, 1996, a check number 104 for \$1,950.00 and a check number 206 for \$2,684.00, respectively, on his *personal* checking account with The Chase Manhattan Bank, N.A. in payment of sales and use tax for the period at issue. Both of these checks were also dishonored.

Petitioner placed the blame for the bounced corporate checks in payment of sales tax, which he had written, on David L. Zinsser, Cottonwood Cafe's president during the period at issue:

I wrote the check and then Mr. Zinsser wrote himself some checks that caused the check to bounce” (tr., p. 77).

According to petitioner, corporate monies were “being diverted for personal problems that Mr. Zinsser had” (tr., p. 86). Further, besides failing to make bank deposits, according to petitioner, Mr. Zinsser used cash funds of the Cottonwood Cafe to purchase supplies for another restaurant he owned called Automatic Slims.

3. A review of the corporate resolutions of the Cottonwood Cafe dated August 16, 1994 on forms provided by The Chase Manhattan Bank, N.A. discloses that David L. Zinsser, as president, and petitioner, as secretary/treasurer, were authorized to sign corporate checks on behalf of the Cottonwood Cafe. The Cottonwood Cafe maintained two business checking accounts with The Chase Manhattan Bank, N.A., account number 219-1-127535 and account number 219-1-127543, and *only one* signature of either petitioner or Mr. Zinsser was required on checks drawn on either account.

4. The Cottonwood Cafe operated a restaurant and bar by that name, with a Southwestern menu and theme, in the Greenwich Village section of Manhattan located at 415-417 Bleecker Street. With approximately 90 seats, the restaurant and bar served lunch and dinner and offered entertainment in the evenings. According to petitioner, the operation had approximately 10 to 20 employees depending on the particular time of year, with many of its employees part-time.

5. Petitioner had a long relationship with the Cottonwood Cafe spanning 17 to 18 years. A native of Texas, with a college degree in comparative literature, petitioner was a singer and songwriter working “in the Cottonwood in Dallas, Texas” with an associate named Jerry Jackson (tr., p. 54). Mr. Jackson moved to New York City and petitioner soon followed in 1981, finding employment as a singer and bartender in the Greenwich Village Cottonwood Cafe, which was

partially owned by Mr. Jackson. In 1982, Stan Tankersly, one of Mr. Jackson's fellow shareholders, left the business, and petitioner purchased Mr. Tankersly's 15.5% interest in the Cottonwood Cafe. In 1982, no one person had a majority interest in the operation. Petitioner's fellow shareholders at such time were as follows: Mr. Jackson, with 30.5% of the shares; Terry Newton, with 34% of the shares; and Mark Hathaway, with 20% of the shares.

6. In 1984, Jerry Jackson decided to return to Texas. Petitioner and his fellow shareholder, Mark Hathaway, decided to bring a mutual friend, Mark Sarro<sup>1</sup> into the business. In addition, David Zinsser, who had been a customer of the Cottonwood Cafe, was brought into the business. As a result, in 1984, the following five individuals owned an interest in the Cottonwood Cafe:

Shareholder	Percentage of ownership in Cottonwood Cafe
Petitioner	15.50%
Mark Sarro	15.25%
David Zinsser	15.25%
Terry Newton	34.00%
Mark Hathaway	20.00%

7. In 1984, petitioner's employment relationship with the Cottonwood Cafe changed from singer and bartender to what petitioner described as "night manager." He testified that his duties as night manager consisted of seating people, making sure the restaurant ran, taking care of the money at the end of the night, and dealing with operational problems.

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<sup>1</sup> Mr. Sarro's name was spelled as "Zarro" in the transcript. A contract dated October 3, 1984 by which Mr. Sarro purchased 15.25% of the common shares of Cottonwood Cafe from Mr. Jackson for \$25,000.00 shows the spelling of his surname with an "S", which has been used in this determination.

8. In 1993, David Zinsser, who wanted to have an active role in the business, and petitioner took control of the Cottonwood Cafe by buying out the interests of Mr. Sarro and Mr. Hathaway for \$15,000.00 each. They borrowed the \$30,000.00 needed to purchase Mr. Sarro's and Mr. Hathaway's shares from Mr. Zinsser's father. They hoped to pay back Mr. Zinsser's father out of the cash flow of the Cottonwood Cafe. Petitioner and Mr. Zinsser had a written agreement between them concerning their purchase of shares with the financial backing of Mr. Zinsser's father, which petitioner did not introduce into evidence.

9. With Mr. Sarro and Mr. Hathaway out of the picture, in 1993, the ownership of the Cottonwood Cafe became as follows:

Shareholder	Percentage of ownership in Cottonwood Cafe
Petitioner	15.50%
David Zinsser	15.25%
Terry Newton	34.00%
Petitioner and Mr. Zinsser	35.25%

According to petitioner, although Mr. Newton retained a 34% interest in the Cottonwood Cafe, in 1993 he was living in Canada and was "out of the picture" (tr., p. 75). Petitioner explained that he and Mr. Zinsser intended "to eventually buy him out" as well (tr., p.74). In any event, as a practical matter, in 1993 petitioner and Mr. Zinsser together, operated the business.

10. In 1993, Mr. Zinsser assumed his active role in the restaurant and bar as the day manager while petitioner continued as night manager. As soon as Mr. Zinsser came into the picture, the Cottonwood Cafe "started to disintegrate" according to petitioner (tr., p. 73). Mr. Zinsser had certain personal problems that petitioner had not been fully aware of:

It was more than just financial problems. It was - - there were differences in opinion on the way things should be done. There was some behavior<sup>2</sup> that I couldn't approve of. There was, just my personal relationship with Mr. Zinsser depreciated to the point where we were barely speaking (tr., p. 80).

11. As noted in Finding of Fact "2", by the end of 1994, the Cottonwood Cafe was failing to pay over to the State the sales tax collected on its restaurant and bar sales. Nonetheless, petitioner apparently felt that it was not until the end of 1995 that the business "had started to go south," and he "resigned as of the 1<sup>st</sup> of January 1996" (tr., p. 71). The log (or case contacts) maintained by the Division's auditors shows that petitioner, over a lengthy period, acted in a way that indicated that he believed that the tax liability of the Cottonwood Cafe would be ultimately satisfied. The auditor's contact sheets<sup>3</sup> showed the following contacts made by the Division with petitioner and Mr. Zinsser:

Contact Date	Exhibit Page Number	Summary of Auditor's Comment
7/7/92	6	Auditor from metropolitan district office sent letter to corporation concerning unpaid taxes
7/16/92	6	Auditor received phone call from petitioner, said corporation will make payment of \$3,000.00 by 7/24/92 and will enter into a payment plan to pay off liability
8/11/92	5	Auditor phoned petitioner, not in, left message
8/12/92	5	Auditor phoned petitioner, not in, received call from David Zinsser, saying payment to be sent

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<sup>2</sup> Petitioner did not detail his complaint concerning Mr. Zinsser. However, the record includes New York State Liquor Authority renewal applications, and included in these documents is a 1984 application for approval of corporate changes by the New York State Liquor Authority when Mark Sarro and David Zinsser came into the business, as noted in Finding of Fact "6". This 1984 application noted that Mr. Zinsser had been convicted of criminal possession of gambling records in 1978.

<sup>3</sup> The Division introduced the contact sheets, consisting of 11 pages, into the record as its Exhibit "J". The sheets were not introduced in chronological order. For purposes of clarity, the contacts noted in this finding of fact have been arranged in chronological order and a reference has been made to the specific page of the 11 pages where the particular contact is noted.

9/8/92	4	Auditor phoned petitioner and Mr. Zinsser, not in, left message taking collection action
9/9/92	4	Phone call from David Zinsser- Deferred payment agreement discussed
2/10/93	3	Auditor phoned petitioner and Mr. Zinsser, neither in, left message, will take collection action
2/17/93	3	Levy served
2/24/93	2	Emerson phoned, will make payment plan
2/24/93	2	Petitioner phoned, thought Zinsser already arranged deferred payment agreement
5/10/94	1	Petitioner came to district office, Metropolitan district office received check for \$1,000.00 to apply to sales tax, petitioner requested deferred payment agreement
11/7/95	7	Field visit to Cottonwood Cafe, saw petitioner
11/7/95	8	Petitioner advised what's going on, petitioner said aware of liability, was working it out
11/7/95	9	Advised petitioner that failure to comply will lead to seizure of business
11/16/95	9	No compliance, warrant and levy
11/22/95	10	Levy served
11/28/95	10	Phone call from petitioner, arranged office appointment to bring payment
12/6/95	11	Deferred payment agreement by petitioner who made down payment of \$5,000.00

12. As noted in Findings of Fact "2" and "3", petitioner had the authority to sign checks on behalf of the Cottonwood Cafe, and did so. In addition, the Division introduced into evidence the sales and use tax return of the Cottonwood Cafe for the period June 1, 1995 through August 31, 1995, which was signed by petitioner on September 20, 1995 in his capacity as the secretary/treasurer of the corporation. This return reported taxable sales and services for the sales tax quarter in the amount of \$91,076.29, out of gross sales and services of \$93,387.63. No other



sales and use tax returns were introduced into the record. However, petitioner conceded that he prepared the sales and use tax returns occasionally and that the last return he prepared was for the sales tax quarter, September 1, 1995 through November 30, 1995. As noted in Finding of Fact “2”, petitioner signed a corporate check dated December 19, 1995, presumably in payment of the sales tax for the quarter, September 1, 1995 through November 30, 1995, which bounced. In addition, as noted in the auditor’s log, as detailed in Finding of Fact “11”, petitioner executed a deferred payment agreement on December 6, 1995 on behalf of the corporation and made a down payment of \$5,000.00. Further, petitioner signed renewal applications dated January 25, 1989 and February 24, 1995, respectively, for the Cottonwood Cafe’s liquor license with the New York State Liquor Authority in his capacity as secretary/treasurer of the corporation.

13. Petitioner testified that at the time of his resignation as of January 1, 1996, he retained his original 15.50% interest in the business, but gave up his interest in the shares which he had purchased with Mr. Zinsser. Petitioner’s testimony concerning his resignation was vague:

It was verbal. It was verbal and I think I wrote Mr. Zinsser a letter; I don’t remember. I don’t have a copy of that letter, though. (Tr., p. 53.)

Petitioner introduced into evidence a photocopy of a letter of Louis S. Sroka, an attorney who he hired to “either get a payout situation or extricate myself or, officially, you know, cut off my association with [Mr. Zinsser]” (tr., p. 79). This letter dated August 16, 1996 provided in relevant part as follows:

We have attempted on many occasions to speak with you regarding a termination of Mr. Johnson’s stock ownership in the corporation but have not had any realistic response from you.

It has been many months since you terminated Mr. Johnson’s ability to actively participate in the conduct of corporate affairs, by terminating his bank account privileges, refusing to pay salary, and refusing to accede to any of his reasonable requests regarding proper management of the corporation’s business.

Specifically, it is our understanding that Mr. Johnson many months ago was urging you to use corporate funds to pay tax liabilities, but that you overruled him and determined to use the funds for other matters known only to you. It has now come to attention through third parties that there is a significant waste of corporate assets going on being perpetrated by you, specifically that equipment is being taken out, that the company is not opening for business on a regular basis, and that good will is being rapidly lost.

This is to advise you, that we hold you personally responsible for the deterioration and waste of corporate assets.

14. During the period at issue, petitioner testified that his salary from the Cottonwood Cafe on a weekly basis was between \$300.00 to \$500.00. In better years, prior to the period at issue, petitioner's salary was approximately \$40,000.00 per year.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

15. Petitioner argues that the blame for the failure of the Cottonwood Cafe to remit sales tax during the period at issue falls upon David Zinsser:

Apparently, Mr. Zinsser was diverting a portion of the restaurant's receipts to personal needs. These personal non-business needs and the fund [sic] that were used to satisfy these needs were totally beyond the petitioner's control (petitioner's letter brief, p. 1).

Prior to Mr. Zinsser's involvement in the running of the restaurant, petitioner asserts that taxes were paid. Further, petitioner maintains that he had no association with the Cottonwood Cafe after December 1995.

16. The Division contends that petitioner did not introduce any evidence other than his own testimony to support his claim that David Zinsser, his fellow corporate officer, misappropriated corporate funds. Further, the Division maintains that petitioner did not substantiate his claim that he resigned from the corporation as of January 1, 1996. Citing ***Matter of Cohen v. State Tax Comm.*** (128 AD2d 1022, 513 NYS 2d 564), the Division argues that petitioner performed "the duties of an officer that make one liable" (Division's letter brief, p. 2).

According to the Division, petitioner managed the corporate business, signed sales tax returns, acted on behalf of the corporation in regard to sales tax, and signed checks. Finally, the Division distinguishes the decision of the Tax Appeals Tribunal in *Matter of Russack* (February 8, 1996). The corporate officer in that matter did not actively participate in the corporate duties of reporting and remitting sales tax while petitioner did so on behalf of the Cottonwood Cafe.

17. Petitioner in his letter brief in reply reiterates the point that he should not be held responsible for unpaid sales tax resulting from Mr. Zinsser's misappropriation of corporate funds.

### ***CONCLUSIONS OF LAW***

A. Petitioner has not challenged the amount of sales tax, totaling \$46,634.12, as detailed in Finding of Fact "1", that the Division asserts was collected by the Cottonwood Cafe on its restaurant and bar sales and not remitted to the State. This total amount was the amount reported by the Cottonwood Cafe on its sales tax returns for the period at issue, and the Division, in turn, did not contest the amount of sales tax as reported by this Greenwich Village restaurant.

B. Pursuant to Tax Law § 1132(a), sales tax "shall be paid to the *person required to collect it*, as trustee for and on account of the state (emphasis added)."

C. Tax Law § 1131(1) defines "persons required to collect [sales] tax" as follows:

[E]very 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, director or employee* of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship *who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article; and any member of a partnership* (emphasis added).

This definition encompasses much more than the corporate vendor, in this case, the Cottonwood Cafe. As emphasized, any officer or employee, who as such officer or employee is under a duty

to act for the corporation, is also a person required to collect sales tax *in trust* for the State. Furthermore, Tax Law § 1133(a) makes “every person required to collect any tax” *personally liable* for sales tax required to be so collected.

D. The determination of whether an individual is a person under a duty to act for a business operation is based upon an examination of the particular facts of the case. In *Matter of Moschetto* (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

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. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interest in the corporation (*Matter of Constantino, supra*).

E. As noted in Finding of Fact “8”, in 1993, petitioner and David Zinsser, as a twosome, took control of the operation of the Cottonwood Cafe by buying out the corporate shares of Mark Sarro and Mark Hathaway. In 1993, petitioner owned outright 15.50% of the corporate shares while David Zinsser owned outright 15.25% of the corporate shares. Together, petitioner and Mr. Zinsser owned an additional 35.25% of the shares. Totaling up these three amounts results in petitioner and Mr. Zinsser controlling 66% of the corporate shares. As noted in Finding of Fact “8”, the remaining 34% of the corporate shares were owned by Terry Newton, who was living in Canada and according to petitioner “out of the picture.” Consequently, it may be concluded that petitioner and Mr. Zinsser, as a twosome, had control of the corporation. This pivotal fact provides an initial basis to support a conclusion that petitioner was a person required

to collect sales tax on behalf of the Cottonwood Cafe. Furthermore, in addition to the fact that petitioner was responsible for the operation of the Cottonwood Cafe with his colleague, David Zinsser, petitioner was also the secretary/treasurer of the corporation and a corporate employee. In his capacity as one of two individuals responsible for the operation of the corporation, petitioner had check-signing authority, made payments of sales tax on behalf of the corporation, and also signed tax returns and other legal forms, including a deferred payment agreement on December 6, 1995, a date toward the end of the period at issue.

F. Petitioner argues that he was precluded from ensuring that the sales tax collected by the corporation was turned over to the State due to the actions of David Zinsser. Given the fact that petitioner may be viewed as a person required to collect sales tax on behalf of the Cottonwood Cafe, he must shoulder a heavy burden to prove he was precluded from carrying out his duty to act for the corporation, when as a major shareholder who controlled the operation as a part of a twosome, as corporate secretary/treasurer and as a corporate employee, he had acted with great frequency on behalf of the corporation in a range of matters, including tax matters. Petitioner has not shouldered this burden. His situation is not similar to that of the taxpayer in *Matter of Russack* (Tax Appeals Tribunal, February 8, 1996). There, the taxpayer was found not to have been liable for the payment of sales and use tax even though he was the controlling stockholder and corporate vice-president. In *Russack*, financial information was deliberately withheld from the taxpayer and he was misled concerning corporate compliance with tax obligations. As emphasized by the Tribunal in *Russack*:

Petitioner was concerned with whether the corporation met its sales tax obligations and . . . petitioner regularly inquired . . . whether the taxes were being paid. In response to these regular inquiries, Mr. Muneses admitted that he lied to petitioner, that he withheld financial records from petitioner and that he intentionally made incorrect entries in the corporation's financial journals for the

purpose of hiding the sales tax liability of the corporation. Thus petitioner exercised regular supervision over the financial affairs of the corporation but was unable to determine that taxes were not being paid because of the intentional deception of Mr. Muneses (*Matter of Russack, supra*).

In the matter at hand, petitioner knew that the corporate checks which he signed in payment of sales tax were not being honored. As noted in Finding of Fact “2”, petitioner signed *nine* checks in payment of sales tax which were dishonored. Unlike the situation in *Russack*, he was not *deceived* into believing that taxes were being paid, when in fact they were not being paid. Further, the taxpayer in *Russack* also was found to be exercising regular supervision over the financial affairs of the corporation, while in the matter at hand, petitioner, knowing that taxes were not being paid, permitted the situation to continue. In fact, as noted in Finding of Fact “11”, although by the end of 1994, the Cottonwood Cafe was failing to pay over to the State the sales tax collected on its restaurant and bar sales, it was not until the end of 1995 that petitioner testified he resigned as of January 1, 1996.

G. In sum, petitioner had the legal duty to ensure that the sales tax the Cottonwood Cafe collected *in trust* for the State was paid over to the State and not used for other purposes. Petitioner was on notice that sales tax *trust funds* were not being paid over to the State when the check he signed at the end of 1994 was dishonored (*cf., Cook v. Tax Appeals Tribunal*, 222 AD2d 962, 635 NYS2d 355). Yet he continued to sign corporation checks that would be dishonored. With the first dishonored check, petitioner had the duty to take vigorous steps to ensure that his corporate operation properly remitted sales tax collected *as trustee* for the State. The record is devoid of any evidence that he took such steps. Although Mr. Zinsser might be viewed as also responsible for the collection and remittance of the Cottonwood Cafe’s sales tax,

petitioner's responsibility for the collection and remittance of such tax remained intact (*see, Martin v. Commissioner of Taxation*, 162 AD2d 890, 558 NYS2d 239).

H. As noted in Finding of Fact "13", petitioner testified that he resigned from the corporation as of January 1, 1996. However, he did not introduce any documentation to support his *vague* testimony concerning his resignation. Given the precarious straits of the corporation, it is not believable that petitioner would terminate his relationship with the corporation without doing so by a written document of some sort. Further, the letter of attorney Louis S. Sroka, as noted in Finding of Fact "13", indicated that petitioner had not been active in corporate affairs for "many months." As noted in Finding of Fact "1", the last sales tax quarter for which there is a significant amount of unpaid sales tax was the period ending May 31, 1996, which is more than a couple of months prior to Mr. Sroka's letter of August 16, 1996. Although it might be argued that "more than a couple months" is not "many months," an unsworn letter of an advocate, without more, is insufficient to counterbalance petitioner's *vague* testimony concerning his resignation and the lack of any specific documentation of his resignation. Consequently, it may not be concluded that petitioner was no longer active in the business of the Cottonwood Cafe as of January 1, 1996.

I. The petition of James W. Johnson is denied, and the eight notices of determination, each dated March 17, 1997, are sustained.

DATED: Troy, New York  
December 16, 1999

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE