

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOHN J. JACOBSON** : DETERMINATION  
 : DTA NO. 818784  
for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period March 1, 1996 through November 30, 1997. :  
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Petitioner, John J. Jacobson, 157 East 57<sup>th</sup> Street, Apt. 18-D, New York, New York 10022-2115, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1996 through November 30, 1997.

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 June 11, 2002 at 10:30 A.M., with all briefs to be submitted by November 15, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by Eric W. Olson, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel).

***ISSUE***

Whether petitioner, as a corporate officer and shareholder, 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 Manhattan downtown bar for the period March 1, 1996 through November 30, 1997.

**FINDINGS OF FACT**

1. The Division of Taxation (“Division”), by its Tax Compliance Division, issued seven notices of determination,<sup>1</sup> each dated October 30, 2000, against petitioner, John J. Jacobson, as an officer or responsible person of 113 Mercer Associates, Inc. (“113 Mercer Corp.”), asserting tax, penalty and interest as follows:

Assessment ID	Sales Tax Quarter Ending	Tax Asserted Due	Interest	Penalty <sup>2</sup>	Payments/Credits	Total Asserted Due
L-018640760-5	05/31/96	\$ 14,908.43	\$10,125.89	\$ 4,443.75	\$ 601.29	\$ 28,876.78
L-018640759-5	08/31/96	14,664.95	9,346.48	4,399.29	0.00	28,410.72
L-018640758-6	11/30/96	17,712.01	10,433.83	5,313.60	0.00	33,459.44
L-018640757-7	02/28/97	20,809.96	11,294.80	6,242.79	0.00	38,347.55
L-018640755-9	05/31/97	19,585.99	9,730.36	5,875.59	0.00	35,191.94
L-018640756-8	08/31/97	19,826.98	8,966.04	5,947.89	0.00	34,740.91
L-018640754-1	11/30/97	100.00	285.75	1,743.28	0.00	2,129.03
Totals		\$107,608.32	\$60,183.15	\$29,571.29	\$ 601.29	\$201,156.37

113 Mercer Corp. operated a small bar/lounge named Wax in the section of lower Manhattan known as SoHo at 113 Mercer Street between Spring and Prince Streets. This small bar/lounge of approximately 2,000 square feet served only beverages, primarily alcoholic, to a clientele which included supermodels, fashion people, rock and roll celebrities and well-known actors, who were attracted to the dimly lit, late-night premises. One of 113 Mercer Corp.’s co-owners, Nur Khan, was a well-known habitue of the SoHo night scene. Described by petitioner

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<sup>1</sup> Tax asserted due against petitioner in four notices of determination for the four sales tax quarters ending 02/28/98, 05/31/98, 08/31/98 and 11/30, 98, respectively, were canceled by a Conciliation Order dated July 20, 2001.

<sup>2</sup> There is no explanation in the record concerning the statutory basis or reason for the assessment of penalty.

as an imposing figure with a reputation for getting into fights, Mr. Khan was nonetheless sought after by this fast-set clientele, denominated as “Nur Khan’s crew” in newspaper accounts of the scene at Wax. The long lines of waiting patrons trying to gain admission and a selective admission policy reflected the bar’s popularity.

2. During the period at issue, Wax reported gross sales, which were the same as its reported taxable sales, of approximately \$1.5 million, as follows:

Sales Tax Quarter Ending	Gross & Taxable Sales Reported
05/31/96	\$ 182,540.00
08/31/96	177,757.00
11/30/96	214,691.00
02/28/97	252,242.00
05/31/97	237,406.00
08/31/97	240,327.00
11/30/97	208,883.00
Total	\$ 1,513,846.00

The Division in computing the amounts shown in Finding of Fact “1” as “Tax Asserted Due” accepted the sales as reported by Wax, merely applying the New York City sales tax rate of 8¼% to such reported sales. The sales tax returns filed by Wax failed to remit payment of the tax shown due. Petitioner did not sign any of these tax returns, which all bear the signature<sup>3</sup> of Travis Keyes, a full-time owner and manager of Wax, except for the return for the period ended November 30, 1997, which was unsigned.

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<sup>3</sup> According to petitioner, either Travis Keyes signed the tax returns or Nur Khan signed Mr. Keyes’s name.

3. Petitioner is a full-time, licensed real estate broker who specializes in properties located in downtown Manhattan, particularly the SoHo and Tribeca neighborhoods. In 1994, he was approached by three friends, Nur Khan, Kevin McHugh and Scott Beck, who were interested in starting a bar business in lower Manhattan. Petitioner and these friends had graduated from the same Connecticut high school ten years earlier. While petitioner had gone off to studies at Roger Williams College in Rhode Island, to receive a degree with a major in business, his friends became involved in the operation of successful bars in Connecticut. Petitioner was easily persuaded by his friends to invest \$40,000.00 in 113 Mercer Associates, Inc., the corporation established to operate the bar to be known as Wax. Petitioner's \$40,000.00 investment consisted of \$20,000.00 borrowed from his then girlfriend, Sherri Silver, and \$20,000.00 borrowed from his brother, Keith Jacobson, who was a banker.<sup>4</sup> Petitioner believed his investment in a SoHo bar would provide him with the potential to develop a social network which would benefit his real estate business. According to petitioner, he did not receive any stock certificates or any agreement or document from the corporation confirming his \$40,000.00 investment and was also unaware of any corporate meetings, articles of incorporation, resolutions or bylaws, claiming that none existed.

4. In the absence of any corporate documents, collateral documents in the record show varying percentages for petitioner's share in the overall ownership of the corporation as follows:

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<sup>4</sup> A written agreement dated June 28, 1994 memorialized petitioner's \$20,000.00 loan from his brother. An undated loan contract signed by petitioner and Sherri Silver memorialized a loan of \$10,000.00 although petitioner claimed "it turned out to be \$20,000.00" (tr., p. 73).

Document	Petitioner's ownership interest in corporation
Undated loan contract between petitioner and Sherri Silver showing a 15-month period of the loan running 07/01/96 through 09/31/97 <sup>5</sup>	20%
Letter dated 05/28/99 to G. Kahana & Co. from petitioner, Kevin McHugh and Scott Beck and stock purchase agreement dated September 30, 1997.	17½%
Undated rider to license application to State Liquor Authority	20 shares out of 95 shares or 21.1%
Letter dated 01/04/95 of attorney Bruce J. Corrigan, Jr. to Chemical Bank on behalf of Kevin McHugh and Scott Beck bearing petitioner's signature dated 01/05/95 noting that he had read and agreed to the letter	100%
Letter dated 02/07/95 of attorney Jason A. Gladstone to Chemical Bank on behalf of petitioner bearing petitioner's signature and Nur Kahn's signature noting that they had read and agreed to the letter	50% (and Nur Khan owning 50%)
Affidavit of Nur Khan dated 04/10/2001	As of June 1997, <sup>6</sup> 0%

5. Petitioner was not involved in the day-to-day operation or management of Wax. Rather, during most of the period at issue, the operation was managed by Nur Khan and an employee of the corporation, Travis Keyes.<sup>7</sup> In 1994, Mr. Khan on behalf of the corporation leased the real property located at 113 Mercer Street in lower Manhattan and also contracted

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<sup>5</sup> There is no explanation in the record why the loan period runs from July of 1996 to September of 1997 when petitioner "borrowed" funds from Ms. Silver in 1994 or 1995. The year is also unclear since the bar opened in the spring of 1994 yet petitioner testified that his investment was made in 1995: "I was hoping to make money. In 1995 when I invested the money . . . ." (Tr., p. 185.)

<sup>6</sup> However, the purchase agreement dated *September 30, 1997* between petitioner and 113 Mercer Corp. shows the corporation's purchase of petitioner's 17.5 shares representing 17.5% of the outstanding shares for \$40,000.00, but does not specify a closing date for such sale. Mr. Khan signed on behalf of the corporation.

<sup>7</sup> According to an affidavit of Nur Khan dated April 10, 2001, in September 1997 Mr. Khan sold his entire interest in the corporation to Mr. Keyes and Ryan Heil who became the co-owners of the corporation.

with an architect to design the bar/lounge. By the time Wax opened for business, Kevin McHugh and Scott Beck had apparently withdrawn from involvement in the enterprise as indicated by the letter dated January 4, 1995 of their lawyer, Bruce J. Corrigan, Jr..

6. Neither was petitioner ever employed by the corporation. Further, in order to gain admission to the popular bar with its long waiting line, petitioner sought the permission of Mr. Khan, who permitted him to run a tab at the bar but eventually required payment from petitioner for what petitioner estimated as 85% of his drinks.

7. But for petitioner's actions, the corporation would not have been able to open a business checking account and conduct its operations. As noted in Finding of Fact "4", petitioner, who was creditworthy, held himself out to Chemical Bank in a letter dated January 4, 1995 as owner of 100% of the corporation's stock, and a month later in a letter dated February 7, 1995 as owner of 50% of the stock with Nur Khan owning the other 50%. At the time of these letters, Wax had still not commenced operations in the face of outspoken community opposition to the bar's obtaining a liquor license. Although the corporation had signed a 10-year commercial lease at the beginning of 1994, community opposition caused a delay of approximately 14 months for it to receive a liquor license. Wax did not open up for business until April 1, 1995.<sup>8</sup> At the time of its opening, it owed \$140,000.00 in back rent, and the landlord agreed to the payment of double rent until the back rent was paid off. Concerned about

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<sup>8</sup> Petitioner's presentation of evidence was extremely confused concerning the opening date of Wax. Even late in the hearing, apparently in continuing error, the opening day was referenced as March or April of 1996 not 1995. As noted in Finding of Fact "1", the first period for which sales tax was asserted due by the Division from sales made at Wax was the quarter March 1, 1996 through May 31, 1996. Perhaps this has led to such confusion. The record does not establish whether sales tax was remitted for the year of the bar's operation prior to this quarter. In any event, petitioner's liability for such sales tax is not at issue in this proceeding.

his investment,<sup>9</sup> petitioner maintains that he decided to misrepresent his ownership interest to the bank so a business checking account could be established and the bar commence operation.

8. On a commercial account application to Chemical Bank dated January 10, 1996,<sup>10</sup> petitioner held himself out as president of 113 Mercer Corp. In addition, he signed the Chemical Bank Corporate Resolutions<sup>11</sup> also dated January 11, 1996 as both president and secretary of the corporation<sup>12</sup> with the awareness that the bank document contained the statement that:

I further certify that the persons herein designated as officers of this corporation have been duly elected to and now hold the offices in this corporation set opposite their respective names, and that the following are the authentic, official signatures of the said respective officers.

Petitioner was an authorized signatory, without the requirement of a co-signatory, for the corporate bank account. He listed himself as treasurer of 113 Mercer Corp. on the bank signature card dated September 27, 1996, which also listed the manager, Travis Keyes, as an authorized signatory. According to petitioner, he signed all of these bank documents “all prior to any income coming into the corporation” and “solely to open up a bank account.” However, all of these documents are dated several months *after* the opening of Wax in April of 1995 with

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<sup>9</sup> Petitioner claims that he and Nur Khan had an agreement that once the bar was operating, he would recoup his investment by the redemption of his corporate stock in exchange for the repayment of his \$40,000.00 investment. However, nothing in writing was submitted to substantiate such agreement other than an affidavit of Mr. Khan dated April 10, 2001, six years after the event at issue, which merely stated that petitioner “was bought out of his entire interest in 113 Mercer Associates in June 1997.” Whether the agreement to redeem petitioner’s interest was reached *before* the bar’s commencement of operation is still an open question.

<sup>10</sup>There is no explanation in the record why this application bears a date several months after Wax had commenced its operation. Presumably, the checking account had been opened earlier by the corporation.

<sup>11</sup> These resolutions authorized petitioner to act for 113 Mercer Corp. in all matters and transactions related to any business with the bank.

<sup>12</sup> Nur Khan signed as corporate vice president. Petitioner testified that the word “president” listed next to his signature was not in his handwriting although the signature was his. Nonetheless, on cross-examination, he admitted that he was “representing to this bank that [he] held the office of president” (tr., p. 177).

presumably considerable sums of money flowing into the corporation based on its reported sales, as detailed in Finding of Fact “2.”

9. Petitioner first responded on direct examination, “Not that I know of,”<sup>13</sup> to the question, “And did you ever sign checks on behalf of the corporation?” Later during his direct examination, when pressed further by his own attorney concerning his signing of checks, petitioner held his position that he did not sign any checks although he altered his position slightly by suggesting that he might have signed one or two checks at the start of the SoHo bar’s operation. In fact, during the period at issue, petitioner signed the following checks on behalf of the corporation:

Check Number	Date	Payee	Amount
6990	07/26/96	NYS Tax Department	\$ 1,169.21
1219	08/15/96	Budget Instalment Inc. (“for insurance” <sup>14</sup> )	1,396.00
1222	08/15/96	American Express (“for corporate card Wax”)	10,500.00
1703	02/17/97	Jacobs, Blumenfeld (“for accountant”)	3,000.00
1705	02/11/97	Budget Instalment Inc.	1,400.56
1707	03/03/97	Commercial Bank of NY	3,500.00
2338	10/24/97	Cash	1,680.00
TOTAL			\$ 22,645.77

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<sup>13</sup> Similarly, petitioner testified that corporate mail was sent to his home only “in the beginning” and “very shortly after that when 113 Mercer Associate opened . . . it went to Travis Keyes’ apartment” which also turned out to be a misstatement of facts (tr., p. 100).

<sup>14</sup> In the bottom left hand corner of each check, there is a preprinted line next to the word “For.” The words in quotation marks in the above list have been written on the respective “for” lines.

All of the above checks had the corporate name of 113 Mercer Associates, Inc. and petitioner's residence as the corporation's address preprinted on them except the two checks with numbers 6990 and 2338, which have the corporation's banking account number and the corporation's name handwritten on the upper left corner of the check. All of the checks noted in the table above are included in the Division's Exhibit "H", a document consisting of 807 pages of photocopies of banking records obtained by the Division pursuant to a subpoena it issued to Chemical Bank. These documents were not made available by the bank prior to the hearing, and the record was left open at the Division's request for their later acceptance into evidence. The Division was unable to cross-examine petitioner concerning these checks he had signed on behalf of the corporation.

10. All of the preprinted checks showed petitioner's residential address as the corporation's business address. In fact, even the check dated November 12, 1998, the latest one included in the record, is imprinted with petitioner's residence as the corporation's business address. This is so even despite the fact that beginning with the monthly checking account statement for the period May 13- June 11, 1997, petitioner no longer received the corporation's banking statements at his home. Rather, statements from such period forward were sent by the bank in care of Travis Keyes at his personal residence at 304 Mulberry Street, Apt 2M, New York, New York. Presumably, all of the other business mail for the corporation petitioner had been receiving at his residence was also, from that date forward, delivered to the residence of Mr. Keyes.

11. Nur Khan primarily controlled the possession of the corporation's checkbook, directed the payment of creditors, and signed most of the business checks during the period at issue. Nonetheless, petitioner had the ability to review the banking statements for the corporation

which he received at his residence although he apparently never chose to do so except at the very start of the bar's operation, and, as noted in Finding of Fact "9", signed some checks.

12. Petitioner admits that he became aware in March or April of 1997 that the corporation had sales tax problems when he received mail at his home from the State. By such time, the corporation, as noted in Finding of Fact "1", had not remitted tax for approximately one year. Nevertheless, petitioner's main concern remained the same: getting back the money he had invested in the corporation. His former girlfriend was "down [his] throat" for repayment and his brother, to his embarrassment, was also "hassling" him for repayment.

13. Petitioner held a bank card for the corporate checking account detailed above. During the period 1996 through 1997, petitioner used his bank card on a monthly or bi-monthly basis with the approval of Nur Khan to withdraw funds in the approximate amount of \$30,000.00. According to petitioner, these withdrawals represented the recoupment of his investment pursuant to an oral agreement with Mr. Khan. Petitioner believes that since he and Mr. Khan "went to high school together, it wasn't something we had to put in writing" (tr., p. 199). With the additional \$10,000.00<sup>15</sup> received from the corporation in June 1997, petitioner ultimately recouped his initial \$40,000.00 investment in Wax and apparently has reimbursed his former girlfriend and brother.

14. Petitioner maintains that as of September 1997, Travis Keyes and Ryan Heil had taken over the complete ownership and operation of Wax. Further, according to Nur Khan's affidavit dated April 10, 2001, these new owners agreed "to pay any and all back sales taxes arising from the operation of Wax." Nonetheless, petitioner signed two powers of attorney in the capacity of

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<sup>15</sup> According to petitioner, "the verbal agreement was when I got my \$10,000.00 check from Ryan Heil and Travis Keyes my ownership was resolved [sic] to Nur or to whoever, it wasn't my concern" (tr., p. 172). As noted in Footnote "7", Nur Khan sold his entire interest in the corporation to Heil and Keyes in September 1997.

vice president of 113 Mercer Corp. after what he claims was the redemption of his ownership interest in June of 1997. A corporate power of attorney on behalf of 113 Mercer Corp. dated September 19, 1997 appointing Gregory J. Curcio, whose professional status was not identified, and another dated November 26, 1997 appointing attorney Mitchell G. Mandell were each executed by petitioner on behalf of the corporation.

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

15. Petitioner argues that the totality of the facts and circumstances surrounding his relationship to 113 Mercer Associates, Inc. establishes that he was not a corporate officer under a duty to act for the corporation, and consequently, he was not personally liable for sales tax required to be collected by the corporation which was not remitted to the State. Petitioner contends that he (i) did not sign sales tax returns or other corporate tax returns, (ii) derived no income from his ownership of stock of the corporation, (iii) had no knowledge of or control over the financial affairs of the corporation, (iv) had no ability to hire or fire employees, (v) had no day-to-day responsibility or involvement with the management of the corporation, (vi) had no ability to control or direct payment of the corporate creditors, and (vii) has identified persons who were under a duty to act for the corporation. Although petitioner signed banking forms as a corporate officer, he was never actually empowered by the corporation and maintains that he was merely a passive investor and a minority shareholder. Petitioner notes that it has “been a nightmare for me,” and “I really feel strongly that it’s something I had no control over” (tr., pp. 197-198). He maintains that by the time the bar opened, his only interest was to recover his initial investment in order to repay his former girlfriend and brother. According to petitioner, he “should not be punished by his accessibility, his stable employment history and his efforts to repay those whom [sic] lent him money” (Petitioner’s brief, p. 35).

16. The Division counters that petitioner failed to meet his burden of proving that he was not a responsible person for the collection and remittance of sales tax for 113 Mercer Associates, Inc. The Division argues that petitioner (i) signed corporate documents and held himself out to the public at various times as president, vice-president, secretary and treasurer of the corporation, (ii) facilitated the opening and operation of the business by representing to the bank that he was a corporate officer and was a 100% owner and then a 50% owner, (iii) signed corporate checks, (iv) took out approximately \$30,000.00 from the corporate account and received an additional \$10,000.00 in June 1997, and (v) was not precluded by anyone from reviewing the corporation's books and records and he, in fact, received corporate bank statements and corporate mail at his home. According to the Division:

Simply put, there are too many factors present and the petitioner had too much authority and knowledge to find that he proved by clear and convincing evidence that he did not have a fiduciary duty to ensure that 113 Mercer complied with the sales tax provisions of the Tax Law (Division's brief, p. 19).

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

A. Petitioner has not challenged the amount of sales tax, totaling \$107,608.32 as detailed in Finding of Fact "1", that the Division asserts was collected by the SoHo bar on its sales over a period of just under two years and not remitted to the State. This total amount was the amount reported by 113 Mercer Corp., the operator of the bar, on its sales tax returns for the period at issue, and the Division, in turn, did not contest the amount of taxable sales and tax thereon reported by the owners of Wax.

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, 113 Mercer Corp. As emphasized, any officer, who as such officer 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. Both petitioner and the Division agree that the determination of whether an individual is a person under a duty to act for a business operation is based upon a close 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.

E. The Division also correctly adds that petitioner bears the burden of proving that the close examination of the particular facts of this matter supports his position that he was not a person under a duty to act for 113 Mercer Corp., the corporate owner and operator of Wax (*see, Matter of Orvis*, Tax Appeals Tribunal, January 14, 1993, *annulled in part* 204 AD2d 916, 612

NYS2d 503, *modified* 86 NY2d 165, 630 NYS2d 680, *cert denied* 516 US 989, 133 L Ed 2d 426 [wherein the Tribunal noted that the Division of Taxation does not have the burden of proving the propriety of its assessment, but rather the failure of the petitioner in Orvis to “establish the specific facts” required the Tribunal to “conclude that petitioner has not sustained its burden”].

F. The very factual nature of the analysis required in this matter is reflected by the Tribunal’s decision in *Moschetto (supra)*, which reversed the determination of the Administrative Law Judge (“ALJ”), who had denied the taxpayer’s petition. In deciding against the taxpayer, the ALJ relied on the following facts: (i) the officer received substantial income from the business, (ii) he influenced the hiring of employees and supervised employees, (iii) he had check-signing authority and signed checks; (iv) he had signed one sales tax check; and (v) was a shareholder, a member of the board of directors and had signed an unlimited guarantee with a bank on behalf of the corporation. The Tribunal decided that the above facts relied on by the Administrative Law Judge were:

not sufficient, given the entire circumstances of petitioner’s involvement in City Chrysler, to sustain the conclusion that petitioner had a duty to act for the corporation in complying with the requirements of the sales tax law (*Matter of Moschetto, supra*).

The Tribunal noted: (1) the officer received the same salary after he became a shareholder as he had when he was only a manager of service and parts and the amount of income received (\$600.00 a week in 1987 through 1989) did not suggest that he was a responsible officer (when sales tax asserted due was approximately \$400,000.00); (ii) the officer did not hire and fire without the approval of a Sheldon Reynolds, who had the real authority in the business; (iii) his check-signing authority and check-signing activities were circumscribed; and (iv) the officer in fact had little actual authority over the corporation’s affairs, in spite of his titles and investment.

In summary, the Tribunal emphasized its similar decision in *Matter of Constantino (supra)*, where it stated:

[P]etitioner's role was essentially that of a minority investor and supervising employee who was precluded from taking actions with regard to the financial and management activities of the corporation.

G. Here, petitioner argues that his involvement with the SoHo bar operated by 113 Mercer Corp. was primarily limited to his \$40,000.00 investment and that, at most, he was a minority shareholder with no authority over the operation of Wax. He vigorously contends that Nur Khan was the person under a duty to act for the corporation. The record does point to Mr. Khan as a person responsible for the collection and remittance of Wax's sales tax. In addition, petitioner, to some extent, apparently feared Mr. Khan, who he described as an imposing figure with a reputation for getting into fights. Nonetheless, Mr. Khan's status as a person under a duty to act for 113 Mercer Corp., and even petitioner's fear of challenging him, does not mean that petitioner is automatically relieved responsibility for the taxes at issue (*see, Martin v. Commissioner of Taxation*, 162 AD2d 890, 558 NYS2d 239).

H. The fundamental problem with petitioner's case is his failure to shoulder the burden of proving that he, in fact, was merely a minority shareholder with no authority over the corporation which was responsible for the operation of the SoHo bar. Contradicting petitioner's testimony, the Division has offered evidence of corporate checks signed by petitioner, as detailed in Finding of Fact "9". The Division has also offered evidence that corporate mail was sent to petitioner's home not only "in the beginning" of Wax's operations, as contended by petitioner, but as noted in Finding of Fact "10" until late spring or early summer of 1997. Most important, as detailed in Finding of Fact "4", there is evidence in the record that petitioner, just prior to the commencement of the bar's operations, had a 100% ownership interest in the

corporation after the withdrawal of petitioner's friends, Kevin McHugh and Scott Beck, from the business. Further, in a letter dated February 7, 1995, a month or so before Wax opened its doors, as indicated in Finding of Fact "4", petitioner and Nur Khan were noted as each having a 50% ownership interest in the corporation. Petitioner argues that he did not really have either a controlling interest or a 50% interest in the corporation at any time and merely held himself out as having such status in order to recoup his investment. He maintains he was just trying to persuade (by misleading) a bank to provide a business checking account and thereby permit Wax to start operations. Further, he contends that *prior to the bar's opening*, which would have been shortly after the withdrawal of his two friends from the operation, he had reached an agreement with Mr. Kahn for the redemption of his shares in the corporation and the return of his \$40,000.00 investment.

I. However, the lack of any supporting documentation undercuts petitioner's case. Neither articles of incorporation, corporate by-laws, corporate minutes or any type of corporate document were produced to support his contention that he was merely a minority shareholder. Neither was any sort of written agreement with Nur Khan for the redemption of petitioner's shares provided. Most damaging, petitioner presented the testimony of a bartender and a bouncer who were not even employed during the period at issue in support of his case. Where were the individuals who could shed some light on petitioner's minority status? Petitioner testified that he has remained friends with Kevin McHugh and Scott Beck, who continue to work and live in Connecticut. There is no explanation in the record why these men, who had personal knowledge of some of the pivotal facts concerning petitioner's investment in 113 Mercer Corp., did not appear to testify especially in the face of petitioner's lack of any sort of documentation to support his position. Furthermore, not even affidavits of these men were

offered in support of petitioner's position. This failure by petitioner to introduce vitally important evidence must be held against him (*see, Meixsell v. Commissioner of Taxation*, 240 AD2d 860, 659 NYS2d 325, *lv denied* 91 NY2d 811, 671 NYS2d 714). The fact of the matter is that once Messrs. McHugh and Beck withdrew, only petitioner and Nur Khan retained ownership stakes in the potential success of a soon-to-be very popular SoHo bar. Furthermore, given petitioner's college education as a business major, his real estate practice in New York City, his brother's status as a banker who loaned him a portion of the funds he invested in Wax, it is not believable that there was no documentation for his investment in 113 Mercer Corp. This is especially so, given his testimony's lack of forthrightness reflected by the Division's ability to contradict important aspects of it.

J. Consequently, although there are some significant facts in the record that would support a conclusion that petitioner was not under a duty to act for 113 Mercer Corp., such as the ones designated (i), (ii), (iv), (v), and (vii) in paragraph "15" of this determination, the above failure of proof requires the denial of the petition. It simply may not be concluded that petitioner was merely a *minority* investor in 113 Mercer Corp., and as a result, the Tribunal's decisions in *Moschetto (supra)* and *Constantino (supra)* are distinguishable. In short, the facts emphasized by the Division in paragraph "16" have not been contradicted by petitioner with adequate proof.

K. Since there is no evidence in the record providing an explanation of the basis for the imposition of penalty<sup>16</sup> or even the specific statutory authority, as noted in Footnote "2", penalty is canceled (*cf., Capital District Better TV Inc. v. Tax Appeals Tribunal*, 200 AD2d 930, *lv*

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<sup>16</sup> The Division, at the hearing and in its brief, defended the imposition of penalty against petitioner. Petitioner, on the other hand, did not specifically address the issue of penalty in its petition or briefs. However, in light of petitioner's failure to prevail on the merits, the issue of penalty has been addressed herein.

*denied* 83 NY2d 758, 615 NYS2d 875 [wherein the court annulled the Tribunal's determination as to three of the petitioners because there was no substantial evidence in the record to support the determination.]

L. The petition of John J. Jacobson is granted to the extent of Conclusion of Law "K", but, in all other respects, is denied, and the seven notices of determination each dated October 30, 2000 are modified to so conform.

DATED: Troy, New York  
May 1, 2003

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE