STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Milton J. Davis	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision of a Determination or Refund of Sales & Use Tax under Article 28 & 29 of the Tax Law for the Period 9/5/78.	

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of March, 1984, he served the within notice of Decision by certified mail upon Milton J. Davis, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Milton J. Davis
213 North Washington Ave.
Scranton, PA 18503

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
9th day of March, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Milton J. Davis	AFFIDAVIT OF MAILING
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State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of March, 1984, he served the within notice of Decision by certified mail upon Frederick A. Griffen, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frederick A. Griffen
Kramer, Wales & McAvoy
P.O. Box 1865, 59-61 Court St.
Binghamton, NY 13902

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
9th day of March, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

March 9, 1984

Milton J. Davis
213 North Washington Ave.
Scranton, PA 18503

Dear Mr. Davis:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Frederick A. Griffen
Kramer, Wales & McAvoy
P.O. Box 1865, 59-61 Court St.
Binghamton, NY 13902
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of MILTON J. DAVIS 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, 1976 through November 30, 1978.	DECISION

Petitioner, Milton J. Davis, 213 North Washington Avenue, Scranton, Pennsylvania 18503, 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, 1976 through November 30, 1978 (File No. 28580).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on September 14, 1982 at 1:15 P.M., with all briefs to be submitted by February 4, 1983. Petitioner appeared by Kramer, Wales & McAvoy, Esqs. (Frederick A. Griffen, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Barry Bresler, Esq., of counsel).

ISSUES

I. Whether petitioner was a person required to collect sales tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

II. Whether petitioner is personally liable for sales tax due on the bulk sale of the equipment of a corporation of which he was president.

III. Whether penalties and interest in excess of the statutory minimum should be waived.

FINDINGS OF FACT

1. On June 20, 1979, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Milton J. Davis, president of John F. Davis Co., Inc. (sic) d/b/a Dey Brothers Tea Room, in the amount of $20,240.16, plus penalty of $4,347.21 and interest of $4,179.76, for a total due of $28,767.13 for the period March 1, 1976 through November 30, 1978. On September 20, 1979, the Audit Division issued a second notice against petitioner in the amount of $1,944.44, plus penalty of $252.78 and interest of $175.00, for a total due of $2,372.22 for the period September 5, 1978.

2. Petitioner was the president of John F. Davis Company ("the corporation"). The corporation was engaged in the operation of restaurant concessions in department stores located in New York, New Jersey and Pennsylvania. The corporation maintained its principal offices in Scranton, Pennsylvania. The officers of the corporation were petitioner and his three sisters. The same four persons also made up the board of directors and were the sole stockholders of the corporation with petitioner owning 125 shares and each sister owning 100 shares. On September 19, 1977, petitioner's three sisters voted to remove themselves from the board and substitute their husbands in their seats on the board. Petitioner disapproved of this action because his relations with his brothers-in-law were strained, especially with one of them, George Carros.

3. Prior to the board substitution, all corporate checks required the signatures of two of the four officers. Usually petitioner and one of his sisters signed. Petitioner's signature was inscribed by a check-writing machine which automatically printed his signature on all checks. The other officers signed their names by hand. By corporate resolution dated October 17,

1977, the authorized check signatories were changed to petitioner, his sister, Iona O'Connor, vice-president, and George Carros, director. Signatures of two of the three were required. Petitioner continued to authorize use of his signature in the check-writing machine.

4. Petitioner's duties as president involved extensive travel to and supervision of each of the corporation's restaurant units. His supervision involved ascertaining that company policies were followed with respect to food preparation, customer service, and all other operational aspects of the business. Petitioner was responsible for hiring and firing managers and supervisors in the field units. Petitioner reviewed the financial reports of the corporation and was aware of its financial condition including the fact that there were problems with respect to sales tax payments.

5. Petitioner signed all Federal and State corporation tax returns. The corporation's comptroller prepared and signed all sales tax returns. After George Carros was elected to the board of directors, he assumed more responsibilities in the running of the corporation. Petitioner objected to Carros' actions; however, he was outvoted by his sisters who were still officers and stockholders. At some point during the period in issue, Carros took charge of the disbursement of funds for the corporation. Petitioner and the comptroller advised Carros of the sales tax payment situation. Carros, however, failed to take heed of this advice and failed to remit full sales tax payments. Despite Carros' neglect, petitioner continued to allow his signature to be used and failed to take any steps to disassociate himself from the operations of the corporation.

6. The corporation had operated concessions in two department stores in New York State, one in Syracuse and one in DeWitt, under license agreements with

Allied Stores Corporation d/b/a Dey Brothers Co. ("Dey Brothers").[1] The corporation had similar license agreements with Allied Stores of Penn-Ohio, Inc. ("Penn-Ohio") for six stores in Pennsylvania and one in New Jersey. On August 14, 1978, following negotiations which primarily involved petitioner, the corporation terminated its license agreements and sold all of its equipment located in the aforesaid nine stores to Dey Brothers and Penn-Ohio for the sum of $125,000.00. All of the equipment in the Syracuse store was owned by the corporation prior to the sale. However, the equipment in the DeWitt store had been supplied and was owned by Dey Brothers prior to the sale and such assets were, therefore, not transferred under the purchase and sale agreement of August 15, 1978. Neither petitioner nor Dey Brothers notified the Department of Taxation and Finance of the sale nor did either remit the sales tax due on the sale.

7. On audit, the Audit Division determined that the corporation was not reporting taxable sales as recorded on its monthly sales statement. Said underreporting resulted in additional tax due of $20,240.16.[2] An examination of the purchase and sale agreement between Dey Brothers and Penn-Ohio and the corporation revealed that the $125,000.00 sales price was not allocated among the different store locations. To determine the portion of the sales price allocable to New York, the auditor divided the number of New York locations

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[1] Although copies of said agreements were not placed in evidence, the Commission takes judicial notice of the agreements which were in evidence at the hearing in the Matter of Allied Stores Corp., decided herewith (see People v. Singleton, 36 A.D.2d 725).

[2] An additional $321.66 in use tax due was assessed against the corporation but not against petitioner and is not in issue herein.

involved, two, by the total number of locations, nine, and multiplied this amount times the total sales price. Thus the sales price allocable to New York was determined to be $27,777.78 resulting in sales tax due on the sale of $1,944.44. No consideration was given to the fact that no equipment was transferred by the corporation with respect to the DeWitt store.

8. Petitioner argued that he should not be personally liable for the tax due on the bulk sale because Allied, as purchaser, should have primary liability. Moreover, he maintained that the amount of tax allocated to New York was inaccurate because the auditor failed to allow for differences in amount and value of equipment among the nine locations. Petitioner, however, produced no evidence indicating what valuation for the New York locations was intended by the parties to the sale or what the fair market value was. Additionally, petitioner argued that he was not liable as an officer of the corporation for underreported sales tax because he no longer had control over disbursements after George Carros became a director. Moreover, petitioner maintained that since he did not physically sign any corporate checks, he could not be considered responsible for any checks paid or not paid. Finally, petitioner argued that even if he were personally liable, penalties should be waived because the corporation's failure to pay tax was due to reasonable cause and not willfulness. Petitioner, however, failed to produce any evidence showing what reasonable cause the corporation had for failing to pay proper sales tax when due.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law provides for a tax on the "receipts from every retail sale of tangible personal property" with certain exceptions not herein applicable. It was the corporation's responsibility as the seller

to collect from Allied the tax due on the sale of the business assets. Although in bulk sale transactions where the purchaser fails to notify the Tax Commission, the purchaser may be personally liable for any sales taxes determined to be due from the seller to the extent of the amount of the purchase price or fair market value of the assets purchased [Tax Law §1141(c)], there is no statutory duty or responsibility imposed on the State to first obtain tax due from either the seller or purchaser before seeking to obtain the tax from the other party (see Edward M. Burns d/b/a Studio B, State Tax Commission, December 14, 1982). Therefore, petitioner's argument that the Audit Division must obtain taxes due on the bulk sale from Allied is without merit.

B. That section 1138(a) of the Tax Law provides that, if a sales tax return is not filed or is incorrect, "the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices...". In view of the fact that the contract between the corporation and Allied failed to allocate a specific amount to the equipment located in New York and petitioner presented no other evidence of fair market value, the auditor was justified in utilizing the formula discussed in Finding of Fact "7" in order to determine the New York allocation for sales tax purposes.

C. That, inasmuch as no equipment was transferred with respect to the DeWitt store, sales tax on the bulk transfer of assets should have been applied to the sales price allocable to the Syracuse store only or one-ninth of the total price of $125,000.00 or $13,888.89 for a sales tax due on the bulk sale of $972.22. The tax due on the bulk sale is, therefore, to be reduced from $1,944.44 to $972.22.

D. That section 1133(a) of the Tax Law provides, in part, that every person required to collect the taxes imposed under the Sales Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Section 1131(1) of the Tax Law defines "persons required to collect tax" as used in section 1133(a) to include any officer or employee of a corporation, or a dissolved corporation, who as such officer or employee is under a duty to act for the corporation in complying with any requirement of the Sales Tax Law.

E. That 20 NYCRR 526.11(b)(2) describes an officer or employee who is under a duty to act as a person who is authorized to sign a corporation's tax returns or is responsible for maintaining the corporate books, or is responsible for the corporation's management. Other "[i]ndicia of the duty... include factors...such as the officer's day-to-day responsibilities and involvement with the financial affairs and management of the corporation" and "the officer's duties and functions..." (Vogel v. New York State Department of Taxation and Finance, 98 Misc. 2d 222, 225).

F. That inasmuch as petitioner was the president, a director and chief stockholder of the corporation, was one of the required signatories on corporate checks, signed all the corporation tax returns, was responsible for hiring and firing, was actively involved in the daily operations of the corporation, was aware of the financial condition of the corporation, and knew that sales taxes were not being paid, he was a person required to collect tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law. The fact that petitioner did not physically sign checks is irrelevant since the use of a machine-made signature is operative as a signature on checks and other commercial paper (see Uniform Commercial Code, §3-401). Moreover, when petitioner was

aware of Carros' improper activity with respect to sales tax, he made no attempt to thwart such activity by refusing to allow use of his signature or by any other means.

Petitioner's reliance on Chevlowe v. Koerner, 95 Misc.2d 388, is misplaced since, in Chevlowe, the petitioner did not have authority to hire and fire, did not sign tax returns, and was not in control of financial affairs. Moreover, in Chevlowe, a receiver was involved in deciding which checks were to be approved. In the present case none of the above facts are present and the approval or disapproval of checks was purely an internal function, there were no external creditors or receivers who assumed this function.

G. That in view of the fact that petitioner was aware that sales taxes were not being paid and offered no reasonable cause for such failure to pay, penalties and interest will not be waived.

H. That the petition of Milton J. Davis is granted to the extent indicated in Conclusion of Law "C"; that in all other respects, the petition is denied and the notices of determination and demand for payment of sales and use taxes due issued June 20, 1979 and September 20, 1979 are sustained.

DATED: Albany, New York
MAR 09 1984

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

P 470 315 262

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to
Frederick A. Griffin Jr.
Street and No.
P.O. Box 1865-59 Ct Court
P.O., State and ZIP Code
Binghamton, NY 13902

Postage	$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$
Postmark or Date	

PS Form 3800, Feb. 1982

P 470 315 261

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to
Milton J. Davis
Street and No.
213 South Washington Ave.
P.O., State and ZIP Code
Scranton, PA 18503

Postage	$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$
Postmark or Date	

PS Form 3800, Feb. 1982