

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JAMES M. VILLANI, OFFICER OF :
CATARACT LUMBER AND HOME CENTER, INC. :
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1983 :
through September 23, 1986. :

In the Matter of the Petition :
of :
KURT M. VILLANI, OFFICER OF :
CATARACT LUMBER AND HOME CENTER, INC. :
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1983 :
through September 23, 1986. :

DECISION
DTA Nos. 804437,
804438 and 804439

In the Matter of the Petition :
of :
LARRY J. VILLANI, OFFICER OF :
CATARACT LUMBER AND HOME CENTER, INC. :
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1983 :
through September 23, 1986. :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 29, 1992 with respect to the petitions of James M. Villani, officer of Cataract Lumber and Home Center, Inc., 1696 Jane Drive, Niagara Falls, New York 14304, Kurt M. Villani, officer of Cataract Lumber and Home Center, Inc., 50 Islewood, Grand Island,

New York 14072 and Larry J. Villani, officer of Cataract Lumber and Home Center, Inc., 254 Timberlink Drive, Grand Island, New York 14072. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel). Petitioners Larry J. Villani and Kurt M. Villani appeared by Gellman & Gellman, Esqs. (Anthony D. Parone, Esq., of counsel). Petitioner James M. Villani appeared by Donald L. Summer, Esq.

The Division of Taxation filed a letter in lieu of a brief in support of its exception and asked that its brief submitted below be considered in furtherance of its arguments. Petitioners Larry J. and Kurt M. Villani together filed a letter in lieu of a brief in response to the Division of Taxation's brief, and as well, asked that the Tribunal consider the brief filed on behalf of petitioners below in conjunction with their brief in response. James M. Villani also filed a letter in lieu of a brief in response. The Division of Taxation filed a letter in lieu of a reply brief. The Division of Taxation's letter brief was received on April 21, 1993 and began the six-month period for the issuance of this decision. Oral argument, requested by the Division of Taxation, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners were persons required to collect sales and use taxes on behalf of Cataract Lumber & Home Center, Inc., and, as a consequence, liable for sales and use taxes due from that corporation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On April 8, 1986, the Division of Taxation ("Division") issued to petitioners, Larry J. Villani, Kurt M. Villani and James M. Villani, separate notices of determination and demands for payment of sales and use taxes due for the period September 1, 1984 through February 28,

1986, assessing each petitioner sales and use taxes in the amount of \$122,864.33 plus penalty and interest.

On December 23, 1986, the Division issued to petitioners separate notices of determination and demands for payment of sales and use taxes due for the period September 1, 1983 through September 23, 1986, assessing each petitioner for taxes due in the amount of \$134,622.22 plus penalty and interest.

The tax assessed by the April 1986 notices of determination was based upon sales tax returns filed by Cataract Lumber & Home Center, Inc. ("Cataract") without full payment of the tax shown as due on those returns. The December 1986 notice of determination was issued as a result of a sales tax field audit of Cataract's books and records. Petitioners were deemed by the Division to be personally liable for taxes determined to be due from Cataract based primarily upon their status as officers and shareholders of Cataract.

Cataract was a supplier of lumber, hardware and other building supplies, operating a retail store in Niagara Falls, New York, and also selling and delivering materials to the building trade. The business was started after World War II by Guido J. Villani, petitioners' father. In 1976, Guido Villani asked his oldest son, Robert, to take over operation of the business, which he did. Under Robert's direction Cataract expanded, opening up a second retail store in Clarence, New York in the summer of 1984. Financial strains caused by the expansion and by a fire in the Clarence store eventually forced Cataract into bankruptcy. By the end of January 1987 the assets of the business were in the possession of M & T Bank, and the business was no longer operating.

Each of the Villani brothers (Robert, Larry, Kurt, and James) was raised in the business by his father. Larry Villani began working full time at Cataract in 1969, after completing his military service. Kurt went to work for Cataract right after finishing high school in 1970. James began working for Cataract in the early 1970's. Cataract was incorporated in 1973. Its original certificate of incorporation was signed by Guido, Larry and Kurt on December 19,

1973. An amendment to the certificate of incorporation was filed in 1981 and signed by Robert and Kurt.¹

Robert Villani attended college and took courses in business and accounting. In 1966, he began working for National Fuel Gas where he remained until his father became ill sometime in 1976. At that time, Guido asked his oldest son to give up his employment with National Fuel Gas and return to Cataract to operate the family business. Until his illness, Guido was in complete control of Cataract. When Robert entered the business, Guido instructed his younger sons to treat Robert as the head of the family and the business. Because of his age, education and business experience, Robert was thought to be the most qualified of the four brothers to head Cataract.

At some point, Robert became the president of Cataract, and he appointed Larry J. Villani as vice-president, Kurt M. Villani as secretary and James M. Villani as treasurer. On Federal income tax returns filed by Cataract for the fiscal years 1981, 1982 and 1983, petitioners were identified as corporate officers, and each of the four brothers was shown as a 25 percent shareholder of Cataract. All four brothers had authorization to sign Cataract bank checks. Cataract never held board meetings and apparently no resolutions were passed to appoint officers or issue stock. Rather, decisions regarding corporate office and stock ownership were made by Robert in consultation with Guido.

Before and during the assessment period, Robert was in control of the financial affairs of Cataract and was responsible for administration, computerizing operations, personnel, credit, and the corporation's relationships with its bank, its wholesale suppliers, its accountants and its lawyers.

With his father's approval, Robert carried out plans to expand Cataract. At its height, Cataract had approximately 60 to 70 employees in two stores and gross sales of approximately \$6 million per year. Robert hired several individuals who worked in the general office and helped him to operate the corporation, including: Carl J. Andrews, comptroller; David Koch,

¹Robert testified that he made the decision to incorporate Cataract in or about 1976. This testimony is clearly erroneous.

hardware manager and purchaser; Gail Villani (Kurt's wife), in charge of accounts payable; Susan Scarpone, lumber purchasing; and Tony Genoa, office manager. These individuals worked in the Cataract administrative offices on the second floor of the retail store building located in Niagara Falls.

Robert placed Larry in charge of the Niagara Falls retail store; Kurt was made responsible for sales to contractors and home builders; and James was assigned to work in the mill which produced customized wood products. He was later given responsibility for advertising. The three younger brothers were not assigned any responsibilities related to overall management of the corporation, finances, legal affairs, personnel, etc. Robert determined salary levels for each brother, and there is no evidence that the corporation ever distributed profits or dividends to any of the brothers.

As the brothers explained it, because of his position as head of the family (Robert described himself as "almost like a second Dad" [Tr. p. 436]) Robert had complete authority to operate Cataract as he saw fit, set his brothers' salaries, and assign duties and responsibilities to the brothers. The brothers were raised not to question their father's authority; consequently, when their father placed Robert in control of the business, they did not question Robert's authority.

Cataract's books of account were maintained by computer. Cataract had a point of sale system which meant that every sales transaction was entered on a computer which used that information to maintain records of all accounts, including sales, accounts receivable, inventory, general ledger, etc. The only account not maintained on this computer system was payroll. Sales tax returns were prepared from information taken from the computer records. Cataract did not have a sales tax accrual account.

Cataract's primary bank account, and only checking account, was with M & T Bank. The accounts payable clerks prepared checks and placed them on Robert's desk for his review and signature. If he was not available, he would direct Carl Andrews to bring a check to one of the

brothers to sign; however, he never allowed any of the brothers to sign checks for Cataract without his explicit permission or direction.

Generally, the only documents signed by any of the younger brothers were signed at Robert's direction. Very often, the brother signing the document did not even read the document in question, since they all trusted Robert to do what was best for the family and the business. Of the brothers, only Robert had any education beyond high school. In addition, Kurt has a learning disability which made it difficult for him to read with comprehension. There are considerable differences in age between Robert and his brothers. He is 7 years older than his next oldest brother, Larry, and 16 years older than his youngest brother, James. Under cross-examination, Larry Villani explained the relationship between Robert and his younger brothers as follows:

Q: "... so how did it come to pass that the only person ever entitled to make a decision in this whole business was your brother?"

A: "It was my father's wish."

Q: "And did he, when did he express this wish to you?"

A: "I don't recall the year. It had to do in the seventies"

Q: "And what, how did he express it to you? Can you tell me?"

A: "Just that, that we were hard workers, is what my father always told us. We did what he always asked us to do, and we worked diligently for the company and that my older brother was, had gone to school, and that he understood the financial end of the business; accounting, he knew how to read financial statements, he knew how to deal with attorneys and what-have-you and that's how it became. There's nothing else involved here." (Tr. pp. 491-492.)

The Division placed in evidence one sales tax return for the quarter ending November 30, 1984, signed by Kurt Villani. During the audit period, several sales tax returns were signed by Carl Andrews as comptroller of Cataract. Two other documents signed by one of the brothers were placed in evidence: a retail sales contract for the purchase of a truck, signed by Kurt, and a retail sales contract for the purchase of an automobile, signed by James. The automobile was James's personal vehicle. It was purchased by Cataract and insured as a vehicle owned by Cataract in order to reduce James's cost of insuring the vehicle.

In 1983, Robert decided to open a store in Clarence, New York. A lease of a building in Clarence, signed by all four of the brothers, was executed on December 13, 1983. Kurt was placed in charge of overseeing the renovation and stocking of the new store. In addition, he was responsible for outside sales which involved building a customer base among contractors and home builders in the Clarence area. He continued working in Clarence after the store was completed. The store manager was an individual named Gary Spuller.

Robert attempted, but was unable, to negotiate a loan to finance the renovation of the Clarence store and the purchase of inventory. As a result, Cataract suffered a severe cash flow problem, and by the summer of 1984, Cataract was being administered by the special loans department of M & T Bank.² The bank extended a line of credit to Cataract, secured by its accounts receivable, to help it meet its daily operational expenses. The amount of credit available on any given day was a product of the overall credit limit, cash on hand, and Cataract's accounts receivable. Each morning at about 9:00 A.M., a loan officer contacted Robert Villani and told him the total amount of credit available to Cataract that morning and the total amount of all checks presented for payment that day. Usually, there was a shortfall of cash. Robert and Carl Andrews would then attempt to raise enough money to cover the checks offered for payment that morning. This would entail attempts to collect payments from contractors and other customers purchasing on credit, deposit of the previous day's receipts, and a calculation of any new accounts receivable which would increase the line of credit. After several hours of attempting to generate cash, Robert would contact the M & T loan officer to obtain a final accounting. If Robert had not raised enough money to cover all checks and was unsuccessful in persuading the loan officer to increase the line of credit, he made the final decision as to which checks were to be honored and which were to be returned to the payee.

The Clarence retail store was opened for business in the summer of 1984. In November or December 1985, there was a fire which caused extensive damage to the store and inventory. Cataract claimed approximately \$400,000.00 in damages. Robert and Carl Andrews attempted

²Cataract's sales tax liabilities stem almost entirely from the period beginning in the summer of 1984.

to obtain an advance from the insurance company based on this claim, but they were unable to do so. Consequently, Cataract suffered even more financial distress which finally led to its filing a petition in bankruptcy.

As Cataract's financial condition deteriorated, Robert's control over corporate finances became tighter. M & T Bank insisted that Robert act as the sole liaison between Cataract and the bank and be responsible for all negotiations and decision-making. Robert attempted to control all purchasing, and he did control all payments to creditors. At some point, he travelled to Pennsylvania to demand that Cataract's second largest creditor, American Hardware, not accept any purchase orders from Cataract without Robert's prior approval of the order.

Several employees had authority to purchase materials for sale including David Koch, Susan Scarpone, Larry Villani, Kurt Villani and other managers. Purchases over \$500.00 had to be cleared through Robert. Payments of purchases were controlled by Robert. Because Cataract was not paying its debts, suppliers became unwilling to extend credit and, consequently, to accept orders. This led to arguments and discussions among the various managers with regard to which suppliers should be paid. All of the brothers participated in those discussions, but Robert always made the final decision regarding who was to be paid and who was not.

Although the financial condition of Cataract was precarious from the summer of 1984, each petitioner denied that he was ever told the true state of affairs. Each one testified that Robert did not discuss Cataract's financial affairs with him. Larry stated that he was assured by his brother that any problems were temporary and that he, Robert, was in control of the situation.

Cataract filed a voluntary petition in bankruptcy under Chapter 11 in September 1986. By October of 1986, M & T Bank repossessed substantially all of Cataract's assets and took control of the business. Robert Villani announced the bankruptcy and M & T's repossession at a meeting of all employees held in October 1986. Until that meeting, Larry, Kurt, and James

Villani did not completely understand the gravity of Cataract's financial situation and did not know that Cataract had filed a bankruptcy petition.

M & T Bank continued operating Cataract for several months after its takeover. Bank employees selected those individuals who were to remain in Cataract's employ and those who were to be dismissed. Robert, Larry and James Villani were retained as was Gail Villani. Kurt did not work for Cataract after October 1986. In the beginning of December 1986, the retail business was closed altogether, and all employees except Gail Villani were dismissed. Gail's primary duties were to assemble information for bank employees and to attempt to collect accounts receivable. She was dismissed at the end of January.

Cataract filed sales tax returns for the period December 1, 1984 through February 28, 1986 without remittance of the tax shown as due on those returns. Robert Villani met with representatives of the Division on several occasions to discuss these tax delinquencies. Gerald Staub, a tax compliance agent present at those meetings, stated his belief that Larry and Kurt were also present at one or more meetings. On October 24, 1989, Mr. Staub testified at a hearing which was held to determine whether petitions filed in this matter were timely. At that hearing, he testified as follows: "I met with three brothers and a controller [sic] once and at least two brothers and a controller [sic] one other time." (Tr. p. 62.) He was asked to identify the brothers present at these meetings and stated: "The only brother I can be sure of is --." This sentence was never completed. Larry and Kurt denied being present. Gail Villani identified the individuals attending those meetings as Robert, Carl Andrews, Cataract's accountant Frank Di Dario, and Tony Genoa. Carl Andrews stated that the meetings were attended by Robert, himself and another accountant, Bill Kearney. He did not believe that any of the other brothers attended these meetings but could not remember with certainty. Mr. Staub testified that he was told by Robert Villani that all four brothers had an equal voice in the running of Cataract.

In July 1986, the Division began a sales tax field audit of Cataract for the period September 1, 1983 through August 31, 1986. In his workpapers, the auditor identified Robert

Villani and Carl Andrews as the persons assisting in the audit.³ Larry, Kurt and James are listed as corporate officers on the "Sales Tax Audit Report Information Sheet", but they are not mentioned in any other portion of the audit report. In connection with the audit, Robert signed a consent to extend the period of limitations for assessment of sales taxes and an audit method election form.

There is a factual dispute with regard to the degree to which Kurt and Larry participated in the audit; consequently, it is necessary to review the auditor's testimony and the responding testimony of petitioners' witnesses in some detail. The auditor's notes indicate that he was in the field, apparently at Cataract's offices, on seven occasions in September, four in October, and five in November. He testified that he was aided in the conduct of the audit by Larry, Kurt and Gail Villani. He also stated that Larry and Kurt were working in the Cataract retail store during the entire time that the store was operating. In addition, he indicated that he saw all four brothers in the store in December 1986.

Kurt testified that he was instructed by Robert to provide the auditor with whatever information he needed. When asked for information, Kurt would either go to the person in charge of that area of recordkeeping, retrieve the requested documents and give them to the auditor or direct the auditor to the requested documents.

Both Gail and Kurt Villani testified that Kurt was not employed by Cataract after M & T Bank took control in October 1986. Gail testified that Kurt was not present in Cataract's offices after that time.

The auditor stated that James did not participate in the audit in any manner. Larry's only role in the audit was to provide the auditor with information on exempt sales and exemption certificates.

The auditor's notes indicate that he was at the offices of Cataract on December 9, 1986; December 17, 1986 and December 18, 1986. He testified that all four brothers were still working in the store on those dates and that the store was still operating (Tr. pp. 591-592);

³Mr. Andrews could not remember participating in the audit in any fashion.

however, his notes indicate that "M & T Bank closed business on [December 9, 1986]". Gail Villani testified that M & T Bank closed the Cataract store at the beginning of December 1986 and that she was the only former Cataract employee on the premises after the beginning of December. She denied that any of the brothers were at Cataract's offices on December 17, 1986 or December 18, 1986.

The audit report contains the following statement:

"At the conclusion of the audit, the schedules and workpapers were reviewed with Robert Villani, President of the corporations.

He indicated that he will research all areas of discrepancies and will try to gather additional information. However, since the vendor has filed bankruptcy and M & T Bank was in the process of liquidating the assets, AU-16's were issued and mailed to the corporation and each of the responsible officers on December 23, 1986. The vendor was advised of his protest rights and given TAB petitions."

Although the notices of determination were issued on December 23, 1986, the auditor's notes indicate that he continued to work on the case through January 1987. Entries for January 5, 21, and 27 show that the auditor worked on the case in his office. There are no entries in the auditor's log that indicate that he met or spoke with representatives of Cataract after December 18, 1986. The auditor's log indicates that he spent the entire day in the field on January 26, 1987. His handwritten entry for that date states: "Reviewed add'l info". He testified that he met with Larry, Kurt and Gail Villani on January 26, 1987, in the offices of Cataract, to discuss additional information needed for the audit. Gail Villani testified that she was present in the Cataract offices in late January when the auditor stopped in to request additional documents. She stated that an employee of M & T Bank was also on the premises at that time. However, it was her testimony that the meeting with the auditor was accidental and not previously arranged and that neither Kurt nor Larry were present. She stated that only bank employees had access to Cataract's offices at that time and that she only went to the offices when a bank representative was present to let her in.

Kurt Villani signed a letter resigning as an officer of Cataract as of June 19, 1984. His resignation came about as a result of an argument between him and Robert. Kurt felt that he

was not being given sufficient authority and control despite his brother's protestations that all the brothers were owners and officers of Cataract. He expressed his opinion that his status as an officer of Cataract was a sham. After consulting with an attorney, Kurt resigned as an officer. Robert then fired Kurt, but after several weeks Robert was persuaded by his father to rehire him. Kurt continued to appear on documents filed by the corporation as a corporate officer.

All of the brothers denied being aware of the financial condition of Cataract during the assessment years. They each stated that Robert never discussed the financial affairs of the company with his other brothers; that they did not know each other's salaries; that they had no authority to hire or fire employees; and that they made no decisions regarding the overall management and supervision of the corporation.

OPINION

The Administrative Law Judge determined that, based on the evidence, including the testimony of three disinterested witnesses who worked for Cataract during the assessment period, "Robert Villani had complete control of Cataract during the assessment period and . . . his younger brothers had only that managerial, administrative, supervisory or financial authority delegated to them by Robert" (Determination, p. 17). Specifically, the Administrative Law Judge noted that petitioners Larry, Kurt and James each lacked the authority to hire and fire employees, decide which creditors were paid and which were not, authorize the payment of debts and sign checks. The Administrative Law Judge further pointed out that from the summer of 1984, M & T Bank, the corporation's primary bank, refused to communicate with anyone except Robert and insisted that he alone be in charge of corporate finances.

In addition, the Administrative Law Judge determined that, contrary to the Division's contentions, the limited observations of a certain tax compliance agent and the auditor were insufficient to disprove the testimony of petitioners or to prove, ultimately, that petitioners were responsible officers of Cataract, exercising authority and control over its operations. For instance, noted the Administrative Law Judge, not only was the tax compliance agent's

testimony regarding petitioners' attendance at various tax compliance meetings inconsistent with the testimony he had given at the 1989 hearing,⁴ as well, it was in conflict with the testimony of petitioners and certain of petitioners' witnesses. In short, held the Administrative Law Judge, the evidence does not prove with certainty that any of petitioners did or did not attend these meetings.

As for the testimony of the auditor, the Administrative Law Judge found that "[i]n specific instances, the auditor's testimony is called into question by other evidence in the record" (Determination, p. 18). For example, the Administrative Law Judge found that there was no evidence to indicate that the auditor met with Kurt and Larry Villani in late January of 1987 for the purpose of a "closing conference." In any case, opined the Administrative Law Judge, such a meeting, if it were held, would have served little purpose since, by that date, the audit had been closed and the notices of determination had been issued. Moreover, added the Administrative Law Judge, whether or not Larry and Kurt were at such a meeting, would not have any material bearing on whether or not either ultimately had a duty to act for the corporation during the assessment period.

Similarly, the Administrative Law Judge found that while the auditor's testimony that he was assisted in the audit by Larry and Kurt is corroborated by other testimony, this does not indicate that the two brothers were actively involved in managing the corporation during the audit period. In fact, the Administrative Law Judge pointed out, there is no mention of Larry, Kurt or James Villani in the audit report; rather, the report reveals that Robert Villani and Carl Andrews represented Cataract during the audit.

As for the ultimate question of whether each of the three petitioners proved that he was not a responsible officer for Cataract during the audit period, the Administrative Law Judge held that "the weight of the evidence establishes that, as a practical matter, Larry, Kurt and James lacked the authority to act for Cataract" (Determination, p. 21). As opposed to the situation in Matter of Pais (Tax Appeals Tribunal, July 18, 1991), relied upon by the Division, the Administrative

⁴As alluded to in the findings of fact, prior to the hearing below, a hearing was held on October 24, 1989, continued on January 9, 1990, regarding the timeliness of petitioners' petitions.

Law Judge held that petitioners here did not choose not to exercise control over the corporation despite the opportunity to do so; rather, they had no authority to ensure that Cataract's sales taxes were paid, and therefore were not under a duty to act for the corporation. Accordingly, the Administrative Law Judge cancelled the notices of determination.

On exception, the Division requests that the determination of the Administrative Law Judge be reversed and petitioners be found responsible officers of Cataract under section 1131(1) of the Tax Law.

In support of its position that petitioners each individually had a "duty to act" for Cataract, the Division stresses that each petitioner was an officer of the corporation, a 25% shareholder, a check signatory and each had an economic interest in Cataract (Division's brief on exception, p. 1, citing Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; 20 NYCRR 526.11[b][2]). In addition, notes the Division, Kurt Villani signed a sales tax return.

The crux of the Division's argument is its assertion that despite the fact that petitioners "could have had as much control over the corporation as they wanted[,] they chose to delegate authority and not exercise control" (Division's brief on exception, p. 2). The Division urges that petitioners' decision not to act does not relieve them of the duty to act, "[n]or does the allegation that they did not act in any way imply that they could not have acted had they chosen to do so" (Division's brief on exception, p. 2, citing Matter of Kropf, Tax Appeals Tribunal, March 21, 1991 [in turn, citing Matter of Blodnick v. New York State Tax Commn., supra]). "The Petitioners may have delegated authority," offers the Division, "[b]ut the question is, was it proper for them . . . to do so?" (Division's reply brief, p. 2). The Division rejects the Administrative Law Judge's characterization of petitioners as having been precluded from acting on behalf of the corporation by Robert, and maintains that the cases cited as support for this notion by the Administrative Law Judge are situationally irrelevant. In sum, the Division

refutes the notion that because petitioners delegated their responsibilities to Robert, he is the sole responsible officer.

The Division specifically objects to the Administrative Law Judge's conclusions that petitioners' assertion that they never questioned their older brother about his conduct of the business was "entirely credible" (Division's brief on exception, p. 3, quoting Determination, p. 21), and that the nature of the familial relationship of the brothers is the basis for the determination that petitioners were each denied the authority to insure that the corporation's sales taxes were paid. For one thing, argues the Division, because petitioners together are majority shareholders of Cataract, had they attempted to act on behalf of the corporation and/or to force Robert out of the corporation, there would have been nothing Robert could have done to prevent this.

Secondly, contends the Division, the supposed delegation of authority was never as complete as petitioners have sought to portray it, for salary levels for all of the brothers were the same; each petitioner had input into how the business was run; all petitioners had a certain say in who was to be hired or fired; there was no absolute separation of duties amongst the brothers; and when asked by the tax compliance agent to identify the responsible officers of the corporation, Robert Villani gave him a list containing all of petitioners' names. In addition, the Division avers that the "many contradictions" in petitioners' testimony and that of petitioners' witnesses "call into doubt" the testimony's value on this issue of delegation (Division's brief below, p. 5).

Thirdly, the Division maintains that petitioners did not accept Robert's control completely, noting that petitioners felt free to quit in protest of how the business was being run, knowing that they would be asked to return and could not be fired.

Finally, the Division objects to the Administrative Law Judge's elevation of "the nature of the familial relations" to a legal status, and her equating it with certain actions taken by the corporate officers in Matter of Roncolato (Tax Appeals Tribunal, August 15, 1991) and Matter of Constantino (supra). The Division warns that "[i]f this Conclusion of Law is allowed to

stand, the implications are mind-boggling. It would introduce an entire new theory of how to evade responsibility: the family relation defense. Thus no wife is ever a responsible officer; 'I always obey my husband' and no son is ever responsible; 'I always obey my father'" (Division's brief on exception, p. 3).

In its reply brief, the Division challenges, in addition, the claim in the brief filed on behalf of Kurt and Larry Villani that the determination was made after the Administrative Law Judge had heard all the testimony. The Division explains that the Administrative Law Judge was present at only the final hearing session and therefore never heard the testimony of Robert and James Villani or Carl Andrews, the latter of whom, according to the Division, the Administrative Law Judge indicated "'testified credibly'" (Division's reply brief, p. 2, quoting Determination, p. 17).

In response, petitioners ask that the determination of the Administrative Law Judge be sustained. Petitioners Larry and Kurt Villani assert that the record clearly supports the Administrative Law Judge's determination that petitioners were not under a duty to act for the corporation in complying with the requirements of the Tax Law and were, therefore, not responsible officers within the meaning of section 1131(1) of the Tax Law. Petitioners further contend that the Division's letter brief amounts to naught but a mere offering of the Division's opinion versus that of the Administrative Law Judge as to how the evidence should be construed in light of the relevant case law. Finally, petitioners reject the Division's "attempts to discredit the Administrative Law Judge's determination by claiming a new 'family relation defense' theory was adopted" (Brief of petitioners Larry and Kurt Villani in response, p. 4). Petitioners maintain that the Administrative Law Judge was simply applying the legal principles and indicia of responsibility in the relevant cases to the evidence presented.

In response to the Division's letter brief, petitioner James Villani asks that the Administrative Law Judge's determination be upheld "as there was no error of law but merely an issue of fact" upon which the Administrative Law Judge based her determination, having had the unique opportunity to hear the witnesses and judge their credibility (Brief of petitioner James Villani in response, p. 2).

We affirm the determination of the Administrative Law Judge. Further, because we find that the Administrative Law Judge completely and adequately addressed the issues before her, we see no reason to analyze these issues further and, therefore, affirm the Administrative Law Judge based on her determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Larry J. Villani, Kurt M. Villani and James M. Villani, officers of Cataract Lumber and Home Center, Inc. are granted; and
4. The notices of determination and demand for payment of sales and use taxes due issued to Larry J. Villani, Kurt M. Villani and James M. Villani on April 8, 1986 are cancelled.

DATED: Troy, New York
September 23, 1993

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner