

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**MARK S. PESSO, OFFICER OF** :  
**PESSO KEEPSAKE DIAMOND CORNER, LTD.** :  
**AND UNIQUE BOUTIQUE, LTD.** :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period December 1, 1992 :  
through August 31, 1993. :

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DECISION  
DTA NOS. 813211  
AND 813212

In the Matter of the Petition :  
of :  
**VICTOR S. PESSO, OFFICER OF** :  
**PESSO KEEPSAKE DIAMOND CORNER, LTD.,** :  
**J.P. LAURENS-ROOSEVELT FIELD, LTD.,** :  
**MUTT & JEFF RESTAURANT, INC.** :  
**AND UNIQUE BOUTIQUE, LTD.** :  
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, 1992 :  
through August 31, 1993. :

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Petitioners Mark S. Pesso, 493 Links Drive East, Oceanside, New York 11572, and Victor S. Pesso, 1116 50th Street, Brooklyn, New York 11290, filed an exception to the determination of the Administrative Law Judge issued on August 1, 1996.<sup>1</sup> Petitioners appeared by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioners filed a brief on exception and a reply brief. The Division of Taxation filed a brief in opposition. Petitioners' request for oral argument was denied.

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<sup>1</sup>Only one exception was filed covering both individuals, but for different time periods.

Commissioner Jenkins delivered the decision of the Tax Appeals Tribunal. Commissioner DeWitt concurs. Commissioner Pinto took no part in the consideration of this decision.

### ***ISSUES***

I. Whether petitioners are liable for sales and use taxes due on behalf of various corporations as persons responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

II. Whether sales tax penalty should be abated due to reasonable cause and the absence of willful neglect.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except for findings of fact "11," "13" through "20," "22" through "25," "30," "32," "34" through "37," "39" and "42" through "43" which have been modified and findings of fact "33" and "45"<sup>2</sup> which have been deleted. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

During the periods in issue, the following retail jewelry stores: Pessio Keepsake Diamond Corner, Ltd. ("Pessio Keepsake"), Unique Boutique, Ltd. ("Unique"), J.P. Laurens - Roosevelt Field, Ltd. ("J.P. Laurens") and a fast food restaurant, Mutt & Jeff Restaurant, Inc. ("Mutt & Jeff") were all located in the Roosevelt Field Shopping Center ("Roosevelt Field").<sup>3</sup> The Roosevelt Field Shopping Center is located in Garden City, New York.

On August 12, 1993, the Division of Taxation ("Division") issued to petitioner Mark S. Pessio ("Mark") a Notice of Determination of sales and use taxes due (L-007770546-8) for the period December 1, 1992 through February 28, 1993, for tax due in the amount of \$30,613.55, penalty due of \$5,325.06 and interest due of \$2,136.58, for a total amount due of \$38,075.19.

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<sup>2</sup>We have deleted finding of fact "45" of the Administrative Law Judge's determination and incorporated its substance in earlier findings.

<sup>3</sup>Collectively, these four corporations are referred to variously as "the subject corporations" or "the stores."

On March 18, 1994, the Division issued to Mark a Notice of Determination of sales and use taxes due (L-008572112-9) for the period June 1, 1993 through August 31, 1993, for tax due in the amount of \$9,667.41, penalty due of \$1,493.94 and interest due of \$633.54, for a total amount due of \$11,794.89. On the same date, the Division also issued to Mark a Notice of Determination of sales and use taxes due (L-008572113-8) for the period March 1, 1993 through May 31, 1993, for tax due in the amount of \$5,455.09, penalty due of \$1,318.39 and interest due of \$545.79, for a total amount due of \$7,319.27.

Each of the notices stated that Mark was personally liable as an officer/responsible person of Unique under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

On December 20, 1993, the Division issued to Mark a Notice of Determination of sales and use taxes due (L-008330669-1) for the period June 1, 1993 through August 31, 1993, for tax due in the amount of \$8,921.88, penalty due of \$1,114.30 and interest due of \$317.03 for a total amount due of \$10,353.21.

On the same date, the Division also issued to Mark a Notice of Determination of sales and use taxes due (L-008330670-1) for the period March 1, 1993 through May 31, 1993, for tax due in the amount of \$5,518.73, penalty due of \$1,311.41 and interest due of \$394.60, for a total amount due of \$7,224.74.

Each of the notices stated that Mark was personally liable as an officer/responsible person of Pesso Keepsake under Tax Law §§ 1131(1) and 1133 for tax determined to be due in accordance with Tax Law § 1138(a).

Included as part of the Division's exhibits in the matter involving petitioner Mark S. Pesso were copies of six Notices of Determination (Division's Exhibit "F") issued to him as officer/responsible person of either Unique or Pesso Keepsake. Five of the notices are described above. However, the sixth notice was a duplicate copy of Notice of Determination L-008330669-1, *supra*. Notice of Determination (L-007770549-5), issued to Mark, as an officer/responsible person of Pesso Keepsake, of sales and use taxes due for the period

December 1, 1992 through February 28, 1993, was not submitted into the record at hearing.

By letter dated July 2, 1996, the Administrative Law Judge notified both parties that the Division of Tax Appeals lacked subject matter jurisdiction over that portion of Mark Pessio's petition which pertained to Notice of Determination L-007770549-5 inasmuch as that notice of determination was not part of the record. The parties were given until July 12, 1996 to submit either a copy of the Notice of Determination or some evidence sufficient to prove both the fact and the date of mailing of the notice of determination by the Division into the record.

The Division submitted a copy of Notice of Determination L-007770549-5 into the record. This Notice of Determination, dated August 12, 1993, of sales and use taxes due for the period December 1, 1992 through February 28, 1993 for tax due in the amount of \$37,015.30, penalty due of \$6,427.16 and interest of \$2,583.00, for a total amount due of \$46,025.46, addressed to Mark and stated that he was personally liable as an officer/responsible person of Pessio Keepsake under Tax Law §§ 1131(1) and 1133 for tax determined to be due in accordance with Tax Law § 1138(a).

The notices issued by the Division to Mark in connection with Unique and Pessio Keepsake were based upon late filed and timely filed sales tax returns accompanied by only partial remittances of the sales taxes reported due on the sales tax returns.

On August 12, 1993, the Division issued to petitioner, Victor S. Pessio ("Victor"), a Notice of Determination of sales and use taxes due (L-007770545-9) for the period December 1, 1992 through February 28, 1993 for tax due in the amount of \$30,613.55, penalty due of \$5,325.06 and interest due of \$2,136.58, for a total amount due of \$38,075.19.

On March 18, 1994, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-008572108-3) for the period June 1, 1993 through August 31, 1993, for tax due in the amount of \$9,667.41, penalty due of \$1,493.94 and interest due of \$633.54, for a total amount due of \$11,794.89.

On the same date, the Division also issued to Victor a Notice of Determination of sales and use taxes due (L-008572109-2) for the period March 1, 1993 through May 31, 1993, for tax

due in the amount of \$5,455.09, penalty due of \$1,318.39 and interest due of \$545.79, for a total amount due of \$7,319.27.

Each of the notices stated that Victor was personally liable as an officer/responsible person of Unique under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

On August 12, 1993, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-007770547-7) for the period December 1, 1992 through February 28, 1993, for tax due in the amount of \$37,015.30, penalty due of \$6,427.16 and interest due of \$2,583.00, for a total amount due of \$46,025.46.

On December 20, 1993, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-008330671-9) for the period June 1, 1993 through August 31, 1993, for tax due in the amount of \$8,921.88, penalty due of \$1,114.30 and interest due of \$317.03, for a total amount due of \$10,353.21.

On the same date, the Division also issued to Victor a Notice of Determination of sales and use taxes due (L-008330672-8) for the period March 1, 1993 through May 31, 1993, for tax due in the amount of \$5,518.73, penalty due of \$1,311.41 and interest due of \$394.60, for a total amount due of \$7,224.74.

Each of the notices stated that Victor was personally liable as an officer/responsible person of Pesso Keepsake under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

On September 20, 1993, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-007948825-9) for the period September 1, 1992 through November 30, 1992, for tax due in the amount of \$8,564.97, penalty due of \$1,625.13 and interest due of \$896.65, less payments of \$212.65, for a total amount due of \$10,874.10.

On November 29, 1993, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-008282335-8) for the period March 1, 1993 through May 31, 1993, for tax due in the amount of \$3,140.66, penalty due of \$606.92 and interest due of \$186.40, for a total

amount due of \$3,933.98.

Each of the notices stated that Victor was personally liable as an officer/responsible person of J.P. Laurens under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

On December 13, 1993, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-008316311-3) for the period December 1, 1992 through February 28, 1993, for tax due in the amount of \$10,088.47, penalty due of \$2,354.74 and interest due of \$883.28, less payments of \$5,691.74, for a total amount due of \$7,634.75.

This notice stated that Victor was personally liable as an officer/responsible person of Mutt & Jeff under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

The notices of determination issued by the Division to Victor in connection with Unique, Pessio Keepsake, J.P. Laurens and Mutt & Jeff were based upon late and timely filed sales tax returns accompanied by only partial remittances of the sales taxes reported due on the sales tax returns.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

On March 21, 1994, the Division issued to Victor a Notice of Estimated Determination of sales and use taxes due (L-008577759-9) for the period March 1, 1993 through May 31, 1993, for estimated tax due in the amount of \$22,458.80, penalty due of \$4,379.41 and interest due of \$2,225.01, for a total amount due of \$29,063.22.

On the same date, the Division also issued to Victor a Notice of Estimated Determination (L-008577760-9) for the period June 1, 1993 through August 31, 1993, for estimated tax due in the amount of \$33,688.20, penalty due of \$5,726.98 and interest due of \$2,409.44, for a total amount due of \$41,824.62.

Each of the notices stated that Victor was personally liable as an officer/responsible person of Mutt & Jeff under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a). Each of the notices also stated that the tax assessed had been estimated in accordance with Tax Law § 1138 because a required tax return had not been filed by Mutt & Jeff. Both of the notices in the record consist of a single page with type on both sides. There is nothing on either notice in the record to show the basis for the

Division's estimates.<sup>4</sup>

After a conciliation conference, the conferee issued Conciliation Orders (CMS Nos. 133393; 137174; 138972; 137173; 135844; 133807; 133395; 139018; and 138971), dated July 22, 1994, sustaining the statutory notices issued to both petitioners.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

Petitioner Mark S. Pessa, as an officer of Pessa Keepsake and Unique, filed a petition for the period November 30, 1992 through August 31, 1993 in the combined amount of \$81,640.00, plus penalty and interest. It is unclear how petitioner arrived at this amount, since the total amount of tax asserted by the six notices in dispute is \$97,191.96. Since this could be an inadvertent error by petitioner, we deem the full amount of \$97,191.96, plus penalty and interest, to be in dispute.

Petitioner Victor S. Pessa, as officer of Pessa Keepsake, J.P. Laurens, Mutt & Jeff and Unique, filed a petition<sup>5</sup> for the period September 1, 1992 through August 31, 1993 in the combined amount of \$110,419.00, plus penalty and interest.<sup>6</sup>

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

The Division, in its answers to Mark's and Victor's petitions,

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We modified finding of fact "11" of the Administrative Law Judge's determination to include the fact that no basis was offered to show how the Division arrived at its estimated assessments.

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The petition referenced the following conciliation orders which were attached to the petition: CMS Numbers 137173, 135844, 133807, 133395, 139018 and 138971.

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We modified finding of fact "13" of the Administrative Law Judge's determination to eliminate extraneous matters and to clarify other matters, i.e., the period covered by Mark's petition and the tax amount covered by the notices. The petition referenced the following conciliation orders which were attached to the petition: CMS Numbers 133933, 137174 and 138972. The six notices of determination covered by those BCMS Orders total tax of \$97,191.96 and cover the period November 30, 1992 through August 31, 1993.

stated, inter alia, that it correctly determined that petitioners were responsible officers within the meaning and intent of Tax Law § 1131(1) and, therefore, personally liable for the tax asserted in the notices at issue.<sup>7</sup>

We modify findings of fact "15" and "16" of the Administrative Law Judge's determination to read as follows:

Mark and Victor's father is Jack Pessa (variously referred to as "Jack," "Jack Pessa," "the president" or "their father"). During the periods in issue, Jack Pessa was president of the subject corporate entities: Unique, Pessa Keepsake, J.P. Laurens and Mutt & Jeff.

Jack Pessa executed a Withdrawal of Petition and Discontinuance of Proceeding in the Matter of the Petition of Jack Pessa, as officer of the four corporations, for the period September 1, 1992 through August 31, 1993. In addition, pursuant to a Deferred Payment Agreement he signed with the Division several months prior to hearing, he has been making monthly payments on the subject liabilities pursuant to that agreement. When Jack Pessa was negotiating the payment agreement with the Division's employee, Jack noted that there were several people in his companies that had check-signing authority during the period Victor and Mark were officers. The Division's employee said yes, but who was responsible? Jack Pessa responded, "I was responsible" (tr., pp. 62-64). The Division's employee then stated that if he was the only responsible officer, then his income would have to be garnished in addition to the monthly payments.<sup>8</sup>

We modify findings of fact "17," "18," "19" and "20" of the Administrative Law Judge's determination to read as follows:

Both Mark and Victor were vice presidents of the following corporations: Unique, Pessa Keepsake, and J.P. Laurens.

Victor was also vice president of Mutt & Jeff. The record is silent as to when Mark and Victor became officers of the various corporations or the specific dates when they resigned. Neither Victor nor Mark owned any shares of stock in the four corporations.

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We modified finding of fact "14" of the Administrative Law Judge's determination to concisely recite the facts set forth therein.

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We modified findings of fact "15" and "16" of the Administrative Law Judge's determination to accurately reflect the record.



Mark resigned from the subject corporations after Christmas 1992 and went to work for Chicken International a/k/a Cluckers, a retail food franchise, in January 1993. In August 1993, Mark, conscious of his father's increasingly serious financial difficulties, returned to work as manager of Unique for a short, unspecified period (tr., pp. 93-94).

Victor resigned from the subject corporations in February 1994 (approximately) because he did not feel that his father was following his advice. He testified that he did not have the necessary decision-making authority in the companies to affect their potential reorganization when they filed Chapter 11 bankruptcy (tr., p. 115).

As noted above, Unique, Pesso Keepsake, J.P. Laurens and Mutt & Jeff were all located in the Roosevelt Field mall.

Also located in Roosevelt Field was a central buying office<sup>9</sup> consisting of an office complex "of a few thousand square feet" which included, inter alia, Mr. Pesso's, Victor's and Mark's offices, a private conference area, the bookkeepers' department and the central inventory department (tr., p. 119). Although Mark had an office, he did not work there (tr., p. 97). Approximately 20 to 25 people were located in that office complex. According to Jack Pesso, the bookkeeping department employed four individuals and Susan Findlay was employed as the "office controller" (tr., p. 41). Susan Findlay had the same check-writing authority as Mark, Victor and their father.

At some point in 1987, the landlord of Roosevelt Field, due to anticipated construction and renovation at the mall, relocated the four Pesso stores to other locations in the mall. At that time, Jack Pesso asked Mark to assist him in the renovation of the four stores. Mark agreed, coming on board at first to renovate the stores and later to manage Unique. Mark opened and closed the store and supervised 10 to 12 employees. Mark spent 90% of his time at Unique. Mark met with his father daily to keep him apprised of what was happening at the store. Mark did not become involved with the financial aspect of the business. Neither Mark nor Victor could do anything with respect to business operations without first getting their father's approval (tr., pp. 47, 70-79). When asked what his sons could do in the operation of the business without first talking to him, Jack Pesso responded, "[n]othing" (tr., p. 47).

At some point in late 1987, Jack Pesso asked Victor to come on board and to help out. Victor described his role at the beginning as being oriented towards getting "a feel for the overall business" (tr., p. 106). After an initial period of time, Victor began buying merchandise for the stores. Although Victor was a buyer, he did not decide what vendors were paid or not paid; his father did. Victor did not sign payroll checks and any checks he did sign were after first obtaining his father's approval (tr., pp. 108-110). Mutt & Jeff had its own manager

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J.P. Enterprises was the umbrella company used as a mailing address for all of the entities.

of over 20 years and operated independently. There are no facts in this record that show that Victor or Mark had any involvement in the day-to-day business operations of Mutt & Jeff.<sup>10</sup>

Both Mark and Victor received the same amount as their respective weekly salary. Mark's salary of \$500.00 per week was paid by Unique, while Victor's \$500.00 per week salary was paid by Pessa Keepsake.

We modify findings of fact "22," "23" and "24" of the Administrative Law Judge's determination to read as follows:

Jack Pessa proffered the following explanation of how he generally ran the various businesses:

"I ran it -- there was no formal way of running it. I wasn't used to that type of an operation other than I would meet with my sons in the morning, possibly another store manager, and just tell them what I wanted done

for the day. And the overall picture was pretty much a gut operation" (tr., p. 40).

Jack Pessa testified that neither Mark, Victor nor anyone else could sign a check without coming to him for approval (tr., p. 42). Before checks were made out, Jack would get a sheet from the comptroller, Susan Findlay, showing all the checks that needed to be made out. He would indicate his approval for those checks he wanted prepared (tr., p. 43). Any one of the bookkeepers would make out the checks that had been approved. Either Mark, Victor or Susan Findlay could sign the checks, but only after Jack Pessa decided who was to be paid and how much. Jack Pessa was totally responsible for hiring and firing employees (tr., p. 44).

Mark and Victor would meet each morning with their father to discuss problems with customers, employees or creditors that needed to be paid (tr., p. 45).

Mark was the general manager of Unique. He was responsible for the daily operations of that store. He also sold jewelry on the floor of Unique. The managers of Pessa Keepsake and J.P. Laurens could discuss problems in their stores with Mark, but this was unusual. At their morning meetings, Mark kept his father abreast of the matters that

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We modified findings of fact "17," "18," "19" and "20" of the Administrative Law Judge's determination to more clearly set forth the facts in the record.

had been brought to his attention.<sup>11</sup>

We modify finding of fact "25" of the Administrative Law Judge's determination to read as follows:

During the periods in issue, the bookkeepers discussed various matters with Victor including sales tax matters for the various corporations. However, the record reflects that, as in other areas, Victor only became involved with tax matters after being directed to do so by his father (tr., pp. 53-55).<sup>12</sup>

As of October 1, 1987, both Mark and Victor were authorized signatories on J.P. Laurens' Chemical Bank Corporation account along with Jack Pessa and Herbert L. Chaback. Only one signature was required on that account. The account's signature card was updated on April 8, 1992, Jack Pessa, Mark and Victor all continued to be authorized signatories; however Susan Findlay replaced Mr. Chaback as the fourth authorized signatory. Review of the updated commercial signature card reveals that "any one" signature was required (see, Division's Exhibit "K").

Division's Exhibit "K" included North Fork Bank's Corporate Resolution for J.P. Laurens, dated March 4, 1993, executed by Susan Findlay, as secretary, and Jack Pessa, as president. Review of this corporate resolution reveals that only one signature of any of the following officers: president, vice president or secretary was required on checks or any other type of withdrawal. It also reveals that any one of the following officers: president, vice president, or secretary was authorized to negotiate and procure loans from the bank. In this corporate resolution, Ms. Findlay certified that, as of March 4, 1993, the following individuals were officers of J.P. Laurens: Jack Pessa, president; Victor and Mark, vice presidents; and Susan Findlay, secretary. The signature card for Account No. 4024012579, dated March 5, 1993, was

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We modified findings of fact "22," "23" and "24" of the Administrative Law Judge's determination to accurately reflect the record.

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We modified finding of fact "25" of the Administrative Law Judge's determination by adding the last sentence to more clearly set forth the facts in the record.

attached to the corporate resolution. The signatures of Jack Pessa, Mark and Victor, as well as Susan Findlay appear on this card.

At some point, checking accounts were opened on behalf of Unique, J.P. Laurens and Pessa Keepsake at The Chase Manhattan Bank, N.A. ("Chase"). Review of the Chase corporate resolution for Unique, executed on January 24, 1993 by Susan Findlay as secretary and Victor as vice president, reveals that only one signature of any of the following officers: president, vice president or secretary was required on checks or any other type of withdrawal. In addition, any one of the following officers: president, vice president or secretary was authorized to negotiate and procure loans from the bank. According to this corporate resolution, the following were officers of Unique as of January 24, 1993: Jack Pessa, president; Victor and Mark, vice presidents and Susan Findlay, secretary. The Division's Exhibit "I" includes a copy of the Chase signature cards for Unique, J.P. Laurens and Pessa Keepsake's respective checking accounts. The following individuals were authorized signatories on the above-mentioned accounts: Jack V. Pessa, president; Victor and Mark, vice presidents; and Susan Findlay, secretary. Review of each signature card reveals that only one signature was required for checks and that in the case of J.P. Laurens and Pessa Keepsake only one signature was required for loans/notes. It is noted that the signature card for the J.P. Laurens checking account had "Closed" written across the card; however, the date of closure is not on the card.

On August 16, 1993, Susan Findlay, as secretary of Unique, and Jack Pessa, as president of Unique, executed North Fork Bank's corporate resolution for Unique (Division's Exhibit "I"). Review of this corporate resolution reveals that only one signature of any of the following officers: president, vice president or secretary was required on checks or any other type of withdrawal. The corporate resolution also stated that any one of the following: president, vice president, or secretary was authorized to negotiate and procure loans from the bank. In this corporate resolution, Ms. Findlay certified that the following individuals were the officers of the corporation, as of August 16, 1993, Jack Pessa, president, Victor and Mark, vice presidents, and Susan Findlay, secretary.

We modify finding of fact "30" of the Administrative Law Judge's determination to read as follows:

Included as part of the Division's Exhibit "J" is a North Fork Bank corporate resolution for PESSO Keepsake executed on August 16, 1993 by Susan Findlay, as secretary, and Jack PESSO, as president. Review of this corporate resolution reveals that only one signature of either the president, vice presidents or secretary was required on checks or any other type of withdrawal. Also, that any one of either the president, vice presidents or secretary was authorized to negotiate and procure loans from the bank. In this corporate resolution, Ms. Findlay certified that as of August 16, 1993, the following individuals were officers of PESSO Keepsake: Jack PESSO, president; Victor and Mark, vice presidents; and Susan Findlay, secretary.

Although Mark, Victor and Susan Findlay were authorized by the above documents to sign checks or negotiate loans, in practice, Jack PESSO retained sole control and authority over such matters (tr., p. 42).<sup>13</sup>

A bookkeeper prepared and signed the sales and use tax returns filed for the various corporations.

We modify finding of fact "32" of the Administrative Law Judge's determination to read as follows:

The construction at Roosevelt Field mall had a serious adverse impact on sales of the four corporations. By 1993, the corporations owed the Division unpaid sales and use tax. While Jack PESSO retained overall control of business operations via the morning meetings, he spent an increasing amount of time during this period trying to raise financing and meeting with lawyers to fend off Chapter 11 bankruptcy. During this period, Victor was given the assignment of "keeping the ship afloat" (tr., p. 50).

Victor signed two checks on behalf of PESSO Keepsake for sales taxes due. He also signed two checks for sales taxes due on behalf of Unique for the periods ending January 31, 1993 and April 30, 1993,

respectively. He also signed two checks on behalf of J.P. Laurens to pay sales taxes for the periods ending January 31, 1993 and April 30, 1993.<sup>14</sup>

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We modified finding of fact "30" of the Administrative Law Judge's determination by adding the second paragraph to more clearly reflect the record.

14

We modified finding of fact "32" of the Administrative Law Judge's determination to accurately reflect the record. Finding of fact "33" has been deleted and its substance is incorporated in finding of fact "32."

We modify finding of fact "34" of the Administrative Law Judge's determination to read as follows:

Both Mark and Victor could sign checks for C.O.D. deliveries of merchandise at the stores, up to the \$300.00 limit set by their father (tr., p. 86).<sup>15</sup>

We modify finding of fact "35" of the Administrative Law Judge's determination to read as follows:

By 1993, the inventory in the jewelry stores was brought in on consignment. Victor was responsible for getting the merchandise on a consignment basis.<sup>16</sup>

We modify findings of fact "36" and "37" of the Administrative Law Judge's determination to read as follows:

As the business of the stores deteriorated, it was necessary to close them down. As the stores closed, no final sales and use tax returns were filed, so the Federal and State tax authorities continued to send "tax bills" as if they were still operating. Jack Pessa told Victor to handle the tax problem (tr., pp. 51, 53, 55). Ultimately, Jack Pessa would end up closing all but one store (tr., p. 51). On February 26, 1993, Victor executed New York State Department of Taxation and Finance deferred payment agreements ("DPA") on behalf of J.P. Laurens and Mutt & Jeff.<sup>17</sup>

On March 30, 1993, Victor executed a DPA on behalf of Pessa Keepsake. The itemized liabilities listed in the DPA included, inter alia, the new sales tax return for the period ending January 31, 1993.

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<sup>15</sup>

We modified finding of fact "34" of the Administrative Law Judge's determination to indicate the \$300.00 limit set by Jack Pessa.

<sup>16</sup>

We modified finding of fact "35" of the Administrative Law Judge's determination by deleting the last four words of the second sentence.

<sup>17</sup>

We modified finding of fact "36" of the Administrative Law Judge's determination by combining its substance with finding of fact "37." We also added the first two sentences to accurately set forth the facts in the record.

We modify finding of fact "39" of the Administrative Law Judge's determination to read as follows:

On March 30, 1993, Victor executed a DPA on behalf of Unique. The itemized liabilities listed in the DPA included, inter alia, the new sales tax return for the period ending January 31, 1993. Jack Pessa testified that these DPAs were signed because he thought he had found a new partner (and financing) that would permit the paying of his back taxes. In any event, the deal with the new partner "fell through" (tr., pp. 54-55). The DPAs were signed only after Jack Pessa told Victor he could sign them (tr., pp. 54-55).<sup>18</sup>

At some point in 1993, Mutt & Jeff ceased operations.

At some point in 1993, J.P. Laurens could no longer pay its rent and the landlord took back the store location, at which point J.P. Laurens ceased operations.

We modify findings of fact "42" and "43" of the Administrative Law Judge's determination to read as follows:

By August 1993, all of the four corporations filed Chapter 11 bankruptcy (tr., p. 56).<sup>19</sup> Mark was not involved with the bankruptcy. Jack Pessa had taken 30 years to build some of these businesses, so he was not emotionally capable of dealing directly with the bankruptcy attorneys. Jack assigned Victor to deal with the bankruptcy attorneys on behalf of the various corporations and gather the necessary information. Victor continued to report to his father on a daily basis (tr., p. 58). As noted earlier, eventually Victor became frustrated with his inability to have an impact on the direction of the four corporations. He did not feel his advice to his father was being taken, so he resigned shortly after Christmas 1993. New bankruptcy lawyers were hired and Jack Pessa, in his son's absence, had to deal with them personally (tr., p. 59).<sup>20</sup>

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We modified finding of fact "39" of the Administrative Law Judge's determination by adding the last three sentences to accurately reflect the record.

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The exact date upon which the four corporations filed for bankruptcy protection is not part of the record.

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We modified finding of fact "42" of the Administrative Law Judge's determination to more clearly reflect the record and the substance of finding of fact "43" has been combined with finding of fact "42."

Included as part of the Division's Exhibit "J" is a letter,<sup>21</sup> dated August 6, 1993, from Jack Pessa to D. Rich, a tax compliance agent with the Division, in which Jack Pessa wrote:

"[R]egarding the various Deferred Payment Agreements that you made with Victor, I would like to offer our explanation as to why we were unable to meet the commitment set forth therein.

"During the payment period, we operated Mutt and Jeff Restaurant, whose lease had been terminated sooner than expected. We also had J.P. Laurens and Malibu Resorts, both of which ceased operations because the leases were terminated as a result of our failure to pay rent.

"Presently, we are left with two (2) stores: Unique Boutique and Pessa Jewelers. It is virtually impossible at this time for these two (2) stores to meet all of the DPA commitments in view of the above and, also, as a result of what has transpired in the past two and one-half (2 1/2) years. As you know, Roosevelt Field was under construction for well over two (2) years. During that period of time, there was virtually no business in Roosevelt Field.

"Also, with the unusual weather of this summer, a shopping center seems like the last place anybody wants to go on a weekend with temperatures prevailing in the 90 degree range. Generally speaking, in the summer with more inclement weather the stores do well on the weekends and, all things being equal, we anticipated that we would have been able to meet our DPA commitments.

"In light of the foregoing, as discussed, we propose to modify our DPA as follows:

- "1. We have paid \$10,000.00 on August 3, 1993.
- "2. We will pay an additional \$20,000.00 on August 16, 1993.
- "3. We will pay the balance of the tax, interest and penalties over a period of twenty-four (24) months, with penalties totaling \$30,000.00 to be paid between the 25th and 30th months.

"We believe this revised schedule will enable us to satisfy all tax liabilities [sic].

"Please advise."

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The stationery's letterhead contained the following address: "JP Enterprises, Roosevelt Field, Garden City, New York 11530, (516)747-4200."



***OPINION***

The Administrative Law Judge concluded: i) that Mark and Victor Pessa were responsible officers of the four corporations based on the fact that they both were officers and authorized signatories on the corporate bank accounts; ii) that there were no documents in evidence to show restrictions on Mark and Victor's ability to borrow funds on behalf of the corporations; iii) that Victor entered into corporate resolutions for Unique's checking account; iv) that Victor also entered into DPAs for the various corporations; v) that both Mark and Victor had daily discussions with their father, Jack; vi) that Mark and Victor had responsibility for the daily operations of the corporations; vii) that petitioners failed to establish when Mark went to work for Chicken International; viii) that there was no evidence that Mark resigned from the Pessa corporations; and ix) that there was no evidence that Mark and Victor could not review the books and records of the four corporations.

Petitioners, on exception, argue that the Administrative Law Judge erred in determining that they were responsible officers of the various corporations. Both petitioners admit that they were officers of some of their father's corporations and that they had authority to sign checks on some of the corporate accounts. However, they contend that Jack Pessa, the owner of the corporations, held the sole power to make business and financial decisions for the stores and had the sole authority to insure that the sales taxes for the corporations were paid. They assert that they did not have sufficient authority over the corporations to render them liable for the sales tax due for the periods in issue. Furthermore, they argue that, during the periods in issue, Mark was not even an employee, let alone a shareholder, of any of the entities in issue.

Petitioners urge that the evidence they presented shows that they owned no stock in the four corporations and that they did not simply fail to act, but rather, had no independent authority to act on behalf of the four Pessa corporations. Petitioners argue that their father treated them like other employees in that Jack Pessa told them their assignments and they were expected to carry them out. Therefore, petitioners assert, they did not have sufficient authority over the corporations to permit them to make independent decisions as to who to pay, how

much to pay and who to hire or fire, such that they would be liable for the sales taxes due for the periods in issue.

The Division disagrees with each of petitioners' arguments and urges that the Administrative Law Judge's determination be affirmed.

We reverse the determination of the Administrative Law Judge.

Tax Law § 1133(a) states, in pertinent part, that:

"every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article . . . ."

Tax Law § 1131(1) defines a "person required to collect any tax imposed by this article [Article 28]" to include:

"any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article . . . ."

It has been held that occupying corporate office does not, per se, impose sales tax liability upon an officeholder (see, Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427; Matter of Unger, Tax Appeals Tribunal, March 24, 1994, confirmed sub nom Matter of Landau v. Tax Appeals Tribunal, 214 AD2d 857, 625 NYS2d 343, lv denied 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is a responsible officer must be determined based upon the particular facts of each case (see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State, 82 Misc 2d 181, 368 NYS2d 448; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; Matter of Hall, Tax Appeals Tribunal, March 22, 1990, confirmed Matter of Hall v. Tax Appeals Tribunal, 176 AD2d 1006, 574 NYS2d 862; Matter of Martin, Tax Appeals Tribunal, July 20, 1989, confirmed Matter of Martin v. Commissioner of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). Among the factors to be considered in determining whether an individual

is a responsible officer are: whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

In Matter of Constantino (*supra*), we stated:

"[t]he 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 [citations omitted]."

We have also held that it is necessary to examine the total circumstances of the individual in the corporation to ascertain whether the individual had the power to control the acts he performed (Matter of Taylor, Tax Appeals Tribunal, October 24, 1991; Matter of Constantino, *supra*).

Petitioners urge that Mark's principal responsibility was store manager for Unique. Mark, as Unique's store manager, opened and closed the store and saw to it that shelves were stocked. Mark never fired or hired individual employees, had no purchasing authority, never signed tax returns and never wrote checks. Petitioners state that Mark only signed checks after they had already been pre-approved by his father or were C.O.D. purchases for under the \$300.00 limit imposed by his father. Petitioners also argue that, in January 1993 through August 1993, Mark left the employ of Unique and went to work for Chicken International, part of which time was spent in a training program in Florida.

Petitioners also argue that Victor worked primarily for, and was paid by, PESSO Keepsake. His principal responsibilities included purchasing jewelry, running promotions and overseeing advertisements. They contend that Victor had no independent decision-making authority with respect to operations and management of the four corporations.

According to petitioners, Jack PESSO was the only individual with authority to make

business decisions for the four corporations, including when sales taxes for the various corporations would or would not be paid. They argue that Jack Pessa was solely responsible for all financial and business affairs of the various corporations. Petitioners maintain that he alone had authority to hire and fire individual employees; he dealt with the accountants and lawyers; he solely dealt with and had guarantees with the banks; and only he decided whether DPAs would be signed with the tax authorities.

In her determination, the Administrative Law Judge concluded that Mark and Victor were responsible officers of the four corporations. The Administrative Law Judge noted that both met a significant portion of the criteria used in determining whether an individual is a responsible officer of a corporation. For instance, Mark was vice president of Unique, Pessa Keepsake, as well as J.P. Laurens and an authorized signatory on their respective corporate checking accounts. Victor was vice president of Unique, Pessa Keepsake, J.P. Laurens and Mutt & Jeff and an authorized signatory on their respective checking accounts.

We do not find the kind of independent authority to act on the part of Mark and Victor that would justify the conclusion that they could decide for themselves, or overrule their father, on such issues as: i) what vendor would be paid or how much; ii) who would be hired or fired; and iii) whether tax returns would be filed and taxes paid. Jack Pessa, who was not a party to this proceeding, testified that he had sole decision-making authority over his four corporations, and that no one, including his two sons, petitioners herein, could make a decision regarding the finances or operations of his businesses without his consent and approval.

Jack Pessa admits that he made all final decisions for the corporations and that he owes the subject taxes. Jack Pessa gave assignments to his sons. Mark managed Unique and Victor would visit vendors seeking merchandise for his father's stores. Each morning Mark and Victor would report to their father on their activities, problems at the stores, what merchandise vendors had been contacted and make recommendations to their father. Sometimes Jack Pessa accepted their recommendations and sometimes he did not.

The Administrative Law Judge found the testimony of Mark and Jack Pessa to be vague

as to when Mark was employed by Chicken International and the dates on which he attended the training program in Florida. We do not find that the date Mark went to work for Chicken International particularly significant since the record is sufficient to show that Mark left the employ of his father's companies at the end of December 1992 and did not return until August 1993. Whether he was employed that whole time or only part of that time with Cluckers is academic.

The Administrative Law Judge also noted that there is no evidence that Mark formally resigned from the various corporations. While that may be true, we find it more telling that we can find no evidence that Mark ever had any independent authority to act even for those periods when he was admittedly in their employ.

Further, the Administrative Law Judge noted that there is no evidence that Mark's ability to review the books and records of any of the corporations of which he was an officer was restricted in any way. In the context of this case, this is of no consequence since it is not simply an officer's ability to review books and records of his company, but his authority to act on what he knows which is relevant.

Jack Pessa had spent nearly 30 years building these businesses before his sons joined him as vice presidents. The record suggests that Jack Pessa had always been a "one man show" and was used to "calling the shots." While he may have been pleased to have his sons begin working with him, we find it probable that this very independent man would not readily relinquish his decision-making control over businesses he built during a lifetime, not even to his sons.

This conclusion is buttressed by Victor's reasons for finally leaving the employ of his father's corporations, i.e., his frustration at not having his advice listened to and not being able to have an impact on the direction of the companies. This is the frustration of a man who feels powerless to control events. We find the testimony of Mark, Victor and Jack Pessa credible and consistent with these underlying circumstances.

There is no evidence in this record that Mark or Victor ever signed a tax return. There is

not a single check in the record that is signed by Mark. While Mark managed Unique, the evidence shows that he did not purchase inventory for the store and he did not decide what inventory was to be purchased for his store. He opened the store in the morning and saw to it that it was closed at night. He also made sure the shelves were stocked with merchandise. There is no evidence in this record that would show that he had any independent decision-making authority over this store or any other store. If the manager of another of his father's stores had a problem, they could discuss it with Mark. Mark then would report back to his father. There is no evidence that Mark had authority to do anything more than discuss problems with these other store managers and report back. The Division could have attempted to rebut this testimony by subpoenaing Jack Pessio's former comptroller or even his bookkeepers. Whether this would have been productive, we have no way of knowing. The point is, the Division did not subpoena others with potential knowledge of the Pessios' business operations to rebut petitioners' evidence.

Instead the un rebutted evidence shows that neither Mark nor Victor had authority to hire and fire employees. Neither Mark nor Victor owned any shares of stock in any of their father's companies.

There is no evidence that Victor had anything to do with the day-to-day operations and management of any of the stores. Victor did sign seven checks that were payments to the Division for sales and use tax on behalf of Pessio Keepsake, Unique and J.P. Laurens. Victor also signed three DPAs in February and March 1993 on behalf of Unique, Mutt & Jeff and J.P. Laurens. However, our inquiry goes farther than merely who signed a particular document. Rather, the question in this case is who had the authority to decide that a particular document would or would not be signed. Mark testified that it was his father. Victor said it was his father. Their father testified that no one could do anything with regard to the operation and management of his stores without his approval. This evidence stands un rebutted by the Division.

We must conclude from this that neither Mark nor Victor had authority to make

management decisions on behalf of the subject corporations without their father's prior approval. While both were vice presidents in their father's companies, the record does not show the kind of independent authority to act on behalf of those corporations that would justify holding petitioners liable here. They were paid salaries, as were other employees, but neither had a financial stake in the various corporations and there is no suggestion in this record that they could overrule their father or act on their own. While Victor negotiated DPAs with the Division, he did so only after being authorized by his father, the president and sole shareholder of the companies. While Mark and Victor had check-signing authority, it was their father who decided what vendors (or tax authorities) would be paid and how much they would be paid. The bookkeepers would prepare the checks that had been approved by Jack Pessa. Jack Pessa confirmed that it was only after checks had been previously approved and prepared that Victor or Mark could sign them. Even payments made for C.O.D. purchases were subject to the limitations imposed by their father.

We conclude that the significance of petitioners' status as officers with check-signing authority in the determination of responsibility is offset by the circumstances relating to Jack Pessa's overall control of the corporations. Petitioners lacked the power to exercise authority over the collection and payment of sales taxes on behalf of the corporation. The evidence does not support a conclusion that petitioners could have acted but chose not to. This case, therefore, is unlike Matter of Blodnick v. New York State Tax Commn. (124 AD2d 437, 507 NYS2d 536), where the responsibility rested with the corporate officers and shareholders because it was not possible to ascertain who else, if anyone, was in control and it appeared that the officers/shareholders had simply declined to exercise any responsibility with regard to the corporation.

The facts here are also unlike those in Matter of Hall (supra). The petitioner in Hall had authority to hire and fire employees, had unrestricted ability to sign the corporation's checks, controlled inventory and paid the recurring bills, signed all of the sales and use tax returns for the period in issue and commingled his personal funds with that of the corporation after the

corporation's checking account was frozen.

Petitioners here did not have such freedom of action. The facts of this case are more like those in Matter of Constantino (supra). In Constantino, the significant facts were that:

"the majority shareholder made all the decisions as to what checks were to be written, petitioner, as one of first three and then two minority shareholders, did not have the power to overrule such decisions; and the majority shareholder made all the final decisions as to the hiring and firing of employees and most purchases for the corporation, petitioner could only make recommendations."

It is noted that the petitioner in Constantino, unlike petitioners here, was a shareholder in the corporation. From the above facts, we conclude, as we did in Constantino, that:

"petitioner's role was essentially that of a . . . supervising employee who was precluded from taking actions with regard to the financial and management activities of the corporation" (Matter of Constantino, supra; see also, Matter of Moschetto, Tax Appeals Tribunal, March 17, 1994).

Accordingly, we conclude that petitioner Mark Pessa did not have independent authority and control over the corporate affairs of Unique and Pessa Keepsake and, therefore, was under no duty to act on behalf of each of those corporations in complying with Articles 28 and 29 of the Tax Law. The evidence also supports the conclusion that petitioner Victor Pessa had no independent authority and control over the corporate affairs of Unique, Pessa Keepsake, J.P. Laurens and Mutt & Jeff and, therefore, was under no duty to act on behalf of all four corporations in complying with Articles 28 and 29 of the Tax Law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mark S. Pessa, officer of Pessa Keepsake Diamond Corner, Ltd. and Unique Boutique, Ltd., and Victor S. Pessa, officer of Pessa Keepsake Diamond Corner, Ltd., J.P. Laurens-Roosevelt Field, Ltd., Mutt & Jeff Restaurant, Inc. and Unique Boutique, Ltd., is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petitions of Mark S. Pessa, officer of Pessa Keepsake Diamond Corner, Ltd. and



Unique Boutique, Ltd., and Victor S. Pessa, officer of Pessa Keepsake Diamond Corner, Ltd., J.P. Laurens-Roosevelt Field, Ltd., Mutt & Jeff Restaurant, Inc. and Unique Boutique, Ltd., are granted; and

4. The notices of determination (Notice Numbers: L-007770546-8; L-008572112-9; L-008572113-8; L-008330669-1; L-008330670-1; L-007770549-5; L-007770545-9; L-008572108-3; L-008572109-2; L-007770547-7; L-008330671-9; L-008330672-8; L-007948825-9; L-008282335-8; and L-008316311-3) are cancelled and the notices of estimated determination (Notice Numbers: L-008577759-9 and L-008577760-9) are cancelled.

DATED: Troy, New York  
May 1, 1997

/s/Donald C. DeWitt  
Donald C. DeWitt  
President

/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner