STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of NATHAN UNGER, OFFICER OF ROBERT LANDAU ASSOCIATES, INC. 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, 1980 through August 31, 1984.	:	DETERMINATION DTA NOS. 805351 AND 806353
In the Matter of the Petition of ROBERT LANDAU, OFFICER OF ROBERT LANDAU ASSOCIATES, INC. 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, 1980 through August 31, 1984.	:	

Petitioner Nathan Unger, officer of Robert Landau Associates, Inc., 59 Winding Wood Road, Rye Brook, New York 10573 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 December 1, 1980 through August 31, 1984.

Petitioner Robert Landau, officer of Robert Landau Associates, Inc., c/o Kamerman & Soniker, 500 Fifth Avenue, Suite 300, New York, New York 10110 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 December 1, 1980 through August 31, 1984.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World TradeCenter, New York, New York on September 13, 1990 at 1:45 P.M., continued at the same offices on March 19, 1991 at 9:45 A.M. and concluded at the offices of the Division of Tax Appeals, 500 Federal Street, Troy,

New York on October 9, 1991 at 9:30 A.M., with all briefs to be filed by April 16, 1992. Petitioner Nathan Unger filed his brief on January 16, 1992. Petitioner Robert Landau filed his brief on January 15, 1992. The Division of Taxation filed its brief on March 17, 1992. Petitioner Nathan Unger filed a reply brief on March 26, 1992. Petitioner Robert Landau filed his reply brief on April 14, 1992. Petitioner Nathan Unger appeared by Orenstein, Musoff & Orenstein, P.C. (Wallace Musoff, Esq., of counsel). Petitioner Robert Landau appeared by Kamerman, Kamerman & Soniker P.C. (Jerome Kamerman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael C. Gitter, Esq., of counsel).

ISSUES

I. Whether personal liability may be imposed upon an officer of a corporation for the taxes due on the corporation's purchases.

II. Whether it is constitutional to impose personal liability upon an officer, director or employee of a corporation for the corporation's failure to comply with Articles 28 and 29 of the Tax Law.

III. Whether petitioner Nathan Unger was a person required to collect and pay over sales tax on behalf of Robert Landau Associates, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(c) during the period in issue.

IV. Whether petitioner Robert Landau was a person required to collect and pay over sales tax on behalf of Robert Landau Associates, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(c).

V. Whether the audit method was reasonably calculated to determine the sales and use taxes due.

FINDINGS OF FACT

Robert Landau Associates, Inc. ("RLA") was founded in 1973 by petitioner Robert Landau as a creative marketing and sales promotion company. The firm developed promotional campaigns as well as provided promotional material to its clients. In or about early 1976, Mr. Landau sold RLA to Kenyon-Eckhart Advertising Agency ("Kenyon-Eckhart").

After the sale, Mr. Landau continued as president of RLA.

In 1978, Mr. Landau reacquired RLA. Since that time and continuing throughout the period in issue, Mr. Landau served as RLA's president, chief executive officer and sole shareholder. When Mr. Landau purchased the company from Kenyon-Eckhart, it had eight to ten people engaged in marketing and one or two people performing bookkeeping. By 1980, the company had grown to about 100 employees of which 80 dealt with customers and 20 were secretaries or bookkeepers. By 1983 the company had grown to approximately 200 employees and had gross sales of approximately $30,000,000.00. During the period in issue, RLA had offices in New York City, Los Angeles, Seattle, Atlanta, Detroit, Dearborn, Georgia and Japan.

On August 16, 1983 the Division of Taxation ("Division") commenced a sales and use tax audit of RLA by scheduling an appointment with RLA's assistant comptroller. On August 22, 1983 the Division mailed a letter to RLA which scheduled an audit appointment on September 19, 1983. The appointment letter stated that the period under audit was December 1, 1980 through August 31, 1983 and requested that the corporation make available all books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records. On August 29, 1984, the Division requested sales tax returns and a general ledger for the purpose of updating the audit through May 31, 1984. RLA did not comply with this request.

On November 14, 1983, an auditor from the Division went to the corporation's premises and was given access to the 1980 and 1981 corporate income tax returns, a sales tax return for one quarterly period and the general ledger for the fiscal year ending October 31, 1982. The auditor was not provided with sales invoices, purchase invoices, exemption certificates or the requested sales tax records. During this visit to RLA, the Division requested that the corporation make available additional records consisting of all invoices for April 1983, cash disbursements from June through August 1982 and the 1981 and 1982 New York State corporation franchise tax reports. The Division also requested that a 1982 corporation income tax return be reconciled with the general ledger.

At a meeting on December 5, 1983, the corporation presented to the Division its sales invoices and the corporation tax returns. However, they did not provide the reconciliation or the cash disbursement records.

At one juncture during the audit, the auditor proposed applying the taxable ratio arrived at during the previous audit to the gross sales found in the general ledger for the current audit period. This approach was not followed because the assistant comptroller told the auditor that petitioner Nathan Unger rejected the use of the prior audit. The auditor did not make a written notation of the rejection in his log. If the results of the prior audit had been used, the additional sales tax due would have been $51,050.00.

The Division found that the company's records were in very poor condition. For instance, the company was missing the general ledger for the first year of the audit period. In addition, the company could not provide a number of invoices, shipping documents or backup to the sales invoices. Further, the auditor could not tie in the sales reported on the sales and use tax returns with the amounts recorded in the general ledger.

The Division compared those quarters for which the corporation reported its sales on its sales and use tax returns to those sales reflected on its gross billings. The comparison disclosed that the gross billings exceeded the sales by $995,750.00.

During the audit, the Division asked for contracts with RLA's customers but these were not provided. The corporation also made a claim that certain of the corporation's sales were tax exempt. However, the corporation had no exemption certificates, no accessible shipping documents and a very limited description of the services or property involved in the sales which were tested.[1] The lack of documents led the auditor to ask why the back-up documentation could not be produced. In response, he was told that the items went in and out so quickly that the company did not prepare shipping documents.

The Division attempted to ascertain from RLA's invoices what kind of services or

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[1]Certain documents were stored at a warehouse; however, the documents were not reviewed because they were not stored in a manner which would make the documents accessible.

products RLA was providing to its clients. However, the invoices were not sufficient for this purpose because there was no description of what was done. In order to remedy this problem, the Division

proposed performing a test on all invoices for April 1983 and requested backup to all such invoices. In conjunction with this proposal, the Division gave Assistant Comptroller Michael Delpezzo an Audit Method Election form which stated, in part, that the Division's representative "has advised that the records available for audit are adequate and sufficient to warrant an audit method that utilizes all records within the audit period." The agreement further provided that in lieu of such an audit, the taxpayer elected to use a representative test period audit method to determine any sales or use tax liability. When the Division gave Michael Delpezzo the test period election form, it was with the understanding that the Division was going to test all of the sales during the month of April 1983 and that all of the invoices needed to perform this test would be available.

The test period agreement was presented to Mr. Unger. Before he signed the document, Eisner & Luban called Mr. Unger and stated that the document should be signed. Further, Mr. Unger was told that the Division was going to use the taxable percentages from the prior audit. On the basis of this representation, Mr. Unger signed the document. Mr. Unger never rejected the proposed audit method. However, before the auditor received the test period agreement back, he told the assistant comptroller that the audit test period would be several days in April 1983 because RLA advised the auditor that it would be an impossible task to provide the backup to all invoices for April 1983.

In January 1984, the Division decided to limit the test to the larger sales during April 1983. The Division asked for the corresponding job jackets and examined the information that was provided. The Division found that some of the sales were nontaxable advertising commissions. On other transactions, the Division found from the job jackets that RLA was selling tangible personal property.

The particular invoices examined by the Division were dated between April 4, 1983 through April 11, 1983[2] and constituted total sales of $505,350.00. However, due to a transpositional error, the Division considered total sales to be $503,350.35. Of the sales examined, the Division found seven invoices wherein it considered the receipt all or partially taxable. The pertinent information regarding these invoices is as follows:

a) The Division examined invoice number 3639 to "Miller" in the total amount of $109,150.00 and ascertained that the amount included nontaxable consulting fees as well as lithographs and visors for, respectively, $12,500.00 and $675.00. Since RLA did not present any shipping documents showing out-of-state shipments and the Division did not know where the product was being sent, the Division considered the combined amount of $13,175.00 subject to tax.

b) The Division found that two invoices, numbers 3645 and 3640, included a total taxable amount of $40,784.00 for "P.O.P" kits[3] sold to Burger King. The Division determined what a taxable P.O.P. kit was from an examination of the job jackets. During the audit, the auditor was told that some of the Burger King items were given away as promotional items. He was also told that some of RLA's sales were to Burger King corporate

headquarters which resold them to their franchises. However, since RLA could not produce the shipping documents to show that the sales reviewed during the audit were those types of shipments, the Division did not give any weight to these contentions.

The Division considered 15 percent of the total to be the amount subject to New York State tax because the Division was familiar with the operation of Burger King and was aware that Burger King had stores in many different areas.

c) The Division ascertained that portions of two invoices, numbers 3643 and 3644, were

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[2]The workpapers mistakenly listed the dates of the invoices as being in 1984.

[3]Point of purchase kits.

for the sale of taxable P.O.P. kits to Coca-Cola. The total amount of the two invoices was $77,207.00 and the amount found taxable was $34,167.00. The Division considered 15 percent of the amount found taxable as subject to New York State tax on the basis of its understanding of the relative population of New York versus the other areas where Coca-Cola conducts business.

d) The Division ascertained that two invoices to Nabisco, numbers 3648 and 3658, in the respective amounts of $75,000.00 and $15,000.00, constituted taxable transactions. On the basis of a review of the job jacket, the Division ascertained that $17,928.00 of the invoice for $75,000.00 was for the sale of breadboxes. The balance of the invoice was for the sale of other taxable material. The other invoice to Nabisco was for the sale of 282 Home Hearth packages.

Each of the foregoing invoices was included in the same job jacket. According to this job jacket, one-quarter of the material was being shipped out-of-state. Although it was not listed as a separate item on the sales invoices, the Division allowed an additional 5 percent of the invoice as a shipping charge.

On the basis of the foregoing audit findings, the Division found that total taxable sales during the period of April 4, 1983 through April 11, 1983 were $87,417.60 and that during the same period of time total sales were $503,350.35. The Division then calculated a taxable ratio of .1738 by dividing the taxable sales during the test period by the total sales during the same period.[4]

The Division multiplied the gross billings during the audit period by the taxable ratio of .1738 to determine taxable sales of $16,966,697.00 and tax due of $1,394,066.65. This amount was reduced by the sales tax paid with RLA's sales and use tax returns of $8,278.25 resulting in additional tax due on sales of $1,385,788.40.

The Division prepared a list of RLA's expense purchases for the period January 1982 through December 1982. While preparing the list, the Division found that the corporation

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[4]If the correct amount of taxable sales had been used (Finding of Fact "12"), the taxable ratio would have been 17.29 percent.

issued resale certificates and did not pay tax when it purchased items such as mechanicals, artwork, photography and topography.

In order to determine the amount of tax due on recurring purchases, the Division examined all of petitioner's invoices during the period January 1982 through December 1982 to find those purchases in which the item was delivered into New York City and no tax was paid. The total purchases were divided by the gross sales per the gross billing records for the same period. The resulting percentage was then multiplied by the gross billings for the audit period. In performing the foregoing analysis, the

Division calculated two taxable ratios. A taxable ratio of 3.53 percent was calculated for those items which were taxable at a rate of four percent such as artwork and topography which are entitled to the manufacturer's exemption. The taxable ratio was applied to gross sales to calculate additional taxable purchases of $3,456,214.00 and additional tax due of $138,248.56.

The Division calculated a taxable ratio of .97 percent with respect to those items which were subject to tax at a rate of 8.25 percent. The taxable ratio was applied to gross sales resulting in additional taxable purchases of $1,632,948.00. This, in turn, resulted in additional tax due of $78,036.55.

When the Division performed the foregoing analysis, it examined sales throughout the audit period. Although the Division did not examine every sale, it noticed that petitioner had a continuing set of customers and the nature of the business remained the same.

The Division performed its work on recurring expense items between December 1983 and January 1984. The auditor did not tell any of RLA's employees his conclusion that RLA failed to pay sales tax on recurring expense items until after RLA filed for bankruptcy in September 1984 because RLA's accountant kept postponing the appointment.

In order to conduct its audit of fixed assets, the Division asked for the general ledger and invoices for the entire audit period. RLA responded that it could not locate the general ledger for the period December 1, 1980 through October 31, 1981. In the alternative, RLA requested

that the Division perform a test to calculate the tax due on fixed assets and the Division agreed to this approach. Subsequently, the Division provided RLA with copies of the pages from RLA's cash disbursement book and asked for the invoices to the items entered thereon. The Division also asked for backup to the entries concerning fixed assets in the general ledger. In performing the foregoing analysis, the Division focused upon four accounts: telephone system, N.Y. furniture, fixtures and equipment, N.Y. leasehold improvements and computer equipment.

The Division examined the invoices which were produced and gave RLA credit for those invoices which showed that tax was paid. The corporation was assessed tax on those items for which no backup was available. After the Division made a listing of those items it considered taxable, it divided the amount taxable in each account by the total amount tested. The Division then multiplied the amount in each of the accounts during the audit period by the taxable ratio. On the basis of its review of fixed assets, the Division reached the following conclusions on the four accounts it examined:

Account	Taxable Ratio	Taxable Purchases	Tax Due
Telephone system	.0257	$ 7,465.00	$ 653.89
N.Y. furniture, fixtures and equipment	.5562	391,190.00	31,177.28
N.Y. leasehold improvement	.9078	300,326.00	24,674.84
Computer equipment	.0858	25,305.00	2,087.68
			$58,593.69

The auditor's workpapers show that for the quarters ending February 28, 1982 and May 31, 1982 the auditor calculated additional tax due on furniture, fixtures and equipment of $1,877.95 and $723.36, respectively. The same workpapers also show that for the quarters ending February 28, 1982 and May 31, 1982 RLA made purchases of furniture, fixtures and equipment without paying sales tax of $10,306.50 and $4,853.00, respectively. Applying a tax rate of 8.25 percent, the tax due for the quarter ending February 28, 1982 was $850.29 and the tax due for the period ending May 31, 1982 was $400.37.

The calculation of the taxable ratio on New York furniture, fixtures and equipment included several invoices from Lanier Business Products, Inc. ("Lanier"). At the hearing, petitioner's produced three invoices from Lanier, which were dated within the audit period,

showing that on at least three occasions Lanier collected sales tax. The invoices presented by petitioners were not considered in the audit.

The Division concluded that Robert Landau was responsible for the taxes due from RLA. This determination was based on finding that Mr. Landau was the president of RLA, was authorized to sign RLA's tax returns, was the sole shareholder, had access to RLA's records and was responsible for the daily management of the company. In addition, the Division was told by the attorney for RLA that Mr. Landau was responsible for everything including financial matters but that some of the responsibility for financial affairs was delegated to his chief financial officer.

The Division also determined that Nathan Unger was responsible for the taxes due from RLA. This conclusion was based on the fact that Mr. Unger signed a number of documents. The Division found that Mr. Unger signed a consent to extend the statute of limitations, the power of attorney form authorizing an accounting firm to represent RLA in the sales and use tax audit for the period December 1, 1980 through November 30, 1983 and an agreement for the Division to conduct a test period audit. The Division also found that Mr. Unger signed the following tax returns: sales tax returns for the quarters ending August 31, 1980, November 30, 1980 and February 28, 1981; corporation franchise tax return for the fiscal year ending February 28, 1981; and corporation franchise tax return for the fiscal year ending October 31, 1982.

On the basis of the foregoing audit, the Division issued two notices of determination and demands for payment of sales and use taxes due dated December 20, 1984 to, respectively, Robert Landau and Nathan Unger, as officers of Robert Landau Associates, Inc. The first notice assessed sales and use taxes for the period December 1, 1980 through May 31, 1984 in the amount of $1,512,600.86 plus interest of $339,452.58 for a total amount due of $1,852,053.44. The second notice assessed tax for the period June 1, 1984 through August 31, 1984 in the amount of $148,066.34 plus interest of $3,737.19 for a total amount due of $151,803.53. Each of the notices explained that, as an officer, each of the individual petitioners, respectively, was

personally liable for the taxes determined to be due from RLA. The notices also stated that the tax had been estimated or determined in accordance with section 1138 of the Tax Law.

The Division issued notices of determination and demands for payment of sales and use taxes due, dated December 20, 1984, to, respectively, Robert Landau and Nathan Unger, which assessed sales and use taxes for the quarters ending February 29, 1984 and August 31, 1984 in the amount of $4,992.12, plus penalty of $499.22 and interest of $299.54, for a total amount due of $5,790.88. Among other things, the notices bore the following explanation:

> "Because a Sales and Use Tax Return was not received, this amount has been determined due based on the average taxable sales as reported on previous returns filed. Upon receipt of the required tax return, this amount will be amended accordingly.
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> "This tax has also been determined by Notice Nos. D8405264601 and D8412018822 dated 5/21/84 and 11/27/84, against Robert Landau Associates, Inc., which is now in an arrangement and of which the taxpayer is an officer."

At the hearing, the Division explained that the foregoing notices had been superseded by the audit.

The Division also issued notices of determination and demands for payment of sales and use taxes due, dated May 15, 1985, to, respectively, Robert Landau and Nathan Unger, which assessed sales and use taxes for the period September 1, 1984 through November 30, 1984 in the amount of $2,496.06 plus penalty of $224.64 and interest of $120.43 for a total amount due of $2,841.13. The notice set forth the following explanation:

> "Because a Sales and Use Tax Return was not received, this amount has been determined due based on the average taxable sales as reported on previous returns filed. Upon receipt of the required tax return, this amount will be amended accordingly.
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> "This tax has also been determined by Notice No. D8503036379 dated 2/27/85, against Robert Landau Associates, Inc., which is now in bankruptcy and of which the taxpayer is an officer."

No evidence was offered at the hearing to show how the foregoing assessment was calculated.

Robert Landau filed a petition dated March 15, 1985 which challenged sales and use tax assessments dated December 20, 1984 for the period December 1, 1980 through August 31,

1984 in the amount of $1,665,659.32 in tax due. The petition included copies of the assessments which assessed tax of $1,512,600.86 and $148,066.34. Robert Landau also filed a petition with the Division of Tax Appeals dated November 21, 1988 which challenged the assessment of tax for the period December 1, 1980 through August 31, 1984. The petition included copies of the notices which assessed tax in the amount of $1,512,600.86, $148,066.34 and $4,992.12.

Nathan Unger filed a petition dated March 19, 1985 which stated that the tax in question is for the year or period "1981 through 1984". The petition listed the date of the assessment as December 20, 1984 and listed the amount of tax as $1,665,659.92. The petition included copies of the notices which assessed tax of $1,512,600.86, $148,066.34 and $4,992.12. Nathan Unger also filed a petition with the Division of Tax Appeals dated March 8, 1988 which stated that the tax in question was for the period December 1, 1980 through August 31, 1984. The date of the assessment is listed as December 30, 1987 and the amount of tax is listed as $1,665,659.20.

In 1979 the Division conducted a sales and use tax audit of RLA. During this audit, RLA was represented by Eisner & Luban. The major areas of adjustment made as a result of the audit concerned expense purchases and tax collected but not remitted. No adjustment was made for the failure to charge tax or collect tax. As a result of the audit, the Division found that tax was due in the amount of $32,842.96. After the audit, Mr. Unger told Mr. Landau that the audit went well and Mr. Landau was left with the impression that RLA was fulfilling its sales tax obligations.

The audit at issue herein was also handled by Eisner & Luban. At one juncture, Mr. Landau directed Mr. Unger to execute a power of attorney authorizing Eisner & Luban to represent RLA during the audit in issue. On June 6, 1984 Mr. Unger signed the power of attorney form as senior vice-president.

Eisner & Luban was authorized to call upon any employee of RLA for assistance with the audit without contacting Mr. Unger first. In accordance with this authority, Eisner & Luban obtained the assistance of Assistant Comptroller Michael Delpezzo. Eisner & Luban did not

ask Mr. Unger for his help during the audit and Mr. Unger never met with the sales tax auditor in this case. Mr. Unger did not know that records which were requested by the auditor were not supplied and no one asked Mr. Unger for help in producing records for the sales tax audit. Mr. Unger first learned that the audit resulted in a finding that tax was due when he got the notice.

As noted, Robert Landau was the president of RLA during the period in issue. In this position, Mr. Landau was authorized to approve everything. Generally, Mr. Landau concerned himself with selling and maintaining client accounts. This involved resolving questions concerning the content, appearance and quality of the presentations. His duties also included deciding which clients would be solicited as well as negotiating and signing contracts on behalf of RLA.

Mr. Landau had the right to hire and fire employees. However, he never hired below the level of president of a division.

Mr. Landau was a signatory on the corporate checking account. Nevertheless, he only signed checks from time to time and not in the regular course of business.

RLA's sales and use tax returns were prepared by RLA's accounting department. Mr. Landau did not sign the sales and use tax returns, resale or exemption certificates.

Mr. Landau was not involved in the sales tax audit and, during the audit at issue herein, the auditor neither spoke with nor saw Mr. Landau. Prior to receiving the notices, Mr. Landau did not know that sales tax was not being properly charged. Mr. Landau never instructed the accounting department or the purchasing department not to charge or pay sales tax. He did not know that the Division was alleging that sales taxes were not properly paid until after the audit and after RLA filed for bankruptcy.

Petitioner Nathan Unger was born on July 29, 1955. In or about January 1978, Mr. Unger received a bachelor of arts degree from Queens College. In March 1978 Mr. Unger began his first full-time employment at the age of 22 with RLA. At this time RLA was a subsidiary of Kenyon-Eckhart.

Mr. Unger's employment interview was conducted by Ira Worthman who was the comptroller of RLA. Mr. Landau was also in attendance. During this interview, Mr. Unger noted that it was his first full-time job after college.

Upon commencing his employment, Mr. Unger performed basic bookkeeping duties. This consisted of drawing checks and making entries in ledgers.

Mr. Landau chose to retain Mr. Unger when RLA became independent of Kenyon-Eckhart. When he made this decision, Mr. Landau did not inquire into Mr. Unger's professional background. Rather, Mr. Landau relied on the advice of the chief financial officer of Kenyon-Eckhart who had told Mr. Landau how competent and capable Mr. Unger was.

Mr. Unger continued to perform bookkeeping services until January 1979 at which time Mr. Landau promoted Mr. Unger to comptroller of RLA. As comptroller, Mr. Unger was responsible for maintaining RLA's books and filing its tax returns. At the time Mr. Landau offered Mr. Unger the position, Mr. Landau explained that it was understood that Mr. Unger did not have the experience to handle the job. However, Mr. Landau told Mr. Unger that he did not need to be concerned because a senior partner from the accounting firm of Eisner & Luban would be available to guide Mr. Unger through each step of the process.

For an extended period of time, Eisner & Luban reviewed Mr. Unger's work on a daily basis in RLA's offices. Eisner & Luban explained the procedures to be followed in the accounting department for invoices, how to set up reports and what the reports should look like. In addition, Eisner & Luban dictated the procedures to be followed in sales tax, which were followed at all times, and made the determination as to which sales were deemed taxable. Upon being told that RLA was informed by its clients that the materials that RLA was processing were for resale, Eisner & Luban advised RLA to obtain resale certificates. Later, Eisner & Luban checked to insure that RLA actually received the resale certificate.

Mr. Unger held the title of comptroller until January 1981. At that time Mr. Landau felt that, because of the growth that the company was experiencing, a different person was needed to handle the finances of the company. Therefore, Mr. Landau hired a gentlemen by the name of

Larry Albert to serve as chief financial officer.

When Mr. Albert was hired in January 1981, Mr. Unger became vice-president of marketing services. In this capacity, Mr. Unger coordinated promotional campaigns and tried to make sure that the schedule for production and shipping was followed. In his new position, Mr. Unger reported to Mr. Albert.

Mr. Albert held the position of chief financial officer for about a year and a half. Thereafter, the position of chief financial officer was filled by Nicholas Gilles. In or about December 1983 Mr. Gilles' employment with RLA ended and Mr. Unger became chief financial officer.

Mr. Albert and subsequently Mr. Gilles supervised the comptroller of RLA during the period that they held the position of chief financial officer. When Mr. Unger became chief financial officer, he also supervised RLA's comptroller. In his position, Mr. Unger was responsible for RLA's bookkeeping and accounting. He was also responsible for RLA's taxes and tax returns.

When he was first employed, Mr. Unger did not have check-signing authority. Later, when he became comptroller, he was authorized to sign checks with another corporate officer of RLA. In or about the end of 1983 or early 1984, Mr. Unger's signature alone became sufficient to draw funds on RLA's checking account. Mr. Unger did not draft checks without Mr. Landau's permission or authorization.

During the period that Mr. Unger was vice-president of marketing services, he was occasionally asked to sign various documents, including tax returns, pertaining to RLA's financial affairs. This occurred when the person who was supposed to sign the document was unavailable. Either Eisner & Luban or someone in the accounting department would ask Mr. Unger to sign in this instance because of Mr. Unger's prior involvement in RLA's accounting. When Eisner & Luban asked Mr. Unger to sign a return, he did so without reviewing the document first.

When RLA was having a shortage of cash, Mr. Unger and Mr. Landau reviewed a list of

suppliers or vendors to decide who would get paid. During this process, Mr. Unger advised Mr. Landau as to which supplier was calling for payment and why he should pay one person over another. At the hearing, Mr. Landau could not recall ever disagreeing with Mr. Unger. However, Mr. Landau always had the final say over who would get paid.

When he first began working as comptroller, Mr. Unger had the authority to hire employees. He also had the authority to fire employees after consulting with the personnel department. When he was engaged in marketing services, Mr. Unger was working with the heads of other departments. He could not have fired these people without permission. The record does not disclose Mr. Unger's authority to hire and fire after he became chief financial officer.

When Mr. Unger first began working for RLA he was paid approximately $10,000.00 a year. After a year, his salary became approximately $12,500.00 a year. At some juncture, his salary became $20,000.00. RLA's Corporation Franchise Tax Report for the fiscal year ended October 31, 1982 reports that Mr. Unger's compensation was $52,292.00. RLA's Corporation Franchise Tax Report for the fiscal year ended October 31, 1983 listed Mr. Unger's compensation as $100,000.00. Mr. Unger was given a substantial increase in salary by Mr. Landau so that Mr. Unger would be able to purchase a home.

For a period of about one year, Mr. Unger kept track of Mr. Landau's personal checkbook. Pursuant to a power of attorney, Mr. Unger drafted checks to pay bills which were supplied by Mrs. Landau.

At the hearing, Mr. Landau testified that RLA developed promotional campaigns for Miller Brewing Company and for Burger King Corporation for which it was paid a monthly creative and consulting services fee of $300,000.00 each during the years under audit. Mr. Landau also testified that the services which RLA rendered on behalf of Nabisco Brands, Inc. consisted of creating packaging for dog biscuits which Nabisco sold to supermarkets. Lastly, Mr. Landau averred that RLA arranged for the manufacture of promotional items which Burger King Corporation sold to its franchisees. Mr. Landau did not offer any documentary

evidence to support these assertions.

At the time of the hearing, RLA's records were stored in thousands of boxes in a warehouse. It would cost from $50,000.00 to $75,000.00 to assemble the records in a manner which would permit access to particular documents.

In accordance with subdivision 1 of section 307 of the State Administrative Procedure Act, the following proposed findings of fact have been accepted to the extent set forth in the determination: "1", "2", "3", "8", "9", "10", "11", "12", "14", "15", "16", "17", "18", "19", "20", "21", "22", "23", "24", "25", "31", "32", "34", "33", "35", "36", "37", "38", "39", "40", "41" and "44". In making these findings, several points may be noted. The record shows that the auditor examined the job jackets pertaining to the invoices issued to Miller Brewing Company, Burger King Corporation and Nabisco Brands, Inc. in determining the nature of the transactions. Petitioners have not presented sufficient evidence to warrant findings which are inconsistent with the transactions found in the job jackets. It is also noted that the fact that it would require a major undertaking in order to gain access to RLA's records cannot relieve petitioners of the need to sustain the burden of proof.

Proposed findings of fact "4", "5", "6", "7", "13", "26" through "30", "42 and "43" are not fully supported by the record.

CONCLUSIONS OF LAW

A. Before proceeding to the arguments raised by counsel, certain threshold matters must be addressed. At the hearing, counsel for the Division explained, without comment or objection, that the notices which pertained only to the quarters ending February 29, 1984 and August 31, 1984 had been superseded. Under these circumstances, this determination will not address these notices since doing so would be academic. Secondly, the petitions in the record do not challenge the notices of determination dated May 15, 1985 which assessed sales and use taxes for the period September 1, 1984 through November 30, 1984. Accordingly, there is no jurisdiction to address these notices (Tax Law § 1138[a][1]). The balance of this determination will address only the notices which assess tax in the amounts of $1,512,600.86 and

$148,066.34.

B. Initially, petitioners argue that personal liability may not be imposed upon an officer, director or employee of a corporation for the corporation's unpaid compensating use taxes. It is petitioners' argument that the use of the word "collect" in Tax Law §§ 1131(1) and 1133(a) means that personal liability may only be imposed for taxes required to be collected by a corporation and not for taxes required to be paid by a corporation.

C. The foregoing argument is without merit. In Matter of Laschever (Tax Appeals Tribunal March 23, 1989) the Tax Appeals Tribunal determined that a responsible officer of a corporation was liable for the sales tax due on the corporation's purchases. In reaching this conclusion, the Tribunal noted that, pursuant to Tax Law § 1131(1), the terms "persons required to collect tax" or "persons required to collect any tax imposed by this article" are defined as including an officer of a corporation who is under a duty to act for the corporation in complying with any requirement of Article 28 of the Tax Law. When a corporation purchases tangible personal property or services, it is a customer within the meaning of Tax Law § 1131(2). Further, when a customer fails to pay the tax to the person required to collect the same, the customer is directed to file a return and pay the tax directly (Tax Law § 1133[b]). It follows from the foregoing provisions that a responsible officer of a corporation is liable for the sales tax due on the corporation's purchases. In reaching this conclusion, it is noted that, contrary to Mr. Landau's argument, Matter of Laschever is controlling precedent since it was issued by the Tax Appeals Tribunal and not an Administrative Law Judge (see, Tax Law § 2010[5]).

D. Petitioners next argue that imposition of personal liability for a corporation's failure to comply with Articles 28 and 29 of the Tax Law constitutes an excessive fine in violation of the Eighth Amendment of the United States Constitution. This argument is based on the premise that since sales tax was not collected from customers, petitioners were not in a fiduciary position.

E. It has been recognized that the jurisdiction of the Tribunal and the Division of Tax Appeals is prescribed by the enabling legislation (Matter of Fourth Day Enterprises, Tax

Appeals Tribunal, October 27, 1988). This jurisdiction does not include a challenge that a statute is unconstitutional on its face (see, e.g., Matter of Bucherer, Inc., Tax Appeals Tribunal, June 28, 1990; Matter of Phelps, Tax Appeals Tribunal, November 2, 1989; Matter of Fourth Day Enterprises, supra; cf., Matter of J. C. Penney Co., Tax Appeals Tribunal, April 27, 1989 [holding that the issue of the constitutionality of the Tax Law as applied was properly before the Tribunal]). Therefore, petitioner's argument is rejected because the liability asserted herein is based on the statutes cited above and it is presumed that the statutes involved are constitutional.

F. Mr. Landau asserts that he was not under a duty to act for the corporation. In support of this argument, Mr. Landau points to the fact that RLA had over 200 employees and that its clients included large national corporations. Further, RLA had offices in a number of different cities. Mr. Landau also notes that RLA, like other large corporations, was departmentalized and that each department was headed by a different individual. Mr. Landau contends that his expertise was in the area of sales and that he did not have any background in accounting, finances or taxes. Mr. Landau points out that he was not involved with maintaining RLA's records and was not involved with preparing or signing sales tax returns. It is argued that the responsibility for various aspects of the business was divided among competent individuals because of the size of the business. In addition, there were independent auditors with whom the auditors consulted.

Mr. Landau states that this is not a case where a corporate official shirked his responsibilities. Rather, it is argued that there was another employee who had this responsibility. In addition, if sales taxes were not properly charged and paid, Mr. Landau did not have any knowledge of this fact until the notices were received.

Mr. Landau submits that he never instructed the accounting department not to charge sales tax on its invoices or not to pay sales tax on its purchases as these decisions were allegedly outside Mr. Landau's realm of responsibilities. Mr. Landau states that he had every reason to believe that the accounting department was carrying out its responsibilities. Further, Mr. Landau posits that the fact that he had no involvement in the conduct of the sales tax audit

shows that he was not an officer under a duty to collect sales tax.

G. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

H. The resolution of whether a person is responsible to collect and remit sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State Tax Commn., 82 Misc 2d 181, 183, 368 NYS2d 448). The relevant factors to consider when determining whether a person has a duty to act for the corporation are whether the person is authorized to sign the corporation's tax returns or is responsible for maintaining the corporate books, or responsible for the corporation's management (20 NYCRR 526.11[b][2]). Other factors which have been examined include: the authority to hire and fire employees, the derivation of substantial income from the corporation or stock ownership, and the authority to write checks on behalf of the corporation (see, Matter of Cohen v. State Tax Commn., supra; Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Autex Corp.., Tax Appeals Tribunal, November 23, 1988).

I. Applying the foregoing standards to the facts of this case leads to the conclusion that Mr. Landau was properly found to be a person required to collect the tax. As sole shareholder and president of RLA, it is clear that Mr. Landau had authority over all aspects of the corporate existence, including responsibility for the corporation's management. The record shows that Mr. Landau had the authority to draft checks, the authority to hire and fire employees, and that he derived a substantial income from the corporation.

J. In essence, Mr. Landau's argument is that the president of a large corporation who has no direct responsibility or function with respect to taxes is not under a duty to act for the

corporation with respect to sales and use taxes.

K. Mr. Landau's argument is correct to the extent that the holding of corporate office does not in and of itself provide a sufficient basis upon which to impose personal liability for sales taxes found owing by a corporation (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427).

However, the prevailing authority does not support petitioner's position. In Matter of Barton (Tax Appeals Tribunal, December 28, 1989) the Tribunal held that an officer who has the authority to ensure the payment of sales tax cannot absolve himself of liability by delegating his "duty to act" on behalf of the corporation to another. Relying upon Barton, in Matter of Roncolato (Tax Appeals Tribunal, August 15, 1991) the Tribunal found the taxpayer responsible for sales and use taxes during the period he was president of a large corporation with a complex corporate structure because he did not show that once he became president he could not ensure the payment of sales tax. It is concluded that the principle set forth in Roncolato compels holding that Mr. Landau is responsible for the taxes due from RLA.

L. Mr. Unger also urges that he is not a person who is responsible for the taxes due from RLA. Initially, Mr. Unger points out that he was only involved in the financial affairs of the corporation when he was assistant to the comptroller (March 1978 to January 1979), comptroller (January 1979 to January 1981) and chief financial officer (December 1983 to December 1984). Furthermore, Mr. Unger argues that even as comptroller his authority was limited.

M. Initially, it is noted that Mr. Unger's youth and inexperience does not, in and of itself, absolve him of responsibility (see, e.g., Matter of Hall, Tax Appeals Tribunal, March 22, 1990, confirmed 176 AD2d 1006, 574 NYS2d 862). On the other hand, in examining the established criteria, one should not merely match the taxpayer's activities with the traditional indicia of responsibility (Matter of Taylor, Tax Appeals Tribunal, October 24, 1991). Rather, one must ask if the taxpayer had actual control over the financial affairs of the corporation (see, Matter of Constantino, September 27, 1990). If the corporate official does not have the authority to remit

taxes, he will not be held as a responsible officer under Article 28 of the Tax Law (see, Matter of Taylor, supra; Matter of Constantino, supra).

The record shows that at the outset of the audit period, Mr. Unger held the title of comptroller and that in this position he signed sales and use tax returns for the periods December 1, 1980 through February 28, 1981, September 1, 1980 through November 30, 1980 and June 1, 1980 through August 31, 1980. He also signed a New York State Corporation Franchise Tax Report for the fiscal years ending October 31, 1981 and October 31, 1982. In addition, as comptroller Mr. Unger had the right to hire and fire employees in the comptroller's office after consulting with the personnel office. The foregoing facts support a finding that Mr. Unger was responsible for the taxes due from the corporation during his initial service as RLA's comptroller.

N. Other facts, however, warrant drawing a different conclusion. The record shows that when Mr. Unger became comptroller, his signature alone was not sufficient to draw funds on the corporate checking account. In addition, Mr. Unger did not sign checks without authorization from Mr. Landau. The lack of control over the corporate checking account is a very significant factor (e.g., Matter of Constantino, supra). It is also significant that Mr. Unger's responsibility to sign the sales tax returns was merely ministerial and performed at the direction of Eisner & Luban (see, Matter of Taylor, supra). Under these circumstances, it is concluded that Mr. Unger was not a person required to collect the tax of RLA during the initial period that he served as RLA's comptroller (until January 1981).

O. The record shows that in 1981 Mr. Unger became the vice-president of marketing services. In this position, he was involved with the creative, art and traffic departments to insure that work was performed on time and the marketing campaigns were progressing as anticipated. During the period of time he was engaged in marketing services, Mr. Unger was not called upon to draft checks. Further, in this position, if Mr. Unger felt someone should be fired, he needed the approval of Mr. Landau or Mr. Lockwood, who was executive vice-president.

P. On the basis of the foregoing facts, it is concluded that Mr. Unger's inconsiderable involvement in the financial affairs of the corporation during the period of time he was vice-president of marketing services is not sufficient to hold him liable for sales taxes during this period. In reaching this conclusion, it is recognized that there were occasions where Mr. Unger signed a tax return; however, this only occurred when other people were not available. It is also recognized that Mr. Unger signed the power of attorney form authorizing Eisner & Luban to appear at the audit as well as the consent to the test period agreement. However, these were singular acts which were performed under a directive and not representative of his duties as vice-president of marketing services.

Q. During the period of time which remains in issue, Mr. Unger assumed the duties of chief financial officer of RLA. In this position, Mr. Unger had all of the authority and responsibility he had previously as comptroller plus he was authorized to sign checks on his own initiative. At this juncture, it is clear that Mr. Unger had the authority and responsibility to remit the taxes which were due. Since he agreed to accept his new position with its attendant responsibilities, Mr. Unger cannot escape liability by arguing that he deferred to Mr. Landau. Accordingly, Mr. Unger is found liable as a person required to collect tax for the period December 1, 1983 through August 31, 1984.

R. Each petitioner argues that the audit method was improper and that it resulted in an incorrect determination of tax due.

Before proceeding to the specific arguments, certain threshold principles should be addressed. Every person required to collect sales tax is also required to keep a record of every sale (Tax Law § 1135; see also, 20 NYCRR 533.2 [adopted during the audit period]). Tax Law § 1135(d) provides that those required to keep records shall make such records "available for inspection and examination at any time upon demand." In turn, Tax Law § 1138(a)(1) authorizes the Division to determine tax due when a return is incorrect or insufficient "upon such information as may be available." If the taxpayer maintains a complete set of books and records and makes those records available to the Division, the Division is restricted to the use of

those records because "[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43). Conversely, the use of external indices is proper when the taxpayer does not produce the records needed to independently determine taxable sales and to conduct an audit (see, e.g., Matter of Continental Arms Corp. v. State Tax Commn., 72 NY2d 976, 534 NYS2d 362).

In Matter of Todaro (Tax Appeals Tribunal, July 25, 1991) the Tribunal set forth the applicable principles to determine the adequacy of a request for records as follows:

> "To determine the adequacy of a taxpayer's records the Division must first request (Matter of Christ Cella, Inc. v. State Tax Commn., supra, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-980) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The request for records must be explicit and not 'weak and casual' (Matter of Christ Cella, Inc. v. State Tax Commn., supra).
>
> "The purpose of the examination is to determine, through verification drawn independently from within these records (Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255, 256-57; Matter of Urban Liqs. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139; Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209), that they are, in fact, so insufficient that it is 'virtually impossible (for the Division of Taxation) to verify taxable sales receipts and conduct a complete audit' (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d 41, 43), 'from which the exact amount of tax can be determined' (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760).
>
> "Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (Matter of Urban Liqs. v. State Tax Commn., supra)."

S. The record in this matter shows that a request for records was made for the period December 1, 1980 through August 31, 1983 and that on August 29, 1984 the Division requested additional records for purposes of updating the audit through May 31, 1984. However, the record does not show that any request for records was made for the period June 1, 1984 through August 31, 1984.

Without a specific request for records, resort to external indices was improper (see, e.g., Matter of Perar Discount Center, Ltd., Tax Appeals Tribunal, June 27, 1991). Accordingly, the

assessments for the period June 1, 1984 through August 31, 1984 are cancelled. The balance of this determination only concerns the assessments for the quarterly periods which remain in issue.

T. Mr. Landau argues that the audit method was improper because RLA maintained sufficient records to conduct an audit.

This argument is patently without merit. The record shows that RLA was missing its general ledger for the first year of the audit period. In addition, the corporation could not provide a number of invoices, shipping documents or backup to the sales invoices. The record also shows that the auditor could not tie in the sales reported on the sales and use tax returns with the amounts recorded in the general ledger. Lastly, the Division determined that RLA's gross billings exceeded the sales reported on its sales and use tax returns by $995,750.00. Under these circumstances, it is clear that RLA did not maintain and present to the Division a complete set of books and records. Consequently, the Division properly resorted to the use of external indices.

In reaching this conclusion, it is noted that the fact that the Division gave RLA a test period agreement form does not create the fiction that RLA had a complete set of books and records. Since RLA did not have adequate records, the Division was permitted to use external indices without RLA's consent.

U. Each petitioner maintains that the audit was improperly conducted because the auditor failed to follow the audit method which was initially agreed upon. It is argued that the Audit Method Election Form was signed with the understanding that the results of the prior audit would be used and that the Division never notified RLA that the results of the prior audit would not be used.

The record in this matter does not support petitioners' argument. It is clear that the auditor initially proposed using the results of the prior audit. However, this approach was abandoned because it was rejected by RLA. Obviously, in hindsight, petitioners should not have rejected the original method which was proposed. Nevertheless, this does not render the

method selected by the Division unreasonable. It is noted that the auditor's testimony on this point is found credible despite the absence of a written notation that the prior audit was not used at RLA's request.

V. Petitioners next argue that it was arbitrary to limit the test period to six days in April 1983. This argument is rejected.

The record establishes that the auditor initially proposed testing all sales during the month of April 1983. However, the audit was limited to a shorter period of time because of the dearth of records available. Thus, it was RLA's failure to maintain proper records which necessitated the use of an abbreviated audit period. A taxpayer cannot demand exactness where the taxpayer fails to comply with the law regarding recordkeeping (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679).

W. In reaching the foregoing conclusion, several points warrant attention. First, the record does not support the claim that the auditor intentionally omitted invoice #3640 in order to produce a higher ratio of taxable sales. To the contrary, the record shows that this invoice was considered (Tr., p. 80).

Secondly, Mr. Landau asserts that errors in the audit are shown by the auditor's allegedly treating nontaxable agency fees as sales of tangible personal property and imposing sales tax upon sales which were for resale. Specifically, Mr. Landau asserts that RLA was not selling bread baskets to Nabisco, but was creating packaging for dog biscuits which Nabisco sold to supermarkets. Further, Mr. Landau maintains that the receipts from Burger King were allegedly for a nontaxable monthly creative and consulting service fee. A portion of the receipts were allegedly also for the sale of promotional items which were the property of Burger King and which were sold to Burger King franchises. RLA was advised not to collect tax on these items. According to Mr. Landau, the auditor was also unaware that Miller paid RLA a monthly nontaxable creative and consulting service fee of $300,000.00. Lastly, Mr. Landau asserts that the arbitrariness of the audit was shown by the way the percentage of goods shipped to New York was handled.

X. The foregoing arguments require a comparison of the relative weight of the evidence presented by the respective parties. With respect to the claimed sales for resale, the record shows that the auditor reviewed job jackets to determine which jobs involved taxable sales and that these findings were later incorporated into the audit. As opposed to this, petitioners present only the testimony of Mr. Landau that his clients resold the items. This testimony is not sufficient to establish a sale for resale without evidence of how RLA's clients treated the items which it purchased (see, Matter of Alde Taxi Meter Service, Tax Appeals Tribunal, January 2, 1992).

Y. It is not questioned that RLA provided nontaxable consulting fees to its clients. The record shows that where the auditor was able to discern that the receipt was for a nontaxable consulting fee, no tax was charged. Conversely, where the fee was for a taxable sale, it was treated as such. In the absence of any documentary evidence to show that this treatment was erroneous, petitioners have not shown that this treatment should be adjusted.

Z. Contrary to Mr. Landau's argument, the Division's allocation of the shipment of goods to New York and other places does not show that the audit was arbitrary. At one juncture, the information available to the auditor was that goods entered and exited so quickly that RLA did not maintain shipping records. At another point, he was told that the shipping documents were in a warehouse but not in any kind of order and would be very difficult to obtain. Regardless of which of the foregoing versions is correct, the important point is that the records were not available to the auditor. Under these circumstances, it was reasonable for the auditor to estimate shipping percentages which reflected the taxes due. Petitioners have no basis to complain about these percentages because they inured to petitioners' benefit. Furthermore, if petitioners were entitled to a greater allocation, they should have offered evidence to support this proposition.

AA. Petitioners submit that the determination of tax due on recurring expense items was erroneous. Initially, it is noted that since RLA did not maintain and present adequate records, the Division was not required to obtain RLA's permission before conducting a test period audit.

Further, contrary to the suggestion of Mr. Landau's attorney, it cannot be said as a matter of law that there is no correlation between recurring expense items and gross billings. In this regard, the auditor explained that the nature of the billings was consistent throughout the audit period thereby lending credence to the audit method which was selected. It is also noted that the auditor's statement that he reviewed invoices throughout the audit period is not inconsistent with his limiting the number of sales during the test of taxable sales. The reason why the sales were limited was not because the invoices were unavailable, but because the backup to the invoices was unavailable.

BB. Mr. Landau objects to the audit on the grounds that the auditor did not discuss the invoices he was examining with RLA until RLA's records were in the possession of the trustee in bankruptcy. This argument is also meritless. Mr. Landau has not pointed to any authority which requires the auditor to discuss the results of an audit with the taxpayer before the audit is completed. The fact that RLA was in bankruptcy at the time the audit was completed is unfortunate. However, this fact does not inure to the Division's detriment.

CC. Petitioners argue that there are several errors in the auditor's calculation of tax due on fixed asset purchases. In support of this argument, petitioners first note that for the quarters ending February 28, 1982 and May 31, 1982 the auditor calculated additional tax due on furniture, fixtures and equipment of $1,877.95 and $723.36, respectively. The auditor's workpapers on RLA's purchases of furniture, fixtures and equipment for the quarters ending February 28, 1982 and May 31, 1982 show that RLA made purchases, without paying sales tax, of $10,306.50 and $4,853.00, respectively. Applying a tax rate of 8.25 percent, the tax due for the quarter ending February 28, 1982 was $850.29 and the tax due for the quarter ending May 31, 1982 as $400.37. In its brief, the Division did not address the foregoing objections to the audit.

Petitioners have accurately identified the foregoing errors in the calculation of tax due on furniture, fixtures and equipment. The Division is directed to recalculate the amount of tax due accordingly.

DD. Petitioners maintain that it was arbitrary for the auditor to treat all purchases for which no invoice was produced as a purchase on which no sales tax was paid. Petitioners submit that this was done even though the invoices came from large organizations which the auditor admitted are in the practice of charging sales tax and which other invoices show have charged sales tax on other transactions.

The foregoing argument is rejected. As noted earlier, it is statutorily presumed that RLA's purchases are subject to tax (see, 20 NYCRR 533.2). The fact that RLA may have paid tax to the same vendors on other occasions or that the entities that RLA made purchases from were large organizations is not sufficient to establish that the tax in issue was paid.

EE. Petitioners' last argument is that the workpapers contain many errors which allegedly affect the tax due. In support of this argument, petitioners focus upon three alleged errors: (1) an error in the computation of the taxable ratio for sales; (2) an error in identifying on the workpapers the invoices which were examined as being from April 1984 when, in fact, they were from April 1983; and (3) the failure to correctly identify one of the invoices used to calculate the sales tax taxable ratio.

FF. As noted earlier, the Division made a transpositional error in calculating the amount of tax due (see, Footnote "1"). Under these circumstances, the Division is directed to recalculate the amount of tax due.

GG. Petitioners have not shown how the remaining alleged errors have any impact on the amount of tax due. The record shows that the Division spent in excess of 290 hours and developed an extensive audit report. The minor errors in the audit report do not show that the audit results were erroneous.

HH. The petition of Nathan Unger, officer of Robert Landau Associates, Inc., is granted to the extent of Conclusions of Law "N", "P", "S", "CC" and "FF" and the Division is directed to modify the notices of determination and demands for payment of sales and use taxes due accordingly; except as so granted the petition is otherwise denied and the notices of determination and demands for payment of sales and use taxes due are sustained.

II. The petition of Robert Landau, officer of Robert Landau Associates, Inc., is granted to the extent of Conclusions of Law "S", "CC" and "FF" and the Division is directed to modify the notices of determination and demands for payment of sales and use taxes due accordingly; except as so granted, the petition is otherwise denied and the notices of determination and demands for payment of sales and use taxes due are sustained.

DATED: Troy, New York
January 28, 1993

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE