

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RAMI INDUSTRIES, LTD. : DETERMINATION
AND SANDY KAMHI, AS OFFICER : DTA NO. 807093
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1984 :
through May 31, 1987. :

Petitioners, Rami Industries, Ltd. and Sandy Kamhi, as officer, 135 West 36th Street, New York, New York 10018, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through May 31, 1987.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 25, 1991 at 1:30 P.M., with all briefs to be submitted by July 3, 1991. Neither petitioner nor the Division of Taxation submitted a brief. Petitioner appeared by Gerald B. Tepper, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation's resort to an observation method of audit in determining petitioners' sales tax liability was appropriate and, if so, whether petitioners have established any error in the resulting dollar amount of tax due as determined from the application of such method. II. Whether petitioner Sandy Kamhi was a person required to collect and remit sales and use taxes on behalf of petitioner Rami Industries, Ltd. pursuant to Tax Law §§ 1131(1) and 1133(a).

III. Whether petitioners have established any basis warranting abatement of penalties imposed

by the Division of Taxation.

IV. Whether the possible failure of petitioners' current representative to have received an answer to the petition herein warrants cancellation of the assessments at issue or any other relief.

FINDINGS OF FACT

On December 1, 1987, following a field audit, the Division of Taxation issued to petitioner Rami Industries, Ltd. (hereinafter "Rami") two notices of determination and demands for payment of sales and use taxes due. On the same date, the Division also issued two identical notices of determination to petitioner Sandy Kamhi, as an officer of Rami. The first of such notices of determination issued to each of the named petitioners assessed tax in the amount of \$61,542.69, plus penalty and interest, for the period March 1, 1984 through May 31, 1987. The second of such notices of determination issued against each petitioner assessed omnibus penalties for the period June 1, 1985 through May 31, 1987. Validated consents extending the period of limitations on assessment were executed on behalf of each of the petitioners permitting the Division to assess tax for the period March 1, 1984 through August 31, 1984 at any time on or before December 20, 1987.

Audit activity in this matter was commenced on or about February 12, 1987, when the Division of Taxation's auditor telephoned Rami's accountant¹ and scheduled an audit appointment for March 16, 1987 at 9:30 A.M. On the same date, the auditor also mailed an audit appointment letter to Rami confirming the date, time and place of the audit appointment. The audit appointment letter specifies the period under audit to be March 1, 1984 through November 30, 1986 and indicates the following:

"All books and records pertaining to your Sales Tax liability for the period under audit should be available. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all Sales Tax records. Additional information may be required during the course of the

¹Rami's accountant at the time of audit is not the same person as the individual who represents petitioners in these proceedings. Rami's accountant at the time of the audit was not called as a witness at hearing.

audit.

* * *

All exemption certificates for all locations must be available at the place of audit for inspection and verification on the starting date of the audit. Any exemption certificate not provided at that time may not be recognized as being timely filed."

Petitioner Rami operates as a wholesale and retail seller through three store locations in New Jersey and two in New York. Its offices are located at 135 West 36th Street, New York, New York. Only the New York retail stores were the subject of this audit. The audited stores are known as Sydelles Fabric Store, located at 295 Livingston Street in Brooklyn, New York, and Kamhis Fashion, located at 54-26 Myrtle Avenue, Ridgewood, New York (hereinafter sometimes referred to respectively as the "Brooklyn Store" and the "Ridgewood Store"). These stores made only retail sales, and no wholesale sales, of merchandise such as buttons, zippers, patterns, ribbons, notions, dresses, skirts, shirts, and fabric. The main items sold were

fabric remnants with very few dresses, skirts and shirts sold.² Neither store accepted checks or credit cards, leaving cash as the only acceptable means of paying for merchandise purchased.

On the scheduled March 16, 1987 audit appointment date, the auditor went to Rami's offices and reviewed Rami's general ledger, sales tax returns and Federal income tax returns. The auditor allegedly found no cash receipts or cash disbursements journals. Bank deposit slips and bank statements were available but were not reviewed by the auditor. Some purchase invoices and a purchase journal were reviewed by the auditor. The auditor spent approximately two days at Rami's offices. On these initial audit dates, as well as at subsequent meetings the auditor, and later her supervisor, specifically asked Rami's accountant to provide cash register tapes or sales invoices for the purpose of verifying sales receipts as reported. Rami's accountant advised in response that such tapes and invoices were not maintained by Rami. The auditor was

²It appears these latter three items of merchandise were not carried as available for sale until nearly the end of the audit period.

advised that sales figures were obtained by telephone calls from the store locations. This advice, coupled with the inability to obtain any sales invoices or cash register tapes, led the auditor to conclude that Rami's records were inadequate for purposes of verifying sales. In turn, the auditor decided to conduct full-day observations of Rami's sales at both the Brooklyn and Ridgewood store locations in order to calculate Rami's sales tax liability and determine the accuracy of Rami's returns as filed.

On April 22, 1987 the auditor, with the assistance of another auditor, observed and recorded each sale at the Brooklyn store for the entire period that the store was open on such date (from 10:00 A.M. to 6:00 P.M.). The auditors were stationed next to the store's one cash register in use during the observation day. On an ongoing hourly basis the sales total on the store's cash register was tallied and compared to the sales as observed and recorded by the auditors. Subsequently, on April 27, 1987, the auditors conducted the same method of observation in the Ridgewood store, again recording every sale transacted and comparing the same on an hourly total basis to the cash register hourly tally.

The auditor utilized the results of the observations in calculating the assessments at issue herein as follows:

- a) Retail sales observed at each of the two store locations on the two observation days (\$380.60 for Sydelles and \$269.52 for Kamhis) were totalled to arrive at observed taxable sales of \$650.12.
- b) Total taxable sales observed (\$650.12) was multiplied by the six days per week that the stores were open, and the resultant total was multiplied by the thirteen weeks in the sales tax quarterly period during which the observation occurred to arrive at estimated quarterly taxable sales of \$50,709.00.
- c) Reported taxable sales per Rami's sales tax return for the observation quarter (\$18,444.00) were subtracted from estimated quarterly taxable sales (\$50,709.00), resulting in unreported taxable sales of \$32,265.00.
- d) Comparing unreported taxable sales (\$32,265.00) to reported taxable sales (\$18,444.00) resulted in a margin of error (underreporting) of 1.74935. In turn, reported taxable sales for the entire audit period per sales tax returns (\$422,742.00) were multiplied by such margin of error to arrive at unreported taxable sales of \$739,524.00, and additional tax due thereon was calculated in the amount of \$61,010.73.

In addition to the foregoing, the auditor reviewed Rami's fixed asset acquisitions. Such review revealed seven items for which invoices could not be supplied or for which invoices showed that no tax was paid by petitioners, as follows:

<u>Name</u>	<u>Amount</u>	<u>Date</u>	<u>Reason</u>
Ancre Victory	\$1,740.00	6/25/85	No tax paid
Kring Swings and Shade	800.00	7/30/85	No tax paid
Reliable Typewriter	400.00	10/31/85	No tax paid
C & S Fencing	1,925.00	11/30/85	Invoice missing
Sepe's Inc. (air condition)	600.00	6/6/86	No tax paid
Schnoll Monument	327.00	10/8/86	Invoice missing
International Electric	656.00	10/24/86	Invoice missing
	<u>\$6,448.00</u>		

The auditor calculated use tax due on the above items in the amount of \$531.96.

Totalling sales tax due on unreported taxable sales (\$61,010.73), plus use tax due on fixed assets (\$531.96), results in a total tax due of \$61,542.69, which amount was assessed by the notices of determination described in Finding of Fact "1".

Petitioners challenged the results of the audit and a prehearing conciliation conference was held. On April 14, 1989, a conciliation order was issued reducing the amount of tax due to \$52,936.96, plus penalty and interest. The basis for this reduction was that an additional seven religious holidays per quarter were allowed as days during which both stores were closed, thereby reducing the number of days open for business per quarter from 78 to 71 and, in turn, reducing the amount of taxable sales per quarter. The amount of tax due reflects a recalculation (reduction) of the error rate from 1.74936 to 1.5026.³

Petitioner Rami made wholesale sales as well as retail sales. The auditor's review of Rami's general ledger and other records revealed no distinction therein between wholesale sales receipts and retail sales receipts, nor any separate statement of the receipts received from each of the two stores in question. The auditor noted that at the time of her visits to the stores in

³This revised error rate results from dividing recalculated unreported taxable sales for the quarterly period ended 5/31/87 (\$27,714.52) by reported taxable sales for the same quarter (\$18,444.00).

question, the store cashier did prepare invoices for each sale, providing one copy of the invoice to the customer while retaining one copy for the store's records. The auditor was advised, apparently by the store cashier, that at the end of each day the cash received, together with the invoices, were given to the store manager.⁴ Cash register tapes were allegedly given to the manager at the end of each month. In turn, the auditor was advised (apparently by the store cashier) that cash receipts and sales invoices were brought to Rami's offices at 135 West 36th Street two or three times per week, with the cash thereafter deposited into Rami's bank account. This information, recorded by the auditor in her audit report and in her log of contacts and comments ("log"), is in apparent direct contradiction to the information provided by petitioner's accountant, who indicated to the auditor that invoices and cash register tapes were not kept and that sales receipts were determined based upon telephone calls from the stores to Rami's main office. The auditor noted that, although bank deposit slips and bank statements were available, the same were not reviewed because without source documents in support of sales, the bank documents would not

necessarily verify the total amount of sales without the assumption that all such sales receipts were in fact deposited into the bank.

Petitioners presented the testimony of one Shirley Sercus, who had been Rami's bookkeeper for a number of years including those under audit. She signed a statement indicating that Rami maintained a "full set of accounting records and all normal books required to run a business, including a cash receipts book, cash disbursements, payroll book and general ledger." She noted that all sales were recorded through the cash receipts book, and that the main office received cash from the stores two to three times per week for deposit to the bank. She also indicated that the sales invoices were forwarded to the main office. Ms. Sercus explained that the Brooklyn store had four to five employees, while the Ridgewood store was

⁴Although not entirely clear from the record, it appears there was one store manager who had charge of both stores.

somewhat smaller and had three to four employees.

Petitioners also introduced into evidence two packets of sales invoices, one for the Brooklyn store and one for the Ridgewood store, which reflect sales made at each store within the quarterly period spanning March through May 1987 (the final quarterly period in question here). These invoices indicate the date of sale, and a description of the type, quantity and price of the items purchased. In no case is a customer number, name or address included on the face of an invoice. No other sales invoices were provided at the time of audit, or thereafter through the time of the subject proceedings. It is alleged by petitioners that all such invoices were destroyed as the result of two separate incidents occurring at the Brooklyn store (see Finding of Fact "16", infra).

Petitioners also presented the testimony of Ralph Kamhi. Ralph Kamhi described Rami as a corporation which was founded, owned and operated entirely by his father. Ralph Kamhi held the office of treasurer of Rami (at least for the period after late 1986), while petitioner Sandy Kamhi held the office of secretary. Ralph Kamhi testified that his father owned all of Rami's stock, and ran the business as the "ultimate boss". Ralph Kamhi testified that petitioner Sandy Kamhi was never in the retail stores, never collected, deposited or in any way controlled cash receipts, had no involvement in hiring or firing employees and had nothing to do with the operation of Rami except that he was an officer "in name only". Ralph Kamhi testified that petitioner Sandy Kamhi⁵ had no authority to write checks on behalf of Rami.

Ralph Kamhi explained that his father died near the end of 1986, at which time Ralph Kamhi first became involved in Rami's business. He testified that he had no actual involvement with Rami prior to such time, but rather worked in the trucking industry. His knowledge of Rami's business comes from discussions with his father and from his involvement with Rami starting in late 1986 after his father's death. Ralph Kamhi signed certain checks and tax returns on behalf of Rami at the time of his father's death and thereafter. Ralph Kamhi

⁵Petitioner Sandy Kamhi also utilized the name Sandy Kay, as indicated on certain documents in the record and as noted in testimony by Ralph Kamhi.

described Sandy Kamhi as "an officer, but he wasn't an operating officer" of Rami during the audit period. He went on to state:

"Before coming [to the hearing], I specifically asked [Sandy Kamhi] if he was involved [in the business of Rami Industries, Ltd. during the audit period], and to the best of his memory, he was not."

Ralph Kamhi admitted that at the time of hearing, Sandy Kamhi was working in Manhattan but chose (apparently) not to appear personally at the hearing, allegedly because he would have had no knowledge of the matters being discussed.

Ralph Kamhi also testified, in response to questions on cross-examination, that Sandy Kamhi never prepared or signed tax returns on behalf of Rami. Thereafter, however, when shown a sales tax return for the quarterly period ended May 31, 1984 and two corporation franchise tax reports for the period April 1, 1983 through March 31, 1984, on each of which the name Sandy Kamhi is signed, Ralph Kamhi testified first that such signatures were in fact Sandy Kamhi's. He later testified that they might not have been Sandy Kamhi's signature. At best, it appears Ralph Kamhi could only guess as to whether the signatures shown were in fact made by Sandy Kamhi. The signatures on the tax returns are clearly similar to those appearing on the power of attorney appointing petitioners' representative in this proceeding, as well as on the consents extending the period of limitations and on the petition filed herein.

Petitioners submitted in evidence two invoices, one from Standard Renovation, Inc. and one from Jamaica Home Improvement Contractors. The former bears a date of December 24, 1986, is issued to Rami Industries, Ltd. at 135 West 36th Street, and includes the description "pump basement of water...7 hrs[,] reason broken pipe". A description of the work location is not included on the invoice. The second invoice was also issued to Rami Industries, Ltd. at 135 West 36th Street, and indicates a job name and location of "295 Livingston St., Brooklyn, N.Y." (the Brooklyn store). This invoice includes a description of the work performed as: "Backup of sewer, 4 ft. of water in basement pumped out". The date promised for completion of this described work was June 10, 1987. In connection with these two invoices, Ralph Kamhi testified that at the end of December 1986 a water pipe burst in the basement of the Brooklyn

store, causing a flood in the basement where the records and invoices of Rami's sales were allegedly stored. He testified that in April of 1987, a city sewer pipe backed up and again flooded the same basement with sewage. Mr. Kamhi indicated that the records of the business, as well as certain inventory, were destroyed and had to be disposed of as a result of these incidents. It was not specified as to whether these items were destroyed as the result of the first or second flooding (separately), or rather were destroyed by the cumulative effects of both floodings. Mr. Kamhi explained that the invoices for the quarterly period ended May 31, 1987 (those submitted in evidence per Finding of Fact "12", supra) were "at the top of the stack" and had survived the flood and sewage backup.

With respect to the use tax portion of the assessments, the invoices relating thereto (see Finding of Fact "7", supra) were not offered in evidence. The only evidence provided on this issue consisted of Ralph Kamhi's testimony that each of the invoiced expenses related to work performed in or at Rami's New Jersey stores. More specifically, he testified that the fencing was installed at Rami's Bloomfield, New Jersey store to provide rear yard security, that the Schnoll monument work involved resetting cornerstones at the Bloomfield store, and that the shelving was attached to the walls of the same store. He noted further that the air conditioning work involved placing an air conditioner in a wall "cut-out" in Rami's Bayonne, New Jersey store, that the electrical invoice related to rewiring the same store, and that the CNS Screens and Shades invoice related to a special window plastic installed to stop sun damage to garments displayed at the Bayonne store. No explanation was offered relative to the Reliable Typewriter invoice.

The auditor's log of contacts and comments includes an entry on August 19, 1987 stating: "[e]xtended two more current quarters in the audit period". This entry is in regard to the fact that the audit period specified in the audit appointment letter extended through the quarterly period ended November 30, 1986, yet the period of assessment covered herein includes the two additional quarterly periods ended February 28, 1987 and May 31, 1987. When questioned about this extension, the auditor admitted that she never specifically asked for

any records for any quarterly periods after November 30, 1986.

CONCLUSIONS OF LAW

A. It is well settled that where a tax return is incorrect or insufficient, the Division of Taxation has the right to determine the amount of tax due from such information as may be available (Tax Law § 1138[a][1]). If a taxpayer maintains a complete set of books and records, 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 v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43.) Conversely, however, the use of external indices to determine taxable sales and tax liability is proper when the taxpayer does not maintain or produce the records needed to independently determine taxable sales and to conduct an audit (see, Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552; Matter of Club Marakesh v. Tax Commn. of the State of New York, 151 AD2d 908, 542 NYS2d 881, lv denied 74 NY2d 616, 550 NYS2d 276). In order to determine whether a taxpayer's records are adequate to conduct an audit or whether external indices are required, the Division must request and examine the taxpayers' books and records for the entire audit period (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858).

B. In this case the Division of Taxation, by its auditor, requested an opportunity to examine Rami's books and records. However, the Division was not provided with any original sales documents such as invoices or cash register tapes for examination. In fact, notwithstanding that upon observation the auditor saw invoices being created at the point of sale, she was told repeatedly by Rami's accountant at the time of audit that sales invoices and cash register tapes were not maintained. Here, in fact, the source records were never available for review during the audit. The conflicting claims by Rami's accountant that invoices were never maintained versus the testimony at hearing that the same were maintained and were stored in the basement of the Brooklyn store outlet leaves only confusion over whether such

documents were actually maintained or available at any time. As to the allegations and evidence concerning the broken pipe and resulting flood and the sewer backup, the former allegedly occurred in December 1986 yet the sole piece of evidence supporting the occurrence, an invoice for pumping water, does not indicate a job location where the water was pumped or substantiate where the flood occurred. The second such piece of evidence, relating to the sewage backup, indicates the date June 10, 1987, which was subsequent to the auditor's request for records, subsequent to the initial audit appointment date, and also subsequent to the observations conducted. It remains unexplained why no one advised the auditor over the course of the audit that records may have been available but were destroyed in the flood and sewage backup. So too, the testimony that the invoices were allegedly brought to the office in Manhattan and then returned to the Brooklyn store for storage in the basement is less than fully convincing. In this regard there is no evidence or allegation as to what use was made of the invoices when they were allegedly brought to the office in Manhattan. Further, with respect to the sets of invoices introduced into evidence and pertaining to the quarterly period ended May 31, 1987 (the last quarterly period assessed which was also the quarterly period during which the observations were conducted), it is interesting that such an allegedly complete set of invoices for this quarterly period exists only because they were luckily stored on top of other items and were not damaged in the sewage backup. Since the specific date of the sewage backup was not mentioned, and the invoices allegedly were transported from the retail outlets to the central office and then back to the Brooklyn location for storage, the same may not, in fact, have been placed in storage until after the sewage backup. It is also equally possible that invoices only began to be used as a result of the then-pending audit and observations. Noting that petitioners suggest no particular use to be made of these invoices for the last quarterly period, for revision or comparative purposes, or otherwise, leaves the same of no value herein.

In sum, the Division's auditor made repeated requests for source documents to verify sales but was provided with none. Although at the time of the observations such source records were being created, the balance of the evidence is insufficient to support a conclusion that such were

created and maintained during the audit period or were at any time made available to the auditor. Hence, the use of an indirect method of computing petitioner's taxable sales, and its tax liability via the application of such method, is sustained (see, Matter of 24 Hour Grocery and Candy, Tax Appeals Tribunal, June 27, 1991).

C. When the Division uses an indirect audit method, it is required to select a method which is reasonably calculated to reflect the tax due (Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 206, 159 NYS2d 150, 157, cert denied 355 US 869; Matter of Urban Liquors, Inc. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139). If the Division uses such method, petitioner bears the burden of proving by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Service Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 446 NYS2d 451). As to the reasonableness of the indirect audit method used here, namely an observation of sales, the same has repeatedly been held to be a method reasonably calculated to reflect tax due (see, e.g., Matter of Meskouris Brothers, Inc. v. Chu, 139 AD2d 813, 526 NYS2d 679).

D. Petitioners have not offered any evidence warranting adjustment of the audit results. It should be noted with respect to the use tax portion of the assessment that petitioners claim all invoices, including those described in Finding of Fact "7", were provided to the auditor. However, such invoices were not submitted in evidence at the hearing nor, more importantly, was any specific evidence submitted to support the claim, via Ralph Kamhi's testimony, that the assessed amounts related to work performed in New Jersey. Given that Ralph Kamhi was not involved with Rami at the time the work in question was performed (compare Findings of Fact "7" and "14"), his testimony alone is insufficient to support a conclusion that tax was paid or was not due with respect to the invoiced amounts.

As to the sales tax portion of the assessment, original sales records were requested by the auditor but were not supplied. Petitioners do not dispute this, rather arguing that such records were maintained but were destroyed by a flood and/or a sewage backup. Whether as the result of a) petitioners' choice not to provide the records; b) the fact that such records were never

maintained and thus could not have been provided, or c) such records were destroyed by water/sewage damage, it remains that no such records were provided. The Division, under all such scenarios, was entitled (and required), to resort to indirect auditing to determine tax liability. In fact, even if the records were unavailable because destroyed, as alleged through no fault of petitioners, petitioners would still have had to provide some secondary evidence to refute the correctness of the assessment. On this score petitioners have not offered evidence or argument nearly sufficient to support their unstated (though assumed) position that all tax due was paid and that Rami's returns as filed were correct. Accordingly, the result of the Division's observation audit, as applied, is sustained.

E. Notwithstanding the foregoing, the Division's entitlement to resort to external indices and estimate tax liability must be preceded, as noted, by a request for and review of records for the entire audit period specified. In this case, the audit appointment letter specifies that the audit extended through the quarterly period ended November 30, 1986. This fact, coupled with the facts that no records were specifically requested for periods subsequent to the specified November 30, 1986 audit ending date, that the last two quarterly periods were assessed by extension of the margin of error, and that later in the audit period Rami's retail business may have changed to some degree in that additional items (specifically dresses and other items of clothing) were included among items offered for sale, must result in cancellation of the portion of the assessment relating to the last two quarterly periods (see, Matter of Adamides v. Chu, supra; Matter of Anton's Car Care Service Ltd., Tax Appeals Tribunal, November 23, 1988).

F. Turning to the issue of petitioner Sandy Kamhi's personal liability, it was admitted that he was an officer of the corporate petitioner. However, it is alleged that he was not at the stores and was in no way involved in the operation of the business. Matter of Autex Corporation (Tax Appeals Tribunal, November 23, 1988) describes the factors relevant to determining whether an individual is a person or officer under a duty to act for a corporation as follows:

"The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 183). Factors stated by the Division's regulations 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]).

Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Blodnick v. State Tax Comm., 124 AD2d 437); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Comm., 128 AD2d 1022, 1023); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. NY Tax & Finance, 98 Misc 2d 222, 225-226); the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 391). Within closely held corporations, 'an officer's knowledge of the corporate affairs and his benefits received from corporate profits (are) extremely important considerations' (Vogel v. NY Tax & Finance, supra at 226)."

Here, Sandy Kamhi was an officer of the corporation and there is evidence that he signed tax returns. The only evidence in support of the petition consists of Ralph Kamhi's denial that Sandy Kamhi was in any way involved in the corporation. This testimony is less than convincing, in view of the documentary evidence submitted, and the fact that Sandy Kamhi was himself working in Manhattan, was aware of the hearing, and was presumably able to come to the hearing but chose not to. In fact, the statement by Ralph Kamhi that "I asked him specifically if he was involved; and to the best of his memory, he was not" is accorded no weight vis-a-vis relieving Sandy Kamhi of liability. Under the circumstances, petitioner Sandy Kamhi has completely failed to meet his burden of establishing that he was not a person or officer under a duty to act on behalf of the corporate petitioner in collecting and remitting sales and use taxes, and thus the assessment against him is sustained.

G. Finally, petitioners have advanced neither argument nor evidence sufficient in any way to support a reduction or abatement of any of the penalties herein properly imposed.

H. A final point is in order. At hearing, petitioners' representative alleged that he had not received a copy of the Division's (Law Bureau's) answer to the petition, that he was unsure of whether either of petitioners or petitioners' former representative had received a copy of the answer, and that this failure to have received a copy of the answer was prejudicial in that he was unable to properly prepare for the subject hearing. With regard to this latter assertion,

petitioners' representative provided no specifics as to how he was disadvantaged. Moreover, there is no evidence that he requested a copy of the answer from the Division's representative prior to hearing. In fact, petitioners' current representative submitted powers of attorney authorizing his appearance at hearing, which powers are dated as executed on October 2, 1990. This date is approximately one year after the September 21, 1989 date of the Division's answer. It is reasonable to assume that the answer would have been mailed to petitioners' former representative (per power of attorney) on or about September 21, 1989. In turn, petitioners' current representative's failure to have obtained a copy of the answer from petitioners' prior representative or from petitioners, or to have requested the same of the Division's counsel prior to hearing, coupled with the failure to specify the manner in which petitioners' current representative was unable to prepare for this hearing as a result of not having a copy of the answer in his possession, leaves the claim of inability to prepare unsupported and of no consequence.

I. The petition of Rami Industries, Ltd. and Sandy Kamhi, as officer, is granted to the extent indicated in Conclusion of Law "E", but is otherwise denied, and the notices of determination and demands for payment of sales and use taxes due dated December 1, 1987, as reduced in accordance herewith (including the reduction determined as the result of the conciliation conference), together with such penalty and interest as are lawfully due and owing, are sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE