STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETER COPPOLA	:	DETERMINATION DTA NO. 819261
for Revision of a Determination or for Refund of Sales Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1999 through November 30, 2000.	:	

Petitioner, Peter Coppola, c/o Carol M. Luttati, Esq., 150 East 58th Street, 12th Floor, New York, New York 10155, 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, 1999 through November 30, 2000.[1]

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 20, 2003 at 10:30 A.M. with all briefs to be submitted by February 12, 2004, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Carol M. Luttati, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Barbara J. Russo, Esq., of counsel).

ISSUES

I. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Coppola N.Y.C., Inc., within the meaning and intent of Tax Law §§

[1] The parties have agreed that the period June 1, 2000 through August 31, 2000 is not at issue in this proceeding.

1131(1) and 1133(a) and is, therefore, personally liable for payment of the taxes, penalties and interest due from the corporation.

II. Whether petitioner has established reasonable cause for the abatement of penalties.

FINDINGS OF FACT

1. On June 18, 2001, the Division of Taxation ("Division") issued four notices of estimated determination to petitioner, Peter Coppola, as an officer of Coppola N.Y.C., Inc. ("Coppola N.Y.C." or "the salon") as follows:

Notice Number	Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
L-019641802	11/30/00	$47,276.37	$3,324.03	$7,564.20	$0.00	$58,164.60
L-019641804	05/31/00	47,276.37	6,455.60	10,400.76	0.00	64,132.73
L-019641805	08/31/99	40,129.44	9,620.80	12,440.06	0.00	62,190.30
L-019641806	05/31/99	40,129.44	11,016.17	12,440.08	0.00	63,585.69

The amount of tax asserted to be due in each of the foregoing notices was estimated because the salon did not file sales and use tax returns for the periods assessed in the notices.

2. Thereafter, the parties stipulated that the amount of tax due for the foregoing periods was revised as follows:

Notice Number	Period Ended	Tax
L-019641802	11/30/00	$29,882.71
L-019641804	05/31/00	33,798.49
L-019641805	08/31/99	34,093.71
L-019641806	05/31/99	35,987.56

3. On June 18, 2001, the Division of Taxation also issued two notices of determination to petitioner which assessed a deficiency of sales and use taxes as a responsible officer of the salon as follows:

Notice Number	Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
L-019641807	11/30/99	$34,246.13	$6,908.84	$10,681.33	$0.00	$51,854.30
L-019641808	02/29/00	37,407.99	6,580.05	9,481.66	0.00	53,469.70

4. The sales and use tax returns for the periods covered by the second set of assessments are unsigned, several are undated, several do not list the name and address of the tax preparer, and all are stamped "LATE RECEIVED." There is no documentary evidence in the record establishing when the returns were mailed.

5. At the time of the hearing, Mr. Coppola had been a resident of Florida for nearly 20 years. During the periods in issue, he spent a significant portion of his time operating a hair salon near his Florida residence.

6. Coppola N.Y.C. was a hair salon located at 746 Madison Avenue, New York, New York. During the period in issue, Mr. Coppola owned 100 percent of the stock of the salon which was organized as a subchapter S corporation. He also held the title of president. Mr. Coppola was authorized to sign checks without a cosigner and had the authority to open bank accounts on behalf of the corporation, make withdrawals from the corporate account and lease equipment on behalf of the corporation. He also had the authority to take out loans and sign contracts on behalf of the corporation. As a regular practice, he signed checks on the account of Coppola N.Y.C. including checks made payable to himself. He also signed the corporate returns of the salon as president.

7. In 1999, Mr. Coppola received wage income of $15,000.00 from Coppola N.Y.C.[2] and income from his salon in Boca Raton, Florida of $10,656.00. In 2000, he received a salary of $130,000.00 from Coppola N.Y.C.[3] During the periods in issue, Mr. Coppola also received amounts from an operating account of Coppola N.Y.C. in repayment of a loan to the salon.

8. In 1999, Coppola N.Y.C. was recovering from a difficult financial position. Previously, a Mr. Pine, who held the office of corporate secretary and owned 25 or 30 percent of the business, had been running the salon on a daily basis. Unbeknownst to Mr. Coppola, over a period of three-and-a-half to four years, Mr. Pine had embezzled a significant sum of money. As a result, the salon had incurred significant debt, and loans and leases were past due.

9. In 1998, Mr. Pine was dismissed by Mr. Coppola, and Mr. Pine's check signing authority was terminated. Thereafter, Erin Sartain, who was Mr. Pine's assistant, was promoted to Mr. Pine's position of office manager or salon manager.[4] The position of office manager was a full-time job. At this time, Ms. Sartain received the title of secretary and was given check signing authority. To the best of her knowledge, Ms. Sartain was not listed as an officer in any minutes of corporate meetings. Prior to her promotion, Ms. Sartain was not an officer and did not have check signing authority.

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[2] The New York franchise tax return of Coppola N.Y.C. for 1999 reports that Mr. Coppola had wage income of $17,500.00 for 1999. The discrepancy is probably due to the fact that the corporation reported its wage expense on an accrual basis while Mr. Coppola's wage and tax statement reflects wages paid on a cash basis. That is, $2,500.00 of additional wages were earned by Mr. Coppola but not yet paid by the corporation.

[3] Mr. Coppola's New York Nonresident and Part-Year Resident Income Tax Return for 2000 reported that the Federal amount of wages was $182,000.00 and the New York amount of wages was $16,250.00. However, Mr. Coppola's wage and tax statement from Coppola N.Y.C. reported wages of $130,000.00 and the wage and tax statement from the salon in Boca Raton, Florida stated that no wages were paid to Mr. Coppola in 2000. The most likely explanation is that the wage and tax statement from the salon in Florida was erroneous and that Mr. Coppola received $52,000.00 in wages from the salon in Florida.

[4] At the time she began her employment at the salon, Ms. Sartain was hired by Mr. Coppola.

10. Ms. Sartain graduated from high school. She received wages of approximately $75,000.00. Ms. Sartain does not have any business experience outside of working for Coppola N.Y.C. In 1999 and 2000 there were about 63 people working at the salon.

11. Although Ms. Sartain was given the title of secretary and signed a bank signature card which designated her as secretary, she never attended a corporate meeting and does not have any corporate documents appointing her as secretary. She has never attended a meeting with the corporate lawyer, accountants and Mr. Coppola.

12. During at least a portion of the period that Mr. Pine was managing the salon, Federal withholding taxes fell into arrears. In order to resolve the difficulty, Mr. Coppola and the attorney for the salon, Ms. Luttati, arranged a payment plan which required monthly payments of approximately $5,000.00 a month for a period of 13 ½ years. In accordance with the plan, the penalties were abated. The agreement with the Internal Revenue Service ("IRS") provided that as long as the salon continued to pay its liability, the IRS would not pursue personal liability against Mr. Coppola. After entering into this agreement, Ms. Luttati contacted petitioner and the corporation's accountants to advise them to send out a check every month. Periodic payments are also being made to New York State although the details of the underlying liability were not brought out at the hearing.

13. As manager, Ms. Sartain was responsible for the daily operation of the business. She had the authority to schedule vacations, set salaries, pay bills of creditors, make bank deposits and transfer funds between the operating account and the payroll account to meet the payroll, make sure that clients were moving from the check-in location to the proper station and deal with clients that had problems. She managed the inventory and supplies received by the business and paid for deliveries by vendors. Ms. Sartain had access to those books and records of the salon

which were maintained on the computer. Each morning, Ms. Sartain reconciled the business receipts with the contents of the cash register drawer. At the end of the week, the salon's accountants would review the reconciliations.

14. The authority of Ms. Sartain to hire and fire depended upon the level of the employee. Ms. Sartain and Mr. Coppola would confer before deciding whether to hire a stylist, colorist or other employee who would generate revenues. Only one "higher-up" was fired during Ms. Sartain's tenure and that was done by Mr. Coppola. Ms. Sartain could have fired assistants, receptionists or cleaning staff, but she would still discuss the matter with Mr. Coppola before doing it. Ms. Sartin decided whether to hire a particular receptionist or person who performed housekeeping chores without consulting with Mr. Coppola.

15. Drafting checks was part of Ms. Sartain's daily responsibilities. She had the authority to issue checks to vendors and third parties for the business. However, other than a late bill termination notice from Consolidated Edison, color orders and items which were payable upon delivery, Ms. Sartain did not determine what bills should be paid. The remaining bills would be processed on a reconciliation form for the week and highlighted through telephone calls to Mr. Coppola and the accountants. Ms. Sartain would then be told what checks to draft and mail. It was unnecessary for Ms. Sartain to call petitioner about issuing a check for color orders or for items on the 30-day account since they would have been on the reconciliation form and known to the accountants. Similarly, the items that were payable upon delivery were already known to petitioner and the accountants.

16. When Ms. Sartain arrived at the salon in the morning, she would find out who called in sick. If a stylist called in sick, Ms. Sartain would ensure that the client was contacted. Ms.

Sartain would also make sure that each cash drawer had $500.00, that the assistants were on the floor ready for work, that the clients were attended to and that everything was ready for business.

17. The corporate books and records were kept at the office of Mr. Coppola's lawyer. Mr. Coppola did not review them in 1999 or 2000. However, he was not prevented from doing so. Similarly, although he could have done so, Mr. Coppola did not review the salon's financial records or corporate financial statements.

18. When Mr. Coppola learned about the embezzlement loss, he decided to change accountants. The accounting firm of Lowey, Solzenberg & Edelstein was retained to perform accounting services and the prior accountant was replaced. During December 1999, the prior accountant oversaw the new firm's continuation of services.

19. The new accounting firm prepared the sales tax returns as of the end of 1999, when it was retained, and continued to prepare the sales tax returns through November 2000. It also oversaw the bookkeeping process and filed the annual Federal, New York State and New York City corporate returns.

20. It was the usual practice of the accounting firm to ask its client for payment of the monthly sales tax. Generally, petitioner's accounting firm would prepare the sales tax return and mail it with a check from its office. After he completed the sales tax returns of Coppola N.Y.C., Mr. Edelstein, the salon's accountant, would mail them without a signature. Since the liability was not being satisfied, Mr. Edelstein also inserted a letter which asked the Division to contact Lowey, Solzenberg & Edelstein in order to establish a payment plan.

21. The sales and use tax returns for the periods March 1, 1999 through March 31, 1999, April 1, 1999 through April 30, 1999, March 1, 1999 through May 31, 1999, June 1, 1999 through June 30, 1999, July 1, 1999 through July 31, 1999, June 1, 1999 through August 31,

1999, September 1, 1999 through November 30, 1999, March 1, 2000 through March 31, 2000, April 1, 2000 through April 30, 2000, March 1, 2000 through May 31, 2000 and September 1, 2000 through November 30, 2000 were filed late and unsigned.

22. Mr. Coppola signed the sales tax returns of Coppola N.Y.C. prior to the periods in issue and continued to have the authority to sign the sales tax returns for Coppola N.Y.C. during the periods in issue. Ms. Sartain was never given any sales tax returns to sign and, at the hearing, did not know who had the authority to sign them. Mr. Coppola did not tell Ms. Sartain not to pay sales tax.

23. During 1999 and 2000, Mr. Edelstein did not tell Mr. Coppola that sales tax was not being paid. Mr. Coppola first became aware that sales tax was not being paid when he received the assessments. This was when Mr. Edelstein first discussed the sales tax with Mr. Coppola.

24. Ms. Sartain first learned that Coppola N.Y.C. was having sales tax problems in April 2002 when she received notices. Prior to receiving the notices, Ms. Sartain did not have any discussions with Mr. Coppola about sales tax. After she received the notices, Ms. Sartain asked Mr. Coppola what was being done. At the time, Mr. Coppola was aware that the business was having sales tax problems.

25. When Mr. Coppola learned that there was a sales tax problem he became very upset. Prior to the receipt of the notices, Mr. Coppola had accountants come to the salon once a month. However, upon receipt of the notices, Mr. Coppola asked Mr. Edelstein if his accounting firm could come to the salon on a more frequent basis. Thereafter, Mr. Edelstein and other personnel from his office started going to the salon on a weekly basis. Since the inception of the more frequent visits, there have not been any additional sales tax deficiencies.

26. The payroll tax returns were handled by a separate company. Ms. Sartain's duties included calling the payroll company to provide information regarding the payroll and withholding. The payroll checks that were subsequently issued were stamped with Mr. Coppola's signature.

27. In 1999, Mr. Coppola went to the salon every couple of months for approximately two days at a time. In 2000, petitioner contemplated relocating the salon, and as a result, he was in New York City more frequently for meetings to consider this option. When he was in New York City, petitioner would meet with his employees at the salon, his attorney and his accountants. Ms. Sartain discussed business operations during her meetings with Mr. Coppola. Petitioner wanted breakfast and dinner meetings with his staff in order to find out what was going on and to maintain contact with his employees.

28. When petitioner was in Florida, Mr. Coppola and Ms. Sartain had daily conversations over the telephone. Mr. Coppola would ask Ms. Sartain what was going on and whether the salon was busy. Mr. Coppola would also concern himself with what needed to be paid, how much money was generated to take care of the business and making sure that payroll was covered. If there was a problem with the business or a valued employee wanted to leave or an important legal document was coming in, Ms. Sartain would contact Mr. Coppola in Florida.

29. Ms. Sartain reviewed the business mail, which consisted mostly of the weekly bills, and then placed them into an envelope for the accountants. Thereafter, the accountants entered the bills into a computer and prepared a printout of the bills. The accountants, petitioner and Ms. Sartain would then decide what bills should be paid. The accountants would also leave a note as to what deposits Ms. Sartain needed to make.

30. The bank statements were sent to the salon. The accountants and Mr. Coppola had the authority to review the bank statements. Since Ms. Sartain did not perform the bank reconciliations, she did not open the bank statements.

31. When he was in New York, Mr. Coppola picked up and reviewed the business mail. If a legal notice was delivered to the salon, it would be sent to the salon's attorney. The notices in issue in this matter were sent to Ms. Luttati.

32. Ms. Sartain saw that the bills from Ms. Luttati reflected services for tax issues for the period 1998 through 2001. The bills mentioned conferring with Mr. Coppola and the accountants regarding New York State sales tax. Ms. Sartain's name was not mentioned on the bills. She also saw an invoice, dated April 24, 1999, from Absolute Managers LLC referring to a trip to Boca Raton, Florida which was paid for by Coppola N.Y.C.

33. Ms. Sartain was assessed by the Division for sales and use taxes as a responsible officer of Coppola N.Y.C.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation . . . who as such officer, director or employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]" (Tax Law § 1131[1]).

B. The determination that an individual is a responsible person depends upon the particular facts of each case (***Matter of Cohen v. State Tax Commn.***, 128 AD2d 1022, 513 NYS2d 564; ***Matter of Autex Corp.***, Tax Appeals Tribunal, November 23, 1988).

In each case, the question to be resolved:

> is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee (***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990).

C. In ***Matter of Goodfriend*** (Tax Appeals Tribunal, January 15, 1997), the Tribunal set forth the relevant factors as follows:

> Factors to consider when determining responsible officer status under Article 28 are the authorization to hire and fire employees (***Matter of Blodnick v. New York State Tax Commn***., 124 AD2d 437, 507 NYS2d 536, ***appeal dismissed*** 69 NY2d 822, 513 NYS2d 1027); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation (***Vogel v. New York State Dept. of Taxation & Fin***., 98 Misc 2d 222, 413 NYS2d 862; ***Matter of Stern***, Tax Appeals Tribunal, September 1, 1988); the duties and functions of the officers and directors as outlined in the certificate of incorporation, corporate bylaws and minutes of corporate meetings, and the preparation and filing of sales tax forms and returns (***Vogel v. New York State Dept. of Taxation & Fin.,*** [98 Misc 2d 222, 413 NYS2d 862]); the individual's economic interest in the corporation and whether he had authority to sign tax returns for the corporation (***Matter of Martin v. Commissioner of Taxation & Fin.***, 162 AD2d 890, 558 NYS2d 239); the payment, including the authorization to write checks on behalf of the corporation, of creditors other than the State of New York and the United States (***Chevlowe v. Koerner***, 95 Misc 2d 388, 407 NYS2d 427). Another factor is the individual's simultaneous status as an officer, director and shareholder (***Matter of Cohen v. State Tax Commn., supra***); and in a closely-held corporation, as in the present matter, the individual's knowledge of the affairs of the firm and the firm's profits (***Vogel v. New York State Dept. of Taxation & Fin., supra; Matter of Blodnick v. New York State Tax Commn***., ***supra***).

D. As the Division has noted in its brief, petitioner satisfies the foregoing criteria for being a responsible officer. Petitioner was the president of the corporation and owned 100 percent of the stock. He hired the accountants and attorney for the corporation and participated in meetings with them. He was authorized to hire and fire the other employees of the salon. The record shows that petitioner was authorized to sign tax returns for the corporation and, in fact, signed the corporate returns during the period in issue. Further, petitioner was authorized to sign

checks on the bank account of the corporation and occasionally drafted checks payable to himself. Although petitioner stressed that he was located in Florida and not involved in the daily affairs of the corporation, the weight of the evidence supports the conclusion that petitioner was directly involved in the daily operations of the salon through telephonic conversations with his salon manager. Any lack of knowledge of the corporate affairs was of his own choosing and does not absolve him of liability.

E. Relying upon ***Vogel v. New York State Dept. of Taxation & Fin***. (98 Misc 2d 222, 413 NYS2d 862) and ***Chevlowe v. Koerner*** (95 Misc 2d 388, 407 NYS2d 427) petitioner argues that he was not under a duty to act and therefore cannot be held personally liable for the salon's sales taxes. Specifically, petitioner argues that he cannot be held personally liable because he allegedly did not have any involvement in or knowledge of the financial affairs and management of the corporation.

In ***Vogel***, the plaintiff sought a preliminary injunction restraining the Division from collecting sales taxes from him which were due from a restaurant and bar. Plaintiff was a 50% shareholder of a corporation which owned a restaurant and bar. He was also the secretary of the corporation. Plaintiff never took an active role in the corporation other than making loans to the business. He did not maintain the corporation's books and records, never had the responsibility for collecting sales taxes or preparing the sales tax returns. After reviewing several criteria obtained from the ***Chevlowe*** case of whether there was a duty to act, the court granted the motion. The Court relied upon the following criteria: (1) the officer's day-to-day responsibilities and involvement with the financial affairs and management of the corporation; (2) the officer's knowledge of corporate financial affairs; (3) the officer's duties and functions outlined in the certificate of incorporation and bylaws; (4) the preparation and filing of sales tax forms and

returns and (5) the officer's knowledge of the corporate affairs and the benefits he received from the corporate profits.

In contrast to the situation in ***Vogel***, the record shows that Mr. Coppola was actively involved in the financial affairs and management of the corporation through daily contact with his office manager to discuss business operations. He also made periodic trips to New York City to attend to Coppola N.Y.C. business. In the process, he visited the business premises of the salon, held meetings with his business manager, employees of the salon, corporate accountants and corporate attorney. The degree of petitioner's engagement in the business affairs of the salon is further evidenced by his participation in hiring and firing employees, his decision to remove a former associate, and his decision to change corporate accountants. Unlike the situation in ***Vogel***, Mr. Coppola was involved with the salon's tax matters. He signed sales tax returns for prior quarters and signed corporate tax returns during the period in issue. He also helped work out a payment plan for tax arrearage with the Internal Revenue Service.

The ***Chevlowe*** case is also readily distinguishable from the facts of this matter. In ***Chevlowe***, the Supreme Court found that an officer ceased to be responsible for the payment of sales taxes due when he lost control, as a result of a corporate merger, to a parent corporation and to a receiver appointed to oversee the operations of the parent. The court noted that "When the receiver stepped in and stopped payment on the checks sent to [the State Tax Commission] any manifestations of control by the plaintiff ceased to exist." (***Chevlowe v. Koerner***, ***supra*** at 392.) Here, Mr. Coppola never lost control over the salon.

F. As pointed out by the Division, the facts of this matter are similar to those presented in ***Blodnick v. State Tax Commn.*** (State Tax Commn., May 21, 1985, ***confirmed*** 124 AD2d 437, 507 NYS2d 536, 538, ***appeal dismissed*** 69 NY2d 822, 513 NYS2d 1027) and ***Matter of LaPenna***

(Tax Appeals Tribunal, March 14, 1991). In ***Blodnick***, the two petitioners, who were the only officers and shareholders of the corporation, participated in an arrangement wherein the petitioners' husbands hired managers who were responsible for the daily operation of the business. The petitioners' husbands also retained a bookkeeper who was in charge of the financial affairs of the corporation. Petitioners argued that they were improperly assessed sales and use taxes because they were not persons required to collect such taxes. The Court concluded that the petitioners were properly assessed and that "[t]he fact that petitioners did not in fact exercise their responsibilities is irrelevant." (***Matter of Blodnick v. State Tax Commn.***, ***supra***, 124 AD2d at 438.) The Court found it significant that petitioners could not state who, if not they, were responsible for the taxes. Similarly, in ***LaPenna***, the petitioners were assessed for the sales and use taxes due from a corporation in which they were the only officers and shareholders. Petitioners argued that they were improperly assessed because they did not have any duties or responsibilities with regard to the operation of the corporation. Relying upon ***Blodnick***, the Tax Appeals Tribunal rejected this argument and found it irrelevant that petitioner did not exercise their responsibilities. The Tax Appeals Tribunal also noted that petitioners had not demonstrated that they were precluded from exercising their authority.

G. Petitioner's attempt to place responsibility upon Ms. Sartain is rejected because it fails to recognize that more than one person can be held liable as a responsible officer (***see, Matter of LaPenna, supra***). Further, petitioner's position that he cannot be held liable as a responsible officer because he was unaware that sales taxes were not being paid is rejected. It is recognized that knowledge that the sales taxes were not being paid may be considered an indication of responsibility since it demonstrates knowledge of the financial affairs of the firm (***see, Matter of Vogel v. Department of Taxation and Finance, supra***). However, it is clearly not a requirement.

The creation of such a requirement would establish a safe harbor for those who disregard their responsibility and run contrary to the established rule that a taxpayer's failure to exercise this responsibility is irrelevant (***Matter of Blodnick v. New York State Tax Commn.***, ***supra***, 507 NYS2d at 538). Lastly, it is noted that here, as in ***LaPenna***, there is no evidence that petitioner was prevented from exercising his authority.

H. Petitioner argues that the embezzlement constitutes reasonable cause for the abatement of the penalty pursuant to Tax Law § 1145(a)(1)(iii). This argument is rejected. As noted by the Division, it is undisputed that the embezzlement took place prior to the periods at issue here. Under these circumstances, the embezzlement does not excuse the failure to pay over the monies that should have been collected after the departure of Mr. Pine. Further, the testimony of petitioner's accountant is insufficient to establish that the returns were timely filed. Therefore, it is concluded that petitioner has not established reasonable cause for the abatement of penalty. It is noted that the administrative law judge determination cited by petitioner to support the cancellation of penalty has not been discussed because determinations of administrative law judges may not be considered as precedent (Tax Law § 2010[5]).

I. The petition of Peter Coppola is denied and the notices of estimated determination dated June 18, 2001, as adjusted by the stipulation, and the notices of determination, dated June 18, 2001, are sustained together with such penalty and interest as are lawfully due.

DATED: Troy, New York
August 12, 2004

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE