

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPHINE ROTONDO,¹	:	DECISION
AS OFFICER OF WAYSIDE CARTING, INC.	:	DTA No. 808818
	:	
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 1985 through November 30, 1988.	:	

Petitioner Josephine Rotondo, 25 Conifer Court, Northport, New York 11768, filed an exception to the determination of the Administrative Law Judge issued on September 23, 1993. Petitioner appeared by Robert Plautz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Both petitioner and the Division of Taxation filed briefs. Petitioner filed a reply brief, received on March 10, 1994 which began the six month period to issue this decision. Oral argument, requested by petitioner was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner Josephine Rotondo was a person required to collect sales and use taxes on behalf of Wayside Carting, Inc., pursuant to Tax Law §§ 1131(1) and 1133(a) for the period in issue.

¹Wayside Carting, Inc. and Franco Rotondo were also petitioners in this proceeding when the matter was before the Administrative Law Judge; however, only Josephine Rotondo filed an exception to the determination of the Administrative Law Judge. As a result, the facts of this decision refer to all three petitioners, but in the Opinion part of this decision, the term "petitioner" refers only to Josephine Rotondo.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 30, 1989, to petitioner Wayside Carting, Inc. ("Wayside"), assessing sales tax in the amount of \$177,086.86 for the period September 1, 1985 to November 30, 1988, plus penalty and interest. A second notice of determination, also dated August 30, 1989, was issued to Wayside assessing penalties in the amount of \$17,708.69 for the period September 1, 1985 through November 30, 1988.

Notices of determination and demands for payment of sales and use taxes due, dated August 30, 1989, were also issued to petitioners Franco Rotondo and Josephine Rotondo, as officers of Wayside, assessing identical amounts of tax, penalty and interest against each as was assessed against the corporation.

Petitioners filed one consolidated petition with the Division of Tax Appeals challenging the six notices of determination issued to the three petitioners. The petition was signed by Stewart Buxbaum, C.P.A., as petitioners' representative. It was accompanied by three powers of attorney, appointing Mr. Buxbaum to represent Wayside, Mr. Rotondo and Mrs. Rotondo, respectively. The powers of attorney from Wayside to Mr. Buxbaum and from Mrs. Rotondo to Mr. Buxbaum bear what appears to be the signature of Josephine Rotondo; however, the testimony of Mr. and Mrs. Rotondo establishes that Mr. Rotondo signed Mrs. Rotondo's name to the powers of attorney, with her permission.

Wayside was in the business of hauling garbage, waste and construction debris. The assessments issued against petitioners resulted from a sales tax field audit of Wayside which commenced in July 1988. In a letter to Wayside dated July 10, 1988, the Division stated:

"Your New York State Sales and Use tax returns have been scheduled for a field examination at your office on the date and time shown above.

"All books and records pertaining to your Sales Tax Liability for the period under audit should be available on the appointment date. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates. Exemption certificates not made available may be disallowed in which case you will be held liable for the tax on the transaction."

The period under audit was identified at the top of the letter as "9/1/85 - 8/31/88".

Attached to the appointment letter is a checklist entitled "RECORDS REQUESTED FOR SALES TAX AUDIT". The audit period is identified on the checklist as September 1, 1985 through August 31, 1987. The checklist requested a number of items for that period. Sales, purchase and expense invoices, plus guest checks and register tapes were requested only for the year 1987. The auditor also made repeated oral requests for books and records.

Wayside's accountant, Vito LaMonica, represented Wayside on audit. The corporation's books and records were made available to the auditor at his offices. The Division was furnished with Wayside's general ledger, Federal income tax returns with depreciation schedules, State sales tax returns and tax-exempt certificates. The auditor's checklist of records available during audit indicates that all the exemption certificates provided were for exempt organizations and that no resale certificates or capital improvement certificates were provided.

On its sales tax returns, Wayside reported gross sales and taxable sales in equal amounts, indicating that it had no nontaxable sales. The auditor compared gross sales posted in Wayside's general ledger for the period September 1, 1985 through November 31, 1988 to taxable sales reported on Wayside's sales tax returns for the same period and found a discrepancy in the amount of \$3,108,061.90. The general ledger did not segregate receipts into taxable and nontaxable sales and petitioners did not provide the auditor with any other records, such as a sales journal or invoices, which would have enabled her to determine which receipts were subject to sales tax and which were not.

Mr. LaMonica claimed that Wayside had a substantial amount of nontaxable sales. He provided the auditor with a file folder containing tax exemption certificates from various

customers, but, inasmuch as no invoices or records of individual sales were maintained, the auditor could not associate any individual sale with a tax exempt certificate.

Since it appeared to the auditor that at least a portion of Wayside's gross sales were not subject to sales tax, she allowed Wayside to substantiate its nontaxable sales through verification from its customers. Mr. LaMonica sent a letter to the Village of Northport asking it to verify payments made to Wayside for the period June 1986 through June 1989. He sent a letter to Huntington Union Free School District asking them to provide a list of payments made to Wayside for the period March 1, 1988 through May 31, 1988.

The auditor testified that Mr. LaMonica sent confirmation letters to other customers from whom Wayside had received a tax-exempt certificate; however, other evidence in the record contradicts that testimony. The auditor's handwritten log documents her activities on this audit. An entry for October 28, 1988 indicates that she adapted a previously used confirmation letter to fit Wayside and, using the tax-exempt certificates to obtain names, prepared a list of Wayside's customers. An entry for November 7, 1988 states: "Sent out confirmation of amts purchased from Wayside to resale & exempt orgs for 3/1/88 - 5/31/88." The confirmation letters placed in evidence bear the auditor's name and signature. Petitioner placed in evidence seven confirmation letters which apparently were returned to the Division by Wayside's customers with responses to the questions asked. Some of those letters have a handwritten entry on them consisting only of a dollar figure. For example, a confirmation letter addressed to Oyster Bay View Estates Ltd. has the notation "\$810" on the bottom of the page. The Division placed in evidence a workpaper which lists the name of each Wayside customer who responded to the confirmation letter, the amount of each customer's purchases for the test period and the customer's tax exempt number where verified.

The record suggests that Wayside's nontaxable sales fell into two broad general categories: sales to tax-exempt organizations or entities, such as municipal governments, and sales of trash removal services to contractors who used those services in the course of performing capital

improvements or demolishing buildings. The extent to which the auditor considered sales in the latter category is uncertain. The auditor sent third-party confirmation letters to several parties whose names indicate that they may have been construction contractors (e.g., Andrews Construction Corporation and Sasto Remodeling Ltd.). In addition, the December 5, 1988 entry in the auditor's handwritten log states: "Went over case with Charlie -- didn't accept contractor resale certif --." Among the vendors who replied to the Division's inquiries were F.J.G. Bldg. Corp., S.E.M. Development and Amma Construction Co. Their purchases from Wayside were treated as nontaxable sales.

Information provided by Wayside's customers was used by the auditor to estimate Wayside's nontaxable sales. The Village of Northport reported purchasing services from Wayside in the total amount of \$822,997.88 for the years 1986, 1987 and 1988. Accordingly, the auditor subtracted this amount from unsubstantiated nontaxable sales in the amount of \$3,108,061.90, yielding unsubstantiated nontaxable sales for the audit period of \$2,285,064.02.

The auditor received responses from 19 Wayside customers reporting total purchases of \$120,916.64 for the test period, March 1, 1988 through May 31, 1988. Among the respondents were the Village of Northport, reporting sales during the test period of \$83,902.03 and the Huntington Union Free School District reporting purchases of \$5,543.76 for the test period. Since the purchases of the Village of Northport had already been subtracted from Wayside's sales, the amount it reported for the test period was eliminated from the auditor's calculation of a nontaxable percentage. For the test period, the auditor was able to substantiate nontaxable sales (in addition to those made to the Village of Northport) of \$37,014.61. She divided this amount by total claimed nontaxable sales for the test period of \$184,354.59 to calculate a nontaxable sales percentage of 20.08. She applied this percentage to unsubstantiated nontaxable sales of \$2,285,064.02 to estimate nontaxable sales for the audit period of \$456,840.86. This amount was subtracted from unsubstantiated nontaxable sales, yielding disallowed nontaxable sales of \$1,826,223.16. The auditor then divided unsubstantiated nontaxable sales by total sales to

calculate a disallowance percentage of 58.75 percent. She applied this percentage to total sales to calculate additional taxable sales of \$1,826,297.17, with a tax due on this amount of \$136,972.29.

The auditor also conducted a test period audit of Wayside's expense purchases. Mr. LaMonica informed the auditor that it would not be possible to provide purchase invoices for the entire audit period. After some discussion with him, the auditor selected a one-month test period of June 1987. She examined two accounts, vehicle repairs and general repairs and maintenance (it would appear that these accounts appeared in Wayside's general ledger). She requested invoices showing each purchase posted to these accounts for the test period. Total purchases for the test period in the category of repairs amounted to \$11,455.85. Invoices established tax was paid on purchases in the amount of \$6,226.75. The auditor divided total purchases for the test period by tax paid purchases to calculate an error rate of 45.6 percent. This error rate was applied to total repair purchases for the audit period of \$305,451.81 to determine purchases subject to tax of \$139,286.03 with sales tax due of \$10,446.45. The same procedure was followed for purchases in the repair and maintenance category to determine purchases subject to tax of \$55,485.52 with sales tax due on that amount of \$4,161.41.

In the category of fixed assets, the auditor performed a detailed review of each asset acquired during the audit period and the period September 1, 1988 through November 30, 1988. These included trash containers, trucks, trailers, and leasehold improvements. Total asset purchases for the audit period were determined to be \$857,017.75. The auditor was able to determine that purchases in the amount of \$514,598.06 were either exempt from taxation or tax paid. She determined that no sales tax was paid on the remainder of the purchases in the amount of \$340,089.69.²

The results of the audit performed are as follows:

²The Division offered in evidence schedules showing each individual purchase in issue and the auditor's determination with regard to tax due on that purchase.

	<u>Amount</u>	<u>Tax Due</u>
Additional taxable sales	\$1,826,297.17	\$136,972.28
Expense purchases	194,771.55	14,607.86
Fixed asset purchases	<u>340,089.69</u>	<u>25,506.72</u>
Totals	\$2,361,158.41	\$177,086.86

On audit, the Division was informed by Mr. LaMonica that the corporate officers of Wayside are Franco Rotondo and Josephine Rotondo, husband and wife.

Following a conciliation conference, the Division issued conciliation orders reducing the tax assessed to \$163,155.45. The conferee found that the Division failed to request Wayside's books and records for the period September 1, 1988 through November 30, 1988 and cancelled tax assessed in the areas of additional taxable sales and recurring expense purchases for that period. The record shows that detailed records of fixed asset purchases were examined for the last quarter of the assessment period.

Wayside was incorporated by Franco Rotondo in 1980. At that time, he was the corporation's sole officer and shareholder. Sometime in late 1986 or 1987 Mr. Rotondo was convicted of a felony in connection with an investigation conducted by the Internal Revenue Service. As a result of his conviction, certain municipalities refused to continue employing Wayside. This was a serious loss, since the municipalities accounted for approximately 50 percent of Wayside's total receipts at that time. In order to retain the business of the municipalities, Franco Rotondo resigned as an officer and director of Wayside effective October 22, 1986. Josephine Rotondo was appointed as president of the corporation and was listed as a signatory on a corporate bank account. Apparently, documents were filed with certain municipalities reporting the changes in Mr. and Mrs. Rotondo's status.

Mr. Rotondo continued to operate Wayside's business as general manager, hiring and firing employees, managing and supervising the day-to-day work of the corporation, overseeing the corporation's finances and generally controlling all of the business and financial affairs of Wayside. Mr. Rotondo began signing Josephine Rotondo's signature to any document that he

believed required the signature of a corporate officer. He continued to sign corporate checks. Sales tax returns filed by Wayside for the period December 1, 1985 through August 31, 1987 bear the signature of Franco Rotondo and were signed by Mr. Rotondo.

Mrs. Rotondo was a full-time homemaker and mother. She had no involvement in running the business of Wayside, did not hire or fire employees, did not maintain books and records and only occasionally executed documents on behalf of the corporation, always at the direction of her husband or Wayside's accountant.

On New York State corporation franchise tax reports and related documents filed by Wayside for the years 1984, 1985 and 1986, Franco Rotondo is listed as president and sole shareholder of Wayside. Franco Rotondo signed the corporation tax reports for those years. Josephine Rotondo signed a form CT-6 (Election by a Small Business Corporation for Personal Income Tax and Corporate Franchise Tax Purposes) dated December 18, 1986. She is listed on the form as an officer and sole shareholder of Wayside. Wayside filed S corporation information reports for 1987 and 1988 with attached Federal schedules, showing Josephine Rotondo as the sole shareholder of that corporation.

Josephine Rotondo testified that she signed her name to the CT-6 form and the S Corporation Information Return for 1988. Franco Rotondo signed his wife's name to the S Corporation Information Return for 1987. He also signed his wife's name to the powers of attorney authorizing Stewart Buxbaum to represent Wayside and Josephine Rotondo respectively before the Division of Tax Appeals. Both Franco and Josephine Rotondo testified that Mrs. Rotondo authorized her husband to sign her name on all documents which required her signature.

Franco Rotondo described Wayside's recordkeeping procedures for the audit years. Wayside employed two kinds of invoices or billing records. One was in the form of a triplicate receipt for services rendered. The receipt did not include a space to enter the amount of the charge for such services. It was used in connection with Wayside's dumpster service. Wayside rented dumpsters to construction contractors, delivering empty dumpsters to the construction site,

picking up full dumpsters and disposing of the debris. When a dumpster was delivered to a site, a copy of the receipt was given to the customer and a copy was retained by Wayside (the disposition of the third copy is not known). Franco Rotondo testified that Wayside did not collect sales tax on charges for these services, because the services were deemed to be a part of the overall service of providing a capital improvement. Mr. Rotondo testified that the receipts for these sales were discarded when they became too numerous to store in a drawer.

Wayside kept track of its residential accounts on preprinted index cards. There was a card for each customer with a space for the customer's name, phone number, the rate charged, and monthly payments. Residential customers received a monthly billing that included sales tax. Tax-exempt organizations such as churches and cemeteries were treated as residential accounts for recordkeeping purposes. Mr. Rotondo stated that the index cards showing payments by each customer were normally retained for years; however, the cards were subpoenaed in connection with the criminal investigation that led to Mr. Rotondo's felony conviction.

Mr. Rotondo estimated the amount of sales tax collected on the residential accounts and deposited this amount in a special account from which sales taxes were paid. Other monies collected from the residential and construction accounts were deposited in a different Wayside account. Mr. Rotondo testified that Wayside did not maintain a general ledger or sales journal. According to Mr. Rotondo, Wayside's bank statements were Wayside's only records of receipts and expenses.

Mr. Rotondo testified that Wayside paid no sales tax on its purchases of roll-off dumpsters, containers, a tractor trailer and other equipment used to remove construction debris and in connection with services rendered to tax-exempt organizations such as churches. He stated that he was advised that no tax was due on these purchases.

At the commencement of the hearing in this matter, petitioners' attorney, Robert Plautz, stated that as a result of a misunderstanding Josephine Rotondo was not present to offer testimony. He stated that petitioners wanted to offer an affidavit subsequent to hearing with

regard to her liability for taxes due from Wayside. The Division's attorney then made an objection stating as follows:

"Division of Taxation objects to only an affidavit from Mrs. Rotondo on her status. I believe it would be more appropriate for her to be here to testify and give the opportunity to the Division of Tax to cross-examine on what she is saying in the testimony. This is a key issue for her and I don't think it should be resolved by just an Affidavit. We would like to have her present in the courtroom." (Tr., pp. 8-9.)

The Administrative Law Judge responded to the Division's objection as follows:

"Mr. Plautz, I can accept an affidavit and really the rules of the Tax Appeals Tribunal allow for affidavits; but you're going to have to understand that the weight that would be given to an affidavit may be somewhat less than actual testimony under oath that is subject to cross-examination. Now I don't know exactly what you intend to put into the affidavit and whether you can prove much of it without her here. This is your case and you will have to weigh the effect of doing it through affidavits. This is your call to make though." (Tr., p. 9.)

At the end of the first day of hearing, Mr. Plautz was given approximately two weeks to decide whether petitioners would submit an affidavit, request a continuance to offer Mrs. Rotondo's testimony or seek the Division's agreement to take a deposition from Mrs. Rotondo.

By letter dated September 30, 1992, petitioners requested that the hearing be continued to a day in February 1993 to allow Mrs. Rotondo to testify. Petitioners also proposed to offer the testimony of Vito LaMonica, Wayside's accountant, at the continued hearing. In a letter dated October 6, 1992, the Administrative Law Judge informed the parties that a continued hearing would be scheduled for February 3, 1993.

The Division brought a motion, dated November 2, 1992, for an order dismissing the petition in this matter as it applies to Wayside and Josephine Rotondo. The Division claimed that a valid petition had not been filed by these petitioners and, therefore, that the Division of Tax Appeals lacks subject matter jurisdiction over the petition of Wayside and Josephine Rotondo. The basis for this claim was Mr. Rotondo's testimony that he had signed his wife's name to the powers of attorney appointing Stewart Buxbaum to represent Wayside and Josephine

Rotondo. The Division argued that the powers of attorney are invalid because they were not signed by Mrs. Rotondo and that the petition and request for a conciliation conference are likewise invalid because they were signed by Mr. Buxbaum.

The Division also requested that determinations on default be issued against Wayside and Josephine Rotondo. The basis for this motion was Mr. Rotondo's testimony that he signed the powers of attorney appointing Mr. Plautz to represent Wayside and Josephine Rotondo before the Division of Tax Appeals. The Division argued that Mr. Plautz did not have the authority to represent either Wayside or Mrs. Rotondo and, as a result, that they failed to appear at the hearing held on September 14, 1992.

The Division also objected to allowing Mr. LaMonica to testify since Mr. Plautz did not request a continuance for that purpose at the hearing and because "testimony by Mr. LaMonica at this time would require the Department to incur the additional time and expense of bringing the auditor back for the continued hearing" (Letter to Corigliano, J., Administrative Law Judge, November 2, 1992).

In a letter dated November 5, 1992, the Administrative Law Judge informed the parties that she was treating the Division's motions as a motion to amend the answer and granting that motion. She stated that all of the issues raised in the motions would be addressed in her determination. She also stated that Mr. LaMonica would be allowed to testify at the continuation.

At the continued hearing, petitioners placed an affidavit from Mr. LaMonica in the record. Mrs. Rotondo testified that she gave her husband blanket authority to sign any documents which required her signature. She stated specifically that she gave her husband permission to sign the powers of attorney appointing Mr. Buxbaum and Mr. Plautz to represent Wayside and her. She stated that she signed the form CT-6, and while she could not remember with certainty she thought she signed the form at the request of Wayside's accountant when Mr. Rotondo was unavailable. Mrs. Rotondo's testimony revealed that she had little knowledge or understanding

of Wayside's business or financial affairs. Mr. Rotondo offered direct testimony at the continued hearing. He stated that Mrs. Rotondo was a signatory on Wayside's general business checking account but was not a signatory on the tax account. Checks drawn on the tax account were signed by Franco Rotondo. With his permission, Mrs. Rotondo signed her husband's name to several checks drawn on the tax account but did not sign in her own name.

At the beginning of the continued hearing, the Administrative Law Judge asked the Division's attorney whether a power of attorney from a wife to a husband need be in writing to make that appointment valid. The attorney never directly answered this question stating that there was no proof in the record that a power of attorney of any sort existed from Mrs. Rotondo to Mr. Rotondo. He also stated that he was not prepared at that time to offer decisional authority to support the Division's motion but stated that he "would be happy to include such case law in the brief, if you require" (tr., p. 174). The Administrative Law Judge replied: "If you intend to follow through with this after this hearing today, I would suggest that you do that" (tr., p. 174). Mr. Jarvis did not address the issues raised in the Division's motions in his closing argument. However, Mr. Plautz argued in his closing that the testimony established that Mrs. Rotondo ratified the acts of her husband, including his appointment of Mr. Buxbaum and Mr. Plautz to represent her and Wayside. At that point, the Administrative Law Judge asked Mr. Jarvis whether the Division contended that Mrs. Rotondo did not ratify her husband's acts. He responded:

"At this point in time that will be our position. Obviously, I will review the testimony produced at today's hearing and determine how that affects the arguments I've previously raised and the position we previously took, and see if those arguments and positions are still valid ones or not. If they're not, if we believe those arguments are no longer valid, we will withdraw them at the time we submit a brief." (Tr., p. 216.)

The Administrative Law Judge established a schedule for submission of briefs by the parties as follows: April 2, 1993 for petitioners' brief, May 3, 1993 for the Division's brief and May 17, 1993 for petitioner's reply brief. After that, the following discussion ensued.

Mr. Plautz: "May I be heard on a procedural point? On the briefs, I would assume that in your brief, Mr. Jarvis, you'll be dealing with the issues you raised in your motions?"

Mr. Jarvis: "That's correct."

Mr. Plautz: "Okay. And I'll be dealing with the answer in my reply."

Judge Corigliano: "I see what you're saying. He's the one who raised it and, therefore, you will answer in your May 17 reply."

Mr. Plautz: "Yes." (Tr., p. 209.)

The Division never submitted a brief; consequently, petitioners did not submit a reply brief addressing the issues raised in the Division's motions.

OPINION

The Administrative Law Judge first dealt with a motion by the Division to dismiss the petitions of Wayside and Mrs. Rotondo or, alternatively, to issue default determinations against them. The motions were based on facts adduced at the hearing which established that Mr. Rotondo signed Mrs. Rotondo's name to the powers of attorney appointing Stewart Buxbaum and Robert Plautz to represent Wayside and Mrs. Rotondo before the Division of Taxation. Because no legal theory and supporting authority were developed at hearing and because the Division did not submit a brief, the Administrative Law Judge concluded that the Division had abandoned its arguments with respect to these motions. As a result, the motion was denied.

The Administrative Law Judge found the auditor made an adequate request for books and records for the period September 1, 1985 through August 31, 1988.

The Administrative Law Judge also found the audit method was reasonable, rejecting the contention that it was unreasonable to rely on third party confirmations. The Administrative Law Judge noted that Wayside did not maintain sales journals or segregate taxable and nontaxable sales in its general ledger and no sales invoices were provided to the auditor. As a result, the Administrative Law Judge concluded that it was not unreasonable for the Division to rely on third party confirmations to determine Wayside's nontaxable sales.

With regard to the issue of whether Mrs. Rotondo was a person required to collect sales tax, the Administrative Law Judge relied on the principles set forth in Matter of LaPenna (Tax Appeals Tribunal, March 14, 1991) to find her a responsible officer. The Administrative Law Judge cited the following facts as support: (1) Mrs. Rotondo was the sole shareholder and officer of Wayside and was designated as such on corporate tax returns; (2) she was authorized to sign checks; (3) she signed some tax returns; (4) she authorized her husband to sign her name to other corporate documents; and (5) both Mr. and Mrs. Rotondo testified that Mrs. Rotondo willingly accepted the positions of authority in order to keep Wayside operating.

The Administrative Law Judge, citing Matter of Blodnick (124 AD2d 437, 507 NYS2d 536), went on to note that the fact Mr. Rotondo had undisputed control over the day-to-day affairs of the corporation is not enough to establish that Mrs. Rotondo was not a responsible officer.

The Administrative Law Judge modified the Division's determination of tax owed because Mrs. Rotondo was not a responsible officer for the entire audit period and should be found responsible only after Mr. Rotondo stepped down.

The Administrative Law Judge also sustained the penalty imposed as no evidence was presented establishing reasonable cause. The Administrative Law Judge denied petitioner's claim for damages, finding the assertion by Mrs. Rotondo that she was required by the Division to testify as baseless. Finally, the Administrative Law Judge also found Franco Rotondo as a person under a duty to act for the corporation in collecting tax.

Petitioner excepts only to the portion of the Administrative Law Judge's determination regarding her status as a person required to collect sales tax pursuant to Tax Law § 1131(1). Petitioner cites several facts as found by the Administrative Law Judge in support of her position: (1) Mrs. Rotondo was a full-time mother and homemaker; (2) she had no involvement in running the day-to-day operations of Wayside; (3) she did not hire or fire employees; (4) she did not

maintain books and records; and (5) she only occasionally executed documents and she executed documents only at the direction of her husband or Wayside's accountant.

Petitioner further argues that the instant case falls within the decisions of this Tribunal and courts that hold an individual cannot be a responsible officer where he or she is under the control and supervision of others. In particular, petitioner relies on Matter of Taylor (Tax Appeals Tribunal, October 24, 1991).

The Division, on exception, asks that the Administrative Law Judge's determination be affirmed in all respects. It argues that no proof has been submitted to show that Mr. Rotondo prevented petitioner from acting with respect to the corporation, as was the case in Matter of Taylor, (*supra*). Further, the Division states that Mrs. Rotondo was not prevented from acting for the corporation but, as found by the Administrative Law Judge, merely chose not to. The Division agrees with the Administrative Law Judge that the instant case is factually identical to Matter of La Penna (*supra*). Additionally, the Division argues the case is also similar to Matter of Mason (Tax Appeals Tribunal, June 29, 1993). The Division further contends the instant case is also distinguishable from cases and decisions cited by petitioner in her brief because petitioner was the only person with authority.

We find the Administrative Law Judge adequately and effectively addressed the arguments presented before her to conclude petitioner was a person required to collect sales tax pursuant to Tax Law § 1131(1). Petitioner, on exception, however, raises the prospect that she was precluded from acting by her husband. As a result, the only issue we need address on exception is whether petitioner falls within our decision in Taylor.³

We affirm the determination of the Administrative Law Judge.

³Although Mr. Rotondo, at hearing and in post hearing brief, argued he was in control of the business and was the dominant figure, it was merely alluded to and not adequately raised that Mrs. Rotondo's authority was merely superficial and she was precluded from acting on her own.

We now look to decide whether petitioner was a person vested with authority but precluded from exercising such authority and control. We have ruled in the past that where the record reflects that an individual had no authority to control the performance of his or her duties, we will not find this person a responsible officer.

In Matter of Taylor (*supra*), we noted the pertinent inquiry in a responsible officer case, after a review of objective criteria, is not simply whether a person was an officer or performed the duties traditionally associated with such a position, but rather, whether the person, in fact, had authority to control the performance of her duties (*see also*, Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; Matter of Hall, Tax Appeals Tribunal, March 22, 1990). In Taylor, while the petitioner held the titles of president and owner and applied for all licenses of the corporation, we found these responsibilities were done at the complete control and supervision of three other individuals. It is fatal to petitioner's argument that there is no evidence in the record showing she was precluded from exercising the authority accorded her as sole officer and shareholder of the corporation. Petitioner does, however, attempt to recharacterize the facts to provide such evidence. Petitioner, for example, argues on exception that she was scared (expletive deleted) of her husband and that this fear kept her from exercising any authority (Petitioner's brief on exception, p. 7). The record reflects that the auditor and Mr. Rotondo testified that petitioner was actually fearful of a "large assessment" from the State (Tr., pp. 93, 96, 97 and 110).

Further, with regard to the auditor's request to turn over corporate books, petitioner contends "had [she] sought, even asked for, the books and records and attempted in any manner to exercise independent power and authority over her husband Franco Rotondo it would have been more than a sign of 'mistrust' and caused far more than 'animosity'" (Petitioner's brief on exception, pp. 18-19). In addition, petitioner contends "[petitioner] did what she was told by Franco Rotondo or else" (Petitioner's brief on exception, p. 3). The above assertions by petitioner are made despite the absence of any basis supporting them existing in the record.

Without the necessary evidence to show she was precluded from exercising her authority, petitioner's argument must be rejected.

In Matter of Taylor (*supra*), we also found significant that there was no evidence that petitioner knowingly or willingly sought to aid or fuel the deception as to who actually possessed control and authority. This is in contrast to the instant case, where both petitioner and Mr. Rotondo testified that petitioner willingly acted as corporate officer and shareholder, which was necessary in order for Wayside to continue doing business with certain municipalities which would no longer contract with Wayside if Mr. Rotondo appeared in control. The Administrative Law Judge found these facts to be similar to those in Matter of LaPenna (*supra*) where positions of authority were assumed by parents of the individual who actually operated the business, but was precluded from a position of explicit ownership or control due to his union affiliations. The parents' knowing assumption of these positions as a ruse to allow their son to run the business without appearing to contravene union policy, contributed to our finding the parents to be responsible officers. We do likewise in the instant case.

To conclude, we agree with the Administrative Law Judge that the facts in this case are similar to those in Matter of Blodnick (*supra*) where the Appellate Division held that it was irrelevant to the determination of responsible officer status that the sole officers and shareholders of the corporation did not exercise their authority.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Josephine Rotondo is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Josephine Rotondo is granted to the extent indicated in conclusions of law "D" and "G" of the Administrative Law Judge's determination, but is otherwise denied; and
4. The Division of Taxation is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes issued to Josephine Rotondo dated August 30, 1989, in accordance with paragraph "3" above, but such Notice is otherwise sustained.

DATED: Troy, New York
August 18, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner