

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JESSIE LUONGO : DECISION
for Revision of Determinations or for Refund of Sales : DTA Nos. 822823 and
and Use Taxes under Articles 28 and 29 of the Tax Law : 822517
for the Periods March 1, 2004 through November 30, :
2006 and March 1, 2007 through February 29, 2008. :

Petitioner, Jessie Luongo, filed an exception to the determination of the Administrative Law Judge issued on April 28, 2011. Petitioner appeared by Roberts & Holland, LLP (Richard A. Levine, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Michael Hall, of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on January 11, 2012 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner was personally liable for the sales and use taxes due on behalf of Fifth Avenue Restaurant Acquisition Corp., as a person required to collect and pay such taxes under the Tax Law.

II. Whether penalties imposed by the Division of Taxation should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact “7,” “8,” “9,” “11,” “21,” “23,” and “26.” The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below.

Fifth Avenue Restaurant Acquisition Corp. (Fifth Avenue) operated a restaurant known as Tuscan Square Restaurant and Marketplace (Tuscan Square), located at 16 West 51st Street, in Rockefeller Center, during the periods in issue. The upper level of the restaurant was a bar and dining room, while the lower level contained a marketplace.

At all relevant times Jessie Luongo (petitioner) was the sole shareholder of Fifth Avenue. Petitioner had completed three years of college, and previously worked as a model for a fashion designer more than 20 years ago. Since then, petitioner was a housewife and mother, with no employment outside the home.

Background on Tuscan Square

Tuscan Square was created in 1996. In addition to being a restaurant and marketplace, it was also a deli, which sold prepared food, had an espresso bar and sold retail glassware and dinnerware from Tuscany. The owner of the original Tuscan Square was an entity known as Toscorp, the parent company of Tuscan Square and at least 16 other restaurants. It operated at that time as Rock 51 PRTN Corporation (Rock 51).

Toscorp filed a voluntary petition in bankruptcy under Chapter 11 of Title 11 of the United States Code (the Bankruptcy Code) on August 31, 2001. At that time, the plan with the secured lender was to organize the debt of the subsidiaries and review those that were performing well. Although a plan in bankruptcy was reached, the events of September 11, 2001 reduced the cash

flow of the business by 65%. After that time, the plan was to liquidate the assets and satisfy the lender, General Motors Acceptance Corporation (GMAC).

On or about August 26, 2003, Rock 51 filed a voluntary petition under Chapter 11 of the Bankruptcy Code, and this filing was consolidated with that of Toscorp for purposes of joint administration. Rock 51 continued in the operation of its business (Tuscan Square) and the management of its property as a debtor-in-possession pursuant to the Bankruptcy Code.

Prior to the bankruptcy of Rock 51, Giuseppe Luongo, petitioner's husband, was the CEO of the company, and petitioner was a minority shareholder of Toscorp.

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

Fifth Avenue was formed on October 24, 2003, for the purpose of acquiring the assets of Rock 51 from Toscorp (among other parties). GMAC was willing to approve the transfer of ownership of assets of Rock 51 to Fifth Avenue, so long as it was to a new shareholder and did not involve Giuseppe Luongo as a shareholder. Advised by attorneys, petitioner was asked to become the owner and sole shareholder of Fifth Avenue, in the interest of preserving assets, to which she agreed. It does not appear as though petitioner put any capital into the corporation for her ownership of all of the stock. The bankruptcy judge approved Jessie Luongo as becoming the sole shareholder of Fifth Avenue.¹

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

On October 24, 2003, petitioner appointed Giuseppe Luongo the sole director of Fifth Avenue, and as the only board member, he appointed himself President, Treasurer and Secretary of Fifth Avenue.² During the periods in issue, Jessie was the sole shareholder and Giuseppe remained the sole director and held the same

¹ We modify this fact to more accurately reflect the record.

² At the time of Fifth Avenue's application for an Alcoholic Beverage Retail License, Mr. Luongo appeared to be very experienced in the operations of the restaurant business as he held concurrent officer and/or director positions with four other restaurants (*see* Exh. O).

corporate officer positions for Fifth Avenue.³ For the periods in issue, the ownership and management were solely in the hands of Jessie and Giuseppe Luongo.^{4, 5}

We modify finding of fact “9” of the Administrative Law Judge’s determination to read as follows:

On December 2, 2003, Fifth Avenue entered into an Asset Purchase Agreement (Agreement), as one of the buyers, for the purchase of the assets of Rock 51.⁶ Pursuant to the Agreement, the assets of Rock 51 were subject to the security interest and liens of Corsair Special Situations Fund, LP (Corsair), the senior secured creditor, as assignee of GMAC Commercial Finance LLC. Fifth Avenue executed a promissory note to Corsair for its share of the obligation under the Agreement. Pursuant to the Agreement, any liability or obligation of Rock 51, including fines and penalties to the Internal Revenue Service and the Division, among others, was considered a nonassumed liability of Fifth Avenue. A Bill of Sale was executed on April 10, 2004, which closed the transactions contemplated under the Agreement.⁷

Fifth Avenue Operations

On or about February 9, 2004, an Application for Alcoholic Beverage Retail License in the name of Fifth Avenue was filed with the New York State Liquor Authority. The application listed Giuseppe Luongo as President, Treasurer, Secretary and Director, listed petitioner as a 100% shareholder of the corporation, and indicated that petitioner was the spouse of Giuseppe Luongo.

³ The terms of the relevant corporate by-laws indicate that petitioner, as the sole shareholder, could dismiss Mr. Luongo as the Director of Fifth Avenue (*see* Exh. N, Article 2.5).

⁴ As noted herein, Fifth Avenue filed for bankruptcy in December 2006, at which time petitioner asserts that a bankruptcy trustee was appointed to the then bankrupt entity. The record contains insufficient evidence as to what extent this appointment changed or otherwise materially reduced petitioner’s and Giuseppe Luongo’s involvement in the control and/or operations of Fifth Avenue.

⁵ We modify this fact to more accurately reflect the record.

⁶ At the time of the sale of the assets, both the seller and Mr. Luongo had tax liabilities, relating to the operation of the earlier restaurant business, asserted against them by the Division of Taxation (Division) (*see* Transcript at 161-162 and 236-237).

⁷ We modify this fact to more accurately reflect the record.

We modify finding of fact “11” of the Administrative Law Judge’s determination to read as follows:

An Application for Registration as a Sales Tax Vendor, Form DTF-17, dated March 11, 2004, was received by the Division on March 22, 2004, bearing only petitioner’s signature as “owner.” The application requires the signature by “a person whose responsibility it is to act for the business in complying with the tax law.”⁸ Petitioner and Giuseppe Luongo asserted that neither of them filled in the information contained in the body of the application. Moreover, where the form and related instructions require “all owners or officers of the business who are responsible for the day-to-day operations of the business” to be listed, the only name that appeared on the form was petitioner’s name. Giuseppe Luongo’s name did not appear at all on the form, particularly in the section where names of all officers who were involved with the day-to-day operations was required. Furthermore, the application incorrectly was filled out to indicate that none of Fifth Avenue’s officers, directors or employees owed New York State or local sales and use taxes.⁹ The record is incomplete and the parties were evasive as to who supposedly filled in the form and who allegedly requested petitioner to sign it.¹⁰

As the only officer of the corporation, Giuseppe Luongo was authorized to open bank accounts for the corporation and to designate signatories for the accounts as he deemed appropriate. The corporation had a corporate bank account at North Fork Bank, and only Mr. Luongo was authorized to sign checks on that account. Another corporate account was maintained at Independence Community Bank, and Giuseppe Luongo was the only authorized signatory on that account.

Giuseppe Luongo testified that he was in charge of the entire daily operation of the corporation. He hired and fired all of the corporation’s employees and never consulted with

⁸ The Administrative Law Judge took official notice of the Division’s Instructions for Form DTF-17 (Revised 8/00), which provides guidance for the completion of an application for registration as a sales tax vendor (Division’s Exhibit R).

⁹ As previously noted, Mr. Luongo owed New York State taxes with regard to his management of a previous restaurant business.

¹⁰ We modify this fact to more accurately reflect the record.

petitioner in making such decisions. Giuseppe Luongo took responsibility for and performed all the functions and duties of the officers of the corporation, and did not delegate such duties to anyone.

The corporation filed New York S corporation franchise tax returns for tax years 2004, 2005, 2006 and 2007, which listed petitioner on form CT-34-SH, New York S Corporation Shareholders' Information Schedule, as being the sole shareholder for the years 2004, 2005, 2006 and 2007. These returns were all signed by Giuseppe Luongo.

All of the sales tax returns for Fifth Avenue, including all the periods at issue, were signed by Giuseppe Luongo. All of the federal and New York State income tax returns for Fifth Avenue were signed by Giuseppe Luongo.

Petitioner never received or opened any mail that was addressed to Fifth Avenue. She was not authorized to sign checks on behalf of Fifth Avenue, never asked to sign any checks and in fact, never signed checks for Fifth Avenue.

Petitioner never met with the chef who ran the restaurant portion of Tuscan Square.

Petitioner never went to the office of Fifth Avenue and never met with the company's comptroller.

Giuseppe Tarillo, the general manager of Tuscan Square for the years in issue, consulted with Giuseppe Luongo regarding all decisions that were made with respect to the restaurant and his only contact with petitioner was when she ate at the restaurant from time to time.

Petitioner never met with the accountant, or anyone else, with respect to the preparation of the income tax returns prepared on behalf of Fifth Avenue or any other issues relating to the tax liabilities of Fifth Avenue.

We modify finding of fact “21” of the Administrative Law Judge’s determination to read as follows:

Petitioner testified that she never received compensation from Fifth Avenue as an officer, director, employee or for any other position.¹¹ The tax returns filed by Fifth Avenue do not indicate otherwise. Throughout the period at issue, petitioner was not prevented in any way from accessing the books and records of Fifth Avenue (*see* Transcript at 281).¹²

Fifth Avenue sustained losses during the years 2004, 2005 and 2007. Since it was organized as an S corporation, the losses flowed through to petitioner. Petitioner had no basis in the stock of Fifth Avenue and did not claim the loss on her personal income tax return for 2004. No other personal returns were provided.

We modify finding of fact “23” of the Administrative Law Judge’s determination to read as follows:

Trial balances for the periods ending December 31, 2004, December 31, 2005 and November 30, 2006 were submitted as part of the record. A liability account entitled “Loans and Exchange-Jessie” had debit and credit entries for the two latter periods. An explanation could not be provided by petitioner, Giuseppe Luongo, Michael Savocchi (the CPA who was comptroller of Fifth Avenue) or Thomas Keller (the CPA who acted as the outside accountant for Fifth Avenue and was responsible for the preparation of the corporate tax returns) as to why the account existed or what was represented by the entries, although, both Messrs. Savocchi and Keller testified that the corporation did not make any loans to, or take any loans from, Jessie Luongo. On October 9, 2007, Fifth Avenue borrowed money from, and executed a promissory note to, North Fork Bank; the promissory note indicates that such was secured, in part, by the personal guarantee of Jessie Luongo.¹³

¹¹ A separate restaurant for which Jessie Luongo was a shareholder of, apparently paid her a significant salary, solely for the fact that she was a shareholder of the restaurant; the testimony in the record indicates that Jessie Luongo allegedly never worked at or was otherwise employed in any way by the restaurant that paid her a salary (*see* Transcript at 246). Mr. Luongo also was significantly involved in the management of this separate restaurant that took the unusual position of paying a shareholder a salary for her status solely as a shareholder (*see* Transcript at 89).

¹² We modify this fact to more accurately reflect the record.

¹³ We modify this fact to more accurately reflect the record.

Fifth Avenue filed for bankruptcy in December 2006. The lease under which Fifth Avenue operated was up for a five-year renewal, and the landlord informed Giuseppe Luongo that pursuant to its terms, which called for fair market value for future rents from that point in time forward, the charges for the space the company occupied were going to increase from \$425,000.00 to \$975,000.00 a year. Mr. Luongo determined that bankruptcy might be the only means of getting relief from this drastic increase.

The Sales Tax Audit

Subsequent to the bankruptcy filing, in 2007, the Division conducted a sales tax field audit of the corporation's books and records for the period March 1, 2004 through November 30, 2006. Petitioner was not involved in this audit. Fifth Avenue's outside accountant, Tom Keller, handled the audit of the company.

We modify finding of fact "26" of the Administrative Law Judge's determination to read as follows:

In connection with the audit, Mr. Keller submitted a Responsible Person Questionnaire stating that Giuseppe Luongo was the responsible person with respect to Fifth Avenue.¹⁴ He did not complete the same questionnaire with respect to petitioner, since he did not consider her to be a responsible person with respect to the company's tax liabilities.¹⁵

The results of the audit showed that Fifth Avenue:

a) underreported gross sales on its sales tax returns by \$2,745,050.00, resulting in additional tax due in the amount of \$232,121.44;

¹⁴ On cross-examination at the hearing, Giuseppe Luongo admitted that he is "judgement proof," i.e., that is he has either minimal or no assets that a party could recover from him (*see* Transcript at 243-244).

¹⁵ We modify this fact to more accurately reflect the record.

b) failed to pay tax on capital purchases of \$39,941.31, which resulted in additional sales tax due of \$3,408.32;

c) failed to pay tax on expense purchases of \$23,662.83, which resulted in an additional assessment of sales tax in the amount of \$1,981.22; and

d) failed to pay tax on tips not remitted to employees of \$27,461.41, resulting in an assessment of \$2,327.59.

The Division thereafter issued a Notice of Determination, dated October 25, 2007, in the amount of \$239,838.57 plus penalty and interest to Fifth Avenue, and a Notice of Determination, dated November 5, 2007, to petitioner for the same amount, as a responsible person. The tables below also contain other Notices that were issued to Fifth Avenue and petitioner.

Notice Number/Type	Date of Notice	Period(s)	Tax Amount	Penalty	Interest	Payments
L-029315345-5 Notice of Determination	10/25/07	3/1/04- 11/30/06	\$239,838.57			
L-028988506-7 Notice and Demand for Payment of Tax Due	8/6/07	3/1/07- 5/31/07	\$32,344.45	\$3,557.88	\$575.63	\$32,344.45*
L-029418149-9 Notice and Demand for Payment of Tax Due	11/13/07	6/1/07- 8/31/07		\$2,362.11	\$124.07	
L-029714320-6 Notice and Demand for Payment of Tax Due	2/11/08	9/1/07- 11/30/07	\$34,797.57	\$3,827.72	\$700.88	
L-029934884-3 Notice and Demand for Payment of Tax Due	5/5/08	12/1/07- 2/29/08		\$100.00		

* Payment made November 28, 2007

The following assessments were issued to petitioner:

Notice Number/Type	Date of Notice	Period(s)	Tax Amount	Penalty	Interest	Payments
L-029361359-8 Notice of Determination	11/5/07	3/1/04 to 11/30/06	\$239,838.57			
L-030063804-7 Notice of Determination	5/19/08	3/1/07- 5/31/07	\$32,344.45	\$4,851.64	\$2,173.05	\$32,344.45
L-030063803-8 Notice of Determination	5/19/08	6/1/07- 8/31/07		\$6,271.00	\$1,560.34	
L-030063802-9 Notice of Determination	5/19/08	9/1/07- 11/30/07	\$34,797.57	\$4,871.63	\$2,046.23	
L-030063801-1 Notice of Determination	5/19/08	12/1/07- 2/29/08		\$100.00		

Tuscan Square, operated by Fifth Avenue, went out of business by the end of 2007.

Both parties agree that Giuseppe Luongo is a responsible officer of Fifth Avenue, and that he is personally liable for the sales tax liabilities of the company. The Division has assessed Giuseppe Luongo accordingly.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected the argument that petitioner was not a responsible person required to collect sales and use taxes pursuant to Articles 28 and 29 of the Tax Law. The Administrative Law Judge also rejected the argument that petitioner was not a person required to collect tax under the Tax Law since she was not a director, officer or employee of Fifth Avenue. The Administrative Law Judge found that, although petitioner may not have been significantly involved in the management of the day-to-day activity of the corporation, the record supports the conclusion that petitioner had sufficient authority to exercise control over corporate affairs. Therefore, the Administrative Law Judge concluded that petitioner was under a duty to act for the

corporation in complying with the sales tax provisions of the Tax Law. Accordingly, the Administrative Law Judge sustained the Notices of Determination issued to petitioner.

ARGUMENTS ON EXCEPTION

In her exception, petitioner makes many of the same arguments as made before the Administrative Law Judge. Petitioner claims that she is not a responsible person for the collection of sales taxes because she is merely a shareholder and not a director, officer, or employee of the company. Petitioner also claims that when Fifth Avenue went into bankruptcy, a bankruptcy trustee took over complete control of the company, and therefore, petitioner could not have had control of the company and liability as a responsible party. Petitioner also claims that the Administrative Law Judge made a mistake when she did not agree with every assertion made by petitioner and her witnesses.

The Division asserts that the Administrative Law Judge correctly determined that petitioner failed to meet her burden of proving that she was not a responsible party and that based upon her status as a shareholder, she should be held liable. In addition, the Division asserts that there is insufficient proof that a bankruptcy trustee actually took over total control of Fifth Avenue, thereby relieving petitioner of any potential liability.

OPINION

We affirm the determination of the Administrative Law Judge. The primary issue in this matter is whether petitioner, who is not an officer, director or employee of Fifth Avenue, could be held liable as a “person required to collect tax” under Tax Law § 1131 (1), for the tax assessments issued to Fifth Avenue.

Tax Law § 1131 (1) expansively defines “persons required to collect [sales] tax” as follows:

“[E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, . . . or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, . . . in complying with any requirement of this article”

The determination of whether an individual is a person under a duty to act for a business operation is based upon a close examination of the particular facts of the case. In *Matter of Moschetto* (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

“The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interest in the corporation (citations omitted).”

In determining whether an individual is personally liable under Tax Law § 1131 (1), consideration must be given to all the facts in each case (*see Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [1987]; *Vogel v New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222 [1979]; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

As noted above, Fifth Avenue was formed on October 24, 2003 with Jessie Luongo as its sole owner. On that same day, October 24, 2003, petitioner appointed Giuseppe Luongo, her husband, as the sole director of Fifth Avenue, and as the only board member, he appointed himself President, Treasurer and Secretary of Fifth Avenue. However, even after Fifth Avenue had its new Director and executive officer in place, Jessie Luongo personally executed Fifth Avenue’s Application for Registration as a Sales Tax Vendor (Form DTF-17). This application requires the

signature of a person whose responsibility it is to act for the business in complying with the Tax Law. Moreover, where the form and related instructions require “all owners or officers of the business who are responsible for the day-to-day operations of the business” to be listed, the only name that appeared on the form, signed by Jessie Luongo, was her own. Furthermore, the application was incorrectly filled out to indicate that none of Fifth Avenue’s officers, directors or employees owed New York State or local sales and use taxes.¹⁶ Petitioner executed a form in which she expressly accepted responsible party liability.

Jessie Luongo also participated in obtaining a liquor license for Fifth Avenue. Furthermore, after the corporation was operating, it appears that Jessie Luongo personally guaranteed a bank loan to Fifth Avenue.¹⁷ In previous cases, such a guarantee has been an important consideration (*see Matter of Martin v Commissioner of Taxation & Fin.*, 162 AD2d 890 [1990]). It is also unclear as to whether petitioner was independently making loans to, or accepting loans from, Fifth Avenue.

In her reply brief, petitioner attempts to criticize the Division for pointing out that Fifth Avenue did not hold any of the required annual shareholder meetings. In this regard, petitioner’s reply brief asserts that, as the sole shareholder of the corporation, “isn’t every moment of her life a ‘shareholder meeting.’”¹⁸ New York’s corporate law supports petitioner’s position in this regard (*see Sire Plan v Mintzer*, 38 Misc 2d 920 [1963]); that is, petitioner had the continuous power in which to summarily remove her appointed director and executive officer from any management or

¹⁶ As previously noted, Mr. Luongo owed New York State taxes with regard to his operation of a previous restaurant business.

¹⁷ At the hearing, Mr. Luongo asserted that the bank documents, which he signed and apparently made several individual handwritten modifications thereto, are incorrect and Jessie Luongo did not guarantee the loan.

¹⁸ Petitioner’s reply brief at page 8.

involvement in the business. The clear fact is that the only individuals with authority to run Fifth Avenue were Jessie and Giuseppe Luongo, wife and husband. Petitioner was the 100% shareholder, giving her the authority to appoint the board of directors, which in turn, nominates the officers. In this case, petitioner as the sole shareholder, appointed her husband as the only member of the board, giving him control to place himself in any or all officer positions, which is what he did. As noted in petitioner's reply brief:

“[Jessie Luongo] was not indifferent to her responsibilities. She appointed her husband, who she believed to be supremely qualified for the position, to run the Corporation. She trusted that if there was something going wrong that she would have to know about the Corporation [*sic*], he would inform her” (Petitioner's reply brief at page 8).

However, petitioner's duty as the sole shareholder did not cease at the appointment of the board. At all times, she had the authority and control, by mere virtue of her complete ownership, to oversee the decisions of Giuseppe Luongo in the running of Fifth Avenue, or act to remove him if he was not acting in the best interests of the corporation. Petitioner admitted that she was not denied access to the corporate books and records. As sole shareholder, she possessed the power to change the director and management of the corporation at any time.

Although it appears that Jessie Luongo did not receive a salary or dividends from Fifth Avenue, as its sole shareholder, she would benefit directly from any and all monies Fifth Avenue derived via the appreciation of the value of the stock, for which she apparently paid nothing. Although the record is not clear on the matter, there is a likelihood that Jessie Luongo's husband, Giuseppe Luongo, received some form of compensation from Fifth Avenue for his duties as sole Director and executive officer of the company.

Petitioner argues that in order to be liable for the sales and use taxes assessed against Fifth Avenue, petitioner must be an officer or employee of the corporation. However, in *Matter of*

Ianniello (Tax Appeals Tribunal, November 25, 1992, *affd sub nom. Matter of Ianniello v New York Tax Appeals Trib.*, 209 AD2d 740 [1994]), petitioners were neither officers, directors nor employees of the company against which tax was assessed. It is clear that Tax Law § 1131 (1) does not bear an exclusive list of those persons who may be held liable for the collection of tax. It was determined in *Matter of Ianniello* that the petitioners could be personally liable. As the Administrative Law Judge correctly pointed out, in the federal case of *United States v Graham*, the question was whether a member of a corporation's board of directors could be considered a "person" required to collect tax when that member was not an employee or officer of the corporation (*United States v Graham*, 309 F2d 210 [1962]). The court, interpreting language in the Internal Revenue Code [26 USC § 6671 [b]; § 6672] which is similar to Tax Law § 1131 (1), held that "[t]he term 'person' [under the statute] does include officer and employee, but certainly does not exclude all others" (*Id.* at 211-212). The court in *Graham* concluded that a contrary conclusion would be too narrow a reading of the section, and that "[t]he statute's purpose is to permit the taxing authority to reach those responsible for the corporation's failure to pay the taxes which are owing" (*Id.* at 212).

Although the Division does not cite to any one authority in support of the theory that a shareholder should be held liable as a responsible person solely for his or her status as a shareholder, we need not rule on that question at this time, since this case involves more than just that analysis. Not only was petitioner the sole shareholder, who appointed her husband, a person with previous sales tax liability issues, as sole manager of the corporation. She also executed what appears to be an inaccurate application for registration as a sales tax vendor, which independently recognized her as the sole responsible party for the collection of sales taxes; she participated in obtaining a valuable liquor license for the corporation; she guaranteed loans for the

corporation; and she may have independently received loans from the corporation. It is petitioner's burden to bring out facts to prove that she was not a person under a duty to act for the corporation (*Matter of Ragonesi v New York State Tax Commn.*, 88 AD2d 707 [1982]; *Matter of Meskouris Bros. v Chu*, 139 AD2d 813 [1988]; *Matter of Surface Line Operators Fraternal Org. v Tully*, 85 AD2d 858 [1981]). To prevail in this case, petitioner is required to establish by clear and convincing evidence that she was not a person having a duty to act on behalf of the corporation. That is that she lacked authority, or that she was thwarted or prevented from any participation in the corporate duties through no fault of her own (*Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994). Petitioner failed to meet her burden of proof that she was not a responsible person.

Petitioner asserts that when Fifth Avenue filed for bankruptcy, a bankruptcy trustee must have taken over complete control of the corporation and thus petitioner could not be held liable for the unpaid sales taxes asserted for that period. However, subsequent to the bankruptcy filing, on February 26, 2007, a Responsible Person Questionnaire (Exhibit 1) was provided to the Division by Fifth Avenue's accountant, Thomas Keller, which indicated that Giuseppe Luongo was still the President of the corporation. In addition, all tax returns filed after the declared bankruptcy, were signed by Mr. Luongo and not by a trustee. Aside from Mr. Luongo's vague references to a trustee having control over Fifth Avenue, none of petitioner's other witnesses effectively corroborated the assertion that there was a separate trustee in bankruptcy who controlled the business operations. Petitioner has failed to establish that she and her husband had been removed from control of Fifth Avenue during its bankruptcy (*cf. Matter of Byram*, Tax Appeals Tribunal, August 11, 1994).

Petitioner also claims that the Administrative Law Judge did not place the appropriate weight on her witnesses' testimony. In this regard we note:

“The credibility of witnesses is a determination within the domain of the trier of facts, the person who has the opportunity to view the witness first hand and evaluate the relevance and truthfulness of their testimony (see, Matter of Gordon, Tax Appeals Tribunal, January 4, 1996; Matter of Moss, Tax Appeals Tribunal, November 25, 1992; Matter of Jericho Delicatessen, Tax Appeals Tribunal, July 23, 1992; Matter of Spallina, Tax Appeals Tribunal, February 27, 1992). Although this Tribunal is not bound by the Administrative Law Judge's evaluation of a witness's credibility (Tax Law § 2006[7]; 20 NYCRR 3000.17[e][1]; Matter of Moss, *supra*; Matter of Jericho Delicatessen, *supra*), we find nothing in the record here which causes us to alter the determination of the Administrative Law Judge (cf., Matter of Wachsman, Tax Appeals Tribunal, November 30, 1995)” (*Matter of On-Site Petroleum Unlimited*, Tax Appeals Tribunal, February 8, 1996).

In the case at hand, we similarly find nothing in the record that causes us to alter the determination of the Administrative Law Judge with regard to the weight placed on each individual's testimony.

Petitioner now seeks to limit the duration of the personal liability that attached to her as a “vendor,” based on the filing of the Application for Registration as a Sales Tax Vendor form, which she signed. In this regard, petitioner argues that it is “inconceivable” that a person who signs a sales tax application form shall continue to be personally liable for the sales tax obligations of the corporation years after execution of the form. However, petitioner provides absolutely no authority for its argument.

We affirm the determination of the Administrative Law Judge. Upon a thorough and complete review of this record, we find that the Administrative Law Judge has fully and correctly addressed each of the issues presented. Petitioner has offered no evidence below or argument on exception that would justify our further modifying the determination.

Finally, petitioner offered insufficient proof that the restaurant's failure to pay appropriate sales tax was due to reasonable cause and not due to willful neglect. Therefore, penalty is sustained (*see Matter of Disanco Home Center Corp.*, Tax Appeals Tribunal, February 16, 1989; *Matter of CBS Corp. v Tax Appeals Trib. of State of N.Y.*, 56 AD3d 908 [2008], *lv denied* 12 NY3d 703 [2009]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jessie Luongo is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jessie Luongo is denied; and,
4. The Notices of Determination dated November 5, 2007 and May 19, 2008 are sustained.

DATED: Albany, New York
July 10, 2012

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner