

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JESSIE LUONGO** : DETERMINATION  
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. :

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Petitioner, Jessie Luongo, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 2004 through November 30, 2006 and March 1, 2007 through February 29, 2008.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 23, 2009, at 10:30 A.M., and continued to its conclusion on September 24, 2009 at 9:15 A.M., with all briefs to be submitted by August 2, 2010, which date began the six-month period for the issuance of this determination. The time for issuance of the determination was extended for three months pursuant to 20 NYCRR 3000.5(d). Petitioner appeared by Roberts & Holland LLP (Richard A. Levine, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael Hall, of counsel).

***ISSUES***

I. Whether the administrative law judge may properly take judicial notice of tax warrants and a Division of Tax Appeals determination concerning petitioner's husband, Giuseppe Luongo, in establishing facts in this case.

II. 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 Tax Law § 1131(1) and § 1133(a).

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

### ***FINDINGS OF FACT***

The parties stipulated to 20 findings of fact that are incorporated in the facts as set forth below.

1. Fifth Avenue Restaurant Acquisition Corp. (Fifth Avenue) operated a restaurant known as Tuscan Square Restaurant and Marketplace (Tuscan Square), located at 16 West 51<sup>st</sup> 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.

2. 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***

3. Tuscan Square was created in 1996, and in addition to being a restaurant and marketplace, it was also a deli, 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).

4. 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. The plan with the secured lender at that time 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%. The plan after that time was to liquidate the assets and satisfy the lender, General Motors Acceptance Corporation (GMAC).

5. 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.

6. 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.

7. Fifth Avenue Restaurant Acquisition Corp. (Fifth Avenue) was formed on October 24, 2003, for the purpose of acquiring the assets of Rock 51. 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. The bankruptcy judge approved the arrangement.

8. 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. During the periods in issue, Jessie was the sole shareholder and Giuseppe remained the sole director and held the same corporate officer positions for Fifth Avenue. For

the periods in issue, the ownership and management was solely in the hands of Jessie and Giuseppe Luongo.

9. 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. 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 New York State Department of Taxation and Finance, 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.

#### ***Fifth Avenue Operations***

10. 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.

11. An Application for Registration as a Sales Tax Vendor, Form DTF-17, dated March 11, 2004, was received by the Division of Taxation (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.”<sup>1</sup> Neither petitioner nor Giuseppe Luongo filled in the information contained in the body of the application. Where the form requested “all owners/officers” to be listed, the only name that appeared on it was petitioner’s, as owner. Giuseppe Luongo’s name did not appear at all on the form, particularly in the section where all officers’ names were required. The record is incomplete as to who filled in the form and who requested petitioner to sign it.

12. 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 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.

13. Giuseppe Luongo 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 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.

14. The corporation filed New York S corporation franchise tax returns for tax years 2004, 2005, 2006 and 2007, that listed petitioner on form CT-34-SH, New York S Corporation

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<sup>1</sup> A judge may take judicial notice on his own motion (Richardson on Evidence, [10<sup>th</sup> ed], §14, p.9). Pursuant to SAPA §306(4), official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. On my own motion, I am taking official notice of the New York State Department of Taxation and Finance’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). Official notice of the instructional guidance contained within the document is determinable by referring to a source of indisputable accuracy, and the use of such instructions is clearly within the specialized knowledge of the agency.

Shareholders' Information Schedule, as being the sole shareholder for the years 2004, 2005, 2006 and 2007. These returns were all signed by Giuseppe Luongo.

15. All 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.

16. 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.

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

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

19. 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.

20. 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.

21. Petitioner never received compensation from Fifth Avenue as an officer, director, employee or for any other position. The tax returns filed by Fifth Avenue do not indicate otherwise.

22. 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.

23. 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.

24. 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***

25. 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.

26. 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. 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.

27. 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;

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 (Finding of Fact 28). The tables below also contain other notices that were issued to Fifth Avenue and petitioner.

| <b>Notice Number/Type</b>                                    | <b>Date of Notice</b> | <b>Period(s)</b>    | <b>Tax Amount</b> | <b>Penalty</b> | <b>Interest</b> | <b>Payments</b> |
|--|-----------------------|---------------------|-------------------|----------------|-----------------|-----------------|
| L-029315345-5<br>Notice of Determination                     | 10/25/07              | 3/1/04-<br>11/30/06 | \$239,838.57      |                |                 |                 |
| L-028988506-7<br>Notice and Demand for<br>Payment of Tax Due | 8/6/07                | 3/1/07-<br>5/31/07  | \$32,344.45       | \$3,557.88     | \$575.63        | \$32,344.45*    |
| L-029418149-9<br>Notice and Demand for<br>Payment of Tax Due | 11/13/07              | 6/1/07-<br>8/31/07  |                   | \$2,362.11     | \$124.07        |                 |

|  |         |                     |             |            |          |  |
|--|---------|---------------------|-------------|------------|----------|--|
| L-029714320-6<br>Notice and Demand for<br>Payment of Tax Due | 2/11/08 | 9/1/07-<br>11/30/07 | \$34,797.57 | \$3,827.72 | \$700.88 |  |
| L-029934884-3<br>Notice and Demand for<br>Payment of Tax Due | 5/5/08  | 12/1/07-<br>2/29/08 |             | \$100.00   |          |  |

\* Payment made November 28, 2007

28. The following assessments were issued to petitioner:

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

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

30. 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.

***SUMMARY OF THE PARTIES' POSITIONS***

31. Petitioner maintains that she is not a person required to collect tax under the Tax Law, since she is not an officer or employee of Fifth Avenue and did not have any involvement with Fifth Avenue other than her status as a 100% shareholder.

32. The Division maintains that petitioner is a responsible person under the Tax Law, since she was an essential participant in the management of Fifth Avenue.

***CONCLUSIONS OF LAW***

A. In accordance with State Administrative Procedure Act § 307(1), the disposition of the proposed findings of fact offered by petitioner is as follows:

a) The following proposed findings of fact have been accepted and included herein: 1-5, 7-10, 12-13, 15-16, 18-19, 22-30, 33-36, 40, 47-48, 50-51, 53-54, 56-57, 59-60, and 66 through 68.

b) The following proposed findings of fact have been modified to more accurately reflect the record: 6, 11, 20, 25, 31-32, 37, 61, and 69.

c) Proposed finding of fact 39 has been included with some modified numeric detail.

d) Proposed finding of fact 17 has been modified in part, and is otherwise not included, as it is not supported by the record.

e) Proposed findings of fact 21, 38, and 62-65 are not included as they are not supported by the record.

f) Proposed finding of fact 14 is rejected as law, not fact.

g) Proposed findings of fact 41-46, 49, 52, 55, and 58 are rejected as extraneous information.

B. State Administrative Procedure Act § 306(4) provides, in pertinent part, as follows:

Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to decision to dispute the fact or its materiality.

C. As set forth above, the State Administrative Procedure Act permits the taking of official notice in administrative proceedings if judicial notice could be taken. A court may only take judicial notice of particular facts if the items are of common knowledge or are determinable by referring to a source of indisputable accuracy (*Matter of Crater Club v. Adirondack Park Agency*, 86 AD2d 714, 446 NYS2d 565, *affd* 57 NY2d 990, 457 NYS2d 244). Courts today will often judicially notice matters of public record (Fisch on New York Evidence, [2<sup>nd</sup> ed], §1063, p. 600), and may take judicial notice of its own record of proceedings, not only in the case before it, but also in other actions involving one or more of the same parties (*Berger v. Dynamic Imports, Inc.*, 51 Misc 2d 988, 274 NYS2d 537; Fisch on New York Evidence, [2<sup>nd</sup> ed], §1065, p. 603).

The Division has requested that judicial notice be taken of the determination issued by Administrative Law Judge Gary Palmer in the *Matter of Giuseppe Luongo* (Division of Tax Appeals, ALJ Unit, January 22, 2004). A copy was provided as an attachment to the Division's brief, and duly served on petitioner. Official notice is taken of such prior proceeding.

The Division has requested that tax warrants issued between December 2002 and August 2005 to Rock 51 Partners Corp. T/A Tuscan Square and Giuseppe Luongo, individually and as a responsible person of Rock 51 and Toscorp, Inc., be judicially noticed. A copy was provided as an attachment to the Division's brief, and duly served on petitioner. A tax warrant issued by the New York State Department of Taxation and Finance is a public record stating that a party owes taxes to New York State, and such taxes may become a lien on real and personal property (*see* Tax Law § 692[c]; § 1092[c]; *see also* 100 NY Jur 2d, Taxation and Assessment § 1653). As a fact within the specialized knowledge of the agency and a matter of public record, it may be the subject of official notice.

D. The primary issue in this matter is whether petitioner, who concededly 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 § 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. Tax Law § 1131(1) provides, in pertinent part, as follows:

‘Persons required to collect tax’ or ‘person required to collect any tax imposed by this article’ shall include: every 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, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company, or individual proprietorship in complying with any requirement of this article; and any member of a partnership or limited liability company.

E. Petitioner maintains 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. I disagree. In *Matter of Ianniello* (Tax Appeals Tribunal, November 25, 1992), where petitioners were neither officers, directors nor employees of the company against which tax was assessed, the Tax Appeals Tribunal was 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 the *Matter of Ianniello* that the petitioners could be personally liable. Similarly, in *United States v. Graham* (309 F2d 210), where the question was whether a member of a corporation’s board of directors could be a “person” required to collect tax when that member was not an employee or officer of the corporation, the court, interpreting language in the Internal Revenue Code [26 USC § 671[b]; § 6672] similar to section 1131(1), held that “the term ‘person’ under the statute ‘does include

officer and employee, but certainly does not exclude all others” (*United States v. Graham*, at 211-212). The court in *Graham* concluded that a contrary conclusion would be too narrow a reading of the section, that its scope is illustrated rather than qualified by the specified examples, and that it must be construed to include all those so connected with a corporation as to be responsible for the performance of the act in respect of which the violation occurred.

Accordingly in this case, bearing no other titles or official positions, petitioner may be held personally liable as the sole shareholder of Fifth Avenue. The inquiry must next turn to whether petitioner engaged in activity or involvement concerning the corporation’s business that renders her personally liable.

F. Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities such that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (*see Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 1023, 513 NYS2d 564, 565 [1987]). The ultimate question to be resolved in any responsible officer case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered responsible for the tax liabilities that ensued (*see Matter of Ianniello; Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

Petitioner emphasizes the facts of this case that are similarly discussed in the vast body of case law that exists in the area of officer liability (see (*Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536 [1986], *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027 [1987]); *Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]; *Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239 [1990]; *Matter of Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427

[1978]; *Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 1023, 513 NYS2d 564, 565 [1987]) such as the fact that petitioner never had any daily management function with respect to the corporation, or signatory authority over any of the bank accounts of Fifth Avenue; that she was never a member of the board of directors, an officer or an employee of Fifth Avenue; that she never signed any of the tax returns prepared on behalf of the business; that she never had an obvious role in the day-to-day operations of Fifth Avenue; and that she had no authority to hire and fire employees. Those facts are important. However, a proper analysis of responsible person status is not simply a matching of the traditional indicia of responsibility to a person's surface acts (*Matter of Taylor*, Tax Appeals Tribunal, October 24, 1991). Critical to the question of fiduciary duty is petitioner's status as sole shareholder. Petitioner unequivocally had a fiduciary duty to the corporation and the legal authority to act for it, which rose to a level of responsibility to the corporation to see that it was properly complying with its sales tax obligations.

Giuseppe Luongo, petitioner's husband, is a savvy businessman with a keen sense of the workings of a sophisticated restaurant business and knowledge of all the components. His testimony concerning the business operations and his control of all the primary aspects were impressive, and his testimony in this regard was credible. However, upon a more thorough review of the testimony and the documents, there are many other segments of his testimony that are not so credible, which leave many unanswered questions about petitioner's active involvement in Fifth Avenue. There was testimony at length about the management skills, knowledge and involvement of Giuseppe Luongo. But this case is not about Giuseppe Luongo, it is about his wife Jessie. Petitioner and her husband, or perhaps petitioner's husband alone, engineered a transaction and created a new corporation, namely Fifth Avenue, for the purchase the assets of Rock 51, so that Tuscan Square could continue in business. Since Giuseppe Luongo was

previously the CEO of Rock 51 and involved with the company when it filed for bankruptcy, the bankruptcy court would approve the arrangement only if he was not a shareholder of the new corporation. Petitioner stated she agreed with the arrangement that she would become the 100% shareholder of Fifth Avenue with the intention of making money. Petitioner did not agree with the Division's characterization that she was acting as a "front" for her husband, Giuseppe Luongo. Instead petitioner acquiesced in becoming the owner of Fifth Avenue, applied for the necessary liquor license with the State Liquor Authority, and submitted the Application for Registration as a Sales Tax Vendor, all to further their financial gain. The Application for Registration as a Sales Tax Vendor omitted Giuseppe's name as an officer of Fifth Avenue, neglected to properly answer that an officer of the company owed sales and use taxes on his own behalf and for another company, and mysteriously has an unknown preparer. Though petitioner signed the sales tax vendor application, accepting responsibility to act on behalf of Fifth Avenue in complying with the Tax Law, she is now trying to disavow any responsibility. The clear fact is that the only individuals with authority to run Fifth Avenue were Jessie and Giuseppe Luongo, husband and wife. Petitioner was the 100% shareholder, giving her the authority to appoint the board of directors, which in turn, nominates the officers. In this case, as with many closely held family businesses, 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 exactly what he did. However, petitioner's duty as the sole shareholder did not cease at the appointment of the board, and 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 interest of the corporation. Petitioner additionally gave evasive and incomplete testimony, and her answers to many questions were simply not

credible. She seemed to know some of the roles Giuseppe Luongo played in other corporations, but failed to recall why she received W-2 income of \$75,000.00 from another company that he was involved with. She stated that prior to the hearing, she was not aware that Fifth Avenue had filed for bankruptcy in 2006. She stated that prior to receiving the notices herein, issued at the end of 2007 and May 2008, she was not aware that she was being pursued personally for the liabilities of Fifth Avenue. Tuscan Square went out of business by the end of 2007. The company owned by petitioner operated that restaurant, which at the very least, was a place she dined. It is incredible to accept that petitioner did not know what happened to Tuscan Square, the restaurant she owned. And if petitioner was hearing these life altering facts for the first time, it would be impossible for me to explain her unlikely calm demeanor. Petitioner's alleged lack of knowledge and control over financial matters was not a question of lack of authority, since she was the majority shareholder of the corporation, but rather a choice based upon deference to her husband, Giuseppe Luongo. Unfortunately, this deference resulted in a responsibility that petitioner cannot now cast aside. Exceptions to the responsible person status have been found only where the person proved that he was *precluded* from acting on behalf of the corporation by the acts of another (*see e.g. Matter of Turiansky; Matter of Moschetto; Matter of Constantino*). Petitioner not only testified that she was not precluded from signing sales tax returns or inspecting the books and records of Fifth Avenue, but has failed to allege, let alone prove, such preclusion. The matter at hand is similar to cases where the petitioner has been the sole shareholder and officer. In such circumstances, the sole shareholder and officer is viewed as having the legal authority and duty to act on behalf of the corporation and, therefore, is held liable for taxes due, notwithstanding the fact that the taxpayer may not have exercised actual control over the corporation (*Matter of Martin v. Commr. of Taxation & Fin.; Matter of Blodnick v. New York State Tax Commn.*, 124

AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Matter of Marvin H. Mason, Inc.*, Tax Appeals Tribunal, July 29, 1993; *Matter of LaPenna*).

It was petitioner's contention that she did not have any responsibility to Fifth Avenue, and that she allowed other people she trusted to handle all corporate matters and tell her what to sign and when. The case law clearly establishes that:

corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge (*Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301, 303).

Although petitioner may not have been significantly involved in the management of the day-to-day activity of the corporation, the evidence in this case supports the conclusion that petitioner had or could have had sufficient authority and control over corporate affairs and therefore was under a duty to act for the corporation in complying with Article 28 of the Tax Law (*see Matter of Pais*, Tax Appeals Tribunal, July 18, 1991). Leaving the execution of the scheme to operate Tuscan Square to her husband, if that is in fact the choice petitioner made, simply does not exonerate her from the responsibility for the taxes due and owing from Fifth Avenue.

G. Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for failure to file a return or to pay any tax under Article 28 in a timely manner. Tax Law § 1145(a)(1)(iii) (and former § 1145[a][1][ii]) further provides that if the failure or delay was due to reasonable cause and not willful neglect, penalty and that portion of interest which exceeds the minimum amount of interest prescribed by law shall be remitted. In order for the penalties to be abated, the burden is on petitioner to establish reasonable cause as well as the absence of willful neglect. Although the audit revealed that the books and records of Fifth Avenue were adequate for a tax

audit and the company had good internal controls, the resulting tax liability was undisputed. Giuseppe Luongo testified that the tax omission was due to errors in his point of sale system of charging sales tax, and this continued for a four-year period. This explanation was not supported in any fashion by documentary evidence, does not account for the tax due on capital and expense purchases, and most importantly, does not account for the fact that the Fifth Avenue was not only underreporting taxable sales, but also gross sales on its tax returns. Clearly, petitioner did not meet her burden in this case. It is therefore concluded that petitioner is properly held liable for the penalty and interest assessed in this matter.

H. The petition of Jessie Luongo is denied and the notices of determination issued to her dated November 5, 2007 and May 19, 2008 are sustained.

DATED: Troy, New York  
April 28, 2011

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE