STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **SIRATHORN BALAKULA** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2009 through November 30, 2015.	DECISION DTA NOS. 830793 and 830794
In the Matter of the Petition of **AHKIN PANCHAROEN** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2009 through November 30, 2015.	

Petitioners, Sirathorn Balakula and Ahkin Pancharoen, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on March 23, 2023. Petitioners appeared by Becker, LLC (Kent L. Schwarz, Esq.). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq. and Michael Hall).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioners' exception. Petitioners filed a brief in opposition to the Division of Taxation's exception and in reply to the Division of Taxation's brief in opposition. The Division of Taxation filed a reply brief to petitioners' brief in opposition. Oral argument was heard on September 28, 2023 in New York, New York.

Pursuant to Tax Law § 2008 (2), the decision in this matter is due within three months of the filing of the petition. With the tolling of the due date for all extensions granted, the due date for the issuance of this decision is November 13, 2023.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Giardina dissents for the reasons set forth in a separate opinion.

ISSUES

I. Whether a responsible officer of a corporation who is liable for unpaid sales taxes may also be held liable for penalties and interest.

II. Whether the Division of Taxation properly imposed fraud penalties and interest on petitioners pursuant to Tax Law § 1145 (a) (2).

III. Whether the Division can impose interest and penalties pursuant to Tax Law § 1145 (a) (1), in the alternative, if fraud penalties are not sustained.

IV. Whether the Division of Taxation properly imposed penalties pursuant to Tax Law § 1145 (a) (1) (vi) based on petitioners' underreporting in excess of 25% of the amount of sales tax required to be shown on the relevant sales tax returns.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 4, 5, 6 and 8 to reflect the record more fully. Additionally, we have not restated the Administrative Law Judge's finding of fact 26 (rulings on proposed findings of fact). As so modified, the Administrative Law Judge's findings of fact appear below.

1. Taste of Thai Express, Inc. (Taste of Thai) is a restaurant offering authentic Thai food. Petitioners, Sirathorn Balakula and Akhin Pancharoen, are the owners and responsible persons

for Taste of Thai. It is open for lunch, dinner, and late-night dining seven days a week. It offers dine-in, take-out, online ordering, and delivery services.

2. Petitioners filed a form DTF-17-R, Application to Renew Sales Tax Certificate of Authority, on June 22, 2009, for Taste of Thai, with the Division of Taxation (Division). On the application, petitioners were the only people listed as responsible persons for the business. Mr. Pancharoen was listed as its president.

3. The Division commenced the relevant sales tax audit on November 12, 2013. Taste of Thai was part of a routine review of restaurants in Ithaca, New York. Taste of Thai was selected for audit because the reported sales tax due on its New York State sales tax returns, form ST-100 (ST-100), was significantly less than the reported gross payments on the merchant card data for tax years 2011 and 2012. The gross sales reported on the ST-100s were also significantly less than the gross receipts reported on the New York State S corporation franchise tax returns, form C-3S, for tax years 2011 and 2012. Reported wages for employees were also greater than reported sales on the ST-100s.

4. The audit period in the current case was from December 1, 2009 through November 30, 2015 (audit period). Using petitioners' records, the Division's audit revealed that Taste of Thai had taxable sales of $10,253,742.71 during the audit period, while its sales tax returns, filed as of the January 28, 2016 execution of the search warrant (***see*** finding of fact 6 below), report only $1,943,159.00 in taxable sales, a difference of $8,310,583.71. Taste of Thai failed to remit most of the sales tax due during the audit period. The audit showed $597,406.94 in sales tax collected but not remitted. Petitioners do not dispute that they are each a "person required to collect tax" within the meaning of Tax Law § 1131, or that they are each responsible to pay all sales and use taxes due that Taste of Thai collected but did not remit.

5. Taste of Thai filed timely sales tax returns for three of the 24 sales tax periods or quarters comprising the audit period. Of those three, only one, for the period ended November 30, 2015, was submitted with payment in full for the sales tax reported to be due. The other two, for the periods ended May 31, 2011 and May 31, 2013, were filed with partial payments for the amounts reported as due. Taste of Thai late-filed sales tax returns for eight quarters of the audit period ended as follows: February 28, 2010, May 31, 2010, August 31, 2010, November 30, 2010, February 28, 2011, February 29, 2012, August 31, 2013, and February 28, 2014.

The foregoing 11 sales tax periods for which Taste of Thai did file returns before the execution of the search warrant also show consistent and substantial underreporting of taxable sales. Taste of Thai reported $1,943,159.00 in total taxable sales for the 11 periods for which it filed sales tax returns before the execution of the search warrant (***see*** finding of fact 6 below). The Division's audit of Taste of Thai's POS records for those periods indicate $4,120,304.68 in audited taxable sales, a difference of $2,177,145.68. The audit further revealed that Taste of Thai collected but did not remit $161,378.28 in sales tax for those periods. As of the date of the search warrant (***see*** finding of fact 6, below), Taste of Thai had failed to file a sales tax return for the 13 sales tax periods ending as follows: August 31, 2011, November 30, 2011, May 31, 2012, August 31, 2012, November 30, 2012, February 28, 2013, November 30, 2013, May 31, 2014, August 31, 2014, November 30, 2014, February 28, 2015, May 31, 2015, and August 31, 2015.

6. A search pursuant to an executed search warrant was conducted of Taste of Thai's business on January 28, 2016. On February 25, 2016, Ms. Balakula electronically filed eight sales tax returns for the periods ended February 28, 2013, November 30, 2013, May 31, 2014, August 31, 2014, November 30, 2014, February 28, 2015, May 31, 2015, and August 31, 2015,

reporting a total sales tax due of $314,829.00. $100.00 was paid on each return at the time of filing.

7. Taste of Thai was subject to a prior audit for the period September 1, 2004 through August 31, 2007. For that audit period, sales records were repeatedly requested and, when received, were incomplete. General ledger detail, guest checks, and cash register tapes were not provided for the entire audit period. Guest checks that were provided did not include cash sales. Additionally, bank deposits were greater than reported sales. The sales tax due for that period was determined using a combination of bank deposits and an observation test. The Division determined there was an additional tax due of $31,168.36, plus interest and penalty. Taste of Thai agreed to the audit findings and set up a payment plan.

8. On May 23, 2017, Ms. Balakula and Mr. Pancharoen were arraigned in Supreme Court, Albany County, for their failure to pay sales tax due. Both were charged with one count of Grand Larceny in the second degree, four counts of Criminal Tax Fraud in the second degree, and four counts of offering a false instrument in the first degree. Ultimately, Mr. Pancharoen pled guilty to one count of Grand Larceny in the third degree for wrongfully taking, obtaining, or withholding money valued in excess of $3,000.00 from the Division. Ms. Balakula pled guilty to one count of Petit Larceny for wrongfully taking, obtaining, or withholding money from the Division. On August 16, 2018, Mr. Pancharoen was sentenced to five years of probation and ordered to pay restitution of $286,200.00, plus a surcharge fee of $14,310.00 to Albany County, New York. Ms. Balakula was sentenced to three years of probation and restitution of the same amount. Petitioners paid $310,000.00 toward the tax deficiency prior to sentencing.

9. In the transcript of the proceeding for Mr. Pancharoen's guilty plea from June 14, 2018, Judge Peter Lynch, Judge of the Supreme Court of Albany County, New York, asked Mr. Pancharoen the following:

> "Directing your attention to the information. Sir, do you admit between December 1, 2009, and November 30, 2015, at the New York State Department of Taxation and Finance, in the City and County of Albany, State of New York, that you did wrongfully take, obtain or withhold property consisting of United States currency, valued in excess of $3,000, from the New York State Department of Taxation and Finance, with the intent to deprive another of the property or to appropriate the property to yourself or to a third person, do you admit that?"

Petitioner responded: "Yes, sir."

10. In the transcript of the proceeding for Ms. Balakula's guilty plea from the same date, Judge Lynch asked her the following:

> "Directing your attention to the information, do you admit between December 1, 2009 and November 30, 2015[1], at the New York State Department of Tax and Finance in the City and County of Albany, State of New York, that you did wrongfully take, obtain or withhold property consisting of United States currency from the New York State Department of Taxation and Finance with the intent to deprive another of the property or to appropriate the property to herself or to a third person, do you admit that?"

Petitioner responded: "Yes."

11. As a result of the audit, penalties were imposed on Taste of Thai by notice of determination L-051098937, dated December 19, 2019 (notice 1). This notice is not part of the instant action. In the computation section of notice 1, it stated, in relevant part, as follows: "[w]e added fraud penalty of two times the amount of the tax you owe, plus statutory interest (NYS Tax Law section 1145). This notice is one of multiple Notices we either have issued, or will issue, concerning this audit case." The total penalty asserted against Taste of Thai was

[1] The determination incorrectly quotes this date as "November 30, 2014."

$1,201,199.93. This included the penalty for failure to pay tax due to fraud and a penalty for under-reporting tax due in excess of 25%.

12. Thereafter, on January 10, 2020, the Division issued to Mr. Pancharoen, in addition to two notices of determination not relevant here, notice of determination L-051141903 (notice 2), asserting interest of $1,032,848.26 and penalty of $1,201,199.93. Notice 2 was issued because Mr. Pancharoen was "an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1) and 1133 of the New York State Tax Law."

13. On the same date, the Division issued to Ms. Balakula, in addition to two notices of determination not relevant here, notice of determination L-051141906 (notice 3), asserting interest of $1,032,848.26 and penalties of $1,201,199.93. Notice 3 was issued because Ms. Balakula was "an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law."

14. Petitioners each requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) protesting notice 2 and notice 3, respectively. By BCMS conciliation order numbers 000318684 and 000318685, each dated November 12, 2021, BCMS sustained the notices.

15. On December 8, 2021, petitioners each timely filed a petition with the Division of Tax Appeals. In their nearly identical petitions, they asserted that "pre-assessment penalties and interest against responsible persons is not appropriate, as it violates the underlying statutes." They claimed that the relevant statutes only impose personal liability for the tax imposed against a corporation, not penalties and interest.

16. The Division filed an answer to the petitions on February 9, 2022, and petitioners each filed a reply to the answer on February 25, 2022.

17. In support of its position, the Division submitted the affidavit of Gina Tagliavento, a Tax Auditor I for the Criminal Investigations Division of the Division, sworn to on November 7, 2022. Ms. Tagliavento has been a Tax Auditor I for the Division for approximately 16 years. Her duties include conducting audits of sales tax returns, withholding tax returns, personal income tax returns and cigarette tax returns.

18. Ms. Tagliavento averred that her office opened an investigation of Taste of Thai in November of 2013, after several indications that it was underreporting sales tax and it failed to file sales tax returns. Initially, the data analysis showed that Taste of Thai's merchant card deposits and reported gross sales did not match. Additionally, Taste of Thai's filed corporate tax returns reported substantially greater amounts than what was reported on its sales tax returns. As a result of these discrepancies, a criminal investigation commenced, and the Division conducted a sales tax audit. Ms. Tagliavento performed the initial analysis, assisted the auditor during the audit, and finalized the audit when the auditor conducting the case left the Division.

19. Ms. Tagliavento averred that the notices at issue asserted fraud penalties pursuant to Tax Law § 1145 (a) (2). She stated that the basis for the fraud penalties was that petitioners "willfully and intentionally failed to file sales tax returns for the purpose of deliberately underreporting both sales and sales tax due and owing, and failed to remit sales tax monies collected and due to the State of New York." Notices 2 and 3 also asserted penalties under Tax Law § 1145 (a) (1) (vi) because petitioners underreported an amount in excess of 25 percent of the amount of sales tax required to be shown on Taste of Thai's sales tax returns.

20. A forensic audit report was included in the evidence submitted with Ms. Tagliavento's affidavit. The report lists Lee E. Shepter, Forensic Auditor and Investigator Bobbi-Jean Bryden on its cover. It is not clear from the record which of the two people authored

the report. The report provided that at the beginning of the investigation of Taste of Thai, bank records were subpoenaed and analyzed. Documents received from Bangkok Bank included Taste of Thai's monthly sales summary reports. These were analyzed and compared to the corporate income tax returns that had been filed. The results were close between the sales figures from the monthly sales summaries and the sales figures as claimed on the corporation income tax returns. When compared to the revenues as reported on the sales tax returns, the sales figures from the monthly sales summaries exceeded the sales figures claimed on the sales tax returns.

Additionally, the report provided that on January 28, 2016, a search warrant was executed at the business address of Taste of Thai Express, Inc. and at the residence of Ms. Balakula. Daily sales summaries, daily sales tax summaries and, where found, monthly sales summaries and monthly sales tax summaries were among the seized books and records. These summarized reports were analyzed and the auditors created schedules. The daily and monthly sales summary reports detailed the sales activity by payment type such as cash, gift card, or credit card, and on-line services such as Grub Hub. From a review of the reports, there were days during each monthly period where no sales tax data existed. Where days were missing and the audit information was incomplete or non-existent, no estimate or inference was made as to the sales or sales tax figures. The final sales tax liability was derived from summarizing the sales tax as specifically stated in the daily or monthly sales tax summary reports printed from the point-of-sale (POS) system and found stored within various notebooks seized while a search of the premises was conducted. Based on its analysis, the Division determined that Taste of Thai had taxable sales during the audit period of $10,253,742.71, while the restaurant's filed sales tax returns as of the date of the warrant, reported $1,943,159.00. Taste of Thai thus underreported

its taxable sales by $8,310,583.00. The Division further determined that the restaurant collected, but failed to remit, at least $597,407.00 in sales tax during the audit period.

21. The Division also submitted transcripts of informal interviews of petitioners into evidence. Ms. Balakula's interview was conducted by Mr. Shepter and Nicole Napoli, a Forensic Tax Auditor for the Division. The year of this interview is not given, but the month and day were January 28th.[2] During the interview, Ms. Balakula stated that she has a master's degree in journalism and communication from "Madison, Wisconsin." She also stated that she does not have an accounting or business background.

When discussing Taste of Thai, Ms. Balakula stated that the entity is organized as an S corporation that has been in business since 2003 and has been at the current location since 2010. She stated that she is the owner of Taste of Thai with her husband, Mr. Pancharoen. She also stated that she and Mr. Pancharoen were the two people responsible for Taste of Thai. She confirmed that Taste of Thai was open 7 days a week from 11:00 a.m. to 10:00 p.m. She also stated that she had about 34 employees and that she uses Paychex to manage payroll.

When asked whether she collected sales tax, Ms. Balakula stated that she did and that she thought it was separately stated on each receipt. She explained that the sales tax was deposited into a bank account at Tompkins Trust bank, and that most of the payments they received were by credit card.

Ms. Balakula advised that she was in the process of hiring a new accountant because, as the business grew, it was confusing for them to keep track of things. Her previous accountant was Paul Stearns. He prepared the corporation franchise tax returns but she or her husband completed the sales tax returns themselves. Petitioners also hired a bookkeeper who was about

[2] It appears that these interviews took place on January 28, 2016, the same day the search warrant was executed.

to start. Ms. Balakula stated that more than 90 percent of customers paid with credit card. She also asserted that she made exempt sales to Cornell University and had exemption certificates from it.

Ms. Balakula also confirmed that all sales went through the POS machine. She believes they started using the POS system in 2010 and that Digital Dining was the manufacturer. She explained that the orders had to go through the POS machine because if they did not, the food would not be made in the kitchen because the POS machine sends the orders to the kitchen to be prepared. She also stated that she could print sales reports every day. She admitted she did not do it every day, but that sometimes she would try to go back and keep track daily. She also claimed that the POS system automatically closed out each night and switched to the next day.

Ms. Balakula stated that she used QuickBooks as an accounting program. She explained that she started using QuickBooks in 2015 in order to keep better track of the records. Mr. Pancharoen prepared the paper tax returns, except for one or two that she completed, before they were prepared online. She stated that she prepared and filed the most recent returns online using Mr. Pancharoen's name and password. Mr. Pancharoen became ill in 2011 or 2012 and was less involved in Taste of Thai after that.

22. Mr. Pancharoen's interview was conducted by Bobbi-Jean Bryden, an investigator with the Division, and Janelle Sabins, an auditor with the Division. The date and time were not provided for this interview. When asked about his highest level of education, Mr. Pancharoen stated that he went to college for business but that he did not take any accounting classes.

Mr. Pancharoen stated that Taste of Thai did collect sales tax, that it was separately stated on each receipt, and that after it was collected, it was deposited with Tompkins Trust. He also stated that every sale was entered into the POS system and that the manufacturer was Digital

Dining. Mr. Pancharoen explained that each night, a sales summary was printed from the POS system stating the sales and sales tax and how much money was collectively brought in that day. He stated that he did not prepare sales tax returns beginning around five or six years prior to the time of the interview.

Mr. Pancharoen also stated that Paul Stearns was his accountant until the year prior to the interview and that he had been his accountant since the beginning of 2003. Mr. Pancharoen did not know why Mr. Stearns prepared his corporate tax returns but not his sales tax returns. He stated that they switched accountants to Jim Streble because Mr. Stearns was slow in preparing their returns.

23. Petitioners were also subpoenaed by the Division and interviewed under oath on February 11, 2016. They were interviewed by Bobbi-Jean Bryden, Lee Shepter, and Melvin Parker, an associate attorney with the Division. Petitioners were represented by Joe Callahan, Esq., during the interview.

Ms. Balakula testified that the building for the current location of Taste of Thai was built between 2008 and 2010. She testified that the construction was financed partially by her family and partially by Bangkok Bank through a branch in New York City. She also stated that the construction costs of Taste of Thai went over budget by approximately $200,000.00. Petitioner confirmed that Bangkok Bank had commenced a foreclosure proceeding to foreclose on the property.

Ms. Balakula testified that Paul Stearns was her accountant until 2015, and that he prepared the corporate returns, but that she decided to switch because she needed more help with the business and when Mr. Stearns filed the corporate returns, they may not have been fully accurate because they were always completed at the last minute. She also stated that when she

gave Mr. Stearns the sales information to report on the corporate returns, she calculated it for him using information from the daily sales from the POS system.

When asked about the sales tax returns and why some of the returns were not filed, she admitted that she did not do a good job filing the returns and it was hard to keep track of things and remember to file them. She also stated that she never received a notice from New York State to file her returns. When asked if she knew when the quarterly sales tax returns were due, she stated that they were for every three months, and were due on the 20th of the month. She was then asked whether she paid the right amount of sales tax when she filed her returns. Her response was that they tried, but that there were some that they did not pay the entire amount because they did not have the funds to do so. The interviewers then asked Ms. Balakula whether the information reported on the sales tax returns that were filed was accurate. For each return, she responded that she did not remember. She also responded that Mr. Pancharoen had prepared most of the returns.

24. During Mr. Pancharoen's interview, he testified that he got sick in 2006 and, thereafter, gradually became less active in the business. When asked about the sales tax returns that were filed during the audit period, Mr. Pancharoen stated that he believed that he filed the documents, but that he did not know whether the numbers reported on the returns were accurate. He stated that his wife provided him with the figures that he reported on the return and that she obtained that information from the printout from the POS system. He also said that occasionally, he would get the printout with the numbers on it and use that to report the amount due. Mr. Pancharoen did not know who submitted the returns that were filed electronically.

25. Paul Stearns was also interviewed by Bobbi-Jean Bryden and Lee Shepter on February 25, 2016. Mr. Stearns is a CPA with more than 30 years of experience. He stated that

he prepared the corporate tax returns for Taste of Thai from 2009 through 2014. Mr. Stearns only provided petitioners with services regarding their corporate and income tax returns. He explained that Ms. Balakula gave him bank statements and the breakdown of the sales information. He would take the raw data from Ms. Balakula and enter it into his QuickBooks program. He stated that he could not get information from petitioners on a consistent monthly basis, and it often came in late and for a year at a time. He also stated that the information Ms. Balakula gave him for the corporate returns for the latter part of the audit period appeared to come from a POS, but he never saw any POS reports. Mr. Stearns also stated that a review of the bank statements showed that petitioners regularly moved money from one bank account to another and that he thought it was to pay whatever creditor was collecting at that time. Mr. Stearns asserted that petitioners owe him roughly $5,000.00 for his accounting services.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first determined, contrary to petitioners' contention, that persons responsible for the collection of sales tax are also subject to liability for penalties and interest.

Next, the Administrative Law Judge examined whether the Division met its burden of proving that petitioners' failure to report or pay over sales tax to the Division was due to fraud. While acknowledging petitioners' substantial sales tax liability as a factor supporting fraud penalties, the Administrative Law Judge concluded that the record lacked other indicators of fraud. The Administrative Law Judge found that petitioners struggled to keep and maintain adequate records and that they made changes, such as using QuickBooks and changing accountants, to improve their recordkeeping and tax reporting. The Administrative Law Judge took note of Mr. Pancharoen's illness and his lack of involvement with the business during the

audit period. The Administrative Law Judge also took note of petitioners' willing participation in interviews with the Division. She concluded that petitioners' course of conduct does not support a finding of fraud and therefore cancelled the fraud penalties.

The Administrative Law Judge also rejected the Division's argument that petitioners are collaterally estopped from contesting the fraud penalties by their guilty pleas, as she found that the crimes to which petitioners pled guilty did not involve fraudulent intent.

The Administrative Law Judge sustained the Division's alternative assertion of negligence penalties. She determined that petitioners' failure to file returns for most of the audit period and to remit most of the tax due when they had all of the necessary information available to them was unquestionably the result of willful neglect and not due to reasonable cause.

The Administrative Law Judge also sustained the Division's imposition of penalties for failure to report and pay an amount in excess of 25% of the amount required to be shown on the return, noting that petitioners offered no argument against these penalties.

ARGUMENTS ON EXCEPTION

Petitioners continue to make the legal argument that their liability as responsible persons is limited to the sales tax owed by Taste of Thai and that they are not subject to liability for penalties. In response, the Division contends that the Administrative Law Judge properly determined that responsible officers of a corporation are subject to liability for sales tax, penalties, and interest.

In support of its exception, the Division asserts that it met its burden of proof to show that petitioners are liable for fraud penalties. The Division argues that the record shows several indicators of fraud, including substantial underreporting of sales tax; consistent failure to remit sales tax collected; petitioners' guilty pleas by which they admitted to knowingly taking sales tax

money from the State; petitioners' statements in their proposed findings of fact and reply brief below that they did not dispute that the business fraudulently underreported and underpaid its sales tax liability; petitioners' filing of sales tax returns for eight periods soon after they became aware of the audit; and petitioners' knowledge at all times relevant that they were collecting sales tax. According to the Division, the totality of the evidence establishes petitioners' fraudulent intent.

The Division further argues that the Administrative Law Judge erroneously determined that petitioners are not collaterally estopped from challenging fraud penalties at issue. The Division asserts that petitioners' guilty plea admissions that they intentionally took the sales tax collected from their customers and their restitution agreement to repay what they took is sufficient to collaterally estop them from contesting the fraud penalties at issue.

In response to the Division's exception, petitioners concur with the Administrative Law Judge's finding that the evidence presented falls short of fraud. Petitioners also concur with the Administrative Law Judge's finding that the offenses to which petitioners pled guilty did not involve fraudulent intent. Petitioners further contend that, contrary to the requirements for collateral estoppel, they neither actually litigated the criminal matter, nor did they have a full and fair opportunity to do so.

OPINION

"[E]very person required to collect any tax" imposed by article 28 of the Tax Law (sales and use tax) is subject to personal liability for "the tax collected" (Tax Law § 1133 [a]). Such a person includes not only the vendor actually making sales (here, Taste of Thai), but also, where the vendor is organized as a corporation, individuals who are under a duty to act for such corporation in complying with any requirement of article 28 (Tax Law § 1131 [1]). The filing of

timely and accurate sales tax returns and the payment of all sales tax collected from customers are among those requirements (Tax Law §§ 1136 and 1137).

A person required to collect sales tax must collect such tax from the customer when collecting the price to which it applies (Tax Law § 1132 [a] [1]). The person required to collect the tax does so "as trustee for and on account of the state" (***id.***).

Petitioners were under a duty to act for Taste of Thai in complying with the requirements of article 28 and were therefore persons required to collect tax under Tax Law § 1133 (a) at all times relevant here.

The subject notices of determination assert penalties and interest pursuant to Tax Law § 1145 (a) (2), which provides, in relevant part, that if "any person" fails to pay over any tax within the time required and such failure is due to fraud "there shall be added to the tax (i) a penalty of two times the amount of the tax due, plus (ii) interest on such unpaid tax at the rate of [at least] fourteen and one-half percent."

As noted, petitioners contend that the personal liability of an individual under a duty to act for a corporation is limited to the sales tax owed by the corporation and that penalties authorized under Tax Law § 1145 may not be imposed against such an individual. This contention is contrary to the well-established case law on this point: "[A] person held liable for failure to pay over sales tax *may also* be held liable for penalties and interest" (emphasis added) (***Lorenz v Division of Taxation of Dept. of Taxation & Fin. of State of N.Y.*** (212 AD2d 992, 993 [4th Dept 1995], ***affd*** 87 NY2d 1004 [1996]; ***see also Matter of Dong Ming Li v Commissioner of Taxation and Fin.***, 65 AD3d 763, 764 [3d Dept 2009]; ***Matter of Hall v Tax Appeals Trib. of State of N.Y.***, 176 AD2d 1006, 1007 [3d Dept 1991]; ***Matter of Mackiewicz***, Tax Appeals Tribunal, June 7, 2007; ***Matter of Benak Corp.***, Tax Appeals Tribunal, August 10,

1995; ***Matter of Dacs Trucking Corp.***, Tax Appeals Tribunal, March 21, 1991). We thus affirm the Administrative Law Judge's conclusion on this issue.

Petitioners argue that the ***Lorenz*** case was wrongly decided and that, instead, the Fourth Department's prior decision in ***Laks v Division of Taxation of Dept. of Taxation & Fin. of State of N.Y.*** (183 AD2d 316 [4th Dept 1992]) should control. ***Lorenz***, however, expressly disavows ***Laks***: "[T]o the extent that our decision in ***Laks*** can be read as holding that a corporate agent may not be held liable for penalties and interest, it is no longer to be followed" (212 AD2d at 993). Moreover, ***Lorenz*** was affirmed by the Court of Appeals (87 NY2d 1004 [1996]). Additionally, as stated, the Third Department has also concluded that individuals under a duty to act for a corporation are subject to liability for penalties in ***Hall*** and ***Dong Ming Li***, as has this Tribunal (***Matter of Mackiewicz***; ***Matter of Benak Corp.***; ***Matter of Dacs Trucking Corp.***).

Laks is premised on a narrow reading of Tax Law § 1133 (a), which provides that responsible persons are "personally liable for the *tax* imposed, collected or required to be collected" (emphasis added). That decision does not consider the language of Tax Law §§ 1131 (1) and 1145 by which responsible persons are subject to liability for both taxes and penalties. In reviewing these provisions, and finding that a responsible person may be held liable for penalties, this Tribunal observed: "Since the requirements to file a return and pay over tax are among the most essential to comply with the sales tax law, there is a clear and logical integration between the responsible officer provisions of § 1131 (1) and the penalty and interest provisions of § 1145 [a] [1]" (***Matter of Hall***, Tax Appeals Tribunal, March 22, 1990, ***confirmed*** 176 AD2d 1006 [1991]).

Turning now to whether fraud penalties should be sustained in the present matter, we note first that the Division bears the burden of proof to show that such penalties are properly imposed (***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989).

Because the sales tax penalty provisions were modeled after federal statutes, federal precedent may be looked to for guidance in determining whether the Division has met its burden (***Matter of Ilter Sener d/b/a Jimmy's Gas Sta.***, Tax Appeals Tribunal, May 5, 1988).

"Fraud is an actual intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing" (***Habersham-Bey v Commr***, 78 TC 304, 311–12 [1982]). The Division bears the burden of establishing fraud by "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (***see Matter of Aqua-Mania, Inc.***, Tax Appeals Tribunal, March 6, 2008, quoting ***Matter of Sona Appliances***, Tax Appeals Tribunal, March 16, 2000; ***see also Matter of Ilter Sener d/b/a Jimmy's Gas Sta.***).

The existence of fraud is a question of fact to be resolved upon consideration of the entire record (***see DiLeo v Commr***, 96 TC 858, 874 [1991], ***affd*** 959 F2d 16 [992], ***cert denied*** 506 US 868 [1992]). Fraud will never be presumed and must be established by independent evidence of fraudulent intent (***Recklitis v Commr***, 91 TC 874, 909-910 [1988]). However, because direct proof of a taxpayer's fraudulent intent is rarely available, fraud may be established by circumstantial evidence and inferences drawn from the facts (***Niedringhaus v Commr***, 99 TC 202, 210 [1992]). In this analysis, a willful failure to file returns is not in itself sufficient evidence of fraud (***Cirillo v Commr***, 314 F2d 478, 482 [1963]; ***Jones v Commr***, 259 F2d 300 [1958]). However, the willful failure to file may be considered along with other relevant facts in

determining whether the requisite fraudulent intent is present (***Powell v Granquist***, 252 F2d 56 1958]; ***Beaver v Commr***, 55 TC 85, 92-93 [1970]).

Circumstantial evidence which may give rise to a finding of fraudulent intent includes but is not limited to: (1) understatement of income; (2) inadequate records; (3) failure to file tax returns; (4) implausible or inconsistent explanations of behavior; (5) concealment of assets; (6) failure to cooperate with tax authorities; (7) filing false [returns]; (8) failure to make estimated tax payments; (9) dealing in cash; (10) engaging in illegal activity; and (11) attempting to conceal illegal activity (***see Niedringhaus v Commr***, 99 TC at 211, citing ***Bradford v Commr***, 796 F2d 303, 307 [9th Cir 1986], ***affg*** TC Mem 1984–601; ***see also Petzoldt v Commr***, 92 TC 661, 700 [1989]). Other relevant factors cited by this Tribunal include, consistent and substantial understatement of tax, the amount of the deficiency itself, the existence of a pattern of repeated deficiencies, and the taxpayer's entire course of conduct (***see Matter of What a Difference Cleaning, Inc.***, Tax Appeals Tribunal, May 15, 2008, citing ***Intersimone v Commr***, TC Memo 1987-290).

There is ample evidence that petitioners failed to pay a substantial amount of sales tax. However, there is inadequate evidence that petitioners were engaged in a willful and intentional effort to deceive the Division with the goal of evading the payment of sales tax collected and lawfully owed. Indeed, the record indicates that petitioners had no special accounting or bookkeeping skills and struggled to maintain records or consistently print the point-of-sales reports while running a seven-day-a-week 15-hour-a-day restaurant operation while one of petitioners was ill. When confronted at audit, they cooperated, filed returns, pleaded guilty to criminal larceny charges for failing to turn over sales tax paid by customers, and improved their record keeping system going forward. Their own records were the basis of the Division's

assessment of the amount of underpayment. Absent are the so-called "badges of fraud" such as willingness to defraud another in a business transaction, failure to furnish records, or refusal to cooperate with investigators (***see Solomon v Commr***, 732 F2d 1459, 1461 [6th Cir 1984] [per curiam]). As the Administrative Law Judge noted, petitioners' course of conduct does not support a finding of fraud (***see Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988).

The Division relies heavily on the respective criminal plea allocutions of petitioners to Grand Larceny in the Third Degree (Mr. Pancharoen) and Petit Larceny (Ms. Balakula) as support for a finding that petitioners committed a civil fraud and should receive the tax fraud penalty. Penal Law § 155.05 (1) provides that a larceny occurs when a person "wrongfully takes, obtains or withholds . . . property from an owner thereof . . . "with intent to deprive another of [such] property or to appropriate the same to himself or to a third person." The plea allocutions of petitioners tracked the language of this definition of larceny and admitted to taking funds that should have been turned over to state tax authorities or, in the vernacular, "stealing" the money.

What is more instructive in this case is the conduct and criminality to which petitioners *did not* plead guilty. New York's Penal Law contains many varied provisions which can be used to target fraudulent conduct (***see e.g. Matter of Vigna***, 184 AD3d 214, 216 [2d Dept 2020] ("[T]he New York felony of scheme to defraud in the first degree, in violation of Penal Law § 190.65, a class E felony . . . provides that a person is guilty of this crime when he or she engages in a scheme with intent to defraud one or more persons by false pretenses, thereby obtaining property in excess of $1,000"). Indeed, the four counts of criminal tax fraud brought against petitioners were dismissed.

In addition, petitioners allocuted in a manner tracking only the general larceny definition and not larceny "by false promise," which is closer to what the Division contends is the fraudulent scheme at issue here. False promise larceny occurs "when, pursuant to a scheme to defraud, [a person] obtains property of another by means of a representation, express or implied, that he . . . will in the future engage in particular conduct, and when he does not intend to engage in such conduct . . . ." (New York Penal Law § 155.05 [2] [d]). Notably "false promise" larceny (which in theory could include taking money from a customer with the simultaneous implied but false promise to lawfully turn that money over to authorities) is very narrowly construed by statute and jurisprudence requiring that the defendant's intent must be "wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed" (***id.***). The Court of Appeals has narrowly interpreted what constitutes larceny by false promise requiring that "the defendant's intention must be ascertained by looking backward from the failure to perform and finding that *at the time* the accused made the promise he did not intend to carry out his end of the bargain (***People v Churchill***, 47 NY2d 151, 157 [1979] [emphasis added]). A defendant who intended to not remit the sales taxes when he collected them could be found guilty of larceny by false promise. But one who simply failed to follow through with the promised conduct after taking property because of ill health, poor record keeping, being overwhelmed by their business operations or bad business practices could not be found to have the requisite intent to commit larceny by false promise.

The wide and varied provisions of New York's Penal Law instruct us that every "stealing" is not a scheme to defraud. Therefore, reliance on a guilty plea to felony or misdemeanor petit larceny, while instructive, cannot alone supply the requisite intention to

defraud in the willful evasion of taxes necessary to impose the fraud penalty. A determination that a fraud penalty should apply is case specific and must consider the totality of the circumstances. The cases relied on by the Division for the proposition that "[s]ince petitioners pled guilty to stealing sales tax trust funds, petitioners should be estopped from contesting the civil fraud penalty for the period at issue" (Division Brief at 17) are inapposite. In ***Matter of Pirrera***, Tax Appeals Tribunal, December 15, 2005, a defendant pleaded guilty to a motor vehicle sales tax scheme spanning five years which was uncovered in part with the assistance of a confidential informant who provided the secret "cash report" on 671 sales on which every page was marked "CASH" but that defendant later contested the fraud penalty. In ***Kuriansky v Professional Care***, 158 AD2d 897 [3d Dept 1990]), a defendant pleaded guilty to grand larceny and agreed not to contest the underlying facts of his $1.8 million Medicaid fraud scheme but later contested payment to the government of the full restitution amount. In ***Plunkett v Commr***, 465 F2d 299 (1972), a taxpayer who pleaded guilty to income tax evasion was estopped from claiming in subsequent civil fraud penalty proceedings that the returns he filed for those years were fraudulent.

The other key factors cited by the Division in its brief and at oral argument, specifically the length of time of the nonfiling and underreporting and the amount of underreporting, are insufficient to meet the Division's burden in light of the mitigating factors cited by the Administrative Law Judge (***see e.g. Gagliardi v United States***, 81 Fed Cl 772 [2008], ***dismissed***, 315 Fed Appx 247 [Fed Cir 2008] [government did not prove by clear and convincing evidence that taxpayers' underreporting of business income during two tax years was caused by intentional wrongdoing motivated by specific purpose to evade a tax known or believed to be owing, so as to warrant fraud penalties, as two-year duration of the underreporting was neither

sufficiently long nor in its magnitude sufficiently substantial to warrant an inference of fraud; moreover, government did not show that taxpayers engaged in willful and purposeful concealment of the unreported income, that taxpayers were uncooperative, or that their explanation for the underreporting was implausible or inconsistent]).

Imposition of the fraud penalty requires "clear, definite, and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing." (***Matter of Sona Appliances, Inc.***, quoting ***Matter of Sener***). The requirement of willful, knowing, and intentionally false representations with the intent to take or withhold property rightfully owed another is the gravamen of fraud.

We agree with our dissenting colleague that the Division rightfully points to certain evidence militating in favor of a fraud finding and several cases that rely in part on a plea allocution and persistent underreporting. But an examination of those cases indicates this Tribunal or another tax court saw no possibility that a fraudulent intent was anything other than "unmistakable" (***see e.g. Matter of Sona Appliances*** (finding petitioner Kathuria's testimony at hearing was "unreliable" and his records inadequate requiring an alternative audit method, and noting he pleaded "I knew these tax returns were false"). The Taste of Thai petitioners clearly collected sales taxes and evidently converted them to their own use and did not remit them to the state. But absent any effort of the Division to hold a hearing to adduce additional evidence to establish the fraudulent intent underlying the fraud penalty sought, such a finding would rely almost entirely on a negotiated and sparse plea allocution to the larcenous taking of funds combined with the fact of non-filing in 13 of the 17 quarters at issue and underreporting in the others. With this record, we must agree with the Administrative Law Judge that the Division did not carry its burden.

We therefore sustain the determination of the Administrative Law Judge in all respects.

As we have determined that the Division has not met its burden to show that penalties pursuant to Tax Law § 1145 (a) (2) are properly imposed herein, it is not necessary to address the Division's argument that petitioners are collaterally estopped from contesting such penalties.

Petitioners did not take exception to the Administrative Law Judge's conclusions sustaining the Division's alternative assertion of negligence penalties pursuant to Tax Law § 1145 (a) (1) (i) and the Division's assertion of penalties pursuant to Tax Law § 1145 (a) (1) (vi) for failure report and pay sales tax in an amount in excess of 25% of the amount required to be shown on a return. We sustain those conclusions for the reasons stated in the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sirathorn Balakula and Ahkin Pancharoen is granted to the extent indicated in paragraph 5 below, but is otherwise denied;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is affirmed;

4. The petitions of Sirathorn Balakula and Ahkin Pancharoen are granted to the extent indicated in paragraph 5 below, but are otherwise denied; and

5. The Division of Taxation is directed to modify notices of determination L-051141903 and L-051141906, each dated January 10, 2020, by canceling penalties imposed under Tax Law § 1145 (a) (2) and imposing penalties under Tax Law § 1145 (a) (1) (i); in all other respects, the notices are sustained.

DATED: Albany, New York
November 13, 2023

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner

COMMISSIONER GIARDINA dissenting:

For the reasons discussed below, I am unable to join my colleagues in deciding this case and would instead reverse the determination of the Administrative Law Judge.

With all due respect to my fellow Commissioners, I believe the facts in this case lead to the conclusion that clear and convincing evidence exists to warrant the imposition of the fraud penalty pursuant to Tax Law § 1145 (a) (2).

There is no dispute that each of petitioners was well cognizant of their responsibility to report and pay over sales tax collected. In their interviews with the Division, each petitioner indicated that they knew that Taste of Thai collected sales tax on its sales and deposited such collected tax in a bank account (***see*** findings of fact 21 and 22). Petitioners also acknowledged that they were responsible to file Taste of Thai's sales tax returns during the audit period (***id.***).

Additionally, petitioners knew that all sales were entered into the restaurant's POS system and were therefore readily available (***id.***). Petitioners used Taste of Thai's POS records to provide monthly reports to their bank (***see*** finding of fact 20). They also used Taste of Thai's records to provide sales information to their accountant, to whom they delegated the responsibility of preparing and filing corporation franchise tax returns (***see*** finding of fact 23).

Petitioners took it upon themselves, however, to file sales tax returns. During his interview with the auditor, Mr. Pancharoen stated that he did not know why their accountant prepared the corporate tax returns but not the sales tax returns (***see*** finding of fact 22). Petitioner's accountant, Paul Stearns, stated in interviews with the Division that Ms. Balakula gave him bank statements and a breakdown of sales information and that he would use that raw data to complete the corporate tax returns. He stated that he could not get information from petitioners on a consistent monthly basis, and it often came in late and for a year at a time. He

never saw any POS reports. He also stated that a review of bank statements showed that petitioners regularly moved money from one bank account to another and that he thought it was to pay whatever creditor was collecting at that time (***see*** finding of fact 25).

Despite their knowing responsibility to timely file accurate sales tax returns and the availability of records upon which the sales tax returns could be filed, i.e., the POS system, petitioners consistently and substantially understated Taste of Thai's sales tax liability throughout the period at issue. Taste of Thai's own records indicate taxable sales of $10,253,742.71 during the six-year audit period, while as of the date of the warrant, petitioners reported only $1,943,159.00 in sales, a difference of $8,310,583.71. Expressed as a percentage, petitioners reported only about 19.8% of their taxable sales during the audit period. The same records further indicate that Taste of Thai collected $597,407.00 in sales tax over the audit period that petitioners failed to remit. The accuracy of the POS records is corroborated by petitioners' use of those records in calculating sales receipts for Taste of Thai's corporate tax returns and in compiling the monthly sales summary reports that Taste of Thai provided to Bangkok Bank (***see*** findings of fact 18 and 20). As determined by the Administrative Law Judge, petitioners' own records establish "an enormous level of underreporting of sales revenue and sales tax over a substantial and continuous period of time."

The Division has thus affirmatively proven petitioners' consistent and substantial underreporting of taxable sales. While proof of underreporting alone is insufficient to establish fraud, petitioners' pattern of underreporting constitutes strong evidence of fraud (***Matter of Cousin's Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988 [underreporting may be considered evidence of fraud where Division provides affirmative proof]; ***Merritt v Commr***, 301 F2d 484 [5th Cir 1962] [understatement of income by about $80,000.00 over seven years deemed to be

evidence of fraud]; ***Foster v Commr***, 391 F2d 727, 733 [4th Cir 1968] [pattern of underreporting over an extended period of time is indicative of fraud]).

The bulk of the restaurant's sales tax underreporting is attributable to the 13 quarters for which petitioners did not file a sales tax return before the execution of the search warrant on January 28, 2016 (***see*** finding of fact 5). More specifically, petitioners failed to file sales tax returns for 13 of the 17 quarters comprising the period June 1, 2011 through August 31, 2015 (***id.***). A substantial pattern of non-filing may be considered circumstantial evidence of fraudulent intent (***see Matter of Mediabuss Sys.***, Tax Appeals Tribunal, March 18, 2014 [taxpayer failed to file sales tax returns for almost six years]; ***Habersham-Bey v Commr***, 78 TC at 312 [taxpayer failed to file income tax returns for three years]). Such non-filing is particularly significant where, as in the present matter, there is no doubt that the taxpayers were aware of the requirement to file (***Lain v Commr***, TC Memo 2012-99) and there is no doubt that petitioners intended to convert the trust fund taxes they collected for their own purposes (***Cirillo v Commr***, 314 F2d at 482 ["To justify a fraud penalty the circumstances surrounding the failure to file returns must strongly and unequivocally indicate an intention to avoid the payment of taxes"]).

The 11 sales tax periods for which petitioners did file returns before the execution of the search warrant also show consistent and substantial underreporting of taxable sales. Petitioners reported $1,943,159.00 in total taxable sales for those periods. Taste of Thai's POS records for those periods indicate $4,120,304.68 in audited taxable sales, a difference of $2,177,145.68. Petitioners thus reported about 47% of its taxable sales for those 11 periods and collected but did not remit $161,378.28 in sales tax (***see*** finding of fact 5). Such a degree of underreporting further supports a finding of fraud (***see Matter of David R. Anthony d/b/a Delevan Motors***, Tax

Appeals Tribunal, November 30, 1995 [30% to 50% underreporting of sales found to support fraud penalties]).

Further, while I agree with my fellow Commissioners that the intent necessary to find fraud is distinct from the intent necessary for the crime of larceny, petitioners' guilty pleas to larceny and petit larceny charges, respectively, together with their admissions in their respective plea allocutions and restitution agreements, are further evidence of their intent to knowingly, intentionally and willfully evade the payment of nearly $600,000.00 in sales tax that they were responsible for collecting from customers in trust for the State during the audit period (***see*** findings of fact 9 and 10).

The fact that petitioners' plea agreement was to larceny charges and did not include criminal tax fraud and the offering of a false instrument as originally charged (***see*** finding of fact 8) is not, in my view, particularly significant. Although not dispositive of the issue of fraud, the larceny pleas show that petitioners knowingly stole, approximately, $600,000.00 in sales tax that they collected from their customers. It is clearly evidence that supports a finding of fraud. Moreover, this Tribunal has sustained fraud penalties where the relevant authorities considered but declined to bring criminal charges (***Matter of Alvin's Wine and Liquor, Inc.***, Tax Appeals Tribunal, October 29, 2009, confirmed sub nom ***Matter of Rodriquez v Tax Appeals Trib. of State of N.Y.***, 82 AD3d 1302 [3d Dept. 2011], ***lv denied*** 17 NY3d 702 [2011]) and where the record contains no reference to criminal charges (***see e.g. Matter of Waples***, Tax Appeals Tribunal, January 11, 1990).

Additionally, I find that the various factors cited by the Administrative Law Judge in the determination mitigating petitioners' manifest failures to be unconvincing.

Petitioners' "willing" participation in interviews with the Division was in the context of the execution of the search warrant on January 28, 2016, and also pursuant to subpoenas later issued by the Division. Further, petitioners' subsequent filing of sales tax returns for eight of the periods at issue on February 25, 2016 does not vitiate their earlier knowing and intentional conduct in falsely representing their taxable sales and failing to remit sales tax collected from customers.

> "'Any other result would make sport of the so-called fraud penalty. A taxpayer who had filed a fraudulent return would merely take his chances that the fraud would not be investigated or discovered, and then, if an investigation were made, would simply pay the tax which he owed anyhow and thereby nullify the fraud penalty'" (***Badaracco v Commr***, 464 US 386, 394 [1984], quoting ***George M. Still, Inc. v Commr***, 19 TC 1072, 1077 [1953], ***affd*** 218 F2d 639 [CA2 1955]).

In fact, petitioners were responsible officers of Taste of Thai during a previous sales tax audit for the period September 1, 2004 through August 31, 2007, that resulted in additional tax due plus interest and penalty. For that audit period, sales records were repeatedly requested and, when received, were incomplete. A number of records were not provided for the entire audit period (***see*** findings of fact 7 and 21).

Petitioners' generic claims that they faced difficulties during the audit period arising from Taste of Thai's growth or recordkeeping challenges neither excuse nor ameliorate petitioners' failure to file accurate returns or pay over sales tax collected under the circumstances herein. Petitioners' POS system maintained accurate records of the restaurant's sales and petitioners were able to provide Taste of Thai's bank with monthly sales summary reports (***see*** finding of fact 20). Moreover, as noted, petitioners were knowingly using sales tax collected in trust for their own purposes throughout the audit period. Additionally, petitioners are not unsophisticated individuals, both being college educated (***see*** findings of fact 21 and 22). There is no indication

in the record that petitioners contacted the Division *sua sponte* to advise the Division of their alleged difficulties and to voluntarily remit the sales tax due and owing to the Division.

As to petitioner Pancharoen's illness, there is no evidence in the record as to how this impacted or impaired petitioners' ability to accurately report and remit sales tax collected during the period at issue. Indeed, petitioners' recollections as to when petitioner Pancharoen fell ill differ so widely as to undercut any claim that the illness significantly impeded the operation of the restaurant (***see*** findings of fact 21 [Balakula: 2011 or 2012] and 24 [Pancharoen: 2006]).

Considering the evidence as a whole, I believe that the Division has met its burden of proof to establish, by clear and convincing evidence, that petitioners were aware of their responsibilities as persons required to collect sales tax on behalf of Taste of Thai; that they were aware of and responsible for Taste of Thai's collection of sales tax from its customers in trust for the State of New York; that they chose not to remit the sales tax so collected, but rather used such funds for their own purposes; and that they falsely represented Taste of Thai's sales tax liability to the State of New York by their consistent pattern of non-filing and underreporting on Taste of Thai's quarterly sales tax returns throughout the audit period. Given the foregoing, I would find that petitioners "acted willingly, knowingly, and intentionally in a manner that resulted in the deliberate nonpayment of taxes due and owing" (***Matter of Uncle Jim's Donut & Dairy Store, Inc.***, Tax Appeals Tribunal, October 5, 1989; ***see also Matter of DeFeo***, Tax Appeals Tribunal, April 22, 1999).

Accordingly, I would reverse the determination of the Administrative Law Judge on the issue of fraud and would sustain the determination in all other respects.

DATED: Albany, New York
November 13, 2023

/s/ Anthony Giardina
Anthony Giardina
President