STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TOMONARI NOMURA	:	DECISION DTA NO. 822181
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, 2001 through November 30, 2004.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 10, 2009. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark Volk, Esq. (Osborne K. Jack, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner did not file a brief in opposition. Oral argument, at the Division of Taxation's request, was heard on November 17, 2010 in New York, New York.

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

ISSUE

Whether petitioner was properly held personally liable for the unpaid sales and use taxes owed by Queen Group, Inc., for the period December 1, 2001 through November 30, 2004 pursuant to Tax Law § 1131(1) and § 1133(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "11" and "17," which have been modified. The Administrative Law Judge's findings of fact

and the modified findings of fact are set forth below.

On July 20, 2007, the Division of Taxation (Division) issued to petitioner, Tomonari Nomura, a Notice of Determination assessing sales and use taxes due in the amount of $715,453.34 for the sales tax quarterly periods spanning December 1, 2001 through November 30, 2004, plus penalty and interest. This notice indicates that petitioner was being held liable as an officer or person responsible to collect and remit sales and use taxes on behalf of Queen Group, Inc.

As the result of a conciliation conference conducted within the Division's Bureau of Conciliation and Mediation Services (BCMS), Conciliation Order No. 220197, dated December 21, 2007, was issued pursuant to which the amount of tax assessed was reduced to $621,354.40, plus penalty and interest. Petitioner does not challenge the dollar amount of tax assessed, or the audit methodology by which such amount (as reduced) was determined, but instead disputes only the Division's claim that he was an officer or person responsible to collect and remit taxes on behalf of Queen Group, Inc.

Petitioner is the president of Nomura Management, Inc., an entity that held a lease on premises located at 212 East 52nd Street in Manhattan, and on premises located at 238 East 53rd Street in Manhattan. The latter space served as the offices of Nomura Management, Inc.

The lease for the third floor premises at 212 East 52nd Street, titled "Standard Lease," is dated May 10, 1999 and covers the ten-year lease term spanning October 1, 1999 through September 30, 2009. The lease required a $16,000.00 security deposit and a monthly rental payment of $4,000.00 from Nomura Management, Inc. (the tenant) to 212 East 52nd Street Corp. (the landlord).

In or about 2000, petitioner became acquainted with Masaaki Hirano, who was the manager of a restaurant located on the first floor of the premises at 212 East 52nd Street. Mr Hirano wanted to open a bar in Nomura Management, Inc.'s then-vacant space on the third floor, and approached petitioner seeking to do so. In turn, Nomura Management, Inc. subleased the third floor space at 212 East 52nd Street, as well as space in Nomura Management's offices at 238 East 53rd Street, to Queen Group, Inc.

The sublease for the third-floor space, titled "Sublease Agreement," is dated June 1, 2002 and covers the period June 1, 2002 through September 30, 2009 (*i.e.*, the balance of the Standard Lease's term). The sublease required a security deposit of $10,000.00 and a monthly rental payment of $5,000.00 from Queen Group, Inc. (the under-tenant) to Nomura Management, Inc. (the over-tenant). The sublease is signed by petitioner on behalf of Nomura Management, Inc., and by Mr. Hirano on behalf of Queen Group, Inc., and also includes a personal guarantee of the rent payments and other sublease terms executed by Mr. Hirano in favor of Nomura Management, Inc.

Queen Group, Inc. was the entity formed to operate Mr. Hirano's third-floor bar known as Club Gold. According to petitioner, Mr. Hirano did not speak English and was not, at the time the two became acquainted, possessed of the necessary immigrant status to obtain the requisite credentials to engage in business in the United States. Petitioner helped Mr. Hirano in this regard by serving as the incorporator of Queen Group, Inc., by assisting Mr. Hirano in the process of obtaining necessary credentials (green card, social security number, etc.), and by opening a bank account for Queen Group, Inc. Petitioner also consulted with and advised Mr. Hirano on operating the business of Queen Group, Inc., including advising Mr. Hirano of the obligation to

file sales and corporation tax returns. He recommended the services of the same accounting firm utilized by Nomura Management, Inc,. to handle Queen Group, Inc.'s accounting and tax work.

Petitioner also recommended to Mr. Hirano an attorney to assist in obtaining a liquor license with respect to Club Gold. In this regard, the Division provided the results of a Public Query to the New York State Division of Alcoholic Beverage Control, State Liquor Authority, dated February 23, 2007, showing a liquor license filing date of June 11, 2001, and an "active" license remaining in effect for the period spanning August 8, 2001 through July 31, 2007 (presumably the then-current period relative to the Division's inquiry). The information provided includes the license serial number and license type (restaurant wine), and lists the principal's name as Masaaki Hirano, the premises name as Queen Group, Inc., and the premises address as 212 East 52nd Street, 3rd Floor, 2nd & 3rd Avenues, New York, New York.

Queen Group, Inc.'s initial U.S. Corporation Income Tax Return (Form 1120), filed for the year 2001, shows total assets of $3,000.00, total liabilities and shareholder's equity (common stock) of $3,000.00, and no business activity. This return lists petitioner as holding 100% of the stock of Queen Group, Inc. Queen Group, Inc., commenced doing business in 2002. Forms 1120, as well as accompanying New York State general corporation franchise tax returns (Form CT-3), and New York City general corporation tax returns (Form NYC-3L), filed for the years 2002, 2003 and 2004, list Masaaki Hirano as owning 100% of the common stock of Queen Group, Inc. and holding the title of president. Petitioner's name does not appear in any of the tax returns described above, save for the initial return. Petitioner did not submit the articles of incorporation, bylaws or minutes of any meetings of Queen Group, Inc. into the record.[1]

[1] The social security number listed for petitioner on the 2001 return differs from the social security number listed for Mr. Hirano on the subsequent returns, thus indicating that Mr. Hirano was successful in obtaining the documents he applied for in connection with commencing the business of Queen Group, Inc. (***see*** Finding of Fact above).

The 2002 and 2004 corporate tax returns referenced above included attached documents labeled Balance Sheet Detail and Profit and Loss Detail, and the 2004 returns also included a General Ledger for 2004. These documents show a regular stream of payments to Nomura Management, Inc., for store (bar) rent and for office rent, as well as additional payments for building maintenance and repairs. The General Ledger for 2004 shows wages paid to Mr. Hirano as an officer of Queen Group, Inc., in the amount of $60,000.00. While there are entries reflecting payments to many other entities and individuals, there are no entries in any of these documents showing any other payments, such as payments for liquor, supplies, or other items, made to either Nomura Management, Inc., or to Mr. Nomura individually.

We have modified finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> In late 2002, 212 East 52nd Street Corp. sold the building at 212 East 52nd Street to KS 212 Property, LLC. The record includes a copy of a ten-year lease for the third-floor space at 212 East 52nd Street between KS 212 Property, LLC (landlord) and Nomura Management, Inc. and Masaaki Hirano (tenants), and an attached Lease Rider between these parties, setting forth the terms of the lease. This lease and rider reflect a lease commencement date of December 1, 2002, an ending date of November 30, 2012, a security deposit of $10,000.00, and rent for the premises (escalating from an initial amount of $5,000.00 per month to an ending amount of $6,333.58 per month). The names of the landlord and of Nomura Management, Inc. are typewritten on the first page of the lease and on the Lease Rider. The name Masaaki Hirano is handwritten on the first page of the lease. The signature page of the lease includes three signature lines, beneath which appear the typewritten names of the landlord, and of Nomura Management, Inc. and of Masaaki Hirano, and on which lines appear signatures for each of such named parties, including the signature of petitioner on behalf of Nomura Management, Inc. This same signature method and execution appears on the signature page of the Lease Rider. Finally, attached to the lease and Lease Rider is a Guaranty pursuant to which, and as an inducement to the landlord to enter into the lease, full performance and compliance with the lease terms is guaranteed in favor of the landlord by Tomonari Nomura and Masaaki Hirano. The signatures of Mr. Nomura, individually, as opposed to on behalf of Nomura Management, Inc., and of Mr. Hirano, individually, both appear at the end of this Guaranty.[2]

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[2] We have modified finding of fact "11" to correct the ending date of the lease.

Petitioner was also involved in assisting Mr. Hirano in or about 2001 in opening another bar located in premises at 238 East 53rd Street, the leasehold to which premises was also held by Nomura Management, Inc. Lounge G, Inc. was the entity operating the bar at these premises, known initially as Lounge G and, subsequently, as Club Aqua.

The assessment at issue results from the Division's audit of Queen Group, Inc. and the tax liability determined to be due from such entity. The field audit log from that audit includes the following entry dated March 15, 2007:

> During a conversation with Mr. Nomura (Noruma Management) he indicated that he was a consultant for Mr. Hirano who did not speak english. . . . He was not involved with the preparation, filing, and remittance of the returns and sales tax. As a result of this discussion and our investigations, we discovered that Mr. Hirano operated a similar business establishment in the same vicinity from 2001 through 2004. During this time he filed sales tax returns for this business and was the signatory on the sales tax returns. Mr. Nomura was also a consultant to this other business. Our observation; during the period, 12/02 - 2/04, Mr. Hirano was filing and signing sales tax returns for the other location, but not doing the same for Queen Group, Inc.

The entry from the same field audit log dated July 10, 2007 provides, in part, as follows:

> Discussed case with team leader. A settlement agreement dated 12/04 which was obtained on a related audit demonstrated that Tomonari Nomura was a responsible person of Queen Group, Inc. for at least part of the audit period. Additionally the 1120 for tax year 2001 identifies Mr. Nomura as owning 100% of the corporation's voting stock.

The "similar business establishment" referred to in the March 15, 2007 entry was Lounge G, Inc., which entity also was the subject of a Division sales tax audit. Entries from the auditor's field audit log for March 15, 2007, March 20, 2007, and March 27, 2007 reflect petitioner's claim that he was the leaseholder on space subleased to Lounge G, Inc. but was not an officer of Lounge G, Inc., and that Mr. Hirano was the officer of Lounge G, Inc. These entries further set forth petitioner's claim that he only provided consulting services, was not involved with the day-to-day operations of Lounge G, Inc. and was not responsible for collecting and remitting sales

tax. Finally, these entries indicate that Lounge G, Inc., was no longer engaged in business as of 2004, and that the leased space was taken over by Club Aqua, which continued the business under a different sales tax identification number.

Additional entries from the auditor's field audit log of the audit of Lounge G, Inc. for the dates April 4, 2007 and April 11, 2007, respectively, provide in part as follows:

> [Mr. Hirano's attorney] informed me that all records were transferred to Mr. Nomura. He was the business manager and partner in the business. Mr. Hirano did not speak english. He would be instructed by Mr. Nomura about what payments would have to be made including sales tax payments. He was instructed to pay tax on liquor and food, not admissions charges. He would be issued a bill by Nomura Mgt to whom he would make payments.
>
> Audit period revised based on settlement agreement. The audit period was concluded on 2/28/05 rather than 11/30/06. . . .A copy of the FITR's (Federal Income Tax Returns) for 2002, 2003, 2004 and 2005 was obtained from Livelink. Copy of the application for Sales tax Registration was also retrieved. Copy of the sales tax return for the quarter 11/20/02 and 11/30/04 with signature of Mr. Nomura on check.

The record includes an Application for Registration as a Sales Tax Vendor (Form DTF-17) filed for Queen Group, Inc., d/b/a Club Gold. This application is dated June 28, 2005 and lists Masaaki Hirano as the sole owner and officer of Queen Group, Inc. There is no application for sales tax registration in the record with regard to Lounge G, Inc., and it is unclear whether the foregoing reference in the auditor's field audit log pertaining to Lounge G, Inc., is to the application pertaining to Queen Group, Inc. or to a different application pertaining to Lounge G, Inc. The record does not include either of the two referenced quarterly sales tax returns or any check allegedly bearing petitioner's signature as referenced in the auditor's field audit log.

We have modified finding of fact "17" of the Administrative Law Judge's determination to read as follows:

> A March 2, 2007 letter from the representative for Queen Group, Inc., discussing the ongoing audit, includes the statement that "I have been informed by the taxpayer [presumably Mr. Hirano as the then 100% owner of the stock of

> Queen Group, Inc.] that earlier periods should have been filed by a management company [presumably Nomura Management, Inc.] that collected, but may not have remitted, Sales tax payments from the taxpayer." The Balance Sheet Detail and Profit and Loss Detail submitted into the record with the 2002 and 2004 corporate tax returns for Queen Group, Inc. do not show any payments to Nomura Management, Inc. or petitioner for sales tax, and there is no evidence in the record that sales tax payments were collected from Queen Group, Inc. by Nomura Management, Inc. or petitioner.[3]

The settlement agreement referenced in the auditor's field audit log is a three-page document dated December 9, 2004 between petitioner and Mr. Hirano. Paragraphs 1, 2 and 3 of this agreement provide as follows:

> 1. Hirano shall have exclusive use of and authority to operate at the premises at 212 East 52nd Street, known as Club Gold/Queen Group. Nomura will cooperate in having the Landlord of the premises cancel the existing lease and enter into a new lease with an entity designated by Hirano. Nomura waives any interest in the leasehold and business operation at Club Gold/Queen Group and he will assign all interest he may have in any entity (including but not limited to Queen Group, Inc.) which purports to have any interest in the club.
>
> 2. Nomura shall have exclusive use of and authority to operate at the premises at 238 East 53rd Street known as Lounge G/Club Aqua. Hirano waives any interest in the leasehold and business operations of Lounge G/Club Aqua. Hirano waives any interest he may have in any entity which purports to have any interest in the business or premises used by Lounge G/Club Aqua. Hirano shall assign 100% of his interest in the corporation known as Lounge G, Inc. to Nomura.
>
> 3. (a). Queen Group will pay to Nomura the sum of $63,238.00 (* * *); (b) Hirano will transfer the balance of the Lounge G bank account in the amount of $16,155.47 . . . to Nomura; (c) Hirano/Queen Group will pay to Nomura the sum of $15,000.00 (* * *) on account of cash withdrawals; (d) Queen Group will reimburse Nomura in the amount of $12,292.70 (* * *) for liquor supplied to the Queen Group; (e) Hirano/Queen Group will guaranty to Nomura the return of the $10,000.00 (* * *) security deposit relating to the premises at 212 East 52nd Street.

The signature capacity listings for the foregoing agreement are very broadly drawn and are nearly identical (or reciprocal) for both petitioner and Mr. Hirano, such that each is signing as:

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[3] We have modified finding of fact "17" to more completely reflect the record.

Masaaki Hirano, individually, and as an officer or shareholder of Lounge G, Inc., Queen Group, Inc., and as the individual who manages the entity known as Club Gold.

and

Tomonari Nomura, individually and as an officer or shareholder of Lounge G., Inc., Queen Group, Inc. and party who manages the entity known as Club Aqua.

Petitioner's relationship with Queen Group, Inc. ended when the Settlement Agreement was executed. The genesis of the Settlement Agreement was Mr. Hirano's desire to have a direct lease with KS 212 Property, LLC. Petitioner explained that although the initial paragraph of the agreement uses the terminology "whereas a dispute has arisen between the parties," the same was not in the context of a "fight" or "disagreement," but rather reflected Mr. Hirano's desire to buy out Nomura Management, Inc.'s leasehold interest in the third-floor premises so as to allow a direct lease between Queen Group, Inc. and KS 212 Property, LLC. This is reflected in the terms of paragraph 3 (a) through (e) of the Settlement Agreement, wherein Queen Group agrees to pay Nomura for a number of specific items, including a set dollar amount ($63,238.00), the balance of the Lounge G bank account ($16,155.47), a sum for prior cash withdrawals from Lounge G ($15,000.00), a reimbursement amount for liquor supplied to Queen Group (presumably from Lounge G) ($12,292.70), and further guarantees the return of Nomura Management, Inc.'s security deposit for the premises at 212 East 52nd Street.

There is no evidence in the record showing that petitioner in fact signed or had the authority to sign checks on the bank account of Queen Group, Inc.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge cited applicable provisions of the Tax Law that impose personal liability upon any person required to collect the tax imposed by Article 28 of the Tax

Law, and noted that a person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28.

The Administrative Law Judge determined that petitioner was not a person under a duty and responsible to collect and remit sales and use taxes on behalf of Queen Group, Inc. The Administrative Law Judge found that beyond serving as the incorporator for Queen Group, Inc., providing certain advice to Mr. Hirano in connection with the business obligations of Queen Group, Inc., and signing the initial corporate tax return for that entity, there was no evidence that petitioner was involved in operating the actual business of Queen Group, Inc., or that petitioner had any connection with the business, other than through Nomura Management, Inc., which held the lease and managed the property within which Mr. Hirano operated the business of Queen Group, Inc. The Administrative Law Judge noted that all tax returns filed subsequent to the initial return, which itself pertained to a period during which Queen Group, Inc. conducted no business activities, were signed by Mr. Hirano as the president and sole shareholder of Queen Group, Inc. Additionally, the Administrative Law Judge found that there was no evidence that petitioner held any title or office within Queen Group, Inc., was a signatory on the check book or bank accounts of Queen Group, Inc., signed any checks on behalf of Queen Group, Inc., received any wage, salary or dividend payments from Queen Group, Inc., or any other payments other than periodic lease and office space rental payments. In contrast, the Administrative Law Judge noted that the corporation's general ledger for 2004 showed wages paid to Mr. Hirano in the amount of $60,0000.00.

The Administrative Law Judge found the allegations of Mr. Hirano's representative, contained in a letter sent to the auditor, alleging petitioner's responsibility for Queen Group, Inc.,

to be of little probative value. The Administrative Law Judge rejected the Division's argument that the Settlement Agreement evidenced petitioner's responsibility for Queen Group, Inc., finding that the agreement resulted from the change to a direct lease between Mr. Hirano and the owner of the building, and that any involvement petitioner had with Club Aqua had no bearing on his liability with respect to Queen Group, Inc.

ARGUMENTS ON EXCEPTION

The Division argues that it had a rational basis for assessing petitioner as a responsible person of Queen Group, Inc., and that petitioner failed to meet his burden of proving that he was not responsible for the taxes of the corporation. The Division asserts that petitioner was an officer and/or shareholder of Queen Group, Inc. from the time of its incorporation through at least December 4, 2004, arguing that because petitioner incorporated the business in 2000 and then severed his relationship with the corporation in 2004, petitioner admittedly was an officer and/or shareholder during the entire audit period. The Division points to the December 4, 2004 Settlement Agreement, which petitioner signed as "officer or shareholder" of Queen Group, Inc., as further support of its argument, and contends that the agreement shows that petitioner and Mr. Hirano were business partners in Queen Group, Inc. The Division further argues that petitioner was responsible for the taxes of the corporation, because, according to the Division, he determined what taxes should be paid, had check signing authority, received economic benefit from the corporation, and was not thwarted from fulfilling his obligations to ensure that the corporation remit sales tax to New York State. The Division also argues that the penalties imposed should be sustained because petitioner has not shown reasonable cause to abate the penalties.

OPINION

Tax Law § 1133(a) provides that:

> [E]very person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article . . . .

Tax Law § 1131(1), in turn, defines "persons required to collect tax" as follows:

> [E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, 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 . . . .

The determination of whether an individual is a person under a duty to act for a business is based upon a close examination of the particular facts of the case (***see Matter of Cohen v. State Tax Commn.***, 128 AD2d 1022 [1987]; ***Matter of Stacy v. State***, 82 Misc2d 181 [1975]; ***Matter of Chevlowe v. Koerner***, 407 NYS2d 388; ***Matter of Hall***, Tax Appeals Tribunal, March 22, 1990, ***confirmed*** 176 AD2d 1006 [1991]; ***Matter of Martin***, Tax Appeals Tribunal, July 20, 1989, ***confirmed*** 162 AD2d 890 [1990]; ***Matter of Autex Corp.***, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (***see*** 20 NYCRR 526.11[b][2]). As we summarized previously in ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990):

> [t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of

> responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (***Cohen v. State Tax Commn.***, ***supra***, 513 NYS2d 564, 565; ***Blodnick v. State Tax Commn.***, 124 AD2d 437, 507 NYS2d 536, 538, ***appeal dismissed*** 69 NY2d 822, 513 NYS2d 1027; ***Vogel v. New York State Dept. of Taxation & Fin.***, ***supra***, 413 NYS2d 862, 865; ***Chevlowe v. Koerner***, 95 Misc2d 388, 407 NYS2d 427, 429; ***Matter of William D. Barton***, ***supra***; ***Matter of William F. Martin***, ***supra***; ***Matter of Autex Corp.***, ***supra***).

The issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (***see Matter of Constantino***, ***supra***; ***Matter of Chin***, Tax Appeals Tribunal, December 20, 1990). In order to prevail, "petitioner was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own [citations omitted]" (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

Upon review of the entire record, it is clear that petitioner has met his burden of proving that he was not properly held responsible for the sales tax obligation in issue. The Division's argument that petitioner was an officer and/or shareholder of Queen Group, Inc. during the audit period is not supported by the evidence in the record. Contrary to the Division's assertion that petitioner admitted that he was an officer and/or shareholder of Queen Group, Inc. during the entire period for which he was assessed, petitioner credibly testified the he was not an officer or owner of the corporation in 2002 through 2004, and that in 2001 he was listed on the corporate return as owning 100% of the shares because he incorporated the business as a favor to Mr. Hirano. Petitioner further credibly testified that all of the stock was transferred to Mr. Hirano at

the end of 2001 or beginning of 2002. Petitioner's testimony is supported by the documentary evidence that shows that all of the corporation's tax returns filed subsequent to the initial return, which itself pertained to a period during which Queen Group, Inc. conducted no business activities, were signed by Mr. Hirano as the president and sole shareholder of Queen Group, Inc. Furthermore, there is no evidence that petitioner held any title or office within Queen Group, Inc. As the Administrative Law Judge properly found, beyond serving as the incorporator for Queen Group, Inc., providing certain advice to Mr. Hirano in connection with the business obligations of Queen Group, Inc., and signing the initial corporate tax return for that entity, there is no evidence that petitioner was involved in operating the actual business of Queen Group, Inc., or that petitioner had any connection thereto other than through Nomura Management, Inc., the entity that held the lease and managed the property within which Mr. Hirano operated the business of Queen Group, Inc.

Moreover, contrary to the Division's assertion that petitioner had check signing authority and received economic benefits from the corporation, the Administrative Law Judge properly found that there was no evidence that petitioner was a signatory on the check book or bank accounts of Queen Group, Inc. or signed any checks or other documents of any kind on behalf of Queen Group, Inc. Although petitioner testified that he initially opened a bank account for Queen Group, Inc. when the business was first incorporated, there is no evidence that petitioner was a signatory on the bank account or signed any checks during the period at issue. Further, there is no evidence that petitioner received any wage or salary or dividend payments from Queen Group, Inc. or any other payments, but for the periodic lease payments and office space rental payments for Queen Group, Inc.

The Division argues that petitioner's testimony that he advised Queen Group, Inc. about what taxes should be paid is an indication of his responsibility. This argument is rejected. Contrary to the Division's assertion that petitioner determined what taxes should be paid, the record establishes that petitioner merely provided Mr. Hirano with advice regarding the tax and other business obligations of Queen Group, Inc. and introduced Mr. Hirano to the same accountant used by Nomura Management, Inc. While petitioner may have advised Mr. Hirano regarding the tax and other business obligations of Queen Group, Inc. and acted as a conduit between Mr. Hirano and the accountant, such actions, without more, do not equate to responsibility for Queen Group, Inc.'s tax liabilities being personally imposed upon petitioner. Merely providing tax or business advice simply does not rise to the level of being an officer, director or employee who is under a duty to act for such corporation in complying with its sales tax obligations.

The Division's argument that petitioner should be found responsible because Mr. Hirano informed the auditor that petitioner was the person who managed the business and determined what taxes should be paid is likewise rejected. We note first that this argument is based entirely on hearsay. Indeed, the auditor's testimony that Mr. Hirano's representative told her that Mr. Hirano told him petitioner's management company was responsible for filing the sales tax returns was double hearsay contained in unsworn letters and conversations, worthy of little weight. Although hearsay evidence is admissible in administrative hearings (***cf. Flanagan v. State Tax Commn.***, 154 AD2d 758 [1989]; ***Mira Oil Co. v. Chu***, 114 AD2d 619 [1985], ***appeal dismissed*** 67 NY2d 756 [1986], ***lv denied*** 68 NY2d 602 [1986]), it denies the trier of fact the opportunity to evaluate the credibility of a witness, which is an important part of the hearing process (***cf., Stevens v. Axelrod***, 162 AD2d 1025 [1990]). In addition, the opposing party's lack of an

opportunity to cross-examine the source of the hearsay evidence is an important consideration in deciding to give minimal weight to the hearsay evidence. Moreover, while the technical rules of evidence do not apply in an administrative hearing, it is within the discretion of the Administrative Law Judge to apportion whatever weight is necessary to hearsay and conclusions (***see*** 20 NYCRR 3000.10[5][d][1]). We therefore find no reason to take issue with this aspect of the Administrative Law Judge's determination.

Moreover, the Division's argument misconstrues the 2004 Settlement Agreement. The Administrative Law Judge correctly observed that the Settlement Agreement coincided with the end of petitioner's leasehold relationship with Queen Group, Inc., (which was the product of Nomura Management, Inc.'s ownership of the leasehold to the premises) which resulted from the described change to a direct lease between Mr. Hirano and the owner of the premises (KS 212 Properties, LLC), and coincided with the commencement of petitioner's operation of Lounge G, Inc. as Club Aqua. The Division asserts that petitioner's testimony that the agreement memorialized Mr. Hirano's desire to discontinue his lease with Nomuri Management and arrange a direct lease with the landlord is baseless. However, the Division's assertion is refuted by the Settlement Agreement itself, which specifically states that petitioner will cooperate in having the landlord of the premises cancel the existing lease and enter into a new lease with an entity designated by Mr. Hirano. Furthermore, it is noted that the Settlement Agreement was entered into subsequent to the period at issue and, contrary to the Division's argument, does not indicate that petitioner and Mr. Hirano were business partners.

Accordingly, we conclude that petitioner was not a person responsible for the collection and payment of sales tax pursuant to Tax Law § 1131(1) and § 1133(a) and is not personally liable for the sales taxes due on behalf of Queen Group, Inc., for the period December 1, 2001

through November 30, 2004. The issue of penalties is rendered moot by virtue of the foregoing discussion.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

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

3. The petition of Tomonara Nomura is granted; and

4. The Notice of Determination dated July 20, 2007 is cancelled.

DATED: Troy, New York
May 12, 2011

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

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

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