

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JEFFREY W. DONAHUE, :
OFFICER OF BED CITY - MANHATTAN, INC. :
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, 1987 through February 29, 1988. :
:

In the Matter of the Petition :
of :
JEFFREY W. DONAHUE, :
OFFICER OF BOULEVARD BED CITY :
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 September 1, 1987 through May 31, 1988. :
:

DECISION
DTA NOS. 808741,
808742 AND 808743

In the Matter of the Petition :
of :
JEFFREY W. DONAHUE, :
OFFICER OF WESTCHESTER BED CITY, INC. :
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, 1987 through February 29, 1988. :
:

In the Matter of the Petition :
of :
JEFFREY DONAHUE, :
OFFICER OF SLEEP CENTERS CORP. :

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, 1988 through February 28, 1989.

In the Matter of the Petition :
of :
JEFFREY W. DONAHUE, OFFICER OF :
FASHIONS IN BEDDING OF QUEENS, INC. :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Periods September 1, 1987 through May 31, 1988 and :
December 1, 1988 through February 28, 1989.

Petitioner Jeffrey W. Donahue, officer of Bed City - Manhattan, Inc., Boulevard Bed City, Westchester Bed City, Inc., Sleep Centers, Corp. and Fashions in Bedding of Queens, Inc., 4164 Saltwater Boulevard, Tampa, Florida 33615, filed an exception to the determination of the Administrative Law Judge issued on March 10, 1994. Petitioner appeared by Joseph A. F. Valenti, Esq. The Division of Taxation appeared by William F. Collins, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a letter in support of his exception. The Division of Taxation filed a letter in opposition. On June 16, 1994, petitioner's representative advised the Tax Appeals Tribunal that a reply brief would not be filed and this date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the execution of consents to the fixing of tax due pursuant to Tax Law § 1138(c) bars petitioner from challenging certain notices of determination and demands for

payment of sales and use taxes due.

II. Whether petitioner was a person required to collect and pay over sales and use taxes on behalf of Bed City - Manhattan, Inc., Boulevard Bed City, Westchester Bed City, Inc., Sleep Centers Corp., and Fashions in Bedding of Queens, Inc.

III. Whether petitioner has established that the Division of Taxation improperly applied payments submitted by petitioner in contravention of an alleged agreement between petitioner and the Division of Taxation, particularly in light of the failure of a Division of Taxation employee to appear at hearing in response to a subpoena.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "27" which has been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Bed City - Manhattan, Inc., Boulevard Bed City, Westchester Bed City, Inc., Sleep Centers Corp., and Fashions in Bedding of Queens, Inc. were retail establishments which sold mattresses and bedding supplies.

In or about August or early September 1986, Bed City Shops, Inc. ("Bed City Shops") was formed with the intention of dissolving a number of corporations, including the foregoing corporations, and merging them into Bed City Shops as one operating entity. Petitioner, Jeffrey W. Donahue, was hired by Jeremiah Crowley in September 1986 to be the chief financial officer of Bed City Shops. Petitioner also held the title of secretary- treasurer. In this position, petitioner was responsible for maintaining the books. He also arranged financing, hired staff and negotiated with creditors.

At the time petitioner became associated with Bed City Shops, Mr. Crowley was the majority shareholder and held 51 or 52 percent of the outstanding stock. Mr. Crowley also served as president. The other investors, consisting of petitioner, his brother, Denny, and Mr. Albanese, split the remaining 48 or 49 percent. Initially, petitioner invested \$100,000.00 in

Bed City Shops. At some juncture, petitioner loaned the corporation an additional \$20,000.00.

Petitioner and Mr. Crowley had three goals with respect to the future of Bed City Shops. The immediate goal was to consolidate the operations of at least 10 small operating companies into one corporation. The second goal was to make the business profitable. Lastly, petitioner and Mr. Crowley sought to gain a dominant position in the tri-state bedding market.

Petitioner's only responsibility for the stores other than Bed City Shops was to see that they continued to function properly.

The revenues from the various corporations flowed into one of four bank accounts of Bed City Shops. Petitioner's office, in turn, paid rent, electricity, telephone and wages of the employees of the various corporations on a continuing basis. Petitioner could pay any bill for any corporation on any of the accounts.

Generally, petitioner conferred with Mr. Crowley before paying bills. However, petitioner paid bills such as those for telephone without approval from Mr. Crowley. He also would have paid a tax bill without approval if it were only for a few hundred dollars.

Mr. Crowley did not sign any checks and he did not put his name on any official documents.

Petitioner provided the information which was used by an accounting firm to prepare the tax returns of Bed City Shops. An accounting firm also prepared the tax returns of the other corporations. Petitioner signed the latter returns.

Petitioner was not an officer or employee of any corporation other than Bed City Shops. He did not receive any compensation from corporations other than Bed City Shops. The other corporations had a chief financial officer, although petitioner does not know who that was.

Petitioner performed functions for corporations other than Bed City Shops because he was directed to do so by Mr. Crowley. Further, petitioner had invested his life savings in Bed City Shops and he was concerned about the various corporations insofar as their ability to pay bills.

Petitioner was never able to get the other corporations dissolved and brought into one

operating entity because liabilities kept appearing and petitioner could not determine what was occurring.

One day a Tax Compliance Agent, Mr. Sam Mazen, appeared at petitioner's office and informed petitioner that a significant amount of taxes were due. It is petitioner's understanding that the liability arose because the prior owner of the various corporations did not file or pay New York State sales tax during the first three quarters of 1986. This was the first time petitioner learned of the prior liabilities of the various corporations. At this point, petitioner began paying the taxes due. According to petitioner, after several months he stated to Mr. Mazen that the liabilities were not the responsibility of Bed City Shops and that the payments were damaging the business. Petitioner testified that thereafter he and Mr. Mazen agreed that future payments would be applied to the liability of Bed City Shops. It was purportedly understood that any payments from the first quarter of 1987 forward would be applied to a current liability or a liability that may have accrued during the final quarter of 1986. Petitioner's agreement with Mr. Mazen was never reduced to writing.

There were occasions when Mr. Mazen would call petitioner on the telephone to arrange a meeting. During these conversations, Mr. Mazen would tell petitioner what was expected. Thereafter, petitioner and Mr. Crowley would confer before the meeting with Mr. Mazen. There were also occasions when petitioner spoke to Mr. Crowley while Mr. Mazen waited in another location. During these meetings, Mr. Crowley would tell petitioner which bills to pay and which liabilities to postpone. However, there were instances where he did not do what he was told because he felt that it would jeopardize Bed City Shops' position.

At the hearing, petitioner reviewed a record prepared by Mr. Mazen which recorded the receipt of funds and showed how the balances were applied. When petitioner first saw how the payments were applied, he was stunned because it was his understanding that after the end of 1986, the Division of Taxation ("Division") would apply all future payments to liabilities that were incurred after September 5, 1986. Each of the liabilities to which petitioner objects were incurred prior to petitioner becoming an officer of Bed City Shops. Petitioner specifically

objects to the Division's application of the following payments.

WESTCHESTER BED CITY, INC. - ID# 13-2982941C

S8612190101 Field Audit 6/1/83-5/31/86

<u>PAYMENTS</u>	2/28/89	\$20,000.00
	4/6/89	2,500.00
	4/11/89	2,500.00
	4/21/89	2,500.00
	4/28/89	2,500.00
	5/3/89	2,500.00
	5/10/89	2,500.00
	5/23/89	2,500.00
	5/16/89	2,500.00
	6/6/89	2,500.00

D8612074411 6/1/86-8/31/86

<u>PAYMENTS</u>	11/12/87	\$15,000.00
	11/23/87	4,840.87

FASHIONS IN BEDDING OF QUEENS, INC. - ID# 11-2214473

D8603310224 9/1/85-11/30/85

<u>PAYMENTS</u>	12/12/86	\$ 4,707.61
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D8605192849 12/1/85-2/28/86

<u>PAYMENTS</u>	2/4/87		\$ 2,768.37
	2/6/87	2,768.37	
	2/9/87	2,768.37	
	2/13/87	2,768.37	
	2/11/87	2,768.37	
	2/16/87	2,768.37	
	5/7/87		68.67

S8609117243 3/1/86-5/31/86

<u>PAYMENTS</u>	2/20/87		\$ 4,967.37
	2/25/87	4,967.37	
	2/27/87	4,967.37	
	3/3/87	4,967.37	
	3/5/87	4,967.37	
	3/6/87	4,967.37	
	5/4/87		295.15

S8704060977 6/1/86-8/31/86

<u>PAYMENTS</u>	11/12/87		\$15,000.00
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BED CITY MANATTAN INC. - ID# 13-2877640

D8604015563 9/1/85-11/30/85

<u>PAYMENTS</u>	11/7/86		\$ 5,450.60
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D8609117431 3/1/86-5/31/86

PAYMENTS	11/12/87		\$14,883.31
	12/11/87		9,274.13
	1/28/88		80.82

BOULEVARD BED CITY - ID# 13-3117918

D8604017987 9/1/85-11/30/85

<u>PAYMENTS</u>	11/17/86		\$ 2,736.68
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D8605215222 12/1/85-2/28/86

<u>PAYMENTS</u>	12/17/86		\$ 3,000.00
	1/14/87		2,392.71
	1/14/87	2,392.71	
	1/14/87	2,392.71	
	1/22/87	2,392.71	
	1/26/87	2,392.71	
	1/28/87	2,392.71	
	2/20/87		53.83

D8609122251 3/1/86-5/31/86

<u>PAYMENTS</u>	11/12/87		\$15,000.00
	12/8/87		7,251.67
	1/28/88		31.96

SLEEP CENTERS CORP. - ID# 13-2797610

D8605211727 12/1/85-2/28/86

PAYMENTS

11/17/86

\$ 2,564.57

The Division offered as an exhibit a document consisting of 11 pages of photocopied checks signed by petitioner. All of the checks were made payable to the order of either the New York State Tax Commission or New York State Sales Tax.

Virtually all of the checks designated a particular assessment and a specific taxable period. At the hearing, petitioner was unable to identify the handwriting in the memo area on certain checks. Petitioner explained that when he signed a check, the memo section was not filled out. However, sometimes petitioner would fill in the memo section and other times the memo section would be completed by the bookkeeper. Generally, the memo section was completed in the office of Bed City Shops before Mr. Mazen's departure.

Of the 11 pages of photocopied checks offered by the Division, petitioner identified 11 checks on which he drafted a memorandum on the face of the check. Pertinent information shown on the face of the checks is as follows:

(a) Petitioner signed a check dated November 14, 1986 on the account of "Sleep Centers Corp./Bed City". The check was made payable to the order of the New York State Tax Commission in the amount of \$2,799.92. The check lists two assessments, one for the quarter ended August 1985 in the amount of \$63.24 and one for the quarter ended November 1985 in the amount of \$2,736.68.

(b) Petitioner signed a check dated January 9, 1987 in the amount of \$2,614.96 payable to the order of the "N.Y.S. Tax Commission". The check was drawn on the account of Sleep Centers, Inc. and designated the quarter ended February 28, 1986.

(c) Petitioner drew a check dated November 11, 1987 in the amount of \$961.35 payable to the order of "N.Y. State Sales Tax". The check was drawn on the account of Sleep Centers Corp. Special Tax Account and listed the quarter ended November 30, 1985 and a particular assessment.

(d) Petitioner drew a check dated January 6, 1987 payable to the order of "N.Y.S. Tax Commission" in the amount of \$2,614.96. The check was drawn on the account of (Bed City) Sleep Centers, Inc. and listed an assessment number and the quarter ended "2/28".

(e) Petitioner drew a check dated January 7, 1987 on the account of (Bed City) Sleep Centers, Inc. payable to the order of the "N.Y.S. Tax Commission". The check was in the amount of \$2,614.96 and listed an assessment number and the quarter ended "2/28".

(f) Petitioner drew a check dated September 18, 1987 payable to the order of "N.Y. State Sales Tax" in the amount of \$6,463.61. The check was drawn on the account of Sleep Center Corp. (Bed City) Credit Card Account. The check listed an assessment number and the quarter ended "8/86".

(g) Petitioner drew a check dated February 17, 1988 payable to the order of "N.Y. State Sales Tax" in the amount of \$5,000.00. The check was drawn on the account of (Bed City) Sleep Centers, Inc. and listed an assessment number and the quarter ended "8/86".

(h) Petitioner drew a check dated February 24, 1988 payable to the order of "N.Y. State Sales Tax" in the amount of \$6,502.44. The check was drawn on (Bed City) Sleep Centers, Inc. and listed an assessment number and the quarter ended "8/86".

(i) Petitioner drew a check dated February 29, 1988 payable to the order of "N.Y. State Sales Tax" in the amount of \$5,000.00. The check was drawn on (Bed City) Sleep Centers, Inc. It listed an assessment number and the quarter ended "8/86".

(j) Petitioner drew a check dated November 14, 1986 payable to the order of "N.Y.S. Tax Commission". The check was drawn on Sleep Centers Corp./Bed City Main Account in the amount of \$6,658.89. The check designated two assessment numbers and the quarters ending November 1985 and February 28, 1986.

(k) Petitioner drew a check on the account of (Bed City) Sleep Centers, Inc. in the amount of \$5,450.60 payable to the order of "N.Y. State Tax Commission". A portion of the date of the check is obscured. However, it is clear that the check was drawn in 1986.

The check listed an assessment number and the quarter ended November 1985.

At the hearing, petitioner acknowledged that there were occasions when, at the request of Mr. Mazen, he would draft a check for payment of "small amounts" of taxes due in prior years.

In addition to the checks wherein petitioner acknowledged completing the explanation section on the check, the record includes numerous other checks which delineate the assessment and period to which the payment is directed. For example, one such check was drawn on the account of (Bed City) Sleep Centers, Inc. in the amount of \$6,443.86 and made payable to the order of "New York State Sales Tax". The check was dated January 8, 1988, lists an assessment number and designates the quarter ended August 1986. There is a second check dated January 15, 1988 payable to "NYS Sales Tax" in the amount of \$6,443.86. This check designates the same assessment number as the check dated January 8, 1986 and also lists the quarter ending August 1986.

Petitioner did not examine the checks when they were returned from the bank because he did not have any reason to think that they would not be applied in accordance with the purported agreement with Mr. Mazen.

In a letter dated December 2, 1987, petitioner proposed a modification of Bed City Shops' relationship with the Division. The letter provided, in part, as follows:

"Dear Mr. Mazen,

"A year has passed since the full extent of Bed City's tax liability became clear. Since then, over 400,000.00 has been paid to reduce that liability and the company has been filing and paying on a timely basis it's [sic] ongoing obligation to the State. We are justly proud of this achievement... But it came at great cost to the company, and I am not talking about dollars only.

"The large payments to the State and other taxing authorities combined with C.O.D. payments to many of our vendors has put a terrible strain on cash flow, so much so that it has become increasingly difficult to operate the business properly. It is doubly frustrating given the fact that all the balance due was incurred prior to our takeover in September of 1986.

"I do not think that, at this point, anyone can seriously question our integrity and our willingness to pay off the remaining balance. That payoff will be structured around our long term plan for financing the company, which has two stages. The first, obtaining a sizable Bank Loan, has already been accomplished. The second,

attracting long term equity interest in the company, is in it's [sic] initial stage. It is critical that these potential equity 'players' see a stable situation from a fiscal standpoint in general and a tax standpoint in particular. This means, in my view, an agreement with the State providing \$5000.00 per month on the old balance and maintaining a current position with our ongoing liability. This does two things. It shows potential investors that we have a working relationship with the State and it provides a workable arrangement, from a cash flow view, that the company can handle without again putting a severe strain on our finances. When the company obtains its equity partner, the remaining balance would be paid. I would put a six months to a year timetable on that investment."

In or about late December 1986, petitioner spoke to Mr. Crowley regarding petitioner's concerns pertaining to his liability and the structure of the associated corporations. Petitioner was worried because he was signing checks for corporations and he did not know who was involved. Mr. Crowley responded that his attorney and accountant were working on straightening the matter out and merging the corporations into one.

Petitioner continued to raise the foregoing matter with Mr. Crowley for the next 18 months. Eventually, petitioner concluded that he had no choice but to resign from the company. In September 1988, petitioner terminated his employment.

After petitioner left his employment, he was contacted by Mr. Crowley who said that New York State was demanding a significant amount of money. In response, petitioner sent Mr. Crowley \$80,000.00 which were proceeds from the sale of petitioner's home. It was petitioner's understanding that the money would be used to pay taxes. However, petitioner never received an accounting of these funds and, to the best of petitioner's knowledge, the money was not used for taxes.

In or about June 1989, Bed City filed a petition under Chapter 11 of the Bankruptcy Act. At this time, petitioner was working for a mid-size paging company in Florida.

We modify the Administrative Law Judge's finding of fact "27" to read as follows:

The Division issued a series of notices of determination and demands for payment of sales and use taxes due which assessed sales and use taxes against petitioner as follows:

(a) The Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (S891013732L), dated October 13, 1989, which assessed sales

and use taxes for the quarter ended February 28, 1988 in the amount of \$10,025.32, plus penalty of \$2,087.08 and interest of \$2,073.82, for a total amount due of \$14,906.22. The notice stated that petitioner was liable individually and as an officer of Bed City - Manhattan, Inc.

(b) The Division issued a series of notices of determination and demands for payment of sales and use taxes due (S891013736L, S891013737L, S891013738L) which assessed sales and use taxes, all dated October 13, 1989, as follows:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
11/30/87	\$ 0.00	\$1,866.62	\$ 121.71	\$ 1,988.33
2/28/88	16,925.56	4,739.13	3,501.18	25,165.87
5/31/88	11,837.82	3,709.39	2,344.98	17,892.19

Each of the foregoing notices explained that petitioner was liable individually and as an officer of Boulevard Bed City.

(c) The Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (S891013748L), dated October 13, 1989, to petitioner which assessed sales and use taxes for the quarter ended February 28, 1988 in the amount of \$15,671.72, plus penalty of \$4,405.20 and interest of \$3,249.64, for a total amount due of \$23,326.56. The notice explained that petitioner was liable individually and as an officer of Westchester Bed City, Inc.

(d) The Division issued notices of determination and demands for payment of sales and use taxes due (S891013708L, S891013709L), dated October 13, 1989, to petitioner which assessed sales and use taxes as follows:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
2/28/88	\$ 0.00	\$1,012.84	\$ 0.00	\$ 1,012.84
2/28/89	8,452.16	1,520.64	771.56	10,744.36

The notices explained that petitioner was liable individually and as an officer of Sleep Centers Corp.

(e) The Division issued notices of determination and demands for payment of sales and use taxes due (S891013716L, S891013717L, S891013718L, S891013719L), dated October 13, 1989, to petitioner which assessed sales and use taxes as follows:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
11/30/87	\$19,857.03	\$6,160.10	\$5,072.29	\$31,089.42
2/28/88	23,481.55	6,805.93	5,126.45	35,413.93
5/31/88	0.00	1,163.05	0.00	1,163.05
2/28/89	14,323.73	2,555.63	1,285.10	18,164.46

The notices explained that petitioner was liable individually and as an officer of Fashions in Bedding of Queens, Inc.¹

In April 1990, petitioner went to New York to meet with Mr. Crowley to ask about Bed City Shops' operation and obtain an accounting. In the conversation which followed, petitioner was denied access to either the company's general manager or accountant. After petitioner returned to Florida, he wrote Mr. Crowley a letter outlining his concerns and asking for an accounting, and again for access to the company's general manager or accountant. Petitioner did not receive a response to this letter.

In December 1990, Bed City Shops' warehouse, which contained the assets of the company, was robbed and all the assets of the company were lost. The company's insurance lapsed just prior to the theft. Several days later, Bed City Shops filed a petition under Chapter 7 of the Bankruptcy Law.

At the time of the foregoing events, there was an outstanding bank debt of \$600,000.00.

In 1990, Mr. Crowley and Mr. Albanese filed petitions for personal bankruptcy. Petitioner's brother, Dennis Donahue, also filed for personal bankruptcy. Initially, a bank moved to oppose the bankruptcy petition of Dennis Donahue. However, the opposition was later withdrawn.

It is petitioner's opinion that the assets of Bed City Shops would have been sufficient to pay a significant portion of the outstanding liability. According to petitioner, Bed City Shops was required to maintain a balance of inventory of \$500,000.00. Petitioner never received an explanation of why some of the liabilities, such as the ones involved herein, were not paid.

Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services on the notices in issue. The conciliation conference on the notices which assessed petitioner as a responsible officer of Sleep Centers Corp. and Fashions in Bedding of

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We modified this fact by adding the assessment numbers and by adding the fact that the notices to Boulevard Bed City were issued on October 13, 1989.

Queens, Inc. was held on May 11, 1990 in Westchester, New York.

According to the Report of Tax Conference, petitioner stated that he was a responsible officer of each of the foregoing corporations until October 7, 1988 when he obtained a new job in Tampa, Florida. It was petitioner's position that he should not be held responsible on the notices which assess tax for the quarter ended February 28, 1989. The conciliation conferee accepted petitioner's position and found him to be a responsible officer except for two notices because of petitioner's resignation from Bed City Shops and the related corporations.

Petitioner received five separate consent forms in the mail. Each of the consent forms was accompanied by a separate letter in a distinct envelope. Three of the consent forms sustained the notices which assessed petitioner as a responsible officer of, respectively, Bed City - Manhattan, Inc., Boulevard Bed City and Westchester Bed City, Inc.

The consent form which concerned the notices which assessed petitioner as an officer of Sleep Centers Corp. set forth the taxpayer identification number, the notice, assessment or file number, and the date of the notice. The following sentence then appeared:

"The final disposition of the Deficiency or Determination at issue as described above is acceptable to me based on the following computation. . . ."

The consent form then set forth two columns which were headed by an assessment number. Below one assessment number, an amount is shown due for penalty. The same amount is listed across from the word "TOTAL". Below the second assessment number, the word "cancelled" appears across from the words "Tax", "Penalty" and "Interest".

After the computation, the form stated:

"I hereby agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the above notice."

The consent was signed by petitioner and is dated June 19, 1990.

The consent which concerned the notices which assessed tax against petitioner as an officer of Fashions in Bedding of Queens, Inc. was drafted using the same format as the prior consent form. The only significant difference is that the latter consent form listed amounts due under three notice numbers and stated the word "Cancelled" under one assessment number in

spaces designated for tax, penalty and interest. This consent was also signed by petitioner and dated June 19, 1990.

Petitioner received each of the consents in the mail. Upon receiving the forms, he spoke to someone in Albany for instructions on what to do with the forms. Petitioner was told that if he did not want to be assessed on the three consents which sustained the assessments, he should not sign the consents.

Petitioner was also told that if he wanted certain assessments cancelled, he should sign the other two consents. Petitioner thought he had to sign the two consents in order to get the benefit of the cancellations. According to petitioner, he did not realize that by signing the consents he was also agreeing to certain assessments. Petitioner maintains that it was never his intent to agree that he owes tax.

Petitioner read each of the consents before two of them were signed. He was not represented by a lawyer or accountant at this stage of the proceeding.

In addition to the facts found by the Administrative Law Judge, we find the following:

Petitioner's representative issued a subpoena to Mr. Mazen requiring Mr. Mazen's attendance at the hearing on this matter. The Division has not offered any legal or factual reasons for the failure of Mr. Mazen to appear at the hearing.

The hearing on this matter was originally scheduled to be held on December 4, 1992. On December 2, 1992, the Supervising Administrative Law Judge sent a letter to petitioner's representative granting the representative's request for an adjournment of the hearing scheduled for December 4, 1992. The letter also stated that the Division's representative "asked me to advise you that the witness which you have requested will be made available at the scheduled hearing" (Letter of Supervising Administrative Law Judge dated

December 2, 1992).²

Petitioner was not advised, prior to the hearing, that Mr. Mazen would not appear at the hearing.

OPINION

The Administrative Law Judge determined that the consents signed by petitioner with respect to Sleep Centers Corp. and Fashions in Bedding of Queens, Inc. were binding and that petitioner could protest only those assessments relating to Bed City - Manhattan, Inc., Boulevard Bed City and Westchester Bed City, Inc. The Administrative Law Judge concluded that petitioner was a responsible officer of these corporations because he signed the tax returns of the corporations and received their revenues and was responsible for paying their obligations. The Administrative Law Judge also concluded that petitioner did not establish that he had an agreement with the Division's tax compliance agent, Mr. Mazen, as to the application of the payments made by petitioner. Specifically, the Administrative Law Judge concluded that "[t]he evidence presented herein is not sufficiently clear to show that the Division violated an agreement on the application of payments" (Determination, conclusion of law "J"). The Administrative Law Judge found that evidence offered by the Division (the cancelled checks and petitioner's letter of December 2, 1987) was not consistent with petitioner's testimony.

Although the Administrative Law Judge acknowledged petitioner's argument that Mr. Mazen did not appear at the hearing despite being subpoenaed and despite a representation that he would appear, the Administrative Law Judge did not address this argument. Neither did the Administrative Law Judge address petitioner's request that the Division be ordered to produce all of the documents in its possession relating to these transactions or that all of the documentary evidence offered by the Division at the hearing and all of the testimony relating to

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The material submitted by petitioner on October 13, 1993 has not been considered in making these additional findings of fact because that material was submitted after the record was closed and is not part of the record.

We make the finding of fact with respect to the Supervising Administrative Law Judge's letter of December 2, 1992 by taking official notice of our own records (State Administrative Procedure Act § 306[4]). The fact that a subpoena was issued is based on page 88 of the hearing transcript.

or derived from the documents should be excluded.

On exception, petitioner asserts that the Administrative Law Judge erred in finding: the consents binding, petitioner a responsible officer of the corporations and that petitioner failed to prove his payment agreement with Mr. Mazen. Petitioner also states that the Administrative Law Judge made no finding with respect to the admissibility of the documents offered by the Division, even though the Administrative Law Judge allowed these documents into the record over petitioner's objection because of Mr. Mazen's failure to appear. Petitioner also argues that he was handicapped in his ability to prove the existence of the agreement with Mr. Mazen by Mr. Mazen's failure to appear. Finally, petitioner contends that even if he is liable for the taxes of the corporation, there is no authority to hold a corporate officer liable for interest and penalty on the tax due from the corporation.

In response, the Division argues that the documents were admissible, under the authority of Matter of Mira Oil Co. v. Chu (114 AD2d 619, 494 NYS2d 458, appeal dismissed 67 NY2d 756, 500 NYS2d 1027), without the testimony of Mr. Mazen. With respect to the subpoena, the Division states it "does not dispute the fact that a taxpayer is sometimes compelled to subpoena a Division employee [footnote omitted] and concedes that, at hearing, Petitioner established that such a subpoena had in fact been issued. (Tr: 88-89) However, most of the discussion regarding the subpoena and its potential effect upon the proceeding was conducted off the record" (Division's letter in opposition, p. 3). The Division claims, that in the off-the-record discussion, the Administrative Law Judge offered petitioner the opportunity to continue the hearing to give petitioner the opportunity to either compel the attendance of Mr. Mazen or to arrange for his deposition. The Division contends that petitioner decided not to pursue this course and that this is evidenced by his representative's statement at the close of the hearing agreeing to close the record. The Division states that "[a]lthough petitioner had a right to pursue enforcement of the subpoena and was, in fact, offered a continuation by the ALJ to do so, he decided for reasons of his own to forego that right and close the hearing" (Division's letter in opposition, p. 4).

Petitioner responds that Mira Oil does not address the refusal of a subpoenaed employee to appear at a hearing. In addition, petitioner contends that he could not afford the legal proceedings necessary to enforce the subpoena and "it is likely that the Division employee knew of Petitioner's financial condition and relied on it in the expectation that he would be unable to afford the additional expense of enforcement of the subpoena" (Petitioner's letter in support, p. 3).

We note the following important points with respect to this case. First, the Division acknowledges that Mr. Mazen was subpoenaed to appear at the hearing. Second, it is undisputed that Mr. Mazen was a Division employee who was personally involved and had personal knowledge of the transactions at issue. Third, the purported discussion about a continuance to seek enforcement of the subpoena is not in the record. Fourth, the Division has offered no explanation or excuse for its employee's failure to appear. Fifth, based on information supplied by the Division, the Supervising Administrative Law Judge advised petitioner that Mr. Mazen would be at the adjourned hearing. Finally, there is no evidence in the record that petitioner was ever advised prior to the hearing that Mr. Mazen would not be present. If petitioner had at least been so advised, he could have sought an adjournment of the hearing to seek judicial enforcement of the subpoena. As it was, the "remedy" of judicial enforcement of the subpoena would have required a continued hearing and a second attendance by petitioner and his representative in this proceeding.

We have the responsibility "for providing the public with a just system of resolving conflicts" with the Division (Tax Law § 2000). A necessary element of such a system is that petitioners are able to obtain the testimony of the Division employees who participated in generating the assessment, e.g., the auditor who performed the audit or, as here, the tax compliance agent who was involved in applying tax payments. Obviously, the taxpayers must have access to this testimony, or the burden to prove the assessment erroneous may be insurmountable. We think it is equally obvious that a system where the taxpayer's access to such testimony is unduly burdensome is not a just system.

In the face of our statutory responsibility, we cannot countenance the totally unexplained failure of the Division's employee to appear, or at least to give notice that he would not appear, in response to the subpoena. The circumstances of this case are exacerbated by the fact that the Division affirmatively misled petitioner by advising him, through the Supervising Administrative Law Judge, that Mr. Mazen would be present at the adjourned hearing.

Our power to respond to the Division's conduct in this case is limited. We do not have the power to compel Mr. Mazen to appear at a hearing on remand. Even if we did have such power, petitioner would be put to the additional expense of attending a second hearing and, thus, the "remedy" would not compensate for the harm done.

Among the powers we do have is the power of de novo review over the Administrative Law Judge's determination (Matter of American Express Co. v. Tax Appeals Tribunal, 190 AD2d 104, 597 NYS2d 485, lv denied 82 NY2d 663, 610 NYS2d 151; 20 NYCRR 3000). We can use this power to overturn an Administrative Law Judge's evaluation of credibility where the record warrants it (see, Matter of Stevens v. Axelrod, 162 AD2d 1025, 557 NYS2d 809).

In this case, we exercise these powers to reevaluate the testimony of petitioner with respect to the payment agreement with the Division. In our evaluation, we draw the strongest possible negative inferences from Mr. Mazen's unexplained failure to appear. Therefore, we weigh the evidence in the record most strongly against the Division (see, Noce v. Kaufman, 2 NY2d 347, 161 NYS2d 1, Milio v. Railway Motor Trucking Co., 257 App Div 640, 15 NYS2d 73) and conclude that Mr. Mazen did not appear because he could not have truthfully contradicted the evidence offered by petitioner (see, Laffin v. Ryan, 4 AD2d 21, 162 NYS2d 730). In our evaluation of the record, we give greater weight to the testimony of petitioner than did the Administrative Law Judge and we give less weight to the documents offered by the Division that appeared to be inconsistent with this testimony. As a result, we conclude that petitioner proved, through his own testimony, that he had an agreement with the Division that payments made after the beginning of 1987 would only be applied to liabilities arising after December 1986.

As the Administrative Law Judge noted, petitioner had the right to direct how the tax payments would be applied (Matter of Myer, Tax Appeals Tribunal, May 17, 1990). Because the Division did not follow this direction, we direct the Division to reapply the payments according to the agreement. Therefore, all payments set forth in finding of fact "15" identified as having been made after January 1, 1987 are to be applied to pay all of the assessments at issue in this proceeding: S891013732L, S891013736L, S891013737L, S891013738L, S891013748L, S891013708L, S891013709L, S891013716L, S891013717L, S891013718L, S891013719L. The payments are to be applied to these assessments as of the dates indicated in finding of fact "15" as the dates of payment. The total of the payments made after January 1, 1987 is \$185,051.11. All of these payment were made prior to October 13, 1989. The total tax, interest and penalty stated on the assessments as of October 13, 1989 is \$157,540.67. Because the amount of the payments made prior to the issuance of the assessments exceeds the total of the assessments, the reapplication of payments by the Division will satisfy all of the assessments at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jeffrey W. Donahue, officer of Bed City - Manhattan, Inc., Boulevard Bed City, Westchester Bed City, Inc., Sleep Centers Corp. and Fashions in Bedding of Queens, Inc. is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Jeffrey W. Donahue, officer of Bed City - Manhattan, Inc., Boulevard Bed City, Westchester Bed City, Inc., Sleep Centers Corp. and Fashions in Bedding of Queens, Inc. is granted; and

4. The Division of Taxation is directed to apply the payments made by petitioner in accordance with the above opinion and to cancel the notices of determination dated October 13, 1989 as a result of these payments.

DATED: Troy, New York
December 8, 1994

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

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