

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LYNDSEY HARRISON, INC.	:	DECISION
	:	DTA No. 812671
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Taxes under Article 22 of the Tax Law	:	
and the New York City Administrative Code for	:	
the Years 1988, 1989 and 1990.	:	

Petitioner Lyndsey Harrison, Inc., 2000 Broadway, New York, New York 10023, filed an exception to the determination of the Administrative Law Judge issued on February 1, 1996. Petitioner appeared by Stewart R. Fink, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Joseph W. Pinto, Jr. took no part in the consideration of this decision.

ISSUES

I. Whether petitioner has established that it was not required to file withholding tax returns and remit New York State and New York City withholding taxes on monies paid to its two officers, Lyndsey Harrison and Michael Harrison, for the years 1988, 1989 and 1990.

II. If petitioner was required to collect the tax and did not, whether it has demonstrated that the failure was due to reasonable cause and not willful neglect, thereby providing a basis for abating the penalties assessed pursuant to Tax Law § 685(a) and (b).

III. Whether the Division of Taxation's method of computing the penalty base and resulting penalties assessed was proper.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Lyndsey Harrison, Inc. ("Harrison"), was selected for a tax field audit in January of 1991 and the Division of Taxation ("Division") began the audit in March of 1991, when it sent an appointment letter to Harrison dated March 8, 1991, which requested specific books and records for review, including Federal and State withholding tax returns, supporting schedules, all books, records, worksheets and other documents pertinent to the preparation of Harrison's withholding tax returns. The Division also invited Harrison to submit original withholding forms for withholding periods that were past due.

In response to the appointment letter, petitioner's representative called the Division and informed it that Harrison was not required to file withholding tax returns or pay the tax because the corporation had only one employee who was also a shareholder who filed estimated taxes and received a bonus at the end of the year. He also told the Division that he was going to submit the following: a letter to explain why Harrison was not required to file withholding tax returns; W-2's and 1120's for the years 1988 and 1989; estimated tax returns; and W-4's. Harrison's representative conceded that it did not have payroll records and cancelled checks for Mr. Harrison's bonuses. Ultimately, Harrison did submit copies of forms IT-2103, Reconciliation of Tax Withheld, for the years 1988, 1989 and 1990.

With no further documentation forthcoming, the Division called for a field appointment, and a meeting was set for June 17, 1991. The Division was informed by Harrison's representative that Harrison did not have its cash disbursements journal but did have its cancelled checks and that they would be made available at that time.

At the June 17, 1991 meeting between the Division and Harrison, the Division was provided with Harrison's Federal income tax returns for the fiscal years ended January 31, 1988 and January 31, 1989; Federal W-2 forms (Wage and Tax Statements) issued by Harrison to its

employees for 1988 and 1989; Federal and State income tax returns of petitioner's two officers/employees for 1989; and various check stubs. No information was provided with regard to 1990 even though requested.

In reviewing the information provided by Harrison, the Division learned that Harrison paid wages to both of its officers/employees in 1988, to wit: \$185,000.00 to Michael Harrison and \$134,000.00 to Lyndsey Harrison. In 1989, Harrison paid wages to only Michael Harrison in the sum of \$50,000.00. Harrison withheld and remitted Federal withholding taxes for Lyndsey Harrison in 1988 and for Michael Harrison in 1989. Harrison's representatives said the difference in handling Federal and State withholding taxes was because Michael Harrison was exempt from New York withholding taxes. No explanation was given for Harrison's failure to file returns or remit withholding taxes to New York on behalf of Lyndsey Harrison while doing so for Federal withholding taxes.

Given Harrison's claim that Michael Harrison was exempt from withholding taxes, the Division requested copies of the Federal W-4 forms (Withholding Tax Allowance Certificates) and the New York State IT-2104 forms (Employee's Withholding Allowance Certificate) for both employees, so that the Division could see how many allowances/exemptions the officers were claiming for Federal and State withholding tax purposes.

The Division also inquired as to when the wages were paid to the employees during the years in issue, but the representative for Harrison said that no checks had been issued in payment of said wages and that only journal entries had been made. However, when the Division asked to see these entries, it was informed that they were not available. The Division was never shown documentation which proved when the W-2 wages were paid to the employees/officers in 1988 and 1989.

In a second meeting with Harrison, the Division received the Federal income tax returns for 1988, 1989 and 1990 for Harrison, copies of W-2's for 1988 and 1989, W-3's for 1988 and 1989; and forms 941 (Employer's Quarterly Federal Tax Return) for 1988 and 1989. Once again, the Division was informed by the representative that the officers/employees were exempt

from withholding taxes for New York State and City. The Division requested W-4's and IT-2104's for the employees but was not provided with any documentation. Further, the auditor's log stated that petitioner's representative told the Division that IT-2104's had never been transmitted to the Division for approval for either of the employees, a fact later contradicted in the affidavit of Lyndsey Harrison.

Without the requested documentation, the Division was not able to conclude the audit, even after a second visit to the representative's office.

By letter dated July 25, 1991, the Division requested additional information pertaining to the withholding tax issue, sending copies of the letter to both the representative and the taxpayer. With no response to this request forthcoming by September 1991, the auditor calculated the deficiencies for the years 1988 and 1989 and prepared the statement of withholding tax audit changes. The Division mailed the proposed statements of withholding tax audit changes to the taxpayer and its representative on the same day it received information with regard to the year 1990. The statements of proposed audit adjustment for the years 1988 and 1989 were based upon the materials submitted by petitioner and assessed penalties pursuant to Tax Law § 685(a)(1) and (b) for both the City and State of New York, and were computed using filing status "single, one" exemption and applying the withholding tax tables in the absence of any other information provided by petitioner which would have been apparent from W-4's or IT-2104's for its officers and employees. The status was based on standard audit procedures and the Federal procedures followed when no information concerning withholding is filed by the taxpayer.

On September 17, 1991, the Division received Forms 941, for the first, second and third quarters of 1990, two IT-2104's and Forms K-1 for 1988. Petitioner's representative was contacted and advised to send in W-2's, individual returns and the missing Form 941 for the last quarter of 1990.

The two IT-2104's for 1988 were simply marked "exempt" without any calculation of withholding allowances or entry of a number where requested on the form. It was then, in

September of 1991, that the Division first saw any IT-2104's in this matter. Although petitioner's new representative, Mr. Rosenblum in a contradiction of what had previously been told to the Division, said that the forms had been mailed to the Division, he had no proof of said mailing. The Division, after making a search of its records, determined that there was no evidence of receiving the forms.

In an affidavit sworn to September 23, 1993, Lyndsey Harrison, president of Lyndsey Harrison, Inc., stated that she prepared the Employee's Withholding Allowance Certificate, Form IT-2104, for herself and also received one for Michael Harrison, the other employee of the corporation, indicating that the two of them were exempt from New York City and New York State withholding taxes. She stated that "based on the instructions [on the form itself] I concluded that [we] had reasonable basis for filing the exemption certificates, since we expected no New York income tax liability in 1988."

She also stated that the instructions she read on the IT-2104 stated that "you can request that no income taxes be withheld . . . if you expect no tax liability in 1988." In fact, this statement does not appear on the form in this context.

Mrs. Harrison stated in her affidavit that she mailed both certificates by certified mail, return receipt requested, but has since lost all records of the mailing despite a thorough search of her records and belongings. Mrs. Harrison also stated that she believed no further filing of exemption certificates was necessary for subsequent years in accordance with her interpretation of Tax Department regulations.

By letter dated October 11, 1991, the Division requested payroll records, bank statements, canceled checks, W-4's, W-3's and W-2 statements for the year 1990, loan agreement and analysis of the loan agreement and the compensation of officers. The information was provided in December of 1991 and indicated that wages of \$7,500.00 were paid to Michael Harrison in the first quarter of 1990 and no extensions were filed for the corporation, only for Michael Harrison. The Division imposed penalty and additional interest because the representative, Harrison, filed late without a properly executed and filed extension.

In a conversation between Mr. Rosenblum, Harrison's second representative, and the auditor on December 5, 1991, the representative informed the Division that petitioner depended on its accountant, Mr. Fink, for instructions on filing withholding tax returns and believed that the exemption was warranted based on his advice.

The Division analyzed the information provided for the year 1990, and concluded that, as in the previous years, Mr. Harrison had not satisfied the requirements to be considered exempt from New York State and City withholding taxes. On December 17, 1991, the Division issued to petitioner a Statement of Withholding Tax Audit Changes for the year 1990.

Mr. Rosenblum sent the Division a letter dated January 24, 1992, in which he sought an abatement of penalties based upon the Harrisons' reliance upon the advice of their accountant, Stewart Fink, and also their belief that they were exempt from tax based upon the fact that they had a de minimus tax liability for the year 1987 and projected heavy losses for the year 1988. Mr. Rosenblum's letter also asserted that Mr. Fink told the Harrisons that the corporation would not have to withhold taxes from wages if they sent the properly completed IT-2104's to the State, a task Mr. Rosenblum insists was done on January 26, 1988. The letter was never placed in evidence and was only referred to in the auditor's log and in the auditor's testimony at hearing. Mrs. Harrison never mentioned such advice or her reliance on same in her affidavit.

At a conference held with petitioner's representative on February 11, 1992, another basis for reasonable cause was asserted, i.e., that the Harrisons had misinterpreted what their accountant, Mr. Fink, had instructed them to do with regard to the preparation and filing of the withholding tax returns.

The Division issued two Notices of Deficiency to petitioner on April 20, 1992 and four Notices of Deficiency on April 27, 1992. Notice numbers L005534205 and L005534206, issued on April 20, 1992, for the tax period ended June 30, 1990, assessed additional tax, interest and penalty of \$612.16 and 323.32, respectively.

Notice numbers L005543189, L005543190, L005543191 and L005543192, issued on April 27, 1992, assessed interest and penalty as follows:

Notice No. L005543189

Tax Period Ended	Tax Amount Assessed	(+) Interest Amount Assessed	(+) Penalty Amount Assessed	(-) Assessment Payments/ Credits	(=) Current Balance Due
01-15-88	0.00	411.33	925.64	0.00	1,336.97
01-31-88	0.00	400.78	921.80	0.00	1,322.58
02-15-88	0.00	388.62	917.37	0.00	1,305.99
02-29-88	0.00	377.66	913.37	0.00	1,291.03
03-15-88	0.00	363.32	908.15	0.00	1,271.47
03-31-88	0.00	346.19	901.91	0.00	1,248.10
10-15-88	0.00	116.72	596.32	0.00	713.04
10-31-88	0.00	107.05	592.79	0.00	699.84
11-15-88	0.00	97.40	589.28	0.00	686.68
11-30-88	0.00	86.51	585.32	0.00	671.83
12-15-88	0.00	76.96	489.54	0.00	566.50
12-31-88	<u>0.00</u>	<u>50.36</u>	<u>387.55</u>	<u>0.00</u>	<u>437.91</u>
TOTALS	0.00	2,822.90	8,729.04	0.00	11,551.94

Notice No. L005543190

Tax Period Ended	Tax Amount Assessed	(+) Interest Amount Assessed	(+) Penalty Amount Assessed	(-) Assessment Payments/ Credits	(=) Current Balance Due
01-15-88	0.00	201.53	453.52	0.00	655.05
01-31-88	0.00	196.36	451.63	0.00	647.99
02-15-88	0.00	190.40	449.46	0.00	639.86
02-29-88	0.00	185.04	447.51	0.00	632.55
03-15-88	0.00	178.01	444.95	0.00	622.96
03-31-88	0.00	169.61	441.89	0.00	611.50
10-15-88	0.00	55.33	282.66	0.00	337.99
10-31-88	0.00	50.74	280.99	0.00	331.73
11-15-88	0.00	46.17	279.32	0.00	325.49
11-30-88	0.00	41.01	277.44	0.00	318.45
12-15-88	0.00	36.48	232.04	0.00	268.52
12-31-88	<u>0.00</u>	<u>23.87</u>	<u>183.70</u>	<u>0.00</u>	<u>207.57</u>
TOTALS	0.00	1,374.55	4,225.11	0.00	5,599.66

Notice No. 05543191

Tax Period Ended	Tax Amount Assessed	(+) Interest Amount Assessed	(+) Penalty Amount Assessed	(-) Assessment Payments/ Credits	(=) Current Balance Due
01-31-89	0.00	206.11	464.33	0.00	670.44
02-28-89	0.00	193.12	459.06	0.00	652.18
03-31-89	0.00	177.97	452.91	0.00	630.88
10-31-89	0.00	.35	6.44	0.00	6.79
11-30-89	0.00	.27	6.41	0.00	6.68
12-31-89	<u>0.00</u>	<u>.17</u>	<u>6.37</u>	<u>0.00</u>	<u>6.54</u>
TOTALS	0.00	577.99	1,395.52	0.00	1,973.51

Notice No. 005543192

Tax Period Ended	Tax Amount Assessed	(+) Interest Amount Assessed	(+) Penalty Amount Assessed	(-) Assessment Payments/ Credits	(=) Current Balance Due
01-31-89	0.00	96.31	216.98	0.00	313.29
02-28-89	0.00	90.24	214.52	0.00	304.76
03-31-89	0.00	83.17	211.64	0.00	294.81
10-31-89	0.00	.17	3.22	0.00	3.39
11-30-89	0.00	.14	3.21	0.00	3.35
12-31-89	<u>0.00</u>	<u>.09</u>	<u>3.19</u>	<u>0.00</u>	<u>3.28</u>
TOTALS	0.00	270.12	652.76	0.00	922.88

In order to compute the correct penalties owed to the City and State of New York, it was necessary to first calculate the penalty base, or the amount of tax that petitioner should have withheld on the wages paid to its two officers/employees during each filing period. To establish the tax that should have been withheld, the auditor utilized the amounts set forth on petitioners' own 1988, 1989, and 1990 forms 941 (the Federal Employer's Quarterly Tax Return) and the W-2's (Wage and Tax Statement) issued to the employees.

These estimates were then divided in half to determine the amounts to be paid in each of the semi-annual periods ending June 30th and December 31st. The resulting amounts were then used to determine petitioner's filing frequency for purposes of the form IT-2101. From this calculation, it was determined that the withholding tax return filing frequency was semi-monthly, monthly and semi-annually for the years 1988, 1989 and 1990, respectively.

Without any other explanatory documentation provided by petitioner, the Division assumed that the payments stated on the 941's and the W-2's were paid evenly throughout the quarters for which they were reported. The total amount of wages paid in each quarter was divided by the number of filing periods in that quarter yielding the wages paid in the filing period.

Tax was determined by reference to the withholding tax tables in effect for the particular period and utilizing the figure for "single, one exemption" filing status, said to be consistent with standard audit procedure, Federal precedent and mandated by the lack of documentation provided by petitioner.

The exact amounts of penalties and interest assessed to petitioner were calculated by the Division's computer program for Tax Law § 685(a) and (b) penalties on the penalty base amount.

Following the issuance of the notices of deficiency, petitioner filed an application for a conference with the Bureau of Conciliation and Mediation Services. A conference was held on September 15, 1993 and an order was issued on December 3, 1993, which cancelled the tax due for the year 1990 but sustained the penalties for all three years in issue. Therefore, the issues of penalty and interest assessed to petitioner for the years 1988, 1989 and 1990 remain for determination herein.

Petitioner, at hearing, submitted the following tax returns of its employees, Michael and Lyndsey Harrison: 1985 and 1986 U.S. individual income tax returns; two amended U.S. individual income tax returns for the year 1990; and a New York Amended Resident Income Tax Return for 1990.

The 1985 return indicated wages of \$564,336.00, interest of \$70,791.00, taxable dividends of \$18,582.00 and other pensions and annuities of \$2,784.00, a loss from rents, royalties, partnerships, estates or trusts of \$587,742.00, for a total income of \$68,751.00. After itemized deductions, the taxable income was \$0.00. A refund of \$131,954.00 was claimed.

The 1986 return indicated total income of \$1,331,418.00 which included a loss from rents, royalties, partnerships, estates or trusts of \$717,241.00. After itemized deductions, taxable income was claimed to be \$1,237,609.00, tax due was \$598,633.00 and the tax owed was stated to be \$593,531.00.

An amended United States return for 1990, executed on August 18, 1993, indicated a reduction in the amount of tax due from \$126,794.00 to \$109,644.00 due to the elimination of recapture on "Super G" pursuant to a settlement agreement with the Internal Revenue Service. The return requested a refund of \$17,946.00.

A second 1990 United States amended tax return, undated, indicated changes to the 1990 return due to the elimination of recapture on "Yuletide Associates" pursuant to an IRS

settlement agreement. The tax originally due was reduced from \$109,644.00 to \$671.00. This amended United States return sought a refund of \$116,987.00.

The two New York amended returns for 1990 followed the Federal returns and reported the changes as indicated on the Federal returns due to the elimination of the recapture on both "Super G" and "Yuletide Associates" pursuant to settlement agreements with the Internal Revenue Service. The return filed on August 18, 1993 requested a refund of \$7,309.00 and the undated return requested a refund of \$45,042.00.

At hearing, petitioner also submitted worksheets, allegedly from the second page of form IT-2104, which calculated the Harrisons' withholding allowances for the years 1988, 1989 and 1990. The first pages were not attached and the computation sheets indicated that Lyndsey and Michael Harrison were claiming entitlement to 130 withholdings in 1988, 73 in 1989 and 144 in 1990. Since Mr. and Mrs. Harrison did not testify and Mrs. Harrison's affidavit does not state she calculated withholdings, it is not certain who prepared these forms or if they were prepared in conjunction with the IT-2104's which were allegedly prepared by the Harrisons and filed with the corporation and the State.

The 1988 IT-2104's allegedly sent to the New York State Department of Taxation and Finance in Albany, NY, were attached to the Petition. Lyndsey Harrison prepared her own and allegedly signed it on January 26, 1988. It is not known who prepared the form for Michael Harrison because Mrs. Harrison said in her affidavit that she only "received" a form for him, not that she prepared a form for him.

Coincidentally, both forms were completed in the same way. On line "1" of each form, which asks for the number of allowances claimed, both Michael and Lyndsey Harrison stated "Exempt" instead of listing the number of allowances. On line "3" of both forms, which calls for the total number of allowances, both individuals listed "Exempt" instead of a number, even though they allegedly completed the worksheets for the number of withholding allowances on page two of the form, which specifically tells the reader to list the result of the worksheet computation and enter the number on line "1" of the Form 2104.

The 1988 instructions for the form IT-2104 stated the following with regard to

"Exemptions":

"In certain cases, you can request that no income taxes be withheld from your pay by filing Form IT-2104E, Certificate of Exemption From Withholding, with your employer. You can claim this exemption from withholding if you had no New York income tax liability in 1987, you expect none in 1988, and you are over 65 years of age, under 18, or a full-time student under 25. If you are a dependent who is under 18 or a full-time student, you are liable for tax if your income is more than \$2,800."

The Harrisons did not prepare IT-2104E's for any of the years in issue, but maintained that after they prepared the defective IT-2104's they were under no further obligation to file any further forms for subsequent years.

OPINION

In the determination below, the Administrative Law Judge held that petitioner had a duty to withhold tax on the wages it paid to its employees and that it did not fulfill that duty. The evidence in the record led the Administrative Law Judge to conclude that the corporate form was not respected or adhered to with regard to petitioner's obligations to collect and withhold tax based on properly completed withholding allowance certificates. The Administrative Law Judge held that Mrs. Harrison's misreading of the instructions on the form is not a basis for abating penalties assessed to the corporation for failure to file withholding returns.

Next, the Administrative Law Judge held that the computation of the penalty base using a "single one" basis for purposes of determining what amounts should have been withheld was proper in the absence of information necessary to determine the correct amount of exemptions that would have been applicable to the Harrisons.

Last, the Administrative Law Judge refused to abate penalties imposed under Tax Law § 685(a)(1) and (b) because petitioner had not established that its failure to file withholding returns was due to reasonable cause and not willful neglect.

On exception, petitioner asserts its failure to file withholding returns was due to reasonable cause, namely, the Harrisons reasonably believed that there would be no New York State or New York City tax liability because of anticipated partnership losses and large amounts of itemized deductions. Alternatively, petitioner argues that the penalty base should be

recomputed taking into consideration additional withholding allowances based upon large itemized deductions, deductible alimony payments and losses from partnerships. Petitioner also asserts that the penalty base should be recomputed using the dates on which wages were paid that are listed on the federal quarterly withholding returns. Finally, petitioner contends that it acted with ordinary prudence with respect to the non-filing of withholding returns.

In response, the Division asserts that petitioner was required to file withholding returns and remit withholding tax on wages it paid to its employees. The Division contends that neither Michael nor Lyndsey Harrison were exempt from withholding nor were the IT-2104's properly completed and submitted to the Division. The Division then argues that, lacking any substantiation as to when the wages were paid to the Harrisons and lacking properly completed IT-2104's or W-4's, the auditor correctly calculated the penalty base using the single, one exemption assuming wages were paid evenly during the quarters for which they were reported. The Division also contends that the record is devoid of any showing of reasonable cause which would allow for abatement of the penalties.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 671(a)(former [1]) requires, in pertinent part, that:

"[e]very employer maintaining an office or transacting business within this state and making payment of any wages . . . shall deduct and withhold from such wages . . . an amount substantially equivalent to the tax reasonably estimated to be due . . . resulting from the inclusion in the employee's New York adjusted gross income or New York source income of his wages received during such calendar year" (see also, Administrative Code of the City of NY, § 11-1771).

Tax Law § 674 requires an employer subject to Tax Law § 671 to file a withholding tax return and remit withheld tax to the Division.

Tax Law § 676 provides that:

"[i]f an employer fails to deduct and withhold tax as required, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer shall not be relieved from liability for any penalties, interest, or additions to the tax otherwise applicable in

respect to such failure to deduct and withhold" (see also, Administrative Code of the City of NY, § 11-1776).

As previously noted, the Division imposed penalties under Tax Law § 685(a)(1) and (b) for petitioner's failure to withhold tax and file withholding returns. The thrust of petitioner's argument for cancelling the penalties is that the Harrisons reasonably believed that they would not have any New York State or New York City tax liability due to large itemized deductions and large partnership losses. While the Harrisons' expectations concerning their New York State and New York City tax liability may have come to pass, it does not excuse petitioner of its duty to withhold based upon a properly completed Employee's Withholding Allowance Certificate. Here, the IT-2104's completed by the Harrisons were not properly completed. Both Lyndsey and Michael Harrison filled out the form writing the word "Exempt" wherein it called for the number of withholdings calculated on the worksheet.

Petitioner claims that it was entitled to rely on the IT-2104's submitted by the Harrisons. Petitioner further asserts that there is nothing in the regulations that states that an employer can only withhold on a properly completed certificate. We disagree.

20 NYCRR former 160.4(d)(2) provides as follows:

"[i]f an employee has not filed a Federal form W-4, or if an employee wishes to claim withholding exemptions other than those claimed for Federal income tax withholding purposes, the employer must obtain a completed Employee's Withholding Allowance Certificate (form IT-2104) from the employee. Such employee shall be entitled to claim only those withholding exemptions allowable on a properly completed Employee's Withholding Allowance Certificate (form IT-2104)" (20 NYCRR former 160.4[d][2], emphasis added).

Although the language of this regulation does not explicitly state that an employer can only withhold on a properly completed withholding certificate, the regulation does state that an employee can only claim those exemptions that are on a properly completed certificate. Implicit in the language of the regulation is that the withholding certificate must be properly completed. Petitioner's allegation, that it was entitled to withhold based upon the withholding certificates filed by the Harrisons until notification from the Division that the certificate was defective, is a specious one indeed. The regulations bespeak the fact that a withholding certificate is defective

if the number of exemptions claimed on the certificate do not correspond to the number of exemptions that the employee is actually entitled to claim (see, 20 NYCRR former 160.4[d][4][iv]). Here, the certificates were not properly completed. An employer cannot be absolved of liability by claiming to have relied upon withholding certificates that are as deficient as the certificates petitioner claims to have relied upon.

Next, we address whether the penalty base should be recomputed. Petitioner asserts that the penalty base should be recomputed taking into account large itemized deductions, deductible alimony payments and losses from partnerships incurred by the Harrisons. Petitioner argues that the auditor erroneously computed the penalty base using the single one exemption and assuming wages were paid evenly throughout the quarters in which they were reported. Petitioner contends that the IT-2104 worksheets submitted at hearing document the proper amount of withholding allowances that the auditor should have utilized. We reject these assertions.

A thorough review of the record reveals that the information necessary to enable us to recompute the penalty base is lacking. The veracity of the calculations contained on the IT-2104 worksheets submitted by petitioner is questionable. The affidavit of Mrs. Harrison does not make any mention of the alimony payments listed on the worksheets. The amounts listed as estimated federal itemized deductions for each of the respective years are, as stated in petitioner's brief, based on prior years' deductions. The Harrison affidavit merely states that the Harrisons expected no New York State and City tax liability in 1988. There is no mention of the amounts that would have been estimated for each of the years in question if the withholding certificates had been properly filled out. Further, the record contains no documentation to substantiate as to when the wages reported on the federal quarterly withholding returns were paid. Lacking such substantiation, it was proper for the auditor to assume such wages were paid evenly during the quarters in which they were reported. Accordingly, petitioner has not presented any basis which would justify recomputing the penalty base.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lyndsey Harrison, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Lyndsey Harrison, Inc. is denied; and
4. The notices of deficiency issued on April 20, 1992 and April 27, 1992, as modified by the December 3, 1993 conciliation order, are sustained.

DATED: Troy, New York
February 20, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

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