STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
REPUBLIC NEW YORK CORPORATION	:	DECISION DTA No. 814051
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1990 and 1991.	:	

Petitioner Republic New York Corporation, Fifth Avenue at 40th Street, New York, New York 10018-2706, filed an exception to the determination of the Administrative Law Judge issued on January 2, 1997. Petitioner appeared by Danow, McMullan & Panoff, P.C. (Keven Danow, Esq. and William R. McMullan, Esq., of counsel). 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 and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Pinto took no part in the consideration of this decision.

ISSUES ON APPEAL

I. Whether an employer's withholding tax obligation is satisfied when the employer fails to withhold the correct amount of income tax from its employee, but the employee makes timely estimated installment payments greater in amount than the amount of tax required to have been withheld by the employer.

II. If not, whether the period for calculating interest should run until the date the estimated tax payments were made or until the filing of the employee's annual income tax return.

III. Whether it was proper for the Division of Taxation to determine the amount of penalty by utilizing a "penalty base."

FINDINGS OF FACT

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

In July 1993, the Division of Taxation ("Division") assigned an auditor to conduct a withholding tax audit of petitioner, Republic New York Corporation ("Republic"), for the years 1990 through 1992. During the years in issue, Republic was a holding company which held interests in financial institutions. It had about 30 employees which represented about one percent of the consolidated payroll. Republic's employees consisted of administrators, top level executives and a few support staff.

Initially, the auditor determined that Republic was registered for corporation tax and withholding tax. After he obtained this information, the auditor arranged a meeting in order to review Republic's payroll records and Federal returns.

In August 1993, a meeting was held at petitioner's offices. During this meeting, the Division was presented with Republic's payroll records for 1992. However, this information was not sufficient to draw any conclusions with respect to Republic's withholding tax practices because the Division also needed to examine the payroll records of the earlier years under audit.

After the Division received information regarding the earlier two years, it compared the documents for consistency. Through the various statements, documents and Federal returns, the Division verified the amount of withholding tax that should have been remitted. Following the examination of the withholding tax records, the Division concluded that there was sufficient withholding for the year 1992 but that there was inadequate withholding for the years 1990 and 1991. Specifically, the Division found that the Federal form W-4A entitled Employee's Withholding Allowance Certificate submitted by Jeffrey C. Keil, one of petitioner's employees, to petitioner indicated that he was married and that he claimed one exemption. Further, the 1990 and 1991 Federal form W-2 Wage and Tax Statements for Mr. Keil showed earnings of $947,565.13 and $602,528.04, respectively; New York State tax withheld of $15,355.31 and

$16,905.13, respectively; and New York City tax withheld of $7,632.88 and $8,910.54, respectively.

On the basis of the Employee's Withholding Allowance Certificate and the New York State Withholding Tax Tables in effect in 1990 and 1991 (Publication IT-2100), petitioner was required to withhold $73,750.13 and $50,643.35, respectively, in New York State taxes and $39,681.27 and $27,547.11, respectively, in New York City taxes on the wages paid to Mr. Keil. Consequently, the additional tax that should have been withheld from Mr. Keil's wages and remitted to the Division by petitioner in satisfaction of New York State and New York City taxes for 1990 was $58,394.82 and $32,048.39, respectively. Further, the additional tax that should have been withheld from Mr. Keil's wages and remitted to the Division by petitioner in satisfaction of New York State and New York City taxes for 1991 was $33,738.22 and $18,636.57, respectively.

In the course of the audit, Republic's personnel were asked to explain the company's policy regarding the payment of bonuses. In response, the auditor was advised that generally there were several special payments made during the course of the year. The largest payment was usually made after the beginning of the following year. Thus, the 1990 bonus was paid in January 1991, and the 1991 bonus was paid in January 1992. However, the 1992 bonus was paid in 1992.

There is no evidence in the record as to either the date that bonuses were paid to Mr. Keil or what amount of the total compensation paid to Mr. Keil constituted bonuses.

After it determined that petitioner was under withholding, the Division asked petitioner to submit proof that Mr. Keil had filed income tax returns in order to ascertain whether Mr. Keil satisfied the tax deficiency. On the basis of the information provided, the Division determined that no tax was due. The Division also concluded that the failure to withhold was unexplained. Therefore, it prepared notices of deficiency which asserted that interest and a penalty for negligence were due.

In order to determine the amount of penalty and interest asserted to be due to New York State for 1990, the Division began by subtracting the amount of tax required to be withheld during 1990, i.e., $73,750.13, from the amount of tax which was actually withheld of $15,355.31 to determine that there was a deficiency of New York State withholding tax of $58,394.82. Thereafter, the Division then divided the deficiency of withholding tax by the 24 payroll periods in issue to calculate a penalty base in the amount of $2,433.12. The interest and negligence penalty were then determined for each payroll period in issue in 1990 on the calculated penalty base amount. A similar procedure was followed with respect to the calculation of penalties and interest on the remaining notices.

The amount of the negligence penalty was computed using a computer program which required the insertion of the penalty base amount into the program. The computer program used in this case is also used for most withholding tax audits. It might not be used in an instance where the calculation is straightforward.

On the basis of its audit, the Division issued a series of notices of deficiency, dated April 18, 1994, which asserted deficiencies of personal income tax plus penalty and interest from petitioner as follows:

Period Ended	Tax Article	Interest	Penalty	Balance Due
1990	22	$6,425.54	$5,442.45	$11,867.99
1990	30	$3,526.47	$2,986.96	$ 6,513.43
1991	22	$2,942.18	$2,959.31	$ 5,901.49
1991	30	$1,625.22	$1,634.80	$ 3,260.02

In support of its position, the Division submitted an affidavit from Stanley Smiech, an employee of the Division who is responsible for administering various audit programs including the withholding tax audit program. In his affidavit, Mr. Smiech explains that when an employer fails to withhold and remit taxes to New York State or New York City on wages paid to its resident employees, as is required by Article 22 of the Tax Law, it is the Division's policy to calculate interest due on the amount not so withheld and remitted by the employer from the due

date of the withholding tax return to the due date of the personal tax return of the employee which is April 15th of the following year. There are two reasons for the Division's policy:

> "(1) For purposes of determining the statute of limitations on filing claims for refunds or credits, both the Internal Revenue Code [Section 6513(d)] and New York State Tax Law [Section 687(I)] provide that estimated payments are deemed paid on April 15th of the following year. New York Tax Law extends this reasoning in Section 688(b) by further holding that estimated payments are also deemed paid on April 15th in crediting interest on overpayments. As a result, it is the position of the Audit Bureau that since the employee's estimated tax payments are deemed paid on April 15th, the employer's liability is not satisfied until the employee files his return; and
>
> "(2) In order to calculate the interest to any other date would impose a significant administrative burden on the Department and its employees, since separate interest computations would have to be done for each employee depending on the date that the estimated payments were made. In addition, where employees have sources of income other than wages it would be difficult to determine what portion of the estimated payments, if any, would apply to the wages." (Division's Exhibit "I")

Mr. Smiech's affidavit provides an example which assumes:

> "(1) a quarter monthly Withholding Tax return filing status of the employer;
>
> (2) employee gross wages subject to New York State Withholding Tax in the amount of $81,250, paid evenly each week in the amount of $1,562.50;
>
> (3) employee filing status of single, with one exemption; and
>
> (4) the dates and amounts of estimated tax payments by the employee." (Division's Exhibit "I")

According to Mr. Smiech, the example annexed to his affidavit, which calculates interest from the due date of the return to the date of the employee's estimated tax payment, shows that 52 separate calculations would be required in order to calculate the interest due for one employee, for one year, for one jurisdiction (New York State). In practice, the number of calculations would be multiplied by the number of employees, and separate calculations would have to be performed for each individual jurisdiction (for example, New York State, New York City, Yonkers) for each employee for each year involved. Moreover, if an employee received a different amount of wages each week, the Division would have to consult the withholding tax

tables for each payroll period in order to calculate the amount of tax due on the wages actually received for that payroll period.

On the basis of the foregoing, Mr. Smiech submits that in order to assess an employer of 20 employees for a 4-year period for three jurisdictions, the Division would have to perform 52 calculations for each employee, for each of the 4 years, for each of the 3 jurisdictions. Consequently, there would be 240 different assessments issued to the employer.

According to Mr. Smiech, the foregoing assessment procedure would place an unreasonable burden on the time and resources of the Division personnel. Further, on the basis of his review of the audit file on this matter, it is Mr. Smiech's position that the calculation of interest in this matter is in accordance with standard Audit Division policy, and that this policy is supported by the Tax Law and the foregoing administrative concerns.

Petitioner, by a vice-president, and the Commissioner of Taxation and Finance, by a representative, executed a document wherein the parties agreed that the amount of withholding taxes due from Republic, for the period January 1, 1990 through December 31, 1990, may be determined or assessed at any time on or before April 15, 1995. Petitioner's vice-president signed the document on October 28, 1993, and the Commissioner's representative signed the document on November 9, 1993. The document was validated on November 9, 1993.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge addressed petitioner's argument that all of the assessments for the period January 15, 1990 through October 31, 1990 were time barred. The Administrative Law Judge rejected petitioner's argument that the statute of limitations for that period expired before the consent to extend the statute of limitations for assessment to on or before April 15, 1995 was validated on November 9, 1993. The Administrative Law Judge stated that for any 1990 withholding tax return filed before April 15, 1991, the return would be deemed filed on April 15, 1991 and the Division would have three years or until April 15, 1994 within which to assert a deficiency of tax. Therefore, since petitioner signed the consent on October 28, 1993 and the Division validated the consent on

November 9, 1993, it follows that the consent was executed before the expiration of the statute of limitations.

Likewise, the Administrative Law Judge reasoned that the withholding tax returns for 1991 were deemed filed on April 15, 1992. Therefore, the Administrative Law Judge concluded that the Division had three years or until April 15, 1995 within which to assert a deficiency of tax against petitioner. Accordingly, since the notices of deficiency were dated April 18, 1994, the Administrative Law Judge concluded that petitioner had not established a prima facie case that the statute of limitations barred the notices at issue.

Although petitioner requested in its brief that the Division provide proof of mailing, the Administrative Law Judge, citing ***Matter of Anzilotti*** (Tax Appeals Tribunal, February 22, 1996), stated that the issue of mailing was not timely raised and the parties are prohibited from introducing additional evidence after the record has been closed. No exception was taken to this portion of the Administrative Law Judge's determination.

In addressing the merits of the case, the Administrative Law Judge concluded, in relevant part, that under Tax Law § 671(a)(former [1]) employers were required to withhold income tax from the wages of their employees.[1] This section provided, in part:

> "Requirement of withholding tax from wages.-(a) General. (1). Every employer maintaining an office or transacting business within this state and making payment of any wages taxable under this article to a resident or nonresident individual shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article resulting from the inclusion in the employee's New York adjusted income or New York source income of his wages received during such calendar year. The method of determining the amount to be withheld shall be prescribed by regulations of the tax commission, with due regard to the New York withholding exemptions of the employee and the sum of any credits allowable against his tax."

[1]Since this case also involves New York City withholding tax, the provisions of the Administrative Code of the City of New York, which are virtually identical to the State statute, are also pertinent (see, Administrative Code §§ 11-1771 - 11-1778).

Petitioner argued that Tax Law former § 671 supported its position that there was no underwithholding because this section required the withholding of an amount reasonably estimated to be due from its wages during the calendar year. According to petitioner, since Mr. Keil was in an "overpayment position" for all of 1990 and 1991, petitioner met the test required by this section.

The Administrative Law Judge concluded that in order to determine the amount to properly withhold from an employee's wages, the Commissioner's regulations required an employer to withhold taxes from an employee's wages based on the statements contained in the employee's filed New York State form IT-2104, Employee's Withholding Allowance Certificate or Federal form W-4 (20 NYCRR former 160.4[d]). On the basis of the information set forth on these forms, an employer may withhold utilizing either the wage bracket table method or the exact calculation method (20 NYCRR former 160.4[a]). The Administrative Law Judge stated that the difficulty with petitioner's interpretation of Tax Law former § 671 is that it did not rely on Mr. Keil's filed withholding allowance certificate and, in the ordinary course, an employer would not have access to an employee's returns or other financial information, i.e., the employer would have no way of knowing whether its employee(s) was making adequate estimated tax payments. Therefore, the Administrative Law Judge rejected petitioner's argument that Tax Law former § 671 supported its position that there was no underwithholding. Rather, on the basis of Tax Law former § 671 and 20 NYCRR former 160.4, the Administrative Law Judge concluded that an employer's obligation to withhold and remit tax is independent from its employee's obligation to remit estimated tax. Furthermore, the Administrative Law Judge concluded, petitioner did not withhold the amount of tax required by 20 NYCRR former 160.4(a) (***citing***, Revenue Ruling 57-12, 1957-1 CB 353 [where Internal Revenue Service concluded that an employer does not have the discretion to withhold less than the requisite amount of tax regardless of whether the employer knows that the employee's tax liability will be less than the amount required to be withheld]) (***see***, Determination, conclusion of law "G").

The Administrative Law Judge also rejected petitioner's argument that the "penalty base" used to compute penalty and interest was defective. The Administrative Law Judge reasoned that if the Division's methodology of computing penalty and interest was erroneous, it was petitioner's burden to demonstrate the nature and amount of the error. However, the Administrative Law Judge pointed out that the record did not include any information concerning the timing or the amount of the bonus paid to Mr. Keil in either 1990 or 1991. Thus, the Administrative Law Judge stated that petitioner did not sustain its burden of proof on this issue.

Next, the Administrative Law Judge addressed the time period for which interest was to be computed. Tax Law § 684(a) provides, in part:

> "If any amount of income tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the rate set by the commissioner of taxation and finance pursuant to section six hundred ninety-seven, or if no rate is set, at the rate of six percent per annum shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted."

Petitioner argued, based on Revenue Ruling 58-577 and Internal Revenue Code § 6601, that interest runs from the period prescribed for the payment of tax by the employer, which it was required to withhold, to the date of payment by the employee or the following April 15 (Petitioner's Brief in Support, p. 12). Petitioner argued that this Federal rule must be followed here.[2] Petitioner argued that since Mr. Keil was in an overpayment position, the payment date must have been earlier than the following April 15.

The Administrative Law Judge concluded that, as an employer, petitioner was required to withhold during each payroll period (Tax Law former § 671). The number of payroll periods was governed by the Commissioner's regulations which required the same payroll periods as that used for Federal income tax

purposes (20 NYCRR former 160.4[c]) (see, Determination, conclusion of law "L").

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[2]Petitioner's Federal conformity argument.

The Administrative Law Judge concluded further that interest runs from the last date prescribed for payment by the employer to the date paid by the employer. He then addressed the question of when the employer's withholding tax must be paid (Tax Law § 684).

The Administrative Law Judge noted that Revenue Ruling 58-577 provided that, under the circumstances presented therein, interest was assessable against an employer who failed to deduct and withhold tax from the wages of an employee even though the employee satisfied his tax liability by filing his annual income tax return and paying the tax due thereon.

> "The Internal Revenue Service further noted that '[w]here the provisions of section 3402(d) apply . . . interest, and where appropriate, penalties, will be assessed against the employer with the periods beginning with the due date or dates for payment of the tax which the employer was required, but failed to withhold, until the following April 15, or any prior date upon which the employee satisfied his individual income tax liability'" (Revenue Ruling 58-577) (Determination, conclusion of law "M").

Thus, the Administrative Law Judge addressed whether the principle of Federal conformity warranted the conclusion that the Division improperly calculated interest until the following April 15.

Tax Law § 676 provides as follows:

> "If 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" (emphasis added).

Internal Revenue Code § 3402(d) is similar to Tax Law § 676 and provides as follows:

> "If the employer, in violation of the provisions of this chapter, fails to deduct and withhold the tax under this chapter, 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 this subsection shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold" (emphasis added).

The Administrative Law Judge noted that Internal Revenue Code § 3402(d), unlike Tax Law § 676, contains no reference to interest due from an employer who fails to withhold. The regulations of the Commissioner of Taxation and Finance also make explicit reference to

interest payable where an employer fails to withhold (20 NYCRR former 165.1). Given this difference between the State and Federal statutes, the Administrative Law Judge concluded that the principle of Federal conformity is not operative with respect to the calculation of interest[3] (***see***, Determination, conclusions of law "M" and "N").

The Administrative Law Judge next concluded that the Division has established that its interpretation of the Tax Law regarding the imposition of interest is valid. Section 687(i) of the Tax Law provides that estimated payments are deemed paid on the 15th day of the fourth month following the close of the taxable year with respect to issues involving refunds or credits. Therefore, the Administrative Law Judge stated, calculating interest to a date prior to April 15th would improperly give petitioner the benefit of the employee's payment before the employee is deemed to have made the payment. The Administrative Law Judge also noted that the Division's interpretation is also consistent with Tax Law § 683(b)(2), which provides that:

> "Return of withholding tax. -- For purposes of this section, if a return of withholding tax for any period ending with or within a calendar year is filed before April fifteenth of the succeeding calendar year, such return shall be deemed to be filed on April fifteenth of such succeeding calendar year."

The Administrative Law Judge agreed with the Division that the calculation of interest to any other date would impose significant administrative burdens.

> "As pointed out by the Division, in those situations where an employer had more than one employee, separate interest calculations would have to be done for each employee since the amount of interest would depend on when the employee made the estimated tax payment. Moreover, where the employee had income from sources other than wages, it would be difficult, if not impossible, to determine what portion of the estimated payment applied to wages. In order to accommodate those situations where an employee did not receive the same amount of wages each week, acceptance of petitioner's argument would require a review of the withholding tax tables for each withholding tax period in order to determine the amount of tax that should have been withheld" (Determination, conclusion of law "O").

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[3]The Administrative Law Judge recognized that this holding is contrary to the general principle that there is Federal conformity in the area of withholding (see, 20 NYCRR 171.1[b]).

The Administrative Law Judge concluded that the Legislature did not contemplate such a cumbersome procedure and that the Division's interpretation possessed the additional benefit of avoiding objectionable consequences (McKinney's Cons Laws of NY, Book 1, Statutes § 141).

With regard to the imposition of penalties, petitioner argued that there is no deficiency within the meaning of Tax Law § 681(g) and, therefore, the assessment of penalties is not supported by the Tax Law. Petitioner also argued that the "penalty base" used to calculate the penalties is defective (Determination, conclusion of law "Q").

The Administrative Law Judge first addressed petitioner's objection to the "penalty base" methodology. The Administrative Law Judge held that the "penalty base" represents the difference in the amount that should have been withheld by petitioner on the wages paid to Mr. Keil and the amount that was actually withheld. The Administrative Law Judge concluded this approach is consistent with the definition of a deficiency set forth in Tax Law § 681(g) and constitutes an appropriate method to calculate interest (***see***, Determination, conclusion of law "P").

The Administrative Law Judge also concluded that Tax Law § 676 expressly contemplates the imposition of penalties in those situations where the employer fails to deduct and withhold the correct amount of tax. The Administrative Law Judge also concluded, contrary to petitioner's argument, that imposition of penalties is supported by sections 685(b)(1) and 681(g) of the Tax Law. Section 685(b)(1) states:

> "[i]f any part of a deficiency is due to negligence or intentional disregard of this article or rules or regulations hereunder (but without intent to defraud), there shall be added to the tax an amount equal to five percent of the deficiency."

The term deficiency, in turn, is defined by Tax Law § 681(g) as follows:

> "[d]eficiency defined.--For purposes of this article, a deficiency means the amount of the tax imposed by this article, less (i) the amount shown as the tax upon the taxpayer's return (whether the return was made or the tax computed by him or by the tax commission), and less (ii) the amounts previously assessed (or collected without assessment) as a deficiency and plus (iii) the amount of any rebates. For the purposes of this definition, the tax imposed by this article and the tax shown on the return shall both be determined without regard to payments on account of estimated tax or the credit for withholding tax;

> and a rebate means so much of an abatement, credit, refund or any other repayment (whether or not erroneous) made on the ground that the amounts entering into the definition of a deficiency showed a balance in favor of the taxpayer" (Determination, conclusion of law "R," emphasis added).

The Administrative Law Judge concluded that petitioner's failure to withhold and remit tax resulted in a deficiency within the meaning of Tax Law § 681(g) and that the definition of the term deficiency is sufficiently broad to include an employer's failure to remit withholding tax.

The Administrative Law Judge noted that petitioner's argument that there was no deficiency of tax is apparently based on its failure to distinguish its own distinct obligation to deduct and withhold the correct amount of personal income tax from Mr. Keil's obligation to remit estimated tax. The Administrative Law Judge concluded that the amount of tax that petitioner was required to withhold and remit is determined by Tax Law former § 671(a) and the Commissioner's regulations "without regard to payments on account of estimated tax" (Tax Law § 681[g]). Therefore, the employee's payments of estimated tax had no bearing on petitioner's duty (***see***, Determination, conclusion of law "S").

The Administrative Law Judge denied the petition of Republic and sustained the subject notices of deficiency.

ARGUMENTS ON APPEAL

Petitioner argues that interest under Internal Revenue Code § 6601 runs from the period prescribed for the payment of tax by the employer to the date of payment by the employee or the following April 15th, whichever is earlier ("the Federal rule"). Petitioner argues that conformity with the Federal rule requires that interest be calculated from the date of underwithholding by the employer to April 15th or to the date of payment by the employee, whichever is earlier. It is submitted that since Mr. Keil overpaid his tax in 1990 and 1991, neither interest nor penalty should be charged.

Petitioner argues that since Mr. Keil was in an overpayment position during 1990 and 1991, Republic's withholding met the test of Tax Law former § 671, which is withholding an

amount reasonably estimated to be due from the wages received during the particular calendar year. Thus, petitioner submits, Tax Law former § 671 supports its position that there was no underwithholding of tax.

The Division counters that the negligence penalties were properly assessed because petitioner failed to properly deduct and withhold tax in accordance with the Tax Law and the regulations. Petitioner, the Division states, did not base the amounts withheld from Mr. Keil's salary on his Employee Withholding Allowance Certificate (NYS form IT-2104 or Federal form W-4A) and did not properly withhold and remit tax on the wages paid to Mr. Keil. Therefore, petitioner failed to do what a reasonable corporation would have done under similar circumstances (Tax Law § 671[a][former (1)]; 20 NYCRR former 160.4[d]). Consequently, the Division argues, it was appropriate for the Division to assert negligence penalties on petitioner.

The Division points out that the only evidence in the record with respect to why penalties should be cancelled consists of a letter which opined that penalties should be cancelled because Mr. Keil was in a prepaid tax position during each of the years in issue and, therefore, there was no tax deficiency upon which to assess negligence penalties and interest against petitioner. The Division argues further that while Mr. Keil made estimated tax payments which satisfied his own personal income tax liabilities, petitioner's argument fails to distinguish between the employer's legal obligation to withhold and remit tax and the employee's separate legal obligation to pay personal income tax. The Division further notes that petitioner had an actual withholding tax deficiency in each filing period during 1990 and 1991.

Petitioner continues to argue that the Division used the incorrect "penalty base." Essentially petitioner's argument is that since Mr. Keil was in an overpayment situation for the subject years, there was no "base" upon which to assert penalties or interest. The Division submits that the "penalty base" used by the auditor in his calculations is the equivalent of the withholding tax that would have been due from petitioner on Mr. Keil's wages if Mr. Keil had not satisfied his personal income tax liabilities. According to the Division, this approach is supported by Tax Law § 681(g). It is also argued that petitioner's failure to distinguish between

its own legal duties to withhold and the separate obligations of employees, amounts to ignorance of the law and does not establish a basis for the abatement of penalties.

OPINION

We affirm the determination of the Administrative Law Judge. Whether, in a given situation, an employer has withheld from an employee's wages "an amount substantially equivalent to the tax reasonably estimated to be due" under Tax Law § 671(a)(former [1]) depends upon the factual statements contained in the employee's filed withholding allowance certificate (i.e., NYS form IT-2104 or Federal form W-4A) (20 NYCRR former 160.4[d]). The employer is required to base its estimate of the amount to be withheld based on the statements contained in those filed forms (***id.***). The amounts withheld by petitioner from Mr. Keil's wages were not "substantially equivalent to the tax reasonably estimated to be due" based on the statements contained in Mr. Keil's withholding allowance certificate. The amounts withheld by petitioner from Mr. Keil's wages bore no relationship to the amount that should have been withheld based on his filed Federal form W-4A. As pointed out by the Administrative Law Judge, the employer's duty to withhold and remit is separate and distinct from the employee's duty to pay tax.

We need not decide herein whether the Division's interest calculation policy was improper since the record contains no evidence of the date(s) of Mr. Keil's estimated tax payment(s) in 1990 and 1991. Further, the record does not support petitioner's contention that the Division has conceded that, during the years at issue, Mr. Keil was always in an "overpayment position." In the absence of evidence to the contrary, the Division's actions were reasonable and in accord with the Tax Law (***see, Matter of Lyndsey Harrison***, Tax Appeals Tribunal, February 20, 1997). Therefore, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Republic New York Corporation is denied;

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

3. The petition of Republic New York Corporation is denied; and

4. The notices of deficiency dated April 18, 1994 are sustained.

DATED: Troy, New York
October 16, 1997

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Donald C. DeWitt
President

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Carroll R. Jenkins
Commissioner