STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SUBURBAN RESTORATION CO., INC.	:	DECISION DTA NO. 816361
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 1991 and 1992.	:	

Petitioner Suburban Restoration Co., Inc., P.O. Box 28, Hawthorne, New Jersey 07507-0028, filed an exception to the determination of the Administrative Law Judge issued on September 30, 1999. Petitioner appeared by Roman Markovic, an employee. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kathleen D. Chase, 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, at petitioner's request, was heard on August 10, 2000 in Troy, New York.

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

ISSUES

I. Whether petitioner has established that the notices of deficiency of withholding tax issued by the Division of Taxation were erroneous.

II. Whether the Division of Taxation should be estopped from asserting a deficiency of withholding tax against petitioner under the circumstances present herein.

III. Whether penalties imposed pursuant to Tax Law § 685(b) should be sustained.

FINDINGS OF FACT

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

Petitioner, Suburban Restoration Co., Inc., was incorporated in New Jersey in 1977. Petitioner is in the construction business. Its activities include roofing, masonry, asbestos removal, insulation, fireproofing and waterproofing. Petitioner's customers are mostly governments and other public entities. Petitioner began doing business in New York State in 1978 and continued to conduct business in New York State throughout the period at issue herein. Petitioner also does business in New Jersey, Pennsylvania, Connecticut, and Massachusetts. During the years at issue petitioner did a significant amount of business in both New York and New Jersey.

On or about March 3, 1993, the Metropolitan District Office of the Division of Taxation ("Division") received a letter dated March 1, 1993 from John R. Peek, Director, Construction Administration, New York City Health and Hospitals Corporation ("NYCHHC") ("the NYCHHC letter"). Petitioner was a contractor for NYCHHC. The NYCHHC letter indicated that in its efforts to "enforce the Labor Law of the State of New York" NYCHHC had received copies of petitioner's Form WRS-2 (Employers Quarterly Report of Wages Paid to Each Employee) for the 4th Quarter of 1991 and Form WT-4-B (Quarterly Combined Withholding and Wage Reporting Return) for the 1st Quarter of 1992. The letter further indicated that NYCHHC

had compared these withholding tax reports with payroll reports for the same period which had been submitted to NYCHHC by petitioner and that this comparison showed four individuals listed on the payroll reports who were not listed on the WRS-2 and WT-4-B reports. The letter stated that the individuals listed on the WRS-2 and WT-4-B reports all had New York addresses while the four individuals listed on the payroll reports but not on the withholding tax reports all had New Jersey addresses. The letter listed the four individuals along with their addresses, social security numbers (which are not included in this determination), and gross wages as reported on the payroll reports as follows:

Individual	***Gross Wages***	
	4th Qtr. 1991	***1st Qtr. 1992***
Roman Markovic 47 Mandon Terrace Hawthorne, NJ 07506	$11,369.18	$ 2,389.04
Lazur Taddensz 1050 Sanford Avenue Irvington, NJ 07111	$12,376.53	$ 9,273.42
Luis Gonzales 326 Roosevelt Avenue Lydhurst, NJ 07071	$ 6,592.48	$15,346.92
Julian Hryniewicki 239 Munn Avenue, Apt. 44 Irvington, NJ 07111	$ 4,741.42	$ 4,535.01

The Division's Metropolitan Office subsequently sent a letter to petitioner dated April 5, 1993 advising petitioner that its payroll withholding tax returns for the years 1990, 1991 and 1992 had been selected for audit and requesting that petitioner telephone the Metropolitan District Office within ten days to make an appointment to begin the audit. The letter further requested that petitioner make the following records available for audit:

Payroll records, cash disbursement book, canceled checks, general ledger;

Records of employment, sick pay, tips, annuity and pension payments, bonus payments, contractors;

Dates and amounts of deposits made of income taxes withheld from employees;

Federal Forms 1120 or 1120S, 941, W-2, W-4, 1099;

New York State Forms WRS-2, IT-2104, IT-2104.1, IT-2104-E, IT-2101, IT-2103;

Results of any Federal audit.

In response to this request, petitioner telephoned the Division's Metropolitan Office on April 19, 1993 to speak with Samuel Thomas, the auditor who had signed the letter and who had been assigned to do the audit. Mr. Thomas was unavailable and petitioner was advised to forward any questions to Mr. Thomas in writing. Petitioner telephoned the Division again on April 21, 1993 and spoke with Mr. Thomas.

Petitioner sent a letter addressed to the Division's Taxpayer Assistance Bureau, "Complaints Department" dated April 21, 1993. In that letter, petitioner, by its employee, Colette Markovic, expressed its opinion that the Division's audit letter was a "strange request" because petitioner was a New Jersey corporation. Petitioner further requested that the Division's Albany office conduct the audit because, as indicated by Mr. Thomas, the audit had originated in Albany. Petitioner also insisted that the audit be conducted in New Jersey. Petitioner "refus[ed] the audit as stated in the [April 5, 1993] letter" unless these conditions were met.

By letter dated May 25, 1993 the Division's District Office Audit Bureau in Albany responded to petitioner's letter of April 21. This letter advised petitioner that the audit would be

conducted by the Metropolitan District Office and that the audit would be conducted at petitioner's place of business in Fairlawn, New Jersey. This letter also advised petitioner to contact the Income Tax Section Head of the Metropolitan District Office, Mr. Allen Brown, if petitioner had any questions regarding the audit.

By letter dated June 17, 1993, petitioner responded to the Division's May 25 letter. Petitioner's letter stated that "[b]ecause your [the Division's] Metropolitan District Office had received a complaint from the NYC Health and Hospitals Corporation and that [sic] the complaint caused the initiation of [the] audit," petitioner's tax returns were not fairly or randomly chosen. The letter stated that the Metropolitan District Office asserted "several" times that the audit was randomly chosen. The letter further stated that the Division could contact petitioner to schedule the audit, provided that the Division would confirm that the audit would be fair and confidential. The letter closed by stating that petitioner "WILL NOT CONTACT MR. ALLEN BROWN, THE INCOME TAX SECTION HEAD OF YOUR METROPOLITAN DISTRICT OFFICE, AT ANYTIME." (Emphasis in original.)

The June 17, 1993 letter also referred directly to the letter to the Division from the NYCHHC[1] as follows:

> My [petitioner's] corporate lawyer has in her position [sic] a letter in which the NYC Health and Hospitals Corporation's Director of the Construction Administration [sic] states that he had "referred" some tax information he had mandated from us to the "State Department of Taxation and Finance" and had asked for a "verification" and/or "audit."

[1] Petitioner obtained a copy of the NYCHHC letter as a result of a Freedom of Information Act request.

The Division's Income Tax Audit Bureau responded to petitioner by letter dated June 23, 1993. This letter advised petitioner of the Division's policy that audits are generally assigned to the district office within the geographic area of the taxpayer, and that the audit of petitioner would remain with the Division's Metropolitan Office. The letter further advised petitioner that withholding tax audits may originate from many sources, including referrals, and further noted the rules of confidentiality under the Tax Law.

The Division's Metropolitan Office sent a second audit appointment letter to petitioner on September 27, 1993. This letter was identical in content to the previous appointment letter sent to petitioner (***see***, above). Additionally, this letter provided: "If we will not hear from you within 10 days we will close the case based on the available information in our file."

Petitioner produced no documentation in response to the Division's requests for records with respect to petitioner's 1990, 1991 and 1992 withholding tax returns.

The Division subsequently issued a Statement of Withholding Tax Audit Changes dated February 17, 1994, which asserted New York State and New York City withholding tax deficiencies for the year 1990. The Division computed these deficiencies by totaling "subcontracting" and "professional and legal" expenses as claimed on petitioner's 1990 Federal income tax return and computing tax due on that total as if it all had been paid as wages.

Petitioner responded to the Statement of Withholding Tax Audit Changes by letter dated March 1, 1994. In this letter petitioner recounted its prior discussions with the Division regarding the origin of the audit. The letter stated petitioner's understanding, purportedly based on conversations with Division employees, that if the audit was initiated by "a complaint" it must be conducted by the Division's Albany Office "in order to eliminate any prejudice." The letter

further stated that because its audit had been initiated by "a complaint," in order for petitioner to get "a fair audit," it must be conducted by the Albany office.

On March 28, 1994, the Division issued two notices of deficiency to petitioner which asserted additional 1990 New York State and New York City withholding tax due. The Division issued the notices at this time because the period of limitations for assessment of 1990 withholding tax was to expire on April 15, 1994. These tax deficiencies were identical to that asserted in the February 17, 1994 statement of audit changes. Petitioner filed two petitions with the Division of Tax Appeals in protest of these notices (DTA No.'s 812947 and 812948). A consolidated hearing was held on April 4, 1995 before an administrative law judge. At the hearing, the Division's representative stated that the issue was "whether or not the petitioner corporation can establish that it does not owe additional withholding tax to New York State and New York City for the 1990 tax year." Following the hearing, and pursuant to the direction of the administrative law judge and the Division's representative, petitioner submitted additional information, including checks and invoices, and the Division of Taxation canceled the 1990 withholding tax deficiencies.

By letters dated April 29, 1994, May 27, 1994 and July 22, 1994, the Division advised petitioner both directly and through its accountant that its withholding tax returns for the years 1991 through 1994 had been selected for audit. Like the letters previously issued to petitioner in connection with the 1990 audit (***see***, Findings of Fact "3" and "10"), these letters requested that petitioner telephone the Metropolitan District Office within ten days to make an appointment to begin the audit and also requested that petitioner make records available for audit. The list of

records requested in these letters was identical to the records requested in the April 5, 1993 letter (***see***, above).

Petitioner did not respond to the Division's letters. The Division therefore determined petitioner's withholding tax liability for the years 1991 and 1992 using petitioner's filed corporation franchise tax return for the year 1992 (Form CT-3). Specifically, the Division added "cost of labor" of $212,880.00 and "sub-contract" costs of $33,307.00 as reported on Schedule A of petitioner's 1992 Federal income tax return (Form 1120S), which was attached to petitioner's CT-3, to determine the total amount of wages, $246,187.00, paid during the year. The Division assumed that all such wages were subject to New York State and City withholding and determined withholding tax due on these wages for 1992 as if they had been earned by one married employee claiming two exemptions. Calculated in this manner, petitioner's 1992 New York State withholding tax liability totaled $19,997.00. From this total, the Division subtracted withholding tax paid by petitioner for 1992, $5,496.00, to reach total State withholding tax due of $14,500.54, and then divided this difference by 12 to reach additional New York State withholding tax due per month for 1992 of approximately $1,208.00. The Division performed a similar set of calculations to determine petitioner's 1992 New York City withholding tax liability. Specifically, the Division determined additional 1992 New York City withholding tax liability of $1,107.84, or approximately $92.00 per month.

The Division also used petitioner's 1992 total wages subject to withholding, determined as noted above, to determine petitioner's 1991 withholding tax liability. Although petitioner had filed its 1991 New York corporation franchise tax return before the audit, this return was unavailable to the Division's auditor at the time of the audit. The Division therefore used the

wages subject to withholding as determined for 1992, i.e., $246,187.00, to calculate petitioner's 1991 liability. The Division used the same method of calculation for 1991 as it used for 1992. Such calculations resulted in a State withholding tax liability of $8,780.85, or approximately $732.00 per month, and a City withholding tax liability of $1,107.84, or approximately $92.00 per month. The reason for the difference in the amount of the State withholding tax assessments is that the tax rates, as well as the amounts withheld and remitted by petitioner, differed in the two years at issue.

The Division advised petitioner of its determinations of petitioner's 1991 and 1992 withholding tax liability by the issuance of statements of withholding tax audit changes dated March 18, 1995. Under the heading "Remarks" the statements provided: "Since you did not respond to our letters and allow us to do the withholding tax audit, we considered the cost of labor and sub contract - other cost to be salaries paid to employees." These statements also advised petitioner of the Division's assertion of penalty pursuant to Tax Law § 685(b) and interest with respect to the withholding tax liabilities. Petitioner did not respond to these statements.

The Division's audit report completed in connection with the 1991 and 1992 withholding tax audit of petitioner states that the audit issue was "[w]hether taxpayer reported and withheld income tax from salaries and wages paid to employees and/or officers during 1991 and 1992." The audit report also states that in 1990, petitioner was previously audited "for the same issue."

On March 31, 1995, the Division issued to petitioner eight notices of deficiency which, together, asserted 1992 New York State withholding tax due of $14,500.54, plus penalty and interest, and 1992 New York City withholding tax due of $1,107.84, plus penalty and interest.

On April 3, 1995, the Division issued to petitioner two notices of deficiency which asserted 1991 New York State withholding tax liability of $8,780.85, plus penalty and interest, and 1991 New York City withholding tax liability of $1,107.84, plus penalty and interest, respectively. The period of limitations for assessment of withholding tax against petitioner for 1991 was to expire on April 15, 1995.

The Division subsequently filed its answer in this matter dated April 23, 1998. A covering letter accompanying the answer states, in part:

> [A]n explanation regarding the withholding tax assessments issued for the 1991 and 1992 tax years is necessary. While it may appear that these assessments were issued on the same basis as petitioner's 1990 withholding tax assessments, which were canceled by the Division following a hearing before Administrative Law Judge Thomas C. Sacca and the submission of additional information by the petitioner, such a statement is not entirely accurate.
>
> During 1993, the Division obtained information that the petitioner had transacted business in New York during the 1991 and 1992 tax years, but had not properly withheld and remitted taxes to New York State/New York City for wages paid to its *nonresident* employees/officers who performed such work in New York. For example, the WT-4-B filed by the petitioner for the 1st quarter of 1992 listed only four employees as receiving taxable New York wages . . . . All of these employees were New York residents. However, the petitioner also paid wages to nonresidents Roman Markovic, Lazur Taddensz, Luis Gonzales and Julian Hryniewicki for work performed in New York State/New York City during this period. (Emphasis in original.)

Representatives of the Division met with representatives of petitioner on October 22, 1998. This meeting was scheduled by the Division for the purpose of explaining the basis of the 1991 and 1992 withholding tax assessments and to review any documentation that petitioner wished to provide with respect to its withholding tax practices for 1991 and 1992 which might justify

making an adjustment to the assessments. Petitioner was represented at the October 22, 1998 meeting by its former authorized representative (an attorney), its bookkeeper, Colette Markovic, and her son, Roman Markovic. The Division was represented by Mr. Alan DeConno, Tax Auditor II and Ms. Laura Witkowski, Senior Attorney.

In an effort to refute the Division's assertion that its subcontracting costs constituted wages subject to withholding, petitioner submitted at the meeting copies of the front and back of 21 cancelled checks, totaling $44,064.04. Petitioner claimed that these checks represented its subcontractor costs for the 1991 tax year. Petitioner also submitted copies of the front and back of 15 cancelled checks, totaling $20,979.75. Petitioner claimed that these checks represented its subcontractor costs for the tax year 1992. Petitioner did not submit any invoices or journal entries to substantiate that the checks represented payments to subcontractors. The amount of checks submitted for the 1992 tax year was $12,327.25 less than the amount of subcontracting expenses claimed on petitioner's 1992 Federal income tax return. The Division could not perform a similar comparison with respect to petitioner's 1991 claimed subcontracting expenses because petitioner did not provide the Division with a copy of its 1991 Federal return.

The parties also discussed the question of whether petitioner had properly withheld tax from its New Jersey resident employees. Through the affidavit of Mr. DeConno,[2] the Division asserts that petitioner made statements essentially conceding that, based on the advice of its former accountant, it had withheld based on residency rather than on where the services were performed. Petitioner disputes that any such statements were made.

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[2] Mr. DeConno was not present at the hearing and did not testify.

Following the October 22 meeting, the Division determined that a recomputation of petitioner's withholding tax liabilities for the 1991 and 1992 tax years was warranted. This recomputation took into account all of the matters discussed at the meeting and reduced petitioner's liability for both years. Rather than using the sum of labor and subcontracting costs as reported on petitioner's 1992 Federal income tax return as the basis for the assessments, the Division used wages allocated to New York State as reported on petitioner's 1991 and 1992 corporation franchise tax returns (Form CT-3).[3] Such reported wage amounts were $175,032.00 for 1991 (Schedule B, Part I, line 71) and $106,569.00 for 1992 (Schedule A, Part III, line 151). The Division concluded that 50% of such reported wage amounts were attributable to the four nonresident employees listed in the March 1, 1993 NYCHHC letter. Based on the letter, the Division took the position that these four employees performed work in New York State and City and that petitioner had not deducted or remitted withholding tax with respect to the wages of these employees. The Division settled on this 50% figure given the verbal description of the job duties of the four nonresident employees as provided by petitioner at the meeting and the absence of documentation to show that petitioner's withholding tax returns as filed were correct. The Division thus determined that petitioner improperly failed to withhold and remit tax on wages totaling $87,516.00 for 1991 and $53,284.50 for 1992. In the absence of any W-4 or IT 2104.1 forms to determine the appropriate withholding tax rates for the four nonresident employees, the Division calculated total additional New York State and New York City withholding tax due on

[3] For purposes of computing petitioner's business allocation percentage, petitioner's 1991 CT-3 reports a New York State receipts factor of 50.2% and a New York State payroll factor of 61.3%. The receipts factor is the ratio of New York State business receipts to total business receipts. The payroll factor is the ratio of New York State wages to total wages. Similarly, petitioner's 1992 CT-3 reports a New York State receipts factor of 74.02% and a New York State payroll factor of 50.06%.

the foregoing wage amounts of $4,375.00 for 1991 and $2,658.00 for 1992. The Division also computed interest on the revised assessments, which totaled $3,150.28 for 1991 and $1,585.33 for 1992 as of November 6, 1998. The Division continued to assert penalties on the revised assessments.

Petitioner did not deduct or remit New York State or City withholding tax on the wages of the four nonresident employees listed in the NYCHHC letter.

Petitioner had nonresident employees working in New York during the years at issue.

Petitioner's Form WRS-2 (Employer's Quarterly Report of Wages Paid to Each Employee) for the last quarter of 1991 indicates that petitioner had seven employees receiving taxable New York wages.

Petitioner's Form WT-4-B (Quarterly Combined Withholding and Wage Reporting Return) for the first quarter of 1992 indicates that petitioner had four employees receiving taxable New York wages.

None of the four employees listed on the NYCHHC letter were among the employees listed on petitioner's Form WRS-2 for the last quarter of 1991 or petitioner's Form WT-4-B for the first quarter of 1992.

Other than the WT-4-B and WRS-2 referenced above, the record contains no withholding tax records of petitioner.

The payroll reports referred to in the NYCHHC letter contained no information regarding withholding taxes and NYCHHC was not responsible for tax enforcement.

Petitioner's bookkeeper and representative in this matter, Colette Markovic, prepared petitioner's payroll and determined the amount of tax to be withheld, and the appropriate

jurisdiction, using forms completed by petitioner's employees called "daily cost cards." Petitioner's employees kept track of their daily work hours and locations using these daily cost cards. A copy of a blank daily cost card was entered into the record. This form contains a column with entries under the heading "Job No." and corresponding entries under the column headings "Time" and "Clock Time Record." Petitioner did not offer any daily cost cards for the period at issue into the record.

Roman Markovic was present at the hearing, but did not testify.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by reviewing the statutory language which requires an employer who transacts business in New York and who employs both residents and nonresidents to deduct and withhold tax (***see***, Tax Law § 671[a][1]; New York City Administrative Code §§ 11-1771 and 11-1908) and such employer's liability for withheld taxes under Article 22 (***see***, Tax Law § 675; New York City Administrative Code §§ 11-1775 and 11-1913).

After a careful review of the facts in this case, the Administrative Law Judge found that the Division received third-party information which indicated that petitioner was not withholding tax from the wages of four nonresident employees who performed services in New York City. As stated in Tax Law § 671(a)(1), petitioner was obligated to deduct and withhold taxes from the wages of such employees and, thus, petitioner faced personal liability for its failure to do so. Therefore, the Administrative Law Judge determined that the Division had a factual basis to conclude that petitioner's withholding tax returns were not properly filed and, thus, it was appropriate for the Division to attempt to audit petitioner's withholding tax returns.

The Administrative Law Judge reasoned that since petitioner did not produce any documents on audit, the Division was entitled to conduct an estimate methodology for the years 1991 and 1992 using petitioner's labor and subcontracting costs as reported on its 1992 Federal income tax return. After the audit had concluded and the notices were issued, petitioner did submit copies of canceled checks to show that the subcontracting costs as claimed on its tax returns did not constitute wages subject to New York withholding. After reviewing this documentation, the Division changed its audit method and elected to use 50% of wages allocated to New York for purposes of the computation of the business allocation percentage as reported on petitioner's 1991 and 1992 New York franchise tax returns. The Administrative Law Judge concluded that based upon the facts of this case, this method had a rational basis and was not arbitrarily chosen as argued by petitioner.

Petitioner relied on the testimony of Colette Markovic to meet its burden of proof in this case and the Administrative Law Judge found that Ms. Markovic's testimony was unreliable and unsubstantiated. The Administrative Law Judge explained that Ms. Markovic's statements alone, without any documentation or testimony from the four individuals involved, clearly fell short of proving petitioner's assertions.

The Administrative Law Judge next addressed the issue of estoppel against the Division. Petitioner claimed that it destroyed its daily cost cards for the years 1991 and 1992 in reliance on a settlement it made with the Department in 1995 for the tax year 1990. After reviewing the case law concerning the application of estoppel, the Administrative Law Judge determined that a concealment or false misrepresentation was a necessary element of an estoppel claim and that

petitioner failed to demonstrate any concealment or misrepresentation by the Division. Therefore, the Administrative Law Judge rejected petitioner's claim of estoppel.

Moreover, the Administrative Law Judge denied petitioner's request for an abatement of the penalties imposed herein pursuant to Tax Law § 685(b) since the record contains no evidence in support of abatement.

The last issue addressed by the Administrative Law Judge was whether the Division's assessments with respect to the 1991 tax year had been issued timely. The Administrative Law Judge explained that any withholding tax return for the 1991 tax year was due on or before April 15, 1992. Tax Law § 683(a) imposes a three-year period of limitations for assessment under Article 22. In this case, the three years are measured from April 15, 1992. Therefore, the Administrative Law Judge held that since the Division had until April 15, 1995 to assess petitioner and the date of the assessment was April 3, 1995, the assessment for the 1991 tax year was issued timely. Petitioner did not take an exception with respect to this issue.

ARGUMENTS ON EXCEPTION

Petitioner asserts that there is no evidence in the record that establishes that the four nonresident employees identified in the NYCHHC letter were working in New York City. Additionally, petitioner argues that the testimony by Ms. Markovic clearly proved that the nonresident employees in question did not work in New York City, but rather, worked in New Jersey. Moreover, petitioner continues to maintain that it was reasonable and, in fact, justifiable, for it to have destroyed its daily cost cards for the audit period which evidence, it urges, would have further established that the four nonresident employees worked in New Jersey during the years at issue.

Petitioner continues to argue that the Division should be estopped from using the absence of the daily cost cards for the period as a means of asserting tax liability. Lastly, petitioner continues to state that the evidence does not indicate either negligence or intentional disregard of the Tax Law by petitioner and, thus, petitioner maintains that the imposition of penalties was made in error.

In opposition, the Division states that the Administrative Law Judge properly determined that petitioner failed to sustain its burden of proof. The Division argues that petitioner's attempt to blame its inability to substantiate its claims on the Division flies in the face of logic and such a premise ignores petitioner's repeated refusal to cooperate with the Division during the audit. Moreover, the Division agrees with the conclusion of the Administrative Law Judge that petitioner failed to set forth the required elements necessary to establish an estoppel claim against the Division. Lastly, the Division asserts that petitioner failed to prove that its failure to comply with the Tax Law was not the result of negligence. Therefore, the Division respectfully requests that the determination of the Administrative Law Judge be sustained in its entirety.

OPINION

Section 671(a)(1) of the Tax Law requires every employer maintaining an office or transacting business in the state and making payment of any taxable wages to a resident or non-resident, to deduct and withhold from such wages for each payroll period a tax in an amount substantially equal to the tax reasonably estimated to be due from the employee's New York adjusted gross income or New York source income received during the calendar year.

The main issue in this case involves the four nonresident employees. The Division determined that these employees worked in New York City but petitioner alleges that these

employees worked only in New Jersey. Therefore, it was incumbent upon petitioner to establish that these employees only worked in New Jersey (***see***, Tax Law § 689[e]). Petitioner failed to meet its burden of proof.

The Administrative Law Judge determined that the testimony of petitioner's bookkeeper, Ms. Markovic, was unreliable for several reasons: the absence of any corroborating evidence in the record; the fact that the witness testified solely from memory regarding the four employees' daily activities which took place six years prior to the hearing; the vagueness of Ms. Markovic's testimony concerning Julian Hryniewicki, one of the four nonresident employees; and her uncorroborated claim that Roman Markovic, her son and one of the nonresident employees, was not paid for his work. We have consistently held that it is the Administrative Law Judge who is in the best position to evaluate the credibility of the witnesses who appear at the formal hearing (***see***, ***Matter of Smith & Groh***, Tax Appeals Tribunal, July 23, 1998; ***Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992). Accordingly, we agree with the Administrative Law Judge's assessment of Ms. Markovic's testimony as unreliable and unsubstantiated.

Absent the testimony of its sole witness, petitioner introduced no evidence in support of any of its positions maintained herein. Petitioner continues to make the same arguments it made below. After reviewing the record and the determination of the Administrative Law Judge, we can find no reason to modify his determination in any respect. Since the Administrative Law Judge adequately and correctly dealt with the issues, we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Suburban Restoration Co., Inc. is denied;

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

3. The petition of Suburban Restoration Co., Inc. is denied; and

4. The notices of deficiency, dated March 31, 1995 and April 3, 1995, as modified by the Division of Taxation pursuant to the findings of fact above, are sustained.

DATED: Troy, New York
February 8, 2001

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

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

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner