STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

MARK PHILLIPS, OFFICER OF :
ATI VIDEO ENTERPRISES, INC. DETERMINATION
: DTA NOS. 812455
for Redetermination of a Deficiency or for AND 812456
Refund of New York State and New York City :
Personal Income Taxes under Article 22 of the
Tax Law and the New York City Administrative :
Code for the Year 1988.

In the Matter of the Petition :

of :

DAVID E. SHEIN, OFFICER OF
ATI VIDEO ENTERPRISES, INC. :

for Redetermination of a Deficiency or for :
Refund of New York State and New York City
Personal Income Taxes under Article 22 of the :
Tax Law and the New York City Administrative
Code for the Year 1988. :

Petitioners, Mark Phillips and David E. Shein, by their then representative, Sigmund Balaban & Co., CPA's, 40 Broad Street, New York, New York 10004, filed separate petitions for redetermination of a deficiency or for refund of New York State and City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1988.

Petitioners, by their current representative, Roberts & Holland (Carlton M. Smith, Esq., of counsel), 30 Rockefeller Plaza, New York, New York 10112-0254, brought separate motions dated June 13, 1994 for an order directing the entry of summary determination in favor of petitioners in the above-referenced matter. The Division of Taxation ("Division"), by itsrepresentative, William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel), on June 23, 1994 filed identical cross-motions for summary determination and affirmations in opposition to

the summary determination motions filed by petitioners in each of the above-referenced matters. Thereafter, on June 28, 1994, petitioners filed separate affirmations in opposition to the Division's cross-motions for summary determination.[1]

Upon review of all the papers filed in connection with the motion, cross-motion, and affirmations, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division should be estopped from collecting the Tax Law § 685(g) penalty from each of the petitioners, as officers of ATI Video Enterprises, Inc.

FINDINGS OF FACT

The parties submitted a "First Stipulation of Facts", signed by petitioners' counsel on June 8, 1994 and by counsel for the Division on June 10, 1994. The facts contained therein have been substantially incorporated into the Findings of Fact in this determination.

In support of their motion for summary determination, petitioners submitted an affidavit of their representative, Carlton M. Smith, Esq, along with attached exhibits. Petitioners assert in their notice of motion that:

(1) the relevant facts, as attested to in Mr. Smith's affidavit, have been stipulated; and 2) these facts mandate a determination in favor of petitioners. Specifically, petitioners argue that the tax owed by ATI Enterprises, Inc. has already been paid and the Division is impermissibly attempting to use Tax Law § 685(g) to collect from petitioners part of the corporate interest and penalties owed. Petitioners also urge in their notice of motion that any cross-motion which may be filed by the Division should be denied for, even if it were permissible for the Division to use Tax Law § 685(g) to collect the corporate penalty and interest, the Division is "bound not to do

[1]Because petitioners' motions for summary determination were identical, as were their affirmations in opposition to the Division's cross-motions, and the Division's cross-motions for summary determination were identical, the motions and affirmations filed will hereinafter be referred to in the singular.

so as a result of a prior resolution in this case reached at the conciliation conference level."

Petitioners argue further that while there appears to be no controlling New York authority on the question of whether Tax Law § 685(g) may be used by the Division to collect from responsible officers the interest and penalties owed by the corporation, Federal case law construing IRC § 6672, upon which Tax Law § 685(g) was modeled, has answered that question in the negative. Federal case law, petitioners explain, supports the imposition of an assessment against a responsible officer for a 100 percent penalty for withholding taxes not paid by his corporation (i.e., a penalty equal to the amount of the withholding taxes owed by the corporation), but not for the penalties and interest assessed against the corporation for failure to pay the tax (citing First National Bank in Palm Beach v. U.S., 591 F2d 1143, 1149; Williams v. U.S., 939 F2d 915).

2. Attached to petitioners' notice of motion are the following exhibits: (1) a copy of each petitioner's individual petition, received by the Division of Tax Appeals on December 6, 1993, both of which address petitioners' arguments on the merits (i.e., that the penalty has already been paid by Mr. Jeffrey Franklin;[2] that this payment was made on the basis of an agreement with the conciliation conferee and the tax compliance agent to the effect that, if the payment were made, no further action would be taken with respect to the conciliation orders; that a letter to petitioners' representative from the conciliation conferee confirmed the substance of this agreement; that a delay in payment occurred due to funds not being immediately available; and that since the penalty has been paid, it would be unfair to "single out subject petitioner[s] and assess a withholding tax penalty"); (2) a copy of the conciliation orders (CMS No. 126890 regarding petitioner Mark Phillips and CMS No. 126889 regarding petitioner David E. Shein), both dated September 10, 1993, denying petitioners' requests and sustaining the statutory notices; (3) a copy of a power of attorney for petitioners' former representatives, Mr. Sigmund Balaban, CPA, and Mr. Richard Tannenbaum, CPA; (4) (attached to petitioner Shein's Notice of

[2]Mr. Franklin is one of the three responsible officers to whom penalty assessments were issued in this matter for the corporation's failure to withhold taxes. Because Mr. Franklin paid the entire amount of the assessment issued to him, no actions are currently pending against him.

Motion) a copy of the Notice of Deficiency (Notice No. L-006159302-2) dated August 3, 1992, issued to petitioner David E. Shein for a total amount due of $59,941.00, which advises petitioner Shein that if a response to the notice was not forthcoming by November 16, 1992, the notice would become an assessment subject to collection action; (5) (attached to petitioner Phillips's Notice of Motion) a copy of the Notice and Demand for Payment of Tax Due (Notice No. L-006159303-1), dated November 27, 1992, issued to petitioner Mark Phillips, for a total amount due of $59,941.00,

referencing an "original notice sent" on August 3, 1992 and advising petitioner Phillips that full payment of the total amount due or his disagreement must be received by December 7, 1992 or "legal action to compel payment of the balance due" would be taken; (6) a copy of a July 28, 1993 letter from the conciliation conferee to Mr. Balaban, petitioners' representative, advising petitioners that the conferee was sustaining the notices of deficiency, and containing the following statement:

> "[a]s explained to you at the conference, the Tax Department seeks only to collect in the aggregate a penalty equal to the taxes due by the corporation, but may issue multiple assessments, each of which represents the full penalty due. In this particular case, for example, three individuals were assessed a penalty of $59,941 for a combined penalty of $179,823. The Department seeks only to collect $59,941 and will cease collection activities once such amount is received from any or all the individuals . . .";

(7) copies of three different checks dated September 15, 1993, October 15, 1993 and November 15, 1993, made out to the "Commissioner of Taxation and Finance" from "Jeff Franklin" for a combined total of $59,941.00; (8) a copy of a letter dated November 24, 1993 from Thomas J. English, the Assistant Supervisor of Tax Conferences, to Mr. Balaban, confirming that conciliation orders sustaining the notices were issued to petitioners on September 10, 1993 and informing him of the following:

> "[i]n [the conciliation conferee's] letter of July 28, 1993, he indicated that although the Department [of Taxation and Finance] had issued deficiencies totaling $179,823.00, they only sought to collect $59,941, an amount equal to the withholding tax at issue. This statement was incorrect. Through collection of penalties asserted by the deficiencies, the Department potentially has the right to collect the total amount asserted. The Department's policy, as I understand it, is to

> attempt to collect an amount equal to the tax, penalty and interest due from the corporation but no more than an amount equal to the tax from each individual ($59,941).
>
> "Payments made by Mr. Franklin totaling $59,941.00 have been applied to assessment L006159304 [Mr. Franklin's assessment], and that assessment should be considered paid in full. . . .
>
> * * *
>
> "Please be advised that your client's rights in the matter are now limited to the filing of a petition with the Division of Tax Appeals . . . within 90 days of the date of the Conciliation Order . . . ";

(9) a copy of an August 20, 1993 letter from Mr. Sigmund Balaban to Mr. Charles Belgrave, the tax compliance agent who represented the Division at the conciliation conference, enclosing the three aforementioned checks from Mr. Franklin which covered the entire amount of the withholding tax due ($59,941.00), and confirming several apparent discussions between Mr. Balaban's firm and Mr. Belgrave to the effect that once the amount of the withholding taxes was paid, all collection procedures against petitioners would be terminated; and (10) a copy of the Division's answer to petitioners' petitions, wherein the Division (a) denies that at the conciliation conference the Division's representative and the conciliation conferee informed petitioners that if the withheld tax were paid by any of the taxpayers in the amount of $59,941.00, the assessments against all three taxpayers would be considered satisfied, (b) affirmatively states that although one of the officers of ATI Video remitted the amount of the withholding tax due, the other officers -- namely, the two petitioners herein -- are not relieved of their liability for the section 685(g) penalty, and (c) affirmatively states that petitioners have the burden of proving that the notices are erroneous or improper.

3. In response to petitioners' motion, the Division, on June 23, 1994, filed a combined cross-motion for summary determination and affirmation in opposition to the summary determination motion filed by petitioners. In this cross-motion, the Division states that all the relevant facts have been stipulated and that the facts mandate a determination in favor of the Division.

In response to petitioners' allegations regarding the Division's "impermissible" attempts at collection, the Division stresses that it is legally entitled to collect the full amount of the penalty

from each responsible officer against whom the penalty is asserted, irrespective of the cumulative amount of the penalty.[3] The Division denies that it has ever tried to collect from any of the responsible officers the penalty and interest assessed against and unpaid by the corporation. In answer to petitioners' charge that the Division is "bound not to [collect the corporate penalty and interest] as a result of a prior resolution in this case reached at the conciliation conference level," the Division maintains that "the only 'resolution' of this case which occurred as a result of the conciliation conference is the Order of the Conciliation Conferee, dated September 10, 1993, which sustains the Notice of Deficiency of penalty issued to the petitioner." As far as concerns the conciliation conferee's letter to the representative of Jeffrey A. Franklin (see, footnote "3", supra), wherein the conferee stated that it was explained at the conference that the Division seeks only to collect "in the aggregate a penalty equal to the taxes due by the corporation," the Division insists that the conferee's letter related solely to the conciliation proceeding regarding Mr. Franklin and has "no bearing" on the instant matter. The Division points out in addition that the letter made clear that the Tax Law provides for the imposition of the full penalty against each individual. Further, the Division argues that it sent a letter to Jeffrey Franklin's

representative on November 24, 1993, advising him that the conferee's statement in the July 28, 1993 letter as to the amount the Division intended to collect was incorrect. The Division refutes the notion that petitioners here relied on the July 28, 1993 letter to their detriment, stating that: (1) estoppel is generally not available for use against governmental acts absent a showing of exceptional facts; and (2) petitioners are now in the same position subsequent to the conciliation conference as they were prior to it (i.e., they are responsible officers of ATI Video Enterprises, Inc. who are individually liable and were assessed for penalty pursuant to Tax Law § 685[g]), and, therefore, petitioners have not been prejudiced in any way by the sending of the July 28,

[3]The Division also notes, however, that the policy of the Division in this regard is to collect no more in cumulative penalty than is owed by the corporation in total for tax, penalty and interest.

1993 letter. Finally, the Division asserts that petitioners have not met their individual burdens of proving that the notices issued were erroneous or improper.

4. On June 28, 1994, petitioners filed an affirmation in opposition to the Division's cross-motion for summary determination on the ground that the Division's cross-motion was filed late under 20 NYCRR 3000.5(a)(1) and that there are material issues of fact in dispute concerning what exactly the Division's representative said at the conference. Petitioners claim that an agreement was reached between the Division's representative and petitioners' representatives at the conference to the effect that the payment of $59,941.00 by any or all of the three officers would end the matter, and, that subsequently, $59,941.00 was sent by Jeffrey Franklin to the Division prior to the entry of the conciliation order. Finally, petitioners aver that, regardless of the Division's ordinary audit policy, it should be estopped from further attempts at collection against the officers here on the grounds that the Division's actions (presumably at the conference and/or in the July 28, 1993 letter from the conciliation conferee) "induced petitioner[s] to enter into [an] agreement with [Jeffrey] Franklin [whereby each petitioner would reimburse Mr. Franklin for one-third of the $59,941.00] in reliance on the payment ending the matter."

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c)(1) after issue has been joined. The regulation provides, in pertinent part, that:

> "Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact." (Emphasis added.)

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University Medical Center, 64

NY2d 851, 487 NYS2d 316, 317, on remand 111 AD2d 138, 489 NYS2d 970, citing Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

B. Here, both parties filed motions for summary determination, with each requesting that the motion be decided in its/their favor, and with each stressing that the relevant facts have been stipulated and that there are no material issues of fact in dispute. In their affirmation in opposition to the Division's cross-motion, however, petitioners argue that the Division's cross-motion should be denied for, among others, the reason that there are material issues of fact in dispute. Specifically, petitioners contend that there is a dispute over what was said by the Division's representative, Mr. Belgrave, at the conciliation conference and at other times during the conciliation process. Petitioners claim that: "an agreement was reached between petitioners' representatives and Mr. Belgrave that payment of $59,941 by any or all of the three officers would end the matter" (Affirmation in Opposition to Division's Cross Motion for Summary Determination, p. 2), and that this directly resulted in the payment of $59,941.00 by Jeffrey Franklin to the Division, with petitioners Shein and Phillips contributing one-third each.

Petitioners' argument that this so-called agreement reached at conference is at the center of a dispute, precluding summary determination, is untenable, for a dispute over the substance of a conference discussion cannot be the basis for the denial of a summary determination motion. First, "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney" (Mazzola v. CNA Ins. Co., 145 Misc 2d 896, 548

NYS2d 610, citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR). If in fact an agreement was struck between Mr. Belgrave and petitioners' representatives at the conference, it was not done in open court, nor was it reduced to writing. Secondly, it may be said that a conciliation conference is in the nature of a settlement negotiation, and, as such, discussions at a conciliation conference should "generally be protected by the same public policy of encouraging attempts at settlement" (Crow-Crimmins-Wolff & Munier v. County of Westchester, 126 AD2d 696, 511 NYS2d 117). Because the discussions which allegedly took place between the Division's and petitioners' representatives at conference were akin to settlement negotiations, the substance of those discussions has no relevance here.

In sum, there is no basis for petitioners' argument that the disagreement over what the Division's representative said at the conference is a material fact in dispute which should preclude the granting of the Division's cross-motion for summary determination since, as noted, the substance of interparty discussions at a conference -- as opposed to signed statements made during the conference or the conferee's order -- should be of little import. Therefore, whether or not there is disagreement regarding the substance of a particular discussion is irrelevant.

C. The relevant facts in this case are not in dispute (i.e., the notices were sustained by the conciliation conferee and, after the checks were received from Mr. Franklin, the Division's collection policy was outlined for petitioners in a letter from Thomas J. English, the Assistant Supervisor of Tax Conferences). Any discrepancies regarding the amount the Division sought to collect from petitioners should have been cleared up by the November 24, 1993 letter to petitioners' representative. It is unfortunate that the conciliation conferee made certain misstatements in his July 28, 1993 letter to petitioners' representative regarding the Division's collection policy (i.e., that the Division sought to collect, in the aggregate, only $59,941.00). However, Mr. English's November 24, 1993 letter corrected these statements, explaining that while the Division potentially has the right to collect the amount of the tax owed by the corporation (here, $59,941.00) from each individual officer, the Division's policy is to attempt

to collect in the aggregate only an amount equal to the total of the tax, penalty and interest due from the corporation -- here, $80,000 (see, First Stipulation of Facts at "7") -- without collecting more than the amount of the tax itself from each officer. This letter suffices to apprise petitioners of the Division's policy regarding the collection of assessments and it supersedes any informal "discussions" had at the conciliation conference.

D. Discussion of the Division's stated policy brings me to the central issue of this determination; namely, whether the Division has the right to collect the penalty from each of the petitioners herein (i.e., $59,941.00 each). Clearly, under Tax Law § 685(g), the Division has the right to assess the penalty from each officer. To wit, section 685(g) provides that:

> "Any person required to collect, truthfully account for, and pay over the tax imposed by this article who wilfully fails to collect such tax or truthfully account for and pay over such tax or wilfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over" (emphasis added).

While there is not much by way of New York case law on the subject,[4] the two State Tax Commission cases which directly address the issue at hand: (1) hold that the Division has the right to collect the full amount of the penalty from each responsible officer; and (2) demonstrate that the Division utilizes this theoretical right of collection to collect, in the aggregate from all of the officers, only the total amount of the corporate liability for tax, penalty and interest. In Matter of Miller (State Tax Commission, October 3, 1977), a husband and wife were each held liable for the total amount of the withholding tax due by the corporation of which they were

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[4]The Federal case law construing IRC § 6672 (upon which Tax Law § 685(g) was modeled) discusses the IRS policy of not collecting the section 6672 penalty from more than one officer (see, e.g., United States v. Pomponio, 80-2 US Tax Cas ¶ 9820 [4th Cir] [IRS policy to collect the amount of the tax only once]; Brown v. U.S., 591 F2d 1136, 79-1 US Tax Cas ¶ 9285 [IRS policy not to attempt to exact penalty separately and cumulatively from each responsible person]; Newsome v. U.S., 431 F2d 742, 70-2 US Tax Cas ¶ 9504, rearg denied 70-2 US Tax Cas ¶ 9597; Kelly v. Lethert, 362 F2d 629, 66-2 US Tax Cas ¶ 9509). However, the Federal cases do not refer to the situation we have here; namely, whether the withholding tax penalty can be collected from various officers up to the amount of the tax, penalty and interest owed by the corporation, with no double recovery of the withholding tax itself attempted. Because the Federal case law does not address this issue, it is not clear that the policy of the IRS would not match that of the Division.

both officers. Despite the fact that they jointly paid, over a period of time, the amount listed on one of the assessments (i.e., the amount equal to the withholding tax owed by the corporation), they were held accountable for another equal payment (with each being newly assessed for half of the amount outstanding), in order to cover additional corporate liabilities, including penalty and interest accrued on the corporation's assessment. In Matter of Gruber (State Tax Commission, February 23, 1979 [TSB-H-79(39)-I]), the petitioner was held to

have been properly assessed for the full amount of the withholding tax owed by the corporation of which he was an officer, despite the fact that other officers were similarly assessed. Since the officers assessed had already jointly submitted the total amount of the withholding tax due (i.e., the total amount stated on one of the notices of deficiency), the Division, in accordance with its policy that it would not collect a cumulative amount of section 685(g) penalties greater than the corporate liability (which includes penalties and interest), ultimately agreed to accept a lesser amount from the petitioner in full settlement of the matter, so that the penalties and interest accrued against the corporation would be covered as well. The State Tax Commission upheld this settlement.

The policy statement of the Division, as revealed in Matter of Gruber (supra), is corroborated by the above-noted letter of Thomas J. English. This letter makes it clear that in a section 685(g) case, the Division will only attempt to collect from the officers,[5] in the aggregate, an amount equal to the total of the tax, penalty and interest due from the corporation. The Division's policy is thus a median point between two seemingly contradictory notions, namely: (1) that the section 685(g) assessment is a penalty rather than a tax, and the full penalty can be collected from all responsible officers (but see, U.S. v. Sotelo, 436 US 268, 78-1 US Tax Cas ¶ 9446, rearg denied, 438 US 907; Kelly v. Lethert, supra, [noted that while IRC § 6672 is denominated a "penalty", it is, in substance, a tax and, pursuant to IRC § 6671, it is assessed and

[5]In the case of only one officer being assessed the section 685(g) penalty, the Division would only be able to collect up to the amount of withholding tax owed by the corporation.

collected

as a tax]); and (2) that while government revenues should be protected, "[d]ouble recovery by the government is not necessary to fulfill" this objective (Brown v. U.S., supra [construing IRC § 6672, on which Tax Law § 685(g) was modeled], citing Newsome v. U.S., supra; Monday v. U.S., 421 F2d 1210, 70-1 US Tax Cas ¶ 9205, cert denied 400 US 821, on remand 342 F Supp 1271, 72-2 US Tax Cas ¶ 9723, affd 478 F2d 1404, 73-2 US Tax Cas ¶ 9589; Botta v. Scanlon, 314 F2d 392, 63-1 US Tax Cas ¶ 9352).

Applying this policy to the case at hand, since the corporation owes a total of $80,000.00 and Jeffrey Franklin has already paid the Division $59,941.00, presumably (although the Division never states this in its brief) the Division intends only to collect an aggregate total from both petitioners of approximately $19,000.00. According to the law in New York as construed via the pertinent cases, in order to collect this amount, the Division was within its rights to assess and to attempt to collect from each petitioner the full amount of the withholding tax due.

E. Petitioners' argument that the Division should be estopped from collecting the penalty assessed from each officer fails because petitioners have not demonstrated that they relied to their detriment on the conciliation conferee's July 28, 1993 letter or on the "resolution" struck between their representative and the Division's representative at conference. First, it is not evidence of detrimental reliance to show that petitioners made an arrangement with Mr. Franklin whereby each would contribute a third of the amount assessed against each individually, and Mr. Franklin would then pay off the assessment issued him. Petitioners are in the same position subsequent to the conciliation conference and the receipt of the letter from the conciliation conferee as they were prior to these events (i.e., they are responsible officers of ATI Video Enterprises, Inc. who are individually liable and who were individually assessed for penalty pursuant to Tax Law § 685[g]). Secondly, Mr. English's November 24, 1993 letter was received within the 90-day time period by which petitioners could appeal the conciliation order via filing a petition with the Division of Tax Appeals for a hearing. Thus, petitioners were

correctly informed of the Division's policy in a timely fashion by Mr. English and did in fact file timely petitions with the Division of Tax Appeals for a hearing. Upon reflection, there is no basis for petitioners' assertion that the Division should be estopped from collecting the entire assessment from each officer.

F. Finally, I find unpersuasive petitioners' argument that the Division's cross-motion for summary determination should be denied since the Division did not make the motion within 90 days of the service of a pleading by the adverse party, as required by 20 NYCRR 3000.5(a)(1).[6] New York courts have recognized the rule that time periods imposed on administrative agencies are directory rather than mandatory (see, Heller v. Chu, 111 AD2d 1007, 490 NYS2d 326, lv dismissed 66 NY2d 696, 496 NYS2d 424, lv withdrawn 67 NY2d 648, 499 NYS2d 1033; Geary v. Commissioner of Motor Vehicles of the State of New York, 92 AD2d 38, 459 NYS2d 494, affd 59 NYS2d 950, 466 NYS2d 304). Therefore, in order for petitioners' argument to succeed, petitioners would have to demonstrate that the delay on the part of the Division resulted in substantial prejudice to its position. Petitioners

have offered no evidence whatsoever of such prejudice. Moreover, 20 NYCRR 3000.5(c)(1) provides that where it is apparent that "a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion", thus obviating the need for time restrictions.

G. The Division has carried its burden of proving that there are no material issues of fact in this case . Any disputes that are apparent are over how the law is applied. Consequently, as the proponent of this motion for summary determination, the Division has shown that it is entitled to judgment as a matter of law.

H. Accordingly, the Division's cross-motion for summary determination is granted,

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[6]Petitioners are referring to the fact that the only pleadings filed by them in this case (i.e., the petitions) were both filed on December 6, 1993, and the Division's cross-motion was not filed until June 23, 1994, 10 days after petitioners filed their motion for summary determination, but more than six months after the petitions were filed.

petitioners' motion for summary determination is denied, and petitioners' notices of deficiency, dated August 3, 1992 are sustained.

DATED: Troy, New York
September 1, 1994

/s/ Daniel J. Ranalli
ASSISTANT CHIEF
ADMINISTRATIVE LAW JUDGE