STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
REPUBLIC NEW YORK CORPORATION	:	DETERMINATION 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 a petition 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.

A hearing was held before Joseph W. Pinto, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 19, 1996 at 1:30 P.M., with all briefs to be submitted by July 8, 1996, which date began the six-month period for the issuance of this determination. Petitioner filed briefs on May 20, 1996 and on July 8, 1996. The Division of Taxation filed a brief on June 20, 1996. Petitioner appeared by Jimmy F. Campbell, C.P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

On September 16, 1996, this matter was transferred to Arthur S. Bray, Administrative Law Judge, for the rendering of a determination.

ISSUE

I. Whether certain asserted deficiencies of personal income tax were barred by the statute of limitations.

II. Whether an employer's withholding tax obligations are 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.

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

IV. Whether it was proper for the Division to determine the amount of penalty and interest due by utilizing a "penalty base".

FINDINGS OF FACT

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. After it determined that petitioner was underwithholding, 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.

9. 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.

10. 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.

11. 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

12. 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")

13. 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.

14. 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.

SUMMARY OF THE PARTIES POSITIONS

15. At the hearing, petitioner's representative argued that there were different withholding tax rates for regular compensation and for bonuses, and that the Division's computer system did not take the different rates into account. Petitioner also argued that interest is calculated from the date of underwithholding to the date of payment by the employee. It is submitted that since Mr. Keil overpaid his tax in both years, neither interest nor penalty should be charged.

16. In its brief, petitioner argues that, as shown on his personal income tax returns, Mr. Keil was in an overpayment position during 1990 and 1991. Therefore, Republic's withholding met the test of section 671 of the Tax Law, which is withholding an amount reasonably

estimated to be due from the wages received during the particular calendar year. Thus, petitioner submits that section 671 of the Tax Law supports its position that there was no underwithholding of tax. Petitioner also argues that the computer program used to calculate the asserted deficiency has serious defects because it assumes that the underwithholding occurred evenly over Republic's 24 semi-monthly withholding tax periods. According to petitioner, the compensation package of Mr. Keil included bonus payments in January and vested nonqualified stock options. However, the auditor conceded that he made no attempt to verify when the bonus was paid or the amount of the bonus. Petitioner submits that the vesting of the nonqualified stock option would also result in a lump-sum included in wages at the time of the vesting which would be included in a specific withholding tax period. Therefore, the "penalty base" used to compute penalty and interest is defective. Petitioner also notes that the term "penalty base" is not found in Tax Law § 684.

According to petitioner, interest under IRC § 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 15 whichever is earlier. Petitioner states that:

> " [w]hile [it] . . . does not concede any underwithholding, the counsel for the Department of Taxation and the auditor have conceded that they do not know the semi-monthly withholding periods for their assertion of underwithholding. Therefore, there is no starting date to compute any interest and their computation of interest must fail. Even if there was underwithholding the Department of Taxation [sic] flawed methodology computed interest to the following April 15. The tax returns of the employee show that he was in an overpayment position for the entire calendar years 1990 and 1991. Therefore the date of payment was earlier than the following April 15." (Petitioner's brief, p. 4.)

17. Relying upon Tax Law § 683(a), (c)(2) and former (e), petitioner argues that it:

> "signed an extension on October 28, 1993 covering the period from January 1, 1990 through December 31, 1990 and such extension was validated by the Commissioner's office on November 9, 1993 (Exhibit D). The extension period ended April 15, 1995. Therefore, all assessments from January 15, 1990 through October 31, 1990 are barred by the three year Statute of Limitations as those periods expired before the Consent was validated on November 9, 1993.
>
> "The Notice of Deficiency was dated April 18, 1994. If the taxpayer files a petition for redetermination of the deficiency, the Statute of Limitation is suspended from the date of mailing of the Notice of Deficiency. There is no extension for the period covering January 1, 1991 through December 31, 1991. Therefore, at least all assessments from January 15, 1991 through April 15, 1991

> are barred by the three year Statute of Limitations. I would respectively request that the Department of Taxation provide proof of the mailing of the Notice of Deficiency in order to determine the other periods between April 15, 1991 and the date of the mailing of the Notice of Deficiency which may also be barred by the Statute of Limitations." (Petitioner's brief, p.6)

Petitioner requests that penalties and interest be be cancelled for those periods where the statute of limitations has allegedly expired.

18. In response to the foregoing, the Division argues that each of the notices of deficiency was timely issued. The Division submits that for the 1990 tax year, the returns were deemed filed on April 15, 1991. As a result, the Division had until April 15, 1994 to issue a notice of deficiency. The consent form allowed assessments for the 1990 tax year at any time on or before April 15, 1995. Petitioner's representative signed the consent form on October 28, 1993, and the Division's representative signed the consent form on November 9, 1993. Accordingly, the consent to extend the statute of limitations was timely executed since the assessment period was still open at the time the document was signed.

The Division further argues that the returns for the 1991 tax year were deemed filed on April 15, 1992. Consequently, the Division had until April 15, 1995 to issue the notices of deficiency for the 1991 tax year. On the basis of the foregoing, the Division contends that each of the notices of deficiency, which were issued on April 18, 1994, were timely.

19. The Division contends 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. After describing the calculation which the Division states should have been used to determine the amount of withholding, the Division argues that petitioner did not provide any proof or verification that Mr. Keil received a bonus during either 1990 or 1991, or show when such bonuses were paid or establish the amounts of such bonuses. The Division submits that therefore the auditor acted properly when he assumed the the wages were regular wages paid evenly throughout the year.

20. According to the Division, even if petitioner were able to establish that the wages paid to Mr. Keil in 1990 and 1991 included bonus payments, the argument that these amounts

were subject to significantly lower withholding tax rates is without merit. The Division posits that there is no evidence as to whether the bonuses were paid with regular wages or at a different time than regular wages. Further, the employer had the choice of using the same withholding tax rates as used for regular wages or the supplemental wage withholding tax rates set by the Commissioner. Here, there is no evidence showing when the bonus payments were paid or which of the withholding rate options petitioner had elected to use. Further, the rates set by the Commissioner for supplemental wages as of October 1, 1991 were higher than the rates for regular wages set forth in Publication IT-2100.

21. The Division contends that petitioner did not properly withhold and remit tax on the wages paid to Mr. Keil and, therefore, petitioner failed to do what a reasonable corporation would have done under similar circumstances. Consequently, it was appropriate for the Division to assert negligence penalties.

22. 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 access negligence penalties and interest against petitioner. The Division submits that, while Mr. Keil made estimated tax payments which satisfied his own personal income tax liabilities, the foregoing argument fails to distinguish between the employer's legal obligation to withhold and remit tax and the employee's legal obligation to pay personal income tax.

23. The Division further notes that petitioner had an actual withholding tax deficiency in each filing period during 1990 and 1991. 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 and the

obligations of employees amounts to ignorance of the law and does not establish a basis for the abatement of penalties.

24. Lastly, the Division maintains that petitioner has failed to establish that the Division's penalty and interest calculations were improper or erroneous. After demonstrating how penalties were calculated, the Division argues that the documents and auditor's testimony show that the auditor's methodology was rational and supported by the law. Further, the affidavit of Mr. Smiech sets forth the basis for the Division's calculations.

25. In a reply brief, petitioner argues on the basis of Tax Law §§ 671 and 684 and Revenue Ruling 58-577 (1958-2 CB 744, modified, Revenue Ruling 66-113, 1966-1 CB 244, modified, Revenue Ruling 86-10, 1986-1 CB 358) that there must be proof of (1) the tax which the employer was required, but failed to withhold, (2) the period or periods of any withholding, and (3) the date that the employee satisfied his individual income tax withholding. Petitioner submits that:

> "[i]nstead of requesting the payroll records of the employee, which would have shown the current wages for each pay period and the year to date wages for such period, a total of 24 entries for each year, which would have identified any period with a variance, so that he could receive an explanation for any such variance, the auditor took the easy way out and employed a computer program methodology which assumes that withholding occurred evenly within the corporation's 24 semi-monthly withholding periods. The auditor knew that the facts in this case did not support such an assumption based on the information he elicited from the employer's Tax Department. Counsel for the Department of Taxation provides no citations in the New York State Tax Laws [sic] or Regulations to support the methodology used in this case by the auditor. Instead, Counsel argues that the methodology was used by the Department to avoid an overwhelming and unreasonable administrative burden on the time and resources of Department personnel." (Petitioner's reply brief, p.8.)

Petitioner contends that the Division is required to follow the Tax Law, and an analysis of a single employee's payroll records would hardly constitute an unreasonable burden on the time of the auditor. Further, the Division has not shown underwithholding by the employer. Relying upon Revenue Ruling 58-577 (supra), petitioner reiterates that since Mr. Keil was in an overpayment position during 1990 and 1991, the calculation of interest is precluded. According to petitioner, the Division's computation of interest is infirm because: it lacks proof of underwithholding by the employer, it lacks proof of the period of underwithholding and it

computes interest to the following April 15th rather than the date on which the employee satisfied his income tax liability.

With respect to the imposition of a negligence penalty pursuant to Tax Law § 685(b)(1), petitioner argues that by virtue of Tax Law § 681(g), the negligence penalty applies to a deficiency on a personal income tax return and not to the failure to withhold. It is also argued that the penalty base is a creation of the Division and not supported by the Tax Law.

CONCLUSIONS OF LAW

A. As noted, it is petitioner's position that all assessments for the period January 15, 1990 through October 31, 1990 are barred by the three-year statute of limitations because those periods expired before the consent to extend the statute of limitations was validated on November 9, 1993. Petitioner also submits that there was no extension for the period January 1, 1991 through December 31, 1991. Therefore, all assessments for the period January 15, 1991 through April 15, 1991 are barred by the three-year statute of limitations. In its brief, petitioner requests that the Division provide proof of the mailing of the notices of deficiency in order to determine whether other periods between April 15, 1991 and the date of mailing of the notices are barred by the statute of limitations.

B. In Matter of Richards (Tax Appeals Tribunal, December 3, 1991), the following standard was set forth for analyzing whether an assessment is barred by the statute of limitations:

> "It is well established that the statute of limitations defense is waived unless affirmatively raised by the taxpayer (see, Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of Convissar v. State Tax Commn., 69 AD2d 929, 415 NYS2d 305; Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887). To establish this defense, the taxpayer must go forward with a prima facie case showing the date on which the limitations period commences, the expiration of the statutory period and receipt or mailing of the notice after the running of the period (see, Amesbury Apts., Ltd. v. Commissioner, 95 TC 227; Robinson v. Commissioner, 57 TC 735; Matter of Jencon, Tax Appeals Tribunal, December 20, 1990). Where the taxpayer has satisfied this initial burden, the burden of going forward with the evidence shifts to the Division to demonstrate that the bar of the statute is not applicable (see, Amesbury Apts., Ltd. v. Commissioner, supra; Adler v. Commissioner, 85 TC 535). The Division must then proceed with countervailing evidence that the statutory notice was timely mailed (see, Coleman v. Commissioner, 94 TC 82)."

C. Section 683(a) of the Tax Law provides, in part, "any tax under this article shall be assessed within three years after the return was filed (whether nor not such return was filed on or after the date prescribed)." Section 683(b) of the Tax Law governs when a return is deemed filed. This section states that for purposes of withholding tax, if a return for a period ending with or within a calendar year is filed before April 15th of the succeeding calendar year, the return will be deemed filed on April 15th of the succeeding calendar year. Further, in accordance with the provisions of Tax Law former § 685(l), penalties assessed under Tax Law § 685(b) are required to be assessed, collected and paid in the same manner as taxes. Moreover, any reference in Article 22 of the Tax Law to income tax or tax imposed by Article 22 is deemed to also refer to the penalties set forth in Tax Law § 685 (Tax Law former § 685[l]). Therefore, 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 to assert a deficiency of tax.[1] It follows that the consent to extend the statute of limitations to April 15, 1995, which was signed by petitioner's representative on October 28, 1993 and validated by the Division on November 9, 1993, was effective because it was executed before the expiration of the statute of limitations.

Similarly, the withholding tax returns for 1991 were deemed filed on April 15, 1992. (Tax Law § 683[b].) Therefore, the Division had three years or until April 15, 1995 to assert a deficiency of tax (Tax Law § 683[a]).

It follows from the foregoing that petitioner has not established a prima facie case that the notices of deficiency, dated April 18, 1994, were barred by the statute of limitations.

D. The request, in petitioner's brief, for the Division to provide proof of mailing of the notices of deficiency is rejected as untimely. Parties are not permitted to submit additional evidence after the record is closed (see, Matter of Anzilotti, Tax Appeals Tribunal, February 22, 1996).

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[1]It is assumed that Republic's withholding tax returns for the year 1990 were filed before April 15, 1991 since petitioner has not shown otherwise.

E. Pursuant to Tax Law § 671(a)(former [1]), employers were required to withhold income tax from the wages of their employees.[2] 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."

F. Petitioner maintains that Tax Law former § 671 supports his position that there was no underwithholding because this section requires the withholding of an amount reasonably estimated to be due from his 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.

G. Petitioner's proposed interpretation of Tax Law former § 671 is rejected. In order to determine the amount to withhold, the Commissioner's regulations permit an employer to rely on either New York State form IT-2104, Employee's Withholding Allowance Certificate and Instructions, 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 difficulty with petitioner's interpretation of Tax Law § 671 is that since an employer would not ordinarily have access to an employee's returns or other financial information, the employer would have no way of knowing whether the employee was making adequate estimated tax payments. Consequently, an employer would not know the proper amount of New York State personal income tax to deduct and withhold. Therefore, petitioner's argument that Tax Law § 671 supports his position that there was no underwithholding is rejected. Rather, on the basis

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[2]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).

of Tax Law § 671 and 20 NYCRR former 160.4, it is concluded that an employer's obligation to withhold and remit tax is independent of an individual's obligation to remit estimated tax. Furthermore, it is clear that petitioner did not withhold the amount of tax required by 20 NYCRR former 160.4(a). (See, Revenue Ruling 57-12, 1957-1 CB 353 [where Internal Revenue Service concluded that an employer does not have the discretion to withhold less then 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].)

H. Petitioner's next argument concerns the methodology utilized by the Division. It is submitted that the Division's procedure assumes that the underwithholding occurred evenly over the corporation's 24 semi-monthly withholding tax periods. However Republic's compensation package included bonus payments in January and vested nonqualified stock options. On the basis of the foregoing, petitioner posits that the "penalty base" used to compute penalty and interest is defective. It is also argued that the term penalty base is not found in Tax Law § 684.

I. The foregoing argument is unavailing. Although it is clear that Republic had a policy of paying bonuses in January of the following year, the record does not establish either the timing or the amount of the bonus paid to Mr. Keil in either 1991 or 1992. (Transcript, pp. 27-28, 35-36, 53-56.) If the Division's methodology was erroneous, it was incumbent on petitioner to establish the nature and amount of the error (see, Matter of Leogrande v. Tax Appeals Tribunal, 187 AD2d 768, 589 NYS2d 383, lv denied, 81 NY2d 704, 595 NYS2d 398). Petitioner has not satisfied this burden.

It is noted that during the years in issue, 20 NYCRR former 160.4(b) provided as follows:

> "Supplemental wages. (1) General. Where supplemental wages (such as bonuses, commissions, overtime pay, sales awards or tips) are paid at the same time as regular wages, the New York State personal income tax to be deducted and withheld should be determined as if the total of the supplemental and regular wages were a single wage payment for the regular payroll period. Where supplemental wages are paid at a different time, an employer may determine the New York State personal income tax to be withheld by adding the supplemental wages either to the regular wages for the current payroll period or to the regular wages for the last preceding payroll period within the same calendar year. However, if New York State personal income tax has been withheld from an employee's regular wages, an employer may withhold New York State personal income tax from the supplemental wages at a rate equal to the highest effective rate of New York State

> personal income tax on New York taxable income for the applicable taxable year (e.g., 7.875 percent for taxable years beginning in 1989, 7.375 percent for taxable years beginning in 1990 and 7 percent for taxable years beginning in 1991 and thereafter), without any allowance for personal exemptions or deductions."

It follows from the foregoing that if interest had been computed on a bonus paid in January, the amount of interest that would have been sought by the Division would have been greater than if the amount of the bonus were prorated over the calendar year. Therefore, assuming petitioner paid bonuses to Mr Keil in January 1991 and January 1992, petitioner has not demonstrated that it has been prejudiced by the Division's method of determining the amount of interest due.

J. Petitioner's next argument pertains to Tax Law § 684(a) which 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."

K. Relying upon Revenue Ruling 58-577 (supra) and IRC § 6601, petitioner submits that interest "runs from the period prescribed for the payment of tax by the employer, which he was required to withhold, to the date of payment by the employee or the following April 15, whichever is earlier." (Petitioner's brief, p.4.) It is argued that counsel for the Division and the auditor have conceded that they did not know the withholding tax periods and therefore there was no starting date to compute interest. Further, since the employee was in an overpayment position, the date for payment was earlier than the following April 15.

L. Initially, it is noted that petitioner's argument that there is no starting point for the computation of interest is specious. 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]).

M. As set forth in Tax Law § 684, interest runs from the last date prescribed for payment to the date paid. Therefore, it must be determined when the employer's withholding tax is paid.

Revenue Ruling 58-577 (supra) 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." (Id.) Thus, the question becomes whether the principle of Federal conformity warrants the conclusion that the Division improperly calculated interest until the following April 15.

N. 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 supplied.)

IRC § 3402(d) is comparable 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 supplied.)

As may be observed, absent from IRC § 3402(d) is any reference to interest due from an employer who fails to withhold. In marked contrast, Tax Law § 676 makes explicit reference to interest. Additionally, the Commissioner's regulation at 20 NYCRR former 165.1 makes explicit reference to interest payable where an employer fails to withhold. Given this clear

distinction in statutory language it is concluded that the principle of Federal conformity is not operative with respect to the calculation of interest.[3]

O. The Division has established that its interpretation of the Tax Law regarding the imposition of interest is well supported. Section 687(i) of the Tax Law provides that estimated payments are deemed paid on on the 15th day of the fourth month following the close of the taxable year with respect to issues involving refunds or credits. Therefore, calculating interest to a date prior to April 15th would give petitioner the benefit of the employee's payment before the employee is deemed to have made the payment. It is 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 Division has also shown 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. It is unlikely that the Legislature contemplated such a cumbersome procedure. Therefore, the Division's interpretation has the additional benefit of avoiding objectionable consequences (McKinney's Cons Laws of NY, Book 1, Statutes § 141).

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[3]It is 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]).

P. Petitioner's objection to the "penalty base" methodology is also without merit. As noted by the Division in its brief, the "penalty base" represents the difference in the amount that should have been withheld on the wages paid to Mr. Keil and the amount that was actually withheld. 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.

Q. In regard to the imposition of penalties, petitioner argues 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. It is also argued that the "penalty base" used to calculate the penalties is defective.

R. Petitioner's arguments are without merit. It is clear that Tax Law § 676 expressly contemplates the imposition of penalties in those situations where the employer fails to deduct and withhold. Moreover, contrary to petitioner's argument, the imposition of penalties is also supported by sections 685(b)(1) and 681(g) of the Tax Law. Section 685(b)(1) states:

> "If 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:

> "Deficiency 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 <u>without regard to payments on account of estimated tax</u> 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."(Emphasis added.)

S. Contrary to petitioner's argument, the failure to withhold and remit tax resulted in a deficiency within the meaning of Tax Law § 681(g). As set forth above, the definition of the term deficiency is sufficiently broad to include an employer's failure to remit withholding tax.

The argument that there was not a deficiency of tax is apparently based on a failure to distinguish the employer's obligation to deduct and withhold personal income tax from the

employee's obligation to remit estimated tax. The law is clear 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.

T. The petition of Republic New York Corporation is denied and the notices of deficiency, dated April 18, 1994, are sustained.

DATED: Troy, New York
January 2, 1997

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE