STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SUBURBAN RESTORATION CO., INC.	:	DETERMINATION 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 a petition 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.[1]

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 5, 1998 at 10:00 A.M., with all briefs to be submitted by April 16, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Colette Markovic, an employee. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Laura J. Witkowski, Esq., of counsel).

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[1] Petitioner also filed a petition for refund of withholding taxes paid under Articles 22 and 30 of the Tax Law for the year 1994 and for redetermination of a deficiency of corporation franchise tax under Article 9-A of the Tax Law (DTA No. 816360). The refund claim was granted pursuant to a Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding dated November 3, 1998. The corporation franchise tax deficiency (Assessment # L-012275648) was canceled pursuant to a Notice of Cancellation dated April 23, 1998. Accordingly, DTA No. 816360 has been resolved.

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.

IV. Whether the subject notices of deficiency were timely issued.

FINDINGS OF FACT

1. 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.

2. 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

3. 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;
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> Records of employment, sick pay, tips, annuity and pension payments, bonus payments, contractors;
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> Dates and amounts of deposits made of income taxes withheld from employees;
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> Federal Forms 1120 or 1120S, 941, W-2, W-4, 1099;
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> New York State Forms WRS-2, IT-2104, IT-2104.1, IT-2104-E, IT-2101, IT-2103;
>
> Results of any Federal audit.

4. 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.

5. 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.

6. 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.

7. 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.)

8. The June 17, 1993 letter also referred directly to the letter to the Division from the NYCHHC[2] 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."

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

9. 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.

10. 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***, Finding of Fact "3"). 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."

11. 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.

12. 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.

13. 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.

14. 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.

15. 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***, Finding of Fact "3").

16. 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.

17. 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.

18. 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.

19. 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."

20. 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.

21. 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.

22. 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.
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> 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.)

23. 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 bookeeper, Colette Markovic, and her son, Roman Markovic. The Division was represented by Mr. Alan DeConno, Tax Auditor II and Ms. Laura Witkowski, Senior Attorney.

24. 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.

25. 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,[3] 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.

26. Following the October 22 meeting, the Division determined that a recomputaion 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

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

Division used wages allocated to New York State as reported on petitioner's 1991 and 1992 corporation franchise tax returns (Form CT-3).[4] 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 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.

27. 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.

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[4] 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%.

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

29. 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.

30. 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.

31. 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.

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

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

34. 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.

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

36. The Division submitted proposed findings of fact numbered “1” through “65”. Of these, the following are, in substance, accepted and have been incorporated into the record herein: “1” through “6”, “8” through “46”, “54”, “56”, “59”, “61”, “63”, and “64”.

37. The Division’s proposed finding of fact “7” is rejected as inconsistent with the record. There is insufficient evidence in the record to make factual findings with respect to the Division’s proposed findings of fact “47” through “53”, “55”, “57”, “58” and “60”. These proposed findings of fact are therefore rejected. The Division’s proposed finding of fact “62” is not in the nature of a finding of fact and is therefore rejected. The Division’s proposed finding of fact “65” is rejected as irrelevant.

38. Petitioner submitted proposed findings of fact numbered “1” through “36”. Of these, the following are, in substance, accepted and have been incorporated into the record herein: “1” through “3”, “5” through “15”, and “17” through “33”.

39. There is insufficient evidence in the record to make factual findings with respect to petitioner’s proposed findings of fact “4” and “34” through “36”. These proposed findings of fact are therefore rejected. Petitioner’s proposed finding of fact “16” is rejected as inconsistent with the record.

SUMMARY OF THE PARTIES’ POSITIONS

40. Petitioner contended that it had properly withheld and remitted New York State and City income tax for all of its employees. Petitioner further asserted that while it had New Jersey-resident employees working in New York, it properly withheld tax from the wages of such employees. Petitioner also asserted that none of the four employees listed in the NYCHHC letter worked in New York during 1991 or 1992. In its brief, petitioner contended that it satisfied its burden of proof through the testimony of its bookkeeper and representative in this matter, Colette

Markovic. Petitioner further asserted that its failure to retain and produce the daily cost cards, which, according to petitioner, would have substantiated petitioner's claim, was justifiable under the circumstances because such documents were never requested by the Division and because the issue of whether petitioner had properly withheld tax for its New Jersey-resident employees was not raised until the Division filed its answer in this matter on April 23, 1998.

41. In its brief the Division asserted that the assessments at issue should be sustained given petitioner's failure to comply with the Division's requests on audit and petitioner's inability to provide any documentation in support of its allegations. The Division contended that petitioner's arguments attempting to justify its failure to keep the cost cards are without merit. The Division asserted that petitioner did fail to properly withhold tax for its nonresident employees and that the Division's initial and revised estimates of petitioner's withholding tax liability were rational and appropriate. In response to a statute of limitations issue raised by petitioner at the hearing (but not addressed on brief), the Division asserted that the subject notices of deficiency were timely issued. Finally, the Division contended that petitioner failed to show that penalties imposed herein should be remitted.

42. In its reply brief petitioner raised the issue of estoppel, contending that the Division should be estopped from assessing withholding tax against petitioner under the present circumstances. Petitioner also contended that it was neither noncompliant nor negligent as the Division claims. Although not expressly stated, it is presumed that this contention relates to the issue of penalty.

CONCLUSIONS OF LAW

A. Tax Law § 671(a)(1) requires every employer maintaining an office or *transacting business* in New York and making payment of any taxable wages to a resident or *nonresident* 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. Sections 11-1771 and 11-1908 of the New York City Administrative Code impose a similar obligation on employers with respect to the collection of New York City withholding tax. The method of determining the amount to be withheld is prescribed by regulations issued by the Commissioner (***see***, 20 NYCRR Part 171). Such regulations provide guidance for the deduction of withholding tax from the wages of a nonresident employee where all services are performed in New York State and where services are performed partly within and partly without New York State (***see***, 20 NYCRR 171.6).

B. Section 675 of the Tax Law provides that every employer required to deduct and withhold tax under Article 22 is liable for such tax. Sections 11-1775 and 11-1913 of the New York City Administrative Code contain parallel provisions pertaining to the employer's liability for New York City withholding tax.

C. Tax Law § 681(a) provides that, if upon examination of a taxpayer's return under Article 22, the Division determines that there is a deficiency of income tax, it may issue a Notice of Deficiency to the taxpayer. Where there is some factual basis for deciding that returns as filed under Article 22 are inaccurate, the Division may estimate the taxpayer's proper tax liability and issue a Notice of Deficiency to the taxpayer (***see***, ***Guiliano v. Chu***, 135 AD2d 893, 521 NYS2d 883; ***Hennekens v. State Tax Commn.***, 114 AD2d 599, 494 NYS2d 208; Tax Law § 681[a]). Although such a notice must have a rational basis, it is presumed correct, and the Division is not required to affirmatively demonstrate the propriety of its assessment (***see***, ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174; ***Matter of Atlantic & Hudson Ltd. Partnership***, Tax Appeals Tribunal, January 30, 1992). Rather, the taxpayer bears the "burden

of proving by clear and convincing evidence that the deficiency assessment and the method used to arrive at the assessment were erroneous" ***(Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383, 384, ***lv denied*** 81 NY2d 704, 595 NYS2d 398; ***see also***, Tax Law § 689[e]).

D. In this case, the Division received third-party information tending to indicate that petitioner did not withhold tax from the wages of certain of its nonresident employees who performed services in New York City. Pursuant to Tax Law § 671(a)(1) petitioner was obligated to deduct and withhold taxes from the wages of such employees and pursuant to Tax Law § 675 petitioner faced personal liability if it failed to so deduct and withhold. The Division thus had some factual basis to conclude that petitioner's withholding tax returns as filed were incorrect. It was appropriate, therefore, for the Division to attempt to audit petitioner's withholding tax returns (***see***, ***Guiliano v. Chu***, ***supra***). Petitioner's allegations to the contrary notwithstanding, the Division's efforts to conduct such an audit were rebuffed by petitioner. Specifically, petitioner did not provide the Division with any of the records requested in its letters dated April 29, 1994, May 27, 1994 and July 22, 1994 prior to the issuance of the notices of deficiency. The Division therefore properly resorted to 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. Considering petitioner's failure to produce records in response to the Division's requests, and considering the questions raised by the NYCHHC letter regarding the accuracy of petitioner's withholding tax returns, this method had a rational basis. At the October 22, 1998 meeting, following the issuance of the statutory notices, petitioner did not provide the Division with any documentation to show that the information contained in the NYCHHC letter was incorrect or that the employees listed in the NYCHHC letter did not work in New York.

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. Having reviewed such 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. This change of audit method had the effect of significantly reducing the withholding tax deficiencies. Considering that petitioner did not submit any information to show that the information contained in the NYCHHC letter was incorrect and considering that petitioner's New York wage factor as reported on its 1991 and 1992 corporate franchise tax returns was 61.3% and 50.06%, respectively, it is concluded that this method, too, had a rational basis and was not, as petitioner asserted, arbitrarily chosen.

E. To meet its burden of proving that the assessments were erroneous petitioner offered the testimony of its bookkeeper, Ms. Colette Markovic. Ms. Markovic testified that the four individuals listed in the NYCHHC letter did not work in New York during 1991 or 1992. Specifically, Ms. Markovic testified that Roman Markovic, her son, worked only in petitioner's New Jersey office and never worked in New York for NYCHHC. She further testified that Roman Markovic was a full-time student during the period at issue and was never paid as an employee. Ms. Markovic testified that Roman Markovic was not paid the amount listed as gross wages on the NYCHHC letter, but was simply worth this amount in terms of value for his work "during the vacation, July and August" (Hearing Transcript p. 69). Ms. Markovic testified that Lazur Taddensz worked for petitioner in New Jersey doing carpentry work. Luis Gonzales worked for petitioner in New Jersey as a driver delivering supplies to petitioner's Fair Lawn shop, according to Ms. Markovic. Finally, Ms. Markovic testified that Julian Hryniewicki

worked only in New Jersey for petitioner. Ms. Markovic testified that she listed him as part of the New York City job in response to the NYCHHC inquiries, but that he never did anything in relation to the NYCHHC job.

The testimony of petitioner's witness is insufficient to show that the four employees did not work in New York during 1991 and 1992. The key to this conclusion is the lack of any evidence in the record corroborating such testimony. Ms. Markovic testified solely from memory regarding the four employees' daily activities which took place approximately six years earlier. Ms. Markovic's credibility is further undermined by her vague testimony regarding Julian Hryniewicki and by her uncorroborated claim that Roman Markovic was not paid as an employee. Accordingly, Ms. Markovic's testimony is insufficient to establish that the four employees did not work in New York in 1991 or 1992. Petitioner presented no other evidence to prove that its 1991 and 1992 withholding tax returns were correct.

A major point of contention at the hearing was petitioner's failure to produce the daily cost cards (***see***, Finding of Fact "34"). Petitioner asserted that it maintained these cards for approximately three years and then destroyed them in accordance with its regular business practices. Petitioner contended that it was reasonable for it to destroy the cards under the circumstances and that, accordingly, its failure to produce the cards for the hearing should not weigh against its position herein. Petitioner's contention that its failure to produce the daily cost cards was reasonable rests on two premises: first, that the Division never asked petitioner to produce the cards and second, that the 1990 matter was resolved upon substantiation of certain subcontracting and professional and legal expenses. As to whether the Division requested petitioner to produce the daily cost cards, the letters sent to petitioner explicitly requested the production of payroll records and employment records (***see***, Finding of Fact "15"). As

petitioner's own witness testified, petitioner used the daily cost cards to prepare its payroll and its withholding tax returns. Clearly, then, these documents were payroll and employment records and petitioner's assertion that the Division did not request such records is without merit. Petitioner's assertion that the circumstances under which the 1990 withholding tax matter was resolved justify the destruction of the daily cost cards is also without merit. Petitioner was in possession of a copy of the NYCHHC letter as of June 17, 1993 (***see***, Finding of Fact "8"), which is prior to the expiration of any self-imposed three-year period for the destruction of the daily cost cards for 1991 and 1992. Petitioner knew at that point that the letter had triggered the audit. If petitioner wished to use the daily cost cards to refute the contentions contained in the letter, it had numerous opportunities to do so. Accordingly, petitioner's failure to produce the daily cost cards was not reasonable and such failure does weigh against petitioner's position herein.

Even without the daily cost cards, however, petitioner had the opportunity to introduce corroborating evidence through the testimony of the four employees listed in the NYCHHC letter, but failed to do so. Indeed, one of the individuals listed in the letter, Roman Markovic, was present at the hearing, but did not testify.

Petitioner also failed to discredit the NYCHHC letter or to show that it was inaccurate in any way. Petitioner asserted that the purpose of the payroll reports referred to in the NYCHHC letter was to show whether petitioner was in compliance with certain prevailing wage requirements and that the individuals listed on such payroll reports did not necessarily work in New York. Petitioner failed to establish these assertions. Again, the key to this conclusion is the lack of any evidence in the record corroborating the testimony of Ms. Markovic.

F. In its reply brief, petitioner raised the issue of estoppel. The premise of petitioner's estoppel claim is that it destroyed its daily cost cards for the years 1991 and 1992 in reliance on

the settlement, in 1995, of the 1990 withholding tax matter upon substantiation of "subcontracting" and "professional and legal expenses" (***see***, Finding of Fact "14") and the fact that, at the time of the settlement, the 1991 and 1992 deficiencies were based on the Division's position that petitioner's reported "labor" and "subcontract" costs constituted wages subject to withholding (***see***, Finding of Fact "18"). Petitioner asserted that it destroyed its daily cost cards in reliance on these circumstances and that such action was reasonable and detrimental to petitioner and that such detrimental reliance resulted in an injustice.

As a general proposition, the doctrine of estoppel is not applicable to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (***Matter of Sheppard-Pollack v. Tully***, 64 AD2d 296, 409 NYS2d 847; ***Matter of Turner Construction Co. v. State Tax Commn.***, 57 AD2d 201, 394 NYS2d 78). This general rule is particularly applicable with respect to the Division of Taxation, for public policy favors full and uninhibited enforcement of the Tax Law (***Matter of Turner Construction Co. v. State Tax Commn.***, ***supra***, 394 NYS2d at 80). The doctrine as it applies to tax matters was concisely stated in ***Schuster v. Commissioner*** (312 F2d 311). There, the Court, after recognizing that estoppel should be applied against the government with utmost caution and restraint, stated:

> It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on the Commissioner's action as to require, in accordance with any sense of justice and fair play, that the Commissioner not be allowed to inflict injury. It is to be emphasized that such situations must necessarily be rare, for the policy in favor of an efficient collection of the public revenue outweighs the policy of the estoppel doctrine in its usual and customary context (***Schuster v. Commissioner***, ***supra***, at 317).

As noted in ***Matter of Harry's Exxon Serv. Sta.*** (Tax Appeals Tribunal, December 6, 1988), "[e]xceptions to the doctrine have indeed been rare and limited to unusual fact situations."

The Tax Appeals Tribunal has embraced the following three-part test to determine applicability of the estoppel doctrine to specific cases: 1) whether petitioner had the right to rely on the Division's representation; 2) whether, in fact, there was such reliance; and 3) whether such reliance was to the detriment of petitioner (***Matter of AGL Welding Supply Co.***, Tax Appeals Tribunal, May 11, 1995; ***Matter of Harry's Exxon Serv. Sta.***, ***supra***).

As a threshold matter, a concealment or false misrepresentation is a necessary element of an estoppel claim (***see***, ***Griesmer v. Bourst***, 141 AD2d 919, 529 NYS2d 232, 233). In this case, petitioner's estoppel claim must fail because there is no evidence in the record that the Division of Taxation made any misrepresentations to petitioner. The Division and petitioner settled the 1990 withholding tax matter in or about April 1995. There is no allegation of any misrepresentation regarding the audit of the 1991 and 1992 tax years. At about the time of the settlement, the Division was asserting deficiencies for 1991 and 1992 based on unsubstantiated expenses for labor and subcontract costs. That the Division later changed the basis of its assessments does not constitute a misrepresentation.

Moreover, even if the circumstances giving rise to petitioner's estoppel claim could be considered a misrepresentation, petitioner's claim must fail nonetheless because petitioner did not have the right to rely on the settlement of the 1990 matter and the then-current status of the 1991 and 1992 matters to destroy its daily cost cards. There is no statute or regulation which even suggests that where the Division and a petitioner settle a matter pending before the Division of Tax Appeals, the terms of such a settlement are binding on the Division in subsequent disputes involving the same issues and taxpayer. ***Matter of Maximilian Fur Co., Inc.*** (Tax Appeals Tribunal, August 9, 1990) supports this conclusion. In that case, the Tribunal, in denying an estoppel claim, determined that a taxpayer did not have the right to rely on a determination made

by a Tax Department conferee with respect to a later dispute involving the same issues and parties. Here, the case against the right to rely is even stronger than in ***Maximilian Fur*** because, in this case, the resolution of the prior matter was by agreement of the parties. Such a resolution is even less formal than in ***Maximilian Fur,*** where the prior matter was resolved by a determination of a conferee under the Rules of Practice and Procedure of the former State Tax Commission (***see***, 20 NYCRR former 601 *et seq*).

Furthermore, even assuming that the Division made misrepresentations that were reasonably relied upon by petitioner, the circumstances of this case do not support the imposition of an estoppel against the Division. As the record in this matter makes clear, petitioner was largely responsible for the circumstances which resulted in its destruction of its daily cost cards. If petitioner had cooperated with the Division and responded to the Division's numerous requests for records, including specific requests for petitioner's employment and payroll records, this daily cost card issue would have been avoided. Consequently, if there was any disadvantage to petitioner resulting from the destruction of records, petitioner was, at the very least, partly responsible by its failure to produce records upon the Division's request. In sum, the facts and circumstances herein are not of such an exceptional nature and petitioner's equitable interest is not so compelling so as to outweigh the strong principles against imputing estoppel to the State in connection with tax matters (***Matter of Turner Construction Co. v. State Tax Commn.***, ***supra***, 394 NYS2d at 80).

G. The Division asserted penalties herein pursuant to Tax Law § 685(b), which provides for such penalty "[i]f any part of a deficiency is due to negligence or intentional disregard of this article or rules or regulations hereunder." Petitioner has the burden to establish that these penalty assessments were erroneous (Tax Law § 689[e]; ***Matter of Erdman and Keyloun***, Tax Appeals Tribunal, April 6, 1995).

To counter the Division's assertion of negligence penalties, petitioner contended that its noncompliance with the Division's efforts to conduct an audit was reasonable under the circumstances. This contention is rejected. That the audits of petitioner resulted from the NYCHHC letter does not justify petitioner's failure to cooperate with the Division. Furthermore, petitioner's rationale for this refusal to cooperate - that the Division's Albany office, as opposed to the Metropolitan office, should conduct the audit to avoid any bias or unfairness - is unsupported by any evidence. There is nothing in the record to suggest that petitioner had any reason to suspect that the Metropolitan office would conduct the audit unfairly. Petitioner also asserted that the Division's "own negligence should eliminate any possible assertion it has regarding negligence" (Petitioner's reply brief, p. 23). The negligence to which petitioner's statement refers is an asserted contradiction between two statements made by the Division. Specifically, petitioner notes that the affidavit of Mr. DeConno states that the 1990 and the 1991-92 matters are "separate and distinct, for both audit and protest purposes." Petitioner asserts that this statement is contradicted by the Division's audit report which states that in 1990 petitioner was audited "for the same issue." This contention is without merit. The statement in the affidavit and the statement in the audit report are not contradictory. Petitioner presented no other arguments against the imposition of negligence penalties. Moreover, the record contains no other evidence supporting abatement. Accordingly, such penalties are sustained.

H. At hearing, petitioner asserted that the Division's assessments with respect to the 1991 tax year had been issued beyond the applicable period of limitations. This assertion is without merit. Tax Law § 683(a) imposes a three-year period of limitations for assessment under Article 22 measured from the date of filing of the return. Tax Law § 683(b)(2) provides that, for purposes of section 683, the date of filing of a withholding tax return for any period ending with or within

a calendar year which is filed before April 15 of the succeeding calendar year *shall be deemed to be filed* on April 15 of such succeeding calendar year. In other words, any 1991 withholding tax return filed before April 15, 1992 is deemed to have been filed on April 15, 1992. Here, the statutory notices for the 1991 tax year were issued on April 3, 1995. Such notices were therfore issued within the three-year limitations period.

I. The petition of Suburban Restoration Co., Inc. is denied and the notices of deficiency, dated March 31, 1995 and April 3, 1995, as modified by the Division pursuant to Finding of Fact "26", are sustained.

DATED: Troy, New York
September 30, 1999

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE