STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

SAMUEL L. DILIBERTO, JR : DECISION
OFFICER OF SAM'S SALOON, INC. DTA No. 810246
:
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1988 through May 31, 1989. :
:

Petitioner Samuel L. DiLiberto, Jr., officer of Sam's Saloon, Inc., 152 North Street, Caledonia, New York 14423, filed an exception to the determination of the Administrative Law Judge issued on March 10, 1994. Petitioner appeared by Althoff, Zoghlin, Bansbach & Asandrov, P.C. (Louis V. Asandrov, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter brief in response. Petitioner filed a reply brief which was received on August 5, 1994, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioner was a person required to pay over sales and use tax within the meaning of Tax Law §§ 1131(1) and 1133(a).

II. Whether persons responsible for payment of sales and use tax are also liable for penalty and interest assessed against a corporation.

III. Whether third parties are entitled to make a claim for refund of payments made on behalf of a corporation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

During the period in issue, petitioner, Samuel L. DiLiberto, Jr., was the president and a member of the board of directors of Pardi Foam Products,Incorporated ("Pardi"). Pardi was engaged in the fabrication of polyurethane foam for use in the furniture industry. The polyurethane foam was also used in packaging. Petitioner's activities with respect to Pardi were the primary source of his livelihood.

In November 1986, petitioner opened a bar and restaurant known as Sam's Saloon. Petitioner planned on holding the business as an investment. He did not intend to operate the business himself. Petitioner invested over $100,000.00 in the equipment used by Sam's Saloon and spent approximately $125,000.00 on other expenses.

Petitioner hired managers who were responsible for the daily operations of Sam's Saloon. For the first 18 months, Ms. Joan Ray Turner served in this position. Thereafter, the position was held by Mr. Frank Wardynski. At some juncture, Ms. Turner resumed her position as manager.

The manager hired most of the staff of Sam's Saloon. The staff included chefs, bookkeepers, bartenders, hostesses, waiters and busboys. At the peak of its operation, the restaurant employed approximately 10 to 12 full-time employees and 60 to 65 part-time employees. Petitioner relied on his staff for the daily operation of the business.

The financial operations of Sam's Saloon were directed by the manager of the business.

Petitioner was never formally designated as president or director of Sam's Saloon. He never received a salary or other income from Sam's Saloon and he was never appointed by the board of directors as a representative for the corporation.

After Sam's Saloon had been operating for a period of time, petitioner learned that a

number of employees had been engaged in misappropriating funds or assets. Petitioner hired a chef who came highly recommended. After seven or eight months, petitioner started getting notices that bills for food had not been paid. When he confronted the chef, she produced $48,000.00 worth of bills that had not been paid and walked out. It is petitioner's belief that the chef was operating a catering business from the restaurant's kitchen.

Some of the bartenders employed by petitioner admitted in writing that they had stolen money over the course of months. One bartender spent time in jail because of the money he took. Although he could not prove it, petitioner discovered that a hostess, who was cashing out the front register, stole thousands of dollars. Furthermore, petitioner employed a bookkeeper who, unbeknownst to petitioner, was making comments to vendors and the general public that Sam's Saloon was going to be bankrupt and erroneously stating that petitioner was engaging in illegal activities.

Sam's Saloon employed many high school students. One student was caught stealing cheesecakes, and several young men were caught stealing champagne. A bartender's son was caught selling cases of beer out the back door to local people.

Petitioner fired the employees who were stealing from the business. He believes that the thefts occurred because he was not on the business premises running the bar and restaurant.

Eventually, petitioner paid Sam's Saloon's debts. This was accomplished by using proceeds from the restaurant and from borrowing money.

Petitioner signed a Deferred Payment Agreement dated April 10, 1989 in the box designated for "[s]ignature of [t]axpayer or [r]esponsible officer". The document listed the billing name and address as Sam's Saloon, Inc., 3154 State Street, Caledonia, New York. Petitioner entered into the Deferred Payment Agreement on the advice of his accountant, Franz R. Griswold, who led petitioner to believe that signing the agreement would result in petitioner's personal protection.

The seventeenth item on the Deferred Payment Agreement listed petitioner as an owner or officer. Petitioner thought he was signing the Deferred Payment Agreement as an owner.

At the time he signed the Deferred Payment Agreement, petitioner was under stress and did not think that the designation above his signature would have significance. The stress was caused by someone from the Division of Taxation ("Division") telling petitioner that, if he did not sign the Deferred Payment Agreement, someone would come after his house or personal property.

The assessment numbers, periods, tax, penalty, interest and total amount due on the assessments involved in the Deferred Payment Agreement are as follows:

Assessment Number	***Period***	***Tax Due***	***Penalty and Interest***	***Current Amount Due***
W8811105402	1987	$1,051.76	$ 363.16	$ 1,414.92
S8806142355	288	8,170.00	3,280.75	11,450.75
S8809131090	388	8,707.56	3,048.25	11,755.81
S8808225483	488	6,686.40	2,539.70	9,226.10
D8901210124	189	6,635.38	1,474.61	8,104.94
D8903194922	289	6,408.94	1,038.63	7,446.57

As set forth above, the total tax due was $37,660.04. The Deferred Payment Agreement stated that the estimated total liability (tax plus penalty and interest) was $52,654.92 and that there was a downpayment of $16,000.00. The agreement contemplated 12 additional payments of $3,054.57.

From May 1989 through December 1989, petitioner made a series of eight payments of $3,054.57. On some occasions, the total payment of $3,054.57 was accomplished through a series of checks. Excluding the downpayment of $16,000.00, petitioner remitted the total sum of $24,436.56. Each of the checks contained either a handwritten or typed notation which said "tax only".

In order to make the $16,000.00 downpayment, petitioner borrowed his parents' life savings, cashed in some insurance policies that petitioner had on himself and his children, used credit cards and remortgaged his house.

When petitioner entered into the Deferred Payment Agreement, the Division had not issued an assessment seeking to hold petitioner liable for the taxes due from Sam's Saloon.

The Division issued a series of notices of determination and demands for payment of

sales and use taxes due dated June 8, 1990 to petitioner, Sam DiLiberto, Jr., which assessed sales and use taxes as follows:

Period Ending	***Tax***	***Penalty***	***Interest***	***Total***
5/31/88	$ 0.00	$ 0.00	$ 703.55	$ 703.55
11/30/88	0.00	1,312.12	773.76	2,085.88
2/28/89	6,679.44	1,603.05	1,052.10	9,334.59
5/31/89	3,803.00	798.63	467.90	5,069.53

Each of the notices explained that petitioner was liable individually and as an officer of Sam's Saloon, Inc. under sections 1131(1) and 1133 of the Tax Law for the taxes determined to be due in accordance with section 1138(a) of the Tax Law.

The record shows that the return for the quarter ending November 30, 1988 was filed late but with full payment of tax. The sales and use tax returns for the remaining periods in issue were timely filed but without payment of tax. Subsequently, the Division applied payments it received to the tax liability for the quarter ending May 31, 1988 which reduced the amount of tax due for this period to zero.

The notices of determination bore petitioner's name and the address 3154 State Street, Caledonia, New York 14423. This was the address of Sam's Saloon, which ceased operating in late April or the first week of May 1989.

Petitioner does not recall personally receiving the notices of determination. At the time of the hearing and for approximately 20 years prior thereto, petitioner resided at 152 North Street, Caledonia, New York. Petitioner has filed New York State income tax returns designating 152 North Street as his address and has not filed New York State income tax returns listing another address.

Petitioner received notices of deficiency dated July 6, 1992 and July 13, 1992 which asserted deficiencies of withholding tax. The notices of deficiency were mailed to petitioner at 152 North Street, Caledonia, New York.

Petitioner requested a conciliation conference in the Bureau of Conciliation and Mediation Services. At the conciliation conference which followed, petitioner was represented by Louis Asandrov, Esq. In an order dated August 30, 1991, the conciliation conferee denied

the request and sustained the statutory notices on the merits.

The petition to the Division of Tax Appeals includes copies of the notices of determination. Petitioner was not certain how he received the notices but believes his attorney may have obtained them from his accountant.

The Vendor Registration Information form for Sam's Saloon was signed by petitioner. His title is listed on the form as president. The Form IT-2103, Reconciliation of Tax Withheld, of Sam's Saloon for the year 1986 was also signed by petitioner as president and dated March 2, 1989.

At the hearing, the Division offered the New York State sales and use tax returns of Sam's Saloon for the periods September 1, 1987 through November 30, 1987, December 1, 1987 through February 29, 1988, September 1, 1988 through November 30, 1988 and December 1, 1988 through February 28, 1989. Included with these returns were amended returns for the quarters ended November 30, 1987 and February 29, 1988. Petitioner signed each of the foregoing returns and reported his title as either president or owner. The original return for the quarter ended November 30, 1987 included the following letter:

> "Dear Sirs,
>
> "We know that we did not file the September 1, 1987 - November 30, 1987 Return on time. Please find that Return enclosed.
>
> "PLEASE NOTE:
>
> "The December 1, 1987 - February 29, 1988 Return has been timely filed, even though it has not been paid for.
>
> "We have been in contact with Mr. Henry Osiniski of the Rochester, N.Y. office of Sales tax Compliance Section on this matter.
>
> Sincerely,
>
> /s/
> SAMUEL L. DILIBERTO JR."

The amended sales and use tax returns for the quarters ended November 30, 1987 and February 29, 1988 and the original sales and use tax returns for the quarters ended November 30, 1988 and February 28, 1989 reported the following gross sales and services and

taxable sales and services:

Period Ended	***Gross Sales and Services***	***Taxable Sales and Services***
November 30, 1987	$116,709.00	$116,709.00
February 29, 1988	124,394.00	124,394.00
November 30, 1988	91,556.00	91,556.00
February 28, 1989	95,420.50	95,420.50

Petitioner hired a certified public accountant to prepare the foregoing sales and use tax returns on behalf of the corporation.

At the hearing, petitioner testified that during the period December 1, 1988 through February 28, 1989 Sam's Saloon's gross sales were approximately $2,000 a week. Therefore, petitioner believed that the sales tax return which reported sales of $95,421.00 for the same period was inaccurate. According to petitioner, during the period March 1, 1989 through May 31, 1989 Sam's Saloon was selling approximately $1,200.00 to $1,500.00 a week. Petitioner maintained that he did not understand why the sales tax returns, which he signed, overstated the sales activity for the period.

Petitioner testified that, from January 1, 1989 through April 30, 1989, business significantly diminished and that Sam's Saloon employed a staff of approximately 8 to 10 people.

In its answer to the petition, the Division stated in paragraph 4 "[f]or the quarter 9/1/88 - 11/30/88, the corporation filed its sales tax return in a late manner, with full payment of tax."

Prior to the hearing, the Division brought a motion for an order granting summary determination to the Division. In response, petitioner brought a cross-motion for summary determination.

In an order, dated November 25, 1992, the Administrative Law Judge noted that petitioner alleged that the sales tax for the quarterly periods ended February 28, 1989 and May 31, 1989 had been fully paid. Petitioner also argued that corporate penalty and interest cannot be assessed against him as a responsible officer and that the assessments for the quarters ended May 31, 1988 and November 30, 1988 were untimely.

The order points out that petitioner claimed a refund of $2,776.52 plus interest because of an alleged overpayment of withholding and sales taxes. The alleged overpayment was premised on the downpayment of $16,000.00, plus eight monthly payments of $3,054.57, equalling $40,436.56. This amount was $2,776.52 greater than the tax shown due on the Deferred Payment Agreement.[1] Petitioner's representative further argued that if the assessments which began with a "D" were corporate franchise tax assessments, then the refund would be greater because petitioner maintained that the Tax Law does not impose liability upon an officer for a corporation's franchise taxes.

In a reply, petitioner stated that he was not a responsible officer of Sam's Saloon, Inc., that he did not willfully fail to pay over taxes and that if a failure occurred, it was due to reasonable cause and not willful neglect.

Relying upon Matter of Kheel (Tax Appeals Tribunal, March 1, 1990), the Administrative Law Judge rejected the claim for refund because the payments made pursuant to the Deferred Payment Agreement were those of the corporation and petitioner, as an individual, was prohibited from seeking a refund of the penalty and interest paid under the agreement. The Administrative Law Judge further held, on the basis of Matter of Harding Caterers (Tax Appeals Tribunal, January 9, 1992), that petitioner's argument that all sales taxes, as opposed to penalties and interest, have been paid is irrelevant since a responsible officer is liable for penalties and interest.

The Administrative Law Judge denied the Division's request to impose a penalty for the maintenance of a frivolous petition because petitioner's positions were unlike the examples of frivolous petitions set forth in 20 NYCRR 3000.15.

In the decretal paragraph, the Administrative Law Judge partially granted the Division's motion for summary judgment to the extent that petitioner's claim for refund was denied. The Administrative Law Judge also denied the Division's motion to impose a penalty against

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[1] Petitioner's payments directed that they be applied to "tax only" in an attempt to limit personal exposure.

petitioner for maintaining a frivolous petition and petitioner's cross-motion for summary determination. The Administrative Law Judge then directed that "the matter will be scheduled for hearing on the issue of petitioner's personal liability for taxes and attendant interest and penalties due from the corporation."

At the hearing, the Division renewed its request for the imposition of a penalty for maintaining a frivolous petition.

After the hearing, the Division submitted a letter which explained that the interest assessed for the quarter ended May 31, 1988 had been paid. The Division also furnished a Notice of Cancellation of Deficiency/ Determination and Discontinuance of Proceeding which stated that the Division agreed to cancel the notice for the quarter ended May 31, 1988. The Division further explained that a payment of $757.00 would be applied to other open liabilities.

We find an additional finding of fact to read as follows:

> The tax reported on, and remitted with, the return for the quarter ending November 30, 1988 was $6,408.94. The return bears a stamp indicating that it was received by the Rochester District Office of the Department of Taxation and Finance on February 24, 1989.

OPINION

The Administrative Law Judge found that while notices of determination for the quarters at issue were never sent to petitioner's last known address, the mailing error was rendered harmless by the fact that petitioner filed a timely request for a conciliation conference. The Administrative Law Judge also rejected petitioner's contention that the assessments for the quarters ending May 31, 1988 and November 30, 1988 are barred by the statute of limitations because the Administrative Law Judge concluded that petitioner had failed to meet the standard for a statute of limitations defense as set forth in Matter of Richards (Tax Appeals Tribunal, December 3, 1991).

Citing Matter of Autex Corp. (Tax Appeals Tribunal, November 23, 1988) for guidance, the Administrative Law Judge found petitioner to be an officer responsible to act for the corporation. The Administrative Law Judge found the following facts relevant: 1) petitioner was sole owner; 2) he signed the deferred payment agreement, sales and use tax returns, the

vendor registration and letter attached to the sales and use tax return for the quarter ended November 30, 1987; 3) petitioner exhibited financial control by paying the Saloon's debts with assets of the corporation; 4) he had authority to hire and fire employees; 5) he repeatedly held himself out as the president; and 6) he had authority to write checks on behalf of the corporation.

The Administrative Law Judge found that petitioner's claims for reasonable cause were not sufficient to warrant the abatement of penalty under Tax Law § 1145(a)(iii). The Administrative Law Judge went on to find that petitioner failed to show that his situation fell within the enumerated examples within the relevant regulations on reasonable cause or the catchall provision of 20 NYCRR 536.5(c)(5). The Administrative Law Judge also noted that petitioner incorrectly relied on Matter of Lenhard (Tax Appeals Tribunal, November 9, 1989) because willfulness is not at issue under Tax Law § 1131(1).

Petitioner has excepted to both the order rendered by Administrative Law Judge Barrie as well as Administrative Law Judge Bray's determination.

On exception, petitioner renews his argument that he lacked the status of an employee, officer or director of the corporation and, thus, cannot be held responsible for the corporation's liability. Petitioner contends he was merely a passive investor and that any failure to pay was caused by those hired to manage the day-to-day operations of the corporation.

We reject petitioner's argument and agree with the Administrative Law Judge's finding that petitioner was under a duty to act on behalf of the corporation to comply with the requirements set forth in Article 28. We find that the Administrative Law Judge fully and correctly addressed this issue and we affirm for the reasons stated in the determination.

Petitioner also excepts to the Administrative Law Judge's conclusion that petitioner had failed to establish reasonable cause to warrant abatement of penalties. Petitioner argues he did all he could to ensure the payment of taxes, including making payments from his personal assets and borrowing funds from friends and family. Petitioner also relies on the decision in Matter of Lenhard (supra) for the proposition that he did not willfully fail to pay over any taxes and,

therefore, penalty and interest should be abated.

We also find the Administrative Law Judge adequately addressed this issue in the determination and we affirm for the reasons stated therein.

We next turn to petitioner's contention that he cannot be held responsible for penalty and interest pursuant to section 1145(e) of the Tax Law.

Petitioner argues that Tax Law § 1133(a) provides that responsible officers are liable for "tax" only, with no provision for imposition of penalty and interest. Petitioner further contends that the only exception is found in Tax Law § 1145(e) which provides that responsible officers are liable for penalty and interest where there has been a failure to prepay the tax on motor fuel required by Tax Law § 1102(a). Petitioner goes on to argue that, were penalty and interest liability to be imposed on all responsible officers, this section would not have been necessary. Petitioner also cites Laks v. Division of Taxation of Dept. of Taxation & Fin. (183 AD2d 316, 590 NYS2d 958) for the proposition that responsible officers are not liable for tax under § 1145(a).

We disagree.

Tax Law § 1145(e) provides, in part:

> "[a]ny officer, director, shareholder or employee of a corporation . . . who as such officer, director, shareholder or employee is under a duty to act for such corporation . . . in complying with any requirement of this article, and any member of a partnership, which fails to pay the tax required to be prepaid by section eleven hundred two of this article, shall, in addition to other penalties provided by law, be liable for a penalty equal to the total amount of the tax not paid, plus penalties and interest computed pursuant to subdivision (a) of this section as if such person were a distributor."

As pointed out by petitioner, the Tax Appeals Tribunal has yet to consider the impact of section 1145(e) on responsible officer liability. Further, the issue was not addressed in any of the court decisions cited by the parties. As a result, none of the decisions cited by either side are precedential on this point (see, Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin., 152 AD2d 87, 547 NYS2d 444).

In order to understand the import of Tax Law § 1145(e), a brief review of the sales tax on motor fuel is warranted. Prior to September 1, 1982, sales tax on motor fuel was imposed and

required to be collected on each gallon of gasoline sold at retail service stations (former Tax Law § 1111[d] and [e]). Beginning September 1, 1982, pursuant to Chapters 454 and 469 of the Laws of 1982, the retail sales tax on motor fuel was generally imposed at a higher point in the distribution chain because a sale of automotive fuel by a distributor was deemed to be a retail sale (former Tax Law § 1101(b)(4)(ii); Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988).

The collection requirements were again changed by Chapter 44 of the Laws of 1985 in response to rampant tax evasion that promoted unfair competition and resulted in the erosion of the State and local tax base by an estimated $90 million annually (L 1985, ch 44, Governor's Approval memorandum). Chapter 44 of the Laws of 1985 introduced a new concept in Article 28, i.e., prepayment of the sales tax imposed on motor fuel. Section 1102 of the Tax Law was added to impose this prepayment requirement. At the same time, Chapter 44 deleted the special definition of "retail sale" that had deemed the sale of motor fuel by a distributor to be a retail sale. As a result, the prepayment of the tax was required before the taxable event, i.e., the retail sale. It is this aspect of the sales tax on motor fuel which sets it apart from the imposition of tax on retail sales of other types of tangible personal property pursuant to Article 28.

Subsection (e) of section 1145 was added in 1986 (L 1986, ch 276, § 23) to reflect the special treatment accorded the sales tax on motor fuel. Because prepayment of the tax on motor fuel occurred before the retail sale and tax was, therefore, collected in a unique manner, section 1145(e) was necessary to ensure that responsible officers could be held liable for the tax that was required to be prepaid, as well as penalty and interest on this prepaid tax. As a result, we reject petitioner's argument that section 1145(e) specifically refers to officers, directors, shareholders and employees because these persons are not otherwise liable for penalty and interest under section 1145(a)(1)(i).

Additionally, a clear reading of the statute cannot reconcile petitioner's limiting interpretation with our reading of the Tax Law in Matter of Hall (Tax Appeals Tribunal, March 22, 1990, affd Matter of Hall v. Tax Appeals Tribunal, 176 AD2d 1006, 574 NYS2d 862). In Matter of Hall,

we said:

> "an officer or employee is held liable because he satisfies the definition of 'persons required to collect tax' set forth in § 1131(1) of the Tax Law as an officer or employee who is under a duty to act for the corporation in complying with any provision of the sales tax law. The penalties and interest at issue are imposed, by § 1145(a)(1)(i) of the Tax Law, on any person failing to file a return or to pay over any tax. Since the requirements to file a return and pay over tax are among the most essential to comply with the sales tax law, there is a clear and logical integration between the responsible person provisions of § 1131(1) and the penalty and interest provisions of § 1145(a)(1)."

With regard to petitioner's reliance on Laks v. Division of Taxation of Dept. of Taxation & Fin. (supra), we have already held, in Matter of Basile (Tax Appeals Tribunal, December 2, 1993), that we will follow the decision in Matter of Hall v. Tax Appeals Tribunal (176 AD2d 1006, 574 NYS2d 862 [3d Dept 1991]) rather than that of the Appellate Division, Fourth Department in Laks.

We next address petitioner's claim that Administrative Law Judge Barrie erred by relying on Matter of Kheel (supra) in granting partial summary judgment. Petitioner argues that the Administrative Law Judge incorrectly concluded that petitioner sought a refund of penalty and interest paid by the corporation. Petitioner contends payments under the deferred payment agreement were made by petitioner personally, not by the corporation. Consequently, petitioner argues Kheel is not applicable and petitioner is entitled to litigate issues regarding the deferred payment agreement. Petitioner reasons that because he was not personally assessed, but voluntarily chose to sign the agreement, payments made under the agreement should have been allocated to "tax only" as directed on the checks written by petitioner. Under this argument, petitioner claims to have overpaid the corporation's taxes by $2,776.52.

Petitioner also contends that since the Division admitted corporate payment for the quarter ended November 30, 1988 in its answer dated February 21, 1992, petitioner's tax liability should be reduced by a corresponding amount ($6,408.94). Petitioner argues this is proper since this quarter was also paid by him personally as part of the deferred payment agreement. Petitioner concludes that if payments were allocated as he directed on his checks and the corporation's liability is reduced by virtue of the double payment of tax for the November 30, 1988 quarter,

his outstanding tax liability of $10,482.44 would be "offset" by $9,185.46 (the total of $2,776.52 and $6,408.94).

We begin by noting that petitioner is correct that Matter of Kheel (supra) is not applicable. Although petitioner did make a request for a refund in his petition, petitioner's current claims appear to be that the corporation's liability should be reduced and, as a result, petitioner's liability. Given that a refund is not at issue, this matter is taken out of the purview of Matter of Kheel (supra) and into the realm of Matter of Halperin v. Chu (134 Misc 2d 105, 509 NYS2d 692, affd 138 AD2d 915, 526 NYS2d 660, appeal dismissed in part, denied in part 72 NY2d 938, 532 NYS2d 845) which held that a decrease in the corporation's liability would result in a decrease in the officer's personal liability.

We first address petitioner's claim for $2,776.52 and his assertion that his directions on the face of checks that payments should be allocated to "tax only" are controlling. While it is a basic principle that a taxpayer may specifically request how funds are to be allocated to satisfy the taxpayer's liability (Matter of Donahue, Tax Appeals Tribunal, December 8, 1994), petitioner erroneously seeks to use this rule to limit his liability to the taxes due from the corporation.

Notations on petitioner's checks that only tax would be paid is irrelevant to the issue of petitioner's liability given his status as a responsible officer. When the corporation failed to file timely returns with payment, interest and penalties began to accrue as of that date (Tax Law § 1145). Further, through the deferred payment agreement, the corporation agreed to pay this liability, including penalty and interest. As noted above, petitioner's liability for the penalty and interest is premised on his conduct as a responsible officer. As a result, as long as any part of the corporation's liability including penalty and interest was outstanding, petitioner was potentially liable for it (Matter of Hall v. Tax Appeals Tribunal, supra). In other words, petitioner's check notations could not affect the liability of the corporation for interest and penalty. Therefore, these notations could not affect petitioner's liability for these amounts.

We next address petitioner's contention that he is entitled to a reduction in liability based on

the double payment of tax for the quarter ending November 30, 1988. The following facts are undisputed: the return for the quarter ending November 30, 1988 was filed late with full remittance of the tax; the tax reported on and remitted with the return was $6,408.94; the deferred payment agreement included an amount ($6,686.40) for the quarter ending November 30, 1988; and petitioner paid $40,436.56 pursuant to the deferred payment agreement from his personal funds. In response to this information, the Division has consistently acknowledged the possibility that there has been a duplication of payments (Division's letter dated October 6, 1993, Hearing tr., pp. 25 and 79), but has not offered any specific evidence whether there was or was not. Instead, the Division has pledged "that to the extent that there's been any duplication payment, the money will be applied to other quarters where tax is still due and owing" (Hearing tr., p. 80). Through this response that it will take the correct action, but refusing to state what this right action will be, the Division is effectively denying petitioner an opportunity to litigate the application of the payments that have been made. Accordingly, we conclude that petitioner has established that tax for the quarter November 30, 1988 in the amount of $6,408.94 has been paid twice, that the corporation is entitled to have its outstanding liability reduced by the amount of $6,408.94; and that the corporate liability to be reduced must be one for which petitioner remains liable. As a result, under Matter of Halperin v. Chu (supra), the notices of determination issued to petitioner shall be reduced by the payment of $6,408.94. Petitioner will be credited with this payment as of February 24, 1989.

In his exception, petitioner stated that "[e]ach and every Conclusion of Law (A-X), by the ALJ is excepted to by the petitioner. The reasons for the exceptions will be detailed in the memorandum of law to be subsequently filed" (Petitioner's exception). By this statement, petitioner took exception to the Administrative Law Judge's holding that the Division's error in mailing was rendered harmless by petitioner's timely filing of a request for a conciliation conference and to the part of the Administrative Law Judge's determination which concluded petitioner had failed to establish that the assessments ending May 31, 1988 and November 30,

1988 were untimely. Petitioner has not elected to address these issues in his brief on exception. Consequently, we must presume petitioner has abandoned them.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Samuel L. DiLiberto, Jr., officer of Sam's Saloon, Inc. is granted to the extent that he will be credited with a payment of $6,408.94 as of February 24, 1989, but the exception is in all other respects denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but is otherwise affirmed;

3. The petition of Samuel L. DiLiberto, Jr., officer of Sam's Saloon, Inc. is granted to the extent indicated in paragraph "1" above, but is otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination dated June 8, 1990 in accordance with paragraph "1" above, but such notices are otherwise sustained.

DATED: Troy, New York
February 2, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner