STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **MARK PHILLIPS, OFFICER OF ATI VIDEO ENTERPRISES, INC.** for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1988.	:	DECISION DTA Nos. 812455 & 812456
In the Matter of the Petition **DAVID E. SHEIN, OFFICER OF ATI VIDEO ENTERPRISES, INC.** for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1988.	:	

Petitioners Mark Phillips and David E. Shein, Officers of ATI Video Enterprises, Inc., c/o Sigmund Balaban & Co., CPA, 40 Broad Street, New York, New York 10004, each filed an exception to the determination of the Administrative Law Judge issued on September 1, 1994. Petitioners appeared by Roberts and Holland, Esqs. (Carlton M. Smith, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. The Division of Taxation filed a letter in response to petitioners' reply brief which was received on November 25, 1994 and began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether the Division of Taxation can collect interest and penalty asserted against ATI Video Enterprises, Inc. from each of petitioners as responsible officers of ATI Video Enterprises, Inc.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "1" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

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

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> In support of their motion for summary determination, petitioners submitted an affidavit of their representative, Carlton M. Smith, Esq, along with attached exhibits. Petitioners assert in their notice of motion that: (1) the relevant facts, as attested to in Mr. Smith's affidavit, have been stipulated; and (2) these facts mandate a determination in favor of petitioners. Specifically, petitioners argue that the tax owed by ATI Enterprises, Inc. has already been paid and the Division is impermissibly attempting to use Tax Law § 685(g) to collect from petitioners part of the corporate interest and penalties owed. The parties stipulate that the amount of the penalty and interest asserted against the corporation is $80,000.00 (First Stipulation of Facts, supra, ¶ 7). Petitioners also urge in their notice of motion that any cross-motion which may be filed by the Division should be denied for, even if it were permissible for the Division to use Tax Law § 685(g) to collect the corporate penalty and interest, the Division is "bound not to do so as a result of a prior resolution in this case reached at the conciliation conference level."
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> Petitioners argue further that while there appears to be no controlling New York authority on the question of whether Tax Law § 685(g) may be used by the Division to collect from responsible officers the interest and penalties owed by the corporation, Federal case law construing IRC § 6672, upon which Tax Law § 685(g) was modeled, has answered that

> question in the negative. Federal case law, petitioners explain, supports the imposition of an assessment against a responsible officer for a 100 percent penalty for withholding taxes not paid by his corporation (i.e., a penalty equal to the amount of the withholding taxes owed by the corporation), but not for the penalties and interest assessed against the corporation for failure to pay the tax (citing First National Bank in Palm Beach v. U.S., 591 F2d 1143, 1149; Williams v. U.S., 939 F2d 915).[1]

Attached to petitioners' notice of motion are the following exhibits: (1) a copy of each petitioner's individual petition, received by the Division of Tax Appeals on December 6, 1993, both of which address petitioners' arguments on the merits (i.e., that the penalty has already been paid by Mr. Jeffrey Franklin;[2] that this payment was made on the basis of an agreement with the conciliation conferee and the tax compliance agent to the effect that, if the payment were made, no further action would be taken with respect to the conciliation orders; that a letter to petitioners' representative from the conciliation conferee confirmed the substance of this agreement; that a delay in payment occurred due to funds not being immediately available; and that since the penalty has been paid, it would be unfair to "single out subject petitioner[s] and assess a withholding tax penalty"); (2) a copy of the conciliation orders (CMS No. 126890 regarding petitioner Mark Phillips and CMS No. 126889 regarding petitioner David E. Shein), both dated September 10, 1993, denying petitioners' requests and sustaining the statutory notices; (3) a copy of a power of attorney for petitioners' former representatives, Mr. Sigmund Balaban, CPA, and Mr. Richard Tannenbaum, CPA; (4) (attached to petitioner Shein's Notice of Motion) a copy of the Notice of Deficiency (Notice No. L-006159302-2) dated August 3, 1992, issued to petitioner David E. Shein for a total amount due of $59,941.00, which advises

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[1] We modified finding of fact "1" of the Administrative Law Judge's determination by adding the sentence "The parties stipulate that the amount of the penalty and interest asserted against the corporation is $80,000.00 (First Stipulation of Facts, supra, ¶ 7)" in order to more fully reflect the record.

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

petitioner Shein that if a response to the notice was not forthcoming by November 16, 1992, the notice would become an assessment subject to collection action; (5) (attached to petitioner Phillips's Notice of Motion) a copy of the Notice and Demand for Payment of Tax Due (Notice No. L-006159303-1), dated November 27, 1992, issued to petitioner Mark Phillips, for a total amount due of $59,941.00, referencing an "original notice sent" on August 3, 1992 and advising petitioner Phillips that full payment of the total amount due or his disagreement must be received by December 7, 1992 or "legal action to compel payment of the balance due" would be taken; (6) a copy of a July 28, 1993 letter from the conciliation conferee to Mr. Balaban, petitioners' representative, advising petitioners that the conferee was sustaining the notices of deficiency, and containing the following statement:

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

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

> "[i]n [the conciliation conferee's] letter of July 28, 1993, he indicated that although the Department [of Taxation and Finance] had issued deficiencies totaling $179,823.00, they only sought to collect $59,941, an amount equal to the withholding tax at issue. This statement was incorrect. Through collection of penalties asserted by the deficiencies, the Department potentially has the right to collect the total amount asserted. The Department's policy, as I understand it, is to attempt to collect an amount equal to the tax, penalty and interest due from the corporation but no more than an amount equal to the tax from each individual ($59,941).

> "Payments made by Mr. Franklin totaling $59,941.00 have been applied to assessment L006159304 [Mr. Franklin's assessment], and that assessment should be considered paid in full. . . .
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> * * *
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> "Please be advised that your client's rights in the matter are now limited to the filing of a petition with the Division of Tax Appeals . . . within 90 days of the date of the Conciliation Order . . . ";

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

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

In response to petitioners' allegations regarding the Division's "impermissible" attempts at collection, the Division stresses that it is legally entitled to collect the full amount of the penalty from each responsible officer against whom the penalty is asserted, irrespective of the

cumulative amount of the penalty.[3] The Division denies that it has ever tried to collect from any of the responsible officers the penalty and interest assessed against and unpaid by the corporation. In answer to petitioners' charge that the Division is "bound not to [collect the corporate penalty and interest] as a result of a prior resolution in this case reached at the conciliation conference level," the Division maintains that "the only 'resolution' of this case which occurred as a result of the conciliation conference is the Order of the Conciliation Conferee, dated September 10, 1993, which sustains the Notice of Deficiency of penalty issued to the petitioner." As far as concerns the conciliation conferee's letter to the representative of Jeffrey A. Franklin (see, footnote "2," supra), wherein the conferee stated that it was explained at the conference that the Division seeks only to collect "in the aggregate a penalty equal to the taxes due by the corporation," the Division insists that the conferee's letter related solely to the conciliation proceeding regarding Mr. Franklin and has "no bearing" on the instant matter. The Division points out in addition that the letter made clear that the Tax Law provides for the imposition of the full penalty against each individual. Further, the Division argues that it sent a letter to Jeffrey Franklin's representative on November 24, 1993, advising him that the conferee's statement in the July 28, 1993 letter as to the amount the Division intended to collect was incorrect. The Division refutes the notion that petitioners here relied on the July 28, 1993 letter to their detriment, stating that: (1) estoppel is generally not available for use against governmental acts absent a showing of exceptional facts; and (2) petitioners are now in the same position subsequent to the conciliation conference as they were prior to it (i.e., they are responsible officers of ATI Video Enterprises, Inc. who are individually liable and were assessed for penalty pursuant to Tax Law § 685[g]), and, therefore, petitioners have not been prejudiced in any way by the sending of the July 28, 1993 letter. Finally, the Division asserts

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

that petitioners have not met their individual burdens of proving that the notices issued were erroneous or improper.

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

In addition to the facts determined by the Administrative Law Judge, we find the following:

> On September 3, 1985, the Director of the Division's Compliance Bureau forwarded a memorandum to District Office Tax Compliance Personnel which read as follows:
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> > "There has been some confusion as to our policy on collection of the full corporate liability (including penalty and interest) on 685(g) assessments when more than one officer is assessed.
> >
> > "As you know, the 685(g) assessment is a penalty assessment against responsible officers and is issued for only the amount of tax due on the corporation assessment, not including penalty and interest. So even if one of the officers pays their individual penalty assessment in full, there is still an open liability for the unpaid penalty and interest due on the corporation assessment. The corporate penalty and interest charges are in no way related to the additional interest charges which are added to the individual officer assessments.

> "Therefore, when full payment of the amount due on an individual officer assessment is received, only the assessment against that individual will be closed, all others are to remain open. Since there is still a balance due on the corporate assessment for unpaid penalty and interest, the remaining officer assessments will remain open until payment is received which is equal to that unpaid balance. Only after the corporate penalty and interest charges are paid will the remaining officer assessment and the corporate assessment be closed.
>
> "This procedure has been cleared through the Law Bureau. I am attaching a copy of a hearing decision in the Matter of Theodore Gruber (TSB-H-79-[39]-I) which reinforces this policy" (Tax Compliance Memo, September 3, 1985).

OPINION

The Administrative Law Judge rejected petitioners' assertion that the Division's cross-motion for summary determination should be denied because there were material issues of fact in dispute. The Administrative Law Judge found that:

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

The Administrative Law Judge also rejected petitioners' assertion that the Division should be estopped from asserting the Tax Law § 685(g) penalty because of the July 28, 1993 letter from the conferee to petitioners' representative regarding the Division's collection policy, i.e., that the Division sought to collect, in the aggregate, only $59,941.00, the amount of the tax asserted against the corporation. The Administrative Law Judge found that:

> "[i]t is unfortunate that the conciliation conferee made certain misstatements in his July 28, 1993 letter to petitioners' representative regarding the Division's collection policy (i.e., that the Division sought to collect, in the aggregate, only $59,941.00). However, Mr. English's November 24, 1993 letter corrected these statements, explaining that while the Division potentially has the right to collect the amount of the tax owed by the corporation (here, $59,941.00) from each individual officer, the Division's policy is to attempt to collect in the aggregate only an amount equal to the total of the tax, penalty and interest due from the corporation -- here, $80,000 (see, First Stipulation of Facts at "7") -- without collecting

> more than the amount of the tax itself from each officer. This letter suffices to apprise petitioners of the Division's policy regarding the collection of assessments and it supersedes any informal "discussions" had at the conciliation conference" (Determination, conclusion of law "C").

On what he termed the central issue, the Administrative Law Judge affirmed the Division's policy of assessing the full amount of the Tax Law § 685(g) penalty against each responsible officer as a means to collect the tax and the penalty and interest assessed against the corporation.[4]

On exception, petitioners assert that the Administrative Law Judge should have granted their motion for summary determination and denied the Division's cross-motion for summary determination. On the latter point, petitioners assert, as ground for denial, the fact that the motion was late filed; that there are material issues of fact which require a hearing, namely, whether a binding settlement had been reached between petitioners and the Division at conference. Petitioners assert that the granting of the motion eliminates the need to deal with the issue of estoppel.

On the issue of the validity of the Division's policy, petitioners assert that the Administrative Law Judge erred and the "policy of the Division is squarely contrary to the Federal case law that the Federal withholding penalty may not be used to collect corporate interest and penalties" (Exception, attachment to p. 2, p. 3). Specifically, petitioners state:

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[4]In his determination, the Administrative Law Judge affirmed the Division's policy stating:

> "[t]he Division's policy is thus a median point between two seemingly contradictory notions, namely: (1) that the section 685(g) assessment is a penalty rather than a tax, and the full penalty can be collected from all responsible officers (but see, U.S. v. Sotelo, 436 US 268, 78-1 US Tax Cas ¶ 9446, rearg denied, 438 US 907; Kelly v. Lethert, 362 F2d 629, 66-2 US Tax Cas ¶ 9509 [noted that while IRC § 6672 is denominated a 'penalty,' it is, in substance, a tax and, pursuant to IRC § 6671, it is assessed and collected as a tax]); and (2) that while government revenues should be protected, '[d]ouble recovery by the government is not necessary to fulfill' this objective (Brown v. U.S., 591 F2d 1136, 79-1 US Tax Cas ¶ 9285 [construing IRC § 6672, on which Tax Law § 685(g) was modeled], citing Newsom v. U.S., 431 F2d 742, 70-2 US Tax Cas ¶ 9504, rearg denied 70-2 US Tax Cas ¶ 9597; Monday v. U.S., 421 F2d 1210, 70-1 US Tax Cas ¶ 9205, cert denied 400 US 821, on remand 342 F Supp 1271, 72-2 US Tax Cas ¶ 9723, affd 478 F2d 1404, 73-2 US Tax Cas ¶ 9589; Botta v. Scanlon, 314 F2d 392, 63-1 US Tax Cas ¶ 9352)" (Determination, conclusion of law "D").

> "[i]n First National Bank in Palm Beach v. U.S., 591 F2d 1143, 79-1 US Tax Cas ¶9286 [5th Cir. 1979], the IRS applied certain undesignated payments made by responsible officers to reduce the corporate liability for interest and penalties on tax not paid over, but then sought section 6672 penalties against those two officers for the balance of the tax not paid over. The Fifth Circuit held that the officers' payments had to be applied first to the corporation's tax liability and that 'under §6672 responsible persons may be liable for a 100 percent penalty for withholding taxes not paid by their corporation, but not for penalties and interest assessed against the corporation for failure to pay withholding tax.' The court stated: 'We recognize that, because the IRS will not be allowed to apply the deposits to interest and penalties in this case, it may not be able to recover the entire debt owed by ABC, because §6672 limits the liability of responsible persons to liability for the taxpayer-corporation's withholding obligation, and does not penalize them for the corporation's liability for interest and penalties for late payment of withholding taxes.' In Williams v. U.S., 939 F.2d 915, 91-2 US Tax Cas ¶50,418 [11th Cir. 1991], the Eleventh Circuit reached the identical conclusion in a similar case involving the assertion of section 6672 penalties against multiple officers" (Exception, attachment to p. 2, pp. 2-3).

The Division, in its brief on exception, argues that the "Division is legally entitled to collect the full amount of penalty from each responsible person against whom such penalty is asserted, irrespective of the cumulative amount of such penalty . . . . However, it is the policy of the Division to collect no more in cumulative penalty than is owed by the corporation, in total, for tax, penalty and interest" (Division's brief, p. 3). The Division asserts that the Federal cases cited by petitioners do not support petitioners' position. Specifically:

> "[s]ection 685(g) of the Tax Law was modeled upon section 6672 of the Internal Revenue Code (IRC) (CL-D). However, the federal cases construing section 6672 do not support the petitioners' arguments that the Division cannot collect the withholding tax penalty from multiple responsible officers up to the amount of tax, penalty and interest owed by the corporation. At no time has the Division assessed any of the responsible persons of ATI Video Enterprises, Inc. for the penalty and interest assessed to and unpaid by the corporation nor does the Division argue that there is authority to assess them for these amounts (see, Williams v. United States, 91-2 USTC 50418 and First National Bank in Palm Beach v. United States, 79-1 USTC 9286).
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> "The petitioners have joint and several liability for the penalty imposed (see, Brown v. United States, 591 F2d 1136, 79-1 USTC 9285) and their liability for penalty is separate and distinct from the liability of the corporation (see, United States v. Pomponio, 80-2 USTC 9820).

> "The ALJ, in Footnote #4, correctly concluded that federal case law interpreting section 6672 of the Internal Revenue Code does not address the issue of whether withholding tax penalty can be collected from various officers up to the amount of the tax, penalty and interest owed by the corporation, with no double recovery of the tax itself attempted. As he points out in CL-D, the Division's policy is a 'median point' between collecting the full penalty from each individual and the federal policy of collecting the tax owed by the corporation only once. The case cited by petitioners in support of their exception (McCollum v. United States, 703 FSupp 71) does not change this conclusion. As the ALJ correctly concluded, based on the policy of the State of New York to collect no more than the amount of tax, penalty and interest owed by the corporation, the prior decisions of the State Tax Commission on this issue and the fact that this precise issue has not been addressed by federal case law, the Division was authorized to collect from each petitioner the full amount of the withholding tax due, up to the amount of tax, penalty and interest owed by the corporation (CL-D)" (Division's brief, pp. 4-5).

We reverse the determination of the Administrative Law Judge.

Tax Law § 685(g) provides as follows:

> "[w]illful failure to collect and pay over tax. Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No addition to tax under subsections (b) or (e) shall be imposed for any offense to which this subsection applies. The tax commission shall have the power, in its discretion. to waive, reduce or compromise any penalty under this subsection."

The section is analogous to section 6672 and, thus, we find Federal case law helpful in guiding us in our interpretation of Tax Law § 685(g) (Matter of Yellin v. New York State Tax Commn., 81 AD2d 196, 440 NYS2d 382).[5]

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[5]Section 6672 provides:

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable."

The premise of the Division's policy is that the joint and several liability of each responsible officer allows the Division to assess and collect from each officer the full amount of the tax asserted against the corporation. We cannot agree.

First, the liability of responsible officers under Tax Law § 685(g) is, as the Division concedes, limited to the amount of the tax asserted against the corporation, and is not derived from the liability of the corporation; rather, it is separate and distinct from such liability (Matter of Yellin v. New York State Tax Commn., supra). The Division's policy seeks to make petitioners indirectly liable for something for which they are not directly liable for under Tax Law § 685(g), i.e., interest and penalty asserted against the corporation. If the Legislature had intended to make the responsible officers liable for the penalty and interest asserted against the corporation, it would have done so explicitly in Tax Law § 685(g) (see, Tax Law § 1145[e]; Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin., 152 AD2d 87, 547 NYS2d 444 [where the Court held that "Had the Legislature intended to obligate bulk sale purchasers for the penalties and interest as well as the seller's taxes, it was free to draft legislation worded accordingly"]). Second, we think the Division misunderstands the derivation and the implication of the characterization of the liability as joint and several. In short, the characterization springs from judicial interpretation of the section 6672 language and is based on a practical analysis by the Court that such construction is in line with the intent of Congress to provide the government with an alternative means to ensure, to the extent possible, that withholding trust funds are turned over to the government (Brown v. United States, supra). When confronted with the possibility of multiple collections of such liability, the Brown Court, while acknowledging that the liability under section 6672 was joint and several, held that:

> "[b]ecause the government has stated that its policy is to collect the total penalty only once, and that it will not attempt to exact that penalty separately and cumulatively from each responsible person, it is unnecessary for us to decide whether it would be entitled to multiple collections of that liability. However, we note that the Eighth Circuit has held that the government is entitled to only one satisfaction, Kelly v. Lethert, 8 Cir. 1966, 362 F.2d 629, 635, and that this court has previously stated:

> "While the penalty imposed by section 6672 is distinct from and not in substitution of the liability for taxes owed by the employer, it brings to the government only the same amount to which it was entitled by way of the tax.
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> "Newsome v. United States, 431 F.2d 742, 745, 70-2 USTC ¶ 9504. Double recovery by the government is not necessary to fulfill § 6672's primary purpose -- protection of government revenues" (Brown v. United States, supra; see also, USLife Title Ins. Co. v. Harbison, 784 F2d 1238, 86-1 USTC ¶ 9278).

We find this reasoning persuasive and, accordingly, conclude that the joint and several nature of the liability is not sufficient grounds for the Division to collect, in the aggregate, more than the total amount of tax asserted against the corporation.

In view of our conclusion on this issue, it is not necessary to deal with the other issues raised by petitioners in their exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Mark Phillips, Officer of ATI Video Enterprises, Inc. and David E. Shein, Officer of ATI Video Enterprises, Inc. are granted;

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

3. The petitions of Mark Phillips, Officer of ATI Video Enterprises, Inc. and David E. Shein, Officer of ATI Video Enterprises, Inc. are granted; and

4. The notices of deficiency, dated August 3, 1992, are cancelled.

DATED: Troy, New York
May 11, 1995

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

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