

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RONALD MISKIE	:	DETERMINATION
	:	DTA NO. 820627
for Redetermination of Deficiencies or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law and New York City Personal Income Tax	:	
under the Administrative Code of the City of New York	:	
for the Period July 1, 2001 through December 31, 2001.	:	

Petitioner, Ronald Miskie, P.O. Box 456, Holiday Point Road, Sherman, Connecticut 06784, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under the Administrative Code of the City of New York for the period July 1, 2001 through December 31, 2001.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 27, 2006 at 11:00 A.M., with all briefs to be submitted by September 22, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Knowledge Transfer International Corp., who willfully failed to do so thus becoming liable for a penalty equal to such unpaid tax under section 685(g) of the Tax Law.

FINDINGS OF FACT

1. Documentation Development, Inc. (“DDI”) was incorporated in Delaware by petitioner, Ronald Miskie, and began doing business in New York State on or about June 1984. DDI changed its name to Knowledge Transfer International Corp. (“KTI”) on or about December 31, 1985. Petitioner was the sole incorporator and officer of KTI and originally owned 100% of the corporate stock. In addition to being the chairman and founder of KTI, petitioner has held the title of president throughout the corporation’s existence including the period July 1, 2001 through December 31, 2001. Petitioner continues to be chairman and president of KTI.

2. Initially, KTI engaged in the business of consulting, particularly in the development of training programs, including management training and computer software training for other corporations. Over time, KTI began offering placement services in addition to consulting services.

3. Petitioner devoted 100 percent of his working time to KTI. At first, petitioner secured the consulting contracts for the corporation and also provided all of the consulting services because he was the corporation’s sole employee. Over time, as more contracts were secured and the corporation’s business grew, petitioner hired additional employees, including his wife, Jacquelyn Miskie. As the business grew, in addition to monetary compensation, KTI provided its employees, including petitioner and his wife, with health insurance and 401-K plans.

4. As chairman and president of KTI, petitioner considered his role to be that of the leader out in the market place, creating KTI’s brand and securing additional customers for the corporation. Petitioner hired people to be responsible for the day-to-day operations of the corporation including, but not limited to, sales, placement and financial matters. All department heads, including, among others, the chief operating officer, the chief financial officer and the

controller, reported directly to petitioner. When necessary, petitioner fired employees, including department heads.

5. In addition to hiring and firing employees, petitioner had authority to make purchases and control inventory of KTI and sign a power of attorney on behalf of KTI. Petitioner was also an authorized signatory on KTI's checking account and signed corporate checks on behalf of KTI. A rubber stamp of petitioner's signature was created and, at times, was used by KTI's financial department on some corporate checks. Petitioner signed checks placed before him without questioning them.

6. KTI conducted its business operations in New York City office space. Eventually, KTI leased office space at 462 7th Avenue, New York, New York, which it continued to occupy through at least December 2001. At some point in the 1990s, KTI also leased office space somewhere in Boston or Cambridge, Massachusetts, which it continued to occupy through at least December 2001. KTI either purchased or leased the furniture, fixtures and equipment used in both offices. Employees who worked in the corporation's New York City offices included, among others, petitioner, his wife and KTI's financial department staff.

7. KTI's financial department was responsible for the corporation's day-to-day financial matters which included, among other things, the preparation and mailing of client invoices, the payment of bills and the filing of reports with government agencies. Petitioner hired an outside accounting firm to prepare the corporate tax returns and to oversee KTI's financial department.

8. Petitioner signed contracts and loans on behalf of KTI. He also signed corporate tax returns, including withholding tax returns, on behalf of KTI. In addition, petitioner had the authority to negotiate with the Internal Revenue Service and the New York State Department of Taxation and Finance with regard to the tax liabilities of KTI.

9. Even though he hired people to handle the day-to-day financial aspects of the business, petitioner had a general sense of what the expenses of KTI were and how much revenue KTI needed to generate. To ensure that KTI's revenues were sufficient to cover its expenses, petitioner regularly reviewed the corporation's sales information, including the number of sales (contracts) closed and the amount of revenue generated from such sales.

10. According to petitioner, he learned whether KTI's year had been profitable when the corporation's tax returns were filed after the close of the fiscal year. The record includes copies of the U.S. corporation income tax returns (forms 1120) ("Federal income tax return") which KTI filed for the fiscal years ending May 31, 1999 (tax year 1998), May 31, 2000 (tax year 1999) and May 31, 2001 (tax year 2000). It also includes the New York State general business corporation franchise tax returns (forms CT-3) ("corporate franchise tax return") which KTI filed for the fiscal years ending May 31, 1999 (tax year 1998), May 31, 2000 (tax year 1999) and May 31, 2001 (tax year 2000) as well as the New York State general business corporation MTA surcharge returns (forms CT-3M/4M) ("MTA surcharge return") which KTI filed for the fiscal years ending May 31, 1999 (tax year 1998), May 31, 2000 (tax year 1999) and May 31, 2001 (tax year 2000). Each of these returns was signed by petitioner as either chairman or president of KTI.

11. On the corporate franchise tax return which KTI filed for the fiscal year beginning June 1, 1998 and ending May 31, 1999, the corporation reported Federal taxable income before net operating loss and special deductions of \$339,755.00. On the same return, KTI reported a net operating loss carryover from the fiscal year ending May 31, 1997 in the amount of \$432,974.00. In its computation of entire net income for the fiscal year ending May 31, 1998, the corporation deducted \$339,755.00 of the net operating loss carryover. On the corporate

franchise tax return which KTI filed for the fiscal year beginning June 1, 1999 and ending May 31, 2000, the corporation reported Federal taxable income before net operating loss and special deductions of negative \$586,545.00. On the corporate franchise tax return which KTI filed for the fiscal year beginning June 1, 2000 and ending May 31, 2001, the corporation reported Federal taxable income before net operating loss and special deductions of negative \$66,810.00.

12. As noted above, petitioner originally owned 100 percent of KTI's stock. At some point, petitioner's wife acquired 30.2 percent of KTI's common stock and an individual named Ross Squire acquired 9.4 percent of the common stock. Both Mrs. Miskie and Mr. Squire were employed by and were officers of KTI and devoted 100 percent of their time to its business. Petitioner retained the remaining 60.4 percent of KTI's common stock. Mr. Squire ceased owning KTI's stock when he left KTI's employ sometime around June 2000. At some point thereafter, petitioner acquired Mr. Squire's KTI common stock. Petitioner was a shareholder and owner of KTI at all times including the period July 1, 2001 through December 31, 2001.

13. On the Federal income tax return filed for the fiscal year ending May 31, 1999, KTI reported the following amounts paid to officers as compensation: \$150,000.00 paid to petitioner; \$105,417.00 paid to Mrs. Miskie and \$115,000.00 paid to Mr. Squire. On the Federal income tax return filed for the fiscal year ending May 31, 2000, KTI reported the following amounts paid to officers as compensation: \$147,917.00 paid to petitioner; \$100,000.00 paid to Mrs. Miskie and \$102,500.00 paid to Mr. Squire. On the Federal income tax return filed for the fiscal year ending May 31, 2001, KTI reported the following amounts paid to officers as compensation: \$207,168.00 paid to petitioner; \$162,667.00 paid to Mrs. Miskie and \$26,875.00 paid to Mr. Squire.

14. As the consulting or placement services were rendered for each contract, KTI issued invoices. KTI experienced difficulty in covering day-to-day operating expenses because collection on these invoices took 30 days or longer. As a result, KTI found it necessary to secure loans from banks to cover daily operating expenses. As KTI collected the receivables, it would pay down the loans.

15. At some point in 1995 or 1996, KTI secured a significant loan from Fleet Bank. When Fleet Bank called the loan sometime in the fall of 1998, petitioner secured alternative financing from Allstate Financial Corporation (“AFC”) on behalf of KTI because the corporation did not have the financial means to pay off the loan.

16. As noted above, KTI incurred financial obligations which it was unable to meet and thereafter entered into a credit arrangement on or about October 20, 1998 with AFC, which ultimately assigned its credit agreement with KTI and all its other rights, guaranties, and agreements to Business Alliance Capital Corp. (“BACC”). The record does not include KTI’s credit agreement with AFC or AFC’s assignment of the credit agreement to BACC.

17. Petitioner personally guaranteed the debts and obligations of KTI to BACC pursuant to a credit agreement guaranty dated October 20, 1998 and by an Amended and Restated Individual Guaranty dated December 30, 2000 whereby petitioner pledged his UBS PaineWebber individual retirement account (“IRA”) to secure the line of credit from BACC. Mrs. Miskie also personally guaranteed the debts and obligations of KTI to BACC pursuant to a credit agreement guaranty dated October 20, 1998 and an Amended and Restated Individual Guaranty dated December 30, 2000. The record does not include the credit agreement guaranty dated October 20, 1998 or the Amended and Restated Individual Guaranty dated December 30, 2000 which petitioner and Mrs. Miskie executed.

18. KTI had a credit arrangement with BACC based upon KTI's accounts receivable whereby BACC would lend KTI money as advances against receivables of KTI. The credit arrangement between KTI and BACC was a revolving line of credit type agreement. BACC advanced KTI money based upon a formula involving KTI accounts receivable which money KTI would put in the bank and use to pay its expenses for day-to-day operations. The money advanced by BACC to KTI had no restrictions and KTI could use this money in any way KTI saw necessary. BACC transferred money directly to KTI by depositing it directly into KTI's Fleet bank checking account. When KTI's customers paid their accounts, KTI used that money to pay down the credit line to BACC. The record does not include KTI's contract with BACC or any other financial documents related to the credit arrangement.

19. As noted above, as the business grew, additional employees were hired to provide the consulting services to KTI's clients. At the beginning of 2001, KTI had approximately 50 people on its New York State and City payroll. In addition, KTI had independent contractors working on some contracts.

20. Petitioner was employed by and derived 100 percent of his income from KTI during 2001 and did not work anywhere else while employed by KTI. Mrs. Miskie was also employed by and derived 100 percent of her income from KTI during 2001.

21. In February 2001, KTI's sales started declining and the corporation began letting people go and ending contracts. BACC stopped lending KTI funds against receivables at some point during the first or second quarter of tax year 2001.

22. On May 11, 2001, petitioner and his wife executed a document, entitled "UNANIMOUS WRITTEN CONSENT OF THE BOARD OF DIRECTORS OF

KNOWLEDGE TRANSFER INTERNATIONAL,” disclaiming liability for all of KTI’s financial obligations.

23. Although KTI continued to work on contracts after February 2001, timely collections on its receivables were insufficient to cover daily operating expenses, including payments to independent contractors working on behalf of KTI on a particular contract. In order to provide KTI with the funds needed to pay the independent contractors, petitioner and his wife took partial distributions from their IRAs. Specifically, on May 31, 2001, petitioner took a partial distribution of \$22,170.62 from his IRA and his wife took a partial distribution of \$29,984.84 from her IRA.

24. Automatic Data Processing, Inc. (“ADP”) handled and prepared KTI’s payroll and quarterly withholding tax returns until the end of June 2001. Payroll checks generated by ADP for KTI bore an authorized reproduction of petitioner’s signature. ADP stopped handling and preparing KTI’s payroll and quarterly withholding tax returns in June of 2001 because KTI was running short of money around that time and was not paying ADP enough money for payroll and the related taxes. Petitioner was aware of the fact that ADP stopped doing KTI’s payroll and quarterly withholding tax returns in June of 2001.

25. Petitioner delegated authority to handle KTI’s financial matters to an individual named Orin Anderson, who was controller and chief financial officer of KTI during the period July 1, 2001 through December 31, 2001. A long-time KTI employee who worked first as a bookkeeper in the corporation’s financial department and later as controller, Mr. Anderson reported to petitioner. Mr. Anderson did not own any KTI stock. An outside accounting firm, hired by petitioner, worked in conjunction with Mr. Anderson and told Mr. Anderson what to do and what papers needed to be filed.

26. After ADP stopped handling and preparing KTI's payroll and quarterly withholding tax returns, Mr. Anderson took over the preparation of KTI's payroll. Petitioner gave Mr. Anderson authority to take care of payroll and payroll taxes for KTI. Petitioner signed KTI payroll checks after ADP stopped doing payroll for KTI.

27. During the months of July, August and September 2001, KTI had 27 employees on its New York State and City payroll. Petitioner and his wife stopped taking salaries sometime in the quarter ending September 30, 2001.

28. During the months of October, November and December 2001, KTI had 23 employees on its New York State and City payroll. The corporation ceased working on pending contracts on or about December 31, 2001.

29. Sometime between May and December of 2001, Mr. Anderson told petitioner that KTI owed approximately \$60,000.00 in payroll taxes.¹ Although petitioner alleges that he borrowed a total of approximately \$62,500.00 from various friends and relatives during the second and third quarters of 2001 to pay KTI's outstanding payroll taxes, the withholding taxes owed by KTI to New York State for the period July 1, 2001 through December 31, 2001 were not paid. Petitioner never asked Mr. Anderson if he had paid KTI's outstanding payroll taxes.

30. Petitioner had the authority to review the books and records, bank statements, tax returns, and mail of KTI. Petitioner was not prevented or precluded from looking at KTI's books and records or tax returns. Petitioner never made a request to inspect the books, records, bank statements and financial data of KTI. He never reviewed KTI's bank statements for the period July 1, 2001 through December 31, 2001.

¹ Petitioner was unable to recall exactly when Mr. Anderson informed him that KTI owed approximately \$60,000.00 in payroll taxes. However, he was sure that it was after ADP stopped preparing KTI's payroll.

31. As noted above, KTI failed to pay withholding taxes to New York State for the period July 1, 2001 through December 31, 2001. However, KTI continued to pay expenses other than withholding taxes, such as payroll and independent contractors, even after petitioner discovered the failure of KTI to pay withholding taxes. Petitioner never inquired whether withholding taxes for the quarters ending September 30, 2001 and December 30, 2001 were being paid.

32. In order to avoid the penalties associated with premature partial distributions from their IRAs, petitioner and his wife had to return the funds within 60 days of the partial distributions. On or about July 30, 2001, KTI repaid petitioner and Mrs. Miskie. Specifically, petitioner received \$22,195.62 from KTI and Mrs. Miskie received \$30,009.95 from KTI, which amounts were deposited into their respective IRAs.

33. During the period July 1, 2001 through December 31, 2001, petitioner unsuccessfully tried to secure new contracts and to convince BACC to continue to loan funds to KTI. During the same period, petitioner also supervised the completion of pending contracts, collections of receivables, payments of wages to KTI employees and payments to independent contractors and vendors.

34. On or about December 13, 2001, BACC claimed default by KTI, petitioner and Mrs. Miskie under the terms of the October 20, 1998 credit agreement and made a demand for possession of the accounts receivable of KTI in satisfaction of the principal balance of approximately \$1,077,000.00 owed to BACC. By Peaceful Possession Agreement (“possession agreement”) dated December 20, 2001, among other things, KTI, petitioner and Mrs. Miskie agreed to turn over to BACC all books, records and documentation relating to the corporation’s accounts receivable and all proceeds from such accounts receivable, including any future

payments received by KTI. BACC did not take control of KTI. Rather, BACC took cash accounts receivable from KTI.

35. On or about December 31, 2001, Mr. Anderson ceased working for KTI.

36. By May 31, 2002, KTI had moved to 527 3rd Avenue, Suite 314, New York, New York. The record is silent as to the exact date on which KTI vacated its leased suite at 472 Seventh Avenue, New York, New York and moved to the suite at 527 3rd Avenue, New York, New York.

37. In or about March of 2002, petitioner was informed by an individual named Mark Gerstein that both Federal and New York State withholding taxes for KTI had not been paid for the period July 1, 2001 through December 31, 2001 and KTI's withholding tax returns for the quarters ending September 3, 2001 and December 31, 2001 had not been filed.

38. Petitioner contacted Mr. Anderson after finding out that KTI's withholding tax returns for the periods at issue had not been filed. Mr. Anderson and a CPA named Reward Poonai prepared the Federal and New York State withholding tax returns for the period July 1, 2001 through December 31, 2001, which petitioner then signed and sent to the Internal Revenue Service and the New York State Department of Taxation and Finance without payments. Petitioner did not ask Mr. Anderson why he had not filed KTI's withholding tax returns for the period at issue in a timely manner. He also did not ask Mr. Anderson why the payroll taxes had not been paid. Petitioner did not review the withholding tax returns for the quarters ending September 30, 2001 and December 31, 2001 with either Mr. Anderson or Mr. Poonai prior to signing them. He also did not review the supporting documentation used by Messrs. Anderson and Poonai to prepare the withholding tax returns for the period at issue. The record does not

include the supporting documentation used to prepare the withholding taxes for the period at issue.

39. The Division of Taxation (“Division”) reviewed the records of KTI for the tax quarters ending September 30, 2001 and December 31, 2001 and found that withholding tax returns for the corporation for these periods were submitted late and without payments. Therefore, it determined that KTI owed delinquent New York State and New York City withholding taxes for the tax quarters ending September 30, 2001 and December 31, 2001.

40. During its review of KTI’s returns, the Division also collected documentation necessary for determination of the individuals responsible for collection of trust fund taxes on behalf of KTI, in the event collection against the corporation was unsuccessful. The documentation collected and reviewed by the Division included the following documents, among others, signed by petitioner as president of KTI: a Request for Six-Month Extension to File (For Franchise/Business Taxes, MTA Surcharge, or Both) for the tax period beginning June 1, 2000 and ending May 31, 2001 and the NYS-45-MN Quarterly Combined Withholding Wage Reporting and Unemployment Insurance Return for the quarter October 1, 2001 through December 31, 2001 received by the Division on June 25, 2002. After a review of all documentation collected during this time, the Division determined that petitioner was a responsible person of KTI.

41. On April 5, 2004, the Division issued two notices of deficiency to petitioner asserting that he was “an Officer/Responsible Person of: KNOWLEDGE TRANSFER INTERNATIONAL CORP.” and, as such, was liable, pursuant to Tax Law § 685(g), “for a penalty in an amount equal to the tax not paid” by KTI. The Notice of Deficiency (Notice no. L-023636099-6) issued for the quarter ending September 30, 2001 asserted a penalty due of

\$17,274.66 and the Notice of Deficiency (Notice No. L-023636098-7) issued for the quarter ending December 31, 2001 asserted a penalty due of \$9,887.11.

42. Petitioner filed a petition with the Division of Tax Appeals on July 14, 2005. In his petition, petitioner asserted that he was not a responsible person of KTI as that term is used in the tax law because he did not have the ability to either prefer one creditor over another or control disbursements of the corporation. Petitioner claimed that KTI had entered into an agreement with a factor pursuant to which complete control of receipts and disbursements was taken away from him. Therefore, petitioner contended that no liability should be asserted against him for New York State and New York City withholding taxes which were not paid by the factor.

43. Entity information obtained by the Division from the website of the New York State Department of State, Division of Corporations, reports that KTI is an active foreign business corporation, incorporated in Delaware, doing business in New York State, whose chairman or chief executive officer is Ronald Miskie.

44. The Division of Taxation submitted 42 proposed findings of fact. All of the findings of fact are accepted and substantially incorporated into this determination with the exception of: the first sentence of proposed finding of fact “13” which has been modified to more accurately reflect documentation in the record; proposed finding of fact “15” which has been modified to more accurately reflect the record; the deletion of the extraneous portion of proposed finding of fact “41” and proposed finding of fact “42” which is entirely extraneous.

CONCLUSIONS OF LAW

A. With regard to the withholding tax penalty asserted against petitioner, Tax Law § 685(g) provides:

Willful failure to collect or 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.

B. Tax Law § 685(n), in turn, furnishes the following definition of “person” subject to the section 685(g) penalty:

The term person includes an individual, corporation or partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs.

C. The determination of whether an individual qualifies as a “person” is factual in nature (*Matter of Hopper v. Commr. of Taxation and Finance*, 224 AD2d 733, 637 NYS2d 494, *lv denied* 88 NY2d 1065, 651 NYS2d 409). The relevant factors to be considered include the following: whether the taxpayer signed or had the authority to sign tax returns, owned stock or served as an officer or employee of the corporation, derived a substantial portion of income from the company, possessed a financial interest in the company, possessed the right to hire and fire employees or had authority to pay the corporate obligations (*Matter of Capoccia v. New York State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476; *Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272; *Matter of Shah*, Tax Appeals Tribunal February 25, 1999). The issue to be resolved in each case is “whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee” (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998; *Matter*

of Constantino, Tax Appeals Tribunal, September 27, 1990; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990).

Petitioner was the founder of DDI which later changed its name to KTI. He was a shareholder and owner of KTI. Petitioner was an officer of KTI since its founding, was on the board of directors and held the titles of president and chairman. Petitioner had authority to sign corporate tax returns and did sign KTI's tax returns, including the withholding tax returns for the period July 1, 2001 through December 31, 2001. He entered into contracts and loans on behalf of KTI. Petitioner personally guaranteed the debts and obligations of KTI to BACC pursuant to a credit agreement guaranty dated October 20, 1998 and by an Amended and Restated Individual Guaranty dated December 30, 2000 whereby petitioner pledged his IRA to secure a line of credit from BACC to KTI. He devoted all of his working time to KTI. Petitioner was employed by and derived 100 percent of his income from KTI during 2001. In addition to his salary, petitioner received other compensation from KTI, including health insurance and a 401K retirement account. Petitioner's wife was also employed by KTI and derived 100 percent of her income from the corporation during 2001. Petitioner had authority to review KTI's books and records, bank statements and business mail. He had authority to sign corporate checks on behalf of KTI and did sign checks, including payroll checks issued to employees during the period July 1, 2001 through December 31, 2001. At all times, including the period July 1, 2001 through December 31, 2001, petitioner hired, fired and supervised employees of KTI.

Clearly, the facts support the conclusion that petitioner was a responsible person pursuant to Tax Law § 685(n).

D. The Court of Appeals, in *Matter of Levin v. Gallman* (42 AD2d 32, 396 NYS2d 623), stated that the test in determining whether the actions of a responsible officer are “willful” under section 685(g) of the Tax Law:

is whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (*id.*, at 34, 396 NYS2d at 624-625; *see, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

Further, a failure to collect and pay over taxes can be willful, notwithstanding the lack of actual knowledge, if the person recklessly disregarded his responsibilities, including the responsibility to see that employment taxes are paid (*Matter of Capoccia v. State Tax Commn.*, *supra*; *Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301) and that “corporate officials as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge” (*Matter of Risoli v. Commissioner of Taxation and Fin.*, 237 AD2d 675, 654 NYS2d 218, 219, quoting *Matter of Ragonesi v. State Tax Commn.*, *supra*, at 708, 451 NYS2d 301).

E. Petitioner contends that his failure to pay the withholding tax due was not “willful,” in that he did not know that the taxes were not being paid. However, lack of actual knowledge does not preclude a finding of willfulness if it is determined that one with a duty to act recklessly disregarded that duty (*Matter of Capoccia v. State Tax Commn.*, *supra*; *Matter of Ragonesi v. State Tax Commn.*, *supra*; *Matter of Hussain*, Tax Appeals Tribunal, December 6, 1990). Although petitioner had the authority to review KTI’s books and records and bank statements and was never prevented from doing so, he failed to review them. Petitioner was aware that KTI’s sales began declining in February 2001 and, as a result, the corporation began firing

employees and ending contracts. He was also aware that ADP stopped preparing KTI's payroll and quarterly withholding returns in June 2001 because KTI was running out of money. After ADP stopped preparing KTI's payroll and quarterly withholding tax returns, petitioner gave Mr. Anderson authority to take care of KTI's payroll, and Mr. Anderson prepared the payroll during the period July 1, 2001 through December 31, 2001. Petitioner signed payroll checks placed before him without questioning them during the period at issue. He never checked to see if withholding tax returns were being filed and if the taxes were being paid during the period July 1, 2001 through December 31, 2001. Rather, he simply assumed that the returns were being filed and the taxes were being paid.

Petitioner claims that he relied upon Mr. Anderson to file the withholding tax returns and pay the tax due for the period at issue. However, he has failed to establish that such reliance was reasonable. Mr. Anderson had no ownership interest in KTI prior to or during the period at issue. A long-time KTI employee, who worked first as a bookkeeper in the financial department and later as controller, Mr. Anderson reported to petitioner. The record does not include any information concerning Mr. Anderson's educational qualifications. There has been no showing as to why petitioner's reliance on Mr. Anderson should be considered reasonable. In addition, petitioner failed to establish that he adequately supervised Mr. Anderson. Petitioner did not review bank statements or financial records of KTI. He signed checks, including payroll checks, placed before him without questioning them. Sometime between May 1, 2001 and December 31, 2001, Mr. Anderson informed petitioner that KTI owed approximately \$60,000.00 in payroll taxes. Despite allegedly borrowing a total of approximately \$62,500.00 from various friends and relatives during the second and third quarters of 2001 to pay KTI's outstanding payroll taxes and allegedly instructing Mr. Anderson to pay the same, petitioner never inquired of Mr. Anderson

if KTI's outstanding payroll taxes were paid and never attempted to verify the payment by reviewing the bank statements. In fact, petitioner never inquired as to whether the withholding taxes were being paid. In sum, petitioner had access to the corporate books and records, but elected to concern himself with other aspects of the business including securing new contracts for KTI, dealing with BACC, supervising completion of pending contracts and collections of receivables, and ensuring that employees, independent contractors and vendors were paid. Under these circumstances, petitioner cannot absolve himself merely by disregarding his duty and leaving it to someone else to discharge (*Matter of Capoccia v. State Tax Commn., supra*; *Matter of Ragonesi v. State Tax Commn., supra*). This matter is similar to the factual situation in *Matter of Hussain (supra)*, where the petitioner attempted to place responsibility on the corporation's comptroller for the failure to pay the taxes due. The Tribunal rejected that petitioner's argument, finding him willful because he failed to prove he made a reasonable delegation of authority to ensure that the taxes were paid, that he did not prove that it was reasonable to rely on the comptroller and failed to prove that he reasonably supervised the comptroller's work. For the same reasons, petitioner is determined to have willfully failed to pay the taxes due.

F. Petitioner also claims that he lost control of KTI and was no longer able to pay KTI's bills when BACC stopped lending KTI funds against receivables on or before July 1, 2001. Petitioner's claim is without merit. There is no evidence that KTI's use of the funds lent by BACC was in any way restricted by BACC. In fact, petitioner offered extensive testimony about the credit relationship between KTI and BACC. The credit arrangement between KTI and BACC was based upon KTI's receivables, whereby BACC would lend KTI money as advances against receivables of KTI in a revolving line of credit type arrangement. BACC advanced KTI

money based upon a formula involving KTI accounts receivable, and then KTI would put the money from BACC in its Fleet bank checking account to pay day-to-day operating expenses. Petitioner admitted that the money advanced by BACC to KTI had no restrictions and KTI could use the money in any manner which KTI deemed necessary. Subsequently, when its clients paid their invoices, KTI would pay down the loan to BACC. There is no evidence that BACC took control of KTI. Nor is there any evidence that BACC had a contractual obligation to pay KTI's debts. Rather, BACC was merely a lender which decided on or before July 1, 2001 to stop advancing funds needed by KTI to cover day-to-day operating expenses. KTI continued operating after BACC stopped lending funds to it. During the period July 1, 2001 through December 31, 2001 (the period at issue), KTI employees or independent contractors hired by KTI continued working on contracts for corporate clients. During the period at issue, petitioner, as president and chairman of KTI, tried to secure new contracts for the corporation and to convince BACC to loan additional funds to the corporation. Petitioner also supervised the completion of pending contracts, collections of receivables, payments of wages to KTI employees and payments to independent contractors and vendors. Although BACC did take control of KTI's cash accounts receivable on or after December 20, 2001, there is no evidence that petitioner informed BACC that KTI had withholding tax obligations which needed to be paid. At all times, including the period at issue, petitioner was free to examine the books and records of KTI to determine if the withholding taxes were being paid, but simply decided not to address the issue of whether tax obligations of the corporation were being satisfied. Petitioner had the authority and the opportunity to determine if the withholding taxes were being paid, but chose not to exercise this corporate authority, and is therefore determined to have willfully failed

to remit the withholding taxes due from KTI during the period July 1, 2001 through December 31, 2001.

G. As an alternative argument, petitioner contends that the late filed withholding tax returns are inaccurate. He asserts that the withholding tax liability for the period July 1, 2001 through December 31, 2001 is less than that reported on the late filed returns for that period because some employees listed as receiving wages on the returns were no longer employed by KTI. In support of this argument petitioner offered his testimony. He claims that he does not have any records to support his recollection and does not know what happened to KTI's payroll records or its Fleet Bank checking account bank statements and checkbook. Petitioner has failed to prove the dates on which KTI fired certain named employees or the amount of wages paid to such employees during the last quarter of their employment by the corporation. At the hearing, petitioner admitted that he did not review the withholding tax returns with either Mr. Anderson or Mr. Poonai prior to signing them. He also admitted that he never reviewed KTI's books and records or bank statements. Petitioner's testimony concerning the alleged inaccuracies of the withholding tax returns for the quarters ending September 30, 2001 and December 31, 2001 was vague. Although he was able to identify specific employees allegedly fired by KTI, he was unable to recall the exact dates on which each employee was fired. Given petitioner's failure to submit any documentation to substantiate his assertion that the withholding tax returns for the period July 1, 2001 through December 31, 2001 are inaccurate, he has failed to establish that the Division's determination was erroneous.

H. The petition of Ronald Miskie is denied, and the notices of deficiency dated April 5, 2004 are sustained.

DATED: Troy, New York
March 22, 2007

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE