

STATE OF NEW YORK

STATE **TAX** COMMISSION

In the Matter of the Petition

of

BERNARD H. WILKER

:

DECISION

for Redetermination of a Deficiency 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 Chapter 46,
Title T of the Administrative Code of the City
of New York for the Years 1978, 1979, 1981 and :
1982.

Petitioner, Bernard H. Wilker, 554 Bernita Drive, Riverdale, New Jersey
07675, filed a petition for redetermination of a deficiency 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 Chapter 46, Title T of the Administrative Code
of the City of New York for the years 1978, 1979, 1981 and 1982 (File No.
46303).

A hearing was held before Allen Caplowaith, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on June 19, 1985 at 2:45 P.M. Petitioner appeared by Robert A. Fee, Esq.
The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of
counsel).

ISSUE

Whether petitioner, Bernard H. Wilker, is subject to penalties pursuant to
section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative
Code of the City of New York, as a person who willfully failed to collect,
truthfully account for and pay over the New York State and City withholding

taxes due from Independent Metal Fabricators, Inc. for the years 1978, 1979, 1981 and 1982.

FINDINGS OF FACT

1. Independent Metal Fabricators, Inc. (hereinafter "IMF"), 320 Casanova Street, Bronx, New York 10474, failed to pay over the New York State and New York City personal income taxes withheld from the wages of its employees for the following periods:

December 16, 1978 through December 31, 1978	\$ 391.67
January 1, 1979 through May 31, 1979	14,484.93
March 1, 1981 through September 15, 1981	
and October 15, 1981 through December 31, 1981	18,700.00
January 1, 1982 through April 20, 1982	<u>5,950.00</u>
Total	<u>\$39,526.60</u>

2. The aforestated amounts due of \$18,700.00 and \$5,950.00 were estimates determined by the Audit Division for the periods as specified above.

3. On March 28, 1983, the Audit Division issued a Statement of Deficiency in conjunction with a Notice of Deficiency against Bernard H. Wilker (hereinafter "petitioner") wherein penalties were asserted pursuant to section 685(g) of the Tax Law and section T46-185.0(g) of the Administrative Code of the City of New York for amounts equal to the total New York State and New York City withholding taxes due from IMF for the aforestated periods. Said penalties were asserted on the grounds that petitioner was a person required to collect, truthfully account for and pay over the withholding taxes at issue, and that he willfully failed to do so.

4. During the entire period at issue, petitioner was President of IMF. He held 23 percent of the non-voting stock in IMF. His family and his father's estate held the balance of the non-voting and all of the voting stock.

5. In early 1979, IMF was experiencing financial difficulties. In order

working capital. In mid-1979, accounts receivable financing was obtained from United Credit Corporation, 10 East 40th Street, New York, New York, and Samuel H. Breiter and Company, Inc., 570 Seventh Avenue, New York, New York.

6. The aforesated financing of IMF was obtained through the efforts of Creative Capital Corporation ("Creative"), a financial management organization. As a condition of such financing, IMF was required to install one Brian Lea of Creative as general manager of IMF. Creative and Brian Lea, individually, executed a "Limited Guaranty" covering certain stipulated procedures as to IMF's handling of accounts and receivables.

7. Commencing in mid-1979, Brian Lea worked on the premises of IMF on a full-time basis.

8. Petitioner alleged, but failed to establish that as of mid-1979, Brian L **was** solely responsible for the financial affairs of IMF, including the preparation of withholding tax returns and the collection and payment of such taxes.

9. Brian Lea was never an officer of IMF.

10. As of mid-1979, all IMF checks required the signature of both Brian Lea and petitioner.

11. Petitioner was aware that the withholding taxes at issue were not being paid.

12. Petitioner signed withholding tax returns during the periods at issue herein.

13. Petitioner was responsible for hiring and firing production and engineering employees of IMF.

14. Petitioner executed an Assignment for the Benefit of Creditors on April 20, 1982, at which time IMF ceased doing business.

15. Petitioner contended that should he be held as a person responsible for the payment of the taxes at issue, he should not be held personally liable since the failure to pay such taxes was not willful on his part.

CONCLUSIONS OF LAW

A. That section 685(g) of the Tax Law provides that:

"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."

For New York City purposes, section T46-185.0(g) of the Administrative Code of the City of New York contains a similar provision.

B. That sections 685(n) of the Tax Law and T46-185.0(n) of the Administrative Code of the City of New York provide that, for purposes of subdivision (g), the term person:

"[I]ncludes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

C. That petitioner Bernard H. Wilker has failed to sustain his burden of proof, imposed pursuant to sections 689(e) of the Tax Law and T46-189.0(e) of the Administrative Code of the City of New York, to show that he was not a person responsible for the collection and payment of the New York State and City withholding taxes of IMF for the periods at issue herein.

D. That turning next to the question whether petitioner's failure to collect, account for and pay over the taxes was willful, the test for determining willfulness is "whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result thereof some tax will be avoided."


Government will not be paid over but will be used for other purposes [citations omitted]." Matter of Levin v. Gallman, 42 N.Y.2d 32, 34 (1977). A finding of willfulness does not require an intent to deprive the Government of its funds. "[K]nowledge that withholding taxes have not been remitted and a failure to investigate or correct this mismanagement of corporate funds **is** enough *to* constitute willful conduct [citation omitted]." Matter of MacLean v. State Tax Commission, 69 A.D.2d 951, 952, aff'd (on opinion below), 49 N.Y.2d 920. The evidence presented is insufficient to show that petitioner's failure to collect account for and pay over the taxes due was other than willful.


E. That the petition of Bernard H. Wilker **is** denied and the Notice of Deficiency issued against him on March 28, 1983 **is** sustained.

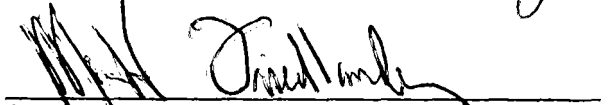
DATED: Albany, New York

STATE **TAX** COMMISSION

JAN 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER