

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RONALD MISKIE	:	DECISION
	:	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, filed an exception to the determination of the Administrative Law Judge issued on March 22, 2007. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to an entity known as 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

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

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 percent 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.

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.

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.

As chairman and president of KTI, petitioner considered his role to be that of the leader out in the marketplace, 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

¹Petitioner 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.

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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge recounted that the Division determined that petitioner was a person as defined in Tax Law § 685(n) who willfully failed to collect or truthfully account for and pay over withholding tax due from the corporation for the period July 1, 2001 through December 31, 2001, and who was, therefore, liable for a penalty equal to the total amount of the tax evaded, not collected or not accounted for and paid over in accordance with Tax Law § 685(g).

The Administrative Law Judge found that 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 of July 1, 2001 through December 31, 2001.

The Administrative Law Judge found that 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, 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.

The Administrative Law Judge found that 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 was, therefore, determined to have willfully failed to remit the withholding taxes due from KTI during the period July 1, 2001 through December 31, 2001.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the parties that acted in a “willful” manner are BACC and Orin Anderson. Petitioner argues that BACC and Orin Anderson are responsible for the withholding taxes due. Petitioner maintains that both BACC and Orin Anderson are financial experts with full knowledge of financial matters including but not limited to the payment of taxes, which petitioner hired to follow the proper and legal actions necessary in the operation of KTI’s business.

The Division, in opposition, argues that the Administrative Law Judge correctly determined that the petitioner was a responsible person and was “willful” for failure to remit withholding taxes.

OPINION

To prevail in this case, petitioner is required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own (*cf.*, ***Matter of Moschetto***, Tax Appeals Tribunal, March 17, 1994; ***Matter of Turiansky***, Tax Appeals Tribunal, January 20, 1994).

Tax Law § 685(n) defines, in relevant part, the “persons” subject to the section 685(g) penalty:

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

Whether a corporate officer comes within the definition set forth in Tax Law § 685(n) is a fact-based inquiry similar to that used to determine responsibility for sales tax purposes (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022 [1987]). In *Cohen*, the court noted a variety of factors as indicative of responsibility, including: status as an officer, director, or shareholder; an individual’s knowledge of and control over the financial affairs of the business; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and whether the individual had a financial interest in the company and had check signing authority. However, the holding of corporate office alone does not, in and of itself, warrant the imposition of liability (*see, Chevlowe v. Koerner*, 95 Misc 2d 388 [1978]).

In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the petitioner was a shareholder and officer of the company, had check signing authority, had signed at least one tax return, regularly signed payroll checks, was involved full time in the corporation’s business, had the authority to hire and fire employees and had invested money in the business. Further, Constantino knew that the corporation was not making its tax payments. However, we found Constantino not liable for taxes due, since other shareholders not only controlled the finances and operations of the corporation but precluded Constantino from taking any action in these areas. We determined that Constantino lacked the power to ensure that taxes were paid on behalf of the corporation.

In the instant case, Mr. Miskie was the chairman and founder of KTI, specifically, he held the title of president throughout the corporation's existence including the period of July 1, 2001 through December 31, 2001. Mr. Miskie admitted that he had the authority to sign checks written on the corporate account and also signed documents and tax returns for the company prepared by Orin Anderson, KTI's controller and chief financial officer during the period of July 1, 2001 to December 31, 2001. We find significant the fact that petitioner was not prevented or precluded from looking at KTI's books and records or tax returns. In fact, petitioner never reviewed KTI's bank statements for the period of July 1, 2001 through December 31, 2001. Although petitioner alleges that he borrowed a total of approximately \$62,500.00 from various friends and relatives to pay KTI's outstanding payroll taxes, he never inquired whether withholding taxes were being paid. Accordingly, we affirm the determination of the Administrative Law Judge and conclude that petitioner was a person under a duty to act for the corporation within the meaning of Tax Law § 685(n).

Having concluded that petitioner was under a duty to act for the corporation to ensure that withholding taxes were paid, we must now determine whether his failure to do so was willful within the meaning of Tax Law § 685(g).

Tax Law § 685(g) provides:

[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 tax evaded, or not collected, or not accounted for and paid over.

The test for willfulness 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 (*Matter of Levin v. Gallman*, 42 NY2d 32, 35 [1977]).

A responsible officer's failure can be willful, notwithstanding his lack of actual knowledge, if it is determined the officer recklessly disregarded his corporate responsibilities including the responsibility to see that taxes were paid (*Matter of Gallo*, Tax Appeals Tribunal, September 9, 1988, *citing Matter of Capoccia v. New York State tax Commn.*, 105 AD2d 528 [1984]; *Matter of Ragonesi v. New York State Tax Commn.*, 88 AD2d 707 [1982]). As founder and president of KTI, petitioner admitted failure to inquire as to whether withholding taxes were being paid to the State constitutes a reckless disregard of his corporate responsibility, and was willful within the meaning of Tax Law § 685(g) (*cf.*, *Matter of Gallo, supra*).

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Ronald Miskie is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Ronald Miskie is denied; and
4. The Notices of Deficiency dated April 5, 2004 are sustained.

DATED: Troy, New York
November 8, 2007

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner