STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GEORGE F. REITMEIER	:	DETERMINATION DTA NO. 818418
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1997 and 1998.	:	

Petitioner, George F. Reitmeier, 1609 William Hapton Way, Mt. Pleasant, South Carolina 29466, 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 for the years 1997 and 1998.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 77 Broadway, Buffalo, New York, on November 28, 2001, at 10:30 A.M., with all briefs to be submitted by September 2, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by Debora K. Becerra, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel).

ISSUE

Whether petitioner was liable for penalties under Tax Law § 685(g) for the willful failure to remit withholding taxes of Tensar Industries for the period August 23, 1997 through September 30, 1998.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued notices of deficiency dated March 20, 2000, to petitioner, George F. Reitmeier, under notice numbers L-017478487-7 and L-017478486-8, as an officer and responsible person of Tensar Industries, Inc. ("Tensar Industries") pursuant to Tax Law § 685(g) for withholding taxes for the period August 23, 1997 through September 30, 1998, in the amounts of $15,967.01 and $3,262.90, respectively. Tensar Industries was audited by the Division commencing in September 1999. The assessments were issued as a result of the Division's determination that Tensar Industries owed delinquent New York State withholding taxes for the third and fourth quarters of 1997 and the first and third quarters of 1998. In addition, during the audit, the Division determined that petitioner was a person required to collect and pay over withholding tax for Tensar Industries in accordance with the Tax Law.

2. Tensar Industries, successor to Tensar Structures, was in the business of designing and manufacturing fabric structures and domes. The president and majority owner of Tensar Structures was petitioner, George F. Reitmeier. Tensar Structures struggled financially and filed for bankruptcy under Chapter 11 as a result of a defaulted military contract to manufacture chemical and biological warfare shelters during the Gulf War. The bankruptcy proceeding was later converted to Chapter 7 before the company's liquidation and sale in 1994 or 1995. Upon liquidation, the assets of Tensar Structures were purchased by James Cornell in 1995, and the business was called Tensar Industries. As a part of the purchase agreement, petitioner agreed to accept employment with Tensar Industries as executive vice president, and remained in this position during the period in issue. During the same period, James Cornell was president of the company, and Michael Moore was controller.

3. Petitioner possessed an undergraduate degree in psychology, and his business experience included working for Birdair Structures, Protective Cover Mat Company, Tensar Structures and Tensar Industries, all of which involved the design and manufacture of fabric structures and domes.

4. Petitioner devoted all of his working time to Tensar Industries in 1997 and 1998 and received 100% of his earned income from Tensar Industries during those years.

5. Bank statements from Tensar Industries' Bank of Akron operating account from November 30, 1997 through June 30, 1998 and copies of checks drawn on that account between October 17, 1997 and June 30, 1998 were submitted into evidence. Petitioner was a signatory on the same Bank of Akron account, along with James Cornell and Michael Moore. The checks revealed that, although Michael Moore signed the majority of checks, petitioner also signed many checks, often without a co-signatory and without apparent regard for the dollar amount of the check. These included checks payable to Tensar Industries' payroll account, loan repayments, payments for payroll savings, and payments to companies that appeared to be suppliers of products, where the checks bore notations of job order numbers and purchase order numbers. There were many checks signed by petitioner without any co-signatories for amounts in excess of $2,500.00. Petitioner did not review Tensar Industries bank statements to determine if there were sufficient funds to cover the checks he was signing and never asked to review the bank statements.

6. Petitioner had and exercised his authority to sign corporate tax returns on behalf of Tensar Industries. He also had authority to supervise employees. In Mr. Cornell's absence, Michael Moore reported to petitioner.

7. From 1995 through 1997, petitioner worked side by side with James Cornell as the two senior executives of Tensar Industries, running the company and supervising its operations, production and sales. During 1997, Mr. Cornell became very involved with his own unrelated consulting business and was out of town nearly 100% of the time. In his absence, petitioner was handling the daily operations of Tensar Industries. Petitioner had the authority to make management decisions, sign checks, pay bills, supervise employees, and sign contracts on behalf of Tensar Industries, without approval from Mr. Cornell. Petitioner always assured Mr. Cornell that the business was running smoothly and that all bills, including taxes, were being paid.

8. During 1998, Tensar Industries began to suffer financially due to the discovery of problems created by the controller, Michael Moore. When James Cornell became aware that there might be some delinquent withholding tax payments, he immediately hired an outside accounting firm to investigate the extent of the problems. When Mr. Cornell was out of town, petitioner apprised him of the information being uncovered by the investigation. By early 1999, the extent of the financial problems, including the tax delinquencies, began to surface, and Mr. Cornell discovered that petitioner had withheld information about Tensar Industries from him, including the withholding tax delinquencies.

9. Unbeknownst to James Cornell, petitioner had filed a business certificate with the Erie County Clerk's Office in May 1998, indicating he was doing business under the assumed name and business identity of Write Field. With the assistance of accounting and legal professionals, an investigation into petitioner's business activities revealed that he was diverting Tensar Industries' funds, contracts, products and trade secrets to his newly-formed company, Write Field. He requested customers to reissue Tensar Industries payments to Write Field, representing it to be a subsidiary of Tensar Industries. In 1999, petitioner was terminated from

Tensar Industries as a result of Mr. Cornell's discovery. At the same time, Mr. Cornell discovered the extent to which tax liabilities had gone unpaid. On the same day petitioner was terminated, he went to the Charter One Bank, which held the Write Field deposits, and emptied the account, acting on his concern that Tensar Industries could seize the funds.

10. Petitioner's 1997 and 1998 New York State resident income tax returns were submitted into evidence. The W-2's attached to petitioner's 1997 return indicate he received $62,470.00 in salary from Tensar Industries. The same year petitioner's wife, Ellin Reitmeier, received wage income from Sonitrol Security SYS BFL, Inc. in the amount of $5,906.08, Cook Moving Systems, Inc. in the amount of $9,109.70, and Tensar Industries in the amount of $14,796.00, for a total of $29, 811.78. In 1998, petitioner's wage statement indicated salary income of $30,316.00 from Tensar Industries. Ellin Reitmeier's wage statements included one from Tensar Industries in the amount of $30,316.00 and one from Sonitrol Security Systems in the amount of $31,196.76, for a total of $61,512.76.

Although petitioner established that his wife had been employed by Tensar Structures in charge of customer service, he could not recall what her position or duties were at Tensar Industries.

11. At the time Tensar Industries purchased Tensar Structures there was an outstanding New York State tax balance which was not settled as part of the bankruptcy estate of Tensar Structures. In an attempt to collect the amount due on behalf of Tensar Structures, the Division served Tensar Industries with a garnishment of petitioner's wages. In order to reduce the amount collected from petitioner as a result of the garnishment, petitioner agreed to have half of his salary paid to his wife, Ellin, whose salary was not subject to the tax liability owed by Tensar Structures during 1998 and a portion of 1997.

12. In April 1999, Tensar Industries brought a lawsuit against petitioner.

13. Petitioner's father, George Reitmeier, Jr., testified on behalf of his son. He was a consultant to Tensar Industries and had held previous positions in an engineering capacity with Birdair and Tensar Structures. He was more involved with Tensar Industries during 1995 through 1997, but phased out of the business after that time.

14. Donald Mumbach, a retired CPA, and former consultant to Tensar Structures, testified on behalf of petitioner. Mr. Mumbach was involved in assisting Tensar Structures with its financial difficulty resulting from the defaulted government contract and sought the expertise of James Cornell to handle this matter. When Tensar Industries was first formed, Mr. Mumbach was in constant contact with James Cornell on matters concerning the company. By 1997 and 1998, the contact Mr. Mumbach had with Tensar Industries amounted to a couple of telephone conversations each week with Mr. Cornell and George Reitmeier.

15. The Division submitted 18 proposed findings of fact. All the proposed facts were incorporated in the Findings of Fact above.

SUMMARY OF THE PARTIES' POSITIONS

16. Petitioner disputes that he is a person responsible for withholding tax for Tensar Industries on the basis that he was neither responsible for nor involved with finance, accounting or payroll, his sole function being that of sales manager. Petitioner asserts that the company was entirely run by its president, James Cornell. Petitioner further argues that even if he is determined to be a responsible person, any failure to pay over withholding taxes due by Tensar Industries attributed to him was not willful.

17. The Division argues that petitioner has not carried his burden of proof by clear and convincing evidence that he was not a person responsible for Tensar Industries' payment of taxes. Furthermore, the Division maintains that petitioner cannot absolve himself by disregarding his duty and leaving it to someone else to discharge. Accordingly, the Division maintains petitioner is a responsible person pursuant to Tax Law § 685(n), and petitioner's conduct should be deemed willful within the meaning of Tax Law § 685(g).

CONCLUSIONS OF LAW

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

Tax Law § 685(n) defines a "person" subject to the section 685(g) penalty as:

> an individual, corporation, 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.

In ***Matter of Levin v. Gallman*** (42 NY2d 32, 396 NYS2d 623, 624-625), the Court stated that 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.

The Tax Appeals Tribunal noted in ***Matter of Gallo*** (September 9, 1988) that:

> 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***, ***supra***, ***citing Matter of Capoccia v. State Tax Comm.***, 105 AD2d 528, 481 NYS2d 476; ***Matter of Ragonesi v. State Tax Comm***., 88 AD2d 707, 451 NYS2d 301).

The issue of whether a corporate officer is a person as defined by section 685(n) has been litigated many times (***e.g.***, ***Matter of McHugh v. State Tax Commn.***, 70 AD2d 987, 417 NYS2d 799; ***Matter of MacLean v. State Tax Commn.,*** 69 AD2d 951, 415 NYS2d 492, ***affd*** 49 NY2d 920, 428 NYS2d 675). The relevant factors to be considered include the following: whether the individual signed the company's tax returns, possessed the right to hire and fire employees, derived a substantial portion of his income from the company's activities, possessed a financial interest in the company and had the authority to pay the company's obligations (***Matter of Amengual v. State Tax Commn.***, 95 AD2d 949, 464 NYS2d 272; ***see also***, ***Matter of McHugh v. State Tax Commn.***, ***supra***; ***Matter of MacLean v. State Tax Commn.***, ***supra***). The person's official duties in relationship to the company are also a pertinent area of inquiry (***Matter of Amengual v. State Tax Commn.***, ***supra***).

B. The issue of whether petitioner is liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of Tensar Industries depends upon the factual situation (***see***, ***Matter of MacLean v. State Tax Commn., supra***). Petitioner compares the facts of his case, noting similarities, to that of ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990). In ***Constantino***, the petitioner had joined Jordan Elevator having many years experience as a service manager for a prior elevator company, similar to George Reitmeier's experience with the manufacture of fabric structures and domes. Constantino owned 30% of the company, held an officer's position and contributed $30,000.00 as a capital investment in Jordan. In contrast, Mr.

Reitmeier had no ownership interest, no apparent capital investment, and held the position of executive vice president with Tensar Industries. Mr. Constantino signed no sales tax or corporation tax returns. At no time did Mr. Constantino's duties include financial management of the company, maintaining the books and records or the preparation of tax returns. Inasmuch as checks written by Jordan required the signatures of two officers, Mr. Constantino alone could not execute any corporate checks. Mr. Constantino was deemed constructively barred from free access to the books and records of the corporation. Accordingly, Mr. Constantino was determined to be a minority investor and supervising employee who was precluded from taking actions with regard to the financial and management activities of the corporation, and therefore not liable for the unpaid corporate liabilities.

On its face, this case seems quite similar. However, there are some key differences, which distinguish it, and require a different result. Although petitioner herein brought valuable previous work experience into Tensar Industries, George Reitmeier, unlike Mr. Constantino, also came with the experience of previously owning and running Tensar Structures, in addition to working with two other companies in the same industry. His role with Tensar Industries was somewhat of a demotion from his prior position in the industry, which appeared reflected in his attitude toward Tensar Industries, as demonstrated by the facts brought out at the hearing. After petitioner lost Tensar Structures to bankruptcy, James Cornell, purchased the assets of Tensar Structures, in an attempt to have the company survive as Tensar Industries. Although George Reitmeier did not have an ownership interest in Tensar Industries, he did hold an officer's position, which he attempted to downplay. Mr. Cornell and petitioner worked side by side running Tensar Industries from 1995 to 1997, around which time Mr. Cornell accepted

consulting work requiring him to be away from Tensar Industries much of the time. What role petitioner took during the years in issue largely comes down to whose testimony is deemed more credible. According to petitioner, he was just like Mr. Constantino, bearing no responsibility for financial decisions or management of the company. The credible and consistent testimony provided by James Cornell (see, Finding of Facts "6" through "9") and documentary evidence in the record not only suggests a different conclusion, but also supports the lack of veracity in petitioner's testimony. Although petitioner claimed there were two signatures required for checks over $2,500.00, he routinely signed checks over that amount on his own. Similarly, although petitioner claims he was not involved in Tensar Industries' payroll, he signed checks which funded the payroll account. Likewise, petitioner claimed he was not responsible for withholding tax deposits or paying other Tensar Industries bills; however, checks signed by him alone and in conjunction with Michael Moore were common for payroll tax deposits and purchase orders to companies that appeared to be suppliers of materials and office products. Further, petitioner created Write Field, another company owned by him, to accept payments for services rendered by Tensar Industries and by petitioner while working for and using the resources of Tensar Industries. He untruthfully indicated to Tensar Industries' customers that Write Field was a subsidiary of Tensar Industries. Most unlike ***Constantino***, where the Administrative Law Judge found Mr. Constantino's testimony credible, petitioner's actions as documented belie his testimony, and therefore, the critical information concerning his role in Tensar Industries is deemed entirely unreliable.

Petitioner introduced the affidavit of Michael Moore in an attempt to establish the duties assigned to petitioner during the years in question. However, before according the affidavit any

significant weight, the credibility of the affiant, vis a vis documentary evidence in the record, must also be evaluated. In this case, Mr. Moore stated that both he and petitioner were given check-writing authority for the convenience of the president, James Cornell, and that it was his belief that all checks over $2,500.00 required two signatures. However, Mr. Moore appeared responsible for preparing, signing and issuing the vast majority of checks in evidence, many of which were over $2,500.00. Some checks clearly contained two signatures, others only one signature, with no apparent pattern or reference to a specific dollar amount. Further, Mr. Moore stated that he was employed by Rowe Bisonite, Inc., a company owned by James Cornell between 1994 and 1998. However, the 1997 Quarterly Combined Withholding and Wage Reporting Return, Form WT-4-B, shows Michael Moore as an employee of Tensar Industries for the wage reporting period January 1 through March 31, 1997, having received wages of $3,000.00. The return was signed by Michael Moore, where he certified that the information on the return was, to the best of his knowledge, true, correct and complete. Mr. Moore did not appear to testify in person, and thus these discrepancies were not subject to clarification. In consideration of the inconsistencies between Mr. Moore's affidavit and the documentary evidence, the Moore affidavit is rejected as unreliable to prove the facts therein.

I am left to consider the testimony of petitioner's father and Donald Mumbach, the CPA who brought petitioner and James Cornell together. Neither of these witnesses was in a position to observe the daily activities of Tensar Industries, especially after the first few years the company existed. Their assessment of the management functions was derived from Michael Moore and petitioner in the absence of James Cornell, and was potentially skewed by Moore and

petitioner, who had a great deal to hide. Any contradiction to the testimony of James Cornell by petitioner's father and Donald Mumbach is less credible and thus rejected.

Accordingly, based upon the credible and reliable testimony of James Cornell, and the facts thereby established, the only conclusion I am able to reach is that petitioner was a responsible person pursuant to Tax Law § 685(n).

C. Petitioner argues that his failure to pay the taxes was not willful, inasmuch as he did not know the taxes had gone unpaid. Unfortunately, the lack of veracity of petitioner's testimony has rendered it unreliable, and it remains unclear what he knew about the failure of Tensar Industries to pay withholding taxes. If it could be proven he was unaware, his lack of actual knowledge that withholding taxes had not been remitted to the State may, under certain circumstances, support a finding that a corporate officer did not act consciously and voluntarily (***Matter of Gallo***, Tax Appeals Tribunal, September 9, 1988). However, the failure to collect and pay over taxes can be willful, notwithstanding the lack of actual knowledge, if it is determined that one with a duty to act recklessly disregarded that duty (***see***, ***Matter of Capoccia v. State Tax Commn.***, ***supra***; ***Matter of Ragonesi v. State Tax Commn.***, ***supra***).

The Division maintains that petitioner's argument regarding his lack of willfulness is similar to that made in ***Matter of Capoccia v. State Tax Comm***. (***supra***) and ***Matter of Risoli v. Commr. Of Taxation and Finance*** (237 AD2d 675, 654 NYS2d 218), and should likewise be rejected. In ***Capoccia,*** the petitioner claimed he was not willful where he was president and principal shareholder of a construction business, and the other principal of the business was corporate secretary-treasurer whose function was to maintain the corporate books and records. Although that petitioner had access to the books and records, he elected to concern himself only

with the corporation's field operations, claiming he did not understand the books. The Court rejected the petitioner's argument that he was not willful, holding that corporate officials could not absolve themselves merely by disregarding their duty and leaving it to someone else to discharge, citing ***Matter of Ragonesi v. New York State Tax Comm***. (***supra***). In ***Risoli***, the Court came to the same conclusion after the petitioner therein argued that he delegated the tax collection and payment responsibilities to other corporate shareholders and relied on their representations that the taxes were being paid.

D. The penalty imposed by Tax Law § 685(g) is modeled after section 6672 of the Internal Revenue Code, and as a result, Federal cases may be used for guidance (***Yellin v. New York State Tax Commission***, 81 AD2d 196, 440 NYS2d 382). In support of its position, the Division cites several Federal cases that speak to "reckless disregard" of one's duty to pay the appropriate taxes. The United States District Court in ***Internal Revenue Service v. Blais*** (612 F Supp 700, 710 [D Mass]) summarizes fact patterns from which a reckless disregard sufficient to demonstrate willfulness in section 6672 is inferred:

> First, courts have held that reliance upon the statements of a person in control of the finances of a company may constitute reckless disregard when the circumstances show that the responsible person knew that the person making the statements was unreliable. This requires a finding that the responsible person had knowledge that the other individual had in the past failed to perform adequately with regard to the financial affairs of the taxpayer entity. . . .
>
> Second, the courts have held that '[w]illful conduct also includes failure to investigate or to correct mismanagement after having notice that withholding taxes have not been remitted to the Government.' This requires a finding that the responsible person had 'notice' that the taxes had not been remitted in the past. . . .
>
> Third, courts have found that when a responsible person continues to pay other bills knowing that the business is in financial trouble, he willfully violates § 6672 if he fails to make reasonable inquiry as to whether money would or would not be available for payment of the taxes when they became due.

In this case, petitioner disregarded his management duties or delegated them without follow-up and oversight, even after he acknowledged that there were financial problems of some magnitude during most of 1998 and before Michael Moore left Tensar Industries. Petitioner worked with Michael Moore on a daily basis and was responsible for the operations of Tensar Industries on a daily basis with James Cornell between 1995 and 1997, and on his own for the latter part of 1997 and 1998, a critical point in the viability of Tensar Industries. Once petitioner knew of some mishandling of the corporate financial affairs by Moore and did not question his reliability to continue in the role of controller, he recklessly disregarded his duty as an officer of Tensar Industries. Although James Cornell initiated an investigation by professionals concerning potential financial problems once they were disclosed, there was no mention of any action taken by petitioner to correct the mismanagement. Lastly, knowing the business was in financial trouble of some kind, which he ignored, petitioner had a duty to make a reasonable inquiry whether funds were available for the payment of taxes when they came due.

In ***Wright v. United States*** (809 F2d 425, 87-1 US Tax Cas ¶ 9130), the court, in criticizing that petitioner, held:

> [m]erely because a corporate officer has check-signing responsibilities and his corporation is in financial trouble, it does not follow that he can be held liable for any and all failures to pay withholding taxes. . . . But if a responsible officer knows that the corporation has recently committed such a delinquency and knows that since then its affairs have continued to deteriorate, he runs the risk of bing held liable if he fails to take any steps either to ascertain, before signing checks, what the state of the tax withholding account is, or to institute effective financial controls to guard against nonpayment.

Wright, like George Reitmeier, did neither of these things. Once a sign of delinquency was uncovered, he took no steps to prevent the continued deterioration and safeguard the company.

E. Based on the evidence in this record, I conclude that petitioner recklessly disregarded his duty to ensure that withholding taxes were collected and paid over to the State. It is not clear when petitioner became aware that the withholding taxes were not being paid. Petitioner knew that Tensar Industries had encountered financial difficulties through most of 1998, vendors had become difficult to work with, and he had been asked to delay the cashing of his paycheck on more than one occasion. Yet petitioner did not concern himself with any corrective measures for such problems, or attempt to understand what was happening. Not once did petitioner request to look at any financial records of Tensar Industries. Under these circumstances petitioner had a duty to act and recklessly disregarded that duty. It has been well established that one with a duty to act for a corporation cannot avoid liability by failing to concern himself with whether or not taxes are being paid (***see, Matter of Malkin v. Tully***, 65 AD2d 228, 412 NYS2d 186, 188). Therefore, petitioner's failure to take any action to ensure that the withholding taxes were paid amounts to a willful failure to pay the tax.

F. The petition of George Reitmeier is hereby denied and the notices of deficiency dated March 20, 2000 are sustained.

DATED: Troy, New York
February 27, 2003

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE