

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

RICHARD DRESNER

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1982.

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Petitioner, Richard Dresner, 951 Hardscrabble Road, Chappaqua, New York 10514, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1982 (File No. 48640).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 4, 1986 at 9:15 A.M., with all briefs to be submitted by May 23, 1986. **Petitioner appeared by Lenefsky, Meier & Novod, Esqs. (Steven K. Meier, Esq., of counsel).** The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes with respect to Dresner, Morris & Tortorello Research, Inc. and National Survey Research Group, Inc., and willfully failed to do so, thus becoming liable for a penalty under section 685(g) of the Tax Law.

#### FINDINGS OF FACT

1. On November 28, 1983, the Audit Division issued to Richard Dresner

as a person required to collect, truthfully account for and pay over withholding taxes of Dresner, Morris & Tortorello Research, Inc. (hereinafter "DMT") in the amount of \$16,464.21 for the withholding tax period July 1, 1982 through December 1982. At the hearing held herein, the Audit Division acknowledged that payment in the amount of \$11,754.81 had been received from bankruptcy proceedings which had been instituted against DMT. Therefore, the deficiency at issue is reduced to \$4,709.40.

2. On February 27, 1984, the Audit Division issued to petitioner a Statement of Deficiency and Notice of Deficiency asserting a penalty pursuant to section 685(g) of the Tax Law against petitioner as a person required to collect, truthfully account for and pay over withholding taxes of National Survey Research Group, Inc. (hereinafter "NSRG") in the amount of \$12,299.11 for the withholding tax period July 1, 1982 through December 31, 1982. At the hearing held herein, the Audit Division acknowledged that payment in the amount of \$8,781.12 had been received from bankruptcy proceedings which had been instituted against NSRG. Therefore, the deficiency at issue is reduced to \$3,517.99.

3. DMT, incorporated in 1979, was in the business of conducting surveys, research and political consulting. Petitioner owned one-third of the shares of DMT and was its President until his resignation in January, 1983. Petitioner's duties with DMT were to provide consulting services and interpretations of research reports. For the year at issue, petitioner spent approximately seventy to eighty percent of his time traveling outside of New York with the remainder of his time spent in New York City.

4. DMT had two offices in New York City, one at 60th Street and Madison Avenue and the other at 42nd Street. Most of the corporate personnel and the corporate books and records were located at 41 1/2 1st St. 10001

petitioner and approximately four other persons worked at the 60th Street office.

5. Prior to its incorporation, DMT was established as a partnership. Pursuant to a partnership agreement signed by the partners on December 3, 1979, petitioner was placed in charge of the financial aspects of the business. Petitioner was unable to recall whether or not the subsequent corporate agreement contained the same provision.

6. Petitioner was authorized to sign the corporate checks of DMT. For the period at issue, petitioner was unable to clearly recall whether or not he had signed salary checks and tax returns, but indicated that he may have done so. For the year 1982, petitioner received from DMT a salary of approximately \$78,000.00.

7. Petitioner contends that Nicholas J. Tortorello, an officer and a one-third shareholder of DMT, and Robert Skolnick, comptroller and chief fiscal officer of the corporation, were in charge of the administration of the internal affairs of DMT. During the latter months of 1982, petitioner was made aware of the fact that DMT was having financial difficulties which eventually resulted in bankruptcy proceedings and was also made aware that certain withholding taxes had not been paid. During this period, petitioner met with Mr. Tortorello and Mr. Skolnick to discuss the prioritization of corporate liabilities.

8. NSRG was a "phone-back" business which, after a survey instrument was prepared, created a sample, conducted phone surveys and computerized the results thereof. At the time NSRG was created, petitioner was a shareholder and an officer, but he was unable to recall whether or not he continued to be an officer during the period at issue.

9. NSRG's offices were located at 42nd Street in New **York** City. NSRG and DMT were affiliated corporations with some interlocking of offices and ownership. Petitioner contends that, for the period at issue, the day-to-day operations of NSRG were placed in the charge of Irwin Goldman, Nicholas J. Tortorello and Robert Skolnick.

10. Petitioner was authorized to sign the corporate checks of NSRG. For the period at issue, petitioner was unable to recall whether he received compensation from NSRG and was also unable to recall whether he had signed corporate checks or tax returns during this time period. Petitioner had no recollection of ever resigning from NSRG. As in the case of DMT, petitioner met with other officers of NSRG in late 1982 to discuss prioritizing the liabilities of NSRG. At this time, petitioner became aware of the fact that certain withholding tax payments had not been made by the corporation.

#### CONCLUSIONS OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding tax and willfully fails to collect and pay over such tax, section 685(g) of the Tax Law imposes on such person "...a penalty equal to the total amount of tax evaded, not collected, or not accounted for and paid over."

B. That section 685(n) of the Tax Law defines a person, for purposes of section 685(g) of the Tax Law, to include:

"...an individual, corporation, or partnership or an officer or employee of any 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 the question of whether petitioner was a person under a duty to collect and pay over withholding taxes must be determined **on** the basis of the facts presented. Some of the factors to be considered include whether petitioner signed the corporation's tax returns, possessed the right to hire and discharge

employees or derived a substantial portion of his income from the corporation. Other relevant factors include the amount of stock petitioner held, the actual sphere of his duties and his authority to pay corporate obligations and/or exercise authority over the assets of the corporation. Matter of Amenguel v. State Tax Comm., 95 A.D.2d 949 (Third Dep't., 1983); McHugh v. State Tax Comm., 70 A.D.2d 987. Finally, the test of willfulness is whether the act, default or conduct was "voluntarily done with knowledge that, as a result, trust funds of the government will not be paid over; intent to deprive the government of its money need not be shown, merely something more than accidental nonpayment [citation omitted]," Matter of Ragonesi v. N.Y.S. Tax Comm., 88 A.D.2d 707, 708 (Third Dep't., 1982).

D. That petitioner has failed to meet his burden of proof as provided under section 689(e) of the Tax Law to show that he was not a person who was responsible for the collection and payment of the withholding taxes of Dresner, Morris & Tortorello Research, Inc. and National Survey Research Group, Inc. for the period at issue herein, and that he did not willfully fail to fulfill these responsibilities.

E. That petitioner, who signed corporate checks and tax returns, was a shareholder and officer of both corporations, received substantial income from the corporations and exercised significant authority within the corporations, was a person required to collect and remit withholding taxes of the corporations for the period at issue. Petitioner, in his meetings with other officers of the corporations, was made aware that withholding taxes remained unpaid and he actively took part in discussions regarding the prioritization of corporate liabilities. Therefore, his failure to collect, account for and pay over the

tax was willful and he is liable for the penalty asserted against him pursuant to section 685(g) of the Tax Law.

F. That the petition of Richard Dresner is denied and the notices of deficiency dated November 28, 1983 and February 27, 1984, after modification in accordance with Findings of Fact "1" and "2", are sustained.

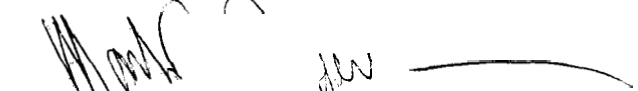
DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT

  
COMMISSIONER

  
COMMISSIONER