

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

NICHOLAS J. TORTORELLO

:

DECISION

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

:

Petitioner, Nicholas J. Tortorello, 160 Foxwood Road, West Nyack, New York 10994, 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. 55690).

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 January 14, 1986 at 9:15 A.M., with all briefs to be submitted by March 25, 1986. Petitioner appeared pro se. 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 Nicholas J. Tortorello (hereinafter "petitioner") a Statement of Deficiency and Notice of Deficiency

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 31, 1982. Payment in the amount of \$11,754.81 was received from bankruptcy proceedings which had been voluntarily instituted by DMT.

2. On November 28, 1983, 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. Payment in the amount of \$8,781.12 was received from bankruptcy proceedings which had been voluntarily instituted by NSRG.

3. DMT was a public opinion research corporation which did surveys of political campaigns and did corporate research. For the period at issue, it was, in fact, a holding company for NSRG; Dresner, Morris & Tortorello Media; Dresner, Morris & Tortorello Research and Dresner, Morris, Tortorello & Sykes. Richard Dresner, Richard Morris and petitioner each owned one-third of the stock of DMT at the time of its incorporation. Petitioner's primary duties for DMT were to sell corporate research and also to supervise certain personnel and administrative matters. He was an authorized signatory and did, on occasion, sign checks for DMT. Prior to January, 1983, petitioner was not involved in the preparation of tax returns or the signing of checks for payment of taxes for DMT or NSRG.

4. Prior to its incorporation, DMT was a partnership. Its partnership agreement provided that Richard Dresner was to have primary responsibility for

the financial aspects of the company. After incorporation, Mr. Dresner continued as chief financial officer and had primary authority over such matters as contracts, loans and leases. During the period at issue, petitioner asked Mr. Dresner whether or not DMT was timely filing and paying its withholding taxes and was informed that the corporation was current in its said tax liabilities. All tax related material was kept under lock and key by Mr. Dresner and, as such, was not made available for petitioner's inspection until January, 1983 when Mr. Dresner resigned.

5. On March 31, 1979, a written agreement was entered into between Barbara Keleman, Leslie Greene, Richard Morris and Richard Dresner, the purpose of which was to form a corporation known as NSRG. In the said agreement, petitioner was neither an officer nor a shareholder. Mr. Morris and Mr. Dresner subsequently purchased the shares of Barbara Keleman and Leslie Greene. After the said purchase of stock by Mr. Morris and Mr. Dresner, the operation and administration of the corporate affairs of both DMT and NSRG were, in fact, performed as if there had been a corporate merger. Although he never signed any corporate documents formally appointing him as an officer of NSRG, petitioner was told by Mr. Dresner that he was the Secretary of the corporation and was authorized to be a signatory for corporate bank accounts. Petitioner was informed that he was to act as Secretary solely for the purpose of enabling him to be a corporate signatory in the event of the absence of the other corporate officers. However, petitioner never signed corporate checks or tax returns for NSRG until Mr. Morris and Mr. Dresner resigned in January, 1983.

6. On May 22, 1980, an option agreement was entered into between DMT and Apple Associates, the purpose of which was to induce Apple Associates to acquire common stock of DMT. The said option agreement was signed by Richard

Dresner, on behalf of DMT, and by Howard Samuels, one of the principal partners of Apple Associates. In the middle of 1982, Mr. Samuels became Chairman of the Board for DMT and NSRG. After the resignation of Mr. Dresner and Mr. Morris during January, 1983, petitioner was instructed to sign and file a New York State Form IT-2103, withholding tax reconciliation form, on behalf of NSRG, in order that NSRG's employees could receive their **W-2** forms. At that time, petitioner intended to issue a check for payment of the said withholding taxes, but was informed by Mr. Samuels that the corporation had insufficient funds to do so. From the time Mr. Samuels became Chairman of the Board, his approval was required before any corporate checks were issued.

7. In February, 1983, petitioner, on behalf of both DMT and NSRG, filed voluntary petitions in bankruptcy in accordance with Chapter 7 of Title 11 of the United States Code. During the pendency of the bankruptcy proceedings, petitioner assisted the bankruptcy trustee in the administration of the bankruptcy case by providing information and background concerning all aspects of the trustee's investigation and the debtors' operations. Petitioner also assisted the trustee in litigation against Richard Dresner and others for corporate waste, mismanagement and fraud, fraudulent conveyances, avoidable preference and post-bankruptcy transfers.

CONCLUSIONS OF LAW

A. That in light of payments received from bankruptcy proceedings, as indicated in Findings of Fact "1" and "2", supra, the deficiency at issue relating to the withholding taxes of DMT is reduced to \$4,709.40 and the deficiency at issue relating to the withholding taxes of NSRG is reduced to \$3,517.99.

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

C. 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."

D. 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 Amengual v. State Tax Comm., 95 A.D.2d 949 (Third Dep't., 1983); McHugh v. State Tax Comm., 70 A.D.2d 987 (Third Dep't., 1979). 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. New York State Tax Comm., 88 A.D.2d 707, 708 (Third Dep't., 1982).

E. That with respect to DMT, although petitioner was a shareholder and

and filing of tax returns and payment of corporate withholding taxes. For the period at issue, petitioner attempted to ascertain from the officer in charge of payment of corporate financial obligations whether or not the corporation was current in its filing and paying of withholding tax and was informed that returns were filed and taxes were paid. Not until the subsequent resignation of said officer did petitioner learn that DMT had not filed returns or paid withholding taxes for the period at issue. Petitioner thereupon filed a voluntary petition in bankruptcy, assisted the trustee in pursuing adversary proceedings and claims and provided the said trustee with information and assistance to permit settlement of the bankruptcy proceeding which included the payment of a portion of the corporation's withholding tax deficiency as indicated in Finding of Fact "1".

F. That with respect to NSRG, petitioner was not a shareholder and was appointed as an officer solely for the purpose of convenience, i.e., to enable him to act as a signatory in the event of the absence of other officers. Not until January, 1983, did petitioner ever sign a corporate withholding tax return on behalf of NSRG and he did so only at the insistence of the Chairman of the Board. Prior to said time, petitioner never signed corporate checks or tax returns and it was not within the scope of his authority to do so. Only after Richard Morris and Richard Dresner became the sole shareholders of NSRG and completed a de facto merger with DMT did petitioner become involved in the activity of NSRG. He did not, however, perform any duties relating to the financial operations of the corporation until after the resignation of Mr. Morris and Mr. Dresner. After the said resignations, petitioner filed a New York State Form 2103 at the request of the Chairman of the Board and attempted to issue a check for the payment of the withholding tax due, but was unable to do

so due to lack of funds in the corporate account. As he did for DMT, petitioner also filed a voluntary petition in bankruptcy on behalf of NSRG and provided assistance to the trustee in bankruptcy in pursuing claims and subsequently settling the bankruptcy proceedings which resulted in the payment of a portion of the corporation's withholding tax deficiency as indicated in Finding of Fact "2".

G. That petitioner 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 is not, therefore, liable for the penalty asserted against him pursuant to section 685(g) ~~of~~ the Tax Law.


H. That the petition of Nicholas J. Tortorello is granted and the notices of deficiency issued November 28, 1983 are hereby cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986


PRESIDENT


COMMISSIONER


COMMISSIONER