

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Richard Dresner :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income
Tax under Article(s) 22 of the Tax Law for the :
Year 1982.
_____ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of September, 1986, he/she served the within notice of Decision by certified mail upon Richard Dresner the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard Dresner
951 Hardscrabble Rd.
Chappaqua, NY 10514

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
15th day of September, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
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Richard Dresner :

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Tax under Article(s) 22 of the Tax Law for the :
Year 1982.
_____ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of September, 1986, he served the within notice of Decision by certified mail upon Steven K. Meier, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven K. Meier
Lenefsky, Meier & Novod
18 E. 48th St.
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
15th day of September, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

September 15, 1986

Richard Dresner
951 Hardscrabble Rd.
Chappaqua, NY 10514

Dear Mr. Dresner:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Steven K. Meier
Lenefsky, Meier & Novod
18 E. 48th St.
New York, NY 10017

STATE OF NEW YORK

STATE TAX COMMISSION

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.	:	

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 (hereinafter "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 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. 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 the 42nd Street office, while

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

SEP 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER