STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SOL DREBIN	:	DETERMINATION DTA NO. 812784
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1982 through 1987.	:	

Petitioner, Sol Drebin, 1655 43rd Street, Brooklyn, New York 11204, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1982 through 1987.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 2, 1995 at 1:15 P.M., with all briefs submitted bySeptember 25, 1995, which date began the six-month period for the issuance of this determination. Petitioner appeared by Morris Werner, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUES

I. Whether petitioner has demonstrated that the Division of Taxation erred in determining that petitioner owed additional New York State and New York City personal income tax attributable to constructive dividends and/or additional unreported salary or other income received from Intercity Electrical Contracting Corp. and/or Century Electrical Contracting Corp.

II. Whether petitioner has demonstrated that his underpayment of New York State and New York City personal income taxes was attributable to reasonable cause and not willful

neglect such that the penalties asserted pursuant to Tax Law § 685(p) for the years 1985, 1986 and 1987 should be abated.

FINDINGS OF FACT

1. Petitioner, Sol Drebin (also known as Label Drebin), was a principal, officer and shareholder in a company known as Intercity Electrical Contracting Corp. ("Intercity") during the years in issue, 1982 through 1987. The business operations of another corporation, Century Electrical Contracting Corp. ("Century"), in existence prior to the period in issue, were merged into the business operations of Intercity in 1982 or 1983. During the audit period, petitioner was president, vice president and/or treasurer of Intercity. His son, Joseph Drebin, also held an office.

2. Sometime prior to December 1988, a Superior Court information was issued against Century, Intercity and Joseph Drebin, alleging that they had, with intent to evade payment of corporate income taxes, failed to file a corporate income tax return for the consecutive taxable years of 1984, 1985 and 1986, resulting in an unpaid tax liability with respect to each of the years. Further, the New York County District Attorney accused the defendants of committing the crimes of repeated failure to file returns and failure to pay utility or corporate taxes for the years 1984, 1985 and 1986, in violation of Tax Law § 1803 and Administrative Code of the City of New York § 11-4003.

3. In a letter from Assistant District Attorney Roslynn Mundell to the defendants' attorney, Jacob Laufer, dated December 19, 1988, the terms of a plea agreement between the District Attorney and the defendants was set forth in detail. The defendants included Intercity, Century, Label Drebin (petitioner herein) and Joseph Drebin, his son. The calendar years covered by the plea agreement were 1982 through 1987. Both Century and Intercity agreed to be prosecuted in accordance with the Superior Court information and pled guilty to one count of repeated failure to file corporate taxes, in violation of Tax Law § 1803, an E felony, and one count of repeated failure to file utility tax or corporate taxes, in violation of section 11-4003 of the New York City Administrative Code.

The corporate taxes determined to be due from the two corporations for the years 1982 through 1987 were based upon combined earnings for both corporations reached in an agreement between the District Attorney's office and the representatives of the defendants, to wit: Max Wasser, CPA and Jacob Laufer, Esq. The combined earnings and tax thereon for the two corporations for the years in issue were determined to be as follows:

	Gross Receipts	Net Profit	NYS Tax	NYC Tax
1982	$ 85,132	$ 21,283	$ 2,124	$ 1,911
1983	811,238	202,809	20,281	18,253
1984	1,252,276	313,069	31,307	28,176
1985	990,523	247,631	24,763	22,287
1986	746,654	186,663	18,666	16,800
1987	849,252	212,313	21,231	19,198

These figures appear in the record in a letter from Mr. Laufer to Mr. Wasser, dated December 29, 1988.

In a letter from Roslynn R. Mundell, Assistant District Attorney, to Assistant Commissioner Bruce Kato of the New York City Department of Finance, dated January 13, 1989, Ms. Mundell described how the amounts of tax were calculated. She explained that the amount of tax was calculated on a net profit figure established by deducting 75% from the amount of gross income as the cost of goods sold. This deduction was based on standards established by Dun and Bradstreet for the cost of doing business for this type of company operating in the New York City area. Three methods of calculating gross income were compared by the District Attorney's office, to wit: bank deposits were included as gross income; "FISA" records showing all payments to both corporations on City contracts; and gross income figures submitted by petitioner's accountant, Max Wasser. Since the figures submitted by the accountant, Max Wasser, were reasonable in comparison to the amounts arrived at using the other methods, they were accepted.

4. Petitioner submitted a two-page chart from a publication named "Investor's Monthly", dated March 1995, which showed the pay-out ratio for major corporations, i.e., the annual dividend expressed as a percentage of estimated earnings.

5. Petitioner was not authorized to legally get contracts for New York City electrical jobs, and needed to align himself by agreement with properly licensed contractors in order to secure New York City contracts. However, there is no credible evidence that petitioner had agreements to share any profits with these other contractors during the years in issue or if profits were shared. An agreement, dated October 30, 1981, between Century, Carl Weiss and petitioner, was executed prior to the audit period and, as stated above, shortly before Intercity assumed the business operation of Century.

6. Intercity agreed to execute a confession of judgment acknowledging the debt due and owing of $118,372.00 to the New York State Department of Taxation and Finance and $106,625.00 to the New York City Department of Finance, representing the combined unpaid corporate taxes for both Century and Intercity for the calendar years 1982 through 1987. The corporations also agreed to pay restitution and a criminal fine of $100,000.00.

Joseph Drebin also agreed to waive indictment and be prosecuted by Superior Court information to lesser included crimes of repeated failure to file corporate tax returns with the City and State of New York with respect to Intercity and also agreed to pay a criminal fine of $50,000.00 and serve a prison sentence, which was conditionally discharged.

As part of the plea agreement, the District Attorney's office agreed not to prosecute petitioner for his participation in the failure to file returns on behalf of Intercity and Century.

7. On December 22, 1988, Joseph Drebin, on behalf of himself and the two corporations, executed waivers of indictment, indicating acceptance of the plea agreement.

On January 4, 1989, the defendants Intercity, Century and Joseph Drebin appeared before the Honorable John A. K. Bradley, Justice of the Supreme Court, and entered their pleas as described above. In addition, Intercity, by its vice president, Joseph Drebin, executed confessions of judgment on the amounts admitted to be due and owing to the State and City of New York in the sums of $118,372.00 and $106,625.00, respectively.

8. A memorandum from Paul Giskin, Associate Fraud Investigator with the New York City Department of Finance, dated March 2, 1989, reported some of the details of the

investigation performed with regard to Century, Intercity, petitioner and Joseph Drebin. He stated that information obtained from the New York City Department of Housing, Preservation and Development ("HPD") indicated that the two companies received in excess of $3,400,000.000 between 1983 and 1987 in contract work performed for HPD. During this period, neither corporation filed any corporation tax returns. Despite numerous attempts to contact the principals of the corporations, Carl Weiss of Century and Label Drebin of Intercity, including subpoenas for tax returns, workpapers, etc., no documents were produced. Given the evidence of tax fraud, the case was referred to the Manhattan District Attorney's Office for criminal prosecution.

9. Both confessions of judgment executed by Joseph Drebin stated that the confessions were made without prejudice to claims by both the New York State Department of Taxation and Finance and the New York City Department of Finance for accrued interest and/or civil penalties.

10. The Division sent an appointment letter to petitioner on November 21, 1989, which requested documents pertaining to petitioner's personal income tax returns for the years 1986 and 1987. The letter also enclosed a power of attorney form in case petitioner chose to appear by a representative.

In fact, in response to this letter, Mr. Max Wasser called the auditor on December 4, 1989 to reschedule the appointment and to say that he would be forwarding a power of attorney. The power was presented to the Division by Mr. Wasser on January 4, 1990.

11. The Division assumed that the excess unreported income of the corporations was distributed to the Drebins as constructive dividends or excess wages since it was never provided with any corporate records or other evidence of how the excess unreported income from Century and Intercity was disposed. No evidence accounting for the unreported corporate income has ever been provided. However, an entry in the auditor's log, dated March 2, 1990, indicated that Mr. Wasser told her that the income was given to charity. The auditor asked for

confirmation of this fact on March 2 and April 6, 1990, and also in a letter to Mr. Wasser, dated April 6, 1990. No evidence of contributions was ever received.

12. Petitioner submitted the "Business Entity Questionnaire" for qualification as a bidder, proposer and subcontractor, dated November 25, 1987, submitted by Intercity to the New York City Department of Housing Preservation and Development, which indicated that the principals in the corporation were Label Drebin, Joseph Drebin and Ivon Coleman. It stated that Sol and Joseph Drebin each owned 40 percent of the stock. Petitioner's son, Joseph Drebin, signed the application as vice president. There was no evidence in the record indicating how the profits of the business were divided.

It is noted that the "Business Entity Questionnaire" contained apparently erroneous answers to some questions. Question "5.c." asked if any of the corporation's officers, directors or employees were affiliated with the lessor/owner of the property being used by the corporation, and the answer given was "no" even though Label Drebin was listed as the lessor/owner of the property.

Question "6.a." asked for the principals in the business and Ivon Coleman was listed as a 20 percent owner and president, even though petitioner testified that he and his son were the only officers and never mentioned another owner.

13. Petitioner was not able to recall when it was that Intercity assumed the business operations of Century, but, as stated above, believed it was in 1982 or 1983. No documentary evidence of this was produced even though the Division requested it. Even the agreement between petitioner, Century and Mr. Carl Weiss, entered into on October 30, 1981, did not establish that Century had any operations during the audit period.

14. Petitioner thought about closing down his contracting business in 1982, but remained in business until 1987, when he turned it over to his son, Joseph. Petitioner was ill during some of the audit period and allowed his son to handle the business during these unspecified periods.

15. During most of the audit period, petitioner drew a salary from Intercity. The offices of Intercity were in petitioner's two-family home and the corporation received its mail and payments from New York City projects there. Petitioner and his son, Joseph, received and deposited the checks from the New York City projects and petitioner had the authority to sign checks for Intercity. As stated earlier, petitioner did not recall what office he held in Intercity, but acknowledged he was an officer.

16. Petitioner's gross income for each of the years 1982 through and including 1987 was increased by the net profit figure calculated by the District Attorney's office, as set forth above in Finding of Fact "3", and petitioner's taxable income was adjusted accordingly and the New York State and New York City tax liabilities recomputed. A Statement of Personal Income Tax Audit Changes for the years 1982 through 1987, dated September 12, 1990, was issued to petitioner and his spouse (who did not file a petition herein), setting forth in detail the additional tax, penalties and interest due.

Like this forum, the auditor was provided with absolutely no credible evidence of ownership. In the audit report, the auditor stated:

> "1. [Label] Drebin, as well as Joseph Drebin, are held individually responsible as corporate officers for the full amounts of the unreported income computed for each year, 1982-1987.
> "2. It is to be noted that this auditor has taken an inconsistent position by assessing both Label Drebin and Joseph Drebin [Audit # D-6364] for the additional tax and related penalties and interest on the unreported income for 1982-1987. In the event that either is found to be fully liable for the assessment, no liability will exist against the other."

17. The Division issued a Notice of Deficiency to Sol and Bayle Drebin, dated February 15, 1991, which asserted additional tax, penalty and interest in the sum of $439,393.91 for the years 1982 through 1987. The Division asserted fraud penalty pursuant to Tax Law § 685(e)(1); additional penalty due to fraud pursuant to Tax Law § 685(e)(2); and penalty for substantial understatement of liability pursuant to Tax Law § 685(p).

18. Petitioner filed an application for a conference in the Bureau of Conciliation and Mediation Services which was held on November 24, 1993. An Order was issued on April 8,

1994, which sustained the tax deficiency in its entirety but modified the penalties asserted by permitting the assessment of Tax Law § 685(p) penalty for only the years 1985, 1986 and 1987.

STATEMENT OF PETITIONERS' POSITION

19. Petitioner argues that the figures used by the District Attorney do not accurately reflect the business of Century and Intercity because the business operations were not like those corporations which form the basis for the Dun and Bradstreet report.

Petitioner questioned the net profit figures used by the District Attorney because of the threat of incarceration to Joseph Drebin, who ultimately pled guilty to charges of failing to file returns and agreed to pay criminal fines for the misdeeds of the corporations in issue and himself. Petitioner pointed out that the Dun and Bradstreet revenue figures cannot be applied to the instant matters because of the neighborhoods in which the work was done, the scene of alleged rampant pilferage, and the fact that jobs had to be repeated at no charge due to damage.

Petitioner also contends that the Division lacked a basis for assuming petitioner was the sole shareholder of both corporations and that he received actually or constructively any of the earnings of the corporations as constructive or actual dividends.

Petitioner argues that any statement made by petitioner's accountant, Max Wasser, concerning the disposition of the net profit of the corporations, i.e., gifts to charity, was hearsay and should be accorded little or no weight.

20. Petitioner believes that the Division's assessment has no rational basis and that substantial evidence has not been introduced to sustain said assessment. Relying on the case of Grace v. New York State Tax Commission (37 AD2d 193, 371 NYS2d 715), petitioner argues that this matter is controlled by the rule in Grace, where the Court of Appeals said that the burden of proof to overcome tax assessments rests upon the taxpayer where there are facts and reasonable inferences from the facts to sustain the Commission's determination.

Petitioner argues that the Division did not show by reasonable inference from the facts that any income was derived by him from the corporations or how much.

Petitioner also argues that the case of Vogt v. Tully (53 NY2d 580, 444 NYS2d 441), which he says stands for the proposition that where there is no substantial evidence in the record to support the State's finding, its determination must be annulled, supports his contention that since there is no substantial evidence in the record which supports the Division's conclusion herein, the assessment must be cancelled.

CONCLUSIONS OF LAW

A. Petitioner's liability is derived from the outcome of a criminal investigation of Century, Intercity, petitioner's son, Joseph Drebin, and petitioner himself by the New York County District Attorney. The District Attorney's office determined net profit figures for the companies for the years 1982 through 1987, which were consistent with figures submitted by petitioner's accountant. These net profit figures were determined to be constructive or actual dividends to petitioner or excess salary, and constitute the basis of the assessment at issue herein.

Petitioner contends that the District Attorney's office erred in its utilization of the Dun and Bradstreet index for purposes of calculating the additional taxes due from Century and Intercity. He makes this contention even though his own accountant provided gross receipt figures to the District Attorney's office which were consistent with the figures it determined using other methods, and, his son, Joseph Drebin, vouched for the accuracy of the figures and the Dun and Bradstreet index in his plea agreement. Petitioner submitted figures from "Investor's Monthly" which purported to show that the numbers used by the District Attorney's office were not accurate, but those figures do not address the specific circumstances of the businesses in question, namely, Century and Intercity, and are therefore irrelevant to the circumstances and corporations herein.

Petitioner did not suggest the substitution of a different external index and did not offer any evidence which disputed the District Attorney's findings with respect to the corporations'

tax liability, most notably any books and records of either Century or Intercity which would have established a different tax liability. This is a glaring failure of proof. To date, no books and records of either corporation have been submitted into evidence. In light of the fact that the corporations' own accountant submitted adjusted gross income figures which confirmed the accuracy of the methods utilized by the District Attorney's office, i.e., bank deposits and proceeds from city contracts, it is concluded that petitioner has not carried his burden of showing that said figures were inaccurate, or that the application of the Dun and Bradstreet index lacked a rational basis. (See, A & J Gifts Shop v. Chu, 145 AD2d 877, 536 NYS2d 209 [where use of Dun and Bradstreet report was upheld by the Appellate Division where that petitioner provided no records to show that method utilized resulted in overestimation of actual sales].)

B. In turn, petitioner has also failed to demonstrate that the personal income tax assessment was erroneous. The Tax Appeals Tribunal has spoken to many of petitioner's arguments in its decision in Matter of R & J Automotive. Inc. (Tax Appeals Tribunal, June 15, 1989), where it said:

> "In a sales and use tax audit, resort to external indices as a method of computing sales tax liability must be founded upon a determination of the insufficiency of the taxpayer's record keeping which makes it virtually impossible to verify sales receipts and conduct a complete audit (Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). This standard, requiring demonstrably inadequate records before an indirect auditing technique may be used, has been explicitly rejected in audits of income for personal income, non-resident earnings and unincorporated business taxes (Matter of Giuliano v. Chu, 135 AD2d 89, 521 NYS2d 883; Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208). The distinction between an income tax audit and a sales tax audit centers on the type of tax being imposed (Hennekens v. State Tax Commn., supra). While sales tax audits seek recovery of taxes imposed directly upon verifiable receipts as evidenced by books and records which are required to be maintained (Matter of Licata v. Chu, 64 NY2d 873, 874, 487 NYS2d 552) audits involving the imposition of tax on income concern the receipt of income which cannot easily be verified by reference to books and records (Matter of Hennekens v. State Tax Commn., supra). The standard articulated by the courts of New York concerning audits of income is that indirect auditing methods are proper where the taxpayer's income is not accurately reflected in his books and records (see, Matter of Giuliano v. Chu, supra; Matter of Hennekens v. State Tax Commn., supra; Matter of Checho v. State Tax Commn., 111 AD2d 470, 488 NYS2d 859).
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> The New York State reconstruction of income cases have their genesis in the Federal law and cases. In particular, the case of Holland v. United States, (348 US

> 121) is recognized as the cornerstone of the law concerning reconstruction procedures. In Holland the Court recognized that reconstruction methods in income tax cases serve two primary purposes. First, they serve as a means of testing the accuracy of the books and records that have been presented. Second, they are cogent evidence of the amount of income which has been unreported. Further, Holland gave rise to the well settled principle that the fact that books and records appear to be adequate on their face does not preclude the use of reconstruction methods (see, Schwarzkopf v. Commr., 246 F2d 731, citing Holland v. United States, supra, at 131-132)."

Petitioner's arguments that the Division lacked a rational basis for its assessment and that the assessment is not supported by substantial evidence do not recognize the Division's superior right to utilize an indirect auditing method in the case of personal income tax, where receipt of the income cannot easily be verified by reference to books and records (see, Hennekens v. State Tax Commn., supra).

The application of the R & J Automotive principles to the instant matter supports the audit methodology chosen and utilized by the Division to compute the additional personal income tax due.

C. Further, the circumstances of this matter are not sympathetic to petitioner. Petitioner's son and business partner, Joseph Drebin, signed statements for both corporations as a director of both and a vice president of Intercity, with the authority to bind them to the most grave of consequences, pleading to criminal conduct. Part of the plea agreements provided that petitioner would not be prosecuted by the District Attorney for his role in the failure of Intercity and Century to file City and State corporate tax returns for the calendar years 1982 through 1987. Although petitioner argues that his son only agreed to the terms of the settlement to protect him and that he did so under duress, there is no evidence to support such a bald assertion. Petitioner admitted that he held the office of president and/or vice president of Intercity during the years in issue, received a salary, signed checks, received and deposited payments on City contracted jobs and maintained the offices of the corporation in part of his two-family house. All the mail of the corporation was received by the corporation at that address, including the checks received in payment for the jobs it did. Petitioner admitted that the business of Century ceased sometime during the years 1982 or 1983, and that its operations

became one with Intercity, consistent with the Division's theory of assessment of petitioner. Also, petitioner submitted absolutely no evidence of the corporate identities, i.e., their books and records or minutes of meetings by the directors, officers or shareholders. Coupled with the lack of documentary evidence, petitioner had a very hazy and incomplete memory of the events which took place during the audit period vis-a-vis the corporations and specific events with respect to his involvement with them. Petitioner never gave a reason for the failure to keep and/or produce corporate records.

Since petitioner, to this day, has not produced any records to dispute the Division's findings with regard to the additional income to Intercity and Century, that finding will not be disturbed. In fact, an examination of the record in this matter reveals that the only evidence submitted by petitioner with regard to the issue of the corporate liability and the derivative personal income tax liability was some of the correspondence with respect to the criminal investigation and pleas, the qualification application filed with the City of New York by Intercity in November of 1987, the agreement between Century, Carl Weiss and petitioner in October of 1981 regarding the business relationship between parties and the dividend analysis of major corporations by "Investors Monthly" for the month of March 1995. Buttressing this paucity of proof was the vague and incomplete testimony of petitioner, who could not remember much about the salient details of either Century or Intercity. Such testimony was not credible.

It is interesting to note that petitioner cites to several cases where courts have discussed the "substantial evidence" rule: Vogt v. Tully, supra; Matter of Clark v. Bouchard (103 AD2d 899, 478 NYS2d 131); Matter of Williams v. Coughlin (145 AD2d 771, 535 NYS2d 499); Matter of Donahue v. Chu (104 AD2d 523, 479 NYS2d 889); and Matter of Kaskel v. New York State Tax Commn. (111 AD2d 431, 488 NYS2d 322). All these cases emphasize the need for there to be substantial evidence in the record to support the assessment and that without such evidence the determination will be annulled. In the instant matter, the Division made several requests for information about the business operations of Century and Intercity and the

disposition of the excess income, but received no response from petitioner. It utilized reliable information from the District Attorney's office regarding excess income received by two corporations--closely held by petitioner--and made the logical but rebuttable presumption that the excess net profit had passed through to the shareholders. The Division was not even told who the shareholders were or their respective interests. Given these circumstances, it is determined the Division acted properly in assessing petitioner and its determination was based upon substantial evidence.

It is concluded that petitioner has failed to carry his burden of proving by clear and convincing evidence that both the method used to arrive at the amounts forming the basis of the assessment and the assessment itself are erroneous (see, Tax Law § 689[e]; Matter of Giuliano v. Chu, supra; Matter of Koren-Di Resta Constr. Co. v. State Tax Commn., 138 AD2d 909, 526 NYS 2d 654, lv denied 72 NY2d 805, 532 NYS2d 755).

D. The next issue is whether the excess income derived by the corporations was passed through to petitioner as a constructive dividend or as additional wages which went unreported. The record is sorely lacking any evidence which would shed light on either of the corporations in issue. This must be construed most stringently against Mr. Drebin, who, as an officer of Intercity, had the ability to produce evidence of the corporations' shareholders and the disposition of the excess income received by those corporations. He did not produce any credible evidence on either of these points. The application submitted by Intercity Electrical Contracting Corporation for qualification as a bidder, proposer and subcontractor, dated November 25, 1987, at the very end of the period in issue, listed petitioner as a 40% shareholder. The application was signed and submitted by his son, Joseph Drebin, as vice president of Intercity. However, the fact that Joseph Drebin subsequently pled guilty to failing to file returns and pay corporation taxes on behalf of Century and Intercity, and the errors and factually inconsistent answers on the questionnaire detract from any credibility one can place in statements made by him during the period in issue, and none is so accorded to the questionnaire herein.

Generally, in the case of a closely-held corporation, special scrutiny is required because of the unfettered control exercised by a limited number of shareholders (Roschuni v. Commr., 29 TC 1193, 1201-1202, affd 271 F2d 267 [5th Cir 1959]). Unfortunately, petitioner herein submitted no evidence with regard to his role in the corporations and his testimony was vague, incomplete and, thus, not credible. Given his disregard for the corporate entities, his lack of knowledge of their officers, the dates of their existence, lack of recordkeeping and his role as a principal (at the least), the Division fairly concluded that Mr. Drebin benefited from the excess income to the corporations, and made a logical assumption that he had received the net profits attributed to the corporations, in light of the totality of the circumstances. Since the burden of proof is on the petitioner herein (Tax Law § 689[e]; 20 NYCRR 3000.10[d][4]), it was incumbent upon him to prove that Intercity's excess income was not received by him as excess wages or as a constructive or actual dividend. The Division was justified in relying on the District Attorney's finding of excess corporate income and it was logical to infer that such excess income to a closely-held corporation was passed through to its principals/shareholders. Once again, petitioner's complete lack of records is fatal. Since he failed to introduce any credible evidence to refute the Division's theory, it is determined that petitioner did receive the unreported income as excess wages or as constructive or actual dividends.

Given the lack of evidence provided to the Division with respect to the percentages of ownership by petitioner and his son, the Division acted prudently in assessing the entire constructive dividend/excess income to both men but stating explicitly in its audit report that it was not its intention to collect more than the tax due on the single distribution. Although it may seem that, given the absence of any evidence of ownership, the Division should have assessed half of the net profit to both individuals, a brief analysis will point out the weakness. If Joseph Drebin, whose hearing was held prior to his father's had been held liable for his portion of the net profit, but petitioner's liability was determined to be less than half of the net profit, the Division would have been deprived of a portion of the tax based upon an artificial division of the profits caused solely by the Drebins' failure to submit any evidence of the ownership of the

corporation. Such a result would be unfair to the Division and unjustly enrich the Drebins, in fact rewarding them for not producing evidence which had been requested of them on many occasions over an extended period. For this reason, the Division's theory of assessment herein is sustained.

The Division is directed to deduct from the liability determined herein that amount of the personal tax liability ultimately accorded to Joseph Drebin pursuant to Audit # D-6364. In this way, petitioner's lack of cooperation and failure to keep and/or produce corporate and financial records will not be rewarded and the Division's interest in protecting the State's fisc will be served.

E. Petitioner was assessed penalty for substantial understatement of liability pursuant to Tax Law § 685(p) for the years 1985, 1986 and 1987, where it was found he understated his income tax for each of those years, and the understatement exceeded the tax required to be shown on the returns for those years by ten percent. The penalty is equal to ten percent of the amount of the underpayment. The statement of personal income tax audit changes sets forth the computation of this penalty for each of the years 1985, 1986 and 1987. Tax Law § 685(p) provides that the Commissioner of Taxation and Finance may waive the penalty on a showing of reasonable cause and that petitioner acted in good faith, but petitioner has not provided any proof whatsoever that either of these existed herein. (See also 20 NYCRR former 102.7.) Therefore, the penalties are sustained.

F. The petition of Sol Drebin is denied and the Notice of Deficiency issued on February 15, 1991 is sustained.

DATED: Troy, New York
February 29, 1996

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE