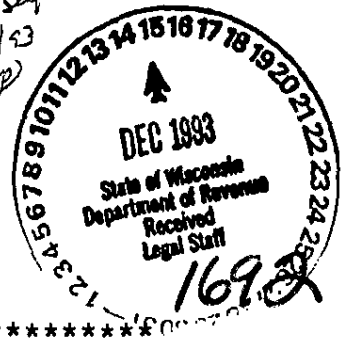


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STATE OF WISCONSIN  
TAX APPEALS COMMISSION

\*\*\*\*\*  
 DONNA M. BYRUM \* DOCKET NO. 92-S-378  
 7817 W. Heather Avenue \* DOCKET NO. 92-W-379  
 Milwaukee, WI 53223 \*  
 JAMES G. NEHRING \* DOCKET NO. 92-S-380  
 3836 S. Whitnall Avenue \* DOCKET NO. 92-W-381  
 Milwaukee, WI 53207 \*  
 \*

Petitioners,

RULING AND ORDER

vs.

WISCONSIN DEPARTMENT OF REVENUE  
 P.O. Box 8933  
 Madison, WI 53708

Respondent.

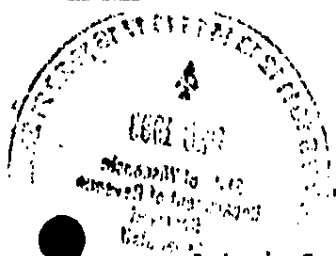
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MARK E. MUSOLF, COMMISSION CHAIRPERSON:

This matter was heard at Milwaukee on May 12, 1993. The petitioners appeared in person and by Attorneys Robert K. Steuer and Thomas E. Mountin. The respondent was represented by Attorney Sheree Robertson and Chief Counsel John R. Evans.

The respondent presented its case first because these were appeals of officer liability assessments.. See, Menzel v. WDOR, CCH Wis. Tax Rptr. ¶202-416 (1984; non-acq.), which assigns respondent the initial burden of going forward in such cases heard by this commission.

At the conclusion of the respondent's case, petitioners' attorneys moved "to dismiss these proceedings on the grounds that the state has failed to establish a prima facie case"; in that respondent had not shown that the petitioners had either the responsibility to pay the taxes or the knowledge that the taxes were not being paid.



The motion was taken under advisement by the Commission and briefs were subsequently submitted by the parties.

As set forth below, we rule in favor of petitioners.

**FINDINGS OF FACT**

The delinquent sales and withholding taxes at issue here were originally assessed against Fond du Lac Hotel Investors Limited Partnership, a Wisconsin limited partnership ("the partnership") which owned a hotel in downtown Fond du Lac, Wisconsin ("the hotel"). The assessments are for the period October 1987 through March 1989.

The partnership was established pursuant to a court-approved plan in a Chapter 11 Bankruptcy Code proceeding involving the previous hotel owner.

The partnership's managing general partner was Retlaw Plaza Hotel, Inc. ("Retlaw"), which was wholly owned by Grootemaat Investment Management Corp. ("GIMCO"). Retlaw had a different name during part of the period under review, but that is of no significance here.

Petitioner Byrum was president and a director of Retlaw. She was president and a salaried employee of GIMCO. She was authorized to sign checks for both corporations. She signed the limited partnership agreement and the hotel management agreement on behalf of Retlaw. She was also responsible for reviewing and approving on behalf of the partnership the annual budgets for the hotel which were prepared by the hotel manager. She approved budgets covering the period under review except for 1989, which she

did not approve because it "showed inadequate cash."

Petitioner Nehring was treasurer of both Retlaw and GIMCO and was authorized to sign checks for Retlaw.

At all times during the period under review the partnership acted through Retlaw, its managing general partner.

The partnership hired Brighton Hotel Corporation ("Brighton") to manage the hotel, at first by interim agreement dated April 1, 1987 and then by a Hotel Management Agreement ("the agreement") dated March 1, 1988. Brighton's on-site hotel manager was Dan Albright.

In the agreement, the partnership assumed liability for the payment of all taxes. However, the agreement also provided that Brighton would collect and deposit all hotel receipts and "disburse and pay" therefrom all expenses, including taxes, on behalf of the partnership.

In practice, all hotel accounting (including deposit of receipts, payroll preparation, withholding and other tax computations, and check preparation) was handled by Linda Stelter<sup>1</sup>, the hotel's "property controller," who was hired by Brighton's hotel manager with the approval of the partnership. All checks for hotel operations, including payroll and taxes, were paid from a hotel operations checking account with checks signed by the property controller and countersigned by the hotel manager or one of his superiors at Brighton.

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<sup>1</sup>John Wagner also served as property controller in the early weeks of the period under review.

2025 RELEASE UNDER E.O. 14176

Neither petitioner was authorized to sign checks drawn on the hotel operations account, and there was no evidence that either petitioner had knowledge of particular disbursements from it.

The property controller also prepared profit and loss statements, but such statements did not contain information concerning state tax delinquencies. Neither petitioner had or exercised any supervisory authority over the property controller.

Sharon Kirk was employed by GIMCO and served as Vice President of Retlaw. She was the partnership "manager" for GIMCO. Although she was not supervised by Byrum, she reported to Byrum as necessary.

Kirk was the officer of Retlaw most involved in and knowledgeable about the financial operations of the hotel, more so than either petitioner. She reviewed monthly hotel financial statements and prepared quarterly financial reports to the limited partners, which were approved by Byrum. Her testimony was vague concerning when she became aware of the unpaid taxes and the extent to which she communicated the same to petitioner Byrum, if at all. She and Byrum met only two or three times with the hotel property controller.

In addition to the hotel operations account, there was a hotel "recapitalization" or "recap" account. This account was funded from contributions to the partnership by the limited partners pursuant to the Chapter 11 plan. The recap account was used to pay for hotel renovation and marketing and related expenses. Requests for payments were initiated by the hotel

property controller, approved by the hotel manager and/or his superiors at Brighton, forwarded to the partnership where they were approved either by Sharon Kirk or petitioner Byrum,<sup>2</sup> and finally returned to the hotel manager who signed the recap account check in payment.

On one occasion in February 1988, sales taxes were apparently paid to the respondent from the recap account along with payments to other partnership creditors. However, there was no evidence that either petitioner knew of these payments.

There was no evidence that either petitioner paid or participated in a decision to pay other creditors while knowing of the unpaid taxes due to the respondent.

#### RULING

Petitioners' motion is tantamount to a motion by the defendant at the close of plaintiff's evidence under § 805.17, Stats., and we treat it accordingly, ruling that upon the facts and the law the respondent has not shown its assessments to be valid.

Respondent points to Wisconsin partnership law, specifically §§ 178.12 and 179.33, Stats., which impose liability for partnership debts upon the general partner of a limited partnership. We agree with respondent that those statutes sanction an assessment against Retlaw for the delinquent taxes.<sup>3</sup> But we agree with petitioners that those statutes do not impose liability

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<sup>2</sup>Although Byrum had the authority to approve recap account expenditures, there was no evidence that she ever did so.

<sup>3</sup>See also Livingston v. U.S., 92-1 USTC ¶50,137, 793 F.Supp. 252-4 (D.C.Idaho 1992).

per se on the petitioners simply because they were officers of Retlaw.

**Wisconsin Statutes Involved**

**71.83 Penalties.**

(1) CIVIL.

\* \* \*

(b) *Intent to defeat or evade.*

\* \* \*

2. Withholding. The penalties provided by this subdivision shall be paid upon notice and demand of the secretary of revenue or the secretary's delegates and shall be assessed and collected in the same manner as income taxes. Any person required to withhold, account for or pay over any tax imposed by this chapter, whether exempt under s. 71.05(1) to (3), 71.26(1) or 71.45 or not, who intentionally fails to withhold such tax, or account for or pay over such tax, shall be liable to a penalty equal to the total amount of the tax not withheld, collected, accounted for or paid over. "Person", in this subdivision, includes an officer or employe of a corporation or other responsible person or a member or employe of a partnership or other responsible person who, as such officer, employe, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

**77.60 Interest and Penalties.**

\* \* \*

(9) Any officer or employe of any corporation subject to this subchapter or other person who has responsibility for making payment of the amount of tax imposed under this subchapter and who wilfully fails to make such payment to the department shall be personally liable for such amounts, including interest and penalties thereon, if that corporation is unable to pay such amounts to the department, and the personal liability of such officer, employe or other responsible person as provided herein shall survive the dissolution of the corporation. Such personal liability may be assessed by the department against such officer, employe or other responsible person

pursuant to this subchapter for the making of sales tax determinations against retailers and shall be subject to the provisions for review of sales tax determinations against retailers, but the time for making such determinations shall not be limited by s. 77.59(3) or by any other statute.

For personal liability to be assessed against petitioners for withholding taxes under § 71.83(1)(b)2., Stats., or for sales taxes under § 77.60(9), Stats., the respondent must show that petitioners had the authority to pay the taxes, a duty to pay them, and that they intentionally breached that duty. See, Gerth v. WDOR, ¶203-367 CCH Wis. Tax Rptr. (WTAC 1992) (withholding tax) and Gould v. WDOR, ¶203-394 CCH Wis. Tax Rptr. (WTAC 1993) (sales tax).

In addition, consistent interpretations of both state and federal officer liability statutes have held that all that is necessary for intent to be proved is to show that there was a decision to use corporate funds to pay other creditors with knowledge of taxes being due. See, Gerth, supra, and Garsky v. U.S., 600 F.2d 86, 79-2 USTC ¶9436 (7th Cir. 1979).

#### **Responsibility for Taxes under the Management Agreement**

Both the partnership and Brighton had responsibilities for paying taxes under the agreement. The partnership had the ultimate responsibility under secs. 5.D.5 and 7.D., but Brighton had operational responsibility under sec. 5.K.1.(a). to "disburse and pay" taxes from the hotel receipts it collected. As a practical matter, without signature authority over the operating account and without its own on-site supervisory personnel, Retlaw was in no position to make withholding and sales tax payments.



Checks in payment of these taxes should have been prepared by the property controller and paid on behalf of the partnership with checks signed by the hotel manager in the same manner as with other operating expenses. Given the agreement, Retlaw and its officers had good reason to assume these taxes were being paid in the normal course absent contrary information or notice. Although that does not necessarily relieve the partnership (and Retlaw) from the ultimate responsibility (as employer and hotel owner) for paying the taxes, it bears significantly on the duty of petitioners to see to their payment.

#### **The Assessments Against Petitioner Nehring**

We summarily grant petitioners' motion to dismiss the assessments against petitioner Nehring. Although he had authority over Retlaw's accounts as its treasurer, he had no duty to pay the taxes because he was not involved in the operation of the hotel, either on-site or as an officer of GIMCO, and did not know the taxes were delinquent. But even if he had such a duty, he was not shown to have breached it by participating in the payment of other creditors when he knew or reasonably should have known that respondent's taxes were unpaid.

Indeed, the witnesses called by respondent confirmed that petitioner Nehring was not a "responsible person" within the meaning of the statute. This would have been sufficient to absolve him even if he had the burden of proof. See, Bledsoe v. U.S., 93-2 USTC ¶150,594 at 89,929 (D.C.Md. 1993).

**The Assessments Against Petitioner Byrum**

Authority. This element is satisfied because Byrum was president and an authorized signatory on all Retlaw accounts, as well as on all GIMCO accounts. She had and exercised operating control of Retlaw.

Duty. At some point petitioner Byrum obviously knew of the delinquent taxes, but when she knew and the circumstances of her knowing were not at all clear from the evidence. An outside audit, apparently performed at Retlaw's behest, was completed at the end of January 1989. This audit uncovered the tax delinquencies. Upon learning of the results of this audit, Byrum had a duty to see to the payment of the delinquent taxes.

Intentional Breach. This essential element, needed to meet the "intentionally" or "wilfully" language of the respective statutes, is simply not present. There was no evidence that petitioner Byrum at any point participated in the payment of other creditors from partnership (or Retlaw) funds to the exclusion of respondent. Without such a showing, the assessments cannot be upheld even assuming a duty to pay the taxes when she learned of the delinquencies sometime after late January 1989.

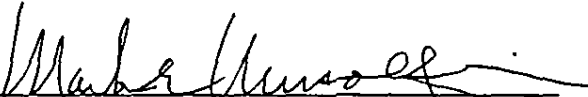
**ORDER**

The petitioners' motion is granted; respondent's actions on petitioners' petitions for redetermination are reversed.

Dated at Madison, Wisconsin, this 14th day of December,

1993.


**WISCONSIN TAX APPEALS COMMISSION**

  
\_\_\_\_\_  
Mark E. Musolf, Chairperson

(Approved)

\_\_\_\_\_  
Thomas R. Timken, Commissioner

ATTACHMENT: "Notice of  
Appeal Information"

  
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Joseph P. Mettner, Commissioner