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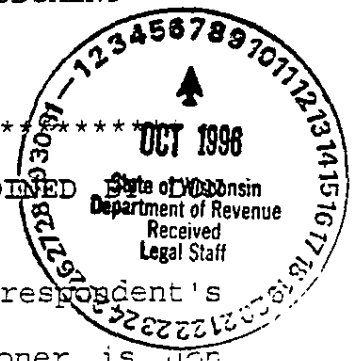
DOLPHIN SWIMMING POOL CO INC 96S22 100396 TAC

STATE OF WISCONSIN
TAX APPEALS COMMISSION

WISCONSIN
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STATE OF WISCONSIN
DEPARTMENT OF REVENUE
LEGAL STAFF

DOLPHIN SWIMMING POOL CO., INC.	*	
P.O. Box 46188		
Madison, WI 53744-6188	*	DOCKET NO. 96-S-22
Petitioner,	*	
vs.	*	RULING AND ORDER
WISCONSIN DEPARTMENT OF REVENUE	*	AWARDING
P.O. Box 8933		
Madison, WI 53708	*	SUMMARY JUDGMENT
Respondent.	*	

MARK E. MUSOLF, COMMISSION CHAIRPERSON, JOINED
M. MILLIS, COMMISSIONER:



The above-entitled matter is before us on respondent's motion for summary judgment. On brief for petitioner is Jon Arbogast, its president. On briefs for respondent is Attorney Linda M. Mintener.

Having considered the entire record, including the briefs and accompanying affidavits of the parties, we find, rule, and order as follows:

SUMMARY OF FACTS

1. As a result of a field audit, respondent issued a sales and use tax assessment against petitioner on August 13, 1993, in the amount of \$76,813.18, for the period of December 1, 1988 through November 30, 1992 ("the period under review"). The assessment mainly involved sales and use tax on petitioner's purchases of tangible personal property which was used in

petitioner's construction of new in-ground swimming pools and spas on which petitioner paid no sales or use tax.

2. On or about September 20, 1993, petitioner filed a petition for redetermination, dated September 17, 1993, for the subject sales and use tax assessment. On November 20, 1995, the petition for redetermination was denied, and a Notice of Amount Due in the amount of \$91,169.34, with updated interest to January 19, 1996, was sent to petitioner by respondent and received by petitioner on November 22, 1995.

3. Petitioner filed its petition for review with the Tax Appeals Commission on January 11, 1996, objecting only to the respondent's adjustments for use tax and respondent's assessment of the 25% negligence penalty.

4. Included in the subject assessment were \$13,168.47 in penalties, pursuant to § 77.60(3), Stats. Respondent's reasons for assessing the 25% negligence penalty against petitioner include the following:

a. For the years 1989-90 and subsequent years of the audit period, petitioner's franchise tax returns incorrectly stated that petitioner had purchased no tangible personal property without payment of state sales or use tax.

b. The amount of additional use tax measure that was found in the field audit herein, \$1,031,743, was approximately three times the measure of use tax petitioner had previously reported.

c. Although petitioner had routinely self-assessed and paid use tax to respondent prior to June 1990, it ceased self-assessing use tax in June 1990 and paid no use tax to respondent from May 1990 to the end of the audit period.

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d. Petitioner hired professional accountants to prepare its sales and use tax returns for the period of June 1990 through December 1990 and to advise its bookkeeper on filing sales and use tax returns for the audit period subsequent to that.

e. According to information obtained in the audit, the materials petitioner purchased from vendors for its in-ground pool construction remained constant throughout the audit period, and the vendors petitioner used remained the same.

f. During the period under review, petitioner made sales of tangible personal property to its customers without collecting sales tax.

g. A previous audit of petitioner resulted in a significant amount of tax owing, including (similar to the period under review) both use tax on purchases made without payment of sales or use tax and the 25% negligence penalty pursuant to § 77.60(3), Stats.

5. Petitioner has held Wisconsin Sales Tax Permit No. 191051 since June 26, 1972.

6. Petitioner and respondent entered into a Stipulation of Issues in this matter which stated that the only issue remaining for trial in this matter is: "Respondent's assessment of the 25% penalty in the amount of \$13,168.47, pursuant to § 77.60(3), Stats." In the stipulation, petitioner expressly conceded the correctness of "all other adjustments made by the respondent." The stipulation was signed by petitioner's representative, Jon Arbogast, on April 16, 1996 and by respondent's attorney on April 18, 1996, and was filed with the Tax Appeals Commission on April 19, 1996.

7. Although petitioner was incorporated in 1972, the current management was not involved until 1987.

8. From November 1986 until June 1990, Bob Wing was the accountant and office manager for petitioner. His responsibilities included all sales and use tax compliance matters, including the preparation of sales and use tax returns and the remittance of the tax due. Mr. Wing signed the checks to the respondent for the sales and use tax. Mr. Wing was experienced in sales and use tax compliance matters. Respondent acknowledges that the sales and use tax compliance system being implemented by Mr. Wing on petitioner's behalf was adequately reporting use tax.

9. Mr. Wing's employment was terminated in June 1990. Jon Arbogast, petitioner's president, relied on his CPA firm, McGladrey & Pullen ("the CPA firm") f/k/a Fitzpatrick & Roberts, in part on his decision in terminating Mr. Wing's services. Mr. Wing was secretive in his responsibilities and accounting activities, which created concern for Mr. Arbogast.

10. Cathy Bram started work in March 1988 as a data entry person and receptionist. She had some prior office experience, which Mr. Arbogast relied on in selecting her to fill Mr. Wing's position. She served as petitioner's bookkeeper for the remainder of the period under review.

11. For the first six months after Mr. Wing's departure, petitioner hired the CPA firm to prepare its sales and use tax returns. During this time, the CPA firm was also hired to train Ms. Bram in the preparation of the sales and use tax returns. Ms. Bram and petitioner relied on the CPA firm's

training for petitioner's compliance obligations under Wisconsin sales and use tax law.

12. Petitioner relied on the CPA firm for the accurate reporting of use tax during the initial six months after Mr. Wing's departure and, thereafter, for properly training petitioner's bookkeeper during the rest of the audit period. Unknown to petitioner's personnel, the CPA firm was no longer including in its use tax measure the purchases for the in-ground swimming pools which petitioner constructed. Such purchases had been reported under the prior system in place during Mr. Wing's tenure. However, for reasons not explained to petitioner by the CPA firm, similar purchases after Mr. Wing's departure were not included in the use tax measure.

RULING

Assessment of 25% Penalty

Respondent assessed the 25% penalty pursuant to § 77.60(3), Stats.:

If due to neglect an incorrect return is filed, the entire tax finally determined shall be subject to a penalty of 25% ... of the tax exclusive of interest or other penalty. A person filing an incorrect return shall have the burden of proving that the error or errors were due to good cause and not due to neglect.

The reasons for respondent's penalty assessment are set forth in detail at #1 of the Summary of Facts, supra.

Petitioner disputes the 25% penalty assessment on several grounds, including that the petitioner relied on the

advice and counsel of a CPA firm in preparing the flawed tax returns, that petitioner "did its absolute best in attempting to comply with its sales and use tax obligations," and that the case of *William Pagel v. DOR*, ¶ 203-344, CCH Wis. Tax Rptr. (WTAC 1992), supports its position.

In arguing reliance on its CPA firm, petitioner ignores this commission's holding in *Acqua Finance, Inc. v. WDOR*, ¶400-197 CCH Wis. Tax Rptr. (WTAC 1996), wherein we reiterated our holding in *Kryshak v. Dept. of Revenue*, ¶ 203-084, CCH Wis. Tax Rptr. (WTAC 1989), which cited cases dating back to 1977, to the effect that reliance on an accountant's advice is not reasonable cause as a matter of law.

This makes sense because the law places the filing and reporting obligation on the taxpayer, and any arrangement between the taxpayer and third parties for assistance in fulfilling that obligation must necessarily remain between them. So it is here, where we again reject reliance on third parties as a defense to the negligence penalty in § 77.60(3).

As to the applicability of *Pagel, supra*, we agree with respondent that that case may be distinguished because it involved withholding taxes and the "wilful neglect" language of § 71.83 (1)(a)4, Stats., which is not present here, together with an embezzlement which was clearly outside the scope of the bookkeeper's employment.

Finally, we address petitioner's argument that its

record prior to the management change of 1987 should not be considered in determining if the negligence penalty should apply. We disagree. The petitioner corporation is the taxpayer, not Mr. Arbogast. It is therefore petitioner's record of compliance which is relevant, not Mr. Arbogast's. When Mr. Arbogast purchased the corporation, he determined for whatever reasons to continue with the existing corporate entity. He cannot now disavow that determination simply because it works to his disadvantage. See, *Gilson Med. Electronics v. Dept. of Rev.*, 115 Wis.2d 532, 534 (1983).

For these reasons, we conclude that the respondent properly imposed the negligence penalty pursuant to § 77.60(3), Stats.

Additional Issues Argued By Petitioner

In its brief, petitioner disregarded the parties' stipulation of issues and argued two additional issues, both of which had apparently been argued before respondent's Office of Appeals (f/k/a Appellate Bureau) and rejected, only one of which was raised in petitioner's petition for review.

However, petitioner made no argument or motion for relief from the terms of the stipulation of issues which was signed by the parties and filed on April 19, 1996, which expressly provides: "Petitioner concedes the correctness of all other adjustments made by respondent herein, and will argue no further issues than [the 25% penalty] at trial or in the litigation of

this matter."

Even assuming petitioner had moved for relief from the stipulation pursuant to § 806.07, Stats., there is nothing in the record to justify our granting such relief. Mr. Arbogast, petitioner's president and representative, had ample opportunity to consider whether to enter the stipulation, and he did so voluntarily on behalf of petitioner. Both respondent and this commission relied on the stipulation when the summary judgment was scheduled for briefing.

Accordingly, this commission denies petitioner relief from the stipulation, and will consider and rule on the single issue stipulated by the parties, viz., whether respondent properly assessed the 25% penalty.

As to respondent's request for a penalty against petitioner pursuant to § 73.01(4)(am) and costs pursuant to § 814.025, Stats., we deny it. Given the stipulation of issues, respondent had no obligation to respond to petitioner's extraneous briefing of issues which petitioner had already conceded.

Finally, we observe that petitioner's "Affidavit of Jon Arbogast" is not in proper form, inasmuch as it is not sworn to before a notary public or other appropriate official. We have chosen to overlook this omission rather than delaying the proceedings to give petitioner time to remedy it. We have no reason to doubt the material facts stated therein, and respondent has not contested them.


We therefore conclude that respondent has shown it is entitled to summary judgment as a matter of law, pursuant to sec. 802.08, Stats.

ORDER

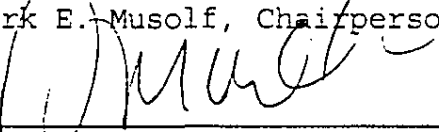
The respondent's motion for summary judgment is granted; respondent's action on the petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 3rd day of October, 1996.

WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner

ATTACHMENT: "Notice of Appeal Information"