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KENTON THOMAS D 88S223 051189 TAC

STATE OF WISCONSIN  
DEPARTMENT OF REVENUE

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

MAY 12 1989  
REGISTRY  
LEGAL DIVISION

\*\*\*\*\*

THOMAS D. KENTON  
c/o Rudolph, Kubasta,  
Rathjen & Murach  
P.O. Box 808  
Wautoma, WI 54982-0808

Petitioner,

vs.

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

Respondent.

DOCKET NO. 88-S-223

RULING AND ORDER

ON MOTION FOR

SUMMARY JUDGMENT

\*\*\*\*\*

This matter was presented to this Commission on affidavits and briefs submitted by Attorney Thomas M. Kubasta on behalf of petitioner and Attorney Donald J. Goldsworthy on behalf of the respondent, pursuant to the following motion of the respondent:

For summary judgment for the respondent on the ground that there is no genuine issue as to any material fact, and the respondent is entitled to summary judgment as a matter of law, pursuant to section 802.08(2), Wisconsin Statutes.

The respondent made motion for summary judgment in its favor on the grounds stated above. The petitioner objected to the granting of the motion. The parties presented affidavits and briefs in support of and in opposition to the motion.

## ISSUE

This Commission must determine whether Thomas D. Kenton continued to "hold" his seller's permits on the date of the sale within the meaning of sec. 77.51(9)(a), Stats., (1985-86), and Wisconsin Administrative Code, Section Tax 11.13(3)(b), and thus was ineligible to claim the "occasional sales" exemption from the sales tax.

The respondent claims that it is entitled to a summary judgment under sec. 802.08(2), Wisconsin Statutes, since legal delivery to the Wisconsin Department of Revenue of the seller's permits at issue herein is conditional upon the postmark date on the envelope bearing such seller's permits.

The petitioner contends that the legislature amended the intent of sec. 77.51(9)(a), Wisconsin Statutes, by adding sec. 77.51(9)(am), Wisconsin Statutes, effective May 17, 1988.

Having considered the pleadings, the record, the motion, the affidavits and the briefs of the parties, this Commission finds as

### FINDINGS OF FACT

1. By notice dated November 13, 1987, respondent made an assessment of sales and use tax against the petitioner in the amount of \$3,203.13, for the period ending September 25, 1987.
2. Under date of November 17, 1987, petitioner filed a petition for redetermination with the respondent.
3. By notice dated March 24, 1988, respondent denied the petitioner's petition for redetermination.

4. The sales and use tax assessment against petitioner relates to the September 25, 1987 disposition of the assets of petitioner's laundromat business operated at two locations, one in the Village of Wild Rose (Seller's Permit #359346A) and the other in the City of Wautoma (Seller's Permit #359346B).

5. Attorney Thomas M. Kubasta conducted the closing in which Thomas D. Kenton sold his Wautoma, Wisconsin laundry and dry cleaning business to Roy G. Pemble and Sandra J. Pemble. Said closing took place between 5:00 P.M. and 6:00 P.M. on Friday, September 25, 1987.

6. The law clerk for Attorney Kubasta, at his direction, left the offices of Attorney Kubasta at approximately 5:45 P.M. with a properly addressed envelope with sufficient postage containing the seller's permits at issue and mailed said envelope by regular mail at the post office in Wautoma, later executing an affidavit to that effect.

7. The seller's permits at issue were surrendered to the respondent by mailing the same to the Wisconsin Department of Revenue in an envelope postmarked September 26, 1987.

8. The respondent has shown good and sufficient cause for the granting of its motion for summary judgment pursuant to sec. 802.08(2), Wisconsin Statutes.

9. Under the provisions of sec. 77.51(9)(a), Wisconsin Statutes, the petitioner's sale of business assets was not exempt as an occasional sale since it failed to comply with the applicable requirements.

AUTHORITY: Fiedler Foods, Inc. v. Wis. Department of Revenue,  
142 Wis. 2d 722, 419 N.W. 2d 311 (App. 1987).

**WISCONSIN STATUTES INVOLVED**  
(1985-86)

Section 77.51 Definitions. Except where the context requires otherwise, the definitions given in this section govern the construction of terms in this subchapter.

\* \* \*

(9) "Occasional sales" includes:

(a) \* \* \* No sale of any tangible personal property or taxable service may be deemed an occasional sale if at the time of such sale the seller holds or is required to hold a seller's permit, \* \* \*.

**WISCONSIN ADMINISTRATIVE CODE INVOLVED**

Section Tax 11.13 Sale of business or business assets. (ss. 77.51(9)(a) and (14g) (h), 77.52(12) and 77.54(7), Stats.)

\* \* \*

(3) DELIVERY OF SELLER'S PERMIT. A permit holder may deliver the seller's permit to the department for cancellation in any one of the following ways:

\* \* \*

(b) The seller's permit may be mailed to the department (P.O. Box 8902, Madison 53708) accompanied by a letter requesting that the permit be canceled on or after the postmark date. Delivery is effective at 12:01 a.m. on the postmark date of a postpaid properly addressed envelope, if the envelope and its contents are actually received by the department. If the retailer desires assurance that the department has received the permit, the retailer may use certified mail, return receipt requested. (Emphasis supplied)

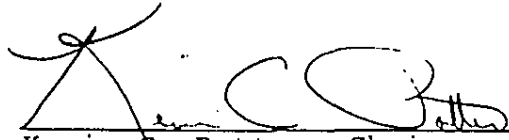
Therefore,

**IT IS ORDERED**

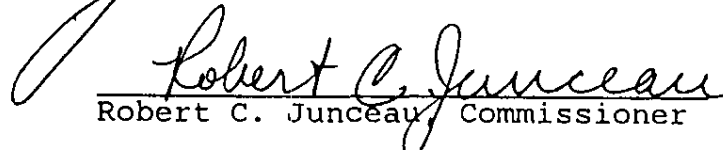
That respondent's motion for summary judgment is granted and the respondent's action on the petitioner's petition for redetermination is hereby affirmed.

Dated at Madison, Wisconsin, this 11th day of May, 1989.

WISCONSIN TAX APPEALS COMMISSION

  
\_\_\_\_\_  
Kevin C. Potter, Chairperson

  
\_\_\_\_\_  
John P. Morris, Commissioner

  
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Robert C. Juncéau, Commissioner

pc: Petitioner  
Representative  
Respondent

Attachment: "NOTICE OF APPEAL INFORMATION"