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STATE OF WISCONSIN
TAX APPEALS COMMISSION

HERBERT LEPP
P. O. Box 307
Kenosha, WI 53141-0307

Petitioner,

DOCKET NO. 87-S-56

v.

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

Respondent.

DECISION AND ORDER

Appearances:

For petitioner: Herbert Lepp, pro se.

For respondent: Robert C. Stellick, Jr., Esq.
Wisconsin Department of Revenue

Bartley, Commissioner, joined by Timken, Chairman, and Morris,
Junceau, and Wagner-Malloy, Commissioners:

I.

ISSUE

Whether taxpayer is personally liable to pay the unpaid sales
taxes of a corporation with which he was associated?

II.

FINDINGS OF FACT

This cases arises out of department's assessment of Herbert Lepp, Inc., a corporation, for \$6,704.45 in unpaid sales taxes attributable to certain periods during the period 1977 to 1981. The assessment was not appealed and became final and conclusive as to the corporation on or about February 24, 1984, 60 days after it was issued.

Taxpayer was president and sole shareholder of the corporation on that date and throughout its existence. He was aware of the department's claim for the unpaid taxes. He signed 105 corporate checks during the period February through May 1984 to employees and creditors, but none in payment of the unpaid sales taxes at issue here.

Department issued a tax warrant against the corporation. The warrant was recorded with the Register of Deeds on March 30, 1984. Department also garnished a corporate account but collected only \$22. In 1986, department assessed Mr. Lepp personally for the unpaid taxes.

III.

CONCLUSIONS OF LAW

The applicable version of Section 77.60(9) provided:

"Any officer . . . of any corporation [liable for sales taxes] who has responsibility for making payment of [sales taxes] and who wilfully fails to make such payment . . . , shall be personally liable for such amounts, including interest and penalties thereon, in the event that after proper proceedings for collection of such amount, as provided in this subchapter, such corporation is unable to pay such amounts * * *."

Taxpayer's liability turns on four questions: (1) whether he had the authority to direct the payment of taxes; (2) if so, whether he had a duty to direct payment; (3) if so, whether he intentionally breached that duty; and (4) whether department made reasonable efforts to collect from the corporation before assessing taxpayer. /1/

Department has satisfied all four elements. /2/ First, as president and sole shareholder, taxpayer necessarily had the authority to direct the payment of taxes.

Second, where the corporate official has the authority and knows the taxes are unpaid, he is duty bound to see to it that the taxes are paid at the earliest possible moment. "Duty attaches to corporate officials who are charged with general control over

/1/ See generally Pharo v. Wisconsin Department of Revenue, CCH Wis. Tax Reporter, ¶ 202-967 (1988), which sets forth three of the four elements listed in the text. The fourth element applies only in sales tax cases brought under the applicable version of the statute.

/2/ In so-called officer liability cases, such as this, department has the burden of proof. See Menzel v. Wisconsin Department of Revenue, CCH Wis. Tax Reporter, ¶ 202-416 (1984).

corporate affairs and who participate in decisions concerning payment of creditors and dispersal of funds." /3/ Here because taxpayer had the authority to pay and knew the taxes were unpaid, he became personally obligated to see that they were paid promptly.

Third, to show intentional breach of duty, "it need not be shown that there be any bad motive or intent to defraud". /4/ Nor does reasonable cause or justifiable excuse preclude liability. /5/ It is sufficient to show that there was a decision to use corporate funds to pay other creditors with knowledge of the taxes being due. /6/ Here because taxpayer knew the taxes were due, and because he chose to pay other creditors, the element of wilfulness is established.

Fourth, there were serious collection efforts made against the corporation -- the tax warrant and the garnishment. We do not read the statute as requiring endless attempts to collect from the corporation before personal liability attaches. How far these attempts must be carried is something that can't be defined

/3/ Pharo v. Wisconsin Department of Revenue, supra n. 1.

/4/ Id.

/5/ Id.

/6/ Id.

with precision. However once department has come forward with evidence showing that such attempts were made, the burden shifts to the taxpayer to show that the attempts were inadequate or perfunctory. Here there was no evidence to show or even suggest inadequate or half-hearted collection efforts. To be sure, additional efforts might have yielded some additional funds. But that's not the proper test. Rather, the test is whether the hypothetically reasonable collection officer, weighing the costs of additional efforts against the potential gains, would have deemed it prudent to proceed. Here we find no basis to quarrel with the decision to forego those further efforts.

Therefore, because all elements requisite to personal liability are met, we hold taxpayer personally liable for the assessment.

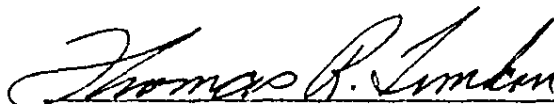
One final point. Although there was an effort by taxpayer to show that the corporate assessment was incorrect, that cannot be an issue in the case, because the assessment became final by the corporation's failure to appeal it. /7/ That finality precludes our review of any matters involved in the underlying assessment.

/7/ Section 77.59(6) provides that a "redetermination shall become final 60 days after receipt by the petitioner of notice of the redetermination unless, within that 60-day period, the petitioner appeals the redetermination [to the tax appeals commission]."

IV.
ORDER

Accordingly department's denial of taxpayer's petition for redetermination is affirmed.

Dated: January 8, 1990



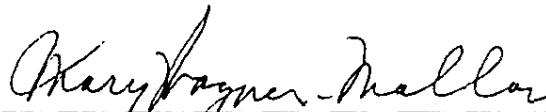
Thomas R. Timken, Chairman



John P. Morris, Commissioner

(APPROVED)

Robert C. Junceau, Commissioner



Mary Wagner Malloy, Commissioner



Douglass H. Bartley, Commissioner

cc: Notice of appeal information