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THOMAS GERALD K 94V222 082195 TAC

FILED
Wisconsin Tax Appeal: Commissioner
AUG 21 1995
Docket No.

Rec'd
7/26/95
9/26/95
(11)

STATE OF WISCONSIN
TAX APPEALS COMMISSION

1779

GERALD K. THOMAS
1815 Chestnut Court
Arlington Heights, IL 60004

Docket No. 94-V-222

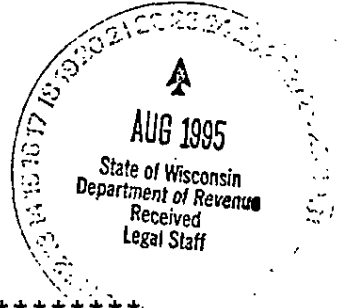
Petitioner,

RULING AND ORDER

vs.

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

Respondent.



JOSEPH P. METTNER, COMMISSIONER:

The above-entitled matter has been submitted for ruling based upon the respondent's Motion for Summary Judgment, filed on March 31, 1995.

The parties have also submitted briefs in support of their respective positions.

The petitioner represented himself in this matter. The respondent was represented by Attorney Linda Mintener.

Having considered the submissions of the parties in their entirety, this commission finds, rules, and orders as follows:

1. On November 19, 1993, the respondent issued a personal liability assessment against the petitioner for special fuel taxes, interest, and penalties due from Thomas Motor Lines, Inc., in the amount of \$ 123,711.44, for the period October 1, 1989 to December 31, 1991.

2. On December 2, 1993, the petitioner filed a petition

for redetermination with the respondent, protesting the assessment issued against him.

3. On May 2, 1994, the respondent denied the petitioner's petition for redetermination.

4. On July 12, 1994, the petitioner perfected his appeal before this commission.

5. On November 3, 1994, the respondent mailed to the petitioner its First Request for Admissions, Interrogatories, and Request for the Production of Documents, which were received on November 10, 1994. The respondent received only partial responses to these documents from the petitioner, dated November 29, 1994.

6. On December 16, 1994, the respondent mailed to the petitioner its Second Request for Admissions, which were received on December 19, 1994. No substantive responses were ever received by the respondent concerning the Second Request for Admissions.

7. The deadlines within which the petitioner was required to admit, deny or object to all items in the respondent's first and second requests for admissions expired on December 6, 1994 and January 18, 1995, respectively, under §§ 801.14(2), 801.15, and 804.11(1)(b), Stats.

8. All matters which were the subject of the respondent's request for admissions which were not met by substantive responses by the petitioner within the allowable time periods noted are deemed admitted and are, for purposes of this action, considered conclusively established under § 804.11(2), Stats.

9. An illustrative, though not exhaustive, list of

matters deemed admitted and conclusively established by the petitioner's failure to substantively deny or object to the individual requests for admissions served by the respondent is as follows:

a. Thomas Motor Lines, Inc. (the "corporation"), was incorporated in 1985 and was in the business of over-the-road hauling, operating approximately 24 trucks.

b. The corporation was out of business in July 1993, is now defunct, and has no assets with which to pay the subject liability.

c. The corporation filed a Chapter 11 bankruptcy petition in December 1990, which was dismissed by the Bankruptcy Court on or about September 18, 1992. Respondent received no payment in the bankruptcy action.

d. Petitioner was the founder, co-owner, and an employee of the corporation during the period under review.

e. During the period under review, petitioner was the president of the corporation.

f. During the period under review, petitioner was the manager of and was involved in the day-to-day operation of the corporation, including the hiring, firing, and supervising of its employees and the engaging of an accountant with whom petitioner personally dealt.

g. During the period under review, petitioner was responsible for, prepared, reviewed, signed, and filed certain Wisconsin tax returns of the corporation. Petitioner also reviewed

and mailed some of the Department of Transportation's ("DOT") Interstate Fuel Tax Reports.

h. During the period under review, petitioner dealt with Wisconsin Revenue Agents Jack Yetter and/or Jacqueline Jensen concerning the payment of the corporation's delinquent taxes. Petitioner made arrangements for and signed an installment agreement for payment of the delinquent corporate state taxes of the corporation, but refused to enter into an installment agreement that included the special fuel tax because he felt the assessment was incorrect. Petitioner also handled contacts for the corporation with the Internal Revenue Service during the period under review.

i. Petitioner had written correspondence with respondent regarding the special fuel tax of the corporation, and on January 10, 1989 wrote a letter to Revenue Agent Jensen regarding state taxes.

j. Petitioner admitted to Revenue Agent Yetter that he was one of the persons personally liable for the state taxes of the corporation, and admitted to respondent's Conferee John Czeshinski that he was personally liable for the corporation's special fuel taxes, although the petitioner has denied that he was the "only one" liable for these taxes.

k. Petitioner was authorized to sign checks for the corporation from 1985 through its closing in July 1993.

l. Petitioner signed the majority of the checks issued by the corporation during its existence, including numerous monthly

checks for such things as payroll, supplies, federal taxes, rent, C.O.D. deliveries, and fuel for trucks. Petitioner co-signed checks for payment of the corporate taxes, and also signed the checks and signature cards, according to copies of bank records accompanying the respondent's affidavits.

m. During the period under review, petitioner opened corporate bank accounts, deposited corporate receipts in bank accounts, authorized payroll checks, and made out checks for payment of corporate bills and obligations.

n. Petitioner negotiated and guaranteed bank loans for the corporation.

o. During the period under review, petitioner directed and/or authorized the payment of corporate bills and obligations, determined the corporation's financial policy, and directed and/or requested Lisa Thomas to co-sign the corporation's checks.

p. Petitioner made most of the corporate decisions during the period under review, including participating in and making the decisions regarding which bills and obligations of the corporation to pay with the limited funds available.

q. Petitioner reviewed and approved the invoices of the corporation during the period under review, and saw to it that some of the corporate obligations were paid.

r. Petitioner paid the corporate bills and obligations necessary to keep the business operating, and discussed the payment and priority of payment of the corporate bills and obligations with others.

s. Petitioner would have paid the special fuel tax at issue if he had known that he would be held personally liable for the tax.

t. The corporation paid numerous obligations during the period under review, including some state and federal taxes.

u. The corporation never filed any fuel tax reports or returns with respondent.

v. The corporation purchased diesel fuel tax-free during the period under review.

w. The corporation was in financial distress in 1990 and 1991, and deliveries to the corporation were being made on a C.O.D. basis.

x. The corporation had delinquent tax warrants filed against it for the special fuel taxes at issue.

y. During the period under review, the petitioner knew that the corporation was unprofitable, was not paying its bills and obligations (including withholding and highway taxes), and had previously had taxes that were delinquent.

z. During the period under review, petitioner received calls from corporate customers regarding unpaid corporate bills.

aa. Petitioner was aware in 1991 that respondent was conducting a special fuel tax audit of the corporation.

bb. Before commencing the special fuel tax audit at issue, respondent's auditors met with petitioner on or about February 28, 1991 regarding the State's audit of the corporation, at which time petitioner was informed (if he had not already known)

that the corporation had not been paying any tax on its bulk special fuel supply as was required by law, that fuel tax accrues from the time the fuel is pumped into bulk storage tanks, and that the State's audit would result in special fuel tax owing.

cc. While the corporation was operating, petitioner was aware that the State's audit resulted in an assessment against the corporation for special fuel tax in excess of \$100,000.

dd. Petitioner saw and reviewed respondent's work papers from its 1991 audit of the corporation, and discussed the work papers and the resulting special fuel tax assessments with Daniel Thomas and Revenue Agent Jack Yetter.

ee. Petitioner was aware in 1992 that the Wisconsin DOT was conducting a fuel tax audit of the corporation. While the corporation was still operating, petitioner knew that the DOT's fuel tax audit resulted in an assessment against the corporation and even discussed the audit results.

ff. The respondent's special fuel tax assessment against the corporation is final and conclusive, the limitation period having passed within which the assessment may have been validly challenged through administrative process.

gg. Petitioner was aware that the special fuel taxes at issue were not discharged in his personal bankruptcy action.

hh. The corporation could have paid the special fuel taxes at issue had it chosen to, since it had adequate gross income to do so.

10. Personal liability assessments may be issued against

an officer, employee, fiduciary or agent who is responsible for paying special fuel taxes, interest, penalties or other charges incurred by another person, as that word is defined in § 77.51(10), Stats., which are reportable and due to the respondent under § 78.49, Stats. (1989-90; 1991-92). See, § 78.70(6), Stats.

11. For purposes of administering personal responsibility assessments of special fuel taxes, interest, and penalties, this commission adopts, with some modification, the legal standard used in the setting of other personal responsibility assessments of state taxes, i.e., that the respondent must show the existence of the alleged responsible person's authority to pay the tax in question, that person's duty to pay the tax, and that person's intentional breach of the duty to pay the tax. See, *Thomas M. Barrett v. Wisconsin Department of Revenue*, WTAC Docket Nos. 91-S-420, 91-W-421, February 23, 1993, reported in, CCH Wis. Tax Rptr. ¶203-394.

Our modification to this standard is based upon a key difference in the language of personal liability statutes in the setting of withholding or sales and use taxes, §§ 71.83(1)(b)2. and 77.60(9), Stats., respectively, when compared with the personal liability statute at issue in this case, §78.70 (6), Stats. In particular, § 78.70(6), Stats., requires only that the appropriate tax and charges be incurred by another person, and that the assessed individual be responsible for paying those taxes and charges incurred. No element of wilfulness or intent to breach a duty to pay need be shown by the respondent in order for assessments made under this statute to stand, making authority and

duty to pay the tax the sole issues for review.

12. Under Wisconsin case law, summary judgment may be based upon a party's failure to respond to a request for admission, even where the deemed admission(s) would be dispositive of an entire case. See, Bank of Two Rivers v. Zimmer, 112 Wis.2d 624 (1983).

13. There is no genuine issue of material fact present in this matter.

14. The respondent has shown good and sufficient grounds for the granting of its motion, and is entitled to judgment as a matter of law under § 802.08(2), Stats., because the petitioner's duty and authority to pay the special fuel tax and charges at issue have been conclusively proved, triggering personal liability under § 78.70(6), Stats.

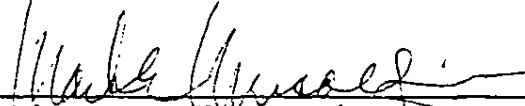
Therefore,

IT IS ORDERED

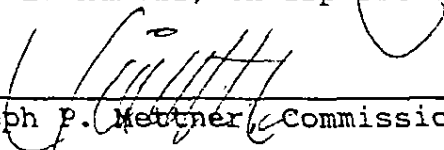
That the respondent's Motion for Summary Judgment is granted, and its action on the petitioner's petition for redetermination is hereby affirmed.

Dated at Madison, Wisconsin, this 21st day of August, 1995.

WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Joseph P. Mettner, Commissioner

ATTACHMENT: Notice of Appeal Information"