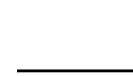


THOMAS GERALD K 94V222 101294 TAC



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STATE OF WISCONSIN

TAX APPEALS COMMISSION

GERALD K. THOMAS
23 Hollyhock Court
Appleton, WI 54914

Petitioner,

vs.

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

Respondent.

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DOCKET NO. 94-V-222

RULING AND ORDER

A
OCT 1994
State of Wisconsin
Department of Revenue
Received
Legal Staff

JOSEPH P. METTNER, COMMISSIONER:

The above-entitled matter is presented to this commission for ruling based upon the respondent's motion to dismiss the petition for review.

Having fully considered the relevant documents filed by the parties, this commission concludes that the respondent's motion to dismiss is denied.

On August 30, 1994, a scheduling conference was held in this matter, and a Scheduling Order Memorandum dated August 31, 1994 was issued to the parties setting forth the items agreed upon during the conference. Primary among those items was the requirement that the petitioner in this case file an amended petition for review by September 30, 1994, because it was not clear to the respondent on what basis the petitioner was challenging the

respondent's action on the petitioner's petition for redetermination.

On September 21, 1994, this commission received from the petitioner a letter setting forth additional facts to supplement the petition for review, the first of several submissions of the parties offered following the scheduling conference. Item #2 in this letter was the petitioner's assertion that "Dan Thomas maintained full responsibility for motor fuel taxes during [Thomas Motor Lines'] existence."

The relevant portion of the August 23, 1994 affidavit of the respondent's attorney, offered in support of the Motion to Dismiss, asserts:

Petitioner's petition for review, as well as his petition for redetermination herein, fail to allege any facts or law on which relief may be granted to Petitioner, since the merits of the underlying assessments against Thomas Motor Lines, Inc., cannot be contested in this personal liability tax appeal.

When considering motions made under § 802.06(2)(f), Stats., for the failure of a party to state a claim upon which relief may be granted, the facts pleaded and all reasonable inferences from the pleadings are admitted to be true, for purposes of testing the legal sufficiency of the claim. Scarpaci v. Milwaukee County, 96 Wis. 2d 663, 669 (1980). The pleadings are to be liberally construed with a view to substantial justice to the parties. Id.

Actions should not be dismissed for failure to state a claim unless it appears certain that no relief can be granted under

any set of facts that a plaintiff can prove in support of his or her allegations. Watts v. Watts, 137 Wis. 2d 506, 512 (1987).

This case involves an assessment for the personal liability of an individual responsible for paying special fuel taxes to the respondent under § 78.70(6), Stats. The petitioner has averred that another individual, Dan Thomas, had full responsibility for motor fuel taxes during the existence of the corporate predecessor to the assessment, Thomas Motor Lines, Inc.

The petitioner is not an attorney and has pleaded his own case in the original and amended petitions for review. Because motor fuel taxes are not under review in this case, we assume that the petitioner was ascribing to another the full responsibility for remitting special fuel tax payments due from Thomas Motor Lines, Inc. As defined in the statutes, "special fuel" is itself a type of motor vehicle fuel, making it easy to understand the petitioner's failure to make the distinction in the averred facts constituting his amended petition for review. See, § 78.43, Stats.

It is clearly reasonable for this commission to determine that the petitioner, in ascribing to another the full responsibility for paying the special fuel taxes at issue, was asserting by negative inference that he had no responsibility for paying such taxes. This statement of fact is sufficient to state a claim for which relief may be granted in this case, i.e., that the petitioner was not a person "responsible" for remitting the taxes to which the personal liability provisions of § 78.70(6), Stats., would apply.


Therefore,

IT IS ORDERED

That the respondent's motion to dismiss is denied, and that this case be set for further scheduling at the earliest possible date.

Dated at Madison, Wisconsin, this 12th day of October, 1994.

WISCONSIN TAX APPEALS COMMISSION



Joseph P. Mettner, Commissioner

pc: Petitioner
Respondent