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 Wisconsin Tax Appeals Commission
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STATE OF WISCONSIN
 TAX APPEALS COMMISSION

IRVIN L. HOUGOM
 329 Lang Drive
 La Crosse, WI 54603-3076

* DOCKET NO. 97-W-239

FILED
 FA 2/21/99
 4/21/99

Petitioner,

* **RULING AND ORDER**

vs.

* **GRANTING RESPONDENT'S**

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

* **MOTION FOR SUMMARY**

* **JUDGMENT**

Respondent.

THOMAS M. BOYKOFF, COMMISSIONER:

This matter is before the Commission on respondent's motion for summary judgment in its favor on the ground that there is no genuine issue as to any material fact. Respondent, Wisconsin Department of Revenue, by its Attorney Michael J. Buchanan of Madison, Wisconsin, has submitted a Notice of Motion, Motion, sworn affidavit, and brief in support of its position on its motion. Petitioner, Irvin L. Hougom, has not responded, although he was given until January 8, 1999 to do so in a November 9, 1999 Scheduling Order of the Commission.

Having considered the entire record, the Commission finds, rules, and orders as follows:

JURISDICTIONAL FACTS

1. By notice dated May 30, 1996, respondent issued an assessment against petitioner for \$9,500.19 (tax, interest, and penalty) as an officer, employe or other responsible person of Scenic Trailways, Inc. (a/k/a Scenic Trails, Inc.), which failed to pay to respondent the income taxes withheld from its employes, in violation of Wis. Stat. § 71.83(1)(b)2. The periods covered are March through December 1994 and March through August 1995.

2. Under date of July 26, 1996, petitioner filed a petition for redetermination with respondent objecting to the assessment. In that objection, petitioner admitted personal liability for the withholding taxes from June 1, 1995 and thereafter. Of the time periods in the assessment, this admission covered June, July, and August 1995. Still in dispute was his personal liability for withholding taxes for (A) March through December 1994 and (B) March through May 1995.

3. In a Notice of Action letter, dated April 24, 1997, respondent denied petitioner's petition for redetermination.

4. Petitioner filed a timely petition for review with the Commission.

ADDITIONAL MATERIAL FACTS

5. Petitioner was an officer of Scenic Trailways, Inc., since 1971 when the corporation first applied for a withholding tax employer identification number from respondent. At that time, the corporation's name was "Allied

Underwriters, Inc."

6. Petitioner held the office of president of Scenic Trailways, Inc., at least from 1991 through 1995. During that period, he was personally involved in the day-to-day operations of the corporation.

7. At least from 1991 to 1995, Scenic Trailways, Inc., was engaged in the business of insurance sales and providing charter bus service.

8. In 1991, Scenic Trailways, Inc., was delinquent in paying \$16,070 of its withholding taxes to respondent. Petitioner signed an Installment Agreement with respondent agreeing to pay the delinquency and agreeing to "File Current tax returns and pay all tax due by the due dates of the returns." (From Respondent's First Request for Admissions, Exhibit B)

9. Subsequently, three times prior to the personal liability assessment here in issue, petitioner received personal liability assessments for failing to pay the withholding taxes of Scenic Trailways, Inc., for various months in 1993 and for January and February 1994, and he paid all three assessments.

10. As president of Scenic Trailways, Inc., petitioner was a signer on the corporate checking account maintained at Norwest Bank of La Crosse N.A. Petitioner personally issued checks on that account in November 1994 and April 1995.

11. Also as president of Scenic Trailways, Inc., petitioner executed the withholding tax reports filed with respondent for the months July

(\$537.39), August (\$561.47), September (\$509.85), October (\$661.01), November (\$550.80), and December 1994 and February 1995. Except for the reports for October 1994 and February 1995, those reports were mailed to respondent with no remittance. A Revenue Agent of respondent personally met with petitioner on October 1, 1994 and discussed Scenic Trailways, Inc.'s then-delinquent withholding taxes.

12. Petitioner accepts personal liability for that portion of the \$9,500.19 of withholding taxes of Scenic Trailways, Inc., from June 1995 and thereafter.

13. Monthly bank statements for the corporate checking account indicate that during June, July, and August 1995, deposits were made in the amounts of \$33,116.87, \$24,885.14, and \$20,313.85, respectively. The monthly bank statements also indicate that checks were written during those three months in the amounts of \$32,649.40, \$25,528.47, and \$19,599.07 to pay Scenic Trailways, Inc.'s creditors. During those three months the corporate checking account received \$78,315.86, of which \$77,776.94 was used to pay other creditors; yet, petitioner did not remit the \$9,500.19 that was due to respondent.

ISSUE

Under Wis. Stat. § 71.83(1)(b)2, is petitioner liable as a person (1) with the authority to direct the payment to respondent of withholding taxes of Scenic Trailways, Inc. (a/k/a Scenic Trails, Inc.); (2) if so, did he have a duty to

direct that payment; and (3) if so, did he intentionally breach that duty?

APPLICABLE WISCONSIN STATUTES

71.83 Penalties.

(1) CIVIL.

* * *

(b) *Intent to defeat or evade.*

* * *

2. 'Personal liability.' The penalties provided by this subdivision shall be paid upon notice and demand of the secretary of revenue or the secretary's designee and shall be assessed and collected in the same manner as income or franchise taxes, except that the time limits under s. 71.77 do not apply to the assessment of personal liability under this subdivision if the corporation ... with which the person is associated is assessed within the time period under s. 71.77. Any person required to withhold, account for or pay over any tax imposed by this chapter, whether exempt under s. 71.05(1) to (3), 71.26(1) or 71.45 or not, who intentionally fails to withhold such tax, or account for or pay over such tax, shall be liable to a penalty equal to the total amount of the tax, plus interest and penalties on that tax, that is not withheld, collected, accounted for or paid over. The personal liability of such person as provided in this subdivision shall survive the dissolution of the corporation.... "Person", in this subdivision, includes an officer, employe or other responsible person of a corporation ... who, as such officer, employe ... or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

CONCLUSIONS OF LAW

1. Petitioner has the personal liability for Scenic Trailways, Inc.'s withholding taxes for March through December 1994 and March through August 1995 because he had the corporate authority as president to direct the payment of taxes and did not do so; he had a duty to direct payment and did

not do so; and he intentionally breached that duty.

2. Under Wis. Stat. § 802.08(2), respondent has moved for summary judgment. It has shown that there is no genuine issue as to any material fact in this case and that respondent is entitled to judgment as a matter of law. Petitioner has not set forth any specific material showing that there is a genuine issue of fact for a trial. See § 802.08(2) and (3).

RULING

The standard for determining whether summary judgment should be granted was recently stated in *Johnson v. Blackburn*, 220 Wis. 2d 260, 270 (Ct. App. 1998), as follows (without citations):

Summary judgment is appropriate in cases where there is *no genuine issue of material fact* and the moving party has established entitlement to judgment as a matter of law.... If a dispute of any material fact exists, or if the material presented on the motion is subject to conflicting factual interpretations or inferences, summary judgment must be denied....

To establish personal liability of a corporate officer for unpaid withholding taxes of that officer's corporate employer, respondent must prove three factors:

1. The officer had the *authority* to pay — or to direct the payment of — the withholding taxes.
2. The officer had a *duty* to pay — or to direct the payment of — the withholding taxes.
3. The officer *intentionally* breached the duty.

Gerth and Kelly v. WDOR, Wis. Tax Rptr. (CCH) ¶ 203-367 (WTAC 1992); Page

v. WDOR, Wis. Tax Rptr. (CCH) ¶ 203-374 (WTAC 1992); and *Michael A. Pharo v. WDOR*, Docket No. 96-W-478 (WTAC October 9, 1997), affirmed by Dane Co. Circ. Ct., June 8, 1998.

If respondent proves the three factors, petitioner must show otherwise by clear and satisfactory evidence. *Drilias v. WDOR*, Wis. Tax Rptr. (CCH) ¶ 400-222 (WTAC 1996). In this case, respondent has met its burden of proof and petitioner has failed to meet his.

1. Petitioner Had The Authority To Direct Payment Of The Taxes

As president of Scenic Trailways, Inc., since 1971 through at least the time periods covered in this case, petitioner was personally involved in the day-to-day operations of corporate activities. This included having the authority to pay — or to direct payment of — the withholding tax in this case.

Petitioner had the authority to sign and issue checks on the corporate checking account. He also personally signed and issued checks drawn on that account to pay other corporate creditors.

Petitioner signed withholding tax reports for July to December 1994 and February 1995 and sent them to respondent without tax payments. He was personally assessed three times as a responsible corporate officer for several months in 1993 and for January and February 1994, and he paid all three assessments. As the corporation's president, petitioner also executed an Installment Agreement in February 1991 in which he agreed to pay \$16,070 of delinquent tax and to "File Current tax returns and pay all tax due by the[ir]

due dates".... He also met with one of respondent's Revenue Agents in October 1994 to discuss delinquent corporate withholding taxes.

Petitioner admitted that he was the person responsible for paying corporate withholding taxes beginning with June 1995. His status in the corporation was no different as corporate president prior to than beginning with June 1995.

The above clearly demonstrates that petitioner had the authority to pay or to direct payment of the corporation's withholding taxes during the periods of the assessment under review.

Petitioner denies, however, responsibility for any pre-June 1995 corporate withholding taxes because he had assigned the task to a corporate employee.¹ In *Masrud v. WDOR*, Wis. Tax Rptr. (CCH) ¶ 203-284 (WTAC 1991), and *Jeffrey P. Mach, Sr. v. WDOR*, Docket No. 95-V-1295 (WTAC September 17, 1997), this commission held that the authority to file includes the authority over those whom a petitioner hired to write checks and file tax reports. The authority may be delegated, but the obligation to comply with the law or to see that it is complied with cannot be delegated to avoid liability.

2. Petitioner Had A Duty To Pay Or To Direct Payment Of The Withholding Taxes.

When a corporate officer has the authority to pay or to direct payment of corporate withholding taxes and knows that the taxes are unpaid,

¹ Petitioner's denial is found in his petition for review. Even if the denial were pertinent, the Commission would not consider it since petitioner may not rest on his pleadings for summary judgment. Wis. Stat. § 802.08(3) and (4).

he or she becomes personally obligated to see that they are paid. This commission has held that "a corporate president with adequate company funds on hand has the duty to see to it that *all* his [or her] company's outstanding payroll taxes are immediately 'paid over' irrespective of whether he knew they were due when they became due." *Gerth and Kelly v. WDOR, supra.*

Petitioner knew as early as 1991 that Scenic Trailways, Inc., experienced difficulty paying its withholding tax. In 1991, he signed an Installment Agreement and agreed to pay the existing delinquency and to keep current in future payments. On October 1, 1994, he met with a Revenue Agent to discuss then-existing delinquencies. In 1994 and 1995, he signed and submitted withholding tax reports without tax payments. Submitting reports in this way demonstrates his knowledge of both the duty to pay and of the nonpayment.

On the above occasions and others, petitioner had a duty to pay — or to direct payment of — withholding taxes. He knew it. And he breached this duty.

3. Petitioner Intentionally Breached His Duty As A Corporate Officer To Pay The Withholding Taxes.

In at least March through December 1994 and March through May 1995, petitioner had the authority to sign and issue checks on the corporate account. He knew or should have known from the bank statements for the account covering those periods that there were substantial funds in the account.

Knowing this, petitioner paid corporate obligations to other creditors but not to respondent. This constitutes a breach of his duty as a corporate officer to pay — or to direct payment of — the corporate withholding tax obligations.

Respondent has demonstrated that petitioner had the authority to pay or to direct the payment of the withholding taxes of Scenic Trailways, Inc., for March through December 1994 and March through May 1995; that petitioner, as a corporate officer, had a duty to pay or to direct the payment of corporate withholding taxes; and that petitioner intentionally breached that duty. It has met its burden of proof in showing that there is no genuine issue as to any material fact in proving the above conclusions.

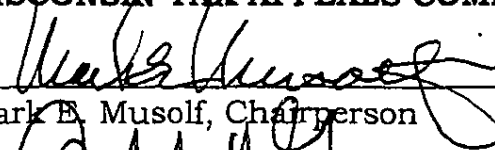
Therefore,

IT IS ORDERED

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

Dated at Madison, Wisconsin, this 28th day of April, 1999.

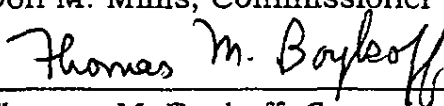
WISCONSIN TAX APPEALS COMMISSION



Mark B. Musolf, Chairperson



Don M. Millis, Commissioner



Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"