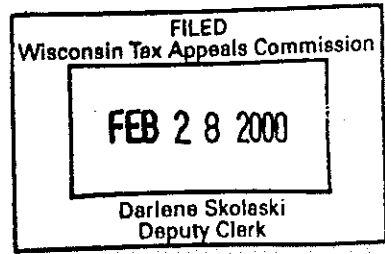


#12



STATE OF WISCONSIN
TAX APPEALS COMMISSION

MARK J. KUZNIEWSKI
3240 S. 55th Street
Milwaukee, WI 53219-4432

* DOCKET NOS. 98-S-229
and 98-W-230
*

Petitioner,

* **RULING AND ORDER**

vs.

* **AWARDING SUMMARY**

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

* **JUDGMENT TO**
* **RESPONDENT**

Respondent.

*

THOMAS M. BOYKOFF, COMMISSIONER:

These matters are before the Commission on both petitioner's and respondent Wisconsin Department of Revenue's ("Department") motions for summary judgment under Wis. Stat. § 802.08. Both the petitioner and the Department have filed sworn affidavits and briefs supporting their positions on the motions.

Petitioner appears *pro se*. The Department appears by Attorney Michael J. Buchanan, Madison, Wisconsin.

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

Undisputed Jurisdictional Facts

1. Under date of December 12, 1997, the Department issued a

sales and use tax assessment for \$12,513.54 to petitioner as an officer, employee or other responsible person of Grill, Inc., d/b/a Central Grill ("Grill, Inc."), who intentionally failed to withhold, account for or pay over to the Department the sales and use taxes of that business under Wis. Stat. § 77.60(9). March through June 1996 is the period involved.

2. Petitioner sent an undated petition for redetermination to the Department which was received on December 29, 1997.

3. Under date of June 12, 1998, the Department denied this petition for redetermination. Petitioner then filed a timely appeal with the Commission.

4. Under date of November 26, 1997, the Department issued a *withholding tax* assessment of \$4,303 to petitioner as an officer, employee or other responsible person of Grill, Inc., who intentionally failed to pay over taxes withheld under Wis. Stat. § 71.83(1)(b)2. The time periods involved are 1995 and January through May 1996.

5. Petitioner sent an undated petition for redetermination to the Department which was received on December 29, 1997.

6. Under date of June 12, 1998, the Department denied this petition for redetermination. Petitioner then filed a timely appeal with the Commission.

Other Undisputed Material Facts

7. Joseph D. Carini ("Mr. Carini") owned the stock of Grill, Inc.,

a bar and restaurant, and his daughter, Jennifer Carini, had been Grill, Inc.'s general manager until January 1996 when she left town.

8. From January 7, 1996 through June 1996, petitioner was the general manager of Grill, Inc., and "the person on the premises" in charge of its day-to-day operations. Petitioner was previously indebted to Mr. Carini, and, rather than receiving a salary, exchanged his services as general manager in payment of the debt.¹

9. From the time petitioner began working at Grill, Inc., he knew that the business had financial difficulties and that it did not have enough funds to pay all of its bills. In late January 1996, petitioner personally paid sales taxes owed by Grill, Inc., for November 1995 (which were delinquent) and December 1995.²

10. Soon after petitioner began working at Grill, Inc., Mr. Carini told petitioner that he (Mr. Carini) had been meeting with IRS employees regarding taxes that Grill, Inc., had failed to pay the IRS.

11. Grill, Inc.'s accountant informed petitioner that even if there was not enough money to pay the sales and withholding taxes of Grill, Inc., the tax forms should be filed showing the liability without including any payment.

¹ In its Initial Brief (at p. 4) and its Reply Brief (at pp. 2-3), the Department suggests that, despite petitioner's denial, he received some type of cash remuneration from Grill, Inc. for his services.. If this were so, it is not a material fact that would affect this ruling. Petitioner would be an employee of Grill, Inc., if he received no remuneration and exchanged his services to pay off a debt or if he received a cash payment for his services. Any income tax liability from either arrangement is not pertinent to this ruling.

² Undisputed Material Facts 9, 10, and 11 were included in the Department's First Request For Admissions but not admitted or denied by petitioner. Therefore, these facts are deemed admitted. See Wis. Stat. § 804.11(1)(b). Also, petitioner stated these facts in his brief (pp.1-2) opposing the Department's motion for summary judgment.

12. On a signature card for a business checking account of Grill, Inc., at Liberty Bank, Milwaukee, petitioner was listed as President and Mr. Carini as Secretary-Treasurer, and each was authorized to sign checks. Between December 1995 and July 1996, tens of thousands of dollars were in that account and were used by the corporation to pay creditors but not to pay the Department for withholding taxes and sales and use taxes owed. Other creditors paid during that period, receiving checks signed by petitioner, included Sysco, Ameritech, and employees of Grill, Inc. Employees were paid, for example, with checks dated January 12, March 15, and April 20, 1996.

13. Petitioner continued to know of Grill, Inc.'s sales and use tax delinquencies. On April 17, 1996, petitioner signed a post office form acknowledging receipt of an envelope sent by certified mail. A code on that receipt indicated that the envelope contained a notice of a hearing date of May 15, 1996 on a notice to show cause to the Department why Grill, Inc.'s seller's permit should not be revoked. In his sworn affidavit, petitioner agreed "that the Respondent did mail a letter to Grill, Inc. The petitioner by now knowing of the tax situation by Mr. Joseph Carini does not open any tax information. He just forwards it to the owner, Mr. Joseph Carini." (Affidavit, p. 1, item 3., Point 9)

APPLICABLE WISCONSIN STATUTES

71.83 Penalties.

(1) CIVIL.

* * *

(b) *Intent to defeat or evade.*

* * *

2. 'Personal liability.' ... 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.

77.60 Interest and penalties.

* * *

(9) Any person who is required to collect, account for or pay the amount of tax imposed under this subchapter and who wilfully fails to collect, account for or pay to the department shall be personally liable for such amounts, including interest and penalties thereon, if that person's principal is unable to pay such amounts to the department. The personal liability of such person as provided in this subsection shall survive the dissolution of the corporation or other form of business association. ... "Person", in this subsection, includes an officer, employe or other responsible person of a corporation or other form of business association or a member, employe or other responsible person of a partnership, limited liability company or sole proprietorship who, as such officer, employe, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

RULING

1. There is no genuine issue of material fact concerning

petitioner's personal liability for withholding taxes and sales and use taxes of Grill, Inc., that were not withheld, accounted for or paid for the periods under review, and these matters are appropriate for summary judgment.

2. Petitioner is personally liable under Wis. Stat. § 71.83(1)(b)2 for the unpaid withholding taxes of Grill, Inc., for 1995 and January through March 1996.

3. Petitioner is personally liable under Wis. Stat. § 77.60(9) for the unpaid sales and use taxes of Grill, Inc., for March through June 1996.

OPINION

The elements necessary³ to establish the personal liability for unpaid withholding taxes are:

1. The *authority* to pay — or to direct the payment of — the taxes;
2. The *duty* to pay — or to direct the payment of — the taxes; and
3. The *intentional breach* of that duty.

Gerth and Kelly v. Wisconsin Department of Revenue, Wis. Tax Rep. (CCH) ¶ 203-367 (WTAC 1992); *Michael A. Pharo v. Wisconsin Department of Revenue*, 1997 Wisc. Tax LEXIS 28 (WTAC 1997), *aff'd* (Dane Co. Cir. Ct. June 8, 1998); *Irvin L. Hougom v. Wisconsin Department of Revenue*, 1999 Wisc. Tax LEXIS 21 (WTAC 1999); and *Danny R. Senf v. Wisconsin Department of Revenue*, 1999

³ The Commission has held that the amount of an assessment may also be an element of personal liability. *Monfre v. Dep't of Revenue*, 1998 Wisc. Tax LEXIS 7, at 29-30 (WTAC 1998). The amount of the assessment is not an issue in this case.

Wisc. Tax LEXIS 42 (WTAC 1999).

If the Department presents clear and satisfactory evidence of the three elements, petitioner bears the burden of proving otherwise by clear and satisfactory evidence. *Drilias v. Wisconsin Department of Revenue*, Wis. Tax Rep. (CCH) ¶ 400-222 (WTAC 1996). In this case, the Department has presented such evidence showing that petitioner was a responsible person with respect to withholding taxes not withheld, accounted for or paid during the period under review. Petitioner has not proven the contrary.

Petitioner Had The Authority To Pay The Taxes

From January 7 through June 1996, petitioner was the president and general manager of Grill, Inc., and the person on the premises. He was in charge of the corporation's day-to-day operations. He had check-signing authority over Grill, Inc.'s business checking account.

Under this check-signing authority, petitioner personally signed and issued corporate checks to creditors of Grill, Inc., with some of the tens of thousands of dollars in the account. He did not, however, pay the corporation's taxes to the Department although he knew they were due, owing, and unpaid.

Petitioner Had A Duty To Pay The Taxes

When a person has authority to pay the taxes due and knows that they are unpaid, he or she becomes personally obligated to see that corporate funds are used to pay this liability. *Gerth and Kelly v. WDOR, supra*, and *Lepp v. WDOR, supra*.

When he began working for Grill, Inc., petitioner knew that the business had financial difficulties and could not pay all of its bills. In late January 1996, petitioner paid Grill, Inc.'s sales taxes for November 1995 (which were delinquent) and December 1995.

While he knew that taxes were owed to the Department, petitioner paid several of the corporation's creditors with corporate funds. These included employees who were paid with checks dated January 12, March 15, and April 20, 1996. These payments were made even though petitioner knew that taxes were owing to the Department.

On April 17, 1996, petitioner signed a receipt for certified mail containing a Notice and Order to Show Cause from the Department, notifying Grill, Inc., that it must appear at a May 15, 1996 hearing to show cause why its seller's permit should not be revoked for failure to pay sales and withholding taxes. Knowing of the delinquent tax situation, petitioner did not open the letter but forwarded it to Mr. Carini.

Petitioner Intentionally Breached His Duty To Pay The Taxes

The Department is not required to show bad faith, malice or evil intent to prove an intentional breach of the duty to pay withholding taxes due. Consistent interpretations of both state and federal officer liability statutes have held that all that is necessary for intent to be proven is to show that there was a decision to use corporate funds to pay other creditors with knowledge of taxes being due. *See, Gerth and Kelly, supra, and Garsky v. U.S., 600 F.2d 86,*

79-2 USTC ¶ 9436 (7th Cir. 1979).

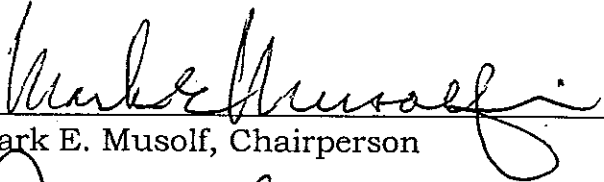
At least between January and April 1996, while knowing that withholding and sales and use taxes were due, petitioner issued checks to Grill, Inc.'s corporate creditors. These checks were on the corporate checking account on which he had check-signing authority in Liberty Bank, Milwaukee. These checks were to creditors including corporate employees, Sysco, and Ameritech. This establishes an intentional breach of duty. *Garsky, supra; Gerth and Kelly, supra; and Senf, supra.*

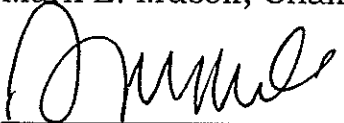
ORDERS

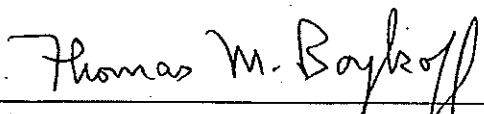
1. The Department's motion for summary judgment is granted.
2. Petitioner's motion for summary judgment is denied.
3. Petitioner's petitions for review are dismissed.

Dated at Madison, Wisconsin, this 28th day of February, 2000.

WISCONSIN TAX APPEALS COMMISSION


Mark E. Musolf, Chairperson


Don M. Millis, Commissioner


Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"