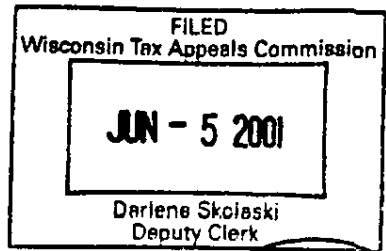


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**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

EUGENE C. RONDON
534 Nova Way
Madison, WI 53704

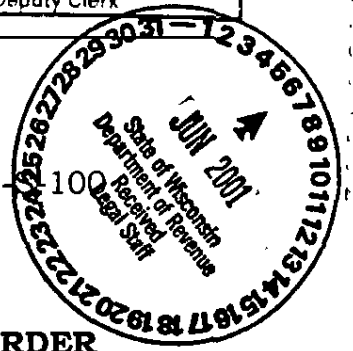
Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708

Respondent.

*
* DOCKET NO. 00-100
*
* **RULING AND ORDER**
*
* **AWARDING**
* **SUMMARY JUDGMENT**
*



MARK E. MUSOLF, CHAIRPERSON:

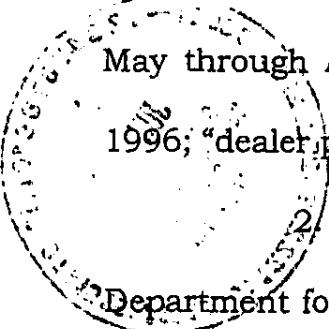
This matter is before us on the respondent's ("the Department") motion for summary judgment. Both parties have filed briefs in support of their positions, and the Department has filed an affidavit. Attorney Gary M. May represents the petitioner ("Mr. Rondon"). Attorney Michael J. Buchanan represents the Department.

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

UNDISPUTED MATERIAL FACTS

1. By notice from the Department dated June 13, 1997, Mr. Rondon was assessed \$42,082.99, including interest, pursuant to Wis. Stat. Sec. 77.60(9), as an officer, employee or other responsible person who willfully

failed to pay over to the Department the sales taxes of National Vehicle Management, Inc., ("NVMI") for the following "period under review"¹: February, May through August, November and December 1995; January through July 1996; "dealer plate project" assessment for January 1992 to December 1995.



2. By letter dated August 11, 1997, Mr. Rondon petitioned the Department for redetermination, which was denied by a Notice of Action letter dated March 30, 2000. Mr. Rondon then timely appealed to this commission.

3. Mr. Rondon was the president and sole shareholder of NVMI. He was in charge of NVMI's day-to-day operations and was authorized to sign checks on its business checking account at Bank One of Madison, Wisconsin.

4. In May and December 1995 and January 1996, Mr. Rondon signed and issued checks to pay creditors other than the Department, even though he knew there were unpaid sales taxes due to the Department. He admits he had knowledge of unpaid sales taxes when he signed checks to pay creditors from March 1995 through 1996.

5. Between April 29 and June 1, 1995, a total of \$141,554.86 was deposited into NVMI's business checking account at Bank One, and checks paid and other withdrawals totaled \$146,671.46. During February 1996, deposits totaled \$6,027.73, and checks and other withdrawals totaled \$5,676.53.

6. Mr. Rondon signed all of NVMI's monthly Wisconsin sales

¹ All facts pertain to the period under review unless otherwise stated.

x returns for the period under review, reporting taxes due to the
ent. He also signed, on behalf of NVMI, an agreement with the
tment on October 12, 1995, acknowledging sales/use tax delinquencies
through August 1995 totaling \$14,097.83, including interest.

APPLICABLE STATUTES

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. . . .
- Personal liability may be assessed by the department against such person under this subchapter for the making of sales tax determinations against retailers and shall be subject to the provisions for review of sales tax determinations against retailers, but the time for making such determinations shall not be limited by s. 77.59(3). "Person", in this subsection, includes an officer, employee or other responsible person of a corporation . . . who, as such officer, employee, . . . or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

CONCLUSIONS OF LAW

1. There is no genuine issue as to any material fact, and summary judgment is therefore appropriate under Wis. Stat. § 802.08.
2. The Department properly assessed Mr. Rondon as a person responsible for the delinquent sales taxes of National Vehicle Management, Inc., pursuant to Wis. Stat. § 77.60(9).

OPINION

Summary Judgment

Summary judgment shall be rendered if the pleadings and discovery on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

Mr. Rondon disputes the Department's entitlement to summary judgment, asserting in his brief that there are genuine issues of material fact, including: (1) whether he "willfully" failed to collect and pay the taxes; (2) whether the amount of the assessment is in violation of the United States and Wisconsin constitutions as an "excessive fine;" and (3) whether the Department violated Mr. Rondon's constitutional rights to due process and equal protection in making the assessment.

These are questions of law, not disputed material facts. The record clearly shows that Mr. Rondon has conceded all of the material facts set forth above. He has not raised any material factual issues by filing the supporting papers required by Wis. Stat. § 802.08(3). Therefore, if the Department shows its entitlement to summary judgment as a matter of law, we must grant the motion. Wis. Stat. § 802.08(2).

Personal Liability

For personal liability to be established for sales and use taxes under Wis. Stat. § 77.60(9), the Department must show the petitioner's

authority to pay the corporation's taxes, a *duty* to pay the taxes, and an *intentional breach* of that duty. See, *Gould v. WDOR*, ¶ 203-319 Wis. Tax Rep. (CCH) (WTAC 1993).

Authority and Duty

There is no question as to Mr. Rondon's authority to pay the taxes or his duty to pay them. He was president, sole shareholder, in charge of NVMI's daily operations, and had full check-signing authority. He signed all the sales and use tax returns, so he knew exactly what taxes were owed to the Department and when they should have been paid. In spite of this, he did not pay them.

Intentional Breach of Duty

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. *Gould v. WDOR, supra; Garsky v. U. S.*, 600 F. 2d 86, 79-2 USTC ¶ 9436 (7th Cir. 1979). There is no question as to Mr. Rondon's intentional breach of duty because he admits he paid other creditors even though he knew taxes were owing to the Department. Moreover, the undisputed record also shows that substantial funds were on hand in NVMI's checking account, presumably from sales on which tax was collected but not paid over.

Although Mr. Rondon complains about § 77.60(9) and its impact

on small business owners, he presents no facts to support his contention that his breach of duty was not intentional under well-established state and federal case law. Mr. Rondon also erroneously argues that no trust is imposed on sales taxes collected under state law. Wis. Stat. § 77.60(11)² expressly imposes such a trust.

Constitutional Claims

Is the Assessment an "Excessive Fine?"

Mr. Rondon argues that the Department's assessment is an "excessive fine" in violation of the 8th Amendment to the U. S. Constitution and Article I, § 6 of the Wisconsin Constitution. He cites *Montana v. Kurth Ranch*, 511 U. S. 767 (1994), and *Austin v. United States*, 509 U. S. 602 (1993), in support of this assertion. However, he provides no analysis of those cases in relation to the facts here.

Both of these cases are inapposite. *Kurth Ranch* and *Austin* involved civil forfeitures in the wake of criminal convictions for drug trafficking. The Supreme Court found in *Kurth Ranch* that the Montana tax departed "so far from normal revenue laws as to become a form of punishment", 509 U. S. at 783, because, among other things, the tax assessed was eight times the value of the drugs involved.

Here, the assessment against Mr. Rondon simply recovers the

² "Whenever a person collects tax moneys imposed under s. 77.52, 77.53 or 77.71 from a consumer, user or purchaser, the person receives those tax moneys as trust funds and state property." . . .

amount of revenue lost to the state as a result of his conduct. See, *U. S. v. Halper*, 490 U. S. 435 (1989).³ Therefore, we cannot conclude that the assessment violates either the 8th Amendment or Article I, § 6 of the Wisconsin Constitution.⁴

Did the Department Violate the Due Process Clause?

Mr. Rondon also complains that his "right to due process and equal protection" was violated by the Department's "failure to implement and apply to him any rational procedures or criteria when determining whether or not to assess the unpaid liability against him personally." This is a vague and unsupported assertion. Mr. Rondon refers generally to the Department's answers to his interrogatories as supporting this claim, but he gives no specifics as to how any particular answer shows he was deprived of his constitutional rights. His argument that the word "may" rather than "shall" in § 77.60(9) shows that the Department deprived him of his constitutional rights makes no legal sense.

ORDER

The Department is awarded summary judgment; its action denying

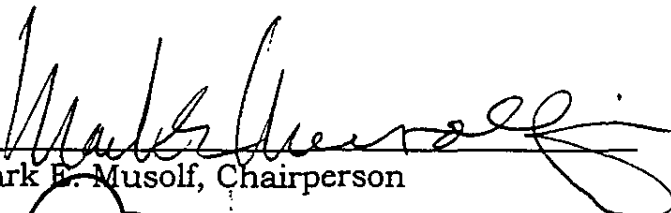
³ "A civil remedy may be imposed as a remedy for actual costs to the State that are attributable to the defendant's conduct." 490 U. S. at 452.

⁴ The presumption of constitutionality is particularly strong in the area of taxation, and a person challenging a legislative act must prove it to be unconstitutional beyond a reasonable doubt. *GTE Sprint v. Wisconsin Bell*, 155 Wis. 2d 184, 192 (1990).

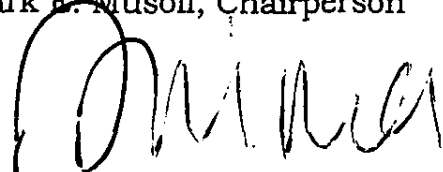
Mr. Rondon's petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 5th day of June, 2001.

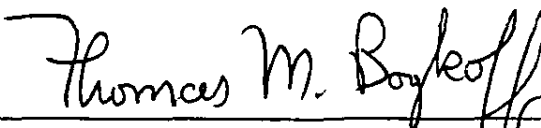
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner



Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"