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 Wisconsin Tax Appeals Commission
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 STATE OF WISCONSIN
 TAX APPEALS COMMISSION
 AUG 1999
 State of Wisconsin
 Department of Revenue
 Received
 Legal Staff

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 P.O. Box 1807
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DOCKET NOS. 98-S-229
 and 98-W-230

Petitioner,

vs.

RULING AND ORDER

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

**GRANTING MOTION FOR
 SUMMARY JUDGMENT**

Respondent.

THOMAS M. BOYKOFF, COMMISSIONER:

This matter is before this commission on respondent's motion for summary judgment pursuant to Wis. Stat. § 802.08. Both petitioner and respondent have filed briefs in support of their position on the motion. Petitioner appears by Attorney William S. Abbott of Bell, Gierhart & Moore, S.C., Madison, Wisconsin. Respondent appears by Attorney Michael J. Buchanan, Madison, Wisconsin.

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

UNDISPUTED MATERIAL FACTS

1. Under date of December 30, 1996, respondent issued an assessment to petitioner for \$106,055.06, as an officer, employee or other

responsible person of Advanced Temperature Technicians, Inc., ("ATT") who intentionally failed to withhold, ~~account for~~ or pay over to respondent the *withholding taxes* of the employees of that business under Wis. Stat. § 71.83 (1)(b)2. The time periods involved are (A) December 16 to 31, 1995, and (B) January, April, and May 1996.

2. By letter dated February 28, 1997, Debra J. Hyde, CPA, petitioner's representative, filed a petition for redetermination, objecting to liability for withholding taxes that were due and owing "prior to December 1, 1995."

3. Under date of August 28, 1998, respondent denied petitioner's petition for redetermination in part. (The estimated portion of the assessment was adjusted to reflect the amount due according to a subsequently filed return.)

4. Under date of January 14, 1997, respondent issued an assessment against petitioner for \$53,169.26, including *sales and use taxes* and interest, as an officer, employee, or other responsible person of ATT for willfully failing to pay to respondent the *sales and use taxes* of that business under Wis. Stat. § 77.60(9). The time periods involved are (A) February to June, September, and October 1995, and (B) January, April, and May 1996.

5. By letter dated March 15, 1997, Debra J. Hyde, CPA, petitioner's representative, filed with respondent a petition for redetermination, objecting to liability for sales or use taxes "prior to December 1, 1995."

6. Under date of August 28, 1998, respondent denied in part petitioner's petition for redetermination. (The estimated portion of the assessment was adjusted to reflect the amount due according to subsequently filed returns.)

7. In petitioner's September 9, 1998, petition for review to the Commission, he stated "I accept full responsibility for all taxes after December 1, 1995 thru May 6, 1996 (The last day of business)."¹

8. During the periods under review (February 1995 through May 1996), petitioner was president of ATT, owned at least 50% of ATT's stock, and was a member of ATT's board of directors.

9. ATT's daily business operations were divided between petitioner and one Bill Patrick. Petitioner was in charge of outside sales and field supervision. Mr. Patrick was in charge of office operations.

10. Since 1990, ATT had a corporate checking account at M&I Northern Bank in Brookfield, Wisconsin. On May 2, 1996, petitioner opened a corporate checking account at Capitol Bank in Madison, Wisconsin. Petitioner and Mr. Patrick had check-signing authority over both accounts.

11. Between February 1, 1995, and February 23, 1996, 192

¹ Subsequent to filing his petition for review, petitioner retained an attorney. Under date of January 27, 1999, petitioner's attorney sent the Commission an amendment to the petition, purporting to rescind the above admission. (Respondent filed a subsequent general denial to the amendment while recognizing petitioner's retaining counsel.) However, petitioner's amendment was not offered with a motion to amend, and no such motion was granted by the Commission. Therefore, the amendment to the petition is *not* accepted. See TA 1.21, Wis. Adm. Code. Even if it were accepted, the reason stated in the amendment for rescinding the admission (i.e., that "petitioner was not aware that taxes from December of 1995 through May 6, 1996 were not being paid....") would not have prevailed. See the Ruling below.

checks on ATT's M&I Northern Bank account were issued bearing petitioner's signature. Some of these checks were signed with a signature stamp which was not in petitioner's possession. Other checks were hand-signed by petitioner, either at job sites (such as for c.o.d. materials, deliveries, or employees' out-of-town expenses) or in the office. Checks signed by petitioner were payable to the post office, Wisconsin Supply, Graingers, Automatic Temp, Milwaukee Stove, Smith & Gestland, and other payees. At least 33 of these 192 checks were payable to petitioner, ranging in amounts from \$36.56 to \$1,521.62 (6 checks); 17 of the 33 checks were for \$450. Only one of the 192 checks was returned "NSF"; the remainder were paid out of ATT's bank account.

12. On August 14, 1995, a revenue agent employed by respondent served petitioner, on behalf of ATT, with a document captioned "Notice and Order to Show Cause", dated August 7, 1995. The document stated that a hearing on the revocation of ATT's seller's permit was scheduled for August 30, 1995; that ATT was expected to show cause for non-revocation; that ATT had failed to pay sales and use taxes and withholding taxes; and that ATT had failed to file tax returns for those taxes.

13. In November 1995, an outside accounting firm was retained by ATT to help manage its financial indebtedness.

14. In December 1995, petitioner attended at least one meeting, which was also attended by a representative of the outside accounting firm, to

discuss ATT's financial status. In December 1995, petitioner knew or should have known that ATT was delinquent in paying sales and use taxes and withholding taxes to respondent for the months of February through December 1995.

ISSUES

1. Under Wis. Stat. § 71.83(1)(b)2, is petitioner personally liable for the withholding taxes of Advanced Temperature Technicians, Inc., that he was required to withhold, account for or pay over to respondent, which he intentionally failed to do, for the periods December 16 to 31, 1995, and January, April, and May 1996?

2. Under Wis. Stat. § 77.60(9), is petitioner personally liable for the sales and use taxes of Advanced Temperature Technicians, Inc., that he was required to collect, account for or pay to respondent, which he "wilfully" failed to do, for the periods February to June, September, and October 1995, and January, April, and May 1996?

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. 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, 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.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact concerning petitioner's personal liability for withholding taxes and sales and use taxes of

Advanced Temperature Technicians, Inc., that were not withheld, accounted for or paid with respect to the periods under review, and this matter is appropriate for summary judgment.

2. Petitioner is personally liable, under Wis. Stat. § 71.83(1)(b)2, for the unpaid withholding taxes of Advanced Technicians, Inc., for December 16 to 31, 1995, and January, April, and May 1996.

3. Petitioner is personally liable, under Wis. Stat. § 77.60(9), for the unpaid sales and use taxes of Advanced Temperature Technicians, Inc., for February to June, September, and October 1995, and January, April, and May 1996.

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. ... [Emphasis supplied]

The elements necessary² to establish the personal liability for unpaid withholding taxes and sales and use 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. *Intentional breach* of that duty.

Gerth and Kelly v. Wisconsin Department of Revenue, Wis. Tax Rep. (CCH) 203-367 (WTAC 1992); *Page v. Wisconsin Department of Revenue*, Wis. Tax Rep. (CCH) ¶ 203-374 (WTAC 1992); *Michael A. Pharo v. Wisconsin Department of Revenue*, Docket No. 96-W-478 (WTAC October 9, 1997), *affd* Dane Co. Circ. Ct., June 8, 1998); *Luetzow Industries v. Wisconsin Department of Revenue*, Docket No. 95-S-1636 (WTAC June 27, 1997); *Kenneth Higgs and Richard F. Wagner v. Wisconsin Department of Revenue*, Docket Nos. 96-W-841 and -843 and 96-S-842 and -844 (WTAC March 11, 1998); and *Irvin L. Hougom v. Wisconsin Department of Revenue*, Docket No. 97-W-239 (WTAC April 28, 1999).

Ordinarily, if respondent 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). However, because respondent has filed a motion for summary judgment, respondent will prevail only to the extent that it

² The Commission has held that the amount of an assessment is also 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 assessments is not an issue in this case.

proves it is entitled to summary judgment as a matter of law. *Grams v. Boss*, 97 Wis. 2d 332, 338 (1980). In this case, respondent has proven that petitioner was a responsible person with respect to withholding taxes not withheld and sales and use taxes not collected, accounted for or paid during the periods under review.

Petitioner Had The Authority To Pay The Taxes

Petitioner was president of Advanced Temperature Technicians, Inc., ("ATT") during the periods February to June, September, October, and December 16 to 31, 1995, and January, April, and May 1996. As president, he was one of two people in charge of ATT's daily operations. The fact that the other person, Mr. Patrick, also had this responsibility does *not* diminish petitioner's control over the daily operations as ATT's president. The duties of the two people in charge were divided among themselves, whereby petitioner had specified duties such as outside sales and field supervision and some check-signing. These duties included having the authority to pay — or to direct payment of — the sales, use, and withholding taxes at issue.

Petitioner and Mr. Patrick each had the sole authority to sign and issue checks on the two corporate checking accounts. Under this authority, petitioner personally hand-signed and issued many of the 192 corporate checks bearing his signature.³

³ It is difficult to deny or to make light of and deny petitioner's circumscribed authority to sign checks, as he does in his Affidavit (p. 4), when 192 checks bear his signature.

Other checks among the 192 were signed by applying petitioner's signature stamp to checks. The Commission reaffirms its 1998 holding that having knowledge of the use of a signature stamp constitutes delegation of its use; not knowing of its use constitutes inattention. Petitioner knew or should have known that the signature stamp was being used and, thereby, assumed the risk that checks would be paid to creditors while taxes were due. *Higgs and Wagner, supra*, p. 15.

On August 14, 1995, a revenue agent employed by respondent served petitioner, on behalf of ATT, with a notice to show cause at a hearing as to why ATT's seller's permit should not be revoked in light of unpaid withholding, sales, and use taxes. If petitioner received the document, did not read it, and did not know the document's contents before giving it to Mr. Patrick, this negligence imputes to him a knowledge of its contents.⁴

Petitioner asserts that he first learned of tax deficiencies — i.e., received *actual knowledge* — in late December 1995, when he met with Mr. Patrick and CPA Debra Hyde. Petitioner states that Ms. Hyde agreed at that time to take charge of ATT's financial affairs, which he believes she did satisfactorily. In the spring of 1996, however, Mr. Patrick took the checkbook from the CPA and made no tax payments. All of this does not discharge

⁴ Petitioner's Affidavit denies any knowledge of unpaid taxes prior to December 1995, but states "... the State has submitted an affidavit indicating that I was served with a tax warrant in August of 1995. That may be true." This receipt admits actual or constructive notice of the unpaid taxes in August 1995 and is a weak denial, if a denial at all. (Affidavit, p. 3).

petitioner, the corporate president, of a duty to be conversant with the financial matters of the corporation and to see that they are properly managed.

To summarize, from August 1995, petitioner knew or should have known that ATT was not paying its withholding, sales, and use taxes. Petitioner was the corporation's president on whom a tax document was served in August 1995. He also signed or authorized the use of his signature stamp to issue 192 checks on a corporate account. At least 33 of the 192 checks were paid to petitioner while ATT had a large tax obligation to respondent.

Petitioner denies, however, responsibility for delinquent corporate withholding, sales, and use taxes because he believed Mr. Patrick would take care of it and because a CPA was given the responsibility. In *Masrud v. Wisconsin Department of Revenue*, Wis. Tax Rep. (CCH) ¶ 203-284 (WTAC 1991), and *Jeffrey P. Mach, Sr. v. Wisconsin Department of Revenue*, Docket No. 95-V-1295 (WTAC September 17, 1997), this commission held that the authority to file tax returns includes the authority over employees who 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. See, *Thomsen, Jr. v. U.S.* 89-2 USTC ¶ 9575 at 89.731, 887 F.2d 12 (1st Cir. 1989). This no-delegation principle has been repeatedly affirmed by this commission for state tax purposes, recently in *Michael A. Pharo, supra*

Petitioner cites a footnote in a 1992 Commission case for the point that "Actual [not implied or imputed] knowledge would be required in other

circumstances [than that case] where, for example, the taxpayer was one of a number of officers that had authority to pay, but who reasonably had assumed that the taxes had been and were being paid." *William Gould v. Wisconsin Department of Revenue*, Wis. Tax Rep. (CCH) ¶ 203-319 (WTAC 1992).

First, the footnote was dictum. Second, petitioner's assumption here that the taxes were paid was not reasonable. On two separate occasions (August and December 1995), petitioner received actual or constructive notice. Once is all that the law requires for liability.

Petitioner Had A Duty To Pay The Taxes

The corporate president, with authority to pay or direct payment of withholding, sales, and use taxes who knows (or should have known) that taxes are unpaid, becomes personally obligated to see that they are paid. When he or she knows the corporation has adequate company funds, the officer has a duty to see that the taxes are paid.

A revenue agent of respondent served an Order to Show Cause on petitioner notifying him of a rescheduled hearing to consider ATT's tax delinquencies. Petitioner signed or authorized use of his signature stamp to sign 192 checks on a corporate account, at least 33 of which were payable to him. Because only one of the 192 checks was not paid by the account (i.e., "NSF") — and the paid checks included all 33 checks payable to him — petitioner *knew or should have known* that there were sufficient funds in the account from which taxes may have been paid.

Petitioner asserts that the mere authority to pay taxes does not, alone, imply the duty to pay taxes. Rather, to establish a "duty", he asserts, respondent must also show that the person had the authority, coupled with actual or *constructive* knowledge that the taxes are not paid; that gives rise to a presumptive duty. This is correct. However, petitioner overlooks his having *constructive* or imputed knowledge by having been served an Order to Show Cause in August 1995. By this service, petitioner knew or should have known of the delinquencies alleged in the document.

Petitioner takes pains to point out that others in the corporation withheld financial information from him; that he assumed others (Mr. Patrick and the CPA) were taking care of tax payments; that he showed little attention to and merely gave to Mr. Patrick the document which was served on him in August 1995; and, generally, although his corporate title was "president", he was only responsible for outside operations. (Petitioner's Affidavit)

On the issue of duty to pay the taxes, petitioner's affidavit (p. 4) states: "although I may have had a duty to see that such taxes were paid because I was putatively the president of the company, and in charge of field operations ... I still had no responsibility to do so and no ability to do so." The initial quoted words constitute an admission that petitioner recognized his duty to pay or direct payment of the taxes. Certain responsibilities follow the title "president", and overseeing tax payment is one. Petitioner cannot sidestep the

duties of his office by, in effect, stating that he was not a *real* president; that he paid no attention; and that he assumed others were taking care of things.

**Petitioner Intentionally Breached
His Duty To Pay The Taxes**

Respondent is not required to show bad faith, malice or evil intent. All that need be shown is that corporate funds were used to pay other corporate creditors, with knowledge that taxes were owing. *Gerth and Kelly, supra.*

Between February 1, 1995 and February 23, 1996, 192 corporate checks were issued bearing petitioner's signature. At least 69 of these checks were written from August 1995 to February 1996. They were payable to creditors, including petitioner, while state taxes were unpaid and delinquent. This establishes intent. *Garsky v. U.S.*, 600 F.2d 86, 79-2 USTC ¶ 9436 (7th Cir. 1997); *Gerth & Kelly, supra.*

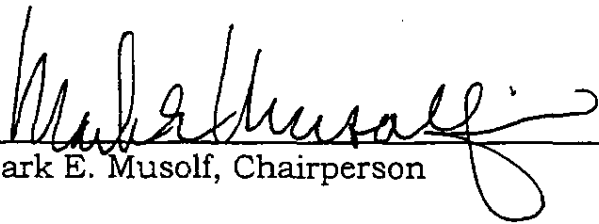
Respondent has shown good cause for the granting of its motion.

IT IS ORDERED

That respondent's motion for summary judgment is granted, and petitioner's petitions for review are dismissed.

Dated at Madison, Wisconsin, this 27th day of August, 1999.

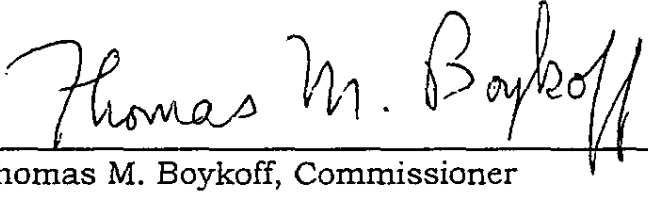
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson

(Concurring in result)

Don M. Millis, Commissioner



Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

DON M. MILLIS, COMMISSIONER, CONCURRING IN RESULT:

I concur in the result reached by the majority. This is a deceptively simple case.

Authority

Petitioner clearly had authority to direct payment of ATT's taxes: He was president of ATT, served on its board of directors, owned 50% of stock and had check-writing authority. Whatever arrangement he made with other persons associated with ATT does not diminish his authority.

Duty

At a minimum, petitioner had a duty to direct payment of ATT's tax obligation once he became aware they were unpaid. By his own admission, petitioner became personally aware in December of 1995 that ATT was delinquent on its sales and withholding tax obligations.

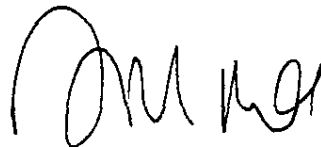
The majority opinion asserts that petitioner should have known that ATT was in default on its tax obligations when petitioner was served with a tax warrant in August of 1995. There is no need to dwell on whether petitioner should have known about these tax deficiencies by virtue of this event. Once petitioner became aware of these tax obligations in December of 1995, he had a duty to ensure that ATT paid all tax obligations, currently owing or past due, before preferring any other creditor. *Keimig v. Dep't of Revenue*, 1998 Wisc. Tax LEXIS 3 at 6-7 (WTAC 1998); *Gerth & Kelly v. Dep't of Revenue*, Wis. Tax Rep. (CCH) ¶ 203-367, 15,590 (WTAC 1992).

Petitioner then admits that he sought to delegate the duty to pay these taxes to a bookkeeper and that another principal usurped this arrangement. Notwithstanding petitioner's effort, the law does not recognize an arrangement by a person with authority to direct the payment of taxes to delegate the duty to pay tax obligations, and certainly not after the person with the authority learns of a deficiency. *See, Pharo v. Dep't of Revenue*, 1997 Wisc. Tax LEXIS 28 at 5 (WTAC 1997). At a minimum, once petitioner learned of the tax deficiency, he had a legal obligation to personally ensure that ATT paid taxes then owing and which were to become due in the future. This he did not do.

Breach of Duty

Petitioner signed checks made payable to him after the December 1995 meeting. Thus, petitioner breached his duty with respect to tax obligations due on or before his December 1995 meeting. Once he was informed of the delinquent tax obligations of ATT, he breached his duty to pay these taxes when he delegated the payment of taxes to a subordinate and did not personally ensure that such taxes were paid.

Respectfully submitted,



Don M. Millis, Commissioner
Concurring in result