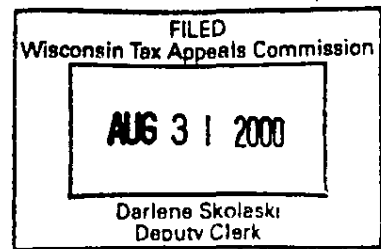


SWARTZ KURT T 995170 083100 TAC



STATE OF WISCONSIN
TAX APPEALS COMMISSION

KURT T. SWARTZ

c/o Attorney Peter F. Herrell
Wiley, Colbert, Norseng, Cray & Herrell, P.C.
21 S. Barstow Street
Eau Claire, WI 54702-0629

Petitioner,

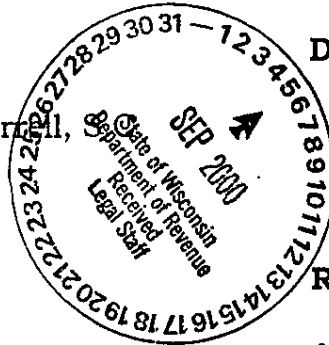
vs.

WISCONSIN DEPARTMENT OF REVENUE

P.O. Box 8933
Madison, WI 53708

Respondent.

DOCKET NO. 99-S-170



RULING AND ORDER

AWARDING SUMMARY

JUDGMENT TO

RESPONDENT

THOMAS M. BOYKOFF, COMMISSIONER:

This matter is before this Commission on a motion for summary judgment by respondent, Wisconsin Department of Revenue ("Department"). Both parties have submitted affidavits and briefs to support their position on the Department's motion. The petitioner, Kurt T. Swartz,¹ appears by Attorney Peter F. Herrell of Eau Claire, Wisconsin, and Attorney Michael J. Buchanan represents the Department.

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

¹ The Department and petitioner's attorney have spelled petitioner's surname "Schwartz", apparently incorrectly. The caption and this Ruling and Order will use the correct spelling.

UNDISPUTED MATERIAL FACTS

Undisputed Jurisdictional Facts

1. Under date of February 14, 1997, the Department assessed petitioner \$285,922.80 pursuant to Wis. Stat. § 77.60(9) as a responsible person of the La Crosse HI Corporation ("corporation") who wilfully failed to collect, account for or pay the corporation's sales tax for the periods April through August 1994, May through August and October and November 1995, and February 1996.²

2. Under date of April 9, 1997, petitioner filed a petition for redetermination with the Department which, under date of July 9, 1999, the Department denied. Petitioner then timely appealed to this commission.

Other Undisputed Material Facts

3. The corporation operated the Holiday Inn Resort and Conference Center in La Crosse, Wisconsin.

4. Petitioner was employed as the controller of the corporation from August 1990 to May 1997, including the period under review. In this capacity, petitioner's duties included supervising the clerks and auditors who maintained the corporation's books and records, signing monthly sales tax reports filed with the Department, and preparing local financial records for the corporation on a day-to-day basis.

5. During the period under review, petitioner was a Minnesota resident.

² This is the "period under review" unless otherwise specified.

6. Petitioner became aware of a sales tax delinquency in April 1994, when he did not file the return for that month until September 30, 1994. In addition, he signed the June, July, August, and October 1994 sales tax returns showing substantial amounts of tax due but filed them with no remittance.

7. Petitioner held himself out as having authority over the corporation's Wisconsin state tax matters. Examples include the following transactions: As controller, petitioner signed the corporation's application for an employer identification (withholding tax) number on February 21, 1991. Petitioner signed all 12 of the sales tax returns the corporation filed for the period under review. When the Department issued a sales tax assessment against the corporation and the parties reached a settlement, petitioner executed the June 30, 1991 closing agreement as controller on behalf of the corporation. When the Department sent the corporation a notice of delinquent tax warrant filing in March 1991, petitioner responded on behalf of the corporation by a letter, which he signed as controller. When the Department wrote to the corporation in January and February 1996 that the corporation had not completed the "county" portion of the sales tax returns for November and December 1995, petitioner prepared the proper forms and signed them on behalf of the corporation.

8. From February 1991 to at least May 1996, petitioner had the authority to cosign checks on the corporate checking account at Norwest Bank La Crosse, N.A. The bank statements for January, August, and November

1995 and February 1996 show substantial deposits (well over \$100,000 each month). The petitioner cosigned checks from this corporate account to pay other creditors, while substantial amounts were owed to the Department.

APPLICABLE WISCONSIN 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 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 of 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 appropriate under Wis. Stat. § 802.08.
2. The Department properly assessed petitioner under Wis. Stat. § 77.60(9) as a "responsible person" liable for the unpaid sales tax of the corporation during the period under review.

OPINION

As the party moving for summary judgment, the Department must demonstrate that there is no genuine issue as to any material fact and that the Department is entitled to a judgment as a matter of law. Wis. Stat. § 802.08(2).

The Department's Affidavit

Some preliminary matters must be addressed. Both parties have submitted affidavits in support of their positions. The Department's affidavit has exhibits attached.

Petitioner argues that the Department's affidavit "is not admissible" because, he asserts, the attorney submitted it "on information [or] belief". (Petitioner's brief, p. 4.) The Department's attorney counters that his affidavit identifies its attached documents, all of which are Department business records kept in the ordinary course of the Department's official business, as well as checks and bank statements obtained through subpoena in the Department's ordinary business operations.

As an exception to the hearsay rule in Wis. Stat. § 908.02, memos, reports, records, and data compilation prepared in the course of a regularly conducted activity as shown by a custodian or "other qualified witness" is admissible at trial (Wis. Stat. § 908.03(6)). This principle also applies to an affidavit supporting a motion before this commission.³

If the affidavit of the Department's attorney was submitted only on

³ Sec. TA 1.39, Wis. Adm. Code, provides in pertinent part: "... the practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state."

information or belief, we could not consider it. See, *Dottai v. Altenbach*, 19 Wis. 2d 373, 376 (1963). However, the affidavit before us was not so submitted. It was submitted by a Department attorney "personally acquainted with...the business records of ... [the Department] relative to the tax assessment that was issued against the petitioner...." (Department's Affidavit, p. 1, para. 1). The affidavit is admissible to support the Department's motion.

Jurisdiction Over Petitioner

Petitioner also asserts that this commission does not have jurisdiction over him because, at all relevant times in this dispute, he was a resident of Minnesota, not Wisconsin. (Petitioner's Affidavit, June 12, 2000, p. 1, para. 1.)

In a December 10, 1999 Scheduling Conference Memorandum and Order, the issue of jurisdiction was discussed. Commissioner Boykoff noted that other assessments have been filed against nonresidents and litigated before this commission. Petitioner said he believes there is a Minnesota statute that should be followed, but did not cite one. The Department's counsel disagreed and stated that the Commission has jurisdiction. Petitioner made no motion subsequently, and the issue next arose in Petitioner's Brief (pp. 2-3).

A litigant submits himself or herself to the personal jurisdiction of a court by invoking the jurisdiction of the court by asking for affirmative assistance of that court. *State ex rel. Warrender v. Kenosha County Ct.*, 67 Wis. 2d 333, 340-41 (1976). The same principle applies to this commission.⁴

⁴ See the administrative rule cited and quoted in Footnote 3.

Petitioner asked first the Department and then this commission for affirmative assistance (i.e., to dismiss the assessment), not raising any jurisdictional issue. Therefore, the Commission has jurisdiction over this matter.

In addition, the Commission clearly has personal jurisdiction over petitioner under Wis. Stat. § 805.01(9). That statute imposes Wisconsin jurisdiction "In any action for ... assessments ... assessed by a taxing authority of this state after July 1, 1960." The Department issued its assessment to petitioner under date of February 14, 1997.

Personal Liability For Sales Tax

The elements necessary to establish a personal liability for unpaid sales 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.

James M. Callen v. WDOR, 1998 Wisc. Tax LEXIS 5 (WTAC 1998); *Danny R. Senf v. Wisconsin Department of Revenue*, 1999 Wisc. Tax LEXIS 42 (WTAC 1999), *aff'd* Dane Co. Circ. Ct.; and *Barbara Bice v. WDOR*, Docket No. 99-S-156 (WTAC Aug. 2, 2000).

A. Authority

Petitioner denies that he had the authority to pay the corporation's sales tax when in its employ. First, he argues, he was "just an employee, not a shareholder, officer or director" of the corporation (Petitioner's Brief, p. 1). This

overlooks the language of § 77.60(9) which also imposes personal liability for sales tax on "an officer, employe or other responsible person of a corporation."

[Emphasis added.]

Second, petitioner denies liability on the ground that he had no authority to issue corporate checks under his sole signature, but was only authorized as a cosigner. This commission has long recognized that being a cosigner can demonstrate authority under § 77.60(9). See, for example, *James M. Callen v. WDOR, supra*.

Petitioner held himself out as having authority over the corporation's Wisconsin state tax matters. As controller, he signed the corporation's application for an employer identification number; he signed all 12 of the sales tax returns the corporation filed during the period under review; he signed a settlement closing agreement to resolve a prior sales tax matter on the corporation's behalf; and he signed a document requested by the Department to pay the "county" portion of the sales tax.

Duty

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

Petitioner knew of the corporation's current sales tax delinquency in April 1994, when he did not file the return until September 30, 1994. In addition, he knew of the delinquency as he signed and filed the June, July,

August, and October 1994 sales tax returns showing substantial amounts of tax due but included no remittance.

Intentional Breach of Duty to Pay

The Department is not required to show bad faith, malice or evil intent to prove an intentional breach of duty to pay sales tax 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, *Danny R. Senf v. WDOR, supra*, *Barbara Bice, supra*, and *Garsky v. U.S.*, 600 F 2d 86, 79-2 USTC ¶ 9436 (7th Cir. 1979).

From February 1991 to at least May 1996, petitioner had the authority to cosign checks on the corporation's checking account at Norwest Bank La Crosse, N.A. The account's bank statements for January, August, and November 1995 and February 1996 show substantial deposits. Petitioner signed checks from this account to pay other corporate creditors while he knew that substantial amounts of tax were due, owing, and not paid to the Department.

Therefore,

IT IS ORDERED

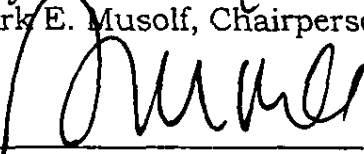
That the Department is awarded summary judgment affirming its action on the petitioner's petition for redetermination.

Dated at Madison, Wisconsin, this 31st day of August, 2000.

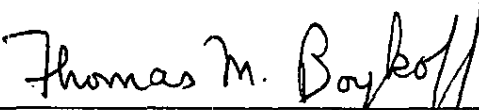
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner



Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"