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FILED
Wisconsin Tax Appeals Commission
JUL 26 2000
Darlene Skolaski
Deputy Clerk

STATE OF WISCONSIN
TAX APPEALS COMMISSION

MARTHA WASHINGTON
6224 W. Boehlke Avenue
Milwaukee, WI 53223

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Petitioner,

DOCKET NO. 99-W-124

vs.

RULING AND ORDER

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

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Respondent.

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JUL 2000
State of Wisconsin
Department of Revenue
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Legal Staff

MARK E. MUSOLF, CHAIRPERSON:

This matter is before us on respondent's motion for summary judgment, pursuant to Wis. Stat. § 802.08. The petitioner has also filed a "Motion for Order to Wisconsin Department of Revenue to Assess Responsible Person" and a "Motion for Protective Order." Both parties have filed affidavits and briefs. Attorney Henry J. Gefke represents the petitioner; Attorney Michael J. Buchanan represents the respondent.

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

UNDISPUTED MATERIAL FACTS

1. By notice from respondent ("the Department") dated August 24, 1998, the petitioner ("Ms. Washington") was assessed \$7,004.65, pursuant to Wis. Stat. § 71.83(1)(b)2, as an officer, employe or other

responsible person of Inner City Council on Alcoholism, Inc. ("the corporation"), who intentionally failed to withhold, account for or pay over the corporation's withholding taxes for the period January through September 1996 ("the period under review").¹

2. By letter dated October 23, 1998, Ms. Washington petitioned the Department for redetermination, which was denied by letter dated April 19, 1999, whereupon Ms. Washington timely appealed to this commission.

3. Ms. Washington was a member of the corporation's board of directors. She was also the corporation's president and board chairperson beginning in February 1996. She served in these positions as an unpaid volunteer.

4. As board chairperson, Ms. Washington signed and certified most of the corporation's semi-monthly withholding tax deposit reports filed with the Department. The reports for January through April and the June report were not signed until June 25, 1996. None of the tax reported due on any of the reports for the period under review was remitted, or the reports were filed late, or both, requiring imposition of statutory interest and late filing penalties. Ms. Washington also signed the corporation's 1996 annual withholding reconciliation report (Form WT-7) as Board Chairperson.²

5. Upon becoming president and board chairperson in February 1996, Ms. Washington was at the corporation's offices nearly every

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

² Although she signed this report in 1997, it included information pertaining to the period under review in 1996.

day and observed what obligations of the corporation were being paid.

6. On February 1, 1996, the corporation's checking account balance was nearly \$50,000, and an additional \$31,439 was deposited into the account during the month. Checks were drawn and paid to creditors in February totaling more than \$66,000. No payments were made for the withholding taxes shown on the reports to the Department that Ms. Washington certified and signed.

7. Ms. Washington admitted to an employee of the Department that she knew, even prior to the period under review, that withholding taxes were not being paid. She first expressed her concerns to Jerry Wilder, executive director prior to February 1996. On March 7, 1996, after Abdul Rashad Diabb became the corporation's executive director, she directed him to pay the taxes, which he did not do. On March 8, 1996, the corporation's checking account had a closing balance in excess of \$28,000. Deposits during March totaled over \$31,000. No withholding taxes were paid to the Department in March. Mr. Diabb was removed as executive director in mid-June 1996.

8. In mid-June 1996, Ms. Washington became a signatory on the corporation's checking account at Firststar Bank Milwaukee. On July 5, 1996, she co-signed checks totaling \$1,811.70 to pay wages to four employees of the corporation. At that time the corporation's checking account had a balance of nearly \$5,600. Deposits during July totaled \$4,100. Ms. Washington also co-signed a check to the Department for \$403.12 on July 24,

1996. Total checks paid to others in July totaled more than \$10,000.

APPLICABLE 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 or other form of business association. "Person", in this subdivision, 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 as to any material fact, and summary judgment is therefore appropriate under Wis. Stat. § 802.08.

2. The Department properly assessed Ms. Washington under Wis. Stat. § 71.83(1)(b)2 as an officer or other responsible person liable for the unpaid withholding taxes of Inner City Council on Alcoholism, Inc., for the period January through September 1996.

RULING

As the moving party, respondent must demonstrate its entitlement

to summary judgment as a matter of law and the absence of a genuine issue as to any material fact. Wis. Stat. § 802.08(2).

Both parties have submitted affidavits with exhibits in support of their positions. We must disregard the affidavit by petitioner's attorney because it contains hearsay and lay opinions, and is not made on personal knowledge that would be admissible in evidence. § 802.08(3). *Hopper v. Madison*, 79 Wis. 2d 120, 130 (1977). Only rarely are attorneys possessed of the personal knowledge of the necessary evidentiary facts to support or oppose a motion for summary judgment. Affidavits on information and belief are not sufficient. *Dottai v. Altenbach*, 19 Wis. 2d 373, 376 (1963).

For personal liability to be established for withholding taxes under § 71.83(1)(b)2, the respondent must show that petitioner had the authority to pay or direct payment of the corporation's taxes, a duty to pay them, and an intentional breach of that duty. See, *Gerth and Kelly v. WDOR*, Wis. Tax Rep. (CCH) ¶ 203-367 (WTAC 1992).

Authority

When she became president and board chairperson of the corporation in February 1996, Ms. Washington acquired the authority to direct payment of the taxes. We reject Ms. Washington's contention that she had no authority until she became a signatory on the corporate checking account. Authority includes the authority over employees who write checks and file tax reports. *Jeffrey P. Mach, Sr. v. WDOR*, 1997 Wisc. Tax LEXIS 23, 3 (WTAC 1997). Ms. Washington had such authority by virtue of her positions as the

corporation's president and board chairperson.

Exercising her authority in early March 1996, she directed the corporation's executive director to pay the taxes, which he did not do and was subsequently removed from his position. In mid-June 1996, Ms. Washington assumed additional financial authority by becoming a signatory on the corporation's checking account. She also exercised her authority by certifying the semi-monthly tax withholding reports to the Department, even though she did not see to it that the withholding taxes were paid for the periods she certified.

Duty to Pay Taxes

Upon assuming the offices of president and board chairperson in early February 1996, Ms. Washington was duty-bound to see to it not only that *current* withholding taxes were timely paid but also that any *unpaid* taxes were paid at the earliest possible moment out of funds on hand. *See, Gerth and Kelly v. WDOR, supra*, at 15,590. This she did not do, even though she knew the taxes were not being paid at least as early as March 7, 1996, when she directed Mr. Diabb to pay them.

Nor is there doubt that funds were on hand to pay the taxes throughout the period under review and during the time petitioner was president and board chairperson. In February, over \$81,000 was available in the corporation's checking account; in March, over \$59,000; and in July, over \$9,700.

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. See, *Gerth and Kelly, supra*, and *Garsky v. U.S.*, 600 F. 2d 86, 79-2 ¶ 9436 (7th Cir. 1979).

Here, Ms. Washington, while knowing that taxes were unpaid, signed at least 4 checks to pay creditors other than the Department. This was a breach of her duty. She also breached her duty by allowing many other creditors to be paid, to the exclusion of the Department, on her watch as president and board chairperson beginning in February 1996.

We therefore conclude that the Department has shown that Ms. Washington is personally liable for the corporation's unpaid withholding taxes within the meaning of Wis. Stat. § 71.83(1)(b)2.

Petitioner's Motions

Motion for Order to Assess Responsible Person

Ms. Washington asks the Commission to order the Department to assess Abdul Rashad Diabb, the corporation's executive director during part of the period under review, as the person who was "primarily responsible" for withholding and paying over the taxes due.

This motion has no basis in law. First, the only requirement for assessment under § 71.83(1)(b)2 is that the person assessed be "an officer, employe, or other responsible person" There is no limitation on the number

of persons who may be assessed. Any individual with the authority and duty to pay or direct payment of the taxes who intentionally breaches that duty is liable under this statute to the extent of unpaid taxes. Mr. Diabb's liability, if any, has no bearing on Ms. Washington's. As a responsible person in her own right, she is individually liable for the full amount of the corporation's unpaid tax, interest, and penalty, just as anyone else properly assessed would be.

Second, this commission has no supervisory authority over the administrative functions of the Department of Revenue. We have no statutory authority to order the Department to assess anyone. The only relief we can provide Ms. Washington is relief from her assessment if it is contrary to law, which it is not.

Motion for Protective Order

This motion seeks protection for Ms. Washington from statements in documents filed by her containing information concerning her medical condition at times other than during the period under review.

Again, we find no basis in law for granting the order sought by Ms. Washington. In the first place, as noted by the Department in its brief, Wis. Stat. § 73.01(4) contains various provisions requiring Commission proceedings and filings to be public. Second, Ms. Washington points to no statutory provision allowing the relief she seeks, and we know of none.

Finally, nothing in either Attorney Gefke's or Ms. Washington's affidavits provides an authoritative basis for any conclusion but that Ms. Washington was competent during the period under review when she

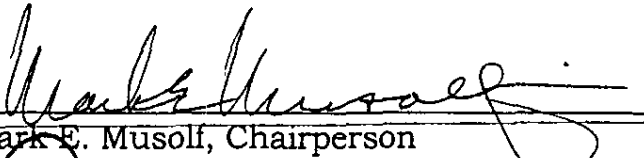
undertook the corporate offices that she did, with their attendant responsibilities and liabilities. The gratuitous conclusions in those affidavits are either inadmissible hearsay or lay opinions lacking foundation.

ORDER

1. The petitioner's motions are denied.
2. The respondent is awarded summary judgment affirming its action on the petitioner's petition for redetermination.

Dated at Madison, Wisconsin, this 26TH day of July, 2000.

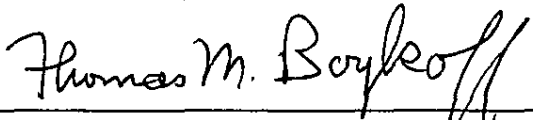
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner



Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

WISCONSIN TAX APPEALS COMMISSION

NOTICE OF APPEAL INFORMATION

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW,
THE TIMES ALLOWED FOR EACH AND THE IDENTIFICATION
OF THE PARTY TO BE NAMED AS RESPONDENT**

The following notice is served on you as part of the Commission's decision rendered:

Any party has a right to petition for a rehearing of this decision within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences the day after personal service or mailing of this decision. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for rehearing should be filed with the Wisconsin Tax Appeals Commission. Nevertheless, an appeal can be taken directly to circuit court through a petition for judicial review. It is not necessary to petition for a rehearing.

Any party has a right to petition for a judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes. **The petition must be filed in circuit court and served upon the Wisconsin Tax Appeals Commission and the Department of Revenue** within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of law of any petition for rehearing. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) **The petition for judicial review should name the Department of Revenue as respondent.**

This notice is part of the decision and incorporated therein.