

STATE OF WISCONSIN
TAX APPEALS COMMISSION

LAURA P. BERRETTINI
340 N. Ahwahnee Road
Lake Forest, IL 60045,

DOCKET NO. 03-W-334

Petitioner,

vs.

RULING AND ORDER

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

Respondent.

DIANE E. NORMAN, COMMISSIONER:

The above-entitled matter is before this commission on respondent Wisconsin Department of Revenue's ("Department") motion for summary judgment pursuant to Wis. Stat. § 802.08. Both petitioner and the Department have filed briefs in support of their position on the motion. Petitioner appears *pro se*. The Department appears by Attorney Michael J. Buchanan.

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

UNDISPUTED MATERIAL FACTS

Jurisdictional Facts

1. By notice dated November 5, 2002, the Department assessed petitioner \$5,518.41 in tax, interest, and penalty, pursuant to Wis. Stat. § 71.83(1)(b) 2, as

an officer, employee or other responsible person of Prospect Venture, LLC, who intentionally failed to withhold, account for or pay over the corporation's withholding taxes for December 2000, February through April 2001, and June through August 2001 ("the period under review").¹

2. By letter dated January 2, 2003, petitioner petitioned the Department for redetermination.

3. By Notice of Action dated October 23, 2003, the Department denied the petition for redetermination.

4. On December 15, 2003, petitioner timely appealed to this commission.

Other Material Facts

5. Prospect Venture, LLC ("the Company"), a limited liability company, operated a restaurant business under the name of Beccofino at 1692 North Prospect Avenue in Milwaukee, Wisconsin (Affidavit of Michael J. Buchanan, Exhibit 4, and Petitioner's Response to Respondent's Initial Brief, p. 2).

6. On January 31, 2001, the Company applied for and received a Wisconsin employer's withholding tax account number from the Department. The application form listed petitioner as owning 10% of the Company, and she signed the application with the title of "Manager." The application form listed petitioner's father, Morando Berrettini, as owning 70% of the Company, and he was also designated as a manager (Buchanan Affidavit, Exhibit 4).

¹ All facts refer to the period under review, unless otherwise noted.

7. Petitioner was designated by the Company's Operating Agreement "as the general manager of the Company with such day-to-day responsibilities with regard to the operations of the Company as shall be delegated to her by the Manager" (Buchanan Affidavit, Exhibit 5, p. 30).

8. As the general manager of the Company, petitioner opened up the checking account for the business with Continental Savings Bank of Milwaukee, Wisconsin, at the request of her father, Mr. Berrettini. She was authorized to sign checks on the business checking account, along with Mr. Berrettini. Mr. Berrettini did not sign any of the business checks. He asked petitioner to sign all of the business checks because he was concerned about the employees of the Company in Wisconsin having an "open checkbook" (Petitioner's Response, p. 3, and unauthenticated Affidavit of Morando Berrettini).

9. Mr. Berrettini was not involved in the management or payment of any obligations of the Company during the period under review (Berrettini Affidavit).

10. Petitioner signed the checks for wages to the Company's employees and withholding taxes, as well as checks for other creditors of the Company. The checks for the business were prepared by personnel of the business in Wisconsin and personally given or sent to petitioner to sign and return to the business (Petitioner's Response, pp. 3-5).

11. Petitioner signed withholding tax reports and sales tax returns for the Company (Buchanan Affidavit, Exhibits 21-28).

12. Petitioner notified the Department on June 13, 2001 that she had discovered some Company checks to pay withholding tax that had not been sent to the Department. She was told by an employee of the Company that there were insufficient funds to pay the withholding taxes. She told the Department that she was going to open a new account and write new checks to cover the amount owed to the Department (Buchanan Affidavit, Exhibit 29, and Petitioner's Response, p. 4).

13. On August 22, 2001, the Department sent petitioner a fax transmittal letter and 8 pages of attachments that notified petitioner of all of the withholding tax of the Company that was due and payable to the Department from December of 2000 to that date (Buchanan Affidavit, Exhibit 30).

14. Bank statements for the Company show that checks were issued and cashed to pay employees and other creditors of the Company for the months of September, October, and November 2001 (Buchanan Affidavit, Exhibits 10, 11, and 12). Cancelled checks issued in September and October of 2001 also show that petitioner signed checks that were paid to employees and other creditors of the Company after she was notified about the Company's unpaid withholding taxes (Buchanan Affidavit, Exhibits 38-41).

ISSUE

Whether petitioner was a responsible person who willfully failed to pay employee withholding taxes of Beccofino restaurant, owned by the business entity Prospect Venture, LLC, within the meaning of Wis. Stat. § 71.83(1)(b)2, during the period under review.

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, . . . 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, 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.

* * *

802.08 Summary Judgment.

* * *

(3) SUPPORTING PAPERS. . . . When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

* * *

CONCLUSIONS OF LAW

1. There is no genuine issue as to any material fact as to petitioner's personal liability for the periods of December 2000, February through April 2001, and June through August 2001, and summary judgment is therefore appropriate under Wis.

Stat. § 802.08.

2. The Department properly assessed petitioner under Wis. Stat. § 71.83(1)(b)2 as an officer, employee or other responsible person of Prospect Venture, LLC.

OPINION

The standard for determining whether summary judgment should be granted is stated in *Johnson v. Blackburn*, 220 Wis. 2d 260, 270 (Ct. App. 1998), as follows:

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. . . .

The elements necessary to establish the personal liability for unpaid withholding taxes under § 71.83(1)(b) 2 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;
3. *Intentional breach* of that duty.

Gerth and Kelly v. Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶ 203-367 (WTAC 1992); *Page v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-374 (WTAC 1992); *Michael A. Pharo v. Dep't of Revenue*, Docket No. 96-W-478 (WTAC October 9, 1997), aff'd Dane Co. Circ. Ct. (June 8, 1998); *Luetzow Industries v. Dep't of Revenue*, Docket No. 95-S-1636 (WTAC June 27, 1997); *Kenneth Higgs and Richard F. Wagner v. Dep't of Revenue*, Docket Nos. 96-W-841, 96-S-842, 96-W-843, and 96-S-844 (WTAC March 11, 1998); and *Irvin L. Hougom v.*

Dep't of Revenue, Docket No. 97-W-239 (WTAC April 28, 1999).

Petitioner Had The Authority to Pay the Taxes

Petitioner was designated by the Company's Operating Agreement as the general manager of the Company. Moreover, she was the only person who signed the checks on the business bank account for the Company. The only other person with that authority, her father, never signed any checks and authorized petitioner to sign all checks. Petitioner and her father both assert that petitioner had the authority to sign all checks so that the employees of the Company would not have an "open checkbook." Although this phrase is not explained, it is apparent that petitioner was in charge of signing all bank checks of the Company to oversee the financial situation of the Company. Therefore, even though petitioner did not prepare the checks herself, she did review all checks prior to signing them or authorizing payment.

Further, petitioner had actual knowledge in June of 2001 that the Company was not paying its withholding taxes. In her response to the Department's brief, petitioner has admitted that she informed the Department in June of 2001 that the withholding taxes had not been fully paid for the Company. Moreover, the Department sent information directly to petitioner in August of 2001 detailing all of the withholding taxes that had not been paid on behalf of the Company.

Petitioner denies, however, responsibility for delinquent withholding taxes because she believed the employees of the Company would take care of it. In *Masrud v. Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶203-284 (WTAC 1991)*, and *Jeffrey P. Mach, Sr. v. Dep't 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 Had a Duty to Pay the Taxes

Petitioner, as general manager of the Company, with authority to pay withholding taxes and knowing that taxes were unpaid, became personally obligated to see that they were paid. When she knew the Company had adequate funds, she had a duty to see that the taxes were paid. *Gerth & Kelly, supra*.

Petitioner had actual knowledge that the withholding taxes of the Company were unpaid in June of 2001. At that time, she contacted the Department about the Company's failure to pay the withholding taxes. The Department sent directly to petitioner a full accounting of the amount of withholding tax that the Company owed in August 2001. Since she had the authority to pay the withholding taxes, as the only person signing checks for the Company, she was personally obligated to see that the taxes were paid if the Company had funds to pay the taxes.

Petitioner Intentionally Breached Her Duty to Pay the Taxes

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

After petitioner became aware that the withholding taxes of the Company were not being paid in June of 2001, several checks payable to creditors were written on the Company's bank account through November of 2001, while state taxes were unpaid and delinquent. This establishes intent. *Garsky v. U S.*, 79-2 USTC ¶9436, 600 F.2d 86, (7th Cir. 1979); *Gerth & Kelly, supra*.

The Department has shown good cause for the granting of its motion for summary judgment.

Therefore,

IT IS ORDERED

The Department's motion is granted, and the petition for review is dismissed.

Dated at Madison, Wisconsin, this 18th day of January, 2005.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"