

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

BURLINGTON NORTHERN RAILROAD COMPANY, DOCKET NO. 98-I-211 (P)

Petitioner,

vs.

RULING & ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ROGER W. LEGRAND, COMMISSIONER:

This matter comes before the Commission on a motion by petitioner dated November 16, 2007, requesting an order compelling discovery of documents from the respondent. Petitioner, Burlington Northern Railroad Company (“BNRR”) appears by Attorney Gregory G. Fletcher of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., and Attorney Richard E. V. Harris of Richard E. V. Harris Law Office. Respondent, the Wisconsin Department of Revenue (the “Department”), appears by Attorney Mark S. Zimmer. Respondent has filed a brief in response to the motion dated January 17, 2008, and petitioner filed a reply brief on February 18, 2007. Respondent filed a surreply brief on March 7, 2008.

FACTS

1. On August 22, 2002, the Commission issued a Ruling and Order on Motions for Partial Summary Judgment denying BNRR’s Motion for Summary

Judgment and granting the Department's Motion for Partial Summary Judgment. BNRR moved for summary judgment reversing the Department's denial of its refund claim, and the Department moved for summary judgment affirming its action on the Petition for Redetermination.

At page 38 of its August 22, 2002, Ruling and Order, the Commission held:

BNRR has simply not demonstrated that Wisconsin's income/franchise tax imposes a greater burden on BNRR or companies protected by the 4-R Act than it imposes on other commercial or industrial entities or other transportation entities. In short, we do not find that Wisconsin's income/franchise tax treats BNRR or other companies protected by the 4-R Act less favorably than any other corporation that became subject to the income/franchise tax during the period under review.

At page 44 of its August 22, 2002, decision the Commission further provided:

Therefore, we conclude that the plain language of section 71.265 applies to any situation in which a corporation first becomes subject to Wisconsin's income/franchise tax. As a consequence, any corporation that became subject to the income/franchise tax after 1991, and during the period under review, was subject to the same provision with respect to its initial basis for Wisconsin's income/franchise tax.

2. BNRR subsequently filed a Petition for Rehearing. BNRR's September 9, 2002 Petition for Rehearing provides in pertinent part on page 9 as follows:

Departmental records that reflect how the Department established the beginning basis of corporations first acquiring Wisconsin sites in 1991 are unquestionably relevant to the issue of whether BNRR was a victim of

discrimination.

The Commission issued its Ruling and Order on Petitioner's Motion for Reconsideration on January 13, 2003. On page 3 of its Ruling and Order, the Commission said:

However, the Commission agreed with respondent that Wisconsin's law governing starting basis did not run afoul of the 4-R Act. The Commission, therefore, granted respondent's motion for summary judgment and affirmed respondent[s] action on the petition for redetermination with respect to the starting basis in petitioner's property for the years at issue.

3. The Ruling and Order further provides at page 3 that the basis for Petitioner's Motion for Reconsideration was that, notwithstanding the status of the law, there had been *de facto* discrimination. At page 5 the Commission said:

However, even though petitioner did not raise the issue of *de facto* discrimination in its motion for summary judgment, the question remains as to whether the Commission should nevertheless permit petitioner to try to prove such discrimination. This determination rests with the sound discretion of the Commission Therefore, the Commission, in its discretion, will afford petitioner an opportunity to prove that respondent engaged in *de facto* discrimination against petitioner with respect to the starting basis of property owned by corporations that first became subject to the Wisconsin income and franchise tax beginning in 1991. Failure to prove such discrimination will result in the reinstatement of the Commission's order affirming respondent's action on the petition for redetermination with respect to petitioner's initial basis.

4. This matter was the subject of the Commission's February 21, 2003 Ruling and Order on Respondent's Motion for a Protective Order. That order provided in part:

The parties have stipulated that there are three issues for the Commission to consider in this matter. The parties have further agreed that the first issue for the Commission to decide is the proper initial basis in Petitioner's depreciable assets when Petitioner first became subject to Wisconsin's corporate income and franchise tax.

On page 2 of that order, the Commission said:

On January 13, 2003, the Commission issued its Ruling and Order on Petitioner's Motion for Reconsideration ("January order"), holding that Petitioner never made a case for *de facto* discrimination. Nevertheless, the Commission decided that the Petitioner would be afforded the opportunity to prove that Respondent engaged in *de facto* discrimination with respect to the initial basis of corporations who first became subject to Wisconsin's income and franchise tax during 1991 through 1993.

5. The February 21, 2003 order indicates on page 2 that Petitioner served Petitioner's Second Request for Production of Documents in an effort to build a case for *de facto* discrimination, seeking the Wisconsin income/franchise tax returns and the Department's audit file for each corporation that first acquired Wisconsin sites, or ceased to be exempt, during 1991, and that was audited by the Department for the period 1991 through 1993.

Because the Second Request sought confidential tax information, the Department objected to the Second Request and filed a motion for a protective order. The Department sought the protective order on the basis of § 71.78, Wis. Stats., which limits the ability of the Department to disclose information provided on returns filed with the Department. At page 4 of the February 21, 2003 order, the Commission provided, "Certainly, the Second Request would run afoul of § 71.78(1), and

Respondent's motion will be granted, in part, on this basis." The February 21, 2003 order, page 4, also discussed the Department's concern regarding undue burden on the Department.

6. At pages 5 and 6 of the February 21, 2003 order, the Commission provided "Guidance to the Parties." The Commission indicated on page 5:

Therefore, it would appear to be an appropriate interrogatory for Petitioner to provide the list of domestic business corporations that were incorporated in Wisconsin and foreign corporations that first did business or were registered in Wisconsin during 1991 to 1993, and to ask Respondent for the number of those corporations who were audited by Respondent during any portion of 1991 to 1993 While this would not be a simple task, it would be considerably less burdensome than complying with the second request.

The order provided on page 6 that once the Respondent had provided the number of "hits" it would be appropriate for the Commission to hold a hearing as to the manner in which this matter would proceed. At page 6, the order provided in part that, "Respondent's motion for a protective order is granted and Respondent need not respond to the Second Request."

7. On May 21, 2003, the Commission issued a Ruling and Order on Petitioner's Motion to Compel Discovery. The May 21, 2003 order indicated that BNRR's counsel had heeded the Commission's suggestion in its February 21, 2003 order. The Petitioner provided Respondent a list of foreign corporations that first did business in or were first registered in Wisconsin during 1991. The Department compared the list with its audit records and determined that there were three foreign

corporations subject to field audit for all or a portion of the period 1991 through 1993. The Department, for reasons explained in the order, refused to provide the audit files, and Petitioner filed its Motion to Compel. The Department argued that taxpayers' files are confidential under § 71.78, Wis. Stats. However, the Commission granted the Petitioner's motion and ordered the Respondent to provide the audit files and returns subject to detailed conditions of access.

The Commission's May 21, 2003 order also indicated on page 6 that the Commission acknowledged that the Department has an obligation to carry out the duties imposed on it by the statutes to hold taxpayer information in the strictest confidence.

8. The parties entered into two detailed stipulations amending the Commission's May 21, 2003 order regarding the conditions of access. The first Stipulation and Order was signed on July 9, 2003. The second Stipulation and Order regarding Discovery was signed on May 26, 2004. The May 26, 2004 Stipulation and Order provided in part that counsel for the Petitioner and Respondent would arrange a pre-deposition telephone hearing regarding the possible deposition of Carol Knox, a Department auditor. If the Commission determined that such deposition would have reasonable probative value, the May 26, 2004 Stipulation and Order further defined the manner in which such deposition was to be held, with due regard for the confidentiality provisions of § 71.78(1).

9. In accordance with the May 26, 2004, order, Attorney Gregory Fletcher, counsel for BNRR, and the Department's attorney, Donald J. Goldsworthy,

scheduled a pre-deposition telephone conference with the Commission for August 17, 2005, at 10:30 a.m. and a telephone hearing regarding the deposition scheduled for August 24, 2005, at 9:00 a.m., with the deposition of Carol Knox to follow at 9:30 a.m. on August 24 and if necessary, August 25, 2005.

10. These hearings were canceled, at the request of petitioner, and never rescheduled.

11. Petitioner changed lead counsel on May 25, 2007, when Attorney Richard E. V. Harris filed a notice of appearance with the Commission.

12. The Commission issued a Status Conference Memorandum and Order dated July 27, 2007, which included provisions with respect to the Confidentiality Orders previously issued by the Commission.

13. On November 16, 2007, Attorney Harris filed the present motion with a supplement dated November 19, 2007, requesting an unredacted copy of the Department of Revenue audit roster, further information about audited companies, and the position of the Department on § 71.265, Wis. Stats.

RULING AND ORDER

This is a discovery motion governed by Chapter 804, Wis. Stats. In general, § 804.01(2)(a) allows for discovery of all matters not privileged which are relevant to the subject matter involved in the action. However, § 804.01(3) allows a court to limit discovery to protect a party from annoyance, embarrassment, oppression, or undue burden and expense. In addition, § 71.78, Wis. Stats., protects confidential information contained in tax returns and strictly limits the Department's disclosure of

taxpayer information.

In this case, a Commission ruling dated May 21, 2003 allowed discovery of redacted information of three audited companies during the period of 1991 through 1993. This was in accordance with the Commission's ruling on the Petition for Reconsideration in which the Commission in its discretion gave petitioner an opportunity to prove *de facto* discrimination against companies that first became subject to Wisconsin income and franchise tax beginning in 1991.

This discovery ruling sought to balance the confidentiality and undue burden concerns of the Department with the interest of a taxpayer (BNRR) attempting to show *de facto* discrimination.

Now, petitioner's new counsel attempts to expand the scope of the earlier ruled upon discovery.

The Commission notes the following circumstances surrounding the motion. First, petitioner has never completed the discovery ruled upon in the February 21, 2003 order and the subsequent stipulations of July 9, 2003 and May 26, 2004, in that it never deposed Department auditor Carol Knox. Second, it has been time consuming and expensive for the Department to comply with the February 21, 2003 order in that it had to redact, line-by-line, many pages of documents. Third, the original order on the Petition for Redetermination limited petitioner's opportunity to prove *de facto* discrimination to companies that first became subject to Wisconsin income and franchise tax beginning in 1991.

Petitioner has not shown that expanding discovery to include confidential

taxpayer information from the years 1988, 1989 and 1990, as requested in the motion, would lead to the discovery of relevant information “reasonably calculated to lead to the discovery of admissible evidence.” § 804.01(2)(a), Wis. Stats. In addition, this expansion would place a substantial burden on the Department. For example, there were 6,592 domestic corporations and 1,211 foreign corporations that first incorporated or registered with the Department of Financial Institutions in 1991 alone. The limits on discovery in this matter were set in the February 21, 2003 ruling that limited discovery to corporations that were incorporated in 1991, 1992 and 1993. In addition, any potential relevance of the new requests has to be weighed against the fact that disclosure would entail divulging privileged information and that the process of protecting the privileged information would entail additional burden and expense for the Department.

The Commission therefore denies the motion regarding the unredacted names of auditors and the expansion of discovery to cover companies incorporated in years other than those already ruled upon. The Commission declines to rule on the third part of the motion, because the Commission already ruled on the application of § 71.265, Wis. Stats., in this matter in its decision of August 22, 2002. That ruling will stand, unless petitioner can prove that the Department engaged in *de facto* discrimination against the petitioner. The burden is on the petitioner to make a case of *de facto* discrimination.

This case is hereby set for a pretrial conference to be held by telephone on February 25, 2009 at 11:00 a.m. (C.S.T.), to schedule a hearing in this matter limited to the issue of *de facto* discrimination.

Dated at Madison, Wisconsin, this 30th day of December, 2008.

WISCONSIN TAX APPEALS COMMISSION

Roger W. LeGrand, Commissioner
5005 University Avenue - Suite 110
Madison, WI 53705
(608) 266-1391