

STATE OF WISCONSIN
TAX APPEALS COMMISSION

MOHAMMAD CHOUDHRY,

DOCKET NO. 09-C-113(P-I)

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This case comes before the Commission on the motion of the Respondent, the Wisconsin Department of Revenue (the "Department"), to dismiss the petition for review on the basis that the Petitioner has failed to state a claim upon which relief can be granted as required by Wis. Stat. § 73.01(5)(b), and that the Commission therefore lacks jurisdiction to review this appeal. The Petitioner appears *pro se* in this case and has filed a response to the motion. Attorney John R. Evans represents the Department and has filed a brief, affidavits with exhibits, and a reply in support of the motion.

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

FINDINGS OF FACT

1. The Petitioner (d/b/a Midwest Oil) purchased for resale certain cigarettes from Friedman Tobacco & Candy Co. ("Friedman"), but did not remit payment for said cigarettes to Friedman, including, but not limited to, \$5,868.48 in

cigarette excise tax (the “excise tax”) applicable to the 152,428 cigarettes at issue for the period April 1, 2005 through November 30, 2005 (the “period at issue”). (Affidavit of Attorney John R. Evans dated July 21, 2009 (“Evans Aff.”) ¶ 4.)

2. Friedman filed a timely claim for refund of the full amount of the excise tax with the Department and the Department refunded the excise tax to Friedman. (Evans Aff. ¶ 5.)

3. By Notice of Amount Due dated September 2, 2008 (the “Notice”) issued to the Petitioner, the Department assessed the Petitioner for the full amount of the excise tax plus interest and penalty, resulting in a total assessment of \$8,288.80. (Evans Aff. ¶ 6, Ex. B.)

4. By letter dated October 15, 2008, the Petitioner’s representative filed a petition for redetermination with the Department. (Evans Aff. ¶ 7, Ex. C.)

5. By Notice of Action dated April 14, 2009, the Department denied the petition for redetermination. (Evans Aff. ¶ 8, Ex. D.)

6. On June 18, 2009, the Commission received the Petitioner’s petition for review via ordinary mail. The petition for review did not include the \$25.00 filing fee required by Wis. Stat. § 73.01(5)(a).

7. By letter dated June 22, 2009, the Commission acknowledged receipt of the petition for review and requested payment of the required \$25.00 filing fee no later than June 29, 2009.

8. On July 21, 2009, the Department filed an alternative answer, notice of motion and motion to dismiss the petition for review, with the Affidavit of Attorney

Evans, exhibits, and brief in support of the motion.

9. By letter sent via facsimile on August 21, 2009 and received on August 24, 2009, the Petitioner filed a response to the motion and paid the required filing fee.¹

10. On September 8, 2009, the Department filed a reply and the Affidavit of Revenue Tax Specialist Deborah A. Klimke dated September 4, 2009 (“Klimke Aff.”) in support of the motion.

11. In his petition for review and response to the motion, the Petitioner asserts that the cigarettes at issue spoiled and “went to waste” after his business failed because they were not stored properly.

CONCLUSION OF LAW

The Department has not established a *prima facie* case for summary judgment in this matter.

RULING

Because the Department filed affidavits and exhibits in support of its motion to dismiss the petition for review, the Commission treats the motion as a motion for summary judgment. *See*, Wis. Stat. §§ 802.06(3) and 802.06(2)(b); *see also*, *City of Milwaukee v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-405 (WTAC 1999) and *Mrotek, Inc. v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-315 (WTAC 1997). Summary

¹ The Department also had moved for dismissal based on the Petitioner’s failure to pay the filing fee required for a petition for review by Wis. Stat. § 73.01(5)(a). The Petitioner did not pay the fee at the time he filed his petition, but did subsequently pay the fee on August 24, 2009. The Department did not renew its discussion of this motion in its reply. In this case, the Commission follows its standard procedure and treats the Petitioner’s late payment of the filing fee as curing the initial failure to pay the fee.

judgment is warranted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2). If the moving party has established a *prima facie* case for summary judgment, then the opposing party must establish that there is a genuine issue of material fact that entitles that party to a trial. *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473 (1980). The Commission concludes that the Department has not established a *prima facie* case for summary judgment in this matter.

The record is not clear as to what actually happened to the cigarettes at issue. The Petitioner does not state specifically what was done with the allegedly spoiled cigarettes. The Department argues that the Petitioner should have returned the unsalable cigarettes at issue to Friedman, which then would have notified the Department, which would have verified the cigarettes’ destruction or return to the manufacturer. (Dept. Reply, p. 1.) Friedman then would have received the same refund of the excise tax, but no tax would have been due from the Petitioner.² However, because the Petitioner did not return the cigarettes, the Department assessed the Petitioner for the excise tax at issue.

As legal support, the Department cites *Supermarkets General Corp. v. Taxation Div. Dir.*, 4 N.J. Tax 431 (1982), *aff’d*, 6 N.J. Tax 252 (N.J. Super. A.D. Oct 17, 1983). In that case, the New Jersey Tax Court upheld an assessment of cigarette taxes

² The Department’s basis for granting the refund to Friedman is not clear from the record, since it appears that the refund was granted before the cigarettes became “damaged or otherwise unsalable,” the cigarettes were never returned to the manufacturer, and the stamps were never returned to the Department. See, Wis. Admin. Code § Tax 9.11.

where the taxpayer alleged that the cigarettes had been destroyed by fire prior to being sold, but the New Jersey Division of Taxation had not properly verified their destruction. While the New Jersey case bears some similarity to this case, there are also significant differences. First, the parties in that case stipulated that the cigarettes at issue had been destroyed by fire, whereas in this case the timing and method of the destruction of the cigarettes is unclear. Second, that case involved unstamped cigarettes held in a distributor's warehouse, while this case involves stamped cigarettes owned by a retailer. Finally, that case involves New Jersey law, and the Department does not explain how it compares to Wisconsin law in this specific area.

We find the record in this case insufficient to support adopting the rule followed in New Jersey at this time. In particular, there are no facts in the record regarding exactly what happened to the cigarettes at issue. The Petitioner does not make a clear statement regarding this fact, other than to allege that they were "bad/spoiled" and "went into waste." He notes that they were stored improperly at his business while the business was in "foreclosure," indicating that they may not have been under his control. Finally, he states that the business was re-opened by another owner with court approval. On this record, it is not clear when or how the cigarettes were destroyed.

In its filings, the Department does not attempt to answer these questions. Instead, the Department relies primarily upon a recitation of the procedures it follows in administering the cigarette excise tax. (Dept. Reply; Klimke Aff.) While an understanding of these procedures may be helpful in this case, their existence does not

establish the Petitioner's liability for the tax at issue, particularly since it appears that the cigarettes at issue may never have been sold.

We find that genuine issues of material fact remain in this case, and the Department therefore is not entitled to summary judgment as a matter of law.

ORDER

1. The Department's motion for summary judgment is denied.
2. The Commission will contact the parties to schedule further proceedings in this matter.

Dated at Madison, Wisconsin, this 7th day of December, 2009.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner