

STATE OF WISCONSIN
TAX APPEALS COMMISSION

JEFFREY CURRO,

DOCKET NO. 12-V-008

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

ROGER W. LEGRAND, COMMISSIONER:

This matter comes before the Commission on a motion for summary judgment filed by the Wisconsin Department of Revenue on April 29, 2012. Subsequently, on October 12, 2012, Petitioner filed a response to the Department's motion and his own motion for summary judgment to which the Wisconsin Department of Revenue responded on December 17, 2012.

The Commission will consider both motions in its decision.

Petitioner Jeffrey T. Curro, appears *pro se*. Respondent, the Wisconsin Department of Revenue, appears by Attorney Sheree Robertson.

Both parties have filed briefs supporting affidavits, and exhibits. Based upon the submissions of the parties, the Commission makes the following:

FINDINGS OF FACT

1. Under the date of November 2, 2010, Respondent, Wisconsin Department of Revenue (Department), issued to Petitioner, Jeffrey T. Curro, d/b/a Curro's Automotive Services, Inc. (Petitioner/Curro), a Notice of Adjustment for an assessment of unpaid Wisconsin motor vehicle fuel tax (Wisconsin fuel tax) in the amount of \$19,221.42, including tax, late fee, penalty and interest. (Affidavit of Timothy Winters ("Winters Affidavit"), ¶ 9 and Exhibit 12.) The Schedule attached to the Notice of Adjustment shows that unpaid Wisconsin fuel tax is due on 24,562 gallons of motor vehicle fuel that Petitioner purchased from Roettgers Company, Inc. ("Roettgers Company") in April 2007. (Winters Affidavit, ¶ 9 and Exhibit 12.) The Schedule also shows that unpaid Wisconsin fuel tax is due on 24,001 gallons of motor vehicle fuel that Petitioner purchased from Roettgers Company in May 2007. (Winters Affidavit, ¶ 9 and Exhibit 12.)

2. On or about December 29, 2010, the Department received from Petitioner an objection, which is considered his Petition for Redetermination, to the November 2, 2010, Notice of Adjustment. (Affidavit of Attorney Sheree Robertson ("Robertson Affidavit"), ¶ 2 and Exhibit 14.)

3. Under its Notice of Action letter dated November 8, 2011, the Department denied Petitioner's Petition for Redetermination. (Robertson Affidavit, ¶ 3 and Exhibit 15.)

4. On November 25, 1994, Roettgers Company was incorporated in the State of Wisconsin. (Affidavit of David J. Roettgers ("Roettgers Affidavit"), ¶ 1.)

5. David J. Roettgers (Mr. Roettgers) is currently the President of Roettgers Company and has been since its incorporation. (Roettgers Affidavit, ¶ 2.)

6. Roettgers Company is a retail dealer and a wholesaler distributor of motor vehicle fuel in Wisconsin, which also owns and operates several convenience stores that sell motor vehicle fuel. (Roettgers Affidavit, ¶ 3.) Roettgers Company does business primarily in the Milwaukee area. (Roettgers Affidavit, ¶ 3.)

7. Roettgers Company purchased motor vehicle fuel from its supplier and paid to the supplier the motor vehicle fuel taxes due on all its purchases. (Roettgers Affidavit, ¶ 4.)

8. As a wholesale distributor of motor vehicle fuel, for many years Roettgers Company sold motor vehicle fuel to Petitioner. (Roettgers Affidavit, ¶ 5.)

9. On April 10, 2007, Petitioner purchased from Roettgers Company 8,600 gallons of motor vehicle fuel and the fuel tax due was computed on the purchase. (Roettgers Affidavit, ¶ 6 and Exhibit 1.) Roettgers Company gave Petitioner invoice number 57565 in the amount of \$24,225.68 for the purchase of the motor vehicle fuel. (Roettgers Affidavit, ¶ 6 and Exhibit 1.) The invoice includes the Wisconsin fuel tax of \$2,657.40 (\$2,317.50 plus \$339.90). (Roettgers Affidavit, ¶ 6 and Exhibit 1.)

10. On April 14, 2007, Petitioner purchased from Roettgers Company 8,001 gallons of motor vehicle fuel and the fuel tax due was computed on the purchase. (Roettgers Affidavit, ¶ 7 and Exhibit 2.) Roettgers Company gave Petitioner invoice number 57931 for the purchase of 8,001 gallons of motor vehicle fuel that shows the amount due of \$22,950.24, which includes Wisconsin fuel tax of \$2,472.31 (\$2,163.31 plus

\$309.00). (Roettgers Affidavit, ¶ 7 and Exhibit 2.) Petitioner did not make a payment on invoice number 57931. (Roettgers Affidavit, ¶ 7.)

11. On April 20, 2007, Petitioner purchased from Roettgers Company 7,998 gallons of motor vehicle fuel and the fuel tax due was computed on the purchase. (Roettgers Affidavit, ¶ 8 and Exhibit 3.) Roettgers Company gave Petitioner invoice number 58351 for the purchase of the motor vehicle fuel that shows an amount due of \$22,349.68, which includes Wisconsin fuel tax of \$2,471.38 (\$2,162.69 plus \$308.69). (Roettgers Affidavit, ¶ 8 and Exhibit 3.) Petitioner did not make any payment on invoice number 58351. (Roettgers Affidavit, ¶ 8.)

12. On April 27, 2007, Petitioner purchased from Roettgers Company 8,000 gallons of motor vehicle fuel and the fuel tax due was computed on the purchase. (Roettgers Affidavit, ¶ 9 and Exhibit 4.) Roettgers Company gave Petitioner invoice number 58860 for the purchase of the motor vehicle fuel that shows an amount due of \$24,451.40, which includes Wisconsin fuel tax of \$2,472.00 (\$2,163.00 plus \$309.00). (Roettgers Affidavit, ¶ 9 and Exhibit 4.) Petitioner did not make any payment on invoice number 58860. (Roettgers Affidavit, ¶ 9.)

13. In April 2007, Petitioner purchased from Roettgers Company a total of 32,599 gallons of motor vehicle fuel. (Exhibits 1 through 4.) Petitioner made a partial payment to Roettgers Company on the amount due for the 32,599 gallons of motor vehicle fuel that was applied toward the balance due on invoice number 57565. (Roettgers Affidavit, ¶ 10.) Mr. Roettgers' handwritten text at the bottom of invoice number 57565 shows an unpaid balance of \$1,585.64, including \$173.93 of unpaid

Wisconsin fuel tax. (Roettgers Affidavit, ¶ 10 and Exhibit 1.) It also shows that there is still Wisconsin fuel tax due on 562.89 gallons of the 8,600 gallons of motor vehicle fuel that Petitioner purchased on April 10, 2007. (Roettgers Affidavit, ¶ 10 and Exhibit 1.)

14. On May 3, 2007, Petitioner purchased from Roettgers Company 8,000 gallons of motor vehicle fuel and the fuel tax due was computed on the purchase. (Roettgers Affidavit, ¶ 11 and Exhibit 5.) Roettgers Company gave Petitioner invoice number 59386 for the purchase of the motor vehicle fuel that shows an amount due of \$25,984.40, which includes Wisconsin fuel tax of \$2,472.00 (\$2,163.00 plus \$309.00). (Roettgers Affidavit, ¶ 11 and Exhibit 5.) Petitioner did not make any payment on invoice number 59386. (Roettgers Affidavit, ¶ 11.)

15. On May 7, 2007, Petitioner purchased from Roettgers Company 8,000 gallons of motor vehicle fuel and the fuel tax due was computed on the purchase. (Roettgers Affidavit, ¶ 12 and Exhibit 6.) Roettgers Company gave Petitioner invoice number 59674 for the purchase of the motor vehicle fuel that shows an amount due of \$25,442.40, which includes Wisconsin fuel tax of \$2,472.00. (Roettgers Affidavit, ¶ 12 and Exhibit 6.) Petitioner did not make any payment on invoice number 59674. (Roettgers Affidavit, ¶ 12.)

16. On May 12, 2007, Petitioner purchased from Roettgers Company 8,001 gallons of motor vehicle fuel and the fuel tax due was computed on the purchase. (Roettgers Affidavit, ¶ 13 and Exhibit 7.) Roettgers Company gave Petitioner invoice number 60183 for the purchase of the motor vehicle fuel that shows an amount due of \$27,260.78, which includes Wisconsin fuel tax of \$2,472.31 (\$2,163.31 plus \$309.00).

(Roettgers Affidavit, ¶ 13 and Exhibit 7.) Petitioner did not make any payment on invoice number 60183. (Roettgers Affidavit, ¶ 13.)

17. Roettgers Company prepared an AR Aged Trial Balance Report (Report) for Petitioner's business account identified by Account Number 3574 that is dated August 12, 2010. (Roettgers Affidavit, ¶ 15 and Exhibit 8.) The Report includes invoice numbers 57565, 57931, 58351, 58860, 59386, 59674 and 60183 and, as of October 31, 2008, shows a balance due of \$242,211.70. (Roettgers Affidavit, ¶ 15 and Exhibit 8.)

18. Roettgers Company mailed to Petitioner's business location at 3075 N. 124th Street a Statement dated June 17, 2010, for Account Number 3574. The Statement shows a balance due of \$242,211.70 that includes charges for motor vehicle fuel sold, Wisconsin fuel taxes due, interest, and legal/collection fees. (Roettgers Affidavit, ¶ 16 and Exhibit 9.) The Statement references invoice numbers 57565, 57931, 58351, 58860, 59386, 59674 and 60183. (Roettgers Affidavit, ¶ 16 and Exhibit 9.)

19. Petitioner did not remit payment to Roettgers Company for the balance due as shown in the Statement dated June 17, 2010. (Roettgers Affidavit, ¶ 17.)

20. Roettgers Company was unable to collect from Petitioner the Wisconsin fuel taxes in question, which were subsequently determined uncollectible. (Roettgers Affidavit, ¶ 18.)

21. Roettgers Company filed with the Department a "Wholesaler Distributor Claim for Tax Refund Uncollectible Wisconsin Motor Vehicle Fuel Taxes" (Claim for Refund) dated June 22, 2010, claiming a refund of \$15,005.93 for Wisconsin

fuel taxes it was unable to collect from Petitioner, which was granted by the Department. (Roettgers Affidavit, ¶ 19 and Exhibit 10.) The Claim for Refund filed by Roettgers Company shows the number of gallons of motor vehicle fuel that Petitioner purchased and received from Roettgers Company in April 2007 and May 2007, which are identified by invoice numbers 57565, 57931, 58351, 58860, 59386, 59674 and 60183. (Roettgers Affidavit, ¶ 19 and Exhibit 10.)

22. The Department granted the Claim for Refund filed by Roettgers Company and issued the requested refund. (Affidavit of Mr. Winters, ¶ 6.)

23. Roettgers Company did not make a profit on the motor vehicle fuel Petitioner purchased from it in April 2007 and May 2007. (Roettgers Affidavit, ¶ 21.)

24. Petitioner operated Curro's Automotive Services, Inc. at 3075 N. 124th Street, Brookfield, Wisconsin, (3075 N. 124th Street) from July 7, 1987, through June 13, 2009. (Robertson Affidavit, ¶ 8; and Curro's Answer to Interrogatory No. 1, Exhibits 18 and 19.) He operated Curro's Automotive Services, Inc., as a full service gas station, mechanical automotive repair station, and convenience store. (Roberson Affidavit, ¶ 9; and Curro's Admission to Request for Admission No. 3, Exhibits 18 and 19.)

25. Petitioner purchased the real property located at 3075 N. 124th Street in February 1992. (Robertson Affidavit, ¶ 10; and Curro's Admission to Request for Admission No. 1, Exhibits 18 and 19.)

26. Petitioner sold to his retail customers the motor vehicle fuel that he purchased from Roettgers Company and collected from them the Wisconsin fuel tax

due. (Robertson Affidavit, ¶ 11; and Curro's Admissions to Requests for Admission Nos. 5, 8, 9, and 10, Exhibits 18 and 19.)

27. Petitioner did not file a report with the Department or pay the fuel tax on 48,563 gallons of the 56,600 gallons of motor vehicle fuel that he purchased from Roettgers Company in April 2007 and May 2007. (Affidavit of Mr. Winters, ¶ 8.)

28. Roettgers Company filed in Waukesha County Circuit Court a Motion for Summary Judgment of Foreclosure and Dismissing the Defendants' Counterclaim in Roettgers Company, Inc. (Plaintiff) v. Jeffrey T. Curro, and Curro's Automotive Services, Inc. (Defendants) and Jeffrey T. Curro, and Curro's Automotive Services, Inc. (Third-Party Plaintiff) v. Scott Oil Company (Third-Party Defendant), Case No. 07CV3610 (Roettgers v. Curro). (Roettgers Affidavit, ¶ 22 and Exhibit 11.) In Roettgers v. Curro, the Court found that J. Curro (Petitioner) owed to Roettgers Company the following amounts as of September 29, 2008, under the Supply Agreement and Mortgage:

Principal and Interest	\$238,632.22
Attorneys' fees	\$ 23,088.00
Costs and Disbursements	\$ 1,806.24

TOTAL DUE ROETTGER'S \$263,526.46

(Roettgers Affidavit, ¶¶ 22 and 24 and Exhibit 11.)

29. According to Paragraph 11 of the Findings of Fact, Conclusions of Law and Judgment (Judgment) in Roettgers v. Curro, no deficiency judgment may be obtained against any defendant. (Roettgers Affidavit, ¶ 25 and Exhibit 11.)

30. Mr. Roettgers is a member of M&I Real Estate Holdings, LLC, which is a limited liability corporation registered with the Wisconsin Department of Financial Institutions. (Roettgers Affidavit, ¶ 26.)

31. Roettgers Company is currently operating a convenience store and retail gas service station at 3075 N. 124th Street. (Roettgers Affidavit, ¶ 27.)

CONCLUSIONS OF LAW

1. Respondent, Wisconsin Department of Revenue, is granted summary judgment.
2. Petitioner's motion for summary judgment is denied.

DECISION

This is a case in which both parties request a summary judgment. Under Wis. Stat. § 802.08(2), summary judgment is granted to a moving party if it can show there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law. Based upon the facts as set forth in the filings and affidavits, the Commission grants summary judgment to the Department and denies summary judgment to the Petitioner.

The facts in this case are uncontested. The Wisconsin Department of Revenue issued to Petitioner, Jeffrey T. Curro, a Notice of Adjustment for unpaid motor vehicle fuel taxes for the months of April 2007 and May 2007. Petitioner objected to the Notice of Adjustment. The unpaid fuel tax resulted from the relationship between Petitioner, a retailer of motor vehicle fuel, and Roettgers Company, a retail dealer and wholesale distributor of motor vehicle fuel. During the periods in question, Petitioner

purchased motor vehicle fuel from Roettgers Company. Roettgers Company forwarded the tax on the fuel to its supplier and the Department. In Wisconsin, with each sale or distribution of motor tax vehicle fuel, the tax collected is added to the selling price so that the tax is ultimately paid by the user of the motor vehicle fuel. All of this is set forth in Wis. Stat. § 78.01(1). Petitioner did not pay the fuel tax on the 48,563 gallons of motor fuel purchased from Roettgers Company. Roettgers Company made numerous attempts to recover the amount owed for the 48,563 gallons of fuel by sending invoices, and finally obtaining a judgment in Waukesha County Circuit Court for \$263,526.46 in Roettgers Company, Inc. v. Jeffrey T. Curro, and Curro's Automotive Services, Inc., Case No. 07CV3610 (Roettgers v. Curro).

Under Wis. Stat. § 78.10(2s), if a licensed supplier or wholesale distributor can show that it is unable to recover the Wisconsin fuel tax from another wholesale distributor or from a retail dealer, it can file a claim for refund. That is exactly what Roettgers Company did. Following Wisconsin Administrative Code § Tax 4.12(3)(b)(1), Roettgers Company filed with the Department a claim for refund claiming as a bad debt the Wisconsin fuel taxes on 48,563 gallons of motor vehicle fuel it was unable to collect from Petitioner. The Department granted the requested refund.

Since Petitioner either used motor vehicle fuel in Wisconsin or possessed motor vehicle fuel and did not pay the Wisconsin fuel tax on 48,563 gallons of motor fuel, he is required to file a report with the Department and pay the tax. Section 78.12(3), Wis. Stat., states:

REPORTS OF OTHERS. Any person, including a terminal operator, who is not a licensee and who either uses any motor vehicle fuel in this state or who has possession of any motor vehicle fuel (other than that contained in the ordinary fuel tank attached to a motor vehicle) upon which the motor vehicle fuel tax has not been paid or the liability therefor has not been incurred by any licensee in this state shall file a report and pay the tax on that motor vehicle fuel and shall be subject to this subchapter in the same manner as is provided for licensees.

In this case, Petitioner, as a person who possessed motor vehicle fuel to sell at retail, was required to file a report and pay the Wisconsin fuel taxes due on the 48,563 gallons of motor fuel that he purchased from Roettgers Company. Petitioner did not file a report with the Department and did not pay the fuel taxes as due. The Department was correct in assessing the unpaid fuel taxes to Jeffrey T. Curro, d/b/a Curro's Automotive Services, Inc.

Petitioner, Jeffrey T. Curro, raises two issues in his cross-motion for summary judgment. First, Petitioner claims that he paid Roettgers Company the fuel taxes in question and that Roettgers Company overbilled him. Second, he claims that in the foreclosure case which Roettgers Company brought against him, Roettgers Company, Inc. v. Jeffrey T. Curro, and Curro's Automotive Services, Inc., Case No. 07CV3610 (Roettgers v. Curro), there is a no deficiency clause in the judgment which Petitioner interprets to mean that no one can come after Petitioner for the \$263,526.64 which Roettgers Company obtained against him.

The facts do not support either of Petitioner's assertions. The judgment obtained against Petitioner in Waukesha County Circuit Court is clear evidence that Petitioner owed Roettgers Company \$263,526.46. Moreover, the invoices which

Roettgers Company submitted to the Department in its claim for refund show that Petitioner did not remit to Roettgers Company payment for the fuel taxes on the 48,563 gallons of motor fuel of the months of April 2007 and May 2007. Thus, Petitioner's first claim has no merit.

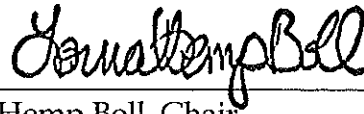
The no deficiency judgment allegation also has no bearing on this case. The case before the Commission involves the Wisconsin Department of Revenue bringing a case against Petitioner, Jeffrey T. Curro, for nonpayment of motor fuel taxes under Wis. Stat. § 78.12(3). The Roettgers Company is not a party to this action. The non-deficiency clause applies to the *Roettgers v. Curro* case which is a foreclosure case. Under Wis. Stat. § 846.103(2), the plaintiff, Roettgers, has the option of waiving a judgment for any deficiency which may remain after the sale of the foreclosed property. The statute only applies to the plaintiff, Roettgers. Petitioner cites no authority to support his contention that the Department of Revenue is bound by the case. The Commission concludes that since the Department of Revenue is not a party to the foreclosure action, it is not bound by the non-deficiency clause.

Under Wis. Stat. § 802.06(2), a motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Under Wis. Stat. § 802.08(3), "an adverse party may not rest upon mere allegations or denials of the pleadings but the adverse party's response, by affidavits or otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial."

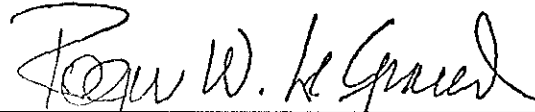
In this case, the Department has produced facts showing that it is entitled to a summary judgment. The Petitioner has raised allegations but has not set forth any facts which would show there is a genuine need for a trial. Nor has Petitioner shown it is entitled to a summary judgment as a matter of law.

Dated at Madison, Wisconsin, this 14th day of June, 2013.

WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

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**

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. **Several points about starting a case:**

- 1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.**
- 2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.**
- 3. The 30-day period starts the day after personal service or the day we mail the decision.**
- 4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.**

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.