

STATE OF WISCONSIN
TAX APPEALS COMMISSION

CHRISTOPHER L. FIELD,

DOCKET NO. 06-S-240

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This matter comes before the Commission following a hearing held at the Commission's offices in Madison, Wisconsin on September 20, 2007, with the undersigned Commissioner presiding. Petitioner Christopher L. Field ("Petitioner") appeared at the hearing representing himself. Attorney Lisa Ann Gilmore appeared for respondent, the Wisconsin Department of Revenue (the "Department"). At the hearing, the Commission received and entered into evidence Petitioner's exhibits D, J, L, S, U, V and Y¹ and the Department's exhibits 1 through 27.² Petitioner provided sworn testimony on his own behalf, and Kimberly Chamberlain (the Department Revenue Agent assigned to this matter), Derek Hanson and Bee Cha were called to testify by the Department and also provided sworn testimony at the hearing.

¹ Prior to the hearing, Petitioner filed exhibits marked A through A.G with the Commission, but introduced only the referenced exhibits into evidence at the hearing. Only those exhibits deemed relevant to the Commission's Decision and Order are cited or discussed herein.

² Prior to the hearing, Petitioner filed a motion in limine to exclude Department Exhibit 20 and the Department's witness list. The Commission denied the motion. During the hearing, Petitioner objected to the Commission's receipt of Department Exhibit 20 as evidence in this matter. The presiding Commissioner overruled Petitioner's objection, as further discussed below.

Having considered the sworn testimony and the parties' exhibits, and acting pursuant to Wis. Stat. § 73.01(4)(em)2, the Commission finds, concludes, decides and orders as follows:

FINDINGS OF FACT

1. By notice to Petitioner dated January 15, 2006, the Department issued an assessment of tax against petitioner for the period July 1, 2001 through December 31, 2001 (the "period at issue") in the total amount of \$13,061.42, including tax, interest and penalty (the "assessment"). (Dept. Ex. 1.) The assessment is based on the Department's determination that Petitioner is a responsible person liable for certain unpaid sales taxes of Next Generation Computers, L.L.C. (d/b/a Aurora Computers and Aurora Computer Services), under Wis. Stat. § 77.60(9).

2. By letter dated February 12, 2006, Petitioner filed with the Department a petition for redetermination of the assessment. (Dept. Ex. 2.)

3. By Notice of Action dated August 7, 2006, the Department granted in part and denied in part the petition for redetermination, with the amount of the assessment remaining the same. (Dept. Ex. 3.)

4. On September 26, 2006, Petitioner filed a timely petition for review of this matter with the Commission.

5. Next Generation Computers, L.L.C., a Wisconsin limited liability company ("NGC"), was organized effective June 21, 2001. (Dept. Ex. 22.) NGC was a successor to Aurora Computer Services, Incorporated, a Wisconsin corporation, which Petitioner, Fairdove Cha and Derek Hanson acquired from Daniel E. Field (Petitioner's

brother) via a Stock Purchase Agreement dated as of June 1, 2001. (Pet. Ex. J.)

6. NGC had a checking account (the "account") at M&I Marshall & Ilsley Bank ("M&I"). Petitioner was one of three individuals who signed a Bank Signature Card for the account and was authorized to act on NGC's behalf with respect to the account. Fairdove Cha and Derek Hanson also signed a Bank Signature Card for the account and were authorized to act on NGC's behalf with respect to the account. (Dept. Ex. 8.)

7. The account was active during the period at issue, with approximately 44 checks written during July, 2001. (Dept. Ex. 9.)

8. Petitioner's signature appears on account check number 508 dated July 12, 2001 in the amount of \$554.50 payable to Hy-Tech. (Dept. Ex. 10.)

9. The account remained active during the period at issue, with approximately 21 checks written during December, 2001. (Dept. Ex. 11.)

10. Petitioner's signature appears on account check number 744 dated December 13, 2001 in the amount of \$443.29 payable to Larry Field. (Dept. Ex. 12.)

11. The account remained active after the period at issue, with approximately 11 checks written during February, 2002. (Dept. Ex. 13.)

12. Petitioner's signature appears on account check number 769 dated February 8, 2002, in the amount of \$270.00 payable to Hy-Tech. (Dept. Ex. 14.)

13. Petitioner's signature appears on account check number 770 dated February 12, 2002, in the amount of \$320.00 payable to AMOS. (Dept. Ex. 15.)

14. Petitioner's signature appears on account check number 768 dated

February 5, 2002, in the amount of \$450.00 payable to Denn Cha. (Dept. Ex. 16.)

15. Petitioner's signature appears on account check number 771 dated February 19, 2002, in the amount of \$176.54 payable to Cash. (Dept. Ex. 17.)

16. NGC filed a 2001 Internal Revenue Service Form 1099-MISC reporting that it paid \$3,145.00 to Petitioner during tax year 2001. (Dept. Ex. 18.)

17. By correspondence dated February 5, 2003, Department Revenue Agent Kimberly Chamberlain notified Petitioner that an informal hearing would be held at which he would be interviewed regarding the unpaid sales tax liability of NGC for the period at issue. (Dept. Ex. 19.) Petitioner attended the informal hearing, which was held on February 26, 2003 (the "Department hearing"). Derek Hanson and Fairdove Cha also attended the Department hearing.

18. At the Department hearing, Petitioner signed³ an Acceptance of Personal Liability form prepared by the Department (the "Acceptance"), which states as follows in relevant part: "I, the undersigned, accept the responsibility for unpaid sales and use tax . . . and any interest and penalties as imposed within the limitations of Section[] 77.60(9), . . . Wisconsin Statutes, for Next Generation Computers for the following specified tax types and periods. I further certify that other debts owed by the corporation were paid after the tax items became due and owing." The tax types and

³ The Acceptance bears Petitioner's signature, but is dated February 25, 2003, even though the Department hearing at which he signed the form was held on February 26, 2003. At the Commission hearing, Petitioner objected to the introduction of the Acceptance into evidence based in part on this discrepancy in the dates, but did not deny signing the Acceptance at the Department hearing. Ms. Chamberlain testified that she dated the Acceptance and inadvertently used the incorrect date. Petitioner further objected that he did not understand the Acceptance when he signed it. The undersigned Commissioner overruled Petitioner's objections and received the Acceptance into evidence as Department Exhibit 20.

periods specified on the form are sales and use tax through December, 2001. (Dept. Ex. 20.)

19. Petitioner filed a document entitled "Statement of Facts, Objections, Points of Law" with the Department on or about December 11, 2006. (Dept. Ex. 21.)

20. The Articles of Organization of NGC were filed with the Wisconsin Department of Financial Institutions effective June 21, 2001. Pursuant to Article 5 of those Articles, the management of NGC was vested in "a manager or managers." Article 6 of NGC's Articles listed Petitioner as one of the four organizers of NGC, along with Bee Cha, Fairdove Cha and Derek Hanson. (Dept. Ex. 22.)

21. On NGC's application for a Wisconsin Seller's Permit (Dept. Form A-101) filed with the Department, Petitioner is listed as an officer and 25% owner of NGC. The Form A-101 was signed by Derek Hanson. (Dept. Ex. 23.)

22. No Operating Agreement for NGC was executed.

23. Derek Hanson was the Chief Financial Officer of NGC and Fairdove Cha was the Secretary of NGC.

24. NGC ceased operating during January, 2002, and Petitioner stopped going to the NGC office during February, 2002.

25. M&I closed NGC's checking account in February, 2002.

26. Although Petitioner now denies that he was a member and officer of NGC, he stated that he was a member and officer of NGC in correspondence he sent to Marie Romero at the Department, which she received on June 15, 2006. (Dept. Ex. 25, Attachment 1.)

27. In an email sent by Petitioner on August 12, 2002, he appears to refer to himself as "C.E.O. Next Generation Computers L.L.C." (Dept. Ex. 25, Att. 4(b).)

28. Derek Hanson testified that he, Fairdove Cha and Petitioner all agreed to pay other bills due from NGC before paying taxes owed by NGC.

29. Petitioner claims that he had no knowledge of the unpaid sales taxes at issue in this matter until August 7, 2002. (Dept. Ex. 25, Att. 4-1.)

30. Derek Hanson testified that when he (Hanson) left NGC around January, 2002, he, Fairdove Cha and Petitioner reached an oral agreement that Hanson would be responsible for NGC's credit card debt and Petitioner and Fairdove Cha would be responsible for NGC's taxes.

31. Kimberly Chamberlain, the Department Revenue Agent assigned to the NGC matter, testified that her first contact with Petitioner was via an informal hearing request sent on or about July 31, 2002 for a hearing to be held in August, 2002. She further testified that she spoke with Petitioner at least twice regarding that hearing, but that Petitioner did not appear at the hearing.

32. At the Department hearing held on February 26, 2003, Derek Hanson and Fairdove Cha also signed Acceptance of Personal Responsibility forms. Derek Hanson testified that he witnessed Petitioner sign his own Acceptance form. Derek Hanson and Fairdove Cha have satisfied their payment obligations with respect to the taxes at issue pursuant to their agreements with the Department.

33. Invoices sent by NGC during October, 2001 and November, 2001 show that NGC was billing clients for Wisconsin sales tax on their purchases during the

period at issue. (Dept. Ex. 27.)

CONCLUSION OF LAW

Petitioner is personally liable for the unpaid sales taxes of Next Generation Computers, L.L.C., as a responsible person under Wis. Stat. § 77.60(9), as determined by the Department.

DECISION

Assessments made by the Department are presumed to be correct, and the burden is on the petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1).

Any person who is responsible for collecting, accounting for, or paying sales and use tax and who willfully fails to do so is personally liable for the amount due, including interest and penalties, if the corporation or other party primarily liable is unable to pay. Wis. Stat. § 77.60(9). This personal liability survives the dissolution of the corporation or other business association. A “person” for purposes of this provision includes an officer, employee, or other responsible person of a corporation, limited liability company (“LLC”), or other form of business association and a member, employee, or other responsible person of a partnership, LLC, or sole proprietorship.

For sales and use tax purposes, LLC’s with two or more members are treated in the same manner as other business entities. The LLC, as a retailer or consumer, is required to register, report, and pay Wisconsin sales and use taxes as are other retailers or consumers. Wis. Stat. §§ 77.52(7), 77.53(9) and (9m); Wis. Dep’t of

Revenue Pub. 119, *Limited Liability Companies (LLC's)* § VII.D (Dec. 2006) (Pet. Ex. L).

To hold an individual personally responsible for a business entity's unpaid sales taxes, the following three elements must be present: (1) The individual had the authority to pay, or to direct the payment of, the taxes; (2) The individual had the duty to pay, or to direct the payment of, the taxes; and (3) The individual intentionally breached that duty. *See, Bice v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-496 (WTAC 2000); *Senf v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-441 (WTAC 1999); *Balestrieri v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-373 (WTAC 1998). If the Department presents clear and satisfactory evidence establishing these three elements, then the petitioner bears the burden of proving otherwise by clear and satisfactory evidence. *Drilias v. Wisconsin Department of Revenue*, Wis. Tax Rptr. (CCH) ¶400-222 (WTAC 1996). In this case, the Department has presented sufficient evidence to establish all three elements required for personal liability to attach to Petitioner under Wis. Stat. § 77.60(9), and Petitioner has failed to prove the contrary.

1. Authority and Duty to Pay the Sales Taxes

Although he now disputes his role at NGC, the evidence shows that Petitioner was an officer and member of NGC during the period at issue. Petitioner was one of three individuals authorized to sign checks for NGC, and signed a number of checks for NGC during the period at issue. Consequently, he clearly had the authority to pay the taxes at issue. As an officer of NGC, Petitioner also had the duty to pay the taxes at issue.

2. Intentional Breach of Duty

To prove that Petitioner intentionally breached his duty to pay the taxes at issue, the Department must show only that Petitioner paid other creditors of NGC when the taxes at issue were due and unpaid. The Department has presented such proof. (Dept. Ex.'s 9 through 17.)

Petitioner's argument that he did not know that the taxes were due and unpaid is simply not credible. The evidence shows that Petitioner was one of the three members of NGC, that he was an officer of NGC, and that he was heavily involved in its operations throughout the period at issue. The NGC invoices show that NGC was billing its customers for Wisconsin sales taxes during the period at issue. (Dept. Ex. 27.) Derek Hanson's testimony that the three members reached an oral agreement regarding the payment of NGC's unpaid taxes in January 2002 was persuasive. Finally, Petitioner signed the Department Acceptance form in 2003 (Dept. Ex. 20), indicating that, at that time, he agreed he was personally liable for the unpaid taxes, along with his former business partners, Mr. Hanson and Mr. Cha.

The Department has presented clear and satisfactory evidence establishing that Petitioner had the authority and duty to pay the taxes at issue and that he intentionally breached that duty. Consequently, the Commission concludes that the Department was correct in determining that Petitioner is a responsible person with respect to NGC, and that he is personally liable for the unpaid sales taxes at issue in the assessment under Wis. Stat. § 77.60(9).

For the reasons discussed herein,

IT IS ORDERED

The Department's action on Petitioner's petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 19th day of March, 2008.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Acting Chairperson

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"