

STATE OF WISCONSIN
TAX APPEALS COMMISSION

DAVID J. AND AUDREE LONGRIE,
DAVID J. LONGRIE,

DOCKET NO. 07-I-162
DOCKET NO. 07-S-163

Petitioners,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

These matters come before the Commission following a hearing held on December 8, 2008. Attorneys David F. Grams and Thomas M. Olson represent the Petitioners, David J. Longrie and Audree Longrie, a married couple, in these matters. Respondent, the Wisconsin Department of Revenue (the "Department"), is represented by Attorney Linda M. Mintener.

At the hearing, the Commission received and entered into evidence the Department's Exhibits 1 through 26 and the Petitioners' Exhibits A through W and Y through JJ. Petitioner David J. Longrie, Department Resolution Officer Jerome ("Jay") Gebert and Department Auditor Eugene Sauer provided sworn testimony. Petitioner Audree Longrie did not appear at the hearing.¹

¹ At the hearing, the Department moved to dismiss the petition in Docket Number 07-I-162 as to Mrs. Longrie due to her failure to appear at the hearing, and the Petitioners' counsel objected. The Commission held the motion in abeyance to be decided in connection with both matters at issue. The Department renewed its motion by a written notice of motion and motion to dismiss filed on January 9, 2009, to which the Petitioners responded on January 20, 2009. The Commission ordered the motion held in abeyance pending the issuance of this decision by Order dated January 16, 2009.

Following the hearing, both parties elected to file post-hearing briefs. The Petitioners filed their brief on January 29, 2009, the Department filed its brief on March 17, 2009, and the Petitioners filed their reply brief on April 29, 2009. Having considered the sworn testimony, the parties' exhibits and briefs, the Commission finds, concludes, decides and orders as follows:

FINDINGS OF FACT

1. By a Notice of Field Audit Action, Notice of Better Records Required and Notice of Amount Due dated March 30, 2006, the Department issued an income tax assessment to the Petitioners for the years 1994 through 1999 (the "period at issue") in the total amount of \$1,027,516.42, including \$340,950.28 in tax, \$345,615.85 in interest and a 100% penalty of \$340,950.29 (the "income tax assessment"). According to the Department's Exhibits attached to these Notices, this assessment was based primarily on the Department's inclusion of significant unreported income in the Petitioners' gross income and the Department's disallowance of significant portions of deductions claimed by the Petitioners on Schedule C of their federal income tax returns for each year at issue for unsubstantiated expenses generally related to Petitioner David J. Longrie's business, Carpet Warehouse. (Dept. Ex. 1.) (Docket No. 07-I-162)

2. By a Notice of Field Audit Action, Notice of Better Records Required and Notice of Amount Due dated March 28, 2006, the Department issued a sales tax assessment to Petitioner David J. Longrie (d/b/a Carpet Warehouse) for the years 1994 through 1999 (the "period at issue") in the total amount of \$1,172,170.20, including \$478,262.81 in tax, \$454,775.96 in interest and a penalty of \$239,131.43 (the "sales tax assessment"). According to the Department's Exhibits attached to these

Notices, this assessment was based primarily on the Department's determination that Wisconsin sales tax was due but had not been charged on significant sales of tangible personal property by Mr. Longrie's business, Carpet Warehouse, during the period at issue. (Dept. Ex. 2.) (Docket No. 07-S-163)

3. The assessments were based upon a field audit of the Petitioners and Carpet Warehouse conducted by Department Auditor Eugene Sauer, who submitted his Field Audit Workpapers to the Department on March 16, 2006. In the Comments section of the Workpapers, Mr. Sauer stated that the Petitioners had not met with him nor had they provided any records in connection with the audit. (Dept. Ex. 3.)

4. By two identical letters received on April 14, 2006, the Petitioners filed with the Department a petition for redetermination of each assessment. Each letter was signed by Mr. Longrie and stated in its entirety: "This letter is for filing an appeal on your audit report the amounts are impossible for us to do that much business with labor. I will be out of town till the end of May and will have more information from our new accountants then." (Dept. Ex.'s 4-5.)

5. By Notice of Action dated June 23, 2007, the Department granted in part and denied in part the Petitioners' petition for redetermination of the income tax assessment, reducing this assessment to a total of \$372,960.02, including \$118,399.21 in tax, \$129,363.52 in interest, \$6,798.09 in underpayment interest, and a penalty of \$118,399.20. Department Resolution Officer Jay Gebert adjusted this assessment based on additional information provided by the Petitioners, including copies of sales invoices for the years 1997 through 1999 and some purchase invoices for the same years. (Dept. Ex. 6.)

6. By Notice of Action dated June 23, 2007, the Department granted in part and denied in part Mr. Longrie's petition for redetermination of the sales tax assessment, reducing this assessment to a total of \$689,765.37, including \$265,079.92 in tax, \$292,145.48 in interest, and a fraud penalty of \$132,539.97. Department Resolution Officer Jay Gebert adjusted this assessment based on additional information provided by Mr. Longrie, including copies of sales invoices for the years 1997 through 1999 and some purchase invoices for the same years. The Department based its assessment of this fraud penalty on its determination that Mr. Longrie had charged and collected but failed to remit to the Department approximately \$30,000 of sales tax per year during the period at issue. (Dept. Ex.'s 7 and 13.)

7. On August 17, 2007, the Petitioners filed petitions for review with the Commission of the Department's partial denials of their petitions for redetermination of the assessments at issue.

8. On September 19, 2007, the Department filed an answer to each petition.

9. On December 8, 2008, the Commission held the hearing scheduled in these matters. Petitioner David J. Longrie appeared and testified at the hearing, but Petitioner Audree Longrie did not appear at the hearing.

10. During the period at issue, the Petitioners were full-time residents of the State of Wisconsin. The Petitioners filed joint federal and Wisconsin individual income tax returns for each year of the period at issue, as well as the years 1992-1993. (Dept. Ex.'s 14-21; Pet. Ex.'s F-K.)

11. During the period at issue, Petitioner David J. Longrie operated a

sole proprietorship that remodeled homes and kitchens (d/b/a Quality Wood Products), which evolved into a business that sold and installed flooring and carpet (d/b/a Carpet Warehouse).² Mr. Longrie reported Carpet Warehouse's income and expenses on Schedule C of the Petitioners' federal income tax returns for the years at issue, including claimed business expenses. (Dept. Ex.'s 16-21; Pet. Ex.'s F-K.)

12. Mr. Longrie has held Wisconsin Sales Tax Permit No. 507824 for his businesses since 1991. (Dept. Ex.'s 22, 24.)

13. Mr. Longrie testified that he had charged and collected sales taxes during the years at issue and believed that such taxes had been remitted to the State, but now agreed had not been so remitted. (Tr. at 39-40.)

14. On March 21, 1997, the Department assigned the income tax field audit of the Petitioners because their 1992-1995 income tax returns showed that their cash expenditures exceeded their cash receipts and because it appeared that they could not live on the amount of income they had reported on those returns. (Dept. Ex. 3 at 3-4, 7, 78-79; Dept. Ex. 14; Tr. at 55.)

15. On March 21, 1997, the Department assigned the sales/use tax field audit of Mr. Longrie because he had filed no sales/use tax returns and had reported no taxable receipts or purchases for his sole-proprietor businesses, including Carpet Warehouse. (Dept. Ex. 3 at 1, 3-4, 7, 78-79; Tr. at 55.)

16. On September 14, 1998, the Department sent a letter to the Petitioners scheduling the income and sales/use tax field audits for October 18, 1998.

² For purposes of clarity and consistency, Mr. Longrie's business is referred to as "Carpet Warehouse" herein.

(Dept. Ex. 3 at 36; Tr. at 57.) At the request of Mr. Longrie or his then-representatives, the audits were repeatedly postponed. (Dept. Ex. 3 at 6, 14, 19-23, 36; Tr. at 57-58, 74.) The parties entered into a series of agreements extending the applicable statutes of limitations during the audit. (Pet. Ex.'s L-EE; Tr. at 58.)

17. These matters remained at the audit level for more than 7 years, during which time the Department made more than 100 requests, orally and in writing, to the Petitioners and their then-representatives for access to their records and for production of certain documents. (Dept. Ex. 3 at 6-43; Tr. at 60.) Despite repeated promises to cooperate in the audits, the Petitioners never met with the Department's auditor, never gave him access to any books or records, and did not provide any documents related to these matters to the Department until 2006. (Dept. Ex. 3 at 3.)

18. On March 16, 2006, Department Auditor Eugene Sauer finalized the audits based on the information the Department had in its files. (Dept. Ex. 3 at 3-4, 18-22.)

19. During 2006-2007, Department Resolution Officer Jay Gebert sent another series of letters to the Petitioners requesting that they produce certain documents. The Petitioners produced some relevant documents in response to these requests. (Dept. Ex. 9 at 4-5, 11, 14, 20; Tr. at 84-90.)

20. At various times during the period 1997-2007, the Department communicated with at least 8 different individuals who represented the Petitioners at different times during this period, and the Petitioners offered a constantly changing list of reasons for their inability to cooperate with the audits. (Dept. Ex. 3 at 6-33; Pet. Ex.'s FF-JJ; Tr. at 29-30, 57-61, 73-75.)

21. Among the adjustments made in the assessments, the Department allowed 50% of Mr. Longrie's claimed Schedule C expenses, even though the Petitioners had not provided any substantiation of these expenses. (Dept. Ex. 3 at 3; Tr. at 100.)

22. Based on additional substantiation provided by the Petitioners pursuant to the Department's discovery requests prior to the hearing, the Department made certain additional adjustments to the assessments, resulting in the income tax assessment reduced to a total of \$301,654.72 (including \$92,129.77 in tax, \$113,984.38 in interest, \$3,410.80 in underpayment interest and a penalty of \$92,129.77) and the sales tax assessment reduced to a total of \$676,684.91 (including \$250,743.35 in tax, \$300,569.87 in interest and a penalty of \$125,371.69). (Dept. Ex.'s 10-11, 23-26; Dept. Br. at 13-14.)

23. Petitioner David J. Longrie testified at the hearing. At the hearing, Mr. Longrie appeared to understand the Department's claims and the issues presented in this matter.

24. At the hearing, Mr. Longrie testified that he had lost certain records due to a burglary in 1998 or 1999 and a tornado in 2005, and generally testified that he had left all of his business' tax matters to his accountants and was not aware of his failure to file sales tax returns and remit sales taxes. (Tr. at 29-40.) Mr. Longrie also testified that normal profit margins for a carpet business were in the range of "4 to 6 percent," with the highest running from "8 to 10." (Tr. at 44.)

25. At the hearing, the Petitioners did not present any additional documentary evidence to substantiate the Schedule C expenses disallowed by the Department, or to contradict the other income or sales tax adjustments made by the

Department in the assessments.

CONCLUSIONS OF LAW

1. The Department is entitled to the dismissal of the Petitioners' petition filed in Docket Number 07-I-162 as to Petitioner Audree Longrie.
2. Petitioner David J. Longrie has failed to satisfy his burden of proof in both matters at issue.
3. The assessments issued by the Department to the Petitioners in these matters are presumptively correct.

DECISION

1. Petitioner Audree Longrie's Failure to Appear at the Hearing

Wis. Stat. § 71.89(2) provides as follows in relevant part:

No person against whom an assessment of income or franchise tax has been made shall be allowed in any action either as plaintiff or defendant or in any other proceeding to question such assessment . . . unless such person shall have made full disclosure under oath at the hearing before the tax appeals commission of any and all income that the person received. The requirement of full disclosure under this subsection may be waived by the department of revenue.

Wis. Stat. § 71.89(2).

There is no dispute that Petitioner Audree Longrie failed to appear at the hearing held in these matters on December 8, 2008. There is also no dispute that she was included on both parties' witness lists filed with the Commission prior to the hearing, that the Petitioners provided no notice in advance of the hearing that she would not attend the hearing, and that the Department did not waive the statutory requirement to appear.

At the hearing, Mr. Longrie and the Petitioners' representatives stated that Mrs. Longrie was in poor health and that she had decided not to attend the hearing on that basis. The Petitioners provided no documentary evidence, either at the hearing or with their post-hearing briefs, concerning Mrs. Longrie's health or any other possible reasons for her failure to appear.

The Petitioners now argue that Mrs. Longrie was not required to attend the hearing under Wis. Stats. §§ 71.87 and 71.88. However, those statutes do not change the obligation of all petitioners to appear in person imposed by § 71.89(2). Instead, as the Department notes, these statutes simply clarify that either spouse initially may appeal an assessment of a joint income tax liability. *See*, Wis. Stats. §§ 71.87 and 71.88. The Petitioners also argue in their post-hearing briefs that Mr. Longrie was Mrs. Longrie's agent for tax purposes. However, there is absolutely no testimony nor any documentary evidence in the record establishing such an agency relationship. Finally, the Petitioners offer certain procedural arguments against the Department's motion to dismiss, but we find that the motion was properly made in a timely manner at the hearing and restated in writing following the hearing.

For its part, the Department notes that none of its representatives has ever had the opportunity to question Mrs. Longrie regarding these matters, nor has she ever testified under oath regarding them. Assuming there are grounds for excusing a petitioner's failure to appear at the Commission's hearing on his or her petition, the Petitioners have not identified any that would apply here. We find that none of the Petitioners' arguments prevail against the Department's motion to dismiss the petition for review of the income tax assessment at issue in Docket Number 07-I-162 as to

Petitioner Audree Longrie for her failure to appear at the hearing, and therefore grant the Department's motion.

2. The Petitioners' Failure to Satisfy Their Burden of Proof

Assessments made by the Department are presumed to be correct, and the burden is on the Petitioners to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Woller v. Dep't of Taxation*, 35 Wis. 2d 227, 233, 151 N.W.2d 170 (1967); *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1)-(2). Tax exemptions, deductions, and privileges are matters of legislative grace and will be strictly construed against the taxpayer. *Fall River Canning Co. v. Dep't of Taxation*, 3 Wis. 2d 632, 637, 89 N.W.2d 203 (1958). With respect to sales/use tax, all sales and purchases of tangible personal property in Wisconsin are presumed to be subject to sales or use tax until proved otherwise. Wis. Stats. §§ 77.52(13) and 77.53(10); *H. Samuels v. Wis. Dep't of Revenue*, 70 Wis. 2d 1076, 1077-78, 236 N.W.2d 250 (1975). In short, the burden of proof in these matters is squarely on the Petitioners.

The disputes in these matters stem from the Department's adjustments to the returns at issue based on its audits of those returns. These adjustments result primarily from the Petitioners' failure to substantiate a number of deductions claimed on their income tax returns and Mr. Longrie's failure to file sales tax returns and remit related sales taxes for his business. First, the Department included additional income in the Petitioners' income for the period at issue based on sales invoices for this period, as well as estimated additional income also based on those invoices. Second, the Department disallowed 50% of Mr. Longrie's claimed business expense deductions on

Schedule C of the Petitioners' federal income tax returns for the years at issue due to lack of substantiation.³ Third, the Department assessed Mr. Longrie additional sales tax and related interest and a penalty for the period at issue based on its determination that he (1) had failed to charge, collect and remit sales tax on his business' sales and (2) had failed to remit sales tax to the State even when he had charged and collected such tax.⁴

Prior to the hearing, the Department made a series of adjustments to and reductions of the assessments based on additional documentary evidence submitted by the Petitioners. At the hearing, the Petitioners provided no additional documentary evidence to substantiate the expenses at issue or to contradict any other adjustment made by the Department in connection with these assessments.

In general, Wisconsin follows federal law with respect to income tax. Regarding business expenses, Section 162(a) of the Internal Revenue Code provides that there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. In this matter, the Department argues that the Schedule C expenses at issue were not deductible because the Petitioners have failed to substantiate those expenses. We agree.

As a matter of law, a petitioner's uncorroborated testimony as to undocumented expenses is insufficient to satisfy that petitioner's burden of proof and overcome the presumption of correctness attached to an assessment. *See, Conrad LeBeau v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-383 (WTAC, June 22, 1984), *aff'd*, 133

³ In their reply brief, the Petitioners continue to argue that the Department should have allowed higher deductions for cost of goods sold, but admit that they cannot substantiate any other claimed Schedule C expense and accept the Department's allowance of 50% of such expenses. (Pet. Reply Br. at 5-6.)

⁴ As noted above, the Department estimates that Mr. Longrie collected and failed to remit approximately \$30,000 per year of sales taxes during the period at issue, and the Petitioners do not specifically contest that figure.

Wis. 2d 476, 394 N.W.2d 920 (Ct. App., August 7, 1986) (unpublished decision); *St. Charles Lockett v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-807 (WTAC 1986).

Mr. Longrie was the only individual who testified on behalf of the Petitioners at the hearing. No other employee, vendor or customer of his business testified.

At the hearing, Mr. Longrie testified that he had lost some records due to a burglary in 1998 or 1999 and a tornado in 2005, and generally testified that he had left all of his business' tax matters to his accountants and was not aware of his failure to file sales tax returns. (Tr. at 29-40.) However, Mr. Longrie also appeared to be a knowledgeable businessman, testifying at one point that normal profit margins for a carpet business were in the range of "4 to 6 percent," with the highest running from "8 to 10." (Tr. at 44.) Based on his testimony and the record in these matters, Mr. Longrie's claims to not understand or be familiar with income and sales/use taxes are simply not believable. As described more extensively in the Commission's findings of fact, the Petitioners essentially refused to cooperate with the Department's auditor and provided few records to substantiate their claims during and after the audit. Despite the Petitioners' delays, the Department continued to make adjustments to the assessments based on new documents as the Petitioners provided them during the several years these matters remained under audit.⁵

In their post-hearing brief, the Petitioners question the Department's

⁵ In their reply brief, the Petitioners assert that the Department is motivated by some special animus towards them in pursuing these assessments based on statements included in the Department's post-hearing brief. However, there is no evidence in the record that Department personnel at the audit or resolution level were ever motivated by any special animus towards the Petitioners. Indeed, the record instead reflects that Department personnel repeatedly granted the Petitioners extensions of time to provide additional documentation and continued to reduce the assessments in response to information provided by the Petitioners even while these matters have been pending before the Commission.

determinations with respect to a number of specific line items in the audit worksheets, essentially requesting that the Commission conduct its own audit of the Petitioners' returns and records, and even request that the Commission remand portions of the audit to the Department for further audit proceedings. All of the Petitioners' requests with respect to these line items involve arguments that the Department could and should have been more reasonable in reaching its determinations, but the Petitioners provide no actual evidence that these determinations are factually incorrect. Invariably, the Petitioners' definition of "reasonable" seems to include only determinations more favorable to the Petitioners. These arguments all highlight the fundamental weakness in the Petitioners' cases, which is that they have failed to substantiate their claims with documentary evidence. Absent any evidence to the contrary, the Commission will not attempt to second-guess the Department's estimates and determinations regarding the amounts at issue. The Commission therefore must presume that the assessments are correct and affirm the Department's actions in these matters.

IT IS ORDERED

1. In Docket Number 07-I-162, the Petitioners' petition for review is dismissed as to Petitioner Audree Longrie.
2. In both matters at issue, the Department's actions on the Petitioners' petitions for redetermination are affirmed, including the subsequent modifications to the assessments made by the Department.

Dated at Madison, Wisconsin, this 27th day of October, 2009.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"