

STATE OF WISCONSIN
TAX APPEALS COMMISSION

MARV & MARY'S BAR & RESTAURANT, LLC,

DOCKET NO. 06-S-176

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This case comes before the Commission on the motion of respondent, the Wisconsin Department of Revenue ("Department"), to dismiss the petition for review on the basis that petitioner has failed to state a claim upon which relief can be granted, pursuant to Wis. Stats. § 802.06(2)(a)(6) and Wis. Admin Code §§ TA 1.31(1) and 1.39.

Petitioner is represented by R. Mark Verity and has not responded to the motion. Attorney Linda M. Mintener represents the Department, and has filed an affidavit with exhibits and a memorandum of law in support of the motion.

Having considered the entire record, including the motion, affidavit, exhibits, and memorandum of law of the Department, the Commission hereby finds, rules, and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS

1. On November 21, 2005, the Department issued a sales/use tax assessment against petitioner for the period of January 2001 through May 30, 2004 (the

date petitioner ceased operation) in the amount of \$6,623.31. The assessment mainly involves sales tax on sales of food and beverages for which no tax was charged and use tax on purchases of restaurant equipment and supplies for which no tax was paid. (Affidavit of Linda M. Mintener, Exh. 1.)

2. On or about December 5, 2005, petitioner filed with the Department a petition for redetermination of the assessment signed by R. Mark Verity. In that petition, Mr. Verity stated that he was the sole owner and operator of petitioner during the period January 1, 2003 through May 30, 2004, and also indicated that he believed that he should be responsible only for the portion of the assessment that related to that period. (Mintener Affidavit, Exh. 2.)

3. By Notice of Action dated March 15, 2006, the Department denied the petition for redetermination on the grounds that petitioner had not appeared at a scheduled conference and no additional information had been provided to refute the Department's position. On March 15, 2006, the Department also issued a Resolution Unit Redetermination Notice of Amount Due with interest updated to May 17, 2006, showing a total amount due of \$6,001.51. (Mintener Affidavit, Exh. 3.)

4. On July 11, 2006, petitioner filed its petition for review signed by R. Mark Verity with the Commission. In the petition, Mr. Verity stated that petitioner had been registered with the state as owned and operated by Carol Verity. Mr. Verity also stated as follows: "The person who signed and submitted incorrect sales tax forms should be held responsible i.e. Carol Verity."

5. On August 7, 2006, the Department filed its Answer to the petition,

as well as a Notice of Motion and Motion to Dismiss, with supporting memorandum of law, affidavit and exhibits, requesting that the Commission dismiss petitioner's appeal on the basis that petitioner has failed to state a claim upon which relief can be granted, pursuant to Wis. Stats. § 802.06(2)(a)(6) and Wis. Admin Code §§ TA 1.31(1) and 1.39.

6. On August 29, 2006, the Commission issued a Briefing Order directing petitioner to file a response to the Department's motion by September 27, 2006.

7. Petitioner did not file a response to the Department's motion.

RULING

The Department has filed a motion to dismiss this case for petitioner's failure to state a claim upon which relief can be granted. Because the Department also filed an affidavit with exhibits and a memorandum of law in support of the motion, the Commission treats the Department's motion as a motion for summary judgment. *See* Wis. Stats. §§ 802.06(3) and 802.06(2)(b); *see also Mrotek, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-315 (WTAC 1997) (where the Department submitted matters outside of the pleadings, motion for judgment on the pleadings treated as motion for summary judgment) and *City of Milwaukee v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-405 (WTAC 1999) (where parties submitted affidavits and briefs, motion to dismiss for failure to state a claim treated as motion for summary judgment). Summary 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. Stats. § 802.08(2).

Assessments made by the Department are presumed to be correct, and the burden is upon petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1). In order to prove that an assessment is incorrect, a petitioner must begin by responding to facts and arguments presented by the Department in support of the assessment at issue.

In its memorandum of law in support of its motion, the Department notes that petitioner does not dispute the taxes and interest claimed in the assessment. Rather, petitioner's representative, Mr. Verity, disputes only his personal liability for a portion of the total amount assessed. However, as the Department states, Mr. Verity's personal liability is not claimed in the assessment. The assessment is against only petitioner, a limited liability company, not Mr. Verity. The only question that can be presented to the Commission is whether the assessment against petitioner is valid. The questions of whether and how petitioner's liability for the assessment may be applied to Mr. Verity and prior owners of petitioner are not at issue in this case.

As an additional note, the Department filed its motion to dismiss and supporting documents on August 7, 2006. Since that date, petitioner has failed to respond to the Department's motion in any way, and failed to comply with the Commission's Briefing Order dated August 29, 2006. Petitioner's demonstrated lack of interest in pursuing its own petition for review constitutes a failure to prosecute its appeal. See Wis. Stats. § 805.03 and Wis. Admin. Code § TA 1.39.

The pleadings and the Department's affidavit and exhibits and memorandum of law show that there is no genuine issue as to any material fact in this case. Therefore, the Department is entitled to a judgment as a matter of law. In addition, as secondary grounds for dismissal, petitioner has failed to prosecute its appeal.

ORDER

The Department's motion is granted, and the petition for review is dismissed.

Dated at Madison, Wisconsin, this 14th day of December, 2006.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"