

STATE OF WISCONSIN
TAX APPEALS COMMISSION

JASON K. SANDBERG,

DOCKET NO. 08-W-143

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This matter comes to the Commission on the Petitioner's motion for costs against the Department of Revenue ("the Department"). The Petitioner is represented by Attorney John C. Santee of Mount Prospect, Illinois. The Department is represented by Attorney John R. Evans, of Madison, Wisconsin. Both sides have filed briefs for the Commission to consider. Based on the record before us, we deny the taxpayer's request to be awarded \$30,090.89 in costs, finding that, while the Department did not prevail at trial, the Department did have "substantial justification" to proceed with the case.

FACTS¹

A. Jurisdictional Facts

1. On May 24, 2007, the Department of Revenue issued an assessment against Petitioner for failure to pay over withholding taxes as an officer, employee, or other responsible person of Ken Sandberg Drywall, Inc., for the periods December 31,

¹ We have incorporated the facts from our November 18, 2011 decision into Sections A and B below.

2004; January 31 through December 31, 2005; and January 15, 2006 through June 30, 2006. The assessment was made pursuant to Section 71.83(1)(b)2, Wis. Stat., in the amount of \$45,297.99.

2. On July 23, 2007, the Petitioner filed a timely petition for redetermination of said assessment.

3. On July 21, 2008, the Respondent denied the petition for redetermination.

4. Petitioner appealed the denial to the Wisconsin Tax Appeals Commission on or about September 22, 2008. (Commission File.)

5. The Commission conducted a trial in this matter and issued a unanimous written decision in the Petitioner's favor on November 18, 2011, thereby reversing the Department's assessment.

B. Material Facts

1. The corporation involved in this case is Ken Sandberg Drywall, Inc., a Wisconsin corporation, which was engaged in the business of drywall installation. The corporation was incorporated in 2004 as a continuation of a sole proprietorship owned and operated by Mr. Kenneth Sandberg ("Kenneth"). At all relevant times, Kenneth was the President, Secretary, Treasurer, sole shareholder, and director of the corporation. The corporation was only a change in the formal structure of the business; otherwise, the day-to-day operation of the business as Kenneth Sandberg's business continued the same. (August 4, 2010, Transcript, pp. 4-8.)

2. The Petitioner, Mr. Jason Sandberg, was a salaried employee of the corporation and a son of Mr. Kenneth Sandberg. Petitioner was not a shareholder or a director of the corporation. He was identified as a vice-president on a bank signature card for the business's checking account, but no corporate minutes or filings with the Secretary of State documented his selection as a vice-president. Petitioner received no additional compensation for this designation. Mr. Jason Sandberg went to work for his father full-time after graduating from college in 2001 with a degree in electrical engineering because his father was "swamped." Previous to Jason's coming into the business, the office duties of the business were performed by a secretary, including the payroll. (August 4, 2010, Transcript, pp. 7-9.)

3. Petitioner was named as a signatory on the bank account at the insistence of the company's bank as a convenience to the business - specifically, in order to have someone in the office available to sign checks. Even though the Petitioner had the authority to sign checks, he did so to pay employees, creditors, and taxing bodies only if approved by Kenneth Sandberg. (August 4, 2010, Transcript, pp. 25-26.)

4. Kenneth Sandberg maintained control over all aspects of the business, including such business operations as hiring and firing employees. Within the business, Petitioner never had independent authority over day-to-day operations or finances. Kenneth Sandberg talked to Petitioner several times each day in order to supervise his activities and to keep control over the business. (August 4, 2010, Transcript, pp. 11-16.)

5. Petitioner's duties within the business were to do whatever Ken Sandberg needed him to do that particular day, which caused the Petitioner's responsibilities to change frequently. However, these responsibilities tended to include opening the mail, organizing the bills, discussing the bills with Ken Sandberg, obtaining Ken's approvals to pay bills, delivering materials to job sites, mudding dry wall, and checking on the status of work at job sites. (August 4, 2010, Transcript, pp. 10 and 12.)

6. Petitioner was also responsible for data entry of employees' time cards and producing paychecks. However, paychecks were never released to employees without Kenneth Sandberg's specific approval to do so, based upon Kenneth's determination of the availability of funds. (August 4, 2010, Transcript, p. 13 and 16.)

7. Petitioner was responsible for generating federal and state income tax withholding reports based upon the paychecks and worked with an accountant to do so. Petitioner sometimes signed a report upon Kenneth Sandberg's approval of the report. Income tax withholdings were sent in with or pursuant to a report only if Kenneth Sandberg specifically approved doing so. Petitioner had no authority to make any such payments without Kenneth Sandberg's express approval and direction. (September 15, 2010, Transcript, p. 188.)

8. While opening the business's mail during the relevant periods, the Petitioner saw notices of unpaid income tax withholdings and passed these notices on to Kenneth Sandberg. Kenneth told the Petitioner not to worry because he was taking

care of them, and that he was working with the IRS and the Wisconsin Department of Revenue to resolve these issues. (September 15, 2010, Transcript, p. 191.)

9. The Petitioner met or talked to Mr. Mehrzad Mohammadi, an agent for the Wisconsin Department of Revenue, on a few occasions, but, in each instance, he did so at Kenneth's specific direction, doing and saying only what Kenneth wanted the Petitioner to do and say. Mr. Mohammadi's notes reflect that on three or four occasions the Petitioner said to Mr. Mohammadi that he "had to check with his father." Mr. Mohammadi's office was approximately a mile away from the drywall business' office in Elkhorn. (September 15, 2010, Transcript, p. 86.)

10. The decision to cease operations of the business in 2006 was made solely by Kenneth Sandberg. Kenneth has had sole possession and control of the business's books and records since the business was closed. (September 15, 2010, Transcript, p. 146.)

11. Jason had no written employment contract. There was no written material such as an employment manual or job instructions. There is no written material, instructions, guides or other documents to substantiate whether or not Jason had to get authorizations for actions. (September 15, 2010, Transcript, p. 206.)

12. The business employed numerous employees over time and subcontractors. The business began to fail around this time period when a large contract was defaulted upon and, from thereon in, the business could not get caught up financially. The business had its office in Elkhorn and that is where Jason Sandberg did the office work portion of his job. Kenneth Sandberg was often out on the road

supervising drywall jobs, which were located generally in the southern half of Wisconsin and the northern part of Illinois. (September 15, 2010, Transcript, p. 207.)

13. Jason would organize and file the bills into folders for the various jobs. This would allow for the determination of the profit or loss on the various jobs. Kenneth would rely on this information to determine whom they could pay and whom they could not pay. (September 15, 2010, Transcript, p. 145 and p. 148.)

14. Jason would also enter the bills on a spreadsheet listing the creditor, the amount, and when the bill was due. Jason would note if the bills were past due. Jason paid particular note to the bills for materials to make sure the amount spent on materials was consistent with the size of the project. (September 15, 2010, Transcript, p. 196.)

15. Kenneth was solely responsible for the solicitation of new business and Kenneth made the decisions regarding the pricing of job estimates. (August 4, 2010, Transcript, pp. 16-17 and 143.)

16. Kenneth was solely responsible for collecting any monies owed by customers and only Kenneth had the authority to compromise accounts receivable. (August 4, 2010, Transcript, pp. 17-18.)

17. Jason was able to spend small amounts of money to buy materials at the local supply shop, but this was the same authority as any other employee. The purchase of supplies costing a substantial amount required Kenneth's specific approval. (September 15, 2010, Transcript, pp. 137 and 160-161.)

18. Jason had no authority to set the compensation for employees, including no authority to give raises; only Kenneth had this authority. Jason had no authority to borrow money on behalf of the business; only Kenneth did. (September 15, 2010, Transcript, pp. 12-13 and 165.)

19. Mr. Michael Stamm, a long-time employee of the drywall business, testified that Jason Sandberg was an employee of Kenneth's "like everyone else." (August 4, 2010, Transcript, p. 74.)

C. The Commission's Decision

1. The Commission's November 18, 2011, written decision states as follows:

Having summarized the evidence, it is now necessary to look at the evidence in relation to the burdens of proof. As mentioned above, the initial burden of going forward in these proceedings is on the Department. Assuming this initial burden is met, the burden then shifts to the Petitioner to disprove the Department's case by clear and convincing evidence. In our view based on the record placed before us at trial, the Department met its initial burden, but the Petitioner subsequently proved that he was not, in fact, a "responsible person." We will examine the evidence in detail below.

The Department produced enough evidence to go forward. The evidence concerning the title of vice president, the check writing, the meeting with the Department's representative and the tax returns all justify the decision to go forward. Once this evidence was produced, the burden then shifted back to the Petitioner. The Commission has in the past analyzed at this point whether there was authority, duty, and an intentional breach of duty. In this case, the Petitioner successfully showed that he had none of these things and that this business was very much, in fact, a "one-man show" where he was "not that man."

(emphasis added)

(Commission's November 18, 2011 Decision, pp. 17-18.)

2. The Commission's written decision also states as follows:

The testimony showed that there were a number of problems with the evidence the Department produced to meet its initial burden. While the Petitioner was able to exercise some functions which indicate management type responsibility, the taxpayer's father controlled all aspects of the business' financial dealings. The taxpayer introduced evidence which showed that the check writing authority was illusory, as the father determined which checks to send out and when to send them out. Secondly, the designation of vice president was not formal or real, and to the degree it was significant, it merely enabled the Petitioner to sign the checks the father approved paying. The tax notices the taxpayer saw took on less significance given that the father assumed responsibility for their payment and the taxpayer had no independent authority to compel payment. On several occasions the taxpayer met with the revenue agent, but the meetings took place at the father's direction and the agent noted that the results had to be cleared by the father. The Department argues in its brief that the Sandbergs worked in collaboration with each other, but our independent observation of the witnesses at the trial clearly indicated otherwise. No one who sat in that hearing room and observed the Sandbergs testify would question that Kenneth was fully in charge.

(Commission's November 18, 2011 Decision, pp. 18-19.)

RELEVANT STATUTE

71.83 Penalties.

(1) CIVIL.

* * *

(b) *Intent to defeat or evade.*

* * *

2. Personal liability. . . Any person required to withhold, account for or pay over any tax imposed by this chapter, . . . who intentionally fails to withhold such tax, or account for or pay over such tax, shall be liable to a penalty equal to the total amount of the tax, plus interest and penalties on that tax, that is not withheld, collected, accounted for or paid over. The personal liability of such person as provided in this subdivision shall survive the dissolution of the corporation or other form of business association. "Person", in this subdivision, includes an officer, employee or other responsible person of a corporation . . . who, as such officer, employee . . . or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

INTRODUCTION

This is a motion for costs the Petitioner makes under Wis. Stat. § 227.485(3).² The Commission presided over a two-day trial in this matter in September of 2010, eventually issuing a written ruling that the Petitioner was not responsible for the \$45,297.99 in tax debts that his father's drywall business had accumulated. The taxpayer then filed a timely request under Wis. Stat. § 227.485(3) to make the Department pay his \$30,090.89 in costs³ incurred in appealing the assessment to the

² There are numerous articles about these laws. See generally Gregory C. Sisk, *The Essentials Of The Equal Access To Justice Act: Court Awards Of Attorney's Fees For Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217 (1994); Phillip S. Dingle, *Examining Unreasonable IRS Behavior And The Award Of Attorney's Fees In Tax-Cases: Underlying Action v. Litigation Position*, 37 U. Fla. L. Rev. 1013 (1985); Harold J. Krent, *Fee Shifting Under The Equal Access To Justice Act - A Qualified Success*, 11 Yale L. & Pol'y. Rev. 458 (1993).

³ The Petitioner's initial motion for costs requested \$29,460.19, but the reply brief adds additional cost items which raise the amount requested to \$30,090.89.

Commission. We will first summarize the relevant law and then we will set forth the reasons an award of costs is not justified here.

SUBSTANTIAL JUSTIFICATION

The primary issue is whether the Department's position before the Commission was “substantially justified.” In relevant part, Wis. Stat. § 227.485(3) states as follows:

In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner⁴ shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

(emphasis added).

An agency's position is substantially justified if it has “a reasonable basis in law or fact.” Sec. 227.485(2)(f), Stats. “The test is essentially one of reasonableness, without more.” *Behnke v. DHSS*, 146 Wis. 2d 178, 183, 430 N.W.2d 600, 602 (Ct. App. 1988) (citation omitted). In *Behnke*, the court of appeals held that the agency meets the test of reasonableness if its position has “arguable merit.” To meet this burden, it must be shown that there is: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. See *University of Wisconsin System v. State*

⁴ While Wis. Stat. § 227.485(3) uses the term “hearing examiner,” an award of costs under this section by the Commission has been upheld by the Wisconsin Court of Appeals. See *Susie Q. Fish Co., Inc., v. Dep't of Revenue*, 148 Wis. 2d 862, 436 N.W.2d 914 (Ct. App. 1989). Neither party here argues that the Commission lacks the authority to award costs under this section.

Personnel Com'n., 2002 WI 79, 254 Wis. 2d 148, 646 N.W.2d 759. We start with the proposition that, merely because the government loses a case, an award under Sec. 227.485, Stats., is not justified. *Behnke* at 183.

ANALYSIS

Wis. Stat. § 227.485(3) states that costs shall be awarded to the prevailing party unless the state agency that is the losing party was substantially justified in taking its position. The Petitioner's argument is that the Department elevated form over substance and did not account for what the practical authority of the Petitioner was. The Petitioner states that the Department failed to perform the practical analysis necessary in these cases, and proceeded forward with the hope of wearing down the Petitioner. Further, the Petitioner argues that the evidence presented at the hearing was well-established to the Department long before the hearing. The Department responds that its case before the Commission was factually and legally strong and the objective evidence, especially the checks, indicated that the Petitioner was the responsible person. The Department argues that, despite the strength of the case and the lack of objective evidence favorable to Jason, the Commission ruled in the Petitioner's favor, relying instead on testimonial evidence. The Department notes that the Commission could have rejected the testimony of Jason and Kenneth as not credible on numerous bases. The Department states that this matter could have gone either way.

There are two main problems with the Petitioner's argument that we will address here. First, the body of law that the Commission applies to responsible person cases requires the Department to bear the initial burden of showing at trial that there

was authority, duty, and an intentional breach of duty. In this case, the written opinion the Commission issued on November 18, 2011, finds that the Department carried this burden successfully by introducing evidence at the hearing, but the Petitioner then proved that he clearly was not, in fact, responsible. The Commission's opinion states the following concerning the Department's evidence:

The Department produced enough evidence to go forward. The evidence concerning the title of vice president, the check writing, the meeting with the Department's representative and the tax returns all justify the decision to go forward. Once this evidence was produced, the burden then shifted back to the Petitioner.

In our view, by satisfying its initial burden at the trial, the Department *ipso facto* showed that it had "substantial justification" to proceed with the case.⁵ While we recognize that the elements of the Department's initial burden and "substantial justification" are not the same thing, we fail to see how the Department could meet the former and not meet the latter.

The second problem with the Petitioner's argument for costs is that the Commission's opinion makes clear that its decision rests on the Commission's assessment of the business relationship between Jason and Kenneth. Much, if not all, of that assessment was based on watching and listening to the testimony. As the decision explains at length, courts and commissions are reluctant to hold an individual

⁵ While there are many definitions of "substantial" and "substantially," one Wisconsin court found that in the case before it that the most common and appropriate definition was "considerable in amount, value or worth." See, *In re Commitment of Kienitz*, 221 Wis. 2d 275, 585 N.W.2d 609 (Ct. App.1998). "Substantial evidence" is that quantity and quality of evidence which a reasonable person could accept as adequate to support a conclusion. *Williams v. Housing Authority of City of Milwaukee*, 2010 WI App 14, 323 Wis. 2d 179, 779 N.W.2d 185.

responsible where he or she is in fact dominated by another person within the business.

See Williams v. United States, 25 Cl.Ct. 682, 685 (1992); *Heimark v. United States*, 18 Cl.Ct.

15, 24 (1989). The Commission's written opinion in this case states as follows:

The Department argues in its brief that the Sandbergs worked in collaboration with each other, but our independent observation of the witnesses at the trial clearly indicated otherwise. No one who sat in that hearing room and observed the Sandbergs testify would question that Kenneth was fully in charge.

In our view, the Department simply would have no way of knowing what that assessment by the Commission would be before going to trial. While a litigant certainly can be charged with knowing the facts and the law of the particular case, asking that litigant to know how the other side's witnesses will be perceived by the Commission is unreasonable.

Thus, there is no basis for an award of costs as there was a reasonable connection between the facts alleged and the legal theory advanced.

CONCLUSION

The taxpayer by way of this motion has asked the Commission to award his litigation costs in overturning the Department's tax assessment. However, at trial the Department produced evidence that the Petitioner signed checks and tax forms, that he sometimes was designated informally as a vice-president, that he forwarded notices of tax delinquencies to his father, and that he even met with a revenue agent on his father's behalf. In his case, the Petitioner then demonstrated clearly and convincingly that despite this evidence he was not, in fact, a "responsible person," and that the

father's business was a "one-man show" where his father, Mr. Kenneth Sandberg, was "that man." Thus, while we ultimately decided the underlying matter in the taxpayer's favor, we find that the Department had "substantial justification" to proceed.

Accordingly, Petitioner's motion for costs is denied.

Dated at Madison, Wisconsin, this 8th day of February, 2012.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"