

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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UNITED WISCONSIN GRAIN PRODUCERS, LLC,

DOCKET NO. 10-W-242

Petitioner,

vs.

**RULING AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**LORNA HEMP BOLL, CHAIR:**

This case comes before the Commission for decision on Respondent's Motion to Dismiss. The Petitioner, United Wisconsin Grain Producers, LLC, Friesland, Wisconsin, appears *pro se* in this matter through its CFO, Ms. Barb Bontrager. The Respondent in this matter, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Axel F. Candelaria Rivera. Both sides have filed briefs with exhibits and affidavits. The issue in this case involves Petitioner's liability for interest and a negligence penalty related to withholding for 2005 and 2006. For the reasons stated below, we uphold the assessment of interest and the negligence penalty.

**FINDINGS OF FACT**

1. Petitioner is a partnership organized in the State of Wisconsin, consisting of numerous partners, many of whom are not residents of the State of Wisconsin.

2. For the years 2005 and 2006, Petitioner did not withhold income tax from its nonresident members.

3. Following contact by the Department in late 2007, Petitioner began withholding income tax for the nonresident members unless they provided the appropriate forms indicating that such withholding was unnecessary. This withholding began with the 2007 tax year.

4. Petitioner claims to have relied on a December 14, 2007, letter from the Department believing Petitioner would receive a determination of which nonresidents had filed the appropriate tax forms for 2005 and 2006, which would consequently indicate for which nonresident members Petitioner should withhold. A copy of that letter has not been furnished to the Commission.

5. By Notice of Amount Due - Pass-Through Withholding, dated February 22, 2010, the Department issued an assessment to Petitioner in a total amount due for tax period(s) beginning January 1, 2005 and ending December 31, 2006 as follows:

Tax	\$9,018.07
Interest	\$5,027.49
Penalty	\$2,254.52
Fees	<u>\$150.00</u>
Total	\$16,450.08

(Department's Exhibit 1.)

6. With Petitioner's Petition for Redetermination, dated March 11, 2010, Petitioner paid the tax amount listed above but continued to contest the interest, penalty, and fees. (Department's Exhibit 3.)

7. On September 10, 2010, the Department issued a Notice of Amount Due for the outstanding interest, penalty, and fees in the amount of \$8,102.75. (Department's Exhibit 3.)

8. By Notice dated September 10, 2010, the Department denied Petitioner's Petition for Redetermination, stating "Based on the information provided interest and penalties have been properly imposed on the withholding tax due for the nonresident shareholder[s] who have not filed Wisconsin income tax returns." (Department's Exhibit 3.)

9. On October 7, 2010, Petitioner timely filed a Petition for Review dated September 21, 2010, with the Wisconsin Tax Appeals Commission. The Petition indicated Petitioner has paid the outstanding \$8,102.75 "to avoid any additional accumulation of interest" but requested the amount be refunded, specifically requesting the interest and negligence penalty be abated. (Department's Exhibit 4)

10. On May 26, 2011, the Department filed a Motion to Dismiss for failure to state a claim upon which relief can be granted.

#### **APPLICABLE LAW**

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. Wis. Stat. § 802.08(2).

The specific statute at issue here outlines a pass-through entity's liability for interest and penalties in the case of a failure to withhold:

Section 71.775(4)(f), Wis. Stats. (2005-06): If a pass-through entity subject to withholding under this section fails to withhold tax as required by this section, the pass-through entity shall be liable for any tax, interest, and penalties. If a nonresident partner, member, shareholder, or beneficiary of the pass-through entity files a return and pays the tax due, the pass-through entity shall not be liable for the tax, but shall be liable for any interest and penalties otherwise applicable for failure to withhold, as provided under ss. 71.82(2)(d) and 71.83.

Section 71.83(1)(a)(3), Wis. Stats. (2005-06): “Incomplete or incorrect deposit or withholding report.” If any person required under subch. X to file a deposit report or withholding report files an incomplete or incorrect report, or fails to properly withhold or fails to properly deposit or pay over withheld funds, unless it can be shown that the filing or failure was due to good cause and not due to neglect, there shall be added to the tax 25% of the amount not reported or not withheld, deposited or paid over.

## ANALYSIS

### I. Whether the Assessment of Interest is Appropriate and Should be Enforced

Wis Stat. § 71.775(4)(f) (2005-2006) above states that, if withholding is not done as required by the statute, the pass-through entity (in this case the Petitioner) “shall be liable for any tax, interest, and penalties.” (Emphasis added.) For the years 2005 and 2006, the Petitioner did not withhold for the nonresident partners. The tax for 2005 and 2006 was not paid until October 2010; thus the imposition of interest is appropriate.

Wisconsin caselaw has indicated that neither the Department nor the Tax Appeals Commission has the authority to waive the statutory interest. *Worley v Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-571 (WTAC 1985) (“Interest and late charges imposed by respondent are mandatory under Chapter 71 of the Wisconsin Statutes and

are not reviewable by this Commission.”) Thus, the Department’s imposition of interest and its denial of a waiver of the interest is also appropriate.

The fact that Petitioner eventually did pay the tax for 2005 and 2006 does not negate the imposition of interest. As *Worley* indicates, payment of the underlying taxes does not relieve taxpayer of the mandatory payment of interest and late charges due under Chapter 71 of the Wisconsin Statutes.

## **II. Whether the Assessment of a Negligence Penalty is Appropriate**

In this case, the failure to withhold resulted in a civil negligence penalty assessed under Wis. Stat. § 71.83(1) (2005-2006). The penalty was appropriate in keeping with the terms of the statute which mandates that a 25% penalty “shall be added to the tax” if the taxpayer fails to properly withhold. The Petitioner does not deny a failure to withhold and has in fact paid the tax, disputing only interest and penalties.

Assessments made by the Department are presumed to be correct, and the burden is on the Petitioner to prove by clear and convincing evidence that the Department erred and in what respects. See *Murphy v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-390 (WTAC 2010).

The Department assessed the negligence penalty in accordance with Wis. Stat. § 71.83(1). Petitioner has the burden to show that Petitioner’s actions fall under the statute’s exception; i.e. that Petitioner’s “filing or failure was due to good cause and not due to neglect.” Wis. Stat. § 71.83(1)(a)(3) (2005-06). The burden of proof is on the taxpayer to establish good cause for improper reporting. See *Grefkowicz v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 200-832 (WTAC 1972), as cited in *Wenger v Wis. Dep’t of Revenue*, 109 Wis. 2d 677, 683, 327 N.W.2d 209 (Ct. App. 1982).

Not being aware of the legal requirement to withhold for nonresident partners does not excuse the Petitioner; taxpayers are responsible for knowing and adhering to the tax laws of the state in which they do business. Likewise, it does not excuse the Petitioner that the Department did not notify Petitioner sooner regarding Petitioner's obligation.

Upon learning of its obligation in December of 2007, Petitioner still failed to make a payment. Petitioner cannot claim reliance on the Department for calculations of taxes due. Petitioner could have consulted its own records to determine the withholding amounts it owed and could have made payments without waiting for additional information from the Department. Instead Petitioner allowed more than two years to elapse without attempting to pay taxes owed.

The fact that Petitioner began withholding and has complied with the law since 2007 does not excuse its non-payment of withholding for 2005 and 2006.

We find the Petitioner has failed to show good cause or lack of neglect and therefore confirm the imposition of the negligence penalty.

#### **DECISION AND ORDER**

The Petitioner failed to properly withhold the nonresident members' tax; therefore, the imposition of interest was appropriate and mandatory. The Petitioner has failed to show that the failure to withhold was due to good cause and not due to neglect; therefore the imposition of the civil negligence penalty was appropriate and mandatory.

The Department is therefore entitled to summary judgment as a matter of law as there is no genuine issue of material fact. Based on the foregoing, it is the order of this Commission that the Respondent's Motion for Summary Judgment is granted.

Dated at Madison, Wisconsin, this 24<sup>th</sup> day of August, 2011.

**WISCONSIN TAX APPEALS COMMISSION**

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Lorna Hemp Boll, Chair

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Roger W. LeGrand, Commissioner

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Thomas J. McAdams, Commissioner

ATTACHMENT: **“NOTICE OF APPEAL INFORMATION”**