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STATE OF WISCONSIN
TAX APPEALS COMMISSION

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FEB 1996
State of Wisconsin
Department of Revenue
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DOCKET NO. 94-S-1017

Petitioner,

RULING AND ORDER

vs.

* AWARDING MOTION FOR

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708

* SUMMARY JUDGMENT

Respondent.

*

DON M. MILLIS, COMMISSIONER, JOINED BY MARK E MUSOLF,
COMMISSION CHAIRPERSON, AND JOSEPH P. METTNER, COMMISSIONER:

The above-entitled matter comes before the Commission on respondent's motion for summary judgment dated August 14, 1995 seeking affirmation of its notice of action assessing sales and use tax liability, including interest, penalty, and late filing fees, against petitioner.

Both parties have filed briefs and documentary evidence in support of their respective positions on respondent's motion. Petitioner is represented by Hess, Dexter & Reinertson S.C, by Attorney Thomas J. Brunner. Respondent is represented by Attorney Linda M. Mintener.

SUMMARY OF UNDISPUTED FACTS

The Commission summarizes the undisputed material facts based on the submissions of the parties and record in this matter as follows:

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1. Petitioner is a Wisconsin corporation, engaged in the business of leasing and selling water treatment equipment.

2. All findings of fact, unless otherwise noted, relate to the audit period of October 1, 1988 through September 30, 1991.

3. Petitioner had master agreements with a number of water treatment equipment dealers ("dealers") that provided for the sale from the dealers to petitioner of water treatment equipment after the dealers installed the equipment in the property of dealers' customers ("customers").

4. The procedure employed by petitioner and its dealers contained the following elements:

A. The dealer installed water treatment equipment from its inventory into the property of the customer;

B. At the time of installation, the customer signed a lease agreement to rent the equipment from petitioner on forms drafted by petitioner;

C. The dealer then collected the first and last month's rent from the customer;

D. Petitioner then paid the dealer for the water treatment equipment in accordance with the terms of the dealer's master agreement with petitioner;

E. Petitioner then collected the remaining payments under the lease agreement from the customer;

F. UCC financing statements were filed with the register of deeds to secure petitioner's security interest in the water treatment equipment.

5. Customers had the option under lease agreements to purchase the water treatment equipment from petitioner for a price established in the lease agreements.

6. If, at the end of the lease term, a customer did not exercise the option to purchase the water treatment equipment, the dealer involved was obligated to purchase the equipment from petitioner for a price in accordance with the lease agreement.

7. If a customer defaulted, the dealer involved was obligated to assist in collection activity, and, if the default lasted 91 days, the dealer would be obligated under the master agreement, at petitioner's option, to repurchase the equipment and purchase the lease agreement from petitioner.

8. The lease agreements authorized the petitioner to remove water treatment equipment in the event of termination of the lease agreement or breach of the lease agreement by customers.

9. The lease agreements provided that the water treatment equipment continued to be petitioner's property (unless the customer exercised the option to purchase) and continued to be personal property, notwithstanding the fact that the equipment may be affixed to real property.

10. Petitioner considered itself to be the owner of the water treatment equipment, and petitioner claimed depreciation expenses with regard to the equipment on its franchise tax returns.

11. Petitioner did not install any of the water treatment equipment. Water treatment equipment was serviced by dealers.

12. Petitioner held no sales tax permit, did not charge, collect or pay any sales or use taxes on any of the transactions that are the subject of this matter, and did not file any sales and/or use tax returns for the period under review.

13. Petitioner has no knowledge as to whether dealers installing the water treatment equipment paid use tax on said equipment.

14. Dealers did not charge or collect any sales tax on amounts received from customers or from petitioner for the purchase of water treatment equipment.

15. With regard to the transactions that are the subject of respondent's notice of action, petitioner leased and sold water treatment equipment at retail.

16. Under the date of July 29, 1992, respondent issued a notice of assessment to petitioner for sales and use taxes due. The assessment included the following components:

A. Sales tax on petitioner's gross receipts from the lease and sale of water treatment equipment as described above;

B. Use taxes on certain purchases of tangible personal property by petitioner for which no sales or use taxes were paid;

C. Delinquent filing fees and interest computed at 1.5% per month pursuant to § 77.60(2), Stats.;

D. Penalty of 25% of the principal tax assessment for failing to file a return in the absence of reasonable cause pursuant to § 77.60(4), Stats.

17. Under the date of September 17, 1992, petitioner filed a petition for redetermination with respondent. In addition to arguing that it had no liability for any of the taxes, fees, penalties, and interest assessed, petitioner argued that in the event that it is liable, its liability must be reduced for those transactions involving exempt organizations and those in which petitioner obtained resale certificates.

18. Respondent's notice of action affirming in part and denying in part the petition for redetermination was mailed on September 15, 1994 and received by petitioner's president on September 16, 1994. A copy of the notice of action was also mailed on September 15, 1994 to petitioner's representative.

19. Respondent's notice of action reduced petitioner's sales tax liability to account for those transactions for which petitioner produced exemption certificates or resale certificates.

20. Petitioner filed a timely notice of appeal with the Commission.

21. While petitioner has objected to the notice of action as being untimely, petitioner concedes, to the extent the

notice of action is valid, that it is liable for amounts assessed for use tax on certain purchases of tangible personal property by petitioner for which no sales or use taxes were paid.

22. Mr. Robert D. Chadwell is president, chief financial officer, and founder of petitioner. Mr. Chadwell's prior experience includes (1) chief operating officer and 25% owner of Marathon Harvestore, Inc., (2) senior vice-president and senior loan officer for the State Bank of Medford, (3) branch manager and agricultural loan officer for the First National Bank in Appleton, and (4) branch manager of Associates Financial Services in Appleton.

23. At the time petitioner commenced leasing water treatment equipment, Mr. Chadwell and petitioner's tax accountant discussed the potential sales tax liability on such receipts and concluded that the transactions involved real property and, therefore, were not subject to the sales tax.

24. There is no genuine issue of material fact and this matter is appropriate for summary judgment.

**APPLICABLE WISCONSIN STATUTES and
WISCONSIN ADMINISTRATIVE CODE PROVISIONS**

Statutes

77.51 Definitions. Except where the context requires otherwise, the definitions given in this section govern the construction of terms in this subchapter.

* * *

(2) "Contractors" and "subcontractors" are the consumers of tangible personal property used by them in real property construction activities and the sales and use tax applies

to the sale of tangible personal property to them. ...

* * *

(4)(a) "Gross receipts" means the total amount of the sale, lease or rental price, as the case may be, from sales at retail of tangible personal property, or taxable services, valued in money, whether received in money or otherwise,

* * *

(13) "Retailer" includes:

(a) Every seller who makes any sale of tangible personal property

* * *

(k) As respects a lease, any person deriving rentals from a lease of tangible personal property situated in this state.

* * *

(20) "Tangible personal property" means all tangible personal property of every kind and description and includes ... leased property affixed to realty if the lessor has the right to remove the property upon breach or termination of the lease agreement,

77.52 Imposition of retail sales tax.

(1) For the privilege of selling, leasing or renting tangible personal property ... at retail a tax is imposed upon all retailers at the rate of 5% of the gross receipts from the sale, lease or rental of tangible personal property ... sold, leased or rented at retail in this state.

77.59 Deficiency and refund determinations.

* * *

(6) Except as provided in sub. (4)(a), a determination by the department is final unless, within 60 days after receipt of the notice of the determination, the taxpayer, or

other person directly interested, petitions the department for a redetermination. ...

(a) Within 6 months of the receipt by the department of the petition for redetermination, the department shall notify the petitioner of its redetermination. ...

77.60 Interest and penalties.

* * *

(2) Delinquent sales and use tax returns shall be subject to a \$10 late filing fee, ... Delinquent sales and use taxes shall bear interest at the rate of 1.5% per month until paid. Taxes imposed by this subchapter shall become delinquent if not paid:

* * *

(b) In the case of no return filed ... by the due date of the return.

* * *

(4) In case of failure to file any return required under authority of s. 77.58 by the due date ... unless it is shown that such failure was due to reasonable cause and not due to neglect, there shall be added to the amount required to be shown as tax on such return 5% of the amount of such tax if the failure is not for more than one month, with an additional 5% for each additional month or fraction thereof during which such failure continues, not exceeding 25% in the aggregate. ...

Administrative Code

Tax 11.68 Construction contractors.

* * *

(2) REAL PROPERTY CONSTRUCTION CONTRACTORS.

* * *

(b) A retailer may also be a real property contractor, such as a department store which sells and installs tangible personal property

which becomes a part of real property after installation.

CONCLUSIONS OF LAW

1. Respondent issued its notice of action in a timely manner consistent with § 77.59(6)(a), Stats.

2. Petitioner is a retailer as that term is defined in § 77.51(13), Stats., because it sold tangible personal property and it derived rentals from the lease of tangible personal property.

3. Petitioner's sales and leases of water treatment equipment were made at retail.

4. Until it is sold to customers or dealers, water treatment equipment installed in a customer's home retains its character as tangible personal property pursuant to § 77.51(20), Stats.

5. Petitioner is liable for sales taxes on its gross receipts for the lease and sale of water treatment equipment.

6. Petitioner is liable for delinquent filing fees and interest at 1.5% per month from the due date of its sales tax returns pursuant to § 77.60(2)(b), Stats., because petitioner failed to file sales tax returns even though they were required.

7. Petitioner is liable for a penalty of 25% of the principal tax assessment for failing to file a return in the absence of reasonable cause under § 77.60(4), Stats.

OPINION

This case presents four issues for consideration: (1) whether respondent is barred from assessing sales tax because its notice of action was arguably untimely, (2) whether the petitioner

is liable for sales tax on its gross receipts on water treatment equipment it has sold or leased, (3) whether petitioner is liable for delinquent filing fees and interest computed at 1.5% per month pursuant to § 77.60(2), Stats., and (4) whether petitioner is liable for a penalty of 25% of the principal tax assessment for failing to file a return in the absence of reasonable cause pursuant to § 77.60(4), Stats.

Burden of Proof

Summary judgment is available only when there is no genuine issue of material fact. Hoglund v. Secura Insurance, 176 Wis. 2d 265, 268, 500 N.W.2d 354 (Ct. App. 1993). While a factual dispute can preclude the entry of summary judgment, evidentiary facts cannot be controverted by the submission of conclusions of law or anything other than evidentiary facts. Hopper v. City of Madison, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977). Facts and documents submitted in opposition to a motion for summary judgment must be authenticated by affidavit in order to be evidentiary and included in the record. E.S. v. Seitz, 141 Wis. 2d 180, 186, 413 N.W.2d 670 (Ct. App. 1987).

In proceedings before the Commission, petitioner bears the burden of demonstrating that respondent's assessment is incorrect. § 77.59(2), Stats. However, respondent as the moving party bears the burden of demonstrating that it is entitled to summary judgment. Grams v. Boss, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). Moreover, a tax will only be imposed by clear and express language, and all ambiguities as to the applicability of a

tax must be resolved in favor of the taxpayer. Kearney & Trecker Corp. v. Dept. of Revenue, 91 Wis. 2d 746, 753, 284 N.W.2d 61 (1979).

Timeliness of the Notice of Action

Petitioner argues that respondent should be barred from imposing liability on petitioner because the notice of action was not issued in accordance with either § 77.59(6)(a), Stats., or the stipulation extending the deadline for respondent to act. Section 77.59(6)(a), Stats., directs respondent to notify a petitioner of its redetermination within six months of respondent's receipt of the petition for redetermination. Petitioner in its brief concedes that the deadline for respondent to act was September 16, 1994.¹ The notice of action was dated and mailed on September 15, 1994 and was received by petitioner's president the next day. Therefore, respondent acted in a timely manner and petitioner's argument fails.

Liability for Sales Tax on Petitioner's Gross Receipts on the Lease and Sale of Water Treatment Equipment

Petitioner makes a number of arguments to assert that it is not liable for sales tax on gross receipts on the lease and sale of water treatment equipment. Petitioner first argues that it is not a retailer, but rather is financing the sale of water treatment equipment by dealers to customers. While the reason for

¹ Petitioner failed to attach or mention in an affidavit the stipulations to extend respondent's deadline. Therefore, the existence of these stipulations is not in the record. In its brief, however, petitioner concedes that the deadline for respondent to act was September 16, 1994.

petitioner's involvement in these transactions may have been to finance the sale of water treatment equipment, the method it chose was that of lessor/lessee, not lender/borrower. Petitioner having arranged these transactions in the manner it did cannot be heard to object to the consequences of this arrangement. Diagnostic Radiology Associates of Wisconsin, S.C. v. Wisconsin Department of Revenue, CCH Wis. Tax Rptr. ¶ 400-087, WTAC Docket No. 93-S-400, Oct. 14, 1994.

In form and in substance, petitioner leased and sold tangible personal property. Therefore, petitioner was clearly a retailer under both §§ 77.51(13)(a) and (k), Stats.

Petitioner also argues that the sales were not at retail, asserting that the transactions occurred after the final ultimate employment of the property that resulted in the removal of the equipment from the marketplace. Petitioner claims that the "retail sale" occurred when the dealer installed the equipment. Had petitioner structured the transactions so that it was a lender providing financing for the customer to pay the dealer for the entire purchase price, this argument may have merit. However, this is not the transaction at issue.

The uncontradicted facts belie petitioner's argument. In each of the lease agreements in the record, petitioner was the lessor/seller of the water treatment equipment and the customer was the lessee/buyer. Customers leased or purchased the water treatment equipment from petitioner, not the dealers. Therefore, the lease agreements constituted retail transactions.

Petitioner next argues that the dealers are real property contractors under §77.51(2), Stats., and that the transaction that should be subject to the sales tax is the purchase of the water treatment equipment by dealers from their suppliers. There is no evidence in the record to support the inference that dealers are real property contractors.

It is true that retailers can be considered real property contractors when they install tangible personal property that becomes part of real property after installation. Tax § 11.68(2)(b), Wis. Adm. Code. However, the water treatment equipment in the subject transactions retained its character as tangible personal property because petitioner had the right to remove the equipment upon breach or termination of the lease agreement. § 77.51(20), Stats. Therefore, respondent was not required to collect the sales tax assessed in this matter on sales of water treatment equipment to dealers.

Petitioner also argues that it should bear no liability for sales taxes on its gross receipts for the sale and lease of water treatment equipment because dealers failed to pay sales tax on the amounts received from petitioner for the water treatment equipment. Even assuming dealers were obligated to pay sales tax on these amounts received from petitioner, their failure would not absolve petitioner of its liability.

Petitioner argues that it should not be assessed for sales back to dealers upon breach or termination of lease agreements because petitioner claims (in its brief, not in an

affidavit) that it always obtained a resale certificate from the dealer. It is undisputed that respondent eliminated from its assessment the sales tax on every transaction for which petitioner provided a resale certificate. Because none of petitioner's arguments have merit, it is liable for sales tax on its gross receipts for the lease and sale of water treatment equipment.

Liability for Delinquent Filing Fees and 18% Interest

Petitioner argues that it should not be liable for late filing fees because it had no sales tax liability and, in the alternative, if it is found liable for sales taxes, the returns are not due until petitioner has exhausted all administrative and judicial remedies. Petitioner also argues that it is not liable for interest at the rate of 1.5% per month because it acted in good faith and because interest does not come due until 30 days after all administrative and judicial remedies have been exhausted. These arguments find no support in the plain language of the applicable statute.

Section 77.60(2)(b), Stats., provides that delinquent fees and interest at 1.5% per month are imposed when no return is filed by the due date of the return. Petitioner cites William Wrigley, Jr., Co. v. DOR, 176 Wis. 2d 795, 500 N.W.2d 667 (1993), to argue that delinquent fees and interest at the 1.5% rate accrue only after all administrative and judicial remedies have been exhausted. Petitioner's reliance is misplaced.

The Wrigley decision concerned interest assessed under Wisconsin's franchise tax law. That law dictated that interest

began to accrue on the 30th day after the final determination of tax liability, as rendered by the Commission or the courts, becomes final and conclusive. § 71.13(2), Stats. (1985-86). The statute involved here provides that the delinquency occurs, and therefore interest begins to accrue, on the date the sales tax return would have been due. Therefore, petitioner is liable for delinquency fees and interest at 1.5% per month.

Liability for 25% Penalty

Respondent relies on the financial and business background of petitioner's president to argue that petitioner's failure to file sales tax returns was not justified by reasonable cause and that petitioner, therefore, is liable for a 25% penalty under § 77.60(4), Stats. Respondent's argument is that no one with this background could reasonably believe that petitioner was not obligated to pay sales tax and file sales tax returns.

Petitioner submitted an affidavit from its accountant testifying that the accountant advised petitioner that there would be no sales tax liability for receipts under its lease agreements with customers. The affidavit does not raise an issue of material fact because reliance on an accountant's advice is not reasonable cause as a matter of law. Kryshak v. Department of Revenue, CCH Wis. Tax Rptr. ¶ 203-084, WTAC Docket Nos. 88-S-210, 88-S-211 & 88-S-213, Aug. 29, 1989. Because petitioner has failed to submit any evidentiary facts to rebut the evidentiary facts submitted by respondent on the issue of reasonable cause, petitioner is liable for the penalty of 25% of the principal tax assessment.

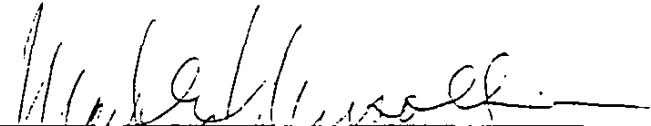
Therefore,

IT IS ORDERED

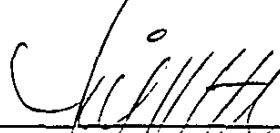
That respondent's action on the petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 26th day of February, 1996.

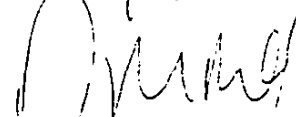
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Joseph P. Mettner, Commissioner



Don M. Millis, Commissioner

ATTACHMENT:
"Notice of Appeal Information"