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STATE OF WISCONSIN
TAX APPEALS COMMISSION

ANNA M. BRZEZINSKI
780 A Pilgrim Parkway
Elm Grove, WI 53122

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Petitioner,

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DOCKET NO. 92-S-370

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RULING AND ORDER

vs.

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

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Respondent.

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JOSEPH P. METTNER, COMMISSIONER:

This matter was submitted to the Commission for ruling based upon the petitioner's motion to dismiss, filed on October 6, 1993. The parties have submitted written briefs as well.

The petitioner was represented by Carol A. Robinson, and the respondent was represented by Attorney Sheree Robertson.

After considering the affidavits, exhibits and written briefs submitted by the parties, this Commission makes the following findings:

1. On December 14, 1989, the respondent issued to the petitioner a notice of sales taxes due in the amount of \$6,177.00. The assessment notice contained, on its face, an explanation that the asserted tax liability was based upon the petitioner's status as an officer or employee of G.T.G. Oasis Restaurant, Inc. ("G.T.G. Oasis") during the time period from March through September of 1988. The personal liability assessed was comprised of sales and

use taxes, interest and penalties which were determined to be due from G.T.G. Oasis, and had since been determined delinquent, from March through September, 1988.

2. The December 14, 1989 assessment was issued after the petitioner had signed two agreements, each dated September 25, 1989, in which she accepted personal responsibility under § 77.60(9), Stats., for certain delinquent sales and use taxes, interest and penalties owed by G.T.G. Oasis. The first agreement noted, in tabular form, inter alia, itemized amounts of sales tax and interest due during the period from January through August of 1988, totalling \$5,753.33. The signature block on the agreement was accompanied by a designation on a form line entitled, "present or former title," which the petitioner completed to read, "Sec. Treas." The second agreement signed by the petitioner and dated September 25, 1989, notes the petitioner's acceptance of personal responsibility for the unpaid sales and use taxes owed by G.T.G. Oasis for September, 1988, along with the petitioner's designation of "Sec. Treas." as her current or past title.

3. In addition, the December 14, 1989 assessment notice of amount due contained explicit language directed to the petitioner, which noted in reference to the G.T.G. Oasis sales and use tax liability for the period from March through September 1988, "that corporate liability is assessed against you." [emphasis added]. The reverse side of the assessment notice contained information detailing the procedures available to the petitioner for appeal of the department's assessment.

4. The petitioner has no recollection of having seen, having been served, or having received the December 14, 1989 assessment notice issued by the respondent, but she has not personally denied receiving the notice.

5. The petitioner did not appeal the December 14, 1989 assessment within the time period required by § 77.59(6), Stats. Accordingly, the respondent's assessment determination became final.

6. On December 2, 1991, the petitioner filed a claim for refund with the respondent for, inter alia, the sales taxes, interest and penalties described above, which were alleged to have been paid by the petitioner. The petitioner maintains that payment of the delinquent liability was made by the respondent's application of tax refunds otherwise due to the petitioner and through certain liens against the petitioner's real property which were obtained by the respondent.

7. The respondent denied the petitioner's refund claim in a letter dated January 9, 1992 signed by S. Lloyd, a Revenue Agent with the respondent.

8. In a letter dated February 24, 1992, the petitioner petitioned the respondent for a redetermination of its denial of the claim for refund.

9. The respondent denied the petitioner's petition for redetermination in an action letter issued on July 10, 1992.

10. The petitioner filed a timely petition for review which was received by this Commission on August 24, 1992.

11. The statutory or administrative authority under which the petitioner has offered a "motion to dismiss" in this case remains unclear. The petitioner's motion may be construed as a motion for judgment on the pleadings under §802.06(3), Stats., however.

12. Under §802.06(3), Stats., a motion for judgment on the pleadings, when accompanied by unexcluded matters offered outside the pleadings, shall be treated as a motion for summary judgment and disposed of under § 802.08, Stats.

13. Under Wisconsin's Rules of Civil Procedure, specifically, § 802.08(6), Stats., the party against whom summary judgment is asserted may be awarded summary judgment when the pleadings and factual averments demonstrate that party's entitlement to summary judgment. This is the case even if the party so entitled has not moved for summary judgment.

14. Since no material facts are in dispute in this case, this Commission determines that the respondent is entitled to summary judgment as a matter of law due to the absence of a legal basis upon which the petitioner may be granted its request for the refund of sales taxes, interest and penalties giving rise to this appeal.

Therefore,

IT IS ORDERED

That the petitioner's motion to dismiss/motion for summary judgment is denied, summary judgment is granted for the respondent and the respondent's action on petitioner's petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 25th day of February,

1994.

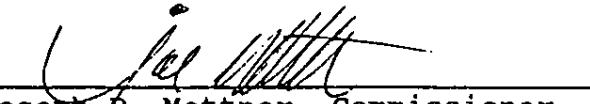
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Thomas R. Timken, Commissioner



Joseph P. Mettner, Commissioner

ATTACHMENT:
"Notice of Appeal Information"