

EVERT DEAN BARBRA 94W30 THRU 94W37 091694 TAC

The uncontroverted affidavit filed with respondent's motion sets forth in detail the undisputed facts pertaining to the various sales and withholding tax assessments against Consolidated Paving Company, Inc. ("Consolidated"), which went delinquent and were then assessed against petitioners as responsible officers, pursuant to Wisconsin Statutes § 77.60(9) (sales tax) and § 71.83 (1)(b)2 (withholding tax).

The petitioners do not dispute the tax or that they were officers of Consolidated and were responsible persons who are liable for Consolidated's unpaid taxes during the period under review. Their petition for review says as much.

What petitioners have requested in their petition for review is that we find that the respondent did not properly apply installment and set-off payments received from Consolidated as required by §§ 71.91-.94 and 73.12, Stats. The respondent applied both installment payments and set-off payments received by the respondent to penalties for each year, beginning with the earliest year, and then to interest for each year, beginning with the earliest year, and then to principal for each year, according to § 71.91(5)(k), Stats.¹

The petitioners allege that they were entitled to application of installment and set-off payments received by the respondent against delinquent sales and use tax liability pursuant to the Installment Agreement and to application of the set-off

¹ In their petition and brief, petitioners repeatedly refer to § 71.95(k), which does not exist. We assume they mean § 71.91(5)(k).

payments received by the respondent to penalties, tax, and principal, in that order, for the earliest year in accordance with § 73.12, Stats.

The respondent's position is that §§ 71.91-.94 and 73.12, Stats., because they relate to collection matters, are not among the enumerated statutes within the grant of jurisdiction to this commission under § 73.01(4), Stats.

The petitioners insist that, since the personal liability they have admitted to is "separate and distinct" from the liability imposed on the corporation, they are entitled to a review by this commission of the manner in which respondent applied payments made on the delinquent corporate tax accounts for which they are being personally assessed. They cite Sawejka v. Morgan, 56 Wis. 2d 70 (1972), at p. 75, where the Supreme Court stated that, "Sec. 73.01(4) is a broad grant of authority to the commission to hear and determine all questions of law and fact arising under the tax laws of the state, except as may be otherwise expressly designated."

However, at the time Sawejka was decided, § 73.01(4) expressly provided that this commission was "the final authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state ... (emphasis added)". But as the Supreme Court observed in Jackson County Iron Co. v. Musolf, 134 Wis. 2d 95 (1986), at pp. 106-7, "After the Sawejka decision, the legislature amended sec. 73.01(4)(a), Stats. to expressly provide that 'the commission shall be the final authority for the

hearing and determination of all questions of law and fact arising under ... [a specified statute].' Ch. 29, Sec. 815, Laws of 1977." Following this statutory change, rather than generally having jurisdiction to hear appeals from all tax laws, our jurisdiction was restricted to those sections of the tax laws specifically enumerated in § 73.01(4)(a). Sections 71.91-.94 and 73.12 are clearly not among those enumerated.

Finally, the respondent, in its brief at pp. 9-12, has cited numerous decisions of this commission in accord with our conclusion here, notably Barrett v. WDOR, CCH Wis. Tax Rptr. ¶ 203-394 (WTAC 1993) and Lepp v. WDOR, CCH Wis. Tax Rptr. ¶ 203-125 (WTAC 1990). Those decisions and our ruling here reject petitioners' theory that their personal liability is "separate and distinct" from the corporation's insofar as the amount of the assessment is concerned. It is the corporation's liability that determines the petitioners', and that liability remains identical until the assessment is paid.

Therefore, because this commission lacks authority under § 73.01(4), Stats., to review questions of law and fact arising under §§ 71.91-.94 and 73.12, Stats., the respondent has shown grounds for the granting of its motion.

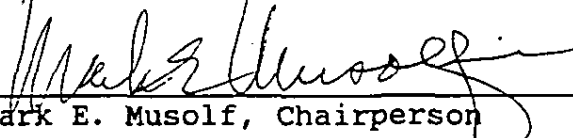
ORDER

The respondent is awarded summary judgment affirming its actions on the petitioners' petitions for redetermination.

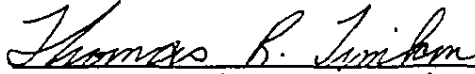
Dated at Madison, Wisconsin, this 16th day of September,

1994.

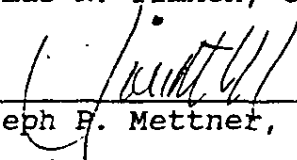
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Thomas R. Timken, Commissioner



Joseph F. Mettner, Commissioner

ATTACHMENT:
"Notice of Appeal Information"