

MILLER DIANE M 95S1346 95W1347 100996 TAC

STATE OF WISCONSIN
TAX APPEALS COMMISSION

OCT 9 1996

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DIANE M. MILLER
1755 Walnut Lane
Egan, MN 55122,

* DOCKET NOS. 95-S-1346
* and 95-W-1347

Petitioner,

vs.

* RULING AND ORDER

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

* GRANTING SUMMARY

* JUDGMENT

Respondent.

*



DON M. MILLIS, COMMISSIONER, JOINED BY MARK E. MUSOLF,
COMMISSION CHAIRPERSON:

The above-entitled matter came before the Commission on respondent's motion for summary judgment. Both parties have filed briefs and supporting papers in support of their respective positions on respondent's motion for summary judgment. Petitioner is represented by Attorney Louis J. Molepske. Respondent is represented by Attorney Michael J. Buchanan. For the reasons stated below, the Commission grants respondent's motion.

Based upon the entire record in this matter, the Commission finds, rules, and orders as follows:

UNDISPUTED MATERIAL FACTS

1. Prior to his death on October 23, 1993, petitioner's brother, Morris N. Firkus, owned and operated, as a sole proprietorship, a Mr. Steak Restaurant in Eau Claire.

2. On October 28, 1993, the Portage County Circuit Court appointed petitioner as a special administrator for the Estate of Morris N. Firkus, with the following powers: "The making of deposits and writing of checks on accounts Nos. 020797766 and 04877752 at Bank One, Stevens Point, NA for the purpose of continuing the businesses of the deceased known as the Steak Restaurant located at 1819 S. Hastings Way, Eau Claire, WI and Eagle Trucking with its principal office located at 5840 Regent Street, Stevens Point, WI. Such deposits and checks will be made only in the continuation of the ordinary course of each of the businesses."

3. Petitioner's involvement with the operation of the Mr. Steak Restaurant consisted simply of writing checks and making deposits. Day-to-day operations of the Mr. Steak Restaurant, including decisions concerning time schedules, hiring, firing, and payment of vendors, was left to the restaurant's personnel.

4. At some time during November of 1993, petitioner received a letter from one of respondent's revenue agents, Angela M. Dunlap, stating, in part: "[Mr. Firkus'] business account, Mr. Steak, located at 1819 South Hastings Way, Eau Claire, is assigned to this office for collection purposes. All missing returns are filed up to date. The balance due on the account is \$21,224.18."

5. Both before and after the receipt of Ms. Dunlap's letter, petitioner used funds of the Mr. Steak sole proprietorship to pay employees, while at the same time amounts owing to respondent for sales and withholding taxes remained unpaid.

6. In mid-December of 1993, petitioner had a telephone conversation with Ms. Dunlap, during which petitioner was told that she may be personally liable for taxes owed by Mr. Steak if she wrote checks on behalf of the Mr. Steak sole proprietorship. Petitioner immediately ceased writing checks, and the Mr. Steak Restaurant was closed.

7. No sales and use tax returns and no withholding tax returns were filed with respondent on behalf of the Mr. Steak sole proprietorship for the months of September, October, November, and December of 1993.

8. Respondent issued four successive assessments against the Mr. Steak Restaurant sole proprietorship each in the amount of \$1,770 for sales taxes, plus interest and penalty, from December 3, 1993 until March 7, 1994. Each of these assessments became delinquent.

9. Under the date of July 15, 1994, respondent issued an assessment against the Mr. Steak Restaurant sole proprietorship in the amount of \$1,149.71 for withholding taxes, plus interest and penalty. This assessment became delinquent on September 15, 1994.

10. Under the date of October 14, 1994, respondent issued an assessment against petitioner in the amount of \$9,795.44 for sales taxes as a responsible person for the Mr. Steak sole proprietorship.

11. Under the date of November 1, 1994, respondent issued an assessment against petitioner in the amount of \$1,646.32

in withholding taxes as a responsible person for the Mr. Steak sole proprietorship.

12. Petitioner filed timely petitions for review with respondent appealing both assessments.

13. Under the date of July 27, 1995, respondent issued notices of action denying both petitions for review.

14. Petitioner filed a timely petition for review of each denial with the Commission.

APPLICABLE WISCONSIN STATUTES

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 subchapter, whether exempt under s. 71.05(1) to (3), 71.26(1) or 71.45 or not, 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, employe or other responsible person of a corporation or other form of business association or a member, employe or other responsible person of a partnership, limited liability company or sole proprietorship who, as such officer, employe, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

77.60 Interest and penalties.

* * *

(9) Any person who is required to make a payment of the amount of tax imposed under this subchapter and who wilfully fails to make such payment to the department shall be personally liable for such amounts, including interest and penalties thereon, if that person's principal is unable to pay such amounts to the department. The personal liability of such person as provided in this subsection shall survive the dissolution of the corporation or other form of business association. Personal liability may be assessed by the department against such person under this subchapter for the making of sales tax determinations against retailers and shall be subject to the provisions for review of sales tax determinations against retailers, but the time for making such determinations shall not be limited by s. 77.59(3). "Person", in this subsection, includes an officer, employe or other responsible person of a corporation or other form of business association or a member, employe or other responsible person of a partnership, limited liability company or sole proprietorship who, as such officer, employe, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

RULING

Petitioner can be held liable for the withholding and sales tax obligations of the Mr. Steak sole proprietorship if the following elements are met: (1) petitioner had authority to direct payment of the sole proprietorship's taxes, (2) petitioner had a duty to pay the sole proprietorship's taxes, and (3) petitioner intentionally breached her duty. Esser v. Wisconsin Dept. Of Revenue, Wis. Tax Rptr. (CCH) ¶ 400-011 (WTAC August 5, 1993); Gould v. Wisconsin Dept. Of Revenue, Wis. Tax Rptr. (CCH) ¶ 203-319 (WTAC March 9, 1992).

In officer/responsible person cases, respondent bears the burden of going forward with proof tending to show that the petitioner is a responsible person. At all times, however, the burden of persuasion remains with petitioner. *Drilias v. Wisconsin Dept. Of Revenue*, Wis. Tax Rptr. ¶ 400-222 (WTAC May 31, 1996). However, because this matter is before the Commission on respondent's motion for summary judgment, respondent bears the burden of showing it is entitled to summary judgment. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). In this case, respondent has proven all three elements and is entitled, therefore, to summary judgment.

Petitioner argues that her appointment as special administrator did not give her authority to pay taxes on behalf of the Mr. Steak sole proprietorship. This assertion runs counter to the plain language of the order appointing petitioner as special administrator. Petitioner had the power to "writ[e] checks ... for the purpose of continuing the business[] of the deceased known as the Mr. Steak Restaurant ...". There can be no doubt that writing checks to pay taxes falls within the purpose of "continuing the business."

Although this is apparently a case of first impression in Wisconsin, the issue of personal liability of a fiduciary has been addressed by the federal courts. In *Keller v. U.S.*, 46 F.3d 851, 95-1 USTC ¶50,088 (8th Cir. 1995), a personal representative was found personally liable for withholding taxes where he had "significant, though not exclusive, authority in the area of

corporate decision-making and matters related to federal tax payments.' *Kenagy v. United States*, 942 F.2d 459, 464 (8th Cir. 1991)." Similarly, although petitioner here was a special administrator rather than a personal representative, she had full authority to pay taxes and other business obligations to continue the business and was, therefore, clearly a "responsible person" within the meaning of § 71.83, Stats.

Petitioner cites the Commission's decision in *Menke v. Wisconsin Dept. Of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-576 (WTAC July 9, 1985), for the proposition that someone who only writes checks and has minimal contact with the business cannot be held liable for tax delinquencies of the business. In *Menke*, the petitioner wrote checks paying taxes that, unknown to the petitioner, were never sent to respondent. Moreover, there was no evidence that the petitioner in *Menke* had any control over the finances of the business. *Id.* at ¶ 12,626. Here, petitioner had complete authority to deposit funds and write checks for the purposes of continuing the business. Moreover, it is clear from petitioner's affidavit that she had significant control over the business. For example, as soon as petitioner found out that she may be personally liable for the sales and withholding tax liability of the Mr. Steak sole proprietorship, it was shut down.

Petitioner's assertion that she did not exercise a significant degree of control over the business does not contradict the undisputed fact that she was granted sufficient authority to pay the taxes owed by the business. Therefore, the first element is

met.

Petitioner admits that she received a letter from respondent during November of 1993. That letter clearly informed petitioner that the Mr. Steak sole proprietorship owed more than \$21,000 in taxes to respondent. Petitioner argues that she did not become aware that she could be held personally liable for sales and withholding taxes owed by the sole proprietorship until December of 1993, and that, once she became aware of this possibility, she ceased writing checks and the business was closed. All that is required to show petitioner had a duty was her knowledge that the Mr. Steak sole proprietorship owed taxes to respondent. Gould, ¶ 15,405. Petitioner's ignorance of her own personal liability does not mitigate her duty to use the sole proprietorship's funds to satisfy the unpaid taxes. Therefore, the second element is met.

The parties disagree about the extent of petitioner's activity on behalf of the Mr. Steak sole proprietorship. There are genuine issues of fact concerning the extent of petitioner's activity, but these are not material. At a minimum, petitioner admitted that she used Mr. Steak funds to pay employees after she learned of the taxes owed to respondent. This alone is sufficient to establish that petitioner breached her duty. Id.

Petitioner finally argues that the priority set forth in § 859.25, Stats., compelled petitioner to subordinate the business' sales and withholding tax obligation to other claims of the estate. Even if this section applied, petitioner violated the

priority set forth in this section by paying employees of the sole proprietorship ahead of respondent. However, this section applies to claims against the estate to be paid by the personal representative. Petitioner was not the personal representative, and, therefore, this section has no applicability.

We are cognizant, however, of the potential for unfairness presented by the application of §§ 71.83(1)(b)2 and 77.60(9), Stats., to cases such as these. But as the Keller court observed:

We are not unsympathetic towards Keller's predicament. Indeed, we recognize that "[t]he statute is harsh, but the danger against which it is directed—that of failing to pay over money withheld from employees until it is too late, because the company has gone broke—is an acute one, against which, perhaps, only harsh measures are availing."

[Citation omitted] 95-1 USTC at 87,322.

Persons in petitioner's position, when presented with the knowledge that taxes are owing to respondent, might be well advised to shut down the business immediately rather than pay other creditors, even though this action might not appear to be in the best interest of the business or the estate. The resolution of this potential problem, and any perceived unfairness, is better left to the legislature.

There is no genuine issue of fact, and respondent is entitled to summary judgment as a matter of law.

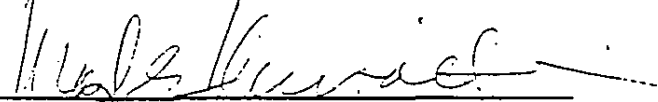
Therefore,

IT IS ORDERED

That respondent's motion for summary judgment is granted, and its actions on petitioner's petitions for redetermination are affirmed.

Dated at Madison, Wisconsin, this 9th day of October, 1996.

WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner

ATTACHMENT: "Notice of Appeal Information"