

STATE OF WISCONSIN
TAX APPEALS COMMISSION

EDI MARKETING, INC.,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

**DOCKET NOS. 08-S-102,
08-S-103 AND 08-S-104-SC**

DECISION AND ORDER

DAVID C. SWANSON, COMMISSIONER:

This matter comes before the Commission on a Stipulation of Facts with Exhibits 1 through 9 filed by the parties on December 23, 2008 (together, the “Stipulation”). Mr. Kevin J. Bestul represents the Petitioner, EDI Marketing, Inc., and Attorney Julie Lotto represents the Respondent, the Wisconsin Department of Revenue (the “Department”), in these matters. Both parties have submitted briefs.

The Commission’s Findings of Fact consist of the facts stipulated by the parties, with certain changes made for form, clarity, consistency and relevance. Pursuant to the Stipulation, all facts refer to the periods under review unless the context of the fact indicates otherwise. Having considered the entire record before it, the Commission finds, decides and orders as follows:

FINDINGS OF FACT

A. JURISDICTIONAL FACTS

1. On March 17, 2007, the Department issued four Notices of Amount Due to the Petitioner that totaled \$13,616.65 for late-filed sales tax returns for the months of September, October, November and December 2006. Each assessment included tax, interest, a late-filing fee, and a negligence penalty pursuant to Wis. Stat. § 77.60(4). These assessments comprise Docket No. 08-S-103. (Ex. 1.)

2. By letter faxed to the Department on March 28, 2007, the Petitioner petitioned the Department for a redetermination of the “penalties, fees and interest that were added to my original sales tax amount for the tax months covering September 2005 through December, 2006.” Because the letter stated the Petitioner was appealing a larger period than the periods assessed, the Department treated the letter as both: (1) A petition for redetermination of the penalties, late fees, and interest portion of the assessment for the periods September – December 2006 (Docket No. 08-S-103); and (2) a Claim for Refund for the remaining periods that were not closed to appeal, specifically October 2005 – March 2006 (Docket No. 08-S-102). (Ex. 2.)

3. By letter dated September 10, 2007, the Department notified the Petitioner that the Claim for Refund for the period October 2005 – March 2006 in the amount of \$3,510.08 was denied. (Ex. 3.)

4. By letter dated November 2, 2007, the Petitioner petitioned the Department for redetermination of the denial of the Claim for Refund. (Ex. 4.)

5. On April 1, 2007, the Department issued a Notice of Amount Due to the Petitioner in the amount of \$53.97 for a late-filed sales tax return for the month of January 2007. The assessment represents the tax and interest remaining after Petitioner's payment of \$2,136.17 was applied toward the penalty first, then interest, and finally tax principal, pursuant to Wis. Stat. § 77.60(1m). This assessment comprises Docket No. 08-S-104-SC. (Ex. 5.)

6. By letter faxed to the Department on May 3, 2007, the Petitioner petitioned the Department for a redetermination of any "penalties, fees and interest that were added to my original sales tax amount for the tax month of January, 2007." (Ex. 6.)

7. On May 2, 2008, the Department issued three Notices of Action respectively denying the Petitioner's Petitions for Redetermination of: (1) the four sales tax assessments for September – December 2006 (Docket No. 08-S-103); (2) the denial of the Claim for Refund for October 2005 – March 2006 (Docket No. 08-S-102); and (3) the sales tax assessment for January 2007 (Docket No. 08-S-104-SC). (Ex. 7.)

8. On June 30, 2008, the Petitioner timely filed a Petition for Review with the Commission appealing all three Notices of Action. (Ex. 8.)

B. MATERIAL FACTS

9. During all periods under review, Kevin J. Bestul ("Mr. Bestul") was the owner of EDI Marketing, Inc. (the "Petitioner").

10. During all periods under review, the Petitioner was a Wisconsin corporation and was required to submit monthly sales and use tax returns and payments.

11. During all periods under review, the Petitioner's sales tax returns were filed late. Prior to the periods under review, the Petitioner's sales tax returns were predominantly timely filed, with the exception of the filings described in paragraphs 33 and 34, below.

12. During all periods under review and in prior years, Mr. Bestul assigned the duty of filing the Petitioner's monthly sales tax returns to the Petitioner's office manager ("Employee A").

13. Employee A had been a trusted employee of the Petitioner for twelve years prior to the period under review and had worked his/her way up to office manager. With the exception of the incident in paragraph 33 below, Mr. Bestul was not aware of any problems that would have led him not to trust Employee A with his sales tax filings prior to the periods under review.

14. Employee A was also responsible for balancing and maintaining the Petitioner's checking account.

15. Due to the nature of his business during the periods under review, Mr. Bestul greatly relied on his employees to manage the Petitioner's accounting and administrative responsibilities, including filing sales tax returns.

16. Employee A claimed to have filed the Petitioner's sales tax returns online via the Department's Sales Internet Process (SIP) for all periods under review.

Mr. Bestul's signature would not have been required on the electronically-filed returns. Upon electronic submission, the SIP website would have prepared a receipt confirming the date of filing and a confirmation number for the Electronic Fund Transfer payments made. The Department never received any electronically-filed sales tax returns or any valid filing receipts from the Petitioner for the periods under review.

17. Employee A never filed the sales tax returns for the periods at issue.

18. The Petitioner's monthly withholding returns during these periods were filed electronically in a timely manner by outside accountant Joe Stephany, CPA.

19. On May 10, 2006, Department Agent James Schleicher made a field stop to the Petitioner's place of business to discuss the delinquent tax periods. Mr. Bestul was not there. He spoke to Employee A by phone and told Employee A that no sales tax returns had been filed since September 2005. Employee A told him that the returns were filed online, that Employee A was not aware that the returns had not been properly submitted electronically, and that Employee A would look into it and get back to him. Agent Schleicher left his card with another of the Petitioner's employees named Jenny. (Ex. 9, 5/11/06 Note.) Mr. Bestul was not made aware of the visit by Agent Schleicher.

20. As of September 15, 2006, the Department still had not received sales tax returns from the Petitioner since September 2005. (Ex. 9, 9/15/06 Note.)

21. On September 15, 2006, the Department issued a bank levy in the amount of \$23,276.40 to the Petitioner's bank to recover delinquent amounts from

unpaid estimated sales tax assessments for the October-December 2005 periods. The bank paid out the entire levy amount on October 10, 2006. (Ex. 9, 9/15/06 and 10/12/06 Notes.) Mr. Bestul was not aware of the levy because Employee A reconciled the accounting of it in the Petitioner's checking account.

22. On November 28, 2006, Agent Schleicher spoke to Employee A again by phone. (Ex. 9, 11/28/06 Note.) Employee A had called him about the bank levy. Employee A claimed that the bank levy was the first time Employee A became aware of the delinquent sales tax problem. Agent Schleicher reminded Employee A about his conversation with Employee A on May 10, 2006. Mr. Bestul was not made aware of this phone call.

23. The Department sent over 30 notices to the Petitioner regarding the missing sales tax returns between October 2005 and February 2007, including requests to file, estimated assessments, notices of delinquent tax, bank levy notices, notices of hearing, and an internet posting warning letter. It was Employee A's responsibility to open the Petitioner's mail.

24. In 2006, Mr. Bestul himself came across a notice from the Department that indicated a sales tax delinquency. He asked Employee A to investigate and respond to the Notice. Employee A told Mr. Bestul that Employee A called the Department, the problem was an error with the electronic submission of the returns, and that it was being taken care of.

25. Later in 2006, Mr. Bestul discovered another notice from the Department regarding a sales tax delinquency. He assumed it was regarding the same

delinquent period as the previous notice he found. He again asked Employee A to look into the problem. Employee A again told Mr. Bestul that Employee A had contacted the Department, the Department was satisfied with the explanation, and the problem was taken care of.

26. On February 14, 2007, Agent Schleicher left a notice on Mr. Bestul's residence door. Mr. Bestul called Agent Schleicher on February 15, 2007. (Ex. 9, 2/15/07 Note.) At this point, Mr. Bestul was first made aware of the severity and length of the Petitioner's late-filed sales tax return problem.

27. Mr. Bestul arranged to pay the tax principal amount due as soon as he was assured that the Department had not received any funds electronically. He did not pay any interest or penalties.

28. On March 12, 2007, Mr. Bestul met with Agent Schleicher. Mr. Bestul late-filed Petitioner's October 2005 – January 2007 sales tax returns and paid \$2,136.17 for the January 2007 tax principal amount only. Agent Schleicher told Mr. Bestul that the Department had determined that the receipts that Employee A had submitted as proof of the Petitioner's electronic filing were fake. (Ex. 9, 3/12/07 Note.)

29. On March 19, 2007, Mr. Bestul paid the tax principal amounts due on the periods September 2006 – December 2006. (Ex. 9, 3/19/07 Note.)

30. As of March 14, 2007, Mr. Bestul was still relying on Employee A to do bank statement reconciliation for his investigation into the sales tax return problem under his supervision. (Ex. 9, 3/14/07 Note.) He continued to give Employee A the

benefit of the doubt. Mr. Bestul found the non-paid sales tax funds through his own efforts.

31. After the period under review, Employee A's office manager duties were greatly diminished. Mr. Bestul allowed a six-month time period to reconsider action on Employee A, who had helped grow the Petitioner's business for twelve years. After six months, Mr. Bestul did not reinstate Employee A as office manager, but offered Employee A a sales position. Employee A continued to work in sales for the Petitioner until October 2007 when Employee A resigned.

32. The Petitioner has not notified law enforcement to date regarding Employee A's actions because no money appears to have been embezzled.

33. Agent Schleicher's notes of February 27, 2006, a year prior to the notice on Mr. Bestul's residence door, indicate that Mr. Bestul called him and said that he had received a notice of levy on the Petitioner's bank account. Agent Schleicher told Mr. Bestul that he had spoken to Employee A on November 8, 2005 and had faxed Employee A the balance due, but the balance had still not been paid. (Ex. 9, 2/27/06 Note.) The levy was to collect an overdue amount from a late-filed February 2005 sales tax return. Mr. Bestul paid the balance in full on March 2, 2006. (Ex. 9, 3/2/06 Note.)

34. Agent Schleicher's notes of January 4, 2005, indicate that the Petitioner also had a late-filed sales return in July 2004. (Ex. 9, 1/4/05 Note.)

CONCLUSION OF LAW

The Petitioner has failed to satisfy its burden of proving the assessments at issue to be incorrect.

DECISION

The Department's sales and use tax office audit assessments are presumed to be correct, and the Petitioner has the burden of proving the assessments to be incorrect. Wis. Stat. § 77.59(1). In these matters, the Petitioner does not contest its liability for the sales taxes claimed by the Department in the assessments at issue and has paid those taxes. Instead, the Petitioner requests that the interest, late filing fees and negligence penalties included in these assessments¹ be forgiven on the grounds that the sales taxes were paid late due to the actions (or inaction) of Employee A, the Petitioner's office manager, which were not approved by the Petitioner.

1. Interest

"Delinquent sales and use taxes shall bear interest at the rate of 1.5% per month until paid." Wis. Stat. § 77.60(2). The Petitioner has admitted that the sales taxes at issue were paid late and the parties have stipulated to the dates of the payments. No statute permits the waiver or abatement of the applicable interest charges, and the Commission has previously held that it does not have jurisdiction to review such mandatory interest on delinquent taxes. *See, French v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-213 (WTAC July 25, 1983). Thus, we find that the interest charges included in these assessments are required by statute.

¹ Specifically, the Petitioner contests the following amounts: (1) \$836.88 in interest, \$1,799.24 in penalties and \$80.00 in late filing fees included in the assessments for the period 9/1/06 through 12/31/06 (Ex. 1) (Docket No. 08-S-103); (2) \$3,510.08 in penalties included in the assessments for the period 10/1/05 through 3/31/06 (Ex.3) (Docket No. 08-S-102); and (3) \$23.22 in interest and the \$20.00 late filing fee included in the assessment for January 2007 (Ex. 5, Adjustment Detail) (Docket No. 08-S-104-SC).

2. Late Filing Fees

“Delinquent sales and use tax returns shall be subject to a \$20 late filing fee unless the return was not timely filed because of the death of the person required to file or unless the return was not timely filed due to good cause and not due to neglect.” Wis. Stat. § 77.60(2). The Petitioner does not dispute that the sales tax returns at issue were filed late. The Department applied the statutory \$20.00 late filing fee to each such late-filed return. The Petitioner requests that these fees be forgiven because the returns were filed late due to good cause and not due to neglect.

In his briefs, Mr. Bestul insists that the returns were filed late due to the actions of Employee A.² According to the stipulated facts, Employee A repeatedly misled Mr. Bestul and Department personnel regarding the status of the payments and returns at issue.

The Commission previously has held that an employer-taxpayer is responsible for the acts of its employee acting on its behalf in filing tax returns. *Frickleton Aviation Cos. V. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-122 (WTAC Dec. 16, 1982). Federal law involving tax returns and payments follows the same general rule. “[W]hen there is no question that a return must be filed, the taxpayer has a personal, nondelegable duty to file the tax when due.” *U.S. v. Kroll*, 547 F.2d 393, 396

² The parties speculate as to Employee A’s possible intent, but there is no probative evidence in the record bearing on Employee A’s intent with respect to filing or not filing these returns. Neither party filed a deposition of Employee A in these matters and Employee A’s state of mind during the periods at issue thus remains unclear. The Petitioner does not allege that Employee A committed a criminal act and also does not specifically allege that Employee A’s actions were tortious, and thus cannot claim a defense against the fees and penalties on such grounds. See, e.g., *In the Matter of American Biomaterials Corp.*, 954 F.2d 919 (3rd Cir. 1992) (employee’s embezzlement of corporate funds provided employer with a defense against federal late filing fees and negligence penalties).

(7th Cir. 1977);³ *see also*, *U.S. v. Boyle*, 469 U.S. 241 (1985); *McMahan v. Comm’r of Internal Revenue*, 114 F.3d 366 (2nd Cir. 1997); *Valen Mfg. Co. v. U.S.*, 90 F.3d 1190 (6th Cir. 1996); *Conklin Bros. of Santa Rosa, Inc. v. U.S.*, 986 F.2d 315 (9th Cir. 1993).⁴

Based on the stipulated facts, it is clear that preparing and filing the returns at issue and paying the taxes due was part of Employee A’s assigned duties as an employee of the Petitioner. To conceal his/her failure to complete these assigned duties, Employee A repeatedly misled Mr. Bestul and Department personnel. Nevertheless, the Petitioner may not delegate its responsibility for filing its returns and paying its taxes. Employee A’s actions appear to be a case of extended neglect, which by law is attributed to the taxpayer-employer, the Petitioner.

The failures of Mr. Bestul, the Petitioner’s other employee and Department personnel to uncover Employee A’s neglect and misrepresentations more quickly do not constitute “good cause” for the late filings. The record indicates that Department personnel made repeated contacts with the Petitioner, including a number of telephone calls, personal visits to its place of business and over 30 written notices. These Department contacts were almost always made with Employee A in accordance with the duties assigned by the Petitioner. The Petitioner acted on these matters only

³ The parties dispute whether the Petitioner exercised “ordinary business care and prudence” in filing the returns, but that question is not relevant here. In *Kroll*, the Court noted that federal Treasury Regulations “define an acceptable excuse for non-compliance [with filing requirements] as a showing that the taxpayer ‘exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time.’” *Kroll*, 547 F.2d at 395, quoting Treas. Reg. §301.6651-1(c)(1). However, that case makes it clear that this defense does not apply in cases where there is no dispute as to whether a return was required to be filed, as in these matters. *Id.* at 396-97.

⁴ Federal law recognizes certain circumstances as reasonable cause for filing a return late. These generally involve events beyond a taxpayer’s control, such as death, a serious illness or unavoidable postal delays. *See, e.g., McMahan*, 114 F.3d at 369. No such events are alleged to be involved in these matters.

after the Department contacted Mr. Bestul personally by delivering a notice to his residence. In this instance, the Department made a greater effort to contact Mr. Bestul than the Petitioner's own bank, which apparently received and paid out a levy of over \$23,000 to the Department without ever personally contacting Mr. Bestul.

We conclude that the Petitioner, not the Department, is the party that is responsible for Employee A's actions, which caused the Petitioner to neglect to file the returns at issue. Consequently, we find that the late filing fees are required by statute.

3. Negligence Penalties

When a sales tax return is filed late, "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." Wis. Stat. § 77.60(4). Pursuant to this statute, the Department added the negligence penalties at issue to the assessments.

The Petitioner requests that the negligence penalties included in the assessments be forgiven. The Department maintains that these penalties are required by statute unless the returns were filed late "due to reasonable cause and not due to neglect," and that the Petitioner has not made the requisite showing to avoid the penalties. We conclude that "reasonable cause" under Section 77.60(4) has the same meaning as "good cause" under Section 77.60(2). For the reasons discussed above regarding the applicability of the late filing fees, we find that the returns were not filed

late due to reasonable cause, but instead were filed late due to neglect. Thus, the negligence penalties assessed by the Department are required by statute.

CONCLUSION

As noted above, the Department's assessments are presumed to be correct and the Petitioner has the burden of showing that they are incorrect. We conclude that the Petitioner has not met its burden of proof, and we therefore affirm the Department's actions in these matters.

ORDER

The Department's actions on the Petitioner's petitions for redetermination in these matters are affirmed.

Dated at Madison, Wisconsin, this 7th day of August, 2009.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"