

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

FALLEN ANGEL, LTD.,

DOCKET NO. 08-S-131

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ROGER W. LEGRAND, COMMISSIONER:

This matter came before the Wisconsin Tax Appeals Commission for a hearing on June 16, 2009, Commissioner Roger W. LeGrand, presiding. Petitioner, Fallen Angel, Ltd. ("Petitioner"), appeared by Mr. Daniel Hurda. Respondent appeared by Attorney Lisa Ann Gilmore. Mr. Hurda provided sworn testimony at the hearing.

Based upon the evidence produced at the hearing, the Commission makes the following findings:

FINDINGS OF FACT

1. On July 15, 2007, the State of Wisconsin Department of Revenue (the "Department") issued a Notice of Field Audit Action to Petitioner assessing a total of \$170,882.26 in sales and use tax plus interest and penalty for the years 2002 through 2005 (the "period at issue"). (Exhibits 1-3.)

2. On July 15, 2007, the Department also issued a Notice of Better Records Required to Petitioner. (Exhibit 2.)

3. On September 17, 2007, Petitioner filed a petition for redetermination with the Department. (Exhibit 4.)

4. On June 20, 2008, the Department issued a Notice of Action denying the petition for redetermination on the grounds that Petitioner had missed “scheduled meetings in the Resolution Unit.” (Exhibit 5.)

5. On June 20, 2008, the Department issued a Payment Voucher Notice to Petitioner updating the total amount due to \$186,289.02. (Exhibit 6.)

6. On August 19, 2008, Petitioner filed a Petition for Review with the Commission, which the Commission acknowledged. (Exhibit 7-8.)

7. On September 2, 2008, the Department filed an answer to the petition for review. (Exhibit 9.)

8. Petitioner, Fallen Angel, Ltd. (d/b/a Brush Fire Games Ltd. and Virtual Magic’s Brush Fire Games Ltd.), a Wisconsin corporation, is engaged primarily in the business of running a paintball park and hobby shop. (Exhibit 1.)

9. In October of 2002, Petitioner purchased a building, added an indoor paintball field and operated a hobby shop in Germantown, Wisconsin.

10. Beginning in October of 2002, Petitioner conducted retail sales and paid sales tax on at least a portion of its retail sales, which included sales of paintball equipment, admissions to the paintball field, paintballs that were sold to players,

paintballs that were sold to be carried out and then used elsewhere, and other hobby-related games. (Tr. at 46-47.)

11. In September of 2006, Delores Jacobs of the Department conducted a field audit of Petitioner for the period beginning January 1, 2002 and ending December 31, 2005. (Exhibit 13.)

12. After examining purchase invoices, payables, bank statements and electronic records provided by Petitioner, she made an audit adjustment on the issue of paintballs based on Wis. Stat. § 77.52(2m)(a), which provides that no part of a charge for services may be deemed a sale or rental of tangible personal property if the property is transferred by the service provider incidental to the selling, performing or furnishing of a service. (Exhibit 21; Tr. at 15-26.)

13. During the course of the audit, Petitioner challenged the taxability of paintballs purchased and used at the Petitioner's paintball park. (Exhibit 21.) Petitioner also challenged the Department's calculation of exempt out-of-state sales without providing any additional documentation as requested by the Department. (Exhibits 25, 26 and 27.)

14. The Department provided a proposed audit report to Petitioner which gave a summary of additional sales and use tax, interest and penalty and an explanation of the adjustments made in the audit. (Exhibit 23; Tr. at 23.)

15. On June 14, 2007, Petitioner filed a form disagreeing in part with the proposed audit, but stated that it was still working to obtain documentation to support the exempt sales. (Exhibit 27.)

16. Delores Jacob prepared a final summary and schedules to support the computation of the additional taxes due, plus interest and penalties. (Exhibit 33.)

17. Petitioner's disagreement with the audit figures (Exhibit 27) was treated as a petition for redetermination and the case was assigned to Resolution Officer James Anfang. (Tr. at 34-35.)

18. The Department and Petitioner extended the time for action on the petition for redetermination to September 15, 2008. (Exhibit 30; Tr. at 37.)

19. The Department attempted to meet with Petitioner regarding the assessment, but never received a response from Petitioner. (Tr. at 38.)

20. The Department denied the petition for redetermination on the grounds that Petitioner failed to appear for a conference and failed to provide any further information to the Department. (Tr. at 40.)

ISSUES

1. Has Petitioner satisfied its burden of proof?
2. Is Petitioner entitled to a waiver of the penalties assessed by the Department?

CONCLUSIONS OF LAW

1. Petitioner has failed to satisfy its burden of proof and the assessment issued by the Department in this matter is presumptively correct.
2. The Department properly included a penalty in the assessment.

OPINION

The Department's sales and use tax assessments are presumed to be correct and the petitioner has the burden of proving such assessments incorrect. *Woller v. Dep't of Taxation*, 35 Wis. 2d 227, 233, 151 N.W.2d 170 (1967); *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1)-(2). All sales and purchases of tangible personal property in Wisconsin are presumed to be subject to sales or use tax until proved otherwise. Wis. Stats. §§ 77.52(13) and 77.53(10); *H. Samuels v. Wis. Dep't of Revenue*, 70 Wis. 2d 1076, 1077-78, 236 N.W.2d 250 (1975).

1. Petitioner's Burden of Proof

In this case, Petitioner's business was selected for a random audit. The Department compared the gross receipts for franchise tax purposes with the gross receipts reported on Petitioner's sales and use tax returns and noted discrepancies. The Department then made adjustments to Petitioner's sales and use tax returns.

After the proposed audit report was sent to Mr. Hurda, he stated he disagreed with it in part and that he was working to obtain documentation to support certain sales that he claimed were exempt from tax. The matter was sent to the

Department's Resolution Unit and a conference was scheduled for April 10, 2008 to allow Mr. Hurda to bring any records he had to support his objections. Mr. Hurda did not attend the conference, nor did he (or any other representative of Petitioner) provide any records to refute the determinations made pursuant to the audit.¹

Under Wis. Stat. § 77.52(13), all receipts are subject to sales tax, unless the contrary is established. During the audit, Petitioner promised to provide documentation to support untaxed sales but never did so. He did not show up for the scheduled conference with the Department's Resolution Unit during its post-determination review, nor did he provide any documentation to the Department's Resolution Officer. At the hearing, he provided no evidence documenting or otherwise supporting his position.

As a matter of law, a petitioner's uncorroborated testimony as to undocumented expenses is insufficient to satisfy that petitioner's burden of proof and overcome the presumption of correctness attached to an assessment. *See, Conrad LeBeau*

¹ In *Paintball Dave's, Inc. v. Wis. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-103 (WTAC Apr. 9, 2008), the Commission concluded that paintballs provided by a paintball establishment as part of a customer's admission to play paintball games were not eligible for a resale exemption upon their earlier purchase by the establishment, because the subsequent provision of these paintballs to players was incidental to the taxable service provided, which was admission to play paintball games. The *Paintball Dave's* parties agreed that that petitioner had collected and remitted sales tax on sales of paintballs that were separate from sales of admissions; the issue in that case was limited to use tax on paintballs provided to customers as part of an admission package. Here, the parties dispute the application of that case, but the record indicates that Petitioner indeed claimed resale exemptions on purchases of paintballs similar to the exemptions disallowed in *Paintball Dave's*, which the Department also disallowed here. (Tr. at 49-51.) Because of Petitioner's lack of documentary evidence in this case, its resale exemption claims and other claims are all unsupported. However, to the extent that Petitioner claimed any resale exemptions on its purchases of paintballs that subsequently were provided to customers as part of admissions packages, the Department properly disallowed such claims, consistent with the Commission's holding in *Paintball Dave's*.

v. Wis. Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶202-383 (WTAC, June 22, 1984), *aff'd*, 133 Wis. 2d 476, 394 N.W.2d 920 (Ct. App., August 7, 1986) (unpublished decision); *St. Charles Lockett v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-807 (WTAC 1986). Mr. Hurda was the only individual who testified on behalf of Petitioner at the hearing. No other employee, vendor or customer of this business testified.

The Department's assessments are presumed to be correct. In the absence of evidence to the contrary, the Department's assessment is upheld.

2. Negligence Penalty

Petitioner also questions the imposition of penalties, including the 25% negligence penalty for the years 2002, 2003 and 2004 imposed pursuant to Wis. Stat. § 77.60(3), and the 25% penalty for failure to file a 2005 tax return imposed pursuant to Wis. Stat. § 77.60(4). Wis. Stat. § 77.60(3) states, "If due to neglect, an incorrect return is filed the entire tax finally determined shall be subject to a penalty of 25% A person filing an incorrect return shall have the burden of proving the errors were due to good cause and not due to neglect."

It is undisputed that there were discrepancies between the gross receipts reported on Petitioner's corporate income tax returns and its sales/use tax returns for the years 2002, 2003 and 2004 that Petitioner cannot explain. There is likewise no dispute that Petitioner failed to file a sales tax return for 2005.

Petitioner provided no documentation to substantiate any exemption of the untaxed sales. At the hearing, Mr. Hurda admitted that the business' recordkeeping

was “poor” and that he could not find documentation to explain the reported discrepancies. (Tr. at 51-52.) Petitioner’s day-to-day accounting had been provided by one of the partners; however, an accountant was used for the sales/use taxes. But neither the accountant nor Petitioner was able to provide any documentation to support the returns. Based upon this evidence, the Department was justified in imposing the negligence penalty for the years at issue. Petitioner is not entitled to a waiver because it provided no evidence to show that its reporting and filing errors were due to good cause and not due to neglect.

Based upon the Commission’s findings of fact and conclusions of law,

IT IS ORDERED THAT

The Department’s action on Petitioner’s petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 12th day of February, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"