

STATE OF WISCONSIN
TAX APPEALS COMMISSION

ELIJAH M. RASHAED,

DOCKET NO. 10-S-071

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE

Respondent.

ROGER W. LEGRAND, COMMISSIONER:

The above matter comes before the Commission on a motion for summary judgment and motion for attorney fees and costs filed by the Respondent, the Wisconsin Department of Revenue (“the Department”). The Petitioner is represented by Attorney James A. Walrath of the law firm of Zetley Law Offices, S.C., which is located in Milwaukee, Wisconsin. The Respondent, the Wisconsin Department of Revenue (“the Department”), is represented by Attorney Sheree Robertson, of Madison, Wisconsin. Both parties have submitted briefs with attachments and exhibits.

STATEMENT OF FACTS

Jurisdictional Facts

1. On March 6, 2009, the Wisconsin Department of Revenue issued to Elijah M. Rashaed, Petitioner, a Notice of Amount Due of an assessment of personal liability in the total amount of \$190,945.42 for the unpaid sales and use taxes, including interest and penalties, of M & S, Inc. for the periods ending February 28, 1998, June 30,

1998, December 31, 1998, February 28, 1999, March 31, 1999, April 30, 1999, May 31, 1999, June 30, 1999, July 31, 1999, August 31, 1999, September 30, 1999, January 31, 2000, February 29, 2000, April 30, 2000, and May 31, 2000. (See Affidavit¹ of Revenue Agent John Mickelson, ¶ 4; Affidavit of Attorney Sheree Robertson, ¶ 2; and Exhibit 1).

2. On behalf of Petitioner, Attorney Michael Stupar timely filed a Petition for Redetermination of the March 6, 2009, Notice assessing personal liability. (Affidavit of Attorney Robertson, ¶ 3; and Exhibit 2).

3. Per its Notice of Action letter dated January 28, 2010, the Wisconsin Department of Revenue denied Petitioner's Petition for Redetermination. (Affidavit of Attorney Robertson, ¶ 4; and Exhibit 3)

4. On March 24, 2010, the Wisconsin Tax Appeals Commission received Petitioner's Petition for Review that was filed on his behalf by Zetley Law Offices, S.C. (Affidavit of Attorney Robertson, ¶ 5; and Exhibit 4). Petitioner's Petition for Review does not state any facts in support of his contentions that he is not personally liable for the tax delinquency of M & S, Inc. for the periods at issue. (Exhibit 4).

5. On April 5, 2010, Respondent filed an answer to the Petition for Review.

¹ References to Affidavits supporting Respondent's Motion(s) are to those dated in November 2010 except when noted as January 2011 or Ms. Bink's Affidavit which is dated January 2011.

6. On November 15, 2010, Respondent filed a motion for summary judgment along with 45 exhibits containing affidavits of various revenue agents, all regarding the assessments against Petitioner, Elijah Rashaed.

7. In addition, the Respondent moved for costs under Wis. Stat. § 73.01(4)(am) on the ground that the Petition for Review was frivolous in that it contained no facts showing that Petitioner was not personally responsible under Wis. Stat. § 77.60(9) for the unpaid sales taxes of M & S, Inc.

8. On February 11, 2011, Petitioner filed a motion to strike the motion for attorney's fees and costs.

9. In a telephone status conference held on March 10, 2011, the Commission ruled that Respondent's motion for costs would only be limited to costs under Wis. Stat. § 73.01(4)(am) and not to costs under Wis. Stats. §§ 802.05(3) and 805.05(3)(b).

Evidentiary Facts

10. Elijah M. Rashaed was formerly known as Dennis Bell. (Affidavit of Revenue Agent Altenhofen, ¶ 2). And, per the computer search Revenue Agent John Altenhofen conducted of the Wisconsin Circuit Court Access Records (WCCA), on August 8, 2001, Mr. Bell filed with the Milwaukee County Circuit Court a petition, which was assigned Case No. 2001CV007369, requesting that his name be legally changed from Dennis Bell to Elijah Mohammad² Rashaed. (Affidavit of Revenue Agent Altenhofen, ¶ 2). Also per the WCCA records, on or about September 21, 2001,

² The name "Mohammed" is also seen spelled as "Mohammad."

the Circuit Court granted Mr. Bell's petition for the name change. (Affidavit of Revenue Agent Altenhofen, ¶ 2). Elijah M. Rashaed, the Petitioner in Docket No. 10-S-071, is also known as Mohammad Rashada, which is the name under which a Petition for Review was filed with the Wisconsin Tax Appeals Commission and assigned Docket No. 06-S-116. (Affidavit of Revenue Agent Altenhofen, ¶ 2). Revenue Agent Altenhofen could not locate a court record showing that Elijah M. Rashaed changed his name to or from Mohammad Rashada or any variations thereof. (Affidavit of Revenue Agent Altenhofen, ¶ 2).

11. An application for a Wisconsin Seller's Permit for M & S, Inc. was filed with the Wisconsin Department of Revenue on or about January 29, 1996. (Affidavit of Revenue Agent Altenhofen, ¶ 3). The Seller's Permit application for M & S, Inc. shows that its principal business was retail clothing. (Affidavit of Revenue Agent Altenhofen, ¶ 3; and Exhibit 15). The Wisconsin Department of Revenue issued to M & S, Inc. a Wisconsin Seller's Permit and assigned it a Seller's Permit number 608793 and 608793B. (Affidavit of Revenue Agent Altenhofen, ¶ 3; and Exhibit 15). M & S, Inc., under its assigned Seller's Permit number, operated three retail clothing stores in the Grand Avenue Mall in Milwaukee, Wisconsin: Viaggio, Georgio's, and Matrix . (Affidavit of Revenue Agent Altenhofen, ¶ 3). Also, M & S, Inc., under its Seller's Permit, operated H H Exclusives at 5500 W. Capitol Drive in Milwaukee, Wisconsin . (Affidavit of Revenue Agent Altenhofen, ¶ 3; and Exhibit 15).

12. According to the Wisconsin Department of Revenue's computer records, M & S, Inc. has a lengthy history of filing its monthly sales and use tax returns

late, which were due by the 20th of each period's succeeding month. (Affidavit of Revenue Agent Altenhofen, ¶ 4). M & S, Inc. also has a lengthy history of not remitting or timely remitting the sales and use taxes due per its returns. (Affidavit of Revenue Agent Altenhofen, ¶ 4). The following is a synopsis of the filing history for M & S, Inc.:

- M & S, Inc.'s monthly sales and use tax returns for January 1996 through September 1996 were filed late, on November 15, 1996, and without remittance of payment.
- M & S, Inc.'s monthly sales and use tax return for October 1996, which was due on November 20, 1996, was filed late on January 29, 1997, with remittance of a partial payment.
- M & S, Inc.'s amended sales and use tax return for October 1996, and monthly sales and use tax returns for November 1996 and December 1996, respectively, were filed on February 6, 1997, without remittance of payments.
- In 1997, five monthly sales and use tax returns for M & S, Inc. were filed late and without payment. Seven of its monthly returns were filed late with partial payments.
- In 1998, five monthly sales and use tax returns for M & S, Inc. were filed late without remittance of payments and seven of its sales and use tax returns were filed with remittance of partial payments.
- In 1999, the January 1999 sales and use tax return for M & S, Inc. was filed with full payment remitted. The February 1999, March 1999, and April 1999 sales and use tax returns for M & S, Inc. were filed on June 11, 1999, without remittance of payments. M & S, Inc.'s sales and use tax returns for May 1999 through September 1999 were filed late without remittance of payments. The October 1999 through December 1999 sales and use tax returns for M & S, Inc. were timely filed with remittance of full payments.
- In 2000, the January 2000 and February 2000 sales and use tax returns for M & S, Inc. were filed late—in March 2000—and the only payment remitted with the returns was full

payment for the January 2000 period. The March 2000 sales and use tax return for M & S, Inc. was timely filed with full payment remitted. M & S, Inc.'s April 2000 and May 2000 sales and use tax returns were timely filed without remittance of payments. M & S, Inc.'s June 2000, July 2000, and September 2000 sales and use tax returns were timely filed with remittance of full payments. M & S, Inc.'s monthly sales and use tax returns for August 2000, October 2000 and November 2000 were filed late in January 2007 and filed without remittance of payments.

(Affidavit of Revenue Agent Altenhofen, ¶ 4).

13. The sales and use tax returns for M & S, Inc., for the periods ending February 28, 1998, June 30, 1998, December 31, 1998, February 28, 1999, March 31, 1999, April 30, 1999, May 31, 1999, June 30, 1999, July 31, 1999, August 31, 1999, September 30, 1999, January 31, 2000, February 29, 2000, April 30, 2000, and May 31, 2000, appear to have been signed by either Larena Scruggs, using variations of her name, or Mr. Rashaed, using variations of his name. (Affidavit of Revenue Agent Altenhofen and Exhibits 16 through 30).

14. The Wisconsin Department of Revenue sent to M & S, Inc. a Notice of Informal Hearing dated April 5, 2001, which was sent via United States Postal Service regular First Class mail to 5500 W. Capitol Drive, Milwaukee, Wisconsin, which is the address for the former Capitol Court Shopping Center. (Affidavit of Revenue Agent Altenhofen, ¶ 5). The Notice was returned as undeliverable with no forwarding address. (Affidavit of Revenue Agent Altenhofen, ¶ 5).

15. In August 2001, the Wisconsin Department of Revenue made a determination to revoke M & S, Inc.'s Wisconsin Seller's Permit as of December 31, 2000,

for failure to timely file its sales and use tax returns and for failure to timely remit the sales taxes due. (Affidavit of Revenue Agent Altenhofen, ¶ 6).

16. The Wisconsin Department of Revenue's records show that it billed M & S, Inc. by issuing Notices of Amount Due for the unpaid sales taxes, including interest, fees and penalties, for the months of February 1998, June 1998, December 1998, February 1999, March 1999, April 1999, May 1999, June 1999, July 1999, August 1999, September 1999, January 2000, February 2000, April 2000, and May 2000. (Affidavit of Attorney Robertson, ¶ 16; and Exhibit 44). M & S, Inc.'s sales tax delinquency for the periods at issue is \$210,236.50, with interest computed to November 1, 2010. (Affidavit of Attorney Robertson, ¶ 16; and Exhibit 45).

17. In September 2001, the Wisconsin Department of Revenue subpoenaed the North Milwaukee State Bank (NMSB) for bank records of M & S, Inc. (Affidavit of Revenue Agent Altenhofen, ¶ 7). The NMSB responded to the subpoena by stating that it had no accounts under that name. (Affidavit of Revenue Agent Altenhofen, ¶ 7). Since the NMSB did not have any accounts under the name of M & S, Inc., the Wisconsin Department of Revenue then issued a subpoena to the NMSB using the names H & H Exclusive and Viaggio, because checks on the account were written payable to the Wisconsin Department of Revenue. (Affidavit of Revenue Agent Altenhofen, ¶ 7). The Wisconsin Department of Revenue also subpoenaed the lease and payment information from the Grand Avenue Mall after determining that M & S, Inc. had multiple businesses registered under its Seller's Permit at that location. (Affidavit of Revenue Agent Altenhofen, ¶ 7).

18. In response to a subpoena issued to the Grand Avenue Mall on September 6, 2001, the Wisconsin Department of Revenue received an answer that listed the trade names used by M & S, Inc. for its leases with Grand Avenue: MMSS Inc. d/b/a Viaggio on their 1998 lease, and NSI Enterprises Inc, d/b/a Viaggio on their 2000 lease. (Affidavit of Revenue Agent Altenhofen, ¶ 8).

19. In January 2002, the Wisconsin Department of Revenue issued a levy on all accounts at the NMSB, using all of the names found on Mr. Rashaed's checks and names listed in the letter received January 15, 2002, from the Grand Avenue Mall. (Affidavit of Revenue Agent Altenhofen, ¶ 9). The levy was in the amount of \$211,891.37. (Affidavit of Revenue Agent Altenhofen, ¶ 9).

20. In January 2002, the NMSB, in response to the levy, contacted Revenue Agent Altenhofen and stated that Mr. Rashaed had multiple accounts at their bank with various names on them but none of them had M & S, Inc.'s Federal Employer's Identification Number (FEIN). (Affidavit of Revenue Agent Altenhofen, ¶ 10). The NMSB also informed the Wisconsin Department of Revenue that some of the accounts had been "transferred to others." (Affidavit of Revenue Agent Altenhofen, ¶ 10). The Wisconsin Department of Revenue then requested that the levy be answered using any account that had Mr. Rashaed's name and the name Viaggio on it. (Affidavit of Revenue Agent Altenhofen, ¶ 10). Under the levy, the Wisconsin Department of Revenue collected \$83.12. (Affidavit of Revenue Agent Altenhofen, ¶ 10).

21. In May 2002, in a phone conversation with the leasing agent for Grand Avenue Mall regarding T F&F, Inc., an entity that Elijah M Rashaed's father had

formed, Revenue Agent Altenhofen was informed that M & S, Inc. was no longer a tenant, that their last store, Viaggio, closed in February 2000, and that they would not be permitted back in the mall. (Affidavit of Revenue Agent Altenhofen, ¶ 12). Revenue Agent Altenhofen received by mail a two-page letter from Grand Avenue, dated May 17, 2002, listing the business entities and trade names used by M & S, Inc. during their tenancy at Grand Avenue Mall, as well as a copy of their lease. (Affidavit of Revenue Agent Altenhofen, ¶ 12). During their tenancy they operated three clothing stores: Matrix, Georgio's, and Viaggio. (Affidavit of Revenue Agent Altenhofen, ¶ 12). All stores operated under M & S, Inc.'s Wisconsin Seller's Permit number. (Affidavit of Revenue Agent Altenhofen, ¶ 12). In addition to M & S, Inc., NSI Enterprises, Inc. d/b/a Matrix, c/o Mohammed Rashaed, was another name that Elijah M. Rashaed, Petitioner, used. (Affidavit of Revenue Agent Altenhofen, ¶ 12). NSI Enterprises did not have a Wisconsin Seller's Permit issued to it. (Affidavit of Revenue Agent Altenhofen, ¶ 12; and Exhibit 31).

22. In May 2003, the Wisconsin Department of Revenue issued a levy to Guaranty Bank, which was served on or about May 29, 2003, on all the accounts at the Guaranty Bank using the names found on Mr. Rashaed's checks and the names Georgio's, H & H Exclusive, Matrix, and Viaggio that were listed in the letter dated May 17, 2002, to the Department of Revenue from the Grand Avenue Mall. (Affidavit of Revenue Agent Altenhofen, ¶ 13). The levy was in the amount of \$228,610.75. (Affidavit of Revenue Agent Altenhofen, ¶ 13). Per Guaranty Bank's response to the

levy, it had no accounts under the names listed. (Affidavit of Revenue Agent Altenhofen, ¶ 13).

23. On March 21, 2005, the Wisconsin Department of Revenue issued to Mohammed Rashada, n/k/a Elijah M. Rashaed, a Notice of Amount Due of an assessment of personal liability in the amount of \$130,957.00, including tax, interest, and penalties, for the unpaid estimated sales and use taxes of M & S, Inc. for the months August 2000, October 2000, November 2000, and December 2000. (Affidavit of Revenue Agent Mickelson, ¶ 5; and Exhibit 5).

24. On behalf of Mr. Rashada (Rashaed), Attorney Michael Stupar filed with the Wisconsin Department of Revenue a Petition for Redetermination dated April 7, 2005, which was received on or about April 8, 2005. (Affidavit of Attorney Robertson, ¶ 7; and Exhibit 6). A Power of Attorney was attached to the Petition for Redetermination. (Affidavit of Attorney Robertson, ¶ 7; and Exhibit 6). The Wisconsin Department of Revenue acted on Mr. Rashada's (Rashaed) Petition for Redetermination by denying it and issued to Mr. Rashada (Rashaed) its Notice of Action letter dated March 8, 2006. (Affidavit of Attorney Robertson, ¶ 7; and Exhibit 7). On behalf of Mr. Rashada (Rashaed), Attorney Stupar filed a Petition for Review with the Wisconsin Tax Appeals Commission objecting to the Wisconsin Department of Revenue's denial of Mr. Rashada's (Rashaed) Petition for Redetermination, which was assigned Docket No. 06-S-116. (Affidavit of Attorney Robertson, ¶ 7; and Exhibit 8).

25. Attorney Robert Stellick represented the Department of Revenue in Docket No. 06-S-116 (Affidavit of Attorney Robertson, ¶ 8).

26. On behalf of Mr. Rashada (Rashaed), Attorney Stupar filed with the Wisconsin Tax Appeals Commission an “Amended Statement of Facts and Objections to the Department of Revenue’s Actions” that is dated September 13, 2006. (Affidavit of Attorney Robertson, ¶ 9; and Exhibit 9). In the Amended Statement of Facts and Objections, it was stated that “Through July 31, 2000, Mr. Rashada controlled the corporation known as M&S Incorporated, which did business under the style and name Viaggio.” (Affidavit of Attorney Robertson, ¶ 9; and Exhibit 9). Also per the Amended Statement of Facts and Objections, “On or about July 31, 2000, Mr. Rashada relinquished control of M&S [*sic*] Incorporated and Viaggio to Dennis Taylor and Debra Taylor.” (Exhibit 9). Dennis Taylor, who is now deceased, was Mr. Rashaed’s father and Debra Taylor was his father’s wife. (See Affidavit of Revenue Agent Altenhofen, ¶ 11).

27. In a letter dated January 12, 2007, which was filed with the Wisconsin Tax Appeals Commission, Attorney Michael Stupar informed then Chairperson Jennifer E. Nashold that M & S, Inc. assigned its trade names to T F&F, Inc. (Affidavit of Attorney Robertson, ¶ 10; and Exhibit 10). Attorney Stupar attached a copy of the Assignment dated December 6, 2000, to his letter. (Affidavit of Attorney Robertson, ¶ 10; and Exhibit 10).

28. In December 2000, Dennis Taylor and Debra Taylor allegedly purchased Viaggio from Mr. Mohomad Rashad, which is a name that Mr. Rashaed, the Petitioner, also used. (Affidavit of Revenue Agent Altenhofen, ¶ 11; and Affidavit of Attorney Robertson, ¶ 11). Viaggio is one of the retail clothing stores that operated

under M & S, Inc.'s Seller's Permit. (Affidavit of Revenue Agent Altenhofen, ¶ 11). A check written on the account of Viaggio-Capitol Court Mall Store, which is dated December 4, 2000, in the amount of \$12,000 for the first installment payment on the purchase of Viaggio, is made payable to Mohomad Rashad and on the signature line for the check it shows the name Debra Taylor. (Affidavit of Revenue Agent Altenhofen, ¶ 11; and Exhibit 32).

29. On January 19, 2007, the Wisconsin Department of Revenue received via United States Postal Service mail M & S, Inc.'s sales and use tax returns for the months August 2000, October 2000, and November 2000, which were signed by Mr. Rashada (Rashaed). (Affidavit of Revenue Agent Altenhofen, ¶ 14). M & S, Inc.'s Wisconsin sales and use tax returns for August 2000, October 2000, and November 2000 appear to have been signed by Mr. Rashada (Rashaed). (Affidavit of Attorney Robertson, ¶ 11; and Exhibit 11). The Wisconsin sales and use tax return for December 2000 was filed for T F&F, Inc. and not under the name of M & S, Inc. (Affidavit of Attorney Robertson, ¶ 11; and Exhibits 11 and 32).

30. After Petitioner filed the Wisconsin sales and use tax returns for M & S, Inc., the parties involved in Docket No. 06-S-116 entered into a written Stipulation that was signed and filed with the Wisconsin Tax Appeals Commission in February, 2007. (Affidavit of Attorney Robertson, ¶ 12 and Exhibit 12). Per the Stipulation, it was stipulated and agreed that on the returns filed by Petitioner, Mr. Rashada (Rashaed), for August, October, and November, 2000 for the entity M & S, Inc., the Wisconsin Department of Revenue, Respondent, reduced the estimated tax

assessment against M & S, Inc. to the return amounts. (Affidavit of Attorney Robertson, ¶ 12; and Exhibit 12). It was further stipulated and agreed that the reduction also applied to the personal liability of the Petitioner for tax, penalty and interest. (Affidavit of Attorney Robertson, ¶ 12). It was further stipulated and agreed that based on the sales and use tax return filed for December, 2000 by the entity T F&F, the Wisconsin Department of Revenue reduced the estimated tax assessment for the December 2000 period against M & S, Inc. to zero. (Affidavit of Attorney Robertson, ¶ 12; and Exhibit 12). It was further stipulated and agreed that the reduction also applied to the personal liability of Mr. Rashada (Rashaed) for the same period. (Affidavit of Attorney Robertson, ¶ 12; and Exhibit 12). The Commission in Docket No. 06-S-116 issued an Order dated February 15, 2007, affirming the Department's action, as modified. (Affidavit of Attorney Robertson, ¶ 12; and Exhibit 12).

31. By November 3, 2009, the Wisconsin Department of Revenue had collected \$6,382.63 from Mr. Rashada (Rashaed) on the stipulated amount in Docket No. 06-S-116. (Affidavit of Revenue Agent Thomas Byrne, ¶ 4).

32. On March 2, 2006, Attorney Michael Stupar faxed to the Wisconsin Department of Revenue a Power of Attorney for Mohammed Rashada, which was signed by Mr. Rashada, who is now known as Elijah M. Rashaed. (Affidavit of Attorney Robertson, ¶ 13; and Exhibit 13). On February 6, 2009, Attorney Michael Stupar faxed to the Wisconsin Department of Revenue a power of attorney for Elijah Mohammad Rashaed, which was signed by him. (Affidavit of Attorney Robertson, ¶ 13; and Exhibit 14). The Powers of Attorney show that Petitioner used various names

during his involvement with M & S, Inc. (Affidavit of Attorney Robertson, ¶ 13; and Exhibits 13 and 14).

33. The Wisconsin Department of Revenue issued to Mohammed Rashada, n/k/a Elijah M. Rashaed, a Notice of assessment of personal liability dated March 21, 2005, for the unpaid withholding taxes of M & S, Inc., for the periods 1999 WT-7, the annual reconciliation withholding tax report, January 2000 through September 2000, and 2000 WT-7, the annual reconciliation withholding tax report. (Affidavit of Revenue Agent Mickelson, ¶ 3 and Affidavit of Revenue Agent Byrne, ¶ 3). The total amount assessed was \$23,646.44, which amount went delinquent because Mr. Rashada (Rashaed) did not appeal the assessment. (Affidavit of Revenue Agent Mickelson, ¶ 3 and Affidavit of Revenue Agent Byrne, ¶ 3). Mr. Rashaed subsequently paid the delinquent assessment of personal liability for withholding taxes that were issued in the name of Mohammed Rashada. (Affidavit of Revenue Agent Mickelson, ¶ 3).

34. In January 2006, Revenue Agent Byrne was assigned the collection case of the personal liability assessed March 21, 2005, to Mohammed Rashada, n/k/a Elijah M. Rashaed, the Petitioner, for the unpaid withholding taxes of M & S, Inc. for the periods 1999 WT-7, the annual reconciliation withholding tax report, January 2000 through September 2000, and 2000 WT-7, which went delinquent and became final. (Affidavit of Revenue Agent Byrne, ¶ 3). Michael Stupar, the Attorney for Mr. Rashada (Rashaed), telephoned Revenue Agent Byrne on May 3, 2006, and stated that Mr. Rashada (Rashaed) would start making monthly payments of \$1,000 on

the assessment for personal liability for the unpaid withholding taxes of M & S, Inc. that went delinquent. (Affidavit of Revenue Agent Byrne, ¶ 3). From June 2006 to October 2009, the Wisconsin Department of Revenue collected from Mr. Rashada (Rashaed) \$24,717.85 on the delinquent assessment for personal liability for the unpaid withholding taxes of M & S, Inc. (Affidavit of Revenue Agent Byrne, ¶ 3). Mr. Rashada (Rashaed) did not always timely make the \$1,000 monthly payments as agreed, but all payments made were voluntary. (Affidavit of Revenue Agent Byrne, ¶ 3). No amounts were ever collected using involuntary collection techniques. (Affidavit of Revenue Agent Byrne, ¶ 3).

35. In September 2008, Revenue Agent Altenhofen noticed that no personal liability assessment was made for M & S, Inc.'s unpaid sales and use taxes for the periods under review and discussed the matter with his supervisor and Revenue Agent Thomas Byrne. (Affidavit of Revenue Agent Altenhofen, ¶ 16). A request was then made to Catherine Bink, the Wisconsin Department of Revenue's Compliance Bureau Director, to personally assess Mr. Rashaed (the Petitioner) for the unpaid sales and use taxes of M & S, Inc. for the periods ending February 28, 1998, June 30, 1998, December 31, 1998, February 28, 1999, March 31, 1999, April 30, 1999, May 31, 1999, June 30, 1999, July 31, 1999, August 31, 1999, September 30, 1999, January 31, 2000, February 28, 2000, April 30, 2000, and May 31, 2000. (Affidavit of Revenue Agent Altenhofen, ¶ 16).

36. In September 2008, the Wisconsin Department of Revenue gathered evidence to personally assess Elijah M. Rashaed for the unpaid sales and use

taxes of M & S, Inc. for the periods ending February 28, 1998, June 30, 1998, December 31, 1998, February 28, 1999, March 31, 1999, April 30, 1999, May 31, 1999, June 30, 1999, July 31, 1999, August 31, 1999, September 30, 1999, January 31, 2000, February 29, 2000, April 30, 2000, and May 31, 2000. (Affidavit of Revenue Agent Byrne, ¶ 5 and Affidavit of Revenue Agent Mickelson, ¶ 4). On October 30, 2008, the Wisconsin Department of Revenue issued a subpoena to Guaranty Bank and issued one to the North Milwaukee State Bank to obtain bank information on M & S, Inc. (Affidavit of Revenue Agent Byrne, ¶ 5). The Guaranty Bank, under the letter dated November 4, 2008, responded to the subpoena by stating that it could not locate any information on M & S, Inc. (Affidavit of Revenue Agent Byrne, ¶ 5; and Exhibit 36). On February 3, 2009, the Wisconsin Department of Revenue received subpoenaed information from the North Milwaukee State Bank, which consisted of bank statements for the account of Mohammed Rashaed, another name that Petitioner Elijah Rashaed used, d/b/a H&H Exclusive/Viaggio located at 5500 W. Capitol Drive in Milwaukee, Wisconsin. (Affidavit of Revenue Agent Byrne, ¶ 5). Also under the subpoena, the Wisconsin Department of Revenue received copies of some of the checks written on Viaggio's checking account in 1998 and 1999. (Affidavit of Revenue Agent Byrne, ¶ 5). The bank evidence shows that checks were written on Viaggio's account to pay others instead of the Wisconsin Department of Revenue. (Affidavit of Revenue Agent Byrne, ¶ 5; and Exhibit 37).

37. The Wisconsin Department of Revenue wrote a letter dated February 3, 2009, to Elijah Rashaed, a/k/a Mohammed Rashada, which was mailed to

him. (Affidavit of Revenue Agent Byrne, ¶ 6). In the letter, Mr. Rashaed was informed that interviews were being conducted to establish personal liability for the delinquent account of M & S, Inc. (Affidavit of Revenue Agent Byrne, ¶ 6; and Exhibit 38).

38. Revenue Agents in the Wisconsin Department of Revenue's Compliance Unit are required to enter notes in the Department's computer systems on actions that Revenue Agents take on delinquent accounts. (Affidavit of Revenue Agent Altenhofen, ¶ 15; and Exhibits 33, 34, 35, and 39).

39. The records of the Wisconsin Department of Financial Institutions show that an entity known as MMSS, Inc. was incorporated in Wisconsin on January 23, 1996, and was administratively or involuntarily dissolved on July 8, 2008. (Affidavit of Attorney Robertson, ¶ 15; and Exhibit 42). On or about January 23, 1996, MMSS, Inc. filed with the Wisconsin Department of Financial Institutions its Articles of Incorporation that show the Petitioner, who used the name of Mohammed Bell, as the incorporator of MMSS, Inc. (Affidavit of Attorney Robertson, ¶ 15; and Exhibit 43). The Petitioner signed the Articles of Incorporation as the incorporator and listed his address as 161 West Wisconsin Avenue in Milwaukee, Wisconsin, which is the address for the Grand Avenue Mall where he operated the retail clothing stores under M & S, Inc.'s Wisconsin Seller's Permit. (Affidavit of Attorney Robertson, ¶ 15; and Exhibit 43). Per the Articles of Incorporation, Larena Scuggs, at the same address as the incorporator, was the registered agent for MMSS, Inc. (Affidavit of Attorney Robertson, ¶ 15; and Exhibit 43). MMSS, Inc. did not change its name. (Affidavit of Attorney Robertson, ¶ 15; and Exhibit 42). MMSS, Inc. was incorporated less than a week before an

application for a Wisconsin Seller's Permit was filed for M & S, Inc. (Affidavit of Attorney Robertson, ¶ 15 and Affidavit of Revenue Agent Altenhofen, ¶ 3; and Exhibit 15).

40. The Wisconsin Department of Revenue has an internal policy that encourages its Revenue Agents, whenever possible, to complete personal liability investigations within a four-year time limit. (Affidavit of Director Catherine Bink, ¶ 2). For the Department of Revenue's internal operations only, if the investigation is not completed within that time, then a request to issue an assessment after the four-year time period is to be made. (Affidavit of Director Bink, ¶ 2). The Revenue Agents for the Wisconsin Department of Revenue are informed in training that there is no statutory time period for issuing an assessment of personal liability for unpaid sales taxes under § 77.60(9), Wis. Stats. (Affidavit of Director Bink, ¶ 3).

RULING

The Petition for Review raises three issues for the Commission to consider:

1. Whether the taxpayer is personally responsible under Wis. Stat. § 77.60(9) for the assessment made by the Department on March 6, 2009.
2. Whether the amount of the assessment is correct, and
3. Whether the assessment is timely as the assessment is over 10 years old.

After reviewing the Petition for Review, Respondent filed a motion for summary judgment. A summary judgment must be granted if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980), citing Wis. Stat. § 802.08(2).

I. Personal Liability

For a person to be personally liable for a sales tax assessment, the Department of Revenue must establish these three elements:

1. Taxpayer had authority to make, or direct, payment of the taxes.
2. Taxpayer had a duty to make, or direct, payment of the taxes.
3. Taxpayer willfully breached that duty.

The three elements above are discussed in the following cases: *Barbara Bice v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-496 (WTAC 2000); *Mark J. Kuzniewski v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-471 (WTAC 2000); *Joseph A. Balestrieri v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-373 (WTAC 1998); *Lepp v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶203-125 (WTAC 1990); and *Gould v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶203-319 (WTAC 1992).

The Petition for Review in this case alleged that the taxpayer did not meet the definition of a responsible officer under Wis. Stat. § 77.60(9). However, in footnote 5, to his brief filed on December 20, 2010, the Petitioner writes:

Petitioner does not contest at this stage, the determination that he was responsible party under § 77.59 for M & S, Inc.'s unpaid taxes. While this issue was raised in his Petition for

Review, the discovery made available to [P]etitioner's new legal counsel, which included a stipulation by him and his prior counsel to his personal liability into August, October and November, 2000, in Docket No. 06-S-110, precludes the issue. Petitioner's new counsel had not been made aware of this stipulation as of the filing of the Petition for Review on March 24, 2010. (Walrath Affidavit, ¶¶5,6).

Respondent found this language to be ambiguous and went on to provide the evidence necessary to prove personal liability. The Commission finds that Petitioner conceded the issue of personal liability in the footnote to his brief. In that footnote, Petitioner stipulated that he was personally liable for the sales taxes of M & S, Inc. for August, October and November of 2000. (Affidavit of Attorney Sheree Robertson, Exhibit 12, Item 1.) The footnote to Petitioner's brief states that this stipulation precludes the issue. As *Polan v. Dept. of Revenue*, 147 Wis. 2d 648, 433 N.W.2d 640, 660 (Ct. App. 1988) states, "We deem abandoned a position turning on a point of law known to exist but not briefed or argued." Petitioner has not raised or argued this issue in his briefs and thus the Commission finds it abandoned.

II. Correctness

The second issue raised in the Petition for Review is the correctness of the assessment. Assessments by the Department are presumed to be correct and Petitioner must show by clear and convincing evidence that they are incorrect. *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

In this case, Petitioner raised the issue of correctness in the Petition for Review but never briefed it, argued it, or provided any evidence to overcome the

presumption. Since no evidence was introduced to contradict the presumption, the presumption stands and the assessment is correct.

III. Timeliness

The third issue that Petitioner raises is the timeliness of the assessment. The assessment was made in March 2009, but refers to sales-related liabilities beginning on February 1, 1998, and ending on May 31, 2000.

Petitioner argues that the Department is barred from making the assessment because it allegedly violated a self-imposed four-year policy of limitation. Because of this, according to the Petitioner, the Department should be equitably estopped from enforcing the assessment.

There is no statutory time period for limiting the Department from issuing an assessment for personal liability in sales tax cases. Wis. Stat. § 77.60(9) makes it clear that personal liability survives the dissolution of corporations and is not limited by the four-year statute of limitations in Wis. Stat. § 77.59(3).

Petitioner talks about an internal policy of the Department which limits sales tax assessments more than four years old, but the record does not cite a place where this policy exists in writing. Respondent admitted to having an internal policy of attempting to complete investigations within four years, but this was not required by the law. In this case, the assessment was made in 2009 for unpaid sales taxes dating back to 1998. Since this was more than four years old, Respondent's internal policy was to request permission from a supervisor before issuing the assessment. Petitioner tries to invoke the doctrine of equitable estoppel to prevent the Department from enforcing

the assessment. Petitioner cites *Dep't of Revenue v. Moebius Printing Co.*, 89 Wis. 2d. 610, 634, 279 N.W.2d 213 (1979), for the proposition that estoppel may be available as a defense against the government, if the government's conduct would work a serious injustice to a taxpayer. Clearly, equitable estoppel does not apply to this case. The government's conduct was to lawfully investigate the personal liability of Petitioner for sales tax. Its conduct of investigating and issuing an assessment in 2009 was within the law and did not result in any injustice to taxpayer.

Finally, the Petitioner argues that Wis. Stat. § 77.60(9) is unconstitutional under the Equal Protection Clause of the United States Constitution. It is unnecessary to address this argument as the Commission does not generally have the authority to declare a statute unconstitutional.³

After analyzing the issues raised by the Petition for Review, the Commission concludes that there is no genuine issue as to any material fact and therefore grants Respondent's motion for summary judgment.

There remains the issue of whether the appeal is frivolous under Wis. Stat. § 73.01(4)(am). That section allows the Commission to assess damages of up to \$1,000 against the taxpayer whenever it appears to the Commission that taxpayer's position is frivolous or groundless.

The Commission chooses not to assess the taxpayer under Wis. Stat. § 73.01(4)(am). While the issue of personal liability raised in the Petition for Review

³ See, generally, *Mark Joseph Rell and Marie Anne Rell v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-580 (WTAC 2001)

caused the Department to spend time and effort working on this case, Petitioner eventually abandoned the issue. However, in our view, the issue of the timeliness of the assessment was arguable enough to defeat the claim that the entire appeal was frivolous. Therefore,

IT IS ORDERED

1. Respondent's motion for summary judgment is granted.
2. Petitioner's Petition for Review is dismissed.
3. No assessment against Petitioner is made pursuant to Wis. Stat. § 73.01(4)(am).

Dated at Madison, Wisconsin, this 13th day of July, 2011.

WISCONSIN TAX APPEALS COMMISSION

Roger W. Le Grand, Acting Chairperson

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"