

01
02
03
04
05
06
07
08
09
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
00

BENDER DANIEL CAROL 03CV79 012804 WOOD CTY CIR CT

DANIEL J. BENDER and
CAROL J. BENDER,

Petitioners,

Case No. 03CV79

-v-

COPY
DECISION

STATE OF WISCONSIN
DEPARTMENT OF REVENUE,

Respondent.

FACTS

In July 1998, the period under review, Mr. Bender was the president, treasurer, and majority stockholder of the corporation, and Ms. Bender was the vice-president of the corporation. Mr. Bender's authority for the corporation included hiring and firing employees, paying bills, doing the banking, placing orders, handling maintenance and deliveries, and generally managing the business. Ms. Bender performed services for the corporation such as running errands.

During July 1998, the corporation received at least 15 shipments of motor vehicle fuel ("fuel") from Phillips 66 Company ("Phillips"), a division of Phillips Petroleum Company. The corporation did not pay Phillips for the fuel, but sold the fuel to its customers in Wisconsin and deposited customer payments into its business checking accounts.

The corporation had business checking accounts in the Nekoosa Port Edwards State Bank, in Nekoosa, Wisconsin; the Whiting Plover Credit Union, in Stevens Point, Wisconsin; and the Wood County National Bank, in Wisconsin Rapids, Wisconsin. Both

petitioners had check-signing authority for the business accounts in the three financial institutions.

In July and August 1998, substantial deposits (i.e., far exceeding \$20,000) were made into each business checking account, and these funds were available to pay creditors. Checks bearing Mr. Bender's signature were drawn on the business accounts in the two banks for purchases (e.g., to the U.S. Postal Service) and to pay creditors (including Phillips), attorneys, an employee, February through August 1998 sales taxes, and January through August 1998 withholding taxes.

The corporation collected the fuel tax on each sale of fuel to its customers, but did not remit the taxes due to the Department on sales made during July 1998.

Phillips provided the Department with substantiation that it was unable to recover the fuel tax from the corporation pursuant to Wis. Stat. §78.01(25). The Department then issued a Notice of Entitlement to Tax Credit to Phillips for the fuel tax on the motor fuel the corporation failed to pay Phillips for, and issued a personal liability assessment for the fuel tax to each petitioner.

The duty of L.L. Bender Oil Corp. to pay the tax is clear. §78.12(3) states in material part that, "Any person . . . (L.L. Bender Oil Corp. is a person under §77.51(10) and §78.70(6)) who is not a licensee (L.L. Bender Oil Corp. is not a licensee - undisputed fact) who has possession of any motor vehicle fuel . . . (undisputed that L.L. Bender Oil Corp. was in possession of fuel, sold it to its customers and collected the tax) upon which the motor vehicle fuel tax has not been paid . . . (Phillips 66 paid the tax and, because they were not paid by L.L. Bender Oil. Corp., received a credit against a later remittance of taxes §78.01(2s). The tax has therefore not been paid) shall file a

report and pay the tax on that motor vehicle fuel. (L.L. Bender Oil is required to comply with this subsection - nothing exempts them) and shall be subject to this subchapter in the same manner as is provided for licensees, (making the licensee issue beside the point).

The only fair and common sense reading of §78.12(3) is that it imposed the duty to pay the tax, if not to a supplier, then to the taxing authority.

This conclusion is supported in three ways: 1.) by reading Chapter 78 in pari materia; 2.) by giving due deference to the Tax Appeals Commission as required by law; 3.) as a matter of public policy.

Chapter 78

It is undisputed that a tax is imposed on all motor vehicle fuel sold in this state. The cost of the tax is ultimately born by the user of the fuel, the person who pays at the pumps. Chapter 78 sets out a statutory scheme for the collection of the tax by requiring each purchaser, at any level, to pay the tax. Each subsequent may recoup that payment from each subsequent purchaser until the payment of the tax trickles down to the guy at the pump. Once the tax is paid at the pump to the seller, in this case L.L. Bender Oil Corp., §78.79 imposes a trust on those tax funds until ". . . all moneys received by . . . other persons, and in their hands and due the state are recovered and collected". This is not a very tricky concept and one with which the officers of L.L. Bender Oil Corp. ought to be familiar since that company was in business for some time prior to July 1998. It is absolutely clear that one who has tax money in their hands must use it to pay taxes unless exempted by §78.01(2s). The attempt to wiggle out of this obligation by verbal legerdemain doesn't work. Licensee or not, L.L. Bender Oil Corp.

had collected tax money and used it for purposes other than that for which it was earmarked.

Deference to the Commission

In a review of any decision of an administrative agency, the court may give deference to interpretation of statutes, rules and regulations concerning which the agency has experience. See *Kelley Co. v. Marquardt*, 172 Wis.2d 234, 493, N.W.2d 68 (1992). Here the Tax Appeals Commission has experience, competence, and knowledge of tax law. Their interpretation of Chapter 78, although not binding, is to be given due weight.

The Tax Appeals Commission has interpreted §78.12(3) to impose liability on the corporation regardless of its license status. "Any other reading of this statute would allow a purchaser or seller of motor fuel to avoid paying to the Department the fuel tax it collects by refusing to become licensed or by surrendering its license. This would lead to an absurd conclusion which we may not accept" Commission Ruling and Order, p.8. This court independently reached the same conclusion as noted above. Once the liability of the corporation to pay the tax is established, §78.70(6) clearly authorizes the Department to collect the tax from any officer, etc. It is hornbook law that officers of corporations have the duty to see to it that corporate obligations are satisfied. While the petitioners argue that the Benders only have the authority to pay bills, they overlook the ancient principle that every right imposes a corresponding duty. The duty to pay the tax is clearly imposed by §78.70(6). Whether or not either Daniel or Carol can be relieved of the liability to pay the tax is a moot point because both were officers and the operation of Chapter 766, Marital Property Law, imputes the debt to both.

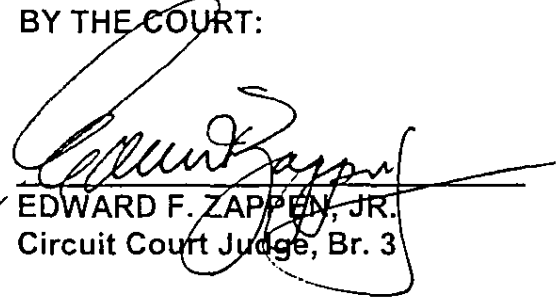
Public Policy

When a tax is imposed and then collected, such as a sales tax, a tobacco tax or a fuel tax, that tax must be paid. As the Commission notes at p. 7. "Why should the corporation collect and keep the tax from the consumer on fuel the corporation never paid its supplier for?" Put another way, why should the Wisconsin taxpayers absorb the deficit created when the corporation had the tax money in hand and then used it for other purposes.

The decision of the Tax Appeals Commission is affirmed.

Dated this 28th January, 2004.

BY THE COURT:



EDWARD F. ZAPPEN, JR.
Circuit Court Judge, Br. 3