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**DISTRICT IV**

June 9, 2011

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2010AP1989

David J. Longrie and Audree Longrie v. Wisconsin Department of  
Revenue (L.C. #2010CV107)

Before Higginbotham, Sherman and Blanchard, JJ.

David Longrie appeals a judgment of the circuit court affirming a decision and order of the Wisconsin Tax Appeals Commission, which affirmed the Department of Revenue's disallowance of verified cost of goods sold expenses for the tax years 1994-95. Based upon our review of the briefs and record, we conclude at conference that the case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2009-10).<sup>1</sup> We affirm.

In 1997, the DOR initiated income tax and sales tax field audits of David, David's wife, Audree Longrie, and David's business, Carpet Warehouse. The audits were repeatedly postponed at David's request, David failed to meet with the DOR auditor, David failed to

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

provide the auditor access to any books or records, and David failed to provide the DOR with any records relating to the audits until 2006.

In 2006, the DOR auditor finalized the audits based on the information the DOR had in its file. For the years 1994-1999, the DOR issued an income tax assessment against David and Audree in excess of one million dollars.<sup>2</sup> According to the DOR, the assessment was based on its inclusion of unreported income in the Longries' gross income and its disallowance of fifty percent of David's business expense deductions on Schedule C of their federal income tax returns for each year at issue due to unsubstantiated expenses generally related to David's business, Carpet Warehouse.

The Longries petitioned the DOR for a redetermination of the income tax assessment. Based on additional information provided by the Longries, the DOR reduced the assessment to a total of \$372,960.02. The Longries then filed petitions for review with the Wisconsin Tax Appeals Commission. Prior to the hearing before the Commission, David provided the DOR with additional documentation. Based on this additional information, the DOR made additional adjustments to the income tax assessments, reducing the total assessment to \$301,654.72.

Following a hearing at which only David participated, the Commission affirmed the DOR's income tax assessment. The Commission concluded that David failed to overcome the presumption of correctness attached to the assessment. The Commission found that David had failed to present any documentary evidence to substantiate his claim that the DOR's adjustments to his federal income tax returns were incorrect and, without such evidence, the Commission

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<sup>2</sup> The DOR also issued a sales tax assessment against David for calendar years 1994-1999, which David also appealed. That assessment is not at issue in this appeal.

would “not attempt to second-guess the [DOR’s] estimates and determinations regarding the amounts at issue.” The circuit court affirmed the Commission’s decision and David appeals.

“On appeal from the Commission, we review the Commission’s decision, not the decision of the circuit court ....” *Nestle USA, Inc. v. Wisconsin Dept. of Revenue*, 2011 WI 4, ¶22, 331 Wis. 2d 256, 795 N.W.2d 46. The agency’s findings will be upheld so long as there is substantial evidence supporting the findings. *Id.*, ¶23. “Substantial evidence is that degree of evidence which would allow a reasonable mind to reach the same conclusion as the agency.” *Schwartz v. Wisconsin Dept. of Revenue*, 2002 WI App 255, ¶14, 258 Wis. 2d 112, 653 N.W.2d 150.

The DOR’s assessment is “entitled to a presumption of correctness which may be overcome only if the challenging party presents significant contrary evidence.” *Nestle USA, Inc.*, 331 Wis. 2d 256, ¶23; WIS. STAT. § 70.995(13).

David contends the Commission erred in affirming the DOR’s income tax assessment because the DOR erroneously disallowed a portion of his Schedule C cost of goods sold deductions for the tax years 1994 and 1995 and, thus, the DOR failed to make the correct assessment. David argues that through purchase invoices produced by him prior to the hearing before the Commission, the DOR was able to verify that he had costs of goods sold expenses in 1994 and 1995 in excess of what he claimed in his income tax returns for those years and, therefore, the DOR erred in not allowing the entirety of what he originally claimed for that deduction for those years. The DOR argues in response that “David was required to establish that [its] computation of entire net income, as opposed to [its] allowance for a particular deduction, was demonstrably unfavorable to [him].” The DOR further argues that David failed

to establish that it overstated David's net income and the corresponding amount of tax due in either 1994 or 1995.

David fails to identify any evidence rebutting the presumption of correctness given to the DOR's assessment. *See Nestle USA, Inc.*, 331 Wis. 2d 256, ¶24. David refers generally to purchase invoices, which are included in fifteen boxes of documents. However, purchase invoices are bills, not evidence of payment, and David refused to provide the DOR with his general ledger or bank statements to verify that the invoices were actually paid. David has thus "failed to present sufficient contrary evidence to rebut the presumption" and thus failed to satisfy his burden of persuasion. *Id.*

Furthermore, David effectively concedes the DOR's position by failing to counter in a reply brief the DOR's contentions that he bore the burden of establishing that the DOR's computation of his entire net income for 1994 and 1995 was demonstrably unfavorable to him and that he failed to meet his burden. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may take as a concession the failure in a reply brief to refute propositions in a responsive brief).

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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A. John Voelker  
Acting Clerk of Court of Appeals