

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

DANE COUNTY

TERRILL J. MARXER

Petitioner,

vs.

Case No. 2011 CV 4783

WISCONSIN DEPARTMENT OF REVENUE

Respondent.

SEP 25 2012

DECISION AND ORDER

Background

Terrill Marxer, a/k/a T.J. Marxer, was assessed tax by the Wisconsin Department of Revenue (DOR) in the amount of \$35,625.00 in a Notice of Amount Due dated November 26, 2006. That represented an assessment for personal liability for sales and use taxes owed by Marc's Brothers, Inc., a Nevada corporation, for the period September 1, 2002 thru March 31, 2004. Mr. Marxer's petition for redetermination was denied by the Department in July of 2009. His appeal to the Wisconsin Tax Appeals Commission was denied on July 15, 2011. He now appeals the Department's Decision to the Circuit Court of Dane County, Branch 3 and this Court determines that the record before the Court supports the findings of the Wisconsin Tax Appeals Commission that Terrill Marxer is personally responsible for the general sales and use tax for Marc's Brothers, Inc. The Court further finds that the record supports the tax assessment against Terrill Marxer in the amount of \$35,625.00 plus interest and penalties.

Statement of Facts

Marc's Brothers, Inc. ("hereinafter MBI") was a Nevada corporation created to operate a used car dealership and was initially owned in equal one-third (33%) shares by Marc Baldwin, Terrill Marxer, and Jack Elsinger. (WTAC R. 31:124; WTAC R. 11, Ex. 8). By the time MBI went out of business, Marxer owned two-thirds (66%) of the company through the signing over of shares by Jack Elsinger. (WTAC R. 31:124). Aside from being an owner of MBI, also listed himself as a manager of the company as well. (WTAC R. 11: Ex. 14) Marxer had keys to the business and could be found there on a regular basis. (WTAC R. 31:54). Although there was a dispute as to whether Marxer reviewed MBI's mail, his access to the mail is acknowledged. (WTAC R. 31).

Marxer established a checking account for MBI at The Pineries Bank and was the only authorized signatory on the account. (WTAC R. 31:113-15; WTAC R. 11: Ex. 18). The bank statements for MBI went to Marxer's home and he had additional access to the documents as the signatory. (WTAC R. 31:113-15). Marxer signed the majority of checks written on behalf of the company. (WTAC R. 11: Ex. 15). This included checks written to third parties dated between September 2002 and March 2004, when the underlying sales tax assessments occurred. (Id.). None of the checks signed by Marxer were made to pay the sales taxes on the cars sold by MBI. (WTAC R. 31:114).

MBI obtained a Seller's Permit to collect and remit sales taxes. (WTAC R. 11: Ex. 21). Sales taxes were collected on cars sold by MBI and placed into the company's bank account. (WTAC R. 31:111). MBI failed to file sales tax returns beginning in September 2002 through March 2004. (Id at 28-31). Marxer was aware that sales taxes

were due on cars that were sold. (Id. at 111). Additionally, testimony was given at the Commission hearing that payments of sales taxes were the responsibility of Baldwin and Marxer. (Id. at 84)

In response to the lack of required sales tax filings by MBI, the Department of Revenue made estimated sales tax adjustments of \$1,875.00 against the company for each month that tax returns were not filed, including interest and penalties. (Id. at 27). These estimates were made intentionally high in order to get the attention of the Seller so that they would submit the required forms and have the amount reduced. (Id.). The required forms for the period of September 2002 until March 2004 were never submitted to the Department of Revenue. (Id at 29-30). At the Commission hearing, none of MBI owners were aware of the amount of sales that the company made. (WTAC R. 31). Additionally, Marxer never submitted any records of the actual amounts of sales by MBI to the Department of Revenue. (Id at 127-133). Nor did he submit records of the actual amounts of sales by MBI in evidence to the Commission. (Id.).

Discussion

A reviewing court employs the “substantial evidence” test when reviewing an administrative agency’s factual determinations. *RURAL v. PSC*, 2000 WI 129, ¶ 20, 239 Wis. 2d 660, 619 N.W.2d 888 (2000) (internal citation omitted). This means that the agency’s factual determinations will be upheld upon review if “...reasonable minds could arrive at the same conclusion as the agency.” *Id.* Therefore, even if a reviewing court may not agree that an agency’s conclusion is the only reasonable decision that could be reached; the “substantial evidence” test requires only that the agency’s determination be a

reasonable one. As the Court of Appeals has concluded, “The agency’s decision may be set aside by a reviewing court only when, upon examination of the entire record, the evidence, including the inferences therefrom, is such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences.”

Wisconsin Bell, Inc. v. PSC, 2004 WI App 8, ¶ 23, 269 Wis. 2d 409, 675 N.W.2d 242 (Ct. App. 2004) (internal citation omitted).

I. Substantial evidence exists to find Marxer personally liable for the tax assessments against MBI.

Under Wis. Stat. § 77.60(9), personal liability for unpaid sales and use taxes, including interest and penalties, may be imposed on a responsible person within the business. A “person” under the subsection is described as any “officer, employee or other responsible person of a corporation or...limited liability company...who, as such officer, employee, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.” *Id.*

The Wisconsin Tax Appeals Commission has held that for a person to be held liable under Wis. Stat. 77.60(9) three elements must be met: (1) The individual had the authority to pay, or to direct the payment of, the taxes; (2) The individual had the duty to pay, or to direct the payment of, the taxes; and (3) The individual intentionally breached that duty. *See Field v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-102 (March 19, 2008), *aff’d*, Wisconsin Circuit Court for Dane County, Branch 14, No. 08-CV-1766, (June 25, 2009), *aff’d*, Wisconsin Court of Appeals, No. 2009AP1746 (June 24, 2010).

Intentional breach of the duty occurs whenever a responsible person has paid other third parties when taxes were due and unpaid. *Id.*

Substantial evidence exists for the Wisconsin Tax Appeals Commission to have found all elements of Wis. Stat. § 77.60(9). First, Marxer was an owner of MBI. (WTAC R. 31:124). Marxer opened MBI's checking account and was the sole signatory for that account. (WTAC R. 31:113-115; WTAC R. 11: Ex. 18). He used the business checking account to make payments to varying third parties while the business was operational. (WTAC R. 11: Ex. 18). His control over the business and the checking account is sufficient evidence to find the first element of the statute that Marxer had the authority to pay the sales taxes.

Aside from being an owner of MBI and having control of the company checking account, Marxer also had keys to the business and held himself out as a manager of MBI. (WTAC R. 11: Ex. 14; WTAC R. 31:54). Marxer was also aware that sales taxes were due on cars that the business sold. (WTAC R. 31:111). Another owner of MBI stated that Marxer was responsible for paying the sales taxes of the business. (WTAC R. 31:84). His position as an owner and manager of the company coupled with his knowledge of the taxes due and ability to pay those taxes is sufficient evidence to find the second element of the statute that Marxer had the duty to pay the sales taxes.

MBI failed to file the required sales tax forms between the period of September 2002 and March 2004. (WTAC R. 31:27). As such, the Department of Revenue made tax adjustments against MBI during that period. (WTAC R. 11: Ex. 5). Although MBI had assets to pay the sales taxes, as indicated by payments from the business checking

account to other third parties, no payments were made to the Department of Revenue. (WTAC R. 31:114; WTAC R. 11: Ex. 15). Because Marxer made payments to third parties while the sales taxes were due to the Department of Revenue, there is sufficient evidence to find the third element of the statute that Marxer breached his duty to pay the sales taxes.

II. The record supports the tax assessment against Marxer as the Department of Revenue's assessment is presumed to be correct and Marxer failed to rebut that presumption.

A party assessed a tax by the Department of Revenue bears the burden of proving the assessment is in error. *All City Communication Co., Inc. v. State Dep't of Revenue*, 2003 WI App 77, ¶ 7, 263 Wis.2d 394, 661 N.W.2d 845 (Ct. App. 2003); citing *Woller v. Dep't of Taxation*, 35 Wis.2d 227, 151 N.W.2d 170 (1967). This presumption cannot be overcome by the oral testimony of an interested party when it is not substantiated by other documentation. *Dvorak v. Wisconsin Dep't of Revenue*, Wis. Tax. Rptr. [CCH] ¶ 400-600 (April 30, 2002), *affd*, *Dvorak v. Wisconsin Dep't of Revenue*, Wisconsin Circuit Court, Case No. 02-CV-005292, (Nov. 25, 2002); citing *Havas v. Comm'r*, 7302 USTC ¶ 9561 (9th Cir. 1973).

In this case, Marxer provides no documentary evidence to support his accusation that the tax assessment is incorrect. (WTAC R. 31:127-33). His only evidence was unsupported claims he made during the Commission hearing. (*Id.*) Although the agents of the Department of Revenue stated the assessment was intended to be intentionally high, this did not relieve Marxer of his burden to prove the assessment was in fact in

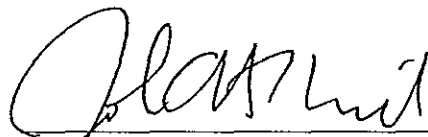
error. As Marxer failed to provide any documentary support for his assertions, the presumption of the Department of Revenue should be upheld. (WTAC R. 31:27-29).

It is the order of this Court that the position of the Department of Revenue is upheld.

SO ORDERED.

Dated this 19 day of September, 2012

By the Court:



John C. Albert
Circuit Court Judge, Branch 3

cc: Mr. Terrill Marxer
AAG F. Thomas Creeron III