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Wisconsin Court of Appeals



COURT OF APPEALS

DECISION

DATED AND FILED

May 8, 2003

Cornelia G. Clark

Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See Wis. Stat. § 808.10 and Rule 809.62.

Appeal No. 02-0739
STATE OF WISCONSIN

Cir. Ct. No. 01-CV-1791

IN COURT OF APPEALS
DISTRICT IV

Eugene C. Rondon,

Petitioner-Appellant,

v.

Wisconsin Department of Revenue,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

1. PER CURIAM. Eugene Rondon, pro se, appeals the circuit court's order affirming an order of the

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Wisconsin Tax Appeals Commission. Rondon argues: (1) that his conduct was not "willful" under Wis. Stat. §77.60(9) (2001-02);¹ (2) that the Wisconsin Tax Commission violated his right to due process; and (3) that the assessment against him is excessive in violation of the Eighth Amendment. We affirm.

¶2. The key facts are not in dispute. Rondon was the president and sole shareholder of National Vehicle Management, Inc. (NVMI). He was also in charge of NVMI's day-to-day operations. Because NVMI did not have enough money to meet all of its financial obligations, Rondon chose to pay creditors of NVMI, rather than pay the sales tax due. The Wisconsin Department of Revenue assessed \$42,082 against Rondon personally for delinquent sales tax on sales made by NVMI, including interest and a penalty of \$198. The Wisconsin Tax Commission affirmed, as did the circuit court.

¶3. Wisconsin Stat. §77.60(9) provides:

Any person who is required to collect, account for or pay the amount of tax imposed under this subchapter and who willfully fails to collect, account for or pay to the department shall be personally liable for such amounts, including interest and penalties thereon, if that person's principal is unable to pay such amounts to the department. The personal liability of such person as provided in this subsection shall survive the dissolution of the corporation or other form of business association. Personal liability may be assessed by the department against such person under this subchapter for the making of sales tax determinations against retailers and shall be subject to the provisions for review of sales tax determinations against retailers "Person", in this subsection, includes an officer, employee or other responsible person of a corporation

We give great weight deference to the commission's interpretation of this statute because its "experience, technical competence, and specialized knowledge" assisted it in interpreting and applying the statute. *William Wrigley, Jr., Co. v. DOR*, 176Wis.2d 795, 801, 500 N.W.2d 667 (1993).

¶4. Rondon first argues that his conduct was not willful under Wis. Stat. §77.60(9) because he had no "bad intention" in failing to pay the tax; he was simply trying to keep his business afloat. However, the commission has explained that, to show willfulness under §77.60(9), it is sufficient to show that the person had the authority and duty to make the sales tax payment, but decided "to pay other creditors with knowledge of taxes being due." *Callen v. DOR*, Wis. Tax Reporter (CCH) ¶400-349 (Feb. 25, 1998). There is no dispute that Rondon failed to pay the sales tax, knowing that the tax was due, and instead chose to pay other creditors. As interpreted by the commission, this behavior is willful conduct under the statute. *See also Wilson v. DOR*, Wis. Tax Reporter (CCH) ¶203-130 (Feb.19, 1990) (to show willfulness, it is not necessary to show bad faith).

¶5. Rondon next contends that his due process rights were violated because the commission did not give his case adequate individual consideration. He contends that Wis. Stat. §77.60(9) does not require the commission to hold him personally liable for NVMI's failure to pay sales tax and, because the commission had discretion in the matter, it should have allowed him to present evidence showing the circumstances surrounding NVMI's failure to pay the tax before holding him personally liable. Rondon bases his argument on the portion of the statute that provides that "[p]ersonal liability may be assessed by the department against such person under this subchapter for the making of sales tax determinations against retailers and shall be subject to the provisions for review of sales tax determinations against retailers" (Emphasis added).

¶6. We reject Rondon's argument that this portion of the statute vests the department with discretion in assessing the taxes against him personally. Here, Rondon *willfully* failed to pay the taxes and, as such, the statute provides that he "shall be personally liable." Wis. Stat. §77.60(9). Rondon has not

