

RONDON EUGENE C 01CV1791 012902 DANE CTY CIR CT



JAN 31 2002

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

BRANCH 16

EUGENE C RONDON,

COPY

Petitioner,

vs.

DECISION and ORDER

Case No. 01 CV 1791

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

Pursuant to Wis. Stat. sec. 227.53, Eugene Rondon seeks review of a decision of the Wisconsin Tax Appeals Commission. Petitioner filed a brief in support of his position on September 5, 2001, and the Department of Revenue responded. No reply brief was filed.

There was no dispute about the facts before the agency and there is no dispute here. Mr. Rondon was the president and sole shareholder of a corporation named National Vehicle Management, Inc. He was in charge of the corporation's day-to-day activities and signed its checks. He also signed the corporation's sales and use tax returns. The Wisconsin Department of Revenue issued an assessment against Mr. Rondon in the amount of \$42,082.99 for sales

and use tax collected by the corporation but not paid to the Department. The assessment also included interest. In doing so, the Department relied on Wis. Stat. sec. 77.60(9) which states:

Any person who is required to collect, account for or pay the amount of tax imposed under this subchapter and who wilfully 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 so the provisions for review of sales tax determinations against retailers, but the time for making such determinations shall not be limited by s. 77.59 (3). "Person", in this subsection, includes an officer, employee or other responsible person of a corporation or other form of business association or a member, employee or other responsible person of a partnership, limited liability company or sole proprietorship who, as such officer, employee, member or other responsible person, is under a duty to perform the act in respect so which the violation occurs.

Petitioner contends that there is a factual dispute about whether he acted "wilfully" in failing to pay the taxes as required in order to have personal liability imposed. However petitioner does not dispute any of the facts upon which the Department relied in finding a wilful violation. The Tax Appeals Commission held, and I concur, that a determination that Rondon acted "wilfully" is a conclusion of law, and not a finding of fact. Therefore the Commission properly granted summary judgment.

Petitioner raises several legal arguments in his brief. In a section entitled "Due Process"¹ Mr. Rondon argues that the Commission did not interpret the statute consistently with the intent of the legislature. In support of this proposition he asserts that corporate officers are shocked to learn they may be personally liable if they fail to turn over tax revenues collected. No reference to actual legislative history is included.

A court is to first apply the language of a statute as written. State v. Rognrud, 156 Wis. 2d 783, 787-88 (Ct. App. 1990). Only if the language of the statute is ambiguous, may the court look at legislative history as an interpretive aid. Kluth v. General Cas. Co., 178 Wis. 2d 808, 815 (Ct. App. 1993). The language of Wis. Stat. sec. 77.60(9) is clear and unambiguous. The Tax Appeals Commission has a long-standing interpretation of the term "wilful".

To show willfulness, it is sufficient to show that there was a decision to use corporate funds to pay other creditors with knowledge of the employment taxes being due. Thus, because petitioner knew that employee withholding taxes had been withheld and were due, and because he chose to pay other creditors over the State, we held that he intentionally breached his duty to cause the taxes to be paid.

Michael A. Pharo v. Wisconsin Department of Revenue, Wis. Tax Rptr. [CCH] P. 202-968 (4/28/88) (R-App. 131 at 132). This long-standing interpretation by the agency charged with applying this statute is entitled to be given great weight by this court. Jicha v. DILHR, 169 Wis. 2d 284, 290-91 (1992).

¹There is no reference to due process within the body of this section of the brief.

The statute is clear and therefore not open to interpretation. The Department's application of this statute is reasonable. The finding of wilfulness is upheld.

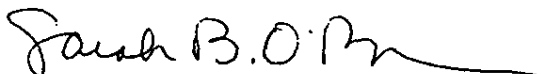
Mr. Rondon also argues that the assessment of taxes constitutes an excessive fine and is prohibited by the Eighth Amendment to the Constitution. This argument makes no sense in this context. Corporations through their officers sell products and collect sales tax. When a person collects taxes from a customer, the person receives the taxes in trust for the state. See Wis. Stat. 77.60(11). The corporate officers are free to spend the proceeds of their sales as they wish. But if they spend the tax money collected in trust instead of turning it over to the state, they may become personally liable for the amount of the taxes diverted. This assessment is neither a fine nor excessive. See State v. Boyd, 2000 WI APP 208, ¶¶ 9-15.

Conclusion

The Decision of the Wisconsin Tax Appeals Commission is affirmed.

DATED: January 29, 2002

BY ORDER OF THE COURT:


Sarah B. O'Brien, Judge
Circuit Court, Branch 16