

STATE OF WISCONSIN
TAX APPEALS COMMISSION

DENNIS J. POTERACKI,

DOCKET NO. 10-S-075-SC
AND 10-W-076

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ROGER W. LEGRAND, COMMISSIONER:

This case comes before the Commission on the motion of the Wisconsin Department of Revenue (the "Department") for summary judgment. The Petitioner appears *pro se* in this matter. Respondent is represented by Attorney LaKeisha Wright Butler. The Department has filed a brief in support of the Motion for Summary Judgment; the Petitioner has filed no response.

Having considered the entire record, including the motion, affidavit, exhibits and brief, the Commission hereby finds, rules and orders as follows:

FINDINGS OF FACT

1. By a Notice of Amount Due dated June 16, 2009, Respondent made a personal liability assessment against Petitioner in the amount of \$781.07 as of August 20, 2009, for sales tax owed by KLMP, LLC, for the period ending December 31, 2007. (Affidavit of Attorney Linda M. Mintener dated August 31, 2010 ("Mintener Aff."), ¶ 2,

Ex. 1.)

2. By a Notice of Amount Due dated June 16, 2009, Respondent made a personal liability assessment against Petitioner in the amount of \$86,688.63 as of August 20, 2009, for withholding tax owed by KLMP, LLC, for the year 2007. (Mintener Aff., ¶ 3, Ex. 2.)

3. Petitioner filed a Petition for Redetermination with the Wisconsin Department of Revenue dated July 13, 2009, questioning the two above personal liability assessments. (Mintener Aff., ¶ 4, Ex. 3.)

4. Respondent denied Petitioner's Petition for Redetermination of Respondent's subject personal liability assessments. (Mintener Aff., ¶ 5, Ex. 4.)

5. Petitioner filed a Petition for Review dated March 22, 2010, with the Wisconsin Tax Appeals Commission contesting Respondent's actions on the Petition for Redetermination, which the Wisconsin Tax Appeals Commission received on March 25, 2010, by ordinary mail.

6. Respondent answered the Petition for Review on April 23, 2010.

7. Respondent mailed its First Request for Admissions, First Set of Interrogatories and First Request for Production of Documents to Petitioner on May 10, 2010. (Mintener Aff., ¶ 8, Ex. 5, with a personal phone number and date of birth in Discovery Exhibit 1, page 4, redacted.)

8. On May 24, 2010, Petitioner, Dennis J. Poteracki, called Respondent's representative, Attorney Linda M. Mintener, stating that he had received Respondent's discovery requests and acknowledged that the cover letter stated that he

must respond within 30 days. Petitioner stated that the phone call was “his response” to the discovery. Attorney Mintener explained to Petitioner that he must respond to each individual admission, interrogatory and production requests in writing. Since it appeared that Mr. Poteracki had hung up, it was unclear if he had heard Attorney Mintener. Therefore, she sent Mr. Poteracki a letter on March 24, 2010, explaining that he must “respond *in writing* to each of the individual discovery requests within 30 days of the date the Department mailed them to Petitioner. Your phone call will not suffice.” In said letter, Attorney Mintener again informed Petitioner that “The admissions will be deemed admitted unless you timely respond.” (Mintener Aff., ¶ 9, Ex. 6, with settlement information redacted.)

9. On June 7, 2010, Respondent received a letter dated June 6, 2010 responding to some, but not all of Respondent’s subject interrogatories and providing some, but not all of the documents requested by Respondent in its First Request for Production of Documents. In said correspondence, Petitioner did not respond in anyway to Respondent’s First Request for Admissions. (Mintener Aff., ¶ 10.)

10. On June 18, 2010, Respondent wrote to Petitioner informing Petitioner that his June 6, 2010 mailing did not constitute a proper response to Respondent’s said discovery requests, and provided him an extension (even though he had never requested one) until July 2, 2010 to respond to Respondent’s First Request for Admissions or the admissions therein would be deemed admitted. (Ex. 7, with settlement information redacted and without the enclosure.) Respondent has received no response to its above June 18, 2010 letter to Petitioner, and has received no

communication whatsoever from him since his June 6, 2010 mailing to Respondent. (Mintener Aff., ¶ 11.)

11. On August 17, 2010, Respondent wrote to Petitioner informing him that due to his failure to respond to Respondent's First Request for Admissions, the matters in Respondent's First Request for Admission were now deemed admitted and conclusively established for purposes of these actions, and that this Motion was being prepared. Respondent has received no response whatsoever to said letter. (Mintener Aff., ¶ 12, Ex. 8.)

12. Respondent has received no responses to its First Request for Admissions, nor has any communication from Petitioner that would indicate that Petitioner intends to provide responses to Respondent's First Request for Admissions or that he did not intend to admit each of the statements therein by his failure to respond. (Mintener Aff., ¶ 13.)

13. Exhibits 1 through 8 are true and correct copies of documents from Respondent's file in these matters, except for noted redaction of confidential information. (Mintener Aff., ¶ 13.)

14. On September 2, 2010, the Commission issued a Briefing Order to both parties requiring Petitioner to file a response to the motion by October 4, 2010.

15. After the Petitioner filed no response to the motion by the October 4, 2010 deadline, the Commission extended the filing deadline on its own motion to October 20, 2010.

16. By letter dated October 21, 2010, the Commission informed the

Petitioner that it had not received any response to either the briefing order, or the follow-up letters.

ORDER GRANTING SUMMARY JUDGMENT AND MOTION TO DISMISS

The Commission grants the Respondent's summary judgment and motion to dismiss on two grounds. First, Petitioner has failed to prosecute his action under Section 805.03 Wis. Stats. He has chosen not to comply with the briefing order issued September 2, 2010. Nor has he responded in anyway to the follow-up letter of the Commission dated October 6, 2010. In that letter, the Commission stated, the following:

If no response to this letter is filed, the Commission may find a failure to prosecute the appeals.

Second, Petitioner has failed to respond to Respondent's Request for Admissions. Respondent mailed the first Request for Admissions to Petitioner on May 10, 2010 (Exhibit 5). The Requests for Admissions made clear that matters are admitted unless there was a response to the contrary. Respondent followed up with a phone call and a letter dated May 24, 2010, which states in part, the following:

The admissions will be deemed admitted unless you timely respond.

(Exhibit 6.)

Although Petitioner filed a letter in response to Respondent's letter, he never responded in any manner to the Request for Admissions.

Under Section 804.11(1)(b) and (2) Wis. Stats., the failure to respond to Request for Admissions within 30 days is conclusive establishment of the matters stated in the admissions. The Requests for Admissions were sent out on May 10, 2010. In

spite of many communications and warnings, Petitioner never responded to the Requests for Admissions and, therefore, the facts therein were conclusively established.

This is a case of personal liability for unpaid sales and withholding tax for KLMP, LLC, for the year 2007. By failing to respond to Respondent's admission requests (Exhibit 5, Admissions 4(a)-(b), Petitioner admitted that he is a responsible party for the 2007 sales/use and withholding taxes of KLMP, LLC.

Since Respondent established Petitioner's personal liability through the admissions and since Petitioner made no response to the Motion for Summary Judgment, there is no need to take the personal liability analysis further.

The Commission grants Respondent's Motion for Summary Judgment.

Petitioner's appeal is dismissed.

Dated at Madison, Wisconsin, this 27th day of April, 2011.

WISCONSIN TAX APPEALS COMMISSION

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Acting Chairperson

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"