

STATE OF WISCONSIN
TAX APPEALS COMMISSION

TERRILL J. MARXER,

DOCKET NO. 09-S-175

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ROGER W. LEGRAND, COMMISSIONER:

This case comes before the Commission after a hearing was held in Madison, Wisconsin on October 21, 2010, before Commissioner Roger W. LeGrand. The Petitioner, Terrill J. Marxer of Stevens Point, Wisconsin, appeared in person and appeared pro se. The Respondent (herein, the "Department") is represented in this matter by Attorney Mark S. Zimmer. Following the hearing, both parties agreed to file post-trial briefs.

Based upon the entire record in this matter, the exhibits and testimony adduced at the trial, the Commission finds, concludes, decides and orders as follows:

FINDINGS OF FACT

1. Petitioner Terrill J. Marxer, a/k/a T.J. Marxer ("Petitioner" or "Marxer") was assessed tax by the Wisconsin Department of Revenue ("DOR" or "the Department") in the amount of \$35,625.00 in a Notice of Amount Due dated November 26, 2006, representing an assessment for personal liability for sales

and use taxes owed by Marc's Brothers, Inc., a Nevada corporation ("Marc's Brothers" or the "Company") for the period September 1, 2002 through March 31, 2004. (Exhibit 1, Testimony of John Mickelson).

2. Petitioner timely petitioned for redetermination of the Notice of Amount Due. (Exhibit 2, Testimony of Shirley Henika).
3. The petition for redetermination was denied by the Department in a Notice of Action dated July 16, 2009, issued by resolution officer Shirley Henika. (Exhibit 3, Testimony of Shirley Henika).
4. Petitioner timely appealed the Notice of Action to the Commission. (Petition for Review).

EVIDENTIARY FACTS

5. Marc's Brothers, Inc. was formed as a Nevada corporation for purposes of operating a used car dealership, and did business under the name Precision Auto Center. (Testimony of Marc Baldwin, Jack Elsinger)
6. At the beginning of the operation of Marc's Brothers, Petitioner, Marc Baldwin and Jack Elsinger each owned one-third (33.3 percent) of the corporation. (Exhibit 8, Testimony of Jack Elsinger, Terrill Marxer).
7. Petitioner was identified as a 33.3% owner of the Company on the Entity/Owner Statement document filed with the Wisconsin Department of Transportation, and signed by Petitioner. (Exhibit 8, Testimony of Terrill Marxer).
8. Petitioner also was listed on Wisconsin Department of Transportation ("DOT") records as a salesperson for the Company. (Exhibit 11).

9. Petitioner also was listed on Wisconsin DOT records as the holder of a Buyer Identification Card for the Company (Exhibit 11).
10. Petitioner signed an application for a Buyer Identification Card Application for the Company under the dealer name of "Precision [sic] Auto Center." (Exhibit 12, Testimony of Terrill Marxer).
11. A Buyer Identification Card is necessary for purchase of automobiles at auction. (Testimony of Terrill Marxer).
12. Petitioner used the Buyer Identification Card to purchase automobiles at auction for Marc's Brothers. (Testimony of Terrill Marxer).
13. Petitioner also contributed money for a Dealer/Salesperson Bond required by DOT. (Testimony of Terrill Marxer, Exhibit 13).
14. Petitioner contributed tens of thousands of dollars to the Company. (Testimony of Terrill Marxer).
15. Petitioner characterized the contribution of money to the Company as an investment. (Testimony of Jack Elsinger).
16. Petitioner, listed as "Manager" on the signature card, was an authorized signer on the Company's checking account with The Pineries Bank. (Exhibit 12, Testimony of Terrill Marxer).
17. Petitioner chose The Pineries Bank for the Company's banking. (Testimony of Terrill Marxer).

18. Although Jack Elsinger was initially authorized as a signer of checks on the Company's account, his wife objected and he was removed as an authorized signer. (Testimony of Terrill Marxer).
19. Jack Elsinger never signed any checks on behalf of the Company. (Testimony of Jack Elsinger).
20. Marc Baldwin was prohibited by court order from having a checking account. (Testimony of Terrill Marxer).
21. The only authorized signatory on the Company's checking account was Terrill Marxer. (Testimony of Terrill Marxer, Jack Elsinger, Exhibit 17, line 18).
22. The vast majority of checks signed on behalf of the Company were signed by Petitioner (Testimony of Terrill Marxer; Exhibit 15).
23. Petitioner was present at the business on a regular basis and would come in to sign checks at Baldwin's request. (Testimony of Marc Baldwin).
24. Petitioner had keys to the business, as did Baldwin and Elsinger. (Testimony of Baldwin, Elsinger, Marxer).
25. The Company applied for a Seller's Permit, authorizing it to collect and remit sales taxes, estimating its monthly sales at \$1,000. (Exhibit 21; Testimony of John Mickelson).
26. Sales taxes were collected from customers on cars sold by the Company, and these taxes were deposited into the Company's bank accounts. (Testimony of Marc Baldwin).

27. Some cars were sold by the Company for between \$200 and \$1,000 each. (Testimony of Terrill Marxer).
28. Jack Elsinger bought a car from the Company for \$15,700, and paid sales tax to the Company on that purchase. (Testimony of Jack Elsinger).
29. Marc Baldwin testified that the Company bought 68 cars over a two-year time period, and sold from sixty-six to eight-five percent of those cars. (Testimony of Marc Baldwin).
30. Some cars were sold for scrap for about \$1,000. (Testimony of Marc Baldwin).
31. Marc Baldwin was unable to state the dollar amount of sales of cars by the Company. (Testimony of Marc Baldwin).
32. Jack Elsinger was unable to state the dollar amount of sales of cars by the Company. (Testimony of Jack Elsinger).
33. Petitioner was unable to state the dollar amount of sales of cars by the Company. (Testimony of Terrill Marxer).
34. Petitioner did not provide any records of the actual amount of sales by the Company to the Department (Testimony of Shirley Henika, John Mickelson).
35. Petitioner did not submit any records of the actual amount of sales by the Company in evidence to the Commission. (Testimony of Terrill Marxer, Petitioner's List of Exhibits).
36. The Company was required to file monthly sales tax returns, form ST-12, based on the estimated monthly sales that were listed on the Company's application for a seller's permit. (Testimony of John Mickelson, Ex. 21).

37. The Company did file sales tax returns, Form ST-12, for the period April through August 2002. (Testimony of Shirley Henika).
38. The Company filed no sales tax returns for the period September 2002 through March 2004. (Testimony of Shirley Henika)
39. The Department made estimated sales tax adjustments against the Company for each month of the period September 2002 through March 2004, in the amount of \$1,875.00 tax, plus applicable penalties, interest and fees. (Testimony of John Mickelson, Ex. 5).
40. The sales tax assessments on Exhibit 5 are final and were not appealed. (Testimony of Shirley Henika)
41. The sales tax assessments on Exhibit 5 have not been paid and are delinquent. (Testimony of Shirley Henika, John Mickelson, Ex. 6).
42. No ST-12s have been filed for the period September 2002 through March 2004, inclusive, for the Company. (Testimony of Shirley Henika).
43. The Department intentionally estimates sales taxes on the high side in order to get the attention of the seller, and to get the correct amounts on the Form ST-12 for the periods in question. (Testimony of John Mickelson).
44. Resolution Officer Shirley Henika asked Petitioner to file the ST-12s for the period of these assessments, noting that such ST-12s would likely reduce the amount due. (Testimony of Shirley Henika).
45. Petitioner, upon the advice of his attorney at the time, did not file the ST-12 returns. (Testimony of Terrill Marxer).

46. Petitioner asserted that he had provided inventories of the cars purchased to Shirley Henika. (Testimony of Terrill Marxer).
47. No inventory of cars purchased by the Company was submitted in evidence to the Commission. (Testimony of Terrill Marxer, Petitioner's List of Exhibits).
48. Petitioner did not provide any documentation to show that the Department's estimates were incorrect. (Testimony of John Mickelson).
49. Jack Elsinger testified that sales taxes were not his responsibility, but were the responsibility of Marc Baldwin and Petitioner, "mostly T.J." (Testimony of Jack Elsinger).
50. Petitioner was aware that sales tax was due when a car is sold. (Testimony of Terrill Marxer).
51. Petitioner often signed checks in blank, several at a time, and gave them to Marc Baldwin. (Testimony of Terrill Marxer).
52. The bank statements for the Company's account came to Petitioner's home and Petitioner had access to these statements. (Testimony of Terrill Marxer, Exhibit 16).
53. Petitioner had access to the bank records of the Company at The Pinerias Bank as a signatory. (Testimony of Terrill Marxer).
54. Petitioner had access to the checkbook of the Company. (Testimony of Terrill Marxer).
55. Sometimes there was no indication in the Company's check register or on stubs to whom the checks were payable. (Testimony of Terrill Marxer).

56. Petitioner never signed any Company checks to pay sales taxes. (Testimony of Terrill Marxer).
57. There was no indication in the Company's check register or on stubs that any checks were being written to the Wisconsin Department of Revenue for sales taxes. (Testimony of Terrill Marxer).
58. Petitioner admitted that he could have been more diligent in checking up on whether the sales taxes were being paid by the Company. (Testimony of Terrill Marxer).
59. Petitioner testified that he knew that Marc Baldwin had previously been in trouble with the Wisconsin Department of Revenue for nonpayment of taxes. (Testimony of Terrill Marxer).
60. Testimony was in conflict as to whether, how often, and to what extent Petitioner examined the Company's mail. Jack Elsinger testified that it was "not very often" though he was only there after his normal job three days a week or so. Petitioner denied that he ever examined the Company's mail in detail, but stated that he simply tossed it on Marc Baldwin's desk. Marc Baldwin testified that Petitioner took all of the Company's mail. (Testimony of Jack Elsinger, Terrill Marxer, Marc Baldwin).
61. Numerous checks payable to various third parties were signed by Petitioner drawn on the Company's account during the period August 2002 through March 2004, the period of the underlying sales tax assessments against Company. (Testimony of John Mickelson, Terrill Marxer, Exhibit 15).

62. The amount shown as deposits into the Company's bank account exceeded the total estimated sales taxes of \$35,625, indicating that the Company was able to pay the sales taxes that were due. (Testimony of John Mickelson, Exhibit 16).
63. Jack Elsinger signed over his 1/3 interest in the Company to Petitioner. (Testimony of Jack Elsinger).
64. Petitioner thereupon owned 2/3 of the Company. (Testimony of Terrill Marxer).
65. During 2004, Elsinger and Marxer had a falling out that resulted in the business being ended. (Testimony of Marc Baldwin).
66. Jack Elsinger testified that there was "bad blood" between Petitioner and Marc Baldwin. (Testimony of Jack Elsinger).
67. Marc Baldwin testified that Petitioner seized all of the assets of the Company, including the remaining cars that were present on the lot. (Testimony of Marc Baldwin).
68. Marc Baldwin appeared at hearing under subpoena from the Department. (Testimony of Marc Baldwin).
69. Marc Baldwin was not promised anything for his testimony at hearing other than the statutory witness fees and mileage due to a person testifying under subpoena. (Testimony of Marc Baldwin).

CONCLUSIONS OF LAW

1. The Wisconsin Tax Appeals Commission has jurisdiction over this matter.
2. Marc's Brothers was a Nevada corporation authorized to collect Wisconsin sales tax.

3. Marc's Brothers collected but failed to remit Wisconsin sales taxes during the period September 2002 through March 2004, as required by law.
4. As an owner and manager of Marc's Brothers, and as a signatory on the Company's checking account, Petitioner, Terrill Marxer had authority to pay the unpaid sales taxes of Marc's Brothers.
5. As an owner and manager of Marc's Brothers, and as the sole person who had signing authority on the Company's checking account, taking part in decisions to make disbursements of Company funds, Petitioner, Terrill Marxer had a duty to pay the unpaid sales taxes of Marc's Brothers.
6. By making payment by check out of the Company's bank account to third parties while Wisconsin state sales taxes were unpaid, Petitioner, Terrill Marxer breached his duty to pay the unpaid sales taxes of Marc's Brothers.
7. Whether others are also personally liable to the Wisconsin Department of Revenue for the Company's unpaid sales taxes is irrelevant; each person who bears personal liability for unpaid sales taxes under Wis. Stat. § 77.60(9) is jointly and severally liable for the entire amount due.
8. The underlying sales tax assessments of the Department are presumed to be correct in a personal liability case. Petitioner bears the burden of proof by clear and convincing evidence that the Department's underlying assessment is in error. Since Petitioner provided no evidence to show the assessment was in error, the assessment is deemed to be correct.

DECISION

The first issue in this case is whether Petitioner is personally liable for the unpaid sales taxes of Marc's Brothers from September 1, 2002 through March 31, 2004.

Personal liability for unpaid sales taxes, interest and penalties may be assessed on responsible persons under Wis. Stat. § 77.60(9). This statute defines a person with personal responsibility as "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 to which the violation occurs."

The Commission has held that in order to hold an individual personally responsible for a business entity's unpaid sales taxes, the following three elements must be present: (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, *Bice v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-496 (WTAC 2000); *Senf v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-441 (WTAC 1999); *Balestrieri v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-373 (WTAC 1998).

Field v. Wis. Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶ 401-102 (WTAC 2008).¹

The Department has the burden of proof. The Department met its burden at trial. It presented evidence to show that Terrill Marxer as manager and eventually majority owner of Marc's Brothers had the authority to sign checks on behalf of the company. As manager and part owner of Marc's Brothers, and the only one authorized

¹The *Field* case was affirmed in Case No. 08-CV-1766 by the Dane County Circuit Court in 2009 and summarily affirmed by the Wisconsin Court of Appeals in Appeal No. 2009AP1746.

to sign checks, Terrill Marxer clearly had the duty to pay taxes. And finally, the evidence is clear that Marxer wrote checks to other creditors while sales taxes were due, (Exhibits 5, 6, and 15) thereby satisfying the third element of intentional breach. Therefore, the Commission concludes that Petitioner is personally liable for the unpaid sales taxes of Marc's Brothers from September 1, 2002 through March 31, 2004.

Petitioner, Terrill Marxer, presented no evidence to contest that he was personally liable for the unpaid sales taxes, but rather blamed another owner, Marc Baldwin for the nonpayment of the taxes. In effect, Petitioner, Terrill Marxer, argues that he delegated the duty to pay taxes to Marc Baldwin. As *Higgs v. Wis. Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-356 (WTAC 1998) points out it is irrelevant whether other people are potentially liable as responsible persons. This involves the personal responsibility of Petitioner, Terrill Marxer, not Marc Baldwin. As *Higgs* states, citing *Godfrey v. U.S.*, 83-2 USTC ¶ 9635 (1983), "A corporate officer may delegate authority, but a corporate officer may not delegate responsibility."

The Commission concludes that the Department has established the three elements of personal liability:

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.

The burden then shifts to the Petitioner to show otherwise. In this case, the Petitioner has provided no evidence to prove that he was not an individual who had personal responsibility under Wis. Stat. § 77.60(9).

The second issue in the case is whether the Department's assessment is incorrect. Petitioner argued that the assessments for each month of the unpaid taxes were inaccurate. The law in this case is clear. Assessments of the Department are presumed to be correct. Petitioner bears the burden of proof by clear and convincing evidence that the Department's assessment is in error. *Riegal Distributors, Inc. v. Wis. Dep't. of Revenue*, Wis. Tax. Rptr. (CCH) ¶ 201-789 (WTAC 1980).

The Petitioner did not meet his burden of proving the assessment to be incorrect. Neither at trial, nor in any of the documents filed before the trial, did Petitioner offer any evidence as to what the correct amounts of the company's sales were. It was unfortunate that he did not do so. The testimony of the state's witness was that the assessment was based on estimates, and that the estimates were possibly high. Petitioner was given ample opportunity before the trial, and even at trial, to provide evidence to contradict the assessment. When asked repeatedly at trial to produce whatever documents existed pertaining to the sales of the automobiles, Petitioner failed to do so. The Commission is therefore forced, under the law, to accept the Department's assessment as correct.

ORDER

1. The Department's action on the Petitioner's Petition for Redetermination is affirmed.
2. The Petitioner's Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 15th day of July, 2011.

WISCONSIN TAX APPEALS COMMISSION

Roger W. Le Grand, Acting Chairperson

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"