

STATE OF WISCONSIN
TAX APPEALS COMMISSION

RASMUSSEN SERVICE CENTER, LLC,

DOCKET NO. 10-S-140

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ROGER W. LEGRAND, ACTING CHAIRPERSON:

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 Sheree Robertson. The Department filed a Memorandum of Law in support of the Motion for Summary Judgment.

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

JURISDICTIONAL FINDINGS OF FACT

1. By a Notice of Field Audit Action dated January 29, 2009, Respondent made an assessment against Petitioner in the amount of \$28,434.88 as of March 30, 2009, for sales/use tax owed for the period beginning January 1, 2004 and ending December 31, 2007, related to Petitioner's Wisconsin sales to out-of-state residents of recreational vehicles such as snowmobiles and ATVs, and services thereto.

(Affidavit of Attorney Linda M. Mintener dated September 9, 2010 ("Mintener Aff."), ¶ 2, Ex. 1.)

2. Petitioner filed a Petition for Redetermination with the Wisconsin Department of Revenue dated March 28, 2009. (Mintener Aff., ¶ 3, Ex. 2.)

3. A Notice of Action dated March 26, 2010, was served upon Petitioner. Respondent denied Petitioner's Petition for Redetermination and issued an amended Exhibit A-B updating the interest due to May 27, 2010, for a total amount due of \$31,508.55 as of May 27, 2010. Respondent stated the following reasons for the denial:

The explanations provided in your petition for redetermination do not support your position that the assessment should be reduced. Since we have not received any information supporting your position, our only alternative is to sustain the assessment in its entirety, plus statutory mandated interest.

(Mintener Aff., ¶ 4, Ex. 3.)

4. Petitioner filed a Petition for Review with the Wisconsin Tax Appeals Commission which was sent by certified mail, date stamped May 21, 2010, contesting Respondent's action on the Petition for Redetermination, which the Wisconsin Tax Appeals Commission received on May 24, 2010. (Mintener Aff., ¶ 5)

5. Respondent filed an Answer to the Petition for Review on June 15, 2010. (Mintener Aff., ¶ 6)

6. On June 15, 2010, Respondent mailed, along with the Answer, Respondent's First Request for Admissions and First Request for Production of Documents to Petitioner, pursuant to § 804.11(1)(b), Stats. (Exh. 4) The cover letter stated:

Note that failure to respond within 30 days of service upon you with a denial or valid legal objection to an admission request will cause the statement in the request to be deemed conclusively established for purposes of this action. Note also that you may be assessed costs for any admission you fail to admit that Respondent later proves is true.

(Ex. 4 at 2; Emphasis in the original)

The introduction to said Request for Admissions further states:

Failure to timely respond will cause the requests to be deemed conclusively established for purposes of this action.

(Ex. 4 at 2; Emphasis in the original) (Mintener Aff., ¶ 7)

7. Petitioner's responses to Respondent's First Request for Admissions and First Request for Production of Documents were due on July 19, 2010, which is 33 days after Respondent mailed them. As of this date, Petitioner has not responded to either Respondent's First Request for Admissions or First Request for Production of Documents. (Mintener Aff., ¶ 8)

8. Respondent sent a letter to Petitioner on August 5, 2010, noting that the statutory time to respond to Respondent's said discovery requests had passed; informing Petitioner that the matters in Respondent's First Request for Admissions were deemed to be admitted and conclusively established for purposes of this action; and requesting Petitioner to advise Respondent immediately if it had any legitimate legal reason to withdraw or amend the admissions. (Mintener Aff., ¶ 9, Ex. 5.)

9. When Respondent's representative returned from vacation on August 17, 2010, Petitioner's owner, Joe Rasmussen had left two voice mail messages, stating that Petitioner had not responded to the discovery because the cover letter stated that "no response was necessary." (Mintener Aff., ¶ 10.)

10. On August 17, 2010, Respondent's representative returned Mr. Rasmussen's telephone calls, and because Mr. Rasmussen was not available, left a message for him to return the call. Petitioner, Mr. Rasmussen, did not return the call. (Mintener Aff., ¶ 11.)

11. Respondent called Mr. Rasmussen again on August 18, 2010, and spoke to Mr. Rasmussen. In their conversation, Mr. Rasmussen admitted that he had not read the entire cover letter, and realized that the "no response" language on the cover letter to the Answer and discovery requests applies only to the Answer and not to the discovery requests. (*See* Ex. 5 at 1.) In their conversation, the Respondent's representative again explained that the matters in the admission requests were now deemed admitted and were conclusively established for purposes of this action, and that Respondent was prepared to bring a motion for summary judgment based on those deemed admissions. Mr. Rasmussen then represented that he would mail to Respondent, by August 20, 2010, at least some of the documents that Respondent had requested in its First Request for Production of Documents or would call to say why he could not send them by that date. (Mintener Aff., ¶ 12.)

12. On August 20, 2010, Petitioner left a message for Respondent. Respondent returned Mr. Rasmussen's call on August 23, 2010. In that conversation, Mr. Rasmussen stated that he had found "a lot of documents"; that he had an appointment with an accountant that day to get additional information and documents; that he would get the information that Respondent had requested from Petitioner's bank; and that he would send all pertinent information and documents to Respondent's representative by August 27, 2010. Respondent's representative explained to Petitioner

that the matters in the admissions were now deemed admitted and were conclusively established for purposes of this action, and that Respondent would be bringing a motion for summary judgment if this matter could not be settled based upon documents that Petitioner had represented that he would provide by August 27, 2010. (Mintener Aff., ¶ 13.)

13. Since the August 23, 2010 phone conversation with Mr. Rasmussen, Respondent has not received any documents from Petitioner; Respondent has not received any responses to its First Request for Admissions or to its First Request for Production of Documents; and Respondent has not had any further communications from Petitioner. (Mintener Aff., ¶ 14.)

14. On September 15, 2010, the Commission issued a Briefing Order to both parties requiring Petitioner to file a response to Respondent's motion by October 15, 2010.

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

16. By letter dated November 12, 2010, the Commission informed the Petitioner that the Commission would consider dismissing the Petition for Review for failure to prosecute, unless he provided a response. To date, the Commission has received no response to the Briefing Order or to the follow-up letters.

**ORDER GRANTING SUMMARY JUDGMENT
AND MOTION TO DISMISS**

This matter is an appeal of Respondent's denial of the Petition for Redetermination involving sales/use tax assessed against Rasmussen Service Center,

LLC on its Wisconsin sales to out-of-state residents of recreational vehicles and services thereto.

While the Petitioner met the jurisdictional requirements to bring its case before the Commission, it failed to follow through after Respondent filed a motion for summary judgment.

Petitioner did not respond in any manner to the briefing order the Commission sent out on September 15, 2010. Neither did Petitioner respond to two follow-up letters dated October 21, 2010 and November 12, 2010. The letter of October 21, 2010, specifically stated the following:

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

Section 805.03 Wis. Stats. allows a dismissal for failure to prosecute. Based upon Petitioner's failure to respond to the briefing order, and the two follow-up letters, the Commission finds a failure to prosecute under Section 805.03 Wis. Stats, and grants Respondent's motion for summary judgment.

Moreover, Respondent has established by use of admission requests, all the facts necessary to show that Respondent's assessment herein is accurate. Summary judgment can be based upon a party's failure to respond to a request for admissions since such a request can seek an admission that would be dispositive of the entire case. *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 631, 334 N.W. 2d 230 (1983).

In this case, Respondent sent Request for Admissions on June 15, 2010. Under Section 804.11(1)(b) and (2) Wis. Stats., the failure to respond to the Request for Admissions within 30 days is conclusive establishment of the matters stated in the

admissions. Petitioner failed to respond to the Request for Admissions even after being verbally warned by Respondent's Attorney of the consequences of a failure to respond. By failing to respond, Petitioner in effect admitted that the adjustments made by the Department were correct. These adjustments dealt with Petitioner's sale of snowmobiles and ATV's to out-of-state residents in Wisconsin. (Exh. 4.) Since snowmobiles and all-terrain vehicles are tangible personal property, Petitioner's sales of them are subject to sales tax pursuant to Wis. Stat. § 77.52(1a). Since no material facts remain at issue, Respondent's motion for summary judgment is granted. Petitioner's appeal is denied. The Department's denial of the Petition for Redetermination is affirmed.

Dated at Madison, Wisconsin, this 19th day of May, 2011.

WISCONSIN TAX APPEALS COMMISSION

Roger W. LeGrand, Acting Chairperson

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"