STATE OF WISCONSIN

TAX APPEALS COMMISSION

JASON K. SANDBERG **DOCKET NO. 08-W-143**

Petitioner,

vs. **ORDER ON MOTION**

WISCONSIN DEPARTMENT OF REVENUE **FOR RECONSIDERATION**

Respondent.

On February 28, 2012, the Petitioner filed with the Commission a Motion for Reconsideration of the Commission's decision denying Petitioner's motion for the Department to pay Mr. Sandberg's $30,000 in costs associated with defending the case. In brief, the Petitioner asserts that the Commission made errors of fact and law in denying the request for costs. The Petitioner in this case is represented by Attorney John C. Santee of Mount Prospect, Illinois. The Department of Revenue has been represented by Attorney John R. Evans. The first part of this decision will set forth the law that applies and the background of the case. The second part of the opinion will respond to the claims made by the Petitioner in the motion for rehearing and explain why the motion for rehearing must be denied.

LAW AND BACKGROUND[1]

In this case, the Department assessed Jason Sandberg approximately $45,297 in unpaid withholding taxes related to his employment as an office manager at his father's failed drywall business. The Department moved for summary judgment, arguing that Jason's responsibility for the nonpayment of the taxes was proven by the numerous checks that Jason signed while taxes were due and owing, his title as vice-president of the corporation, his receipt of the nonpayment notices, and his meetings with the Department to discuss the unpaid taxes. The Petitioner responded by alleging that the business was a "one-man show" where the father made the decisions on which obligations to pay. The Commission denied the motion, finding that there were unresolved material facts, and

[1] The information in this section is not meant to change or supplant the findings of fact the Commission has previously made in this case.

that the law in Wisconsin was not settled that someone working in Jason's capacity was liable *per se* for the unpaid taxes.

The Commission presided over a trial in this matter in the fall of 2010. The Department introduced the evidence described above and moved for a directed verdict. The Commission denied that motion, but found that the Department had introduced enough evidence to meet the initial burden placed on the Department in "responsible person" cases to prove clearly and convincingly that the taxpayer had the duty to pay the taxes, the authority to pay the taxes, and that there had been an intentional breach of that duty. The Commissioner stated that, given the particular defense proffered by the taxpayer, there had been sufficient evidence introduced for a reasonable finder of fact to make a decision for the Department, and that, as the respective sides had presented cases that were diametrically opposed, the Commission's decision at the conclusion of the trial would hinge on the credibility of the witnesses. The only witnesses to testify for more than a few minutes were the taxpayer, his father, and the Department's revenue agent. A fair summary of the father's testimony is that he made all of the financial decisions and was solely responsible for the fact that the taxes went unpaid.

After post-trial briefs were submitted, the Commission issued a 24-page written decision finding that Jason had proved at trial that despite the checks bearing his signature, the father in fact made all of the important business decisions, and that Jason was therefore not a person responsible for the payment of the taxes.

The Petitioner then filed a motion several weeks later to have the Department pay his litigation costs, then totaling about $30,000. In brief, Chapter 227 allows a taxpayer who has prevailed in an administrative proceeding to recover costs from a state agency, but not if the state agency had a "substantial basis" for pursuing the case. There are a number of Wisconsin court cases holding that the government is not liable for costs merely because it lost the case. The Commission determined that, despite the result, Wisconsin law dictated that the Department was not responsible for the taxpayer's costs because the Department had a "substantial basis" for proceeding with the case.

Pursuant to Wis. Stat. § 227.49(3), the Commission can grant a rehearing of that decision only on the basis of: (1) a material error of law, (2) a material error of fact, or (3) the discovery of new evidence sufficiently strong to reverse or modify the order which could not have been previously discovered with due diligence. For the reasons stated below, the motion for rehearing fails to meet any of these three standards.

THE PETITIONER'S ARGUMENTS FOR A REHEARING

The Petitioner's motion for a rehearing makes two arguments that we will attempt to summarize below. Neither meets the test for a rehearing.

First, the Petitioner argues that the Commission incorrectly linked the Department's initial burden at the hearing and "substantial justification," arguing that the former is *merely* a procedural device and the Department should have known from the discovery that meeting that burden was not going to be enough to prevail in the case. In brief, the Petitioner takes the position that the Commission's connection between the Department's initial burden of proof at the hearing and "substantial justification" was an error of law. The Petitioner argues that our discussion in the opinion of substantial justification and the Department's legal burden was incorrect and not logical. The Petitioner argues that the Department's case has lacked "arguable merit" since the point in time the Commission denied the Department's motion for summary judgment in 2009.

There are several problems with the argument. First, what we actually wrote in the decision denying costs was the following:

> In our view, by satisfying its initial burden at the trial, the Department *ipso facto* showed that it had "substantial justification" to proceed with the case. [footnote omitted]. While we recognize that **the elements of the Department's initial burden and "substantial justification" <u>are not</u> the same thing**, we fail to see how the Department could meet the former and not meet the latter.

[emphasis added].

In our view, the Petitioner's motion for a rehearing overstates the role that the above observation played in our decision. The quote from the Petitioner's motion that frames our alleged rationale omits the footnote that appears at the conclusion of the first sentence in the original, which directs the reader to Wisconsin case law analyzing the meaning of "substantial" and "substantial evidence." While we doubt that this oversight was intentional, our point was that in the context of the facts of this particular case, the evidence the Department produced would have been enough for the Department to prevail had the taxpayer and his father not testified credibly as to their claim that the father controlled the business. The Department in its brief opposing the payment of costs made the argument that the Commission chose to decide this case not on the objective evidence the Department produced, but instead relied on subjective

testimony from the trial. There is some truth to this observation, and we agree more with the Department's characterization of the reasons for our decision than we do with the Petitioner's characterization.

The Petitioner makes a number of other assertions in connection with this argument for which no legal support is offered, and we will address three of them. For example, at one point the Petitioner describes the Department's burden in these cases as a "minimal requirement." At another point, the Petitioner asserts that "the initial burden is unlikely to be enough if the taxpayer produces evidence in his favor." As to the former assertion, what Wisconsin law actually states is that the Department's initial burden of proof is to produce ***clear and satisfactory*** evidence that the Petitioner had the authority to pay the company's taxes and the duty to pay them, and that there was an intentional breach of that duty. *Whitney v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶400-330 (WTAC 1997). Thus, we disagree with the Petitioner that this is a burden of proof which appropriately can be described as "minimal." As to the latter claim, we preside over many of these trials, and it has been our experience that the person alleged to be responsible almost always produces evidence in his or her favor at the trial, but that the Department nevertheless prevails.

The Petitioner also asserts that the decision denying the Department's motion for summary judgment made clear that the applicable law in this case would be the "*McLaughlin* case and its ilk" and, therefore, an analysis of the type employed by meeting the initial burden would not be enough. We have two points in response. First, what we actually wrote in the decision concerning the facts of the case for summary judgment purposes was the following:

> We agree with the Petitioner that the above is enough to establish that there are facts in dispute here such that summary judgment is inappropriate. First, the summary judgment bar is relatively high. As recited above, reasonable inferences at this point in the case go to the party opposing summary judgment. Further, we must view those inferences in the light most favorable to the party opposing summary judgment. Reviewing these items using these standards, one might reasonably conclude from the record before us today that the Petitioner did not have the *de facto* authority to be a responsible person, and that this was a "one-man show," as the Petitioner claims. Second, in our view, the credibility of the various assertions is at issue and weighing evidence has no place on a motion for summary judgment. *See, e.g., Yahnke v. Carson,* 2000 WI 74, ¶27, 236 Wis. 2d 257, 613

> N.W.2d 102; *Pomplun v. Rockwell Intern. Corp.,* 203 Wis. 2d 303, 552 N.W.2d 632 (Ct. App. 1996). Instead, that is a function best reserved for trial...

Second, what this quote makes clear is the Commission's view that this trial would be something along the lines of a "swearing match," requiring the Commission to weigh the evidence and to determine who was telling the truth. It is, in our view, unreasonable to argue that the Department should void an assessment or be responsible for costs because the taxpayer denies responsibility for the taxes in discovery or in an audit, or because another family member claims responsibility. What the Petitioner misses is that some assertions, even those made under oath, are self-serving and are usually viewed as having more limited reliability. *See, generally, State v. Davis*, 95 Wis. 2d 55, 288 N.W.2d 890 (Ct.App. 1980); *Vic Hansen & Sons, Inc. v. Crowley,* 57 Wis. 2d 106, 203 N.W.2d 728 (1973); *State v. Daniels*, 160 Wis. 2d 85, 465 N.W.2d 633 (1991). The Department was, in our view, entitled to test those assertions in court by way of cross-examination.

In sum, as to the Petitioner's first argument for a rehearing, while the Petitioner may not agree with our reasoning or our view of the evidence, the Petitioner has not demonstrated that either constitutes an error of law.

The second claim that the Petitioner makes in support of the motion for a rehearing is as follows:

> The WTAC's decision and order on the Petition for Costs concludes that the WDOR had substantial justification for its litigating position because "the Commission's opinion makes clear that its decision rests on the Commission's assessment of the business relationship between Jason and Kenneth. Much, if not all, of that assessment was based on watching and listening to the testimony .... In our view, the Department simply would have no way of knowing what that assessment by the Commission would be before going to trial. While a litigant can be charged with knowing the facts and the law of the particular case, asking that litigant to know how the other side's witnesses will be perceived by the Commission is unreasonable.
>
> [The Petitioner] respectfully submits that this could not be more wrong. Litigants and their attorneys make this type of assessment all the time.

The Petitioner goes on to state that the evidence here was uncontroverted, and that the WDOR knew what the case law mandated and what the evidence at trial would be, and the WTAC's conclusion to the contrary was an error of law. There are several problems with the Petitioner's second claim and we will address them below.

First, the above quotation from the Petitioner's brief is somewhat selective, leaving out between the ellipses the portion of the Commission's reasoning that emphasizes the importance to the decision of the Commission's independent observation of the witnesses at trial and that no one who had sat through the trial would question that the father was in charge of the business. Second, the Petitioner states that the evidence at the trial was essentially uncontroverted, but we cannot agree with the Petitioner's characterization of the evidence as such. At a minimum, there were a number of disputes as to what, in fact, Jason's duties were and what independent authority he had to act. There was vigorous cross examination of the Petitioner's witnesses. The substantial, and skillful, effort the Petitioner's attorney put forth in this case belies the contention that this case was straightforward, or "open and shut." Third, the summary judgment decision in this case reviewed the prior cases and demonstrated that this case was something of a case of first impression, as the Commission had apparently never before had a taxpayer successfully prove that someone else so dominated the business that it was a "one-man show." This undermines the Petitioner's claim that the Department knew it would lose after the summary judgment motion was decided. This was a much closer case than indicated by the Petitioner's motion for a rehearing. As we pointed out in the summary judgment decision, these cases are fact intensive, so there is rarely, if ever, a set formula for responsible person cases.

Fourth, in an attempt to impeach the Commission's reasoning here, the Petitioner cites *Hess v. NLRB*, 112 F.3d 146 (4th Cir. 1997). In that case, the court overturned the board's failure to award the company its litigation costs under the federal equivalent of the statute at issue here. In brief, the court took the board to task for the lack of an investigation of the claim. In particular, the court wrote the following passage:

> The point is that the relevant evidence before the General Counsel was substantial, and all of it indicated that Hess had a valid defense. Under such circumstances, no reasonable party would have proceeded with the complaint without further investigation to ensure that the defense could be challenged.... Additional inquiry in this case, of course,

> would have uncovered only mounting evidence favoring Hess...

Hess, 112 F.2d at 148.

There are several reasons that *Hess* does not help the Petitioner here, however. First, in that case, all of the independent witnesses corroborated Hess' version of what took place. The court thus took counsel to task for not further investigating the case and described counsel's case as "flimsy." Here, the Petitioner does not tell us what additional investigation the Department could have undergone before the trial that would have avoided the need for a trial. Second, *Hess* is a case where there was not only a lopsided dispute as to the evidence, but there was also an independent legal justification for the firing related to poor job performance. Third, there is other case law which indicates that, where a case is decided in substantial part based upon credibility resolutions made by an administrative law judge, substantial justification will be found. *See Hillman Rollers and Teamsters Local 469*, 2001 WL 1631374; *Nyebolt Steel, Inc.*, 323 NLRB 436, 437 (1997); *Blaylock Electric Co.*, 319 NLRB 928, 930 (1995); *Tajon, Inc.*, 277 NLRB 1639, 1641 (1986). Thus, in our view, the *Hess* case and the other cases discussing credibility resolutions actually support our decision that an award of costs is not appropriate.

CONCLUSION

The full Commission has considered Petitioner's Petition for Reconsideration. The Commission finds that Petitioner has shown no material error of law or fact nor the discovery of new evidence sufficiently strong to reverse or modify its decision and which could not have been previously discovered by due diligence. Wis. Stat. § 227.49(3).

IT IS ORDERED

That Petitioner's Petition for Reconsideration of the Decision and Order denying Petitioner's motion for costs in this matter is hereby denied.

Dated at Madison, Wisconsin, this 29th day of March, 2012.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Commissioner

pc: Jason K. Sandberg
Attorney John C. Santee
Attorney John R. Evans

ATTACHMENT: **"NOTICE OF APPEAL INFORMATION"**