

STATE OF WISCONSIN
TAX APPEALS COMMISSION

KING'S ENTERPRISES OF WAUSAU, INC.,

DOCKET NO. 10-S-130

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This case is here before the Commission for decision. The Commission presided over a trial in this matter in Madison on August 31, 2011. Both sides called witnesses, and after trial each side submitted briefs. The Petitioner in this matter is represented by Attorney Nathaniel J. Krautkramer, of the law firm of Byrne & Krautkramer in Wausau, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer, of Madison, Wisconsin. The issue in this case is if the Department should be equitably estopped from collecting \$132,000 in unpaid sales taxes from 2004 to 2007 on the Petitioner's sales of nonmotorized recreational vehicle trailers to nonresidents. In brief, the Petitioner attempted at the trial to prove that Department employees had told it not to collect the taxes. For the reasons stated below, we find for the Department.

I. FINDINGS OF FACT¹

A. Jurisdictional Facts

1. After conducting a field audit, the Department issued an assessment to Petitioner King's Enterprises of Wausau, Inc. ("King's") by Notice of Field Audit Action, dated January 21, 2009, for additional sales/use taxes for tax years 2004-2007 in the amount of \$130,856.92, including regular interest and a 25% negligence penalty. Respondent's Ex. 1.

2. By letter dated March 20, 2009, King's petitioned the Department for a redetermination of the assessed sales on Schedule 3 of the Notice of Field Audit Action, the "Non Residential Sales Without Tax," and the assessed sales on Schedule 4 of the Notice of Field Audit Action, the "Wisconsin Customer Sales Without Tax." Transcript ("Tr.") 126; Respondent's Ex. 2.

3. By Notice of Action dated March 18, 2010, the Department granted in part and denied in part King's Petition for Redetermination. No adjustment was made to Schedule 3, the "Nonresident Sales Without Tax." The amount due, according to the schedule issued with the Notice of Action, was \$132,776.75, including regular interest and a 25% penalty. Tr. 126; Respondent's Ex. 3.

4. King's timely filed a Petition for Review with the Wisconsin Tax Appeals Commission on May 14, 2010 arguing that the doctrine of equitable estoppel bars the Department from assessing sales tax, interest and penalties on the nonresident

¹ The Department submitted a proposed statement of facts with its post-trial brief and the Petitioner's brief included facts in the argument section with citations to the record. We have made selections from both with edits for form, content, and punctuation.

sales because Department employee Jim B.² advised King's to report these sales as tax exempt by using Wisconsin Department of Transportation ("DOT") Form MV-11.³ Respondent's Ex. 4.

B. Material Facts

5. The majority of additional sales tax was assessed on sales of nonmotorized vehicles purchased by nonresidents of Wisconsin who took delivery of the vehicles at King's location in Wausau. Tr. 22-23, 124; Respondent's Ex. 1, Ex. C and Schedule 3.

6. During the Department's field audit, the auditor looked at 100% of the sales invoices for the period 2004-2007 in order to make the assessment determination. Tr. 125; Respondent's Ex. 1, p. 5, Explanations of Adjustments on Ex. C.

7. King's was incorporated in Wisconsin on December 10, 1990, and has held a valid Wisconsin Seller's Permit since then. Tr. 18, 22; Respondent's Ex. 9.

8. King's is a retailer of nonmotorized campers, trailers, and fifth wheels⁴ in Wausau, Wisconsin. Tr. 22.

9. Mr. Ronald Gajewski purchased the corporation that would become King's in late 1990 and is currently the President and General Manager of King's. Tr. 10, 18.

² The Commission has decided to refer to this individual, and several others, using only an initial for the last name. Unfortunately, another individual referred to in the testimony has the same initials, so it will be necessary to use first names.

³ The MV-11 is a form to request a title and a license plate.

⁴ A "fifth wheel" coupling provides a link between a semi-trailer and the towing vehicle. Some recreational vehicles use a fifth wheel configuration, requiring the coupling to be installed in the bed of a pickup truck as a towing vehicle.

10. Mr. Gajewski testified at trial that King's was contacted by the Department in 1991 because King's was unable to pay the sales taxes it needed to pay because of lack of income. Tr. 20.

11. Mr. Gajewski swore in a January 28, 2010 Affidavit ("Affidavit") that Department employee Jim B. was working closely with King's from 1991-1995 to correct its sales tax liability underpayments. Tr. 24, 36-38; Respondent's Ex. 6, ¶ 2.

12. Mr. Gajewski also swore in his Reply to the Department's First Interrogatories ("First Reply") that he worked closely with Jim B. from 1991 or 1992 through 1995. Respondent's Ex. 7, ¶ 1(c).

13. Mr. Gajewski swore in his First Reply that King's first made contact with Jim B. in 1991 or 1992. Respondent's Ex. 7, ¶ 1(a).

14. Mr. Gajewski swore in his First Reply that he had frequent meetings with Jim B. to resolve the past due taxes, and to insure compliance moving forward. He swore that Jim B. reviewed sales/use tax filings prepared by King's as part of this ongoing compliance effort. Respondent's Ex. 7, ¶ 1(d).

15. Mr. Gajewski swore in his Affidavit that Jim B. advised him to use DOT Form MV-11 to report trailer sales to nonresident purchasers as tax exempt if the purchaser provided proof of sales tax paid to another state. Respondent's Ex. 6, ¶ 5.

16. Mr. Gajewski swore in his First Reply that Mr. William Vanden Heuvel was also present when Jim B. offered this advice. Respondent's Ex. 7, ¶ 2(c).

17. Mr. Gajewski swore in his First Reply that he did not recall meeting Jim B. prior to 1991. Respondent's Ex. 7, ¶ 1(f).

18. Employee Jim B. retired from the Department of Revenue on June 30, 1990, and did not work for the Department after that date. Tr. 105-106; Respondent's Ex. 8.

19. King's amended its Petition for Review with the Commission and stated that from 1991-1995, King's worked closely with John B. and Bruce K. from the Department to correct its sales tax liability underpayments. Respondent's Ex. 10, ¶ 3.

20. Mr. Gajewski swore in his Reply to the Department's Second Interrogatories ("Second Reply") that he worked closely with Bruce K. and John B. from 1991 or 1992 through 1995. Respondent's Ex. 11, ¶ 1(c).

21. King's Amended Petition for Review stated that it was Bruce K. and John B. that reviewed and approved King's sales tax reporting during the period 1991-1995. Respondent's Ex. 10, ¶ 7.

22. Mr. Gajewski swore in his Second Reply that he had weekly meetings with Bruce K. and John B. during 1991-1995 to resolve past due taxes and to insure compliance moving forward. Respondent's Ex. 11, ¶ 1(d).

23. King's Amended Petition for Review stated that it was Bruce K. and John B. that advised King's to use DOT Form MV-11 to report trailer sales to nonresident purchasers as tax exempt if the purchaser provided proof of sales tax paid to another state. Respondent's Ex. 10, ¶ 5.

24. Mr. Gajewski testified at trial that he did know Jim B. prior to 1991, as he had dealt with Jim B. in his previous business, and he would call Jim B. for advice

occasionally. He testified that his prior sworn answer to Respondent's First Interrogatories to Petitioner was not correct. Tr. 21, 28, 66-67, 69-70.

25. The company's accountant testified at trial that originally it was John B. from the Department who worked with King's. Tr. 72.

26. The company accountant testified that John B. made sure the forms were done and timely filed. Tr. 72.

27. The company accountant testified that Jim B. did not give the advice to him. Tr. 83.

28. The company accountant testified that he never met with Jim B. in regards to King's. Tr. 84.

29. The company accountant testified that it was Mary D. who did motor vehicle inspections for the DOT, who initially brought up DOT Form MV-11 and "that's how we got to where we're at today." Tr. 73-74, 76.

30. The company accountant testified that the Department had monthly meetings with King's. Tr. 83.

31. Mr. Gajewski testified that he met with the Department people at their office in Wausau "on a monthly basis" Tr. 11.

32. Mr. Gajewski testified that John B. and other Department employees told him back in the early 1990s that if King's had to get a unit titled using DOT Form MV-11 on a sale to a nonresident, then Exempt Codes 5 and 6 on the Form would also apply to that unit to claim the sale as tax exempt. Tr. 17, 47-48; Petitioner's Ex. A, p. 2.

33. Mr. Gajewski swore that Jim B., Bruce K. and John B. all advised using DOT Form MV-11 to report nonresident trailer sales as exempt if the purchaser provided evidence that the sales tax was paid to another state (Exempt Code 5). Exs. 6, 7, 10, 11.

34. The company accountant testified that John B. told King's that if King's had out-of-state sales of nonmotorized vehicles, the procedure was to use the DOT Form MV-11 to report them as an exempt sale because tax was paid to another state (Exempt Code 5). Tr. 77.

35. Mr. Gajewski testified that King's primarily used Exempt Code 6 (which is for a Purchaser who is not a Wisconsin resident and will not use the motor vehicle in Wisconsin except to remove it from Wisconsin), not Code 5. Tr. 50-51.

36. Mr. Gajewski testified that the sales at issue are for nonmotorized vehicles to nonresidents - mostly towable travel trailers and fifth wheels. Tr. 22-23; Respondent's Ex. 1, Sch. 3.

37. The company accountant testified that John B. said that King's would be at a competitive disadvantage if it did not report the nonresident sales as exempt because a similar dealer on the border could just take the trailer across the border and say the sale took place across the border, whereas King's did not have that luxury being in Wausau. Tr. 73, 97-98.

38. King's attorney and Mr. Gajewski interviewed John B. prior to trial, but John B. was not subpoenaed by King's to appear at trial on its behalf. Tr. 45.

39. Mr. Gajewski testified that at the time of sale to the nonresident purchaser, the purchaser could not possibly have had proof the purchaser paid tax to another state. Further, King's would have no way of knowing the purchaser would pay tax to another state, and no way of knowing the purchaser was even going to take it out of Wisconsin. Tr. 48, 54-55.

40. Mr. Gajewski testified that, pursuant to King's contract with the nonresident purchasers of the sales at issue, every purchaser sent proof to King's that he or she paid sales tax to another state within 30 days of the sale. However, those records were thrown away and none of the records were introduced at trial by King's. Tr. 48-49.

41. Ms. Michelle Biermeier, Department Field Audit Resolution Officer, testified that King's did submit proof that sales tax was paid by its customers to other states for 30% of the nonresident sales listed on Schedule 3, but no credit was allowed because those were Wisconsin sales first. Tr. 131; Exs. 1, 5.

42. King's never paid sales tax on the sales listed in Schedule 3 to the State of Wisconsin or to any other state. Tr. 130, 142-143; Respondent's Ex. 1, Sch. 3.

43. John B. and Bruce K. were revenue agents with the Department, not auditors. Tr. 105, 107.

44. Bruce K. and John B. did not conduct an audit of King's, reviewing all of King's sales records and invoices each month; they just made sure the numbers were properly filled in on the ST-12 sales tax return form for gross sales. They did not confirm the accuracy of those numbers. Tr. 43-44, 77-78, 87, 89.

45. Mr. Dennis Clark, a Compliance Supervisor with the Department for 35 years, testified that revenue agents with the Department will answer questions regarding how to fill out the lines on an ST-12 sales tax return, but they do not conduct audits or ask for substantiating documentation of the numbers filled in on those lines. Tr. 105, 119-120.

46. Mr. Gajewski and the company accountant both testified that they have no records from their meetings with the Department employees. Tr. 14, 92-93.

47. King's has nothing in writing from the Department that says King's could use Form MV-11 to report nonmotorized trailer sales to nonresident purchasers as tax exempt. Tr. 46, 132; Respondent's Ex. 7, ¶ 2(b); Respondent's Ex. 7, Reply to Respondent's First Request for Production of Documents, Nos. 1-2; Respondent's Ex. 11, ¶ 2(c); Respondent's Ex. 11, Reply to Respondent's Second Request for Production of Documents, No. 1.

48. The company accountant also has no correspondence, notes or other documentation that supports King's contention that a Department employee advised King's to use Form MV-11 to report trailer sales to nonresident purchasers as exempt from sales tax. Tr. 92-96; Respondent's Exs. 12-13.

49. Mr. Gajewski testified that he "can't remember exactly" when King's first had contact with the Department, but it was sometime before the middle of 1991. Tr. 10.

50. Mr. Gajewski testified that he "can't remember exactly" who he made contact with at the Department, but it was "probably John B." Tr. 10.

51. Mr. Gajewski testified that he cannot remember exactly what Bruce K. said regarding DOT Form MV-11. Tr. 44.

52. Mr. Gajewski testified that he cannot remember if Bruce K. and John B. gave him the same advice regarding Form MV-11. Tr. 45.

53. Mr. Gajewski testified that his memory is faulty as to who from the Department gave him the advice regarding DOT Form MV-11. Tr. 34.

54. Mr. Gajewski testified that he does not remember on what dates he received the advice. Tr. 45.

55. The company accountant did not know if Mr. Gajewski was there when Bruce K. gave the advice, but he was fairly sure Mr. Gajewski was there when they met with Mary D. and John B. Tr. 82.

56. The company accountant did not know the dates of the meetings in which he heard the advice. Tr. 82.

57. Mr. Gajewski never called the Department to confirm the advice, nor did he ask the Department if the law had changed in the 18 years between the advice and the field audit determination at issue here. Tr. 56-57; Respondent's Ex. 1.

58. The Department published its position regarding nonmotorized vehicles sold to nonresidents in two *Sales and Use Tax Reports*, June 1977 and January 1995. Tr. 133-135; Respondent's Exs. 14-15.

59. The Department's *Sales and Use Tax Reports* were mailed to every person who held a valid Wisconsin Seller's Permit. Tr. 135; Respondent's Ex. 16.

60. Mr. Gajewski testified that he did not read the Department publication that stated its position on sales of nonmotorized vehicles to nonresidents that was mailed to King's. Tr. 58-59.

61. The Department also published its position regarding nonmotorized vehicles sold to nonresidents in three different *Wisconsin Tax Bulletins* ("WTB") prior to the period under review: WTB 99, October 1996; WTB 102, July 1997; and WTB 107, April 1998. Tr. 135-137; Respondent's Exs. 16-18.

62. The tax bulletins were available to subscribers who requested these documents from the Department of Revenue, but were not sent to each taxpayer. Tr. 141.

OPINION

The Commission conducted a trial in this matter in 2011. The issue in the case was the lack of sales tax paid on sales of nonmotorized trailers to nonresidents of Wisconsin. In brief, the Petitioner's allegation is that Departmental employees told the Petitioner not to collect Wisconsin sales tax on sales to nonresidents. The Petitioner now admits that these sales should have been taxed, but the legal claim is that the Department should be equitably estopped from collecting the tax on these sales from 2004 to 2007. The years from 1990 to 2003 are not in issue here, and the Department apparently is not trying to, or able to, collect any sales taxes for those years. Based on the evidence received at trial, we find that the Petitioner has not proven its case. The first part of this opinion will set forth the applicable law. The second part of the

opinion will summarize the arguments the parties have presented in their briefs. The third part of the opinion will state the reasons we find for the Department.

A. APPLICABLE LAW

We begin by summarizing the law applicable to these cases and by summarizing equitable estoppel.

1. The Burden of Proof and the Procedural Law

Assessments made by the Department are presumed to be correct, and the burden is upon the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Calaway v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), citing *Puissant v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

Sales of nonmotorized vehicles in Wisconsin are taxable as tangible personal property and the sales tax is imposed on all Wisconsin retailers. Wis. Stat. § 77.52(1). When delivery of the nonmotorized vehicle is taken in Wisconsin, the sale is taxable by the State of Wisconsin no matter if the purchaser is a Wisconsin resident or not. See *Sawvell dba Prairie Camper Sales v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-077 (WTAC 2007), orally aff'd Case No. 08-CV-2504 (Dane Co. Cir. Ct., September 30, 2008). It is presumed that tangible personal property sold by any person for delivery in this state is sold for use in this state until the contrary is established. The burden of proving the contrary is upon the person who makes the sale, unless that person accepts from the purchaser a valid exemption certificate. Wis. Stat. § 77.53(10). While sales of *motorized* vehicles to nonresidents are exempt under a specific statutory

exemption, there is no such statutory exemption for sales of nonmotorized vehicles to nonresidents. Wis. Stat. § 77.54(5)(a); Wis. Admin. Rule § Tax 11.83(4)(a) (Register September 2006, No. 609).

2. Equitable Estoppel

A party asserting estoppel must prove all of the elements by clear, convincing, and satisfactory evidence. *Advance Pipe & Supply Co., Inc. and Milwaukee Sewer Pipe & Supply Co., Inc. v. Wis. Dept. of Revenue*, 128 Wis. 2d 431, 439, 383 N.W.2d 502 (Ct. App. 1986), (quoting *Mowers v. City of St. Francis*, 108 Wis. 2d 630, 633, 323 N.W.2d 157, 158 (Ct. App. 1982) Equitable estoppel, also called estoppel *in pais*, is a bar to the assertion of what would otherwise be a right; it does not of itself create a right. *Murray v. City of Milwaukee*, 2002 WI App 62, ¶ 15, 252 Wis. 2d 613, 642 N.W.2d 541. The elements of equitable estoppel are (1) action or nonaction by the person against whom estoppel is asserted, (2) that induces reliance by another, (3) to his or her detriment. *Department of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 634, 279 N.W.2d 213 (1979). The Commission must then balance the public interests at stake if the governmental action is estopped against the injustice that would be caused if the governmental action is not estopped.⁵ *Id.* at 639.

A party's reliance on another's action or inaction must be reasonable. *Coconate v. Schwanz*, 165 Wis. 2d 226, 231, 477 N.W.2d 74 (Ct. App. 1991); *Gonzalez v.*

⁵ The balancing test needs to be applied only when a party is successful in showing the basic elements of equitable estoppel. See *Independence Corrugated, LLC v. City of Oak Creek.*, 2008 WI App 160, 314 Wis. 2d 508, 758 N.W.2d 225 citing *DOR v. Moebius Printing Co.*, 89 Wis. 2d 610, 639, 279 N.W.2d 213 (1979).

("Because [we] conclude[] that the elements of the defense of estoppel against a private person are met in the case at bar, we must next consider whether the defense of estoppel shall be applied against a state agency.").

Teskey, 160 Wis. 2d 1, 14, 465 N.W.2d 525 (Ct. App.1990). Equitable estoppel is not as freely granted against a governmental agency as it is against private parties. *Moebius* at 638. Equitable estoppel is designed to promote equity and justice. *Rascar, Inc. v. Bank of Oregon*, 87 Wis. 2d 446, 453, 275 N.W.2d 108 (Ct. App. 1978).

B. LEGAL ARGUMENTS

1. The Petitioner

The Petitioner's two witnesses both testified that they were advised by employees of the Department of Revenue in the early 1990s that sales of towables were exempt from tax. King's Enterprises argues that it then relied upon this advice, not collecting the sales tax on these transactions and reporting these sales as nontaxable on their sales tax returns since 1991. The Petitioner argues that it has shown that the doctrine of equitable estoppel bars the Department here from assessing sales tax, penalties, and interest.

2. The Department

The Department argues that the Petitioner has not met its burden of proof to show that the Department's assessment of sales tax on its sales of nonmotorized trailers to nonresidents who took delivery in Wisconsin was incorrect. Nor has King's met its heightened burden of proof to show that the Department should be estopped from assessing tax on these sales based on oral statements made by Department personnel twenty years ago. The Department argues that King's has failed to prove by convincing evidence who from the Department made these statements, when the statements were made, and what the Department actually said, if anything. The Department argues that King's put no written proof these statements were made into the record at trial, instead relying on the shaky and conflicting testimony of interested parties. Even if King's did prove the statements were made, its reliance on oral statements was not reasonable considering the Department's numerous publications citing the correct application of the law in King's exact circumstances.

C. ANALYSIS OF THE EVIDENCE AND DECISION

This is a case where the taxpayer admittedly incorrectly failed to collect sales taxes on its sales of nonmotorized vehicles to nonresidents from 1990 to 2007. In its defense, the taxpayer states that several Department employees told the taxpayer that the taxpayer was correctly reporting the sales, so the business' practices went on for a long period of time, although they were incorrect. When the audit began, the error was revealed and the Department issued an assessment for approximately \$130,000, but only for the period between 2004 and 2007.

1. Brief Summary of the Trial Evidence

The Petitioner has the burden in this case to show that the Department should be equitably estopped from collecting from it \$132,000 in sales taxes that the Petitioner failed to collect from its customers between 2004 and 2007. In order to make its case, the Petitioner called as its witnesses the company's president and the company's accountant. In brief, they each testified that they were told by three different employees from the Departments of Revenue and Transportation at various points at meetings in the early to mid 1990s to report the relevant sales as tax exempt on a DMV form. The Petitioner did not call any of those employees as witnesses, however, nor did the Petitioner produce any documentation of that advice.

The Department called as its first witness the supervisor for the district the business is located in. He testified that one of the employees had, in fact, retired before the relevant time frame and, thus, could not have given the advice. The Department also called the resolution officer assigned to the case, who gave the historical background of the case and testified that various departmental publications were available in the relevant time frame explaining the tax as to nonmotorized vehicles.

2. Holding

The taxpayer seeks to prove that the Department should be equitably estopped from collecting the taxes, alleging that several state employees in the early 1990's told the Petitioner not to collect the taxes from their customers.⁶ The Department disputes that took place, however, so this case requires us to determine credibility and to weigh the evidence. The strongest points in the taxpayer's favor, in our opinion, are the fact that this treatment took place over a long period of time, that there was professional advice involved, and that the Petitioner apparently collected other sales taxes. There are, however, several large problems with the taxpayer's case, which consisted entirely of the oral testimony of the company president and the accountant as to the key questions here. We will go through several of the problems in detail.

First, the witnesses' memory as to what took place in the early to mid 1990's was not clear or precise. The Department was able to show that the person from the Department who allegedly made the statements had retired before the statements were supposedly made. In fact, the company president's version of what took place admittedly changed in significant ways several times during the course of the case, as his memory of events long ago was confronted with various documented facts. One of several exchanges verbatim from the trial will suffice to show the point:

⁶ One of the individuals who provided the alleged advice not to collect the tax worked for the Department of Transportation. However, in *Spickler Enterprises, Ltd. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-187 (WTAC 1995), the Commission determined that the Petitioner's alleged reliance on oral advice given by WDOT personnel regarding Wisconsin sales tax did not estop the Department in a case involving property similar to that here. See, also, *Zunker v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-812 (WTAC 1986).

[Dept. Attorney]. None of these sworn statements are true, though, are they?

[Company President]. The name is wrong.

Q. So, no, those statements are not true?

A. Evidently.

Q. In fact, [Jim B.] never assisted King's Enterprises with its sales tax delinquency problems, correct?

A. To this day, I still say he did, but I can't prove it in any way, because he died on me a year ago, so.

Q. You've alluded to the fact, that you're aware that [Mr. Jim B.] retired, what is your understanding?

A. I was told recently that he retired before I bought King's and I would swear on a stack of bibles right now that I dealt with him, you know, and so my recollection, obviously, is not correct on that. The name was wrong, I would have sworn I could see him in that office when I was doing this stuff, so.

Q. So it's your testimony now that it's not [Jim B.] that assisted King's with its sales tax delinquency, correct?

A. I'm told that it was not [Jim B.], but I still don't believe that. I'm sorry, I just don't.

Q. So [Jim B.] did not tell you to use the MV11 form to report the -

A. I'm sure he did. I know he told me to use it when I asked him for advice. Evidently, he was on the telephone or when stopped in to visit me. He used to do that often after he retired, so somewhere along the line, I verified that with him what somebody else evidently told me, had to be.

My recollection, obviously, for 20 years wasn't the most fantastic. I remembered the wrong name, so.

[trial transcript, pp. 25-26].

Second, as imprecise as it was, the testimony of the Petitioner's witnesses still conflicted with each other on key details. In particular, the testimony of the president and the accountant differed in that the latter testified that it was a *DOT employee*, and not a DOR employee, who initially brought up the MV-11. Last, but not least, there was no corroboration or substantiation offered by the taxpayer for any part of the taxpayer's version of what took place.⁷ While we are not unmindful of the practical difficulties taxpayers would face in a case like this in providing such documentation to the Commission, we cannot help but agree with the proverbial observation that the palest ink is usually better than the clearest memory.

There are in our view at least two possible explanations for what took place here. First, to some degree, the Petitioner heard what it wanted to hear. Not collecting the tax made it easy on the nonresident customers and on King's, and might have enabled King's to be slightly more competitive on sales to nonresidents. It seems unlikely to us that three separate state employees, including a representative from a separate state agency like DOT, independently would direct the taxpayer not to collect the sales tax from its nonresident customers. Second, it is also possible that the Petitioner might have initially confused treatment of motorized vehicles with nonmotorized vehicles. In sum, what the Petitioner put before us does not in its entirety have the ring of truth, and certainly does not reach the level of clear and

⁷ The testimony of the company president was to the effect that the Petitioner at one time did have documentation, but destroyed it pursuant to its record retention policy. The Petitioner also points out in its brief that the Department has also destroyed its records from this time period, but we cannot decide this case on evidence that is not before the Commission.

convincing evidence.⁸ As made clear in the summary above, the bar here is relatively high. Proof of estoppel must be clear, satisfactory and convincing and is not to rest on mere inference and conjecture. *Variance, Inc. v. Losinske*, 71 Wis. 2d 31, 39, 237 N.W.2d 22, 26 (1976). In our view, the Petitioner has failed to prove the first element of equitable estoppel, and thus we need not address the other two elements.

King's Enterprises points to cases in which a taxpayer has been successful in using equitable estoppel and argues that none of those cases states that written confirmation of the alleged advice is required. *See DOR v. Family Hosp., Inc.*, 105 Wis. 2d 250, 253, 257, 313 N.W.2d 828 (1982); *DOR v. Moebius Printing Co.*, 89 Wis. 2d 610, 632-33, 636-37, 641-42, 279 N.W.2d 213 (1979); *Libby, McNeill & Libby v. Department of Taxation*, 260 Wis. 551, 554-60, 51 N.W.2d 796 (1952). We agree with the Petitioner that none of those cases states that a writing is required, but that is not, in our view, what the issue is here. Instead, we see the issue here in terms of whether or not the alleged advice was ever given, and based on the testimony here, the Petitioner has not clearly and convincingly proven that it was.⁹

⁸ We should make clear that we believe that the company president and the company accountant testified truthfully, but as the above excerpt demonstrates, their memory of these long ago events was not clear or precise.

⁹ The Commission has discussed whether oral advice is sufficient on several occasions. *See, Olken v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-057 (WTAC 1982); *Zunker v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-812 (WTAC 1986). In our view, it is unnecessary to reach that question here.

CONCLUSION

The Petitioner has not shown that the Department should be equitably estopped from collecting the sales taxes the Petitioner failed to pay over from 2004 to 2007.

ORDER

The Department's action denying part of the petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 11th day of May, 2012.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"