

STATE OF WISCONSIN
TAX APPEALS COMMISSION

VILLAGER FOOD MART/BEER & LIQUOR,

DOCKET NO. 10-S-276

Petitioner,

vs.

RULING & ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

LORNA HEMP BOLL, CHAIR:

This matter comes before the Commission on cross-motions for summary judgment. The Petitioner in this matter is represented by Attorney Vincent J. Bobot of Milwaukee, Wisconsin. The Respondent in this matter, the Wisconsin Department of Revenue (“the Department”), is represented by Attorney Daniel P. Brzozowski.¹ Both sides have filed briefs with exhibits and affidavits. The issue in this case is whether the Petitioner is liable for sales taxes as a successor business. For the reasons stated below, we grant summary judgment to the Respondent.

FINDINGS OF FACT

Jurisdictional Facts

1. On October 2, 2009, the Department issued a Sales and Use Tax Determination in the amount of \$120,000, assessing the Petitioner for sales tax due for the periods ending November 30, 2002, through December 31, 2006. (Department’s Exhibit A.)

¹ On January 31, 2012, the Department notified the Tax Appeals Commission that this case was reassigned to Attorney Axel F. Candelaria.

2. The tax liability in question arises from taxes due attributable to the business purchased by the Petitioner prior to the date on which Petitioner purchased the business.

3. Petitioner's Petition for Redetermination was filed timely and considered by the Department and denied in Department's notice dated October 8, 2010. (Department's Exhibit C.)

4. On November 4, 2011, the Department filed a motion for summary judgment, along with a brief and affidavit with exhibits in support of the motion.

5. Petitioner has filed a brief in opposition to the Department's motion with a cross-motion for summary judgment, and the Department has filed a reply with additional exhibits.

Material Facts

1. In July 2008, Petitioner acquired a business, known as K&D Villager, by purchasing the lease, personal property, and substantially all assets, goods, and inventory. (Petitioner's Admissions 1-3 and Petitioner's Response to Interrogatory 1.)

2. The Petitioner renamed the business Villager Food Mart/Beer & Liquor, but the business remained at its original location and carried on essentially the same convenience store type of business.

3. At some point before the purchase price was fully paid, Petitioner learned that there were delinquent state sales taxes due and, on June 29, 2009, Petitioner requested the State of Wisconsin to issue a clearance certificate. (Petitioner's Admission 4.)

4. Petitioner held back the remaining unpaid balance of the purchase price pending the issuance of a clearance certificate. (Petitioner's Admission 4.) The amount withheld (\$49,000) is less than the amount of taxes due (\$120,000).

5. A clearance certificate was never issued regarding the tax liability of the former owners of Petitioner's business. (Petitioner's Admission 8.) Instead, on October 2, 2009, the Department sent Petitioner a notice of amount due for sales taxes due from the prior owner. (Department's Exhibit A.)

6. Prior to assessing Petitioner as a successor, the Wisconsin Department of Revenue made numerous unsuccessful attempts at collection from Petitioner's predecessor, K&D Village, including levies, warnings and ultimately a revocation of seller's permit, tax warrant liens, and assessments of personal liability against the former principals. (Affidavit of Department Resolution Officer Mary Nelson.)

APPLICABLE LAW

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

Successor liability is governed by the Wisconsin Statutes² which establish that the purchaser assumes unpaid tax liabilities of the seller up to the extent of the purchase price.

² These statutory provisions are echoed in Wis. Admin. Code § Tax 11.91(1)(a).

Wis. Stat. § 77.52(18)(am): If any retailer liable for any amount of tax under this subchapter sells out the retailer's business or stock of goods or quits the business, the retailer's successors or assigns shall withhold sufficient of the purchase price to cover such amount until the former owner produces a receipt from the department that it has been paid or a certificate stating that no amount is due.

Wis. Stat. § 77.52(18)(bm): If the purchaser of a stock of goods fails to withhold from the purchase price as required, the purchaser becomes personally liable for the payment of the amount required to be withheld by the purchaser to the extent of the purchase price valued in money.

ANALYSIS

Petitioner initially argued that he did not purchase the business but simply its assets. This line of reasoning was not pursued in the briefs but we will address it here. The Commission faced a similar set of circumstances in *Elrick, Elrick & Romenesko d/b/a Jack's Pizza v. Wis. Dep't of Revenue*, Wis. Tax Rptr. ¶ 200-558 (WTAC 1969). The Commission described the business in *Elrick* as follows:

The pizza buyer would have a difficult time on February 2, 1966 distinguishing the new business from the old. Business was conducted from the same location with virtually the same name and equipment. Two sons and an uncle operated the same type of business their father had conducted before them. Virtually the same customers were serviced with no significant gap in time.

The record is clear that Petitioner Villager Food Mart is in the same line of business as K&D Villager, that is, a convenience store, and is located at the same location operating under virtually the same name. (Petitioner's Admission 1b.) Further, Petitioner has admitted to the purchase of substantially all equipment, assets,

personal property, and the stock of goods from the predecessor business. (Petitioner's Admission 2a and 2b.)

As a purchaser of the stock of goods sold by the preceding owner of this business which is now operated in a substantially similar manner under a similar name, Petitioner becomes a successor under Wis. Stat. § 77.52 (10). *Elrick*, Wis. Tax Rptr. ¶ 200-558 (WTAC 1969).

The legislative intent of these statutes was to prevent a business owner who owes sales tax from selling the business and not paying the sales tax obligations. *Id.* The statutes impose a duty upon the purchaser to exercise due diligence to determine whether taxes are owed. *Id.* If there is a tax liability, the purchaser has a duty to determine the amount and to withhold the amount owed from the purchase price until the purchaser receives a receipt showing that the taxes have been paid or a certificate indicating that no taxes are due. *Id.* If the purchaser fails to make such a determination and to withhold any amount owed, the purchaser becomes personally liable for the taxes owed by the seller. *Id.*

The general rule of interpretation is that, unless the statute is unclear or ambiguous, words should be given their obvious and ordinary meaning. *Transamerica Financial Corp. v. Wis. Dep't. of Revenue*, 56 Wis. 2d 57, 64, 201 N.W.2d 552 (1972). "The law is quite clear that, unless a purchaser withholds from the purchase price a sum sufficient to cover the seller's sales tax liability, the purchaser is liable for those taxes." *Gregory L. Vallee v. Wis. Dep't of Revenue*, Wis. Tax Rptr. ¶ 202-786, (WTAC 1986). Both parties rely on *Kastengren v. Wis. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-022

(WTAC 1993). As in *Elrick*, the Commission in *Kastengren* also noted that the statutory intent is for the tax debt to follow the business or its assets, noting the statute's broader intent to protect the state's interest in collecting the taxes. *Id.*

The relevant statute dictates that the purchaser "shall withhold sufficient of the purchase price to cover" the amount of unpaid taxes. Partial compliance does not exonerate Petitioner. In this case, while Petitioner withheld what was left to be paid when he discovered a tax liability existed, there is no question he did not withhold a sufficient amount from the purchase price.

Petitioner, citing *Kastengren*, has also asserted that the Department has an obligation to collect these taxes from the predecessor before bringing an assessment against the Petitioner. Petitioner's position is correct. However, the Department's reply brief included an affidavit substantiating numerous efforts to collect these taxes from K&D Villager, the predecessor business, and its owners. This documentation clearly puts Petitioner's objection as to collection efforts to rest.

Finally, Petitioner has questioned the amounts due. Assessments made by the Respondent are presumed to be correct and the burden is upon the Petitioner to prove by the greater weight of credible evidence in what respects Respondent erred in its determination." *Id.* Petitioner has produced no documentation to support calculations other than those contained in the assessment.

CONCLUSIONS OF LAW

1. The Petitioner was a successor to the seller pursuant to the provisions of Wis. Stat. § 77.52(18).

2. At the time of sale of the business to Petitioner, the seller was liable for unpaid sales tax for the period under review.

3. Not having received from the seller a receipt from the Department that all amounts of sales tax had been paid or a certificate stating that no amount was due pursuant to Wis. Stat. § 77.52(18), Petitioner's failure to withhold from the purchase price an amount sufficient to cover this liability renders him liable for that amount.

4. The Department made sufficient attempts to collect these taxes from the seller of the business. The Department is not estopped from assessing such tax against Petitioner.

5. Petitioner has failed to meet the burden of proof to show the Department's assessment to be incorrect. Therefore the amount of the assessment is affirmed as well.

DECISION AND ORDER

There being no genuine issues of material fact, we find the Petitioner responsible for the tax liabilities of its predecessor business and further affirm the amount of the assessment.

Based on the foregoing, it is the order of this Commission that the Department's motion for summary judgment is granted and Petitioner's motion for summary judgment is denied.

Dated at Madison, Wisconsin, this 4th day of April, 2012.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: **“NOTICE OF APPEAL INFORMATION”**