STATE OF WISCONSIN

TAX APPEALS COMMISSION

SMITH-BISONETTE, INC., **DOCKET NO. 11-S-257**

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DECISION AND ORDER

LORNA HEMP BOLL, COMMISSIONER:

This matter comes before the Commission following a trial on a limited factual issue. This case concerns a sales tax payment remitted to the Department which was not owed and which was subsequently refunded. Statutes require the taxpayer to return a refund of any taxes collected from customers to those customers. Any monies not so returned to customers must be returned to the Department. The taxpayer takes the position that no tax was collected and, therefore, that he is justified in keeping the funds which he was not obligated to pay to the Department in the first instance. The Department seeks return of the refund pursuant to Wis. Stat. § 77.59(4)(c) (2003-2004) and in later years pursuant to Wis. Stat. § 77.59(5m). We find for the Department.

FINDINGS OF FACT

Procedural History

1. For the taxable years of 2003 through 2007, Petitioner included all admissions of professional drivers entering through the pit gate, or "backgate," at the Rice Lake Speedway in the gross sales figure used to calculate the sales tax remitted to the Department for those tax years.

2. On December 17, 2007, Petitioner claimed a refund of sales taxes related to admissions at Rice Lake Speedway; among other entry fees, the refund claim included sales tax attributable to entry fees paid by professional drivers entering races at Petitioner's track.

3. In response to the refund claim, the Department conducted a field audit for the taxable years 2003 through 2007. The refund was partially denied but, relevant to these proceedings, allowed for sales tax attributable to the backgate driver admissions.

4. The Department's Notice of Field Audit Action adjusted the sales tax calculations to exclude these driver admissions for the contested years. Under Notice of Field Audit Action dated October 20, 2008, the Department issued a refund in the amount of $16,003.58, representing the tax paid on backgate driver admissions ($12,505.24) plus interest.

5. Petitioner petitioned for a Redetermination and then in 2009 appealed the Department's denial of Petitioner's Petition for Redetermination to the Tax Appeals Commission.

6. In that appeal, designated Docket No. 09-S-230, the Petitioner contested the amount of the refund, claiming other entries should have also been exempt. Eventually Petitioner conceded the remaining issues and agreed to withdraw the appeal in a letter dated January 15, 2010. The Commission dismissed Docket No. 09-S-230 by order on February 5, 2010.

7. In the Notice denying Petitioner's Petition for Redetermination dated September 14, 2009, the Department alluded to a statutory requirement to return sales tax refunds to customers: "In addition, if a seller files a claim for refund of sales or use tax that the seller collected from buyers, the seller shall return the tax and related interest to the buyers from whom the tax was collected per s. 77.59(5m), Wis. Stats."

8. Throughout the pendency of Docket No. 09-S-230, Petitioner contested the Department's assertion of the requirement of Wis. Stat. § 77.59(5m).[1] The disposition of the funds was not yet ripe for adjudication in Docket No. 09-S-230 and the February 2010 order dismissing the action specifically noted that the disposition issued would be "handled in future proceedings, if necessary."

9. On November 4, 2010, the Department began to pursue the return of the refund, alleging that the Petitioner was supposed to have passed the refunded amount along to drivers whose admissions were the basis of the sales tax overpayment

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[1] Wis. Stat. § 77.59(4)(c) (2003-2004) was amended and renumbered to Wis. Stat. § 77.59(5m) for the years 2005 and beyond. We refer to the later version; however, for the purposes of this opinion, the change was not a material one. The earlier version reads as follows:

> Wis. Stat. § 77.59(4)(c) (2003-2004): A seller who receives a refund under par. (a) or (b) of taxes that the seller has collected from buyers shall return the taxes and related interest to the buyers from whom the taxes were collected. The seller shall return to the department any part of a refund that the seller does not return to a buyer along with a penalty of 25% of the amount not returned or a penalty equal to the amount not returned in the case of fraud.

which was subsequently refunded.

10. On December 13, 2010, the Department issued a Notice of Amount Due in the amount of $23,482.65, which represented the $12,505.24 tax refund along with 12% interest and a 25% penalty. The Petitioner contested the Notice, and, on July 15, 2011, the Department denied Petitioner's Petition for Redetermination. Petitioner appealed to the Commission in the instant case, Docket No. 11-S-257.

11. Because the majority of the facts are not in dispute, the Department brought a Motion for Summary Judgment. That Motion was denied in February 2013. The Commission found that a question of fact remained as to whether Petitioner did in fact "collect" the taxes from those drivers.

12. The Commission held a trial to afford Petitioner an opportunity to present documentary evidence and the testimony of witnesses under oath concerning the details of how the driver admissions were handled at Rice Lake Speedway.

Trial Testimony

13. Petitioner received the refund for the portion of taxes paid attributable to the driver backgate admissions. Petitioner did not pass the refund on to any of the drivers who paid admissions at the speedway.

14. From the time he started operating the speedway, Petitioner did not believe sales tax was owed on driver backgate admissions. However, Petitioner deferred to his accountant who did believe these sales should be included in the sales tax calculations.

15. Petitioner did not visibly or in any other manner advise the drivers

one way or the other as to whether their $25 admission included a collection of sales tax.

16. Petitioner did not present evidence to show any effort to segregate any portion of the driver admissions to be expressly set aside as sales tax; however, the driver backgate admissions were included in the gross receipts used to calculate sales tax liability for the years in question.

17. The auditor testified regarding Petitioner's spreadsheets of the calculations of sales tax. The math showed that taxable sales were calculated essentially by subtracting out sales taxes from the gross sales. In other words, the gross sales (i.e., each $25 driver admission) consisted of a taxable sale price plus the actual sales tax.

18. Petitioner did not present evidence to show any effort to exclude the driver backgate admissions from the gross receipts and sales tax calculations.

19. Petitioner did not present evidence to show any effort to segregate any portion of the driver admissions to create a pool for prize money.

20. Although Petitioner did not agree with his accountant's methodology, he authorized tax returns for the tax periods at issue and did not formally contest the payment of the sales tax with the Department until 2007.

APPLICABLE LAW[2]

> Wis. Stat. § 77.59(5m) (2005-2008):
> A seller who receives a refund under sub. (4)(a) or (b) of taxes that the seller has collected from buyers, who collects amounts as taxes erroneously from buyers, but who does not remit such amounts to the state, or who is entitled to a refund under sub. (4)(a) or (b) that is offset under sub. (5), shall submit the taxes and related interest to the buyers from

[2] See FN 1.

> whom the taxes were collected, or to the department if the seller cannot locate the buyers, within 90 days after the date of the refund, after the date of the offset, or after discovering that the seller has collected taxes erroneously from the buyers. If the seller does not submit the taxes and related interest to the department or the buyers within that period, the seller shall submit to the department any part of a refund or taxes that the seller does not submit to a buyer or to the department along with a penalty of 25% of the amount not submitted or, in the case of fraud, a penalty equal to the amount not submitted.

OPINION

Assessments are presumed to be correct. Petitioner has the burden to prove the Department erred in its assessments. The Commission has long held that the taxpayer's own self-serving testimony alone is insufficient to meet this burden. *Ruhl Enterprises, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 201-924 (WTAC 1981).

Undisputed Facts

The parties agree to these facts: For the years at issue, Petitioner charged drivers coming in through the back gate $25 for their entry fee. For the years at issue, Petitioner included these receipts in his gross receipts calculations used to compute the sales tax due.

All now agree that these types of driver admissions are and were exempt from taxation in Wisconsin. Nevertheless, Petitioner included these admissions in total gross receipts in the calculations of sales tax from the time he began operating the track through the 2007 racing season.

In December of 2007, Petitioner filed a claim for refund of the taxes paid which were attributable to the driver backgate admissions. The claim for refund was

answered with a field audit. At the conclusion of the audit, the Department conceded that these admission receipts from drivers at the backgate were not taxable. The Department refunded the amount of the sales tax erroneously paid with direction to pass the funds on to the drivers who allegedly paid the tax to the Petitioner. Petitioner did not pass the refund on to any drivers and continued to contest any obligation to do so as well as any obligation to return the funds to the Department.

Trial Evidence

The question addressed at trial was whether Petitioner was entitled to keep the funds refunded to him by the Department.

Petitioner argued that no tax had been "collected from" the drivers. The evidence showed that drivers were charged a flat $25 fee to which no tax was expressly added. There was no sales tax expressly charged to drivers upon admission. The ticket price was not advertised as $23 and change, which, after charging tax, happened to add up to $25.

So did the $25 implicitly include tax? The Department argues that it did. Petitioner very credibly testified that, from the day he purchased the Rice Lake Speedway, he did not believe the back gate driver entry fees were taxable. It was obvious that the amounts remitted were calculated upon receipts after the fact. His memories of discussions with owners of other tracks were consistent from Day One – these admissions were not taxable. Of course, Petitioner was right.

Unfortunately for Petitioner, however, the accountant he hired to do the accounting for his track did not share his belief and advised him instead to include the

driver entry fees in with all other taxable admissions. If at some point Petitioner could prove her wrong, they would file for a refund; she reasoned that strategy would be better than later being potentially subject to substantial penalties and interest if Petitioner's belief was wrong.

Petitioner went along with the accountant's plan. As a subtle display of disagreement, Petitioner displayed signage which stated, "Applicable sales tax included" in the admission price. Petitioner testified that he purposefully added the word "applicable" because he did not believe any tax *applied* to the driver admissions and therefore "applicable tax" on those sales was zero.

Although Petitioner's belief was ultimately found to be correct, his actions were in conflict. For the years 2003-2007, Petitioner remitted sales tax as though the driver admissions were taxable. Petitioner's tax return calculations support the Department's position: Amounts attributable to sales tax were backed out of the gross receipts to calculate the amount of taxable sales. The remaining $23 or so per driver admission was included in the taxable sales upon which Petitioner remitted sales tax for five tax years. This calculation evidence established that the driver admission price did include sales tax.

It was not until 2007 that Petitioner found support at a race track owners' convention sufficient to convince his accountant to file for a refund. During the audit that was sparked by the refund claim, the Department eventually agreed that the driver admissions, upon which Petitioner had been submitting sales tax, were nontaxable. In the end, the taxes paid were refunded to Petitioner.

The Department's working files showed that, from the first discussions regarding the refund, Petitioner was told that, if he received the refund, he would be obligated to return it to the drivers who paid it to Petitioner. Petitioner received the refund, and Petitioner kept the refund. Petitioner's posture before this Commission has been that he needn't return funds he had not expressly collected as sales tax from the drivers. But we find that tax was included in the price of admission.

This case involves vindication without reward. If Petitioner is to be believed, had he never paid the taxes that were not owed, the funds would still be his. He regrets following the advice of the accountant. Caselaw on this topic does Petitioner no favors; the Commission has held that the errors of an accountant are the errors of the taxpayer. This Commission has historically rejected "it's the accountant's fault" as a defense. *Dziniela v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-953 (WTAC 2015); *Kirschbaum v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-325 (WTAC 2010). In other words, Petitioner cannot escape this predicament by pointing to poor advice he may have received from his accountant.

Although Petitioner gave extremely credible testimony that he believed from the get-go that these admissions were nontaxable, the Commission requires additional proof to overcome the presumption of the correctness of the assessments. The unsupported testimony of a self-interested taxpayer is simply not enough. *Dvorak v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-600 (WTAC 2002).

The only probative factor leaning in Petitioner's favor was the fact that, once everyone agreed that the driver admissions were nontaxable, the price of the

driver admissions did not go down to reflect the absence of collection of the tax. On balance, however, there was also, for example, no testimony that the receipts from the driver admissions were kept separate and used expressly for prize money,[3] nor was a separate calculation of the total tax without the inclusion of these sales, nor was any protest lodged at the time of payment.

The bulk of the evidence at trial did not lean in Petitioner's favor: the tax calculations, the tax payments, the tax deduction for sales tax paid, the lack of photographs of the "applicable" verbiage, the lack of testimony by witnesses such as other track owners or anyone with whom he might have had those conversations at the time he bought the track. Petitioner's one witness, the accountant, provided little in the way of helpful memories.

Because Petitioner was unable to prove he did not collect a sales tax from the drivers and because Petitioner did not pass the refunded monies on to any of the drivers at the speedway, the monies must be returned to the Department.

RULING

The parties agree that the driver admissions were at all times exempt from sales tax. The sole issue of this trial was to determine whether the Petitioner is entitled to keep funds refunded by the Department. We find that he is not.

Petitioner was obligated to pass the refunded tax and related interest back to the drivers who raced at Rice Lake Speedway from 2003-2007. He did not do so.

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[3] According to the Department's internal legal ruling memo, driver admissions are exempt from tax because the money is paid back as prize money. (Ex. 24, p. DOR276.)

Any monies not so returned must be remitted to the Department.

To add insult to injury, the statutory penalty language is mandatory (monies not so returned to buyers *shall* be submitted to the Department "*along with* a penalty of 25%"), so the penalty is likewise upheld.

CONCLUSIONS OF LAW

1. Sales tax was "collected from" the drivers in question.

2. The tax and interest refunded to Petitioner must be returned to the Department along with the 25% penalty.

ORDER

Now therefore, based upon the foregoing reasoning and caselaw, it is ordered that the Department's assessment is upheld and Petitioner's Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 17th day of November, 2015.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

David D. Wilmoth, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. **Several points about starting a case:**

1. **The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier** within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.

2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.

3. The 30-day period starts the day after personal service or the day we mail the decision.

4. **The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.**

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is *http://wicourts.gov*.

This notice is part of the decision and incorporated therein.