

STATE OF WISCONSIN
TAX APPEALS COMMISSION

AIRTEC, INC.
1003 Harlem Street
Altoona, WI 54720,

DOCKET NO. 04-S-133

Petitioner,

vs.

SUMMARY JUDGMENT

WISCONSIN DEPARTMENT OF REVENUE RULING AND ORDER
P.O. Box 8907
Madison, WI 53708-8907,

Respondent.

DIANE E. NORMAN, COMMISSIONER:

The above-entitled matter is before the Commission on a motion for summary judgment by respondent, Wisconsin Department of Revenue ("respondent"), supported by affidavit and brief of Attorney Linda M. Mintener.

Petitioner, Airtec, Inc. ("petitioner"), failed to respond to the motion.

Having considered the entire record before it, the Commission finds, rules, and orders as follows:

FINDINGS OF FACT

In a notice dated November 8, 2002, respondent assessed petitioner for additional sales and use tax, as well as interest and penalties, in the amount of \$129,409.50. Respondent adjusted several items originally reported in petitioner's Wisconsin tax returns for the period from April 1, 1997 through March 31, 2000 (Affidavit of Linda M. Mintener, Ex. 1).

Under date of December 26, 2002, petitioner filed with respondent a timely petition for redetermination of the assessment. In its letter, petitioner indicated that it disagreed with the assessment of tax on sales for which exemptions apply, disagreed with assessments of tax on purchases that are exempt for resale or manufacturing, and disagreed with the assessment of the 25% penalty (Mintener Affidavit, Ex. 2).

Under date of March 18, 2004, respondent denied the petition for redetermination (Mintener Affidavit, Ex. 3).

Petitioner filed a timely appeal to the Commission on May 19, 2004. Petitioner appealed the assessment by respondent on the bases that: many of the sales assessed by respondent were exempt from taxation, as supported by exemption certificates; many purchases of cylinders used for gas storage were exempt from taxation because they were assessed when leased to customers; the samples used by respondent in the field audit were incorrect; some sales were exempt from taxation because delivery occurred outside of Wisconsin; and petitioner should not be assessed interest or penalties, as it had corrected many deficiencies in its accounting system.

On June 16, 2004, respondent sent its First Request for Admissions, First Set of Interrogatories, and First Request for Production of Documents to petitioner (Mintener Affidavit, Ex. 4). The request for admissions, in particular, indicated that petitioner was required to respond to respondent's requests within 30 days, and that failure to respond would result in the deemed admission of all items addressed in respondent's request.

The 30-day period provided by Wis. Stat. § 804.11(1)(b) for response by petitioner to respondent's various discovery requests expired on or around July 16, 2004.

Respondent wrote a letter to petitioner on July 26, 2004 indicating that no responses had been received by respondent to the discovery requests sent to petitioner (Mintener Affidavit, Ex. 5). Respondent filed a Motion for Summary Judgment on August 2, 2004. Petitioner had made no contact with respondent as of the August 2, 2004 date of the Motion for Summary Judgment (Mintener Affidavit, No. 9).

Petitioner was ordered by the Commission to file a response to respondent's Motion for Summary Judgment no later than September 3, 2004. Petitioner failed to file any response to respondent's Motion for Summary Judgment.

The failure of petitioner to provide timely responses to respondent's request for admissions resulted in the deemed admission of the requested statements under Wis. Stat. § 804.11(1)(b), which means, for purposes of this action only, that the admitted matters are considered conclusively established by operation of statute. *See* Wis. Stat. § 804.11(2).

Matters deemed admitted by petitioner and considered conclusively proved include:

1. None of the sales in the assessment are exempt from taxation because petitioner did not take any exemption certificates from its purchasers and petitioner does not have any exemption related to any of the contested sales, certificates on file and cannot obtain any such certificates from its purchasers.
2. None of the sales in the assessment used to determine sales and use tax are exempt from taxation because none of the items sold were used in an exempt manner, and petitioner knew or should have known that the purchaser would not use the item sold in an exempt manner.
3. Petitioner was not taxed twice for the purchase of cylinders and subsequent rental of those cylinders because petitioner did not pay any sales or use tax on the purchase of the cylinders that were used for storage of gases and also rented to customers.
4. Petitioner is not contesting any of the sampling used by respondent¹ in its field audit to determine sales and use tax.
5. Petitioner admits that sales of items in the field audit report were sold to a purchaser(s) or purchaser's(s') agent in Wisconsin and that the items were used in Wisconsin.
6. Petitioner reported and paid no use tax to respondent for the period under review and had no use tax reporting system during this period.
7. This is the second audit that respondent has conducted of petitioner, and petitioner failed to correct the mistakes respondent found in the first audit and continued to make the same mistakes in failing to report and pay

¹ Wisconsin sales and use tax statutes allow respondent to determine the tax required to be paid on the basis of sampling in field audits. Wis. Stat. § 77.59(2).

sales/use tax.

CONCLUSION OF LAW

There is no genuine issue of material fact in this
Wis. Stat. § 802.08(2), it is entitled to a judgment as a

matter, and respondent has demonstrated that, under
matter of law.

OPINION

The deemed admissions show that petitioner no longer
respondent. Petitioner has admitted that

disputes the additional sales and use taxes as assessed by

the sales used in the field audit to determine sales tax purchases and subsequent leases, that samples used in sales used in the field audit were for sales within the Petitioner had the burden of proving that its errors in to good cause and not due to neglect, to avoid paying a Stat. § 77.60(3). Petitioner not only failed to prove this was the second audit performed by respondent, first audit. Petitioner even admitted in its appeal that that would justify penalties for negligence.

Finally, petitioner is required to pay interest on the tax 12% interest on any unpaid taxes resulting from the Summary judgment is appropriate in this case. Under party's failure to respond to a request for admission, dispositive of an entire case under Wis. Stat. § 624, 631, 334 N.W. 2d 230 (1983). Respondent has Motion for Summary Judgment.

were not exempt, that petitioner was not taxed twice for the field audit to determine taxes were correct, and that state of Wisconsin.

failing to file correct sales and use tax returns were due 25% penalty on the entire tax finally determined. Wis. good cause and lack of neglect, but, having admitted that petitioner failed to correct any mistakes identified in the there were many deficiencies in its accounting system

assessed. Wisconsin Statutes require that petitioner pay field audit. Wis. Stat. § 77.60(1)(b).

Wisconsin law, summary judgment can be based upon a and admission[s] may be sought which would be 804.11(2). *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d shown good cause for the Commission to grant its

Therefore,

IT IS ORDERED

That respondent's motion for summary judgment is hereby granted, and its action on petitioner's petition for redetermination is hereby affirmed.

Dated at Madison, Wisconsin, this 7th day of March, 2005.

COMMISSION

WISCONSIN

TAX

APPEALS

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

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