

No. A05-0440

STATE OF MINNESOTA
IN SUPREME COURT

James L. Wilson,

Relator,

vs.

Commissioner of Revenue,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUES

I. Relator, acting through a corporation, entered into a sham employment relationship with an “employee” who was seeking to avoid a levy by the Commissioner of Revenue (“Commissioner”) for the employee’s unpaid taxes. The levy was issued to a third-party for whom the employee was providing services under a contract. The corporation, which took over the contract and continued to furnish identical services through the employee, subsequently received notice from the Commissioner of a withholding tax levy on the employee but willfully failed to honor it. Under the statute in effect at the time, an employer who willfully failed to honor a levy was liable for the full amount of the employee’s unpaid taxes set forth in the notice, in this case approximately \$35,000 (as of the time of a tax court trial challenging the corporation’s levy). For failing to honor the levy, the corporation - and then Relator personally - were assessed for the full amount of the employee’s unpaid taxes. Although the tax court sustained the assessment against the corporation and twice sustained the assessment against Relator, this Court ultimately determined that an assessment for the full amount of the employee’s unpaid taxes resulted in an “excessive fine” in violation of the federal and state constitutions. The Court ordered a recomputation of the assessment limited to 25 percent of the property not surrendered, plus a 25 percent penalty, which significantly reduced the amount of the assessment although otherwise holding Relator liable. Did the tax court properly exercise its discretion in denying Relator’s motion for attorney fees in connection with: (1) the prior tax court case involving the corporation, where the

Commissioner prevailed and no appeal was taken; (2) the instant case as to two separate appeals to this Court, given Relator's failure to request attorney fees under Minn. Civ. App. P. 139.06, subd. 1; and (3) the various tax court proceedings in this case?

The tax court held: Relator was not a "prevailing party," was not entitled to attorney fees and otherwise did not rule.

Apposite authority: *Borchert v. Maloney*, 581 N.W.2d 838 (Minn. 1998); Minn. Stat. §§ 15.471 - 15.474 (1998); Minn. Stat. § 271.19 (2004); Minn. R. Civ. App. P. 139.06.

II. Did the tax court properly deny Relator's motion for costs and disbursements in connection with: (1) a prior 1997 tax court case, involving Relator's corporation, in which the Commissioner prevailed and no appeal was taken; (2) the instant personal liability case as to two separate, prior appeals to this Court, given Relator's failure to file a notice of taxation of costs and disbursements in this Court under Minn. R. Civ. App. P. 139 in either appeal; and (3) the various tax court proceedings in this case?

The tax court held: Relator was not a prevailing party, was not entitled to costs and disbursements and otherwise did not rule.

Apposite authority: Minn. Stat. § 271.19 (2004); Minn. R. 8610.0150 (2003); Minn. R. Civ. App. P. 139.03.

III. Whether Relator's motion for attorney fees should be denied by the Court on the alternative grounds that he failed to show the Commissioner's position was not

substantially justified and failed to show that he qualifies as an eligible “party” entitled to attorney fees?

The tax court: Did not rule.

Apposite authority: *Fownes v. Hubbard Broad., Inc.*, 310 Minn. 500, 542, 246 N.W.2d 700, 702 (1976); *Donovan Contracting of St. Cloud, Inc. v. Minnesota Dep’t of Transp.*, 469 N.W.2d 718 (Minn. Ct. App. 1991); *United States Dep’t of Labor v. Rapid Robert’s, Inc.*, 130 F.3d 345, 347-48 (8th Cir. 1997); Minn. Stat. §§ 15.471 - 15.474 (1998); Minn. Stat. § 271.19 (2004).

STATEMENT OF THE CASE

The lengthy procedural history of this case, which has twice before been considered by the Court and is set out in its two prior opinions, is summarized here without further citation to the record of the prior appeals.

Relator James L. Wilson (“Mr. Wilson” or “Relator”) filed an appeal in the Minnesota Tax Court on June 20, 1997, to contest a determination by the Commissioner of Revenue (“Commissioner”) that he was personally liable for the unpaid tax assessment of Hazardous Waste Controls of Bloomington, Inc. (“HWC”), a corporation which he founded, operated, and then closed, all in 1994. App. at A-1. The Commissioner had assessed HWC for willful failure to honor a wage levy on an employee. The tax court affirmed the assessment in a companion matter, *Hazardous Waste Controls of Bloomington, Inc. v. Comm’r of Revenue*, No. 6589, 1997 WL 158263 (Minn. T.C. Mar. 17, 1997) (hereinafter “*Hazardous Waste Controls*”), based on the corporation’s willful failure to withhold or remit taxes in response to the employer wage levy.

HWC had contested the Commissioner’s assessment, inter alia, on the ground that it had not “willfully” failed to comply with the levy and on various legal theories, including the constitutional claim that an assessment for the entire amount of the employee’s tax liability set forth in the notice constituted an “excessive fine.” In sustaining the assessment against HWC, the tax court found that Mr. Wilson had colluded with an HWC employee to circumvent the Commissioner’s tax collection efforts. See *Hazardous Waste Controls*, Finding No. 23, 1997 WL 158263, at *2. The tax court

further held that while it found no merit to HWC's constitutional argument, the constitutional issue was not properly before it, as HWC had failed to invoke a procedure necessary to invest the tax court with jurisdiction to pass upon a constitutional challenge (the "Erie Shuffle"). Following the tax court's ruling, HWC filed no post-trial motions and failed to appeal the tax court's adverse decision to this Court, thus permitting it to become a final judgment against the corporation.

In a pre-trial order in the present case, challenging his personal liability assessment for the amount assessed against HWC, the tax court held that Mr. Wilson was prohibited by the doctrine of collateral estoppel from offering or introducing evidence regarding a number of factual matters which were necessarily determined against HWC in the earlier case.¹ In addition, the tax court concluded that Mr. Wilson was barred by the doctrine of res judicata from contesting whether the amount of the assessment against HWC constituted an "excessive fine," because he was in privity with HWC in the earlier case and because HWC had had a full and fair opportunity to litigate the constitutional issue in the earlier case.

After the completion of pre-trial discovery, the Commissioner moved the tax court for summary judgment on the ground that the only issue remaining to be determined was the fact question of whether Mr. Wilson had sufficient control over and responsibility for the business affairs of HWC to be held personally liable for its willful failure to comply

¹ The tax court's collateral estoppel holding was not challenged by Relator in his first appeal and is the law of the case in this matter.

with the Commissioner's wage levy. Mr. Wilson responded by conceding that he had sufficient control and/or responsibility to be held personally liable. However, Mr. Wilson contended that the applicable statutes required the Court to limit the amount of his liability to the Commissioner's "pecuniary loss" that resulted from HWC's failure to comply with the employee wage levy. As a consequence, Mr. Wilson argued that a "material fact," as to the "amount" of pecuniary loss, remained in dispute.

Following argument on the Commissioner's summary judgment motion, the tax court rejected Mr. Wilson's contention that the Commissioner's authority to assess personal liability for HWC's unpaid tax assessment was limited to the Commissioner's actual pecuniary loss. Therefore, in light of Mr. Wilson's concession that he had sufficient control and responsibility over the business affairs of HWC to be held personally liable for the unpaid levy, the tax court determined that there were no material facts in dispute and granted summary judgment in favor of the Commissioner. Order, dated March 14, 2000.

This Court reviewed the tax court's order on a writ of certiorari and reversed and remanded solely on the issue of res judicata, holding that res judicata did not bar consideration of Mr. Wilson's "excessive fine" constitutional claim. *Wilson v. Comm'r of Revenue*, 619 N.W.2d 194 (Minn. 2000) ("*Wilson I*").²

² The Court did not reach Mr. Wilson's second claim (later reasserted in his second appeal) that the statute under which he was assessed limited the assessment to the amount of "the state's actual pecuniary loss." *Wilson I*, 619 N.W.2d at 196, 200.

On remand to the tax court, the parties conducted further discovery, after which a trial was held on the excessive fines claim. Following post-trial briefing, the tax court rejected Mr. Wilson's claim that the assessment was an unconstitutional excessive fine. In its holding, the tax court concluded that the wage levy statute's purpose was facially remedial, rather than punitive, and that the amount assessed was not grossly disproportionate to the total of the amount of taxes owed by the employer and the collection costs incurred by the Commissioner. Order, dated January 8, 2000, Mem. at pp. 8-11. Relator then petitioned this Court for review by certiorari for a second time, which was granted.

On April 1, 2003, this Court again reversed and remanded to the tax court, holding that the assessment against Relator did not serve a solely remedial purpose, but also served retribution and deterrent purposes and was therefore a "punishment." *Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 554 (Minn. 2003), *reh'g denied* (Apr. 1, 2003) ("*Wilson II*"). The Court then determined that the statutory assessment against Relator for the entire amount (over \$45,000) of unpaid taxes of the employee whose wages were subject to the dishonored levy, was an unconstitutional excessive fine. *Id.* at 557. While the Court invalidated the amount of the assessed liability as excessive, it upheld the assessment and simply modified the amount to 25 percent of the employee's wages during a specified period, plus statutory interest, plus "25 percent of the total amount due under the levy as a penalty for failing to withhold and remit . . . without reasonable cause." *Id.* at 557-58. The Court then remanded to the tax court for calculation of the actual amounts

due, “with the hope that the parties will agree upon the proper amount without further extending this already lengthy litigation.” *Id.* at 558.

On second remand, the parties ultimately agreed to settle the matter,³ without further payment by Mr. Wilson and without the payment of any refund by the Commissioner, but preserving the issue of fees, costs and disbursements. App. at A-26. The tax court entered an Order for Dismissal on July 28, 2004. App. at A-29. Relator’s motion for attorney fees and costs and disbursements followed. App. at A-30. After briefing and argument, the tax court entered its order denying Relator’s motion in all respects on the basis that he was not a “prevailing party.” App. at A-122. Relator then petitioned the Court for a Writ of Certiorari, which issued on March 4, 2005.

STATEMENT OF FACTS

The underlying facts in this matter are not set out in Relator’s statement of facts, which is devoted to a discussion of the procedural history of this litigation. However, the essential facts are not in dispute and have been stated extensively in prior briefing to the

³ The parties were unable to agree on remand on whether wages which the corporate employer, HWC, had to begun attribute to the employee’s son following service of the wage levy were properly included in the calculation of the employee’s wages under this Court’s opinion, based on the tax court’s observation in *Hazardous Waste Controls* that the substitution of the son on the payroll was apparently part of the scheme to evade the Commissioner’s collection efforts, or whether further evidence on this issue could be taken. As the tax court stated: “The record also shows that [HWC] substituted Employee’s son, Jay R. Hanson IV, on its payroll records for no understandable reason other than perhaps to further circumvent the levy. *Hazardous Waste Controls*, 1997 WL 158263 at *4 (slip op., Mem. at pp. 9-10). Following briefing by the parties, the tax court had determined that additional evidence on the issue could be taken. But, as noted, the matter settled.

Court and in the Court's opinions in *Wilson I* and *Wilson II*. An abbreviated summary of the facts, without further citation to the record of the prior appeals, follows as an aid in understanding the tax court's ruling that Relator is not a "prevailing party" in this matter.

In 1994, J. R. Hanson, III ("Mr. Hanson"), who owed a substantial amount of unpaid Minnesota sales and income taxes, was providing janitorial cleaning services as an independent contractor to a local automobile dealership.⁴ On May 12, 1994, the Commissioner issued a third-party levy to the dealership directing it to pay to the State of Minnesota any funds then owed to Mr. Hanson under the contract. A third-party levy on an independent contractor's earnings requires the payor to remit 100 percent of the contractor's earnings to the Commissioner, rather than to the contractor. In contrast, a wage levy on an employee's earnings generally requires an employer to pay the State no more than 25 percent of the employee's wages.

Mr. Hanson retained Mr. Wilson, as a tax consultant, to represent him with respect to his unpaid taxes and the levy. Upon failing to negotiate a suitable payment plan for Mr. Hanson, Mr. Wilson arranged for a company he owned, Hazardous Waste Controls of Bloomington, Inc., to replace Mr. Hanson as the cleaning service contractor for the automobile dealership. He then hired Mr. Hanson (and perhaps Mr. Hanson's son) to

⁴ This statement of facts is based on findings made by the tax court in the original *Hazardous Waste Controls* case ("HWC Findings"), which findings the tax court held Mr. Wilson was bound by (Order, dated May 5, 1999), and on the additional evidence developed in the record of this case in the tax court, both through summary judgment motions and through the findings made following a trial on remand from the appeal to this Court in *Wilson I*.

perform the same services at the dealership on behalf of HWC, but at the reduced rate of \$6 per hour, rather than the \$18 per hour that the automobile dealership had been paying to Mr. Hanson as a contractor.

On June 6, 1994, Mr. Wilson informed the Commissioner of the new employment relationship. The Commissioner subsequently issued to the new corporate employer, HWC, a wage levy with respect to Mr. Hanson. Receiving no response, the Commissioner issued a "Wage Levy No Response Received" letter to HWC, dated October 4, 1994, which advised HWC that if it failed to comply with the levy it would be liable "for the total amount due in the notice, plus interest." HWC thereafter made only one payment to the Commissioner, failed to file a disclosure form with respect to its payment of wages to Mr. Hanson, and made no further payments, despite its bi-weekly payroll schedule. On November 2, 1994, the Commissioner issued to HWC an Order Assessing Liability for Failure to Honor Notice to Employer, which assessed HWC for the full amount of Mr. Hanson's unpaid tax liability, as set forth in the Notice. Throughout this employment relationship, HWC, acting through Mr. Wilson, colluded with its "employee," Mr. Hanson, to circumvent the Commissioner's tax collection efforts and willfully failed to withhold additional amounts of tax.

In concluding that HWC's failure to comply with the Commissioner's wage levy was "willful" and the result of collusion between HWC and its employee, the tax court made the following observations concerning the formation and purpose of this "employment relationship":

To avoid the 100% third-party levy on earnings of independent contractors, Mr. Wilson arranged for his company, [HWC], to hire [Mr. Hanson] and arranged to become the new cleaning service contractor for [the automobile dealership]. Mr. Wilson further affected the levy that could be imposed by establishing [Mr. Hanson's] hourly rate at \$6 per hour rather than the \$18 [Mr. Hanson] had been receiving as an independent contractor.

We find this employee relationship with [Mr. Hanson] a sham. It was a technique Wilson designed to circumvent the third-party levy that was in effect at [the automobile dealership]. Rather than having 100% withheld under the third-party levy, Wilson devised an "employee" relationship where only one-fourth of an employee's wages could be withheld. By decreasing the hourly wage to a third of what [Mr. Hanson] had been receiving from the automobile dealership, perhaps Wilson speculated that the Commissioner might not pursue issuing a wage levy against [HWC]. When the Commissioner issued the Wage Levy to [HWC], Wilson and [HWC] essentially ignored the Wage Levy, instead focusing on securing a payment plan for [Mr. Hanson].

The record shows that [HWC] made a single payment of \$315.08 one day before the 10-day Reminder Notice would have expired. Thereafter, no payments were made and no disclosure forms were ever filed showing what payments were required, if any. The record also shows that [HWC] substituted [Mr. Hanson's] son, Jan R. Hanson IV, on its payroll records for no understandable reason other than perhaps to further circumvent the levy. We find the record indicates that [HWC] belatedly tried to extricate itself from a substantial assessment for non-compliance with the levy, well **after** [emphasis in original] the assessment order had been issued and after this case commenced.

We find that [HWC's] failure to comply was willful. [HWC's] officer, Mr. Wilson, a knowledgeable former IRS collector, was aware of its legal duty to withhold. Wilson knew and intentionally designed ways to circumvent the levy. We further find the evidence strongly indicates that [HWC's] non-compliance was both voluntary and intentional.

Based on these facts, we conclude that [HWC's] failure to comply was willful under Minn. Stat. § 290.92, subd. 23(3) and [HWC] is liable.

Hazardous Waste Controls, 1997 WL 158263 at * 4 (slip op., Mem. at pp. 9-10).⁵

HWC received between \$15,347.12 and \$17,175.12 from the automobile dealership during the duration of its “employment relationship” with Mr. Hanson. See Ex. 2 (total deposits of \$15,347.12, excluding 6/13/94 opening \$10,000 deposit by Mr. Hanson and 12/6/94 Deposit Correction Notice of \$300.00); Ex. 1 (total deposits of \$17,175.12, excluding 6/13/94 opening \$10,000 deposit by Mr. Hanson). In addition,

⁵ The tax court’s conclusion in *Hazardous Waste Controls* that there was collusion between HWC and its employee, Mr. Hanson, was reinforced by Mr. Wilson’s deposition and trial testimony in the present case and by Mr. Hanson’s trial testimony. In his deposition and testimony, Mr. Wilson stated that new HWC employee, Mr. Hanson, who was significantly indebted to the State of Minnesota at the time, supplied a \$10,000 check to open the HWC corporate checking account. Wilson Depo. at 35; T.65, 67; see Ex. 1 at 1 (6/13 deposit), Ex. 3 at 45 (check register). These funds were promptly disbursed by HWC to Mr. Hanson or one of his businesses. Wilson Depo. at 35-38. Mr. Hanson’s trial testimony confirmed the deposit and disbursements. T. 23-26, 30-32. No credible explanation as to why it was necessary to run money through the HWC account that was to be immediately disbursed to Mr. Hanson’s other businesses was provided by either witness. T. 30-31, 65, 67. Nor can this factual holding be characterized as a dictum, because the tax court was required to examine the underlying employment relationship in assessing whether HWC’s conduct was a “willful” failure to honor the levy.

gross wages identified by HWC as having been paid to Mr. Hanson and “his son” totaled \$6,544.18 during the periods the HWC wage levy was in effect.⁶ Ex. 6-7.

STANDARD OF REVIEW

Relator does not discuss the applicable standard of review in his brief. With respect to his request for an award of attorney fees by the tax court, “this court will not reverse a trial court’s award or denial of attorneys fees absent an abuse of discretion.” *Becker v. Alloy Hardfacing & Eng’g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). An award of costs and disbursements is similarly reviewed under an abuse of discretion standard. *Kellar v. Von Holtum*, 605 N.W.2d 696,703 (Minn. 2000). With respect to an award of costs in particular, a tax court determination as to which party “prevailed” below, if any, is reviewed for abuse of discretion. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54-55 (Minn. 1998). More generally, with respect to questions of law, including the interpretation of statutes, the Court has plenary power to review the tax court’s decision

⁶ The tax court determined in *Hazardous Waste Controls* that payments ostensibly made to Mr. Hanson’s son were a further part of a sham, designed to avoid the effectiveness of the Commissioner’s wage levy. *See supra* note 3. The impact of this collusive arrangement on the amount subject to the Commissioner’s levy is graphically illustrated by Mr. Wilson’s Exhibits 6 and 7. The establishment of the purported “employment relationship” with HWC also halted the Commissioner’s third-party levy on the dealership and caused considerable delay, before statutory notices needed to issue a wage levy could be served and the levy implemented (over three months transpired following notice of HWC employment before service of the wage levy). However, the Court noted in *Wilson II*, that the third party levy could not have continued as it was unlawful for Mr. Hanson to continue work as an independent contractor without a sales tax permit. 656 N.W.2d at 555.

de novo. *E.g.*, *Bond v. Commissioner of Revenue*, 691 N.W.2d 831 (Minn. 2005); *Nagaraja v. Comm'r of Revenue*, 352 N.W.2d 373, 376 (Minn. 1984).

ARGUMENT

Relator, both before the tax court and in this appeal, conflates a number of issues with respect to his request for attorney fees and for costs and disbursements, both in connection with this case and, ostensibly, as to a prior case involving his defunct corporation (in which the Commissioner prevailed). The result is a muddled and confusing set of claims.⁷ For the sake of clarity, it is necessary to separately consider the scope and nature of what appear to be Relator's various claims.

I. THE TAX COURT PROPERLY HELD THAT RELATOR IS NOT ENTITLED TO ATTORNEY FEES IN THE PRIOR *HAZARDOUS WASTE CONTROLS* TAX COURT MATTER OR IN THIS PERSONAL LIABILITY MATTER, EITHER WITH RESPECT TO HIS TWO PRIOR APPEALS OR WITH RESPECT TO THE TAX COURT PROCEEDINGS.

A. Relator Has No Basis to Claim an Award of Attorney Fees for the Prior *Hazardous Waste Controls* Case, in Which the Commissioner was the Prevailing Party.

Relator's Motion before the tax court, unsupported as initially filed by any memorandum or legal argument, sought an award of costs, disbursements and attorney

⁷ Relator has, for example, failed to state whether he continues to seek attorney fees, costs and disbursements in the prior corporate case. He has also failed to state whether he continues to seek such amounts in connection with two prior appeals to the Court in this case, where he failed to move for fees or to give notice of the taxation of costs and disbursements. Furthermore, although Relator states that the legal issue in this case is whether the tax court properly determined he was not "entitled to attorney's fees" (Rel. Br. at 1), his brief contains numerous references to costs and disbursements, suggesting that he still seeks to recover those items.

fees allegedly incurred in the prior *Hazardous Waste Controls* case. App. at A-30, A-37. It is unclear from Relator's brief whether he persists in that request, which is completely inappropriate and frivolous, in this appeal.

First, it is beyond dispute that the *Hazardous Waste Controls* case was litigated to a final conclusion in March 1997. The parties were a corporation, HWC, and the Commissioner. The Commissioner was awarded a judgment sustaining his assessment and was hence the prevailing party. The losing party, HWC did not appeal, thus allowing the tax court's judgment to become final. No motion for cost, disbursements or fees was filed within 90 days of the date of the tax court's final order (*see* Minn. R. 8610.0150 (2003)), or at any other time, until the motion now under review. Hence, no award based on the long-ago concluded *Hazardous Waste Controls* case would be timely now, even if HWC had been the prevailing party, which it was not.

Second, the party opposing the Commissioner in *Hazardous Waste Controls* was not Mr. Wilson, but a corporation in which he held a controlling interest and which was long ago dissolved. The present matter provides no vehicle by which Mr. Wilson personally may seek an award in a case where he was not a party, even if he personally financed the expenses of the prior litigation, as his tax court affidavit suggests. App. at A-37; *see* Appellant's Motion Brief, at A-57-A-58. Indeed, as the corporation was held liable to the Commissioner in the earlier case and never satisfied the judgment, and as Mr. Wilson's claim can only be based on his relationship to the corporation, any award, even if proper, would presumably be subject to the Commissioner's right of setoff.

Third, due to HWC's failure to request an "Erie Shuffle" in the prior case,⁸ the constitutional issue on which Mr. Wilson now claims to have prevailed in this case, the "excessive fines" claim, was not even properly raised before the tax court in *Hazardous Waste Controls*, as both the tax court in that case, 1997 WL 158263 at * 5 (slip op., Mem. at 11), and this Court in *Wilson I*, 619 N.W.2d at 199-200, determined. Hence, regardless of the Court's holding on the merits of that issue in *Wilson II*, it could not have made HWC the prevailing party in the earlier *Hazardous Waste Controls* case.

In sum, Mr. Wilson has not cited a single authority that supports an award in a later case for costs or fees incurred by a losing party or his privies in an earlier case against the party who prevailed in the earlier case. Any request for an award based on the *Hazardous Waste Controls* case, in which the Commissioner prevailed and which became final over eight years ago, is completely out of bounds and should be summarily denied.

B. Relator Has Waived Any Claim to an Award of Attorney Fees Incurred for the Appeals in *Wilson I* and *Wilson II*, Having Previously Failed to Timely Request Them In This Court.

Before the tax court, Relator also requested an award of attorney fees in connection with the two prior appeals in this matter in *Wilson I* and *Wilson II*. But the rules of this Court require that application for such an award must be made to the Supreme Court, not to the trial court. Minn. R. Civ. App. P. 139.06, subd. 1. provides

⁸ The so-called "Erie Shuffle" procedure involves the transfer of a case from the tax court (an executive branch agency) to the district court (a judicial branch agency), and then back to the tax court, in order to invest the tax court with the district court's jurisdiction to consider constitutional issues. *Wilson I*, 619 N.W.2d at 199-200.

that a party seeking attorney fees on appeal shall submit a request “no later than within the time for taxation of costs or such other period of time as the court directs.”⁹ Minn. R. Civ. App. P. 139.03 provides that costs and disbursements in the Supreme Court are to be taxed upon written notice by the prevailing party, and failure to serve and file notice “within 15 days of the decision or order shall constitute a waiver of taxation.” Relator failed to request attorney fees in either of his two prior appeals, and the time to do so has long since passed.¹⁰ Hence, Relator has waived the right to request attorney fees on appeal in *Wilson I* and *Wilson II*, and his request should be denied.

C. The Tax Court Did Not Abuse its Discretion in Ruling That Relator Was Not a Prevailing Party Entitled to Claim Attorney Fees in the Tax Court Under Applicable Law in This Proceeding.

The tax court rejected Relator’s motion for attorney fees based on its determination that he was not the prevailing party in this litigation. App. at A-127. The lower court

⁹ The purpose of the rule is procedural only, and any right to attorney fees is determined by the substantive law. See generally Eric J. Magnuson & David F. Herr, 3 *Minnesota Practice Series, Appellate Rules Annotated*, §139.8 at 662 (2005).

¹⁰ Before the tax court, Relator was unable to offer any explanation as to why he did not request attorney fees pursuant to the Court’s rules and conceded he could offer no authority as to why this portion of his attorney fees claim was not barred by the rules. Transcript of Tax Court Motion Hearing on Fees and Costs, Nov. 4, 2004, at 8. Now, on appeal, Relator simply says nothing about the issue, leaving the Court and Respondent to guess as to what his current claim is. Having said nothing in his opening brief, he should not be permitted to resurrect this issue in his “reply” brief, in the guise of responding to new material raised by the Commissioner, and thereby having not only the first word but the last word. Rather, he should be deemed to have waived any claim to attorney fees in connection with prior appeals.

based its inquiry on the following standard stated in this Court's decision in *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998) (footnotes omitted):

In determining who qualifies as the prevailing party in an action, "the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action." The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered.

App. at A-127. The tax court noted that both parties had prevailed in the matter to an extent. The Commissioner's assessment for failure to honor the wage levy was sustained, but its amount was significantly reduced by this Court's decision in *Wilson II*. *Id.* The tax court also looked to the parties agreement to settle the case on remand by simply "walking away from a long and arduous case," where "no one recovers anything more than has already been paid, no one admits to any liability, and the case is dismissed." *Id.* at A-128. It then concluded: "While both parties succeeded in some aspects of the litigation, neither party appears to have succeeded in the matter overall. We cannot determine that Appellant is the prevailing party." *Id.*

As previously noted, a ruling as to whether to award attorney fees by a trial court is reviewed under an abuse of discretion standard. Here, the tax court did not abuse its discretion in refusing to determine that Relator was the prevailing party. As the court noted, both parties succeeded in some aspects of the litigation, but neither party succeeded overall. Most importantly for present purposes, Relator's claim that he should be exonerated because he was not a "person" subject to assessment was squarely rejected. Indeed, this Court indicated in *Wilson II* that the assessment against Relator should be for

the maximum amount consistent with existing Minnesota law and with the state and federal constitutions. Because this Court affirmed the assessment and merely modified the amount, Relator is in no genuine sense the prevailing party in this litigation. *Cf. Borchert*, 581 N.W.2d at 840 (prevailing party is party in whose favor judgment is entered).

II. THE TAX COURT PROPERLY HELD RELATOR IS NOT ENTITLED TO COSTS AND DISBURSEMENTS IN THE PRIOR *HAZARDOUS WASTE CONTROLS* TAX COURT MATTER OR IN THIS PERSONAL LIABILITY MATTER, EITHER WITH RESPECT TO HIS TWO PRIOR APPEALS OR WITH RESPECT TO THE TAX COURT PROCEEDINGS.

A. Relator Has No Basis to Claim Costs and Disbursements in the Tax Court for the Prior *Hazardous Waste Controls Case*, in Which the Commissioner was the Prevailing Party.

As discussed with respect to his claim for attorney fees in the in *Hazardous Waste Controls* case, *see supra* Part I, A, to the extent Relator persists in this appeal with his claim for an award of expenses in connection with that prior corporate litigation, in which the Commissioner was the prevailing party, the request is inappropriate and frivolous and should be rejected.¹¹

¹¹ Presumably the request is also time-barred, as the tax court rules require that a prevailing party file a motion for costs and disbursements “[n]o later than 90 days after the date of a final order of the tax court. Minn. R. 8610.0150 (2003). The tax court’s order in *Hazardous Waste Controls* became final in 1997, when its March 17, 1997, order was not appealed within 60 days by HWC. Minn. Stat. § 271.10 (1996 & Supp. 1997).

B. Relator Has Waived Any Claim to Costs and Disbursements Incurred for the Appeals in *Wilson I* and *Wilson II*, Having Previously Failed to Timely Request Them in this Court.

As with respect to his claim for appellate attorney fees, *see supra* Part I, B, in the tax court Relator also requested an award of costs and disbursements in connection with the prior appeals in this matter in *Wilson I* and *Wilson II*. Here too the rules of this Court require that application for such an award be timely made to the Supreme Court, not with the trial court on remand. Minn. R. Civ. App. P. 139.03 provides that costs and disbursements in the Supreme Court are to be taxed upon written notice by the prevailing party, and failure to serve and file notice “within 15 days of the decision or order shall constitute a *waiver* of taxation.” Emphasis added. Relator simply failed to request costs or disbursements in connection with either of the prior appeals in this litigation, and the time to do so has long since passed. Hence, the tax court did not abuse its discretion when it refused to award costs and disbursement to Relator as to any items associated with either of his prior Supreme Court appeals.

C. The Tax Court Did Not Abuse its Discretion Under Applicable Law in Ruling That Relator Was Not a Prevailing Party Entitled to Costs and Disbursements in the Tax Court in This Proceeding.

Relator also seeks costs and disbursements in this case in connection with proceedings in the tax court. To obtain costs and disbursements under Minn. Stat. § 271.19 (2004) and Minn. R. 8610.0150 (2003), Relator was required to establish that he is the “prevailing party” in this litigation and to document that he incurred the claimed expenses and that they are reasonable. However, as the tax court held, Relator

has not shown that he is the “prevailing party” in this litigation. *See supra*, Part I, C. This Court rejected Relator’s claim that he was not a “person” who could be assessed in this case. Indeed the Court sustained the Commissioner’s assessment, including the determination that Relator had willfully failed to comply with an employer wage levy. The Court simply reduced the amount assessed. Relator ignores these holdings. But in light of these holdings, the tax court did not abuse its discretion when it held that Relator cannot be considered the prevailing party for purposes of the award of costs and disbursements.¹²

The tax court properly exercised its discretion in holding that, as a person who willfully failed to comply with a wage levy, Relator failed to establish that he prevailed in this case. His claim for costs and disbursements in the tax court was correctly denied.

¹² As with his *Hazardous Waste Controls* claim, Relator’s costs motion, as originally filed in the tax court, was also undocumented and unsupported by any receipts for expenses he claimed to have been incurred. The tax court could not determine whether the expenses were reasonably or necessarily incurred based on mere averments in the affidavits furnished. Hence, the motion failed to provide the tax court with the most basic information necessary to support an award of costs and disbursements, other than perhaps those costs which the court could document from its own records, such as the filing fee. Although the tax court permitted Relator to supply further information (Transcript of Tax Court Motion Hearing on Fees and Costs, Nov. 4, 2004, at 3), there remain portions of the claim that are improperly asserted or poorly documented. *See* Commissioner of Revenue’s Reply Memorandum, dated October 29, 2004, at 7, App. at A-105.

III. RELATOR IS NOT ENTITLED TO CLAIM ATTORNEY FEES BECAUSE HE HAS FAILED TO ESTABLISH AFFIRMATIVELY THAT THE COMMISSIONER'S POSITION IN THIS MATTER, BASED ON THE APPLICATION OF EXISTING STATUTORY LAW, WAS NOT SUBSTANTIALLY JUSTIFIED, AND HE HAS WAIVED HIS RIGHT TO DO SO IN THIS APPEAL.

It is well-established that Minnesota courts apply the general "American Rule" regarding attorney fees: attorney fees may not be awarded to a successful litigant without explicit statutory or contractual authorization. *Fownes v. Hubbard Broad., Inc.*, 310 Minn. 500, 542, 246 N.W.2d 700, 702 (1976). Under Minnesota's common law, "each party bears [its] own attorney fees in the absence of a statutory or contractual exception." *In re Silicon Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 422 (Minn. 2003) (citing *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000); *Garrick v. Northland Ins. Co.*, 469 N.W.2d 709, 714 (Minn. 1991)). Here, no basis exists for a fee award under contract or statute.

As no contract for fees exists, to establish a claim for attorney fees in this case, Relator must demonstrate that he is a "prevailing party" entitled to fees under the only available statute, the Minnesota Equal Access to Justice Act ("MEAJA"), Minn. Stat. §§ 15.471 - 15.474 (1998). *See* Minn. Stat. § 271.19 (2004) (applying provisions of MEAJA to certain tax court proceedings). But even if he can satisfy the prevailing party requirement, which the tax court held he could not (*see supra* Part I, C), Relator must also show that the Commissioner's position in this case was "not substantially justified" and that he qualifies as an eligible "party" under the MEAJA. Relator has failed to even allege, much less to establish, either of these required elements.

A. Relator Has Not Shown That the Commissioner's Position Was Not Substantially Justified Under the MEAJA.

To recover fees under the MEAJA, the “prevailing party” in a case against the state must show that “the position of the state was not substantially justified.” Minn. Stat. § 15.472 (a) (1998).¹³ It is not enough merely to show that the party prevailed.¹⁴ *Donovan Contracting of St. Cloud, Inc. v. Minnesota Dep't of Transp.*, 469 N.W.2d 718, 720-21 (Minn. Ct. App. 1991). The state's position is substantially justified when the state's position “had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation” Minn. Stat. § 15.471, subd. 8 (1998).

The Minnesota Court of Appeals has looked to federal case law addressing the Federal Equal Access to Justice Act to further define the phrase “not substantially justified.” *State v. Minnesota Democratic–Farmer–Labor Party*, 671 N.W.2d 894, 900 (Minn. Ct. App. 2003) (citing *Donovan Contracting of St. Cloud, Inc. v. State, Dep't of*

¹³ Because Relator's action was commenced by a notice of appeal filed on June 20, 1997, this case is governed by the 1998 rather than the 2000 version of MEAJA. See Act of April 24, 2000, ch. 439, 2000 Minn. Laws 967-69. It should be noted that absent special circumstances not present here, any award of attorney fees under the applicable 1998 version of the MEAJA would be limited to an hourly rate of \$100, under Minn. Stat. § 15.471, subd. 5(c) (1998), since this case was commenced prior to the effective date of the current \$125 hourly rate provision. See Act of April 24, 2000, ch. 439, 2000 Minn. Laws 967-69 (amending Minn. Stat. §§ 15.471, subds. 4-6, 15.472, and providing that “[t]his act is effective August 1, 2000, and applies to any civil action or contested case proceeding which is commenced on or after that date”).

¹⁴ This requirement distinguishes the MEAJA from its federal counterpart, where once a private litigant has shown it is a prevailing party and has merely “alleged” that the government's position was not substantially justified, the government has the burden of demonstrating the contrary. *Scarborough v. Principi*, 541 U.S. 401, 413-15, 124 S. Ct. 1856, 1865-66 (2004)

Transp., 469 N.W.2d 718, 720 (Minn. Ct. App. 1991)). In *Donovan Contracting*, the court of appeals further interpreted “substantially justified” to mean “justified to a degree that could satisfy a reasonable person” rather than “justified to a high degree.” In addition, no presumption arises that the state’s position was not substantially justified simply because the state did not prevail. See *Donovan Contracting*, 469 N.W.2d at 720.

Here, Relator has not even offered an argument that the Commissioner’s position had no reasonable basis in law and fact and was not substantially justified, focusing instead solely on the end result in this case, a settlement. Relator was obligated to demonstrate that the Commissioner’s position was not substantially justified to establish his claim to attorney fees, and he has failed to address the issue in his brief to the Court, thus waiving it. However, because this element of Relator’s claim is completely lacking, a brief review of how he belatedly attempted to address it in the tax court is helpful.

In the tax court, Relator similarly offered no argument that the Commissioner’s position was not substantially justified in his initial motion and only addressed the matter in response to the Commissioner’s objections that he had not supplied an essential basis for recovery of fees under the statute. A-46-A-47; A-64-A-67. Relator’s primary assertion before the tax court that the Commissioner’s position was not substantially justified, once it was announced, was based solely on 20-20 hindsight, as expressed in his statement “that both the statute [which the Commissioner followed in making the assessment] and the Minnesota Tax Court’s conclusions were rejected by the Minnesota Supreme Court.” App. at 65. But if the final result of a case were the acid test for

liability under the MEAJA, as Relator suggested below, then every party who ultimately won a case against the state would be entitled to attorney fees. Further, Relator provided no authority that the Legislature intended to expose the state to such broad, substantial liability in enacting the MEAJA. Indeed, exclusive reference to outcome reads out of the law the “not substantially justified” standard.

Relator suggests, in his tax court brief, also without authority, that to deny recovery here “would allow the State of Minnesota to evade responsibility for an unconstitutional action” by relying on an unconstitutional statute. App. at 65. However, Relator ignores a basic principle of statutory construction that statutes are presumed to be constitutional. *E.g., Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12, 23 (Minn. 2004) (presumption is that a statute is constitutional); *see* Minn. Stat. § 645.17(3) (2004). The fact that Relator may have overcome the burden of successfully challenging the validity of the application of a statute, and in particular a tax statute¹⁵, does not demonstrate that the state was unjustified in applying and defending the statute enacted by the Legislature, at least until a court had reviewed it and ruled otherwise. Indeed, it would be an unusual case where a state official would be “substantially unjustified” in following the judgment of the Legislature and the Governor and abiding by the statutory law as written. To do otherwise would require the state official to set himself up as the arbiter of

¹⁵ In *Wilson II*, this Court specifically noted that states enjoy a wide latitude in enacting taxation schemes and that taxpayers bear a heavy burden in challenging the constitutionality of a state tax statute. *Wilson v. Comm’r of Revenue*, 656 N.W.2d 547, 552 (Minn. 2003).

constitutionality of state statutes, in place of the courts, following only those provisions that he deemed constitutional and, in effect, ignoring others and possibly exposing himself to the risk he might later be held wrong and in dereliction of his official duties.

The Commissioner, in our three-branch system of government, does not have the power to strike down a statute enacted by the Legislature. The power of judicial review is reserved to the judicial branch. The Commissioner was, therefore, justified in relying on and following the levy statute as duly enacted and as twice upheld by the tax court in this case. There is nothing in the opinion of the Court in *Wilson II* (which upheld the assessment against Relator, albeit at a reduced amount), to suggest the Commissioner was unjustified in following the existing law in what was described as “an issue of first impression for our Court.” 656 N.W.2d at 552. Rather, it is apparent that the question raised as to the application of federal and state constitutional “excessive fines” provisions to civil judgments was a novel one in Minnesota, as well as in the country as a whole.¹⁶ *See, e.g., United States v. \$100,348.00 in U.S. Currency*, 354 F.3d 1110, 1124 (9th Cir. 2004) (district court did not abuse discretion in holding government’s position substantially justified in currency seizure action where non-owner claimant prevailed solely on jurisdiction to raise issue of Eighth Amendment excessive fine clause, over which reasonable jurists could disagree). Any suggestion that Relator is entitled to

¹⁶ Accordingly, this case does not present a situation where the existing law was generally well-established, even though not previously ruled on in Minnesota, and the Commissioner can be said to have blindly or unreasonably ignored adverse precedent.

recover attorney fees under the MEAJA merely because he prevailed on his novel constitutional challenge to one aspect of the application of the statute should be rejected.

Furthermore, as noted above, Relator has waived his opportunity to show that the Commissioner's position was not substantially justified in this appeal, having said nothing of it in his opening brief. Since this showing is a required element of his claim to attorney fees under the MEAJA, he cannot save it for his reply brief. This practice would give the Commissioner literally no opportunity to respond to his claim, particularly in a case without oral argument. A party cannot omit any discussion of an element of its claim from its opening brief and then assert that it is responding to "new matter" raised by its opponent. Hence, Relator's attorney fees claim should be rejected on this waiver ground alone.

B. Relator Has Not Shown That He Qualifies as A "Party" Under the MEAJA.

Before the tax court, the Commissioner also argued that Relator does not qualify under the statute as a "party" who is entitled to claim an award of attorney fees under the MEAJA. The Commissioner noted that this case relates only to Mr. Wilson's personal liability for HWC's unpaid tax debt, not to the liability of HWC itself (which he dissolved before this litigation commenced), which was established in the *Hazardous Waste Controls* case and which he is precluded from challenging. Again, Relator was obligated

to demonstrate that he qualifies as a “party” and he has failed to address the issue in his brief to the Court, thereby waiving it.¹⁷

C. Special Circumstances Make an Award of Attorney Fees to Relator Unjust.

The MEAJA also provides that an award of attorney fees can be denied where “special circumstances make an award unjust.” Minn. Stat. § 15.472 (a) (1998).¹⁸ In this case, special circumstances justify the denial of any fee award even if Relator had demonstrated that he otherwise qualified, because an award would be inequitable. First, the bulk of the fees incurred by Relator are attributable to Relator’s failure, acting through a corporation he controlled, to properly place the “excessive fines” issue before the tax court in the 1997 *Hazardous Waste Controls* case. A proper Erie Shuffle would have permitted a tax court ruling and, consequently, review by this Court, in *Hazardous Waste Controls*. This would have obviated the need for eight more years of litigation. Although this Court in *Wilson I* held, in a case of first impression, that Relator was not *barred* by *res judicata* from litigating the excessive fines issue, the need for so much additional

¹⁷ The Commissioner’s tax court argument on this issue appears in his tax court memoranda, located in the Appendix at A-48-53 and A-103-05. The Commissioner also argued that it would be outrageous to construe the MEAJA as allowing a claim for attorney fees by an individual, such as Relator, who utilized a corporation solely to effect a collusive relationship with a person subject to a lawful tax levy, in an effort to defeat the levy. However, as Relator has utterly failed to address the issue, which is an element of his claim to attorney fees, no further argument is appropriate or necessary.

¹⁸ While no Minnesota appellate decision appears to have considered the application of the “special circumstances” exception to the MEAJA, the United States Eighth Circuit Court of Appeals has noted that the exception in its federal counterpart permits a court to deny an award where traditional equitable considerations dictate against an award. *United States Dep’t of Labor v. Rapid Robert’s, Inc.*, 130 F.3d 345, 347-48 (1997).

litigation and expense can be directly attributed to Relator's failure to place the matter properly before the tax court if he wished to rely on it as a defense.¹⁹ Indeed, there would have been no need to litigate issues of collateral estoppel and res judicata, which were necessarily and properly raised by the Commissioner in this second case, had the "excessive fines" issue been properly litigated in the initial case.

In addition, in both the present case and in *Hazardous Waste Controls*, the Commissioner himself asked the tax court to reduce the assessment mandated by the existing statute and the tax court declined.²⁰ Like the Commissioner, the tax court reasonably felt it was required to apply existing statutory law as written. A good deal of the alleged disparity between the assessment ultimately upheld in *Wilson II* and the amount assessed under the existing statute disappears when it is recognized that the Commissioner sought, albeit unsuccessfully, to have the assessment reduced to an amount more closely related to the perceived injury caused by Relator's willful failure to honor the levy. Hence, the difference between the amount assessed under the statute and the amount actually sought by the Commissioner in litigation is a further circumstance that should be considered in applying the MEAJA to this case.

¹⁹ It should be noted that prior to the Court's ruling in *Wilson I*, many tax practitioners assumed that any party who wished to present a constitutional issue in a tax court case and failed to implement the procedures necessary to invest the tax court with jurisdiction over the constitutional issue did so at its peril. See Jerome A. Geis & Barry R. Greller, *The Minnesota Tax Court: The Taxpayer's Choice of Forum to Litigate a State Tax Liability*, 21 Hamline L. Rev. 414, notes 62-63 and accompanying text (1998).

²⁰ *Wilson v. Comm'r of Revenue*, No. 6918, 2002 WL 58477 (Minn. T.C. Jan. 8, 2002), at * 6; *Hazardous Waste Controls*, 1997 WL 158263 at *5, note 4 and accompanying text.

CONCLUSION

For all the foregoing reasons, the Commissioner respectfully requests that this Court deny in its entirety Relator's request for an award of attorney fees and for taxation of costs and disbursements and bring this protracted litigation to a final conclusion, leaving the parties where they stood at the time they agreed to resolve this matter without a further trial on its last remand to the tax court.

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