

No. A11-2015

STATE OF MINNESOTA

IN SUPREME COURT

Bruce Nelson,

Relator,

vs.

Commissioner of Revenue,

Respondent.

**BRIEF AND APPENDIX
OF
RESPONDENT COMMISSIONER OF REVENUE**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

1. Did the Tax Court correctly deem Mr. Nelson a responsible person and therefore personally liable for petroleum and sales taxes assessed to Twin Cities Avanti Stores, LLC?

The Tax Court held that Mr. Nelson is a responsible person subject to personal liability for petroleum taxes and sales taxes incurred by Twin Cities Avanti Stores, LLC.

Apposite authorities:

Minn. Stat. § 270C.56 (2008)

Minn. R. Civ. P. 56.03

Larson v. Comm'r of Revenue, 581 N.W.2d 25 (Minn. 1998)

Peterson v. Comm'r of Revenue, 566 N.W.2d 710 (Minn. 1997).

DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997)

Benoit v. Comm'r of Revenue, 453 N.W.2d 336 (Minn. 1990)

2. Did the Tax Court err by entering summary judgment for the Commissioner despite Mr. Nelson's request for additional discovery to develop an estoppel defense?

The Tax Court held that the defense the Appellant was bringing, estoppel, was not an available defense and therefore additional discovery was not required.

Apposite Authorities:

Nicollete Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845 (Minn. 1995)

Ridgewood Dev. Co. v. State, 294 N.W.2d 288 (Minn. 1980)

In re Mesaba Aviation Div. Of Halvorson of Duluth, Inc. v. County of Itasca, 258 N.W.2d 877 (Minn. 1977).

STATEMENT OF THE CASE

Relator Bruce Nelson is appealing the Tax Court's entry for Respondent Commissioner of Revenue of summary judgment. Mr. Nelson is challenging several personal liability assessments that the Commissioner made based on unpaid petroleum and sales tax owed by Twin Cities Avanti Stores, LLC ("Avanti"). The periods at issue are September 2008 through April 2009. The amount at issue for all periods, as of September 2009, exceeds \$4 million. *See Commissioner's Returns (Orders Denying Appeal or Assessing Personal Liability)*.¹

In addition to the assessment against Mr. Nelson, the Commissioner also assessed Scott Stevens with personal liability for the same outstanding petroleum and sales tax liability, over the same periods of time. The Tax Court granted summary judgment to the Commissioner on Mr. Steven's appeal, and Mr. Stevens has appealed to the Minnesota Supreme Court separately. *See Stevens v. Comm'r of Revenue*, Minn. Appeal No. A11-2020.

Mr. Nelson appeals the decision of the Tax Court, and asserts that the Tax Court erred by granting summary judgment to the Commissioner, by not allowing additional discovery to explore an estoppel defense.

¹ The tax liability, after taking into account various partial payments, is approximately \$3,500,000. Penalties and interest (through the time of filing in this Court) account for approximately \$500,000, although interest continues to accrue pursuant to Minn. Stat. § 289A.55.

STATEMENT OF FACTS

In 2008 and 2009, Avanti filed tax returns but failed to pay petroleum taxes and sales and use tax. In 2009 and 2010, the Commissioner assessed Mr. Nelson and Mr. Stevens with personal liability for Avanti's unpaid taxes. Mr. Nelson appealed the assessments to the Tax Court. The Commissioner moved for summary judgment. In opposing the motion, Mr. Nelson did not dispute that he could be held personally liable under Minn. Stat. § 270C.56 (2010), which provides the Commissioner may assess tax liability on a person or persons who has "control of, supervision of, or responsibility for filing returns or reports, paying taxes, or collecting or withholding and remitting taxes and who fails to do so..." Instead, Mr. Nelson argued that the Court should give him more time to develop an estoppel defense. He asserted that the Commissioner should be estopped from collecting on the assessment because he believed the Commissioner was responsible for Avanti's failed Chapter 11 bankruptcy.

The Tax Court rejected Mr. Nelson's argument and entered summary judgment for the Commissioner. The Court held that estoppel was not an available defense to personal liability, because there was no evidence that the Department of Revenue misrepresented to Mr. Nelson that he would not be personally assessed if the lien against related entity Twin Cities Stores, Inc. ("T.C. Stores") remained intact. Further, the Court found there was no issue of material fact regarding Avanti's tax liability, or whether Mr. Nelson was a person who had control, responsibility, and supervision of paying Avanti's taxes within the meaning of Minn. Stat. § 270C.56. Mr. Nelson appeals, arguing only that he should have received time to develop his estoppel claim.

I. THE RELEVANT ENTITIES AND PERSONS.

T.C. Stores and Avanti were part of a group of affiliated entities in or through which Mr. Nelson held ownership interests. Other Nelson-owned entities included Goodtime Stores and Roundtree Market, also known as RM Group (“RM”). *See* RA. 2, Rsp. 0022, (Interrog. No. 8); RA. 4, Rsp. 0077, ¶ 3. Both T.C. Stores and Avanti owned or operated various retail convenience stores, primarily in Minnesota. *See* RA. 5, Rsp. 0166. Mr. Nelson acquired the group of gas/convenience stores that formed Avanti’s operations in 2001. *Id.*; *see also* RA. 2, Rsp. 0020, (Interrog. No. 2). Avanti did business as Oasis Markets, using the names Oasis Markets, Food ‘n Fuel, Happy Dan’s, and Budget Mart. RA. 5, Rsp. 0127, (Interrog. No. 2). Mr. Nelson holds the controlling interest (approximately eighty-five percent) in RM Group, the parent, or holding company, for Avanti and T.C. Stores. RA. 2, Rsp. 0021-0022, (Interrog. Nos. 7, 8). Mr. Nelson is also the Chairman and sole Director of RM. *Id.*; *see also* RA. 5, Rsp. 0116, (Tr. at 4).

Other persons involved in Avanti and T.C. Stores were Scott Stevens and Robert Lovejoy. Scott Stevens was the Sole Manager and member of the Board of Managers for Avanti during the periods at issue, as well as Avanti’s President, Secretary, and Treasurer. RA. 2, Rsp. 0022, (Interrog. No. 9); RA. 2, Rsp. 0038, (Written Action in Lieu of Meeting). Robert Lovejoy (“Consultant”) was Avanti’s Chief Administrative Officer until February, 2006. RA. 4, Rsp. 0077, ¶ 2. From December, 2007 through July, 2009, Avanti retained the Consultant to “advise on financial matters that may affect

the company.” RA. 5, Rsp. 0120-0125. The Consultant could not “make or implement decisions customarily reserved for directors and officers of a company,” and the services he performed were “as an independent contractor and not as an agent or employee” of Avanti. *Id.*, Rsp. 0121, ¶ 4. He had no responsibility for or authority to make “commitments for payments on creditor accounts where funds have been collected and withheld at the point of sale.” *Id.*

The petroleum taxes and sales taxes at issue were assessed solely against Avanti. Add-2; App. 41-42. T.C. Stores did not file returns and thus was not assessed, although the Department of Revenue placed liens on the assets of T.C. Stores on June 3, 2009. App-43. The liens were removed by the Department of Revenue on January 26, 2010. App-40.

II. MR. NELSON’S ROLE WITH TWIN CITIES AVANTI AND CONTROL OVER TAX MATTERS.

Mr. Stevens, who worked with Mr. Nelson, testified that Avanti was “Bruce Nelson’s company. He is the maestro here.” RA. 6 at 41. As Stevens testified, for “any kind of whether it was a strategic decision, capital[,] you went to Bruce.” *Id.* at 63. The Tax Court found that Mr. Nelson was the Chairman and Secretary of RM Group, which owns Avanti. Add-3; RA. 2, Rsp. 0022-0023, 0031-0032.

Further, as Mr. Stevens testified, Mr. Nelson’s control over Avanti’s financial operations increased as cash resources diminished. Add. 4; RA. 4, Rsp. 0079. Mr. Nelson maintained a cash forecasting system, by which he approved various Avanti expenditures recommended by management. *Id.* With input from Mr. Stevens, Mr.

Nelson maintained this forecasting model to determine which creditors were paid, and when they were paid. Add. 5; RA. 2, Rsp. 0027. Mr. Nelson went so far as to sign the bankruptcy petition for Avanti, which is a significant financial decision. Add. 4; RA. 2, Rsp. 0032.

As time went on and Avanti continued to struggle financially in 2008 through 2009, Mr. Nelson tightened his control and directed payments. Add. 5; RA. 5, Rsp. 0133. Mr. Nelson maintained the books and records for Avanti, and urged that Avanti's financial priorities should be to pay vendors and withholding taxes. Add. 5; RA. 5, Rsp. 0134. When Mr. Stevens, president of Avanti, approached Mr. Nelson and discussed shutting Avanti down and filing bankruptcy because of ongoing tax liabilities, Mr. Nelson refused. *Id.* He assured Mr. Stevens that Avanti had sufficient assets to pay its tax liabilities. *Id.*

Mr. Nelson also decided whether and when Avanti made tax payments to Minnesota, and participated in the discussions about the company's gas tax liability. See RA. 4, Rsp. 0095-0096, ("Please do NOT pay the gas tax this month until after Bruce or I give the OK"); *Id.*, Rsp. 0097, ("What is the status of the . . . amount due on past gas taxes?"). The Tax Court specifically found, undisputed by the parties, that Mr. Nelson participated in discussions with the Minnesota Department of Revenue regarding the unpaid petroleum tax, and was kept informed of Avanti's bank accounts and how the tax payments would be managed in light of the negative balances in the accounts. Add-5, 6; RA. 2, Rsp. 0040, 0045-0046, 0048-0049; RA. 5, Rsp. 0161-0162. Mr. Nelson even met in person with Department representatives to discuss Avanti's tax liabilities. Add. 6;

RA. 2, Rsp. 0052-0053, RA. 5, Rsp. 0181-0182. Ultimately, Mr. Nelson decided how much of the gas tax would be paid, and when. Add. 6; RA. 4, Rsp. 0100-0101; RA 2, Rsp. 0049. In March 2009, Mr. Stevens sent Mr. Nelson a proposal of negotiated payment terms with the Department for paying the large amount of unpaid petroleum taxes, which Mr. Nelson signed. Add. 7; RA. 5, Rsp. 0183. Mr. Nelson was a signatory on some of Avanti's bank accounts as the Chairman of RM Group. Add. 6, RA . 2, Rsp. 0024-0025; *Id.*, Rsp. 0032-0033.

ARGUMENT

I. STANDARD OF REVIEW

“This court reviews findings of fact of the tax court to determine whether there was sufficient evidence to support the tax court’s decision.” *Igel v. Comm’r of Revenue*, 566 N.W.2d 706 (Minn. 1997) (citing *Benoit v. Comm’r of Revenue*, 453 N.W.2d 336, 339 (Minn. 1990)). “The tax court’s conclusions of law and interpretation of statutes are reviewed *de novo*.” *Chapman v. Comm’r of Revenue*, 651 N.W.2d 825, 830 (Minn. 2002). “Decisions that involve questions of fact are reviewed ‘to determine whether there is sufficient evidence to support the decision.’” *Sanchez v. Comm’r of Revenue*, 770 N.W.2d 523, 525 (Minn. 2009) (quoting *Miller’s Estate v. Comm’r of Taxation*, 59 N.W.2d 925, 926 (Minn. 1953)). “We review an order granting summary judgment to determine if the lower court erred in applying the law and whether any material facts are disputed.” *Sanchez*, 770 N.W. 2d at 525; *Chapman*, 651 N.W.2d at 830.

The Tax Court granted summary judgment to the Commissioner. The Respondent’s only argument on appeal is that the Tax Court should have allowed him to

conduct additional discovery to develop his defense of estoppel against the Commissioner of Revenue. In short, the Relator argues on appeal that if the Tax Court had allowed for him to take additional discovery, he could show that the Commissioner's collection efforts should be estopped because the Commissioner released a lien against a related third-party (T.C. Stores), which affected Avanti's bankruptcy. The Court should affirm the Tax Court's entry of summary judgment in favor of the Commissioner because Mr. Nelson is a responsible person with control and supervision over Avanti's accounts in accordance with Minn. Stat. §270C.56, and estoppel is not a defense available to Mr. Nelson to evade personal liability.

II. THE TAX COURT CORRECTLY HELD MR. NELSON PERSONALLY RESPONSIBLE FOR THE SALES TAX AND PETROLEUM TAX ASSESSED AGAINST AVANTI.

Mr. Nelson does not dispute that he is a person that had the requisite control and supervision to be held personally liable for Avanti's tax debt. Minnesota Statute § 270C.56 allows the Commissioner of Revenue to assess liability for taxes, penalties, and interest on a person or persons, who has "control of, supervision of, or responsibility for filing returns or reports, paying taxes, or collecting or withholding and remitting taxes and who fails to do so." Minn. Stat. § 270C.56, subd. 1 (2010). Under that statute, the first question that must be asked is whether Mr. Nelson is a "person" as defined by the statute, and the second is whether he had (either singly or jointly) control of, supervision of, or responsibility for paying Avanti's taxes. The Tax Court determined, and Mr. Nelson does not appeal, that he was a responsible person in such a position. The Tax

Court addressed each of the *Benoit* factors to determine whether Mr. Nelson is a responsible person. Add. 13. The *Benoit* factors are:

1. The identity of the officers, directors and stockholders of the corporation and their duties;
2. The ability to sign checks on behalf of the corporation;
3. The identity of individuals who hired and fired employees;
4. The identity of the individuals who were in control of the financial affairs of the corporation; and
5. The identity of those who had an entrepreneurial stake in the corporation.

Benoit v. Comm'r of Revenue, 453 N.W.2d 336, 344 (Minn. 1990).

The Tax Court found that Mr. Nelson met each of the factors and that the statute and the *Benoit* factors did not have an element of causation essential to an estoppel defense. It was undisputed that Mr. Nelson was a majority shareholder in the company that owned Avanti; that Mr. Nelson had the ability to write checks on most of Avanti's active bank accounts; that Mr. Nelson could hire and fire employees, and in fact hired the President of Avanti; that Mr. Nelson has control over the financial affairs of the corporation; and that Mr. Nelson has an entrepreneurial stake in the corporation. Mr. Nelson does not dispute any element in the statute or in the *Benoit* factors.

III. ESTOPPEL IS NOT A DEFENSE TO PERSONAL LIABILITY.

Mr. Nelson argues that the Tax Court should have allowed him more time to develop a defense of estoppel to prevent the Commissioner from collecting Avanti's tax debts from him. Mr. Nelson believes that the Commissioner is responsible for the failure of T.C. Stores and Avanti's bankruptcies because the Department of Revenue removed a

tax lien on T.C. Stores for Avanti's tax debt. The Tax Court correctly rejected this argument. Whether T.C. Stores is also liable for Avanti's tax debt and whether the lien on T.C. Stores was valid has no bearing on Mr. Nelson's liability. The Tax Court correctly recognized that even if Mr. Nelson was afforded additional discovery time, he could not succeed on an estoppel theory.

“This court has described estoppel as an equitable doctrine addressed to the discretion of the court and intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights. To establish a claim of estoppel, plaintiff must prove that defendant made representations or inducements, upon which plaintiff reasonably relied, and that plaintiff will be harmed if the claim of estoppel is not allowed.” *Brown v. Minnesota Dept. of Public Welfare*, 368 N.W.2d 906, 910 (Minn. 1985). Estoppel is not “freely applied” against the government. *See In Re Mesaba Aviation*, 258 N.W.2d 877, 880 (Minn. 1977). Even if it is applied, the public interest does not favor estoppel over the collection of taxes. “[P]ublic interest may override the equity established by reliance ... [and] the public interest involved here is the collection of taxes.” *Dommert v. Cty. of Dakota*, No. C7-88-2872, 1988 WL 129691 (Minn. Tax. Ct., Dec. 2, 1988) (rejecting estoppel theory where taxpayer “did not act or change her position because of the advice given”); *see also* Minn. Stat. § 3.736, subd. 3(c) (2010) (state is immune from tort liability for “loss incurred in connection with the assessment and collection of taxes”).

The Tax Court determined that in this dispute, estoppel is not an available remedy because it is an equitable remedy rarely applied against the government, and the

Commissioner did not induce Mr. Nelson in incurring the debt. Add. 8. The tax debt that is owed by Avanti was incurred and was due and owing far before Mr. Nelson filed the bankruptcy petitions. As the Tax Court held, “[h]ere, there is no evidence the Department misrepresented to Appellant he would not be personally liable for the unpaid taxes of Avanti if the lien against T.C. Stores remained intact.” Add 8-9.

Mr. Nelson submitted no evidence to suggest that the Department misrepresented anything regarding its lien filings to induce Mr. Nelson to believe that he was not personally liable for Avanti’s tax liabilities. “There are no facts on the record, or any applicable law, to suggest a lien against T.C. Stores would ensure Appellant’s immunity from personal liability for T.C. Stores’ or Avanti’s unpaid taxes.” Add. 9. “Appellant’s alleged reliance that any lien against T.C. Stores would preclude his personal liability in this matter was unreasonable.” *Id.*

Mr. Nelson asserts the bankruptcy of T.C. Stores and Avanti were not successful, and blames their failure on the Department of Revenue, and therefore the Commissioner should be estopped from collecting from him for the debts of Avanti. What Mr. Nelson is liable for, and who else the Department may collect from, are two distinct and separate questions that have little relation to one another. Mr. Nelson never asserted that he changed his position personally to avoid personal liability of taxes owed by Avanti – precisely because he could not. Mr. Nelson, as a responsible person with the requisite control over Avanti’s business, was assessable and potentially liable when Avanti signed and filed the tax returns without payment. Whether T.C. Stores is also liable for Avanti’s

tax debt and whether the lien on T.C. Stores was valid has no bearing on Mr. Nelson's liability.

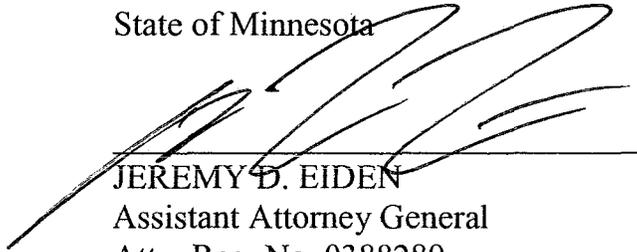
At no point was there any discussion with Mr. Nelson that the Department believed the liens or the bankruptcy would relieve Mr. Nelson of personal liability, and no information of that sort was relayed to Mr. Nelson, who did not personally change his position based on advice that was not given by the Department. The Tax Court therefore correctly entered summary judgment for the Commissioner and rejected Mr. Nelson's efforts to pursue an estoppel defense.

CONCLUSION

The undisputed facts reflect that Mr. Nelson is personally liable for Avanti's unpaid tax liability. The Tax Court correctly entered summary judgment for the Commissioner. Because Mr. Nelson offered no evidence nor compelling reason to overturn the Tax Court's decision, the Court should affirm the Tax Court's order.

Dated: January 5, 2012

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