

A11-2015

STATE OF MINNESOTA

IN SUPREME COURT

---

Bruce Nelson,

Relator,

v.

Commissioner of Revenue,

Respondent.

---

**RELATOR'S REPLY BRIEF**

**TERRANCE A. COSTELLO**  
Attorney Reg. No. 0163168

Lakes and Plains Office Building  
842 Raymond Avenue, Suite 200  
St. Paul, MN 55114  
(651) 698-8102

**ATTORNEY FOR RELATOR**

**LORI SWANSON**  
Minnesota Attorney General

**JEREMY D. EIDEN**  
Assistant Attorney General

900 Bremer Tower  
445 Minnesota Street  
St. Paul, MN 55101-2127

**ATTORNEYS FOR RESPONDENT**

## ARGUMENT

### **THE TAX COURT ERRED BY DENYING NELSON'S REQUEST FOR AN OPPORTUNITY TO DEPOSE THE DEPARTMENT OFFICIALS WHO FILED, BUT LATER WITHDREW, THE STORES LIENS.**

On appeal, Nelson claims that the Tax Court erred by refusing to allow him to depose Department officials to discover facts supporting his claim that the Department should be estopped *from collecting from him*. The Commissioner does not respond to this claim. Instead, mimicking the Tax Court, the Commissioner asserts that Nelson seeks to estop the Department *from holding him personally liable in the first instance*, then dismisses this contrived claim as meritless. By thus adopting the Tax Court's mischaracterization of Nelson's estoppel claim, the Commissioner excuses himself from furnishing the Court with any substantive response to Nelson's actual argument. This Court should not only reject the Commissioner's evasive approach; it should also bind the Commissioner to his strategy, and should refuse to allow him to expand his response during oral argument.

A careful review of the record confirms that the Tax Court and the Commissioner have systematically distorted Nelson's estoppel claim to avoid addressing it. In addition to opposing the Commissioner's summary judgment motion, Nelson and Stevens ("Taxpayers") filed a joint motion to compel, seeking to depose the Department officials who filed and later withdrew the Stores liens.<sup>1</sup> Nelson's estoppel claim was straightforward: By placing liens against Stores, the Department asserted that Stores was a joint obligor with Avanti for the unpaid petroleum tax for which Nelson had been

---

<sup>1</sup> See generally Taxpayers' Joint Mem. Supp. Mot. Compel.

personally assessed. In reasonable reliance upon this assertion, Nelson caused Stores to file bankruptcy along with Avanti. Approval of the companies' joint bankruptcy plan would have garnered the Commissioner an immediate \$750,000 payment, and a 48-month stream of future payments. By later withdrawing the Stores liens, the Department surrendered its secured position in Stores' assets, and thereby ensured that it would *not* be paid through bankruptcy. Thus, *even assuming Nelson could be held personally liable*, the Department should be equitably estopped *from collecting from him*.

At the hearing on the motion to compel, Taxpayers' counsel noted that "if the taxes were paid in bankruptcy, the personal assessments would be irrelevant."<sup>2</sup> Likewise, in their joint post-hearing memorandum, Taxpayers asserted that the Department "ha[d] no one to blame but itself for allowing the potential payment set forth in the Joint Plan to die," and they asked that the Department "now be estopped *from collecting these taxes from Appellants*."<sup>3</sup> Clearly, Nelson's estoppel claim pertained to *collectability*, not *liability*.

The Tax Court's Order, however, completely recasts Nelson's estoppel claim. Rather than addressing Nelson's actual claim that the Department's filing and later withdrawal of the Stores liens should estop the Department *from collecting from Nelson* (assuming his personal liability), the Tax Court recasts Nelson's estoppel claim as one asserting *immunity from liability* (rather than collection), and then rejects that entirely separate claim as lacking evidentiary support.

---

<sup>2</sup> Add-19.

<sup>3</sup> Supp. Joint Mem. Opp'n to Summ. J at 9 (emphasis added)

The Tax Court begins its estoppel discussion, “[Nelson] argues that Commissioner should be estopped from assessing Appellant with personal liability ....”<sup>4</sup> After briefly discussing estoppel generally, the court rejects as unsupported the claim it had foisted upon Nelson:

Here, there is no evidence the Department misrepresented to [Nelson] he would not be personally liable for the unpaid taxes of Avanti if the lien against T.C. Stores remained intact... There are no facts on the record, or any applicable law, to suggest a lien against T.C. Stores would ensure [Nelson’s] immunity from personal liability for T.C. Stores or Avanti’s unpaid taxes. Any belief [Nelson] had in this regard was unreasonable.<sup>5</sup>

Having rejected as unsupported an argument Nelson neither made nor tried to support, the Tax Court easily concludes that “equitable estoppel is not an appropriate remedy.”<sup>6</sup>

As did the Tax Court, the Commissioner attributes to Nelson the straw-man claim that Department actions render Nelson *immune from liability*. Freely quoting the Tax Court, the Commissioner argues, for example:

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.” “Appellant’s alleged reliance that any lien against T.C. Stores would preclude his personal liability in this matter was unreasonable.”

Comm’r’s Resp. Br. at 11 (quoting Tax Court’s Order, at Add-9).

---

<sup>4</sup> Add-8.

<sup>5</sup> Add-8 to Add-9. *See also* Add-10 to Add-11 (“The Commissioner did not misrepresent [Nelson’s] personal liability nor did [Nelson] reasonably rely on any such alleged misrepresentation.”).

<sup>6</sup> Add-11.

As this direct reliance upon the Tax Court makes plain, the Commissioner has simply adopted the Tax Court's evasive approach: (1) pretend that Nelson's estoppel claim pertains to liability rather than collectability; (2) assert that "there is no evidence the Department misrepresented to [Nelson] he would not be personally liable for the unpaid taxes of Avanti"; and then (3) reject Nelson's supposed claim as meritless.

This Court should consider Nelson's *actual* claim: that despite Nelson's conceded liability, the Department should nevertheless be estopped from collecting from him.<sup>7</sup> Nelson's Opening Brief fully explains—in light of his *actual* estoppel claim—why the Department's reasons for filing and later withdrawing the Stores liens are facts material to that claim. *See* Nelson's Opening Br. at 21-24. It also explains why the Tax Court erred by denying Nelson's request for a continuance and an opportunity to depose the Department officials who took those actions. *Id.* at 26-33.

Having saddled Nelson with a spurious estoppel claim, the Commissioner asserts that Nelson can point to no evidence supporting that claim. Nelson seeks a remand and the opportunity to obtain evidence to support the estoppel claim he actually advances.

---

<sup>7</sup> In the lower court, Nelson: (a) challenged his personal liability on the merits; and (b) argued, in the alternative, that the Department should be estopped from collecting from him *even if he was personally liable*. As the Commissioner himself notes, Nelson has *not* appealed the portion of the Tax Court's Order affirming the personal liability assessment. *See* Comm'r's Resp. Br. at 8-9. Consequently, since Nelson concedes liability on appeal, the Commissioner could have no genuine reason to believe that Nelson's estoppel argument on appeal pertains to liability (rather than collectability). In addition, Nelson specifically observed in his Opening Brief that "the Tax Court denied an estoppel claim Nelson never asserted." *See* Nelson's Opening Br. at 17. The Commissioner's election to ignore Nelson's actual estoppel claim is obviously tactical, and the Court should bind the Commissioner to that election by refusing to allow him to expand his response during oral argument.

## CONCLUSION

This Court should conclude that the Tax Court erred by denying Nelson's motion to compel, by failing to grant him a continuance to conduct discovery, and by prematurely disposing of this case through summary judgment. Accordingly, this Court should remand this case to the Tax Court for further proceedings.

Dated: 18 January 2012

Respectfully submitted,

  
TERRANCE A. COSTELLO, ESQ.  
Attorney Reg. No. 0163168  
Lakes and Plains Office Building  
842 Raymond Avenue, Suite 200  
St. Paul, MN 55114  
(651) 698-8102

ATTORNEY FOR RELATOR  
BRUCE NELSON

**CERTIFICATE OF COMPLIANCE  
WITH MINN. R. APP. P 132.01, Subd. 3**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subdivisions 1 and 3. It was prepared using a proportional spaced font size of 13 pt. The length of this brief is 1176 words. The word count is stated in reliance on Microsoft Word 2008, Version 12.3.1, the word processing system used to prepare this submission.

  
Terrance A. Costello  
TERRANCE A. COSTELLO