

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF REVENUE

In the Matter of the Proposed Revocation  
of the Sales Tax Permit of National  
Pawnbrokers, Inc., 8650 Lyndale Avenue  
South, Bloomington, Minnesota 55420-  
2736; MN ID No. 1330019

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came duly on for hearing before Administrative Law Judge Howard L. Kaibel, Jr., on May 14, 1996, in Minneapolis, Minnesota. The record closed on July 1, 1996, upon receipt of simultaneous reply briefs.

Linda Geier, a Staff Attorney at the Appeals and Legal Services Division of the Department of Revenue, 10 River Park Plaza, St. Paul, Minnesota 55146, appeared on behalf of the collection staff of the Department of Revenue (hereinafter: "Department Staff"). Stuart Gale, Attorney at Law, 210 Valley Office Park, 10800 Lyndale Avenue South, Bloomington, Minnesota 55420, appeared on behalf of the Permittee, National Pawnbrokers, Inc., who requested the hearing on the proposed revocation (hereinafter: "Respondent").

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of the Department of Revenue shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with the Commissioner of Revenue, Matthew G. Smith, 10 River Park Plaza, St. Paul, Minnesota 55146.

STATEMENT OF ISSUES

(1) Should this proceeding to revoke Respondent's sales tax permit be dismissed because two of the three specified charges (failure to file and to pay the January, 1996 return) were admittedly erroneously included in the Notice of Intent to Revoke?

(2) Can the Department Staff require the filing of a post-revocation security deposit (the bonding to assure payments upon reinstatement authorized by the Legislature in Minn. Stat. § 297A.28) of Permittees such as this Respondent whose sales tax permits have never been revoked?

(3) If so, can such a deposit be required of this Respondent, as a condition of remaining in business, based on the alleged failure to timely pay its \$6,719.00

December 1995 return, given the previous record of interactions between the Respondent and the Department's Staff?

(4) If so, can the Department Staff require a deposit in the amount of \$11,764.00, given the statutory limit for bonds of the lesser of \$10,000.00 or double the average liability?

(5) If the Department Staff is correct in its claim that it has an implied, unstated, discretionary authority to require such pre-revocation bonds, is it required to adopt a uniform policy on how that authority will be implemented, equally applicable to all similarly situated sales tax permit holders.

(6) If so, would such a policy be an official agency statement of general applicability and future effect which could only be implemented after proper promulgation as a rule pursuant to Minn. Stat. Chapter 14?

(7) Regardless of whether promulgation of a rule is legally mandated, are sales tax permittees entitled to some notice of what minimal circumstances they must meet, in order to avoid imposition of any security deposit requirements which would potentially put them out of business?

(8) Is the Commissioner and/or the Department Staff required to engage in some fact finding process, potentially subject to some minimal judicial review, prior to imposing such requirements?

(9) Does the Department Staff have some implied discretionary authority to require permittees such as the Respondent, whose permits have never been revoked, to waive their statutory right to an independent Chapter 14 revocation hearing as a condition of remaining business?

(10) If so, can this Respondent be required to waive such rights to any future hearings based on the alleged failure to pay its December 1995 return and the particular history of its previous interactions with Department Staff?

(11) If so, does the evidence relating to this Respondent's circumstances justify imposing the waiver of hearing rights required of post-revocation permittees, of two years, as opposed to some shorter period such as six months or 60 days?

(12) If pre-revocation permittees such as Respondent can be forced to waive their statutory hearing guarantees, are there other due process requirements which the Department has no implied authority to circumvent to prevent the Staff from subsequently summarily revoking their sales tax permits and closing down their businesses?

(13) If Department Staff has this discretionary authority to selectively impose such hearing waivers, should that authority be exercised only in accord with duly adopted rules?

(14) Could Department Staff introduce evidence at the duly noticed revocation hearing conducted herein, of new alleged charges that have arisen since the Notice of

Hearing was issued and served, without amending that Notice and according Respondent a full legal opportunity to prepare a response to those allegations?

(15) Were the new issues which Department Staff sought to raise “fully stated in advance of the hearing” or “fully stated as soon as practicable” as required in Minn. Stat. § 14.58?

(16) If a sales tax permit holder “fails to comply with” the law and rules relating to monthly filing and payment of returns pursuant to Minn. Stat. § 297A.07, on a single occasion, does the error give the Department continuing jurisdiction at its sole discretion to revoke the permit, even after the alleged error has been subsequently corrected?

(17) Did the Minnesota Legislature intend in adopting the expressed delegation of authority to the Department to impose specific post-revocation, reinstatement requirements on permit holders to also authorize imposition of those requirements on pre-revocation Respondents?

(18) Is it a violation of due process in cases such as this one, for the Director Of Sales And Use Taxes, who will make the final decision and sign the final order, to be consulted by Department Staff and personally approve the security deposit and hearing waiver requirements at issue, when the Notice of Intent to Revoke was prepared? See, Iowa Beef Processing, Inc. v. Commissioner of Revenue (Tax Court Docket No. 2266, December 20, 1976).

(19) Do the Director and/or the other staff who found that a bond should be required, have the requisite authority to make such a finding, when the security deposit statute limits such authority to “the Commissioner”? Ibid.

(20) Did Department Staff exceed its statutory authority in the Notice of Intent to Revoke when it required Respondent to “state the basis of your protest” a mandate which is not included in the statute?

(21) Are the provisions of Minn. Stat. § 297A.28 unconstitutional and violative of Section 2, Article 1, and does the proposed application of the statute exceed the authority contained in Article 10, Section 1 of the restructured Constitution of the State of Minnesota and violate the equal protection clause of the 14th Amendment to the United States Constitution?

(22) Have the foregoing issues all been rendered “moot” or academic abstract questions, because the disputed liability has been paid after the hearing, leaving no live, actual controversy to be determined or decided?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. Respondent is a small business in Minnesota which is required by law to obtain a permit from the Department of Revenue to collect and account for sales taxes on the Department’s behalf. If that permit is revoked, Respondent’s business outlets will be forced to cease making further sales of any kind, forthwith.

2. Respondent's first difficulties meeting filing and payment deadlines occurred in the summer of 1994. At that time the company was a sole proprietorship and its owner, with the informal assistance of Ms. Gilster, the assigned collection agent, "cleaned up" the difficulties and everything was current again by September 1994.

3. The newly incorporated Respondent fell behind again early in 1995. It worked out an installment payment agreement with the assistance of Ms. Gilster in June to eliminate the delinquency in 60 days. It met its obligations under that agreement and was completely current again by August 11, 1995.

4. The cordial relations began to deteriorate when one of Respondent's checks bounced on August 21, 1995. Ms. Gilster began escalating formal collection activities. She threatened revocation, issued default notices, filed liens against Respondent's real estate, prepared and issued formal Notices of Intent to Revoke and ultimately, in November of 1995, executed a "cash drawer levy" on all three of Respondent's business outlets by raiding them and seizing all cash on hand to satisfy allegedly overdue accounts.

5. Respondent subsequently exercised its statutory right, stated in the Notice of Intent to Revoke, to request a contested case hearing on the alleged arrearages. The hearing, which was scheduled for December 15, 1995, was canceled on December 14, when the parties reached an accord on what was due and that amount was remitted.

6. When Respondent's December, 1995, return was timely filed on January 22, 1996 without a check for \$6,719.00 due, Ms. Gilster prepared a new Notice of Intent to Revoke threatening further "enforced collection action" and summary revocation of the permit unless a hearing was requested within 30 days.

7. The revocation notice was issued on February 9, 1996, when Respondent's December payment was allegedly 18 days late. The notice also purported to base the proposed revocation on Respondent's failure to file and pay the January return, although that return was not yet due and would not be due for filing and payment until February 20, 1996.

8. In addition to these payment demands, Ms. Gilster also added two requirements to this notice which have evidently never been included before in any previous Notices of Intent to Revoke ever issued by the Department. As a condition of continuing to do business in Minnesota, the notice required Respondent to put up a "security deposit of \$11,764.00" and to sign an agreement waiving all statutory hearing rights on any future alleged delinquencies for the next two years. Neither Ms. Gilster, who issues 1,000 Notices of Intent a year or her supervisor had ever heard of those conditions being imposed before on pre-revocation permit holders.

9. Security deposits are specifically provided for by the legislature for post-revocation sales tax permittees who are seeking probationary reinstatement, in order to re-open their businesses. Before including the unprecedented pre-revocation security deposit requirement in the Notice of Intent, Ms. Gilster consulted with and obtained approval from her supervisor at the Bloomington office, the Manager of the statewide Collection Division, department legal staff and Mr. Donald Trimble, the revenue

department official who makes the final decisions on proposed permit revocations and signs the final orders. Mr. Trimble agreed prior to issuance of the Notice to "support" the inclusion of the waiver and deposit requirements and to sign a revocation order based on Respondent's anticipated failure to accept them.

10. Although the security deposit is expressly limited by statute to a maximum of \$10,000.00, the Department Staff's Notice of Intent to Revoke required a bond of \$11,764.00.

11. Respondent was initially uncertain whether the allegations of a December delinquency were accurate. It also contested the February filing and payment demands and the bond and hearing waiver requirements, contending that they were invidious and illegal. Respondent consequently requested this hearing to litigate these and other objections to the proposed revocation.

12. The Department Staff conceded in their final reply brief that the January filing and payment requirements were improperly included in the Notice of Intent to Revoke. Staff also conceded in their reply brief that "the amount listed on the Notice of Intent as required security deposit was erroneous" asserting that it "must be in accordance with Minn. Stat. § 297A.28" and proposing "to attempt to correct this amount through negotiations with Taxpayer" (sic).

13. Respondent also became convinced during the hearing process that its December liability had not been paid, conceding that it was delinquent. The Company's cash flow was at the same time not particularly conducive to continuing to vigorously litigate the numerous issues raised in its appeal, as it was forced to liquidate assets in order to raise the money to make the December payment. Although it continued to contest the other proposed requirements stated in the Notice of Intent to Revoke, the Company tendered full payment of the December liability on June 18, 1996, which has apparently been accepted by the Department.

14. Until 1995, hearings were automatically required by statute on all sales tax permit revocations. Department Staff indicated at the hearing that they have taken several steps to ensure that it is "very rare that we ever have a hearing these days." First they sponsored a statutory amendment to eliminate hearings unless a permit holder affirmatively requests one. Then they discouraged hearing requests by adopting an unwritten policy that refuses to enter into any installment payment plan with anyone who requests a hearing. They also required anyone entering into an installment plan to sign a "voluntary" waiver of hearing, allowing for automatic revocation in the event of any alleged subsequent default. They further propose in this case to impose such waivers involuntarily in Notices of Intent to Revoke, whenever they decide that a permit holder is being unduly recalcitrant.

15. There are no formal or informal, published or internal, written guidelines, policies or memoranda spelling out when or how these new requirements of security deposits and hearing waivers are to be implemented. Ms. Gilster's supervisor indicated that there are no definite or uniform criteria and that each case will have to be evaluated separately.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Notice of Hearing was in all respects proper with regard to form, content, execution and filing.
2. That all other procedural and substantive requirements of statute and rule have been duly complied with.
3. That the Department duly acquired and now has jurisdiction over this matter.
4. That the payment of the alleged delinquency by the Respondent and the acceptance of that payment by the Department Staff have rendered the matter moot.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

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RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of Revenue dismiss the proposed revocation of Respondent's Sales Tax Permit.

Dated this 13th day of September 1996.

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HOWARD L. KAIBEL, JR.  
Administrative Law Judge

Reported: Taped, not transcribed.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Preface

Frequently Administrative Law Judges analyze and make recommendations on all or several issues in a case, even when a decision on one issue would make it unnecessary to reach the others, "in the interests of judicial economy". This avoids the potential delay associated with remanding the case for further consideration in the event that the Commissioner or other final decision maker might reach a different conclusion on the one issue that the Judge deemed dispositive. It is particularly important to draft

such alternative rulings when the decision on the dispositive issue is a close call and remand is a realistic possibility. Such omnibus, hypothetical rulings are also particularly advisable when the secondary and tertiary issues are not especially complicated and their resolution would not require a lot of legal research and writing.

However, this is manifestly a case where judicial economy is better served by the approach recommended in the attached report - disposition based on the single issue of mootness, reserving judgment on the other 21 issues for future cases where they are vigorously litigated by parties with a real interest in their legal resolution. The application of the mootness doctrine to this case is not a close question where reasonable legal minds are likely to differ. The Department Staff did not even argue the mootness issue in its brief or reply brief. Furthermore, if the other 21 issues were not moot, many of them would be complicated, worthy of extensive consideration and would appear from preliminary research to involve some potentially close calls. It would consequently most likely be exceedingly wasteful to resolve all those issues at length in this report, when the rulings would almost certainly turn out to be mere advisory opinions on abstract propositions of law.

If the Commissioner were to ultimately conclude that the other issues in this matter were not moot, an additional issue would be presented in this litigation: whether that judgment should be immediately appealable prior to remand. Perhaps certification of that question, if it arises, as important and doubtful should be considered to expedite final resolution of this dispute and to avoid a potentially significant waste of judicial resources.

### Mootness

The general rule that moot questions should be avoided is central to the Anglo-American adversarial judicial system.

A case is moot on appeal if it has lost its character as present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law. Mahiai v. Suwa, 69 Haw. 349, 742 P2d 359 (Haw. 1987).

In the words of the Minnesota Supreme Court, it has long been "well established in this state's jurisprudence . . . that the court will decide only actual controversies." Matter of Schmidt, 443 N.W.2d 824 (Minn. 1989). Legal decision makers must reserve judgment on claims prematurely argued "until presented with a factual situation which has ripened into a justiciable controversy." State v. Colsch, 284 N.W.2d 839 (Minn. 1979) at 842.

Litigation ordinarily is considered moot when the party claiming to be aggrieved ceases to have a personal stake in its outcome . . . . Attorney General v. Commissioner of Insurance, 403 Mass. 370, 530 N.E.2d 142 (Mass. 1988).

Our system of civil litigation cannot function when one side is presented by a litigant with only a half-hearted retrospective interest in the outcome. A party must have a sufficient stake in the outcome of the litigation to ensure that both sides will be

vigorously presented, particularly in taxpayer actions. Cornblum v. San Diego County Board of Supervisors, 168 Cal. Rptr. 294, 110 CA3d 976 (Cal. 1980).

Courts are consequently vigilant to ensure that moot matters are dismissed, frequently on the courts own motion. Matters should not be decided unless the parties are directly aggrieved, that is "substantially affected or actually injured". Snyder's Drugstores, Inc. v. Minnesota State Board of Pharmacy, 301 Minn. 28, 32, 221 N.W.2d 162, 165 (1974).

The party initiating the litigation (in this case Respondent, who requested the hearing to contest the government's alleged excesses) where no counterclaim has been filed, "has an absolute right to nonsuit." General Land Office of State of Texas v. OXY U.S.A., Inc., 789 S.W.2d 569 (Texas 1990). The law always permits, if not encourages Plaintiff, if he changes his mind, to withdraw his prayer for relief.

This principle is particularly important in sales tax cases where potential penalties and interest mount up daily as litigation drags on. (In this case, the disputed \$6,700.00 return had already grown to \$9,700.00 with penalties and interest by the time of the hearing, four months later.) The law will not compel the permit holder to continue to litigate all of the issues raised in an appeal against her/his will, even after the government has made concessions on several of the most important grievances, especially after the permittee becomes satisfied that the underlying disputed obligation is legitimately owed. (Tax litigants are frequently encouraged to pay first and sue for a refund later to minimize this problem).

It must be understood that Respondent in this case was faced with the classic Hobson's choice. Although there was the real possibility that the company might ultimately prevail in principle on the security deposit and hearing waiver issues by continuing to withhold its December return, there was also the real possibility that the Commissioner might decline to reach those issues, revoking the permit based solely on the December delinquency. Department Staff could then impose the security deposit and hearing waiver requirements as post-revocation penalties and Respondent would still be liable for penalties and interest, plus legal costs, which could be orders of magnitude more than the initial liability. At some point a perspicacious plaintiff permits prudence to prevail over principle.

The legal corollary to this axiom is that once the winner in a lawsuit accepts the disputed payment s/he is estopped from pursuing any further appeal. Mastin v. May, 130 Minn. 281, 153 N.W. 756 (Minn. 1915). The acceptance of the sought after relief (in this case, the alleged December delinquency which authorized issuance of the Notice of Intent to Revoke) moots the litigation.

The Department Staff does not argue that any of the rare exceptions recognized at law to the mootness doctrine would have any application herein. They do not assert, for example, that there would be unacceptable "collateral consequences" or that the issues are of such peculiarly short duration that they are "capable of repetition, inherently evading review" or that there is a compelling "public interest" in making an exception here.

The mootness doctrine cuts both ways and has frequently been relied upon by the government in the past to avoid review of the legality of its practices and procedures. For example, in Minnesota Auto Specialties, Inc., 346 N.W.2d 657 (Minn. 1984) the Minnesota Supreme Court refused to rule on the merits of the legal questions raised by an OSHA inspection, because the citation that was issued pursuant to that inspection had since become final. The court held that a ruling on behalf of the cited employer would consequently "be a futile gesture." In another case, the doctrine was cited by the government to quash a suit brought by taxpayers against a contumacious official after the county ordered remission of all unpaid penalties. State ex rel Board of Tax Appeals v. Smith, 361 N.E.2d 1062.

No case has been cited by the parties or uncovered in extensive research in this or any other jurisdiction permitting taxing authorities to proceed with a sales tax revocation after the permit holder has paid the alleged delinquency. On the contrary, it appears well accepted that payment of the alleged delinquency moots an appeal automatically. In Carson Pirie Scott and Company v. Hennepin County, 1992 WL 109239 (Minn. Tax Court Docket Nos. 10576 and 11778, March 20, 1992) Chief Judge Arthur Roemer was forced to reluctantly deal with what may have been moot legal issues because the payment of the delinquency could not be confirmed:

The question may be **moot** since the Petitioner has indicated that it plans to pay the **taxes** in full so that it can complete a sale. However, as of this date this court has not been advised of the payment of the **taxes** in full and thus must address the issue. (Emphasis original).

#### Postscript

It would appear to the detached observer that there may be considerable potential at this point in this case for an arms-length, good faith mediation or settlement conference with an independent experienced peacemaker. A proverbial stitch in time, just might save nine. There is certainly nothing to be lost in talking! The alternative would appear to be intensification and escalation of this expensive, protracted legal struggle where both sides stand to lose a lot more than they gain.

Two new files have already been opened, docketed and preliminarily argued in a renewed, somewhat redundant effort to revoke Respondent's sales tax permit. These new files further seek to revoke the occupational licenses issued by local governments at Respondent's three retail outlets, potentially redoubling the legal issues that must ultimately be dealt with. One issue to be addressed in those dockets is the degree to which they may be mooted by the continuing litigation in this proceeding. In short, the attached report appears to deal with an opening salvo in a skirmish that lead to a much larger conflagration. Action on the attached report alone will involve extensive time consuming and expensive legal activity for both participants, including: filing and arguing formal exceptions to the report of the Administrative Law Judge, potential remands for further consideration, appeals to the Court of Appeals on whether that is an interlocutory order, subsequent review on the merits, etc.; before and/or at the same time as legal wrangling proceeds on the new dockets.

The biggest problem for the mediator would be to get the decision makers for both participants in this struggle to shake hands and take a chance that a good faith compromise might produce peaceful co-existence. Although Department Staff has not accused Respondent of willful evasion of the sales tax laws or knowing failure to remit payments, which would be a gross misdemeanor under Minn. Stat. § 289A.63, subd. 1 or embezzlement (see 8 ALR 4, 1068); the Staff does appear to sincerely believe that Respondent is an "egregious" malcontent that is deliberately misusing and abusing due process aspects of the law to frustrate its collection efforts. Similarly, Respondent appears to sincerely believe that Department Staff at the Bloomington office are deliberately abusing and misusing the collection tools in the law to pursue a malicious, relentless vendetta aimed solely at putting it out of business.

The task of fostering reconciliation under these circumstances would doubtless be daunting. We will never know whether it is possible, until one of the parties agrees to give it a try. The mechanisms are there and have worked well in the past in less promising circumstances: Minnesota Rules 1400.5950 and 1400.6550.

HLK