

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

In the Matter of the Revocation of the
Lottery Retailer Contract of Moreno
Diversified, Inc.

**RECOMMENDATION GRANTING
SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Manuel J. Cervantes (ALJ) on the Department of Revenue's (Department) Motion for Summary Disposition. On May 20, 2010, the Department served a Notice and Order for Hearing (Notice) on Moreno Diversified, Inc. (Respondent or Moreno Diversified) by U.S. mail. Two prehearing conferences took place in this matter; on June 21, 2010 and August 26, 2010.

Wayne L. Sather, Department of Revenue Attorney, appeared on behalf of the Department. Mr. Moreno appeared on behalf of Moreno Diversified.

At the August 26, 2010 prehearing conference, the parties agreed that there are no material facts in dispute and that the Department could proceed by Motion for Summary Disposition. On September 2, 2010, the Department filed its Motion. No response to the motion was received on behalf of Moreno Diversified. The record closed on September 17, 2010, when the period for filing a response expired.¹

STATEMENT OF ISSUE

Does Moreno Diversified owe the State of Minnesota \$500 or more in delinquent taxes, penalties, or interest which would serve as a basis for the revocation of its Minnesota Lottery License?

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the ALJ makes the following:

RECOMMENDATION

1. That the Department's Motion for Summary Disposition be GRANTED, and

¹ Minn. R. 1400.6600 (a response to a motion may be filed within ten working days after receipt).

2. That the Commissioner of Revenue (Commissioner) REVOKE Moreno Diversified's Minnesota Lottery Retailer License.

Dated: October 12, 2010

s/Manuel J. Cervantes

MANUEL J. CERVANTES
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record and this report. The Commissioner may adopt, reject, or modify this Report and Recommendations.

Under Minn. Stat. § 14.61, the Commissioner may not make a final decision until after the parties have had access to this report for at least 10 days. During that time, the Commissioner must give any party adversely affected by this report an opportunity to file objections to the report and to present argument supporting its position. Parties should contact Ward Einess, Commissioner of Revenue, 600 N. Robert Street, St. Paul, MN 55164-7100, to learn the procedure for filing exceptions or presenting argument.

The record of this proceeding closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration for doing so. The Commissioner must notify the parties of the date on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve his final decision upon each party and the ALJ by first class mail or as otherwise provided by law.

MEMORANDUM

I. Jurisdiction

The ALJ and the Department have jurisdiction pursuant to Minn. Stat. §§ 14.50, 207C.72; 349.155, subd. 3; and 349.06, subd. 2.² The Respondent was given notice of the hearing in this matter and Department has complied with all relevant procedural requirements.

² Statutes are cited to the 2008 Edition.

II. Contention of the Parties

This is an appeal by Respondent from the Department's Notice, filed May 20, 2010,³ indicating that Respondent has not paid all taxes due to the State of Minnesota. As of May 14, 2010, the Respondent owed \$26,885 in Sales and Use tax and related penalties, interest and other charges, and \$665 in Minnesota Withholding tax and related penalties, interest, and other charges.

The current outstanding balance is \$25,185.⁴ At the August 25, 2010 prehearing conference, Respondent acknowledged that this balance was due. The Department filed its motion for summary disposition on September 2, 2010. Respondent's reply was due ten working days after receipt or on September 17, 2010. The Respondent has not filed any reply to the Department's motion.

III. Procedural Standard

Minn. R. Civ. P. 56 provides that summary judgment shall be granted if "there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law."⁵ Summary disposition is the administrative equivalent of summary judgment in district court practice. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law when the law is applied to those undisputed facts.⁶ The Office of Administrative Hearings has generally followed summary judgment standards developed in judicial courts when considering motions for summary disposition in contested case matters.⁷ A genuine issue is considered one that is not frivolous or a sham, and a material fact is one whose resolution will affect the result or outcome of the case.⁸

A moving party has the initial responsibility of showing no material fact is in dispute. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.⁹ When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.¹⁰ All doubts and factual inferences must be resolved against the moving party.¹¹ Although all doubts and factual

³ Notice and Order for Hearing.

⁴ Affidavit of Matt Hyman, DOR, Ex. 6; attached to the Department's Notice of Motion and Motion.

⁵ Minn. R. Civ. P. 56.03 (1994); *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1995); *Louwegie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500K

⁶ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1995); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d. 63, 66 (Minn. App. 1985); Minn. R. 1400.5500, K; Minn. R. Civ. P. 56.03.

⁷ See Minn. R. 1400.6600 (2007).

⁸ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau, Inc. v. Minnesota Dept. of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

⁹ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

¹⁰ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

¹¹ See, e.g., *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).

differences must be resolved in favor of the non-moving party, the party opposing the motion must establish by substantial evidence that there exists a genuine issue of material fact.¹² If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.¹³ The ALJ is to make a recommendation about the appropriate interpretation of the law and about how that law applies to the undisputed facts.

V. Undisputed Facts

The Respondent in this matter holds a Minnesota Retailer Contract (license), issued by the Minnesota State Lottery. The Respondent is delinquent in excess of \$500 in Minnesota Sales and Use Tax, and Withholding tax. On March 8, 2010, the Department notified Respondent of its intention to revoke his Minnesota Lottery license.¹⁴ On March 30, 2010, Nancy Moreno, Treasurer, timely requested a contested hearing on behalf of Respondent.¹⁵

VI. Analysis

The facts in this case are not in dispute; as of August 26, 2010, Respondent owes the Department \$25,855 in Minnesota Sales and Use tax, Minnesota Withholding tax, penalties, interest, and other charges.

Minn. Stat. § 207A.72, subd. 2, in relevant part, states,

Tax clearance required.

The state or a political subdivision of the state ... must revoke, a license for the conduct of a profession, occupation, trade, or business, if the commissioner notifies the licensing authority that the applicant owes the state delinquent taxes payable to the commissioner, penalties, or interest. The commissioner may not notify the licensing authority unless the applicant taxpayer owes \$500 or more in delinquent taxes, penalties, or interest, or has not filed returns.

Minn. Stat. §3 49A.06, subd. 1, in relevant part, states,

¹² *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (citing *Anderson v. State Dep't of Natural Res.*, 693 N.W.2d 181 (Minn. 2005)).

¹³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

¹⁴ DOR Ex. 1.

¹⁵ DOR Ex. 2.

Contracts.

The director shall sell tickets for the lottery through lottery retailers with whom the director contracts....

Subd. 2. Qualifications.

(a) The director may not contract with a retailer who:

* * *

(3) owes \$500 or more in delinquent taxes as defined in section 270C.72.

Minn. Stat. § 349.155, subd. 3, in relevant part, states,

Mandatory disqualifications.

(a) In the case of licenses..., the board ... shall revoke a license under this chapter, if the ... licensee:

* * *

(4) owes \$500 or more in delinquent taxes as defined in section 270C.72.

The only issue in this matter is whether Moreno Diversified owes Minnesota taxes, penalties, or interest in excess of \$500. Moreno Diversified concedes this point. The Department has ample authority to revoke Moreno's Lottery license and it is so recommended.

M. J. C.