

BEFORE THE

STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION

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In the matter of the contribution liability,  
or status, under Chapter 108, Stats., of

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: Hearing No. 7698, S  
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THADDEUS BLACK & PAMELA BLACK, Appellants  
7853 North 60th Street  
Milwaukee, WI 53233

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:  
: SEE ENCLOSURE AS TO TIME  
: LIMIT ON FURTHER APPEAL.  
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Account  
No. 281062-7

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A Department deputy's Initial Determination held that Thaddeus Black and Pamela Black were personally liable for the delinquent unemployment taxes, interest and penalties of Quik Pick Food Mart, Inc., in the amount of \$2,369.89. Thaddeus and Pamela Black timely appealed the Initial Determination, and a hearing was held on June 7, 1989 before Administrative Law Judge Paul E. Gordon, acting as an Appeal Tribunal of the Wisconsin Department of Industry Labor and Human Relations. Prior to issuance of the decision, a stipulation was arrived at that Pamela Black would not be held personally liable for the delinquent amounts. The Appeal Tribunal Decision, issued on September 15, 1989, reversed the Initial Determination, and held that Thaddeus Black and Pamela Black were not personally liable for the delinquent amounts.

The Department timely petitioned for review by the Wisconsin Labor and Industry Review Commission. Based on the evidence and applicable law, and having considered the arguments presented by the parties, the Commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Quik Pick Food Mart was a corporation organized under the laws of the State of Wisconsin on January 1, 1984. The purpose of the corporation was to operate

store business. As of its date of incorporation, the corporation  
A Co. deemed a mandatory successor under Chapter 108 of the Wisconsin Statutes of  
the business known as Quik Pick Food Store, Thaddeus Black, proprietor,  
operated at 2312 North Holton Street in Milwaukee, Wisconsin.

Thaddeus Black was president of Quik Pick Food Mart, Inc., and owned  
90 percent of the corporation's stock. At all times during the operation of  
the Quik Pick Food Store business, both before and after incorporation of  
Quik Pick Food Mart Inc., Thaddeus Black was the individual with the authority  
and responsibility for completing all unemployment compensation quarterly forms  
and paying all unemployment compensation taxes.

Unemployment compensation taxes for periods in 1984, 1985 and 1986 were not  
paid by Quik Pick Food Mart Inc., as more particularly set forth in  
determinations issued by the Department on September 7, 1985, September 23,  
1985, December 9, 1985, and April 6, 1986. These determinations were not  
appealed and became final. In an effort to obtain collection of the amounts  
for which Quik Pick Food Mart Inc. was thus determined to have been liable, the  
Department wrote a number of letters to Quik Pick Food Mart Inc. These were  
generally of three types. One type, apparently used initially after the  
issuance of a determination, recited generally that a review of the account  
indicated that an amount remained due for particular quarters and it asked that  
the employer "Please pay this amount now." A second type, apparently used as a  
follow-up if the first type of letter failed to generate payment, recited that  
the employer had been previously notified of the unpaid amount and indicated  
that, to avoid the issuance of a warrant which would be served and executed by  
the sheriff of the employer's county, it must return information to the  
Department indicating how it intended to resolve the matter. A third type of  
letter, apparently used as a follow-up to the second type of letter, was

somewhat more blunt; it recited, in bold type, "Payment is demanded within five days," and indicated that a warrant, commanding the sheriff to seize and sell sufficient of the employer's property to insure full payment of the delinquent taxes due, would be issued unless the Department heard from the employer at once. Seven letters of one or the other of these three types were sent by the Department to Quik Pick Food Mart Inc. between January 15, 1986 and March 9, 1987, although not necessarily in the sequence that might be expected for them; thus, after a "five-day letter" issued on April 9, 1986 concerning the 1984 special assessment for interest and the tax and penalties for the second and third quarters of 1985, a "Please pay this amount now" letter was sent to Quik Pick Food Mart Inc., relating to the 1984 special assessment for interest and the second, third and fourth quarters of 1985, on June 25, 1986, and again on September 9, 1986.

On April 6, 1987, Quik Pick Food Mart Inc. filed for bankruptcy, seeking reorganization and protection from creditors under Chapter 11 of the United States Bankruptcy Code. On April 9, 1987, the business entered into an Offer to Purchase Agreement with prospective buyers. The agreement provided for the sale of the business assets and the real property for a total of \$60,000. On May 5, 1987, notice of sale and payment to secured creditors was mailed to interested parties, including the Department. On May 20, 1987, the business was sold, including the real property. The proceeds of the sale of the business on May 20, 1987 were used to pay off various debts of the business, including a debt to the Internal Revenue Service for back taxes. On July 28, 1987, the Department filed a proof of claim in the bankruptcy proceedings for unemployment compensation taxes owed in the total amount of \$2,152.85. On September 10, 1987, the bankruptcy proceedings were dismissed.

Because of its relatively lower priority in the bankruptcy proceeding as compared to those of other creditors, the claim of the Department for unpaid unemployment compensation taxes was not satisfied prior to the dismissal of the bankruptcy proceedings.

The issue for decision is whether Thaddeus Black may be held personally liable for the delinquent unemployment compensation taxes, late filing fees, and accrued interest owed by Quik Pick Food Mart Inc., which has been determined in an amount of \$2,369.89 through January 31, 1988. By stipulation of the parties, no individual liability will attach to Pamela Black.

Section 108.22 (9), Stats. provides:

"(9) Any officer or any employe holding at least 20 percent of the ownership interest of a corporation subject to this chapter, who has control or supervision of or responsibility for filing contribution reports or making payment of contributions, and who wilfully fails to file such reports or to make such payments to the department, may be found personally liable for such amounts, including interest, tardy payment or filing fees, costs and other fees, in the event that after proper proceedings for the collection of such amounts, as provided in this chapter, the corporation is unable to pay such amounts to the department. The personal liability of such officer or employe as provided in this subsection survives dissolution, reorganization, bankruptcy, receivership, assignment for the benefit of creditors, judicially confirmed extension or composition, or any analogous situation of the corporation and shall be set forth in a determination or decision issued under s.108.10."

Thaddeus Black held at least 20 percent of the ownership interest of Quik Pick Food Mart Inc., and he also had control or supervision of or responsibility for filing contribution reports or making payments of contributions, within the meaning of section 108.22 (9), Stats.

The Commission finds that Thaddeus Black "wilfully" failed to file such reports or to make such payments to the Department, within the meaning of section 108.22 (9), Stats. Corporate funds were available which Black chose to pay to other creditors of the corporation rather than to the Department, and by so doing, he acted "wilfully" within the meaning of the Statute. Additionally,

the Commission concludes that the corporation is now unable to pay to the Department the amounts in question. The corporation's assets have been liquidated and distributed to other creditors.

The remaining issue is whether there were "proper proceedings for the collection of such amounts" within the meaning of section 108.22 (9), Stats. The Commission is satisfied that there were. After issuing the Determinations as to the amounts due, the Department methodically attempted, by way of correspondence to the corporation reminding it of the liability and demanding (with varying degrees of forcefulness) payment, to collect such amounts. Additionally, the Department filed a claim in the bankruptcy proceedings. While the Department had not filed a tax warrant prior to the commencement of the bankruptcy proceedings on April 6, 1987, its failure to do so does not require a conclusion that "proper proceedings for the collection of such amounts" did not take place. Under all of these circumstances, the Commission is satisfied that the Department's collection efforts were adequate to meet the standards set forth in section 108.22 (9), Stats.

The Commission therefore finds that appellant Thaddeus Black is personally liable for the delinquent unemployment taxes, interest and penalties of Quik Pick Food Mart Inc. in the amount of \$2,369.89 through January 31, 1988, pursuant to section 108.22 (9), Stats. The Commission further finds that appellant Pamela Black has no personal liability for such amounts.

#### DECISION

The Appeal Tribunal Decision is affirmed in part and reversed in part. Accordingly, Thaddeus Black is personally liable for the delinquent unemployment taxes, interest, and penalties of Quik Pick Food Mart Inc., as

Page 6

determined by the Department. Pamela Black is not personally liable for the delinquent unemployment taxes, penalties, and interests of Quik Pick Food Mart Inc., as determined by the Department.

Dated and mailed

February 14, 1990

110:CD3487

ER 451

/s/

Kevin C. Potter, Chairman

/s/

Carl W. Thompson, Commissioner

/s/

Pamela I. Anderson, Commissioner

## MEMORANDUM OPINION

The dispositive issue on appeal is whether there were "proper proceedings for the collection" of the amounts at issue such that appellant Thaddeus Black could be subjected to personal liability for the unpaid unemployment compensation taxes of Quik Pick Food Mart Inc. Based on the arguments of the parties, the Commission understands there to be no dispute over the Administrative Law Judge's conclusion that Pamela Black has no such personal liability, and that all of the conditions of section 108.22 (9) Stats., necessary to the imposition of personal liability, apart from the question of "proper proceedings for the collection of such amounts," are met in the case of Thaddeus Black.

The Administrative Law Judge concluded that "proper proceedings for the collection of such amounts" did not take place here because the Department did not file a tax warrant as it could have under section 108.22 (2), Stats. He concluded that "proper proceedings" under section 108.22 (9), Stats., must include the issuance of a warrant "where feasible." In support of affirmance of the Administrative Law Judge's Decision, Black argues to the Commission that the Administrative Law Judge's construction of the statute is justified by the great significance of the corporate structure as a method intended to promote investment and capital development by shielding investors from liability, and on the correspondingly great importance of limiting the circumstances under which the corporate veil may be pierced. The Department argues, in effect, that it cannot know in advance when a corporation may file for bankruptcy court protection (thus precluding the filing of tax warrants) and that its collection efforts should not be forced to go the extreme stage filing a tax warrant as an initial step in every case merely in order to preserve the eventual possibility of enforcing personal liability against shareholders.

There are no reported cases interpreting section 108.22 (9), Stats., with respect to the "proper proceedings" language. The Commission has therefore found it appropriate to look to other sources for guidance as to the construction of that section.

Section 77.60 (9), Stats., concerns the circumstances under which an officer or employe of a corporation can be held personally liable for delinquent sales taxes, penalties and interest owed by the corporation. In its purpose and function, it is quite similar to section 108.22 (9), Stats. Significantly, in the form in which it existed in the 1985 statutes, it was expressed in the same language as the present section 108.22 (9), Stats. Section 77.60 (9), 1985 Wisconsin Statutes, provided:

"Any officer or employe of any corporation subject to this subchapter or other person who has responsibility for making payments of the amount of tax herein imposed and who wilfully fails to make such payments to the Department, shall be personally liable for such amounts, including interest and the penalties thereon, in the event that after proper proceedings for the collection of such amounts, as provided in this subchapter, such corporation is unable to pay such amounts to the Department, and the personal liability of such officer, employe or other responsible person as provided herein shall survive the dissolution of the corporation. . ." (emphasis added)

This section was amended by 1987 Act 399 to remove the "after proper proceedings" language, but a decision recently issued by the Wisconsin Tax Appeals Commission interpreted the 1985 language, specifically with respect to the "proper proceedings" element of the Statute. In Lepp v. Wisconsin Department of Revenue (Tax Appeals Commission, Docket No. 87-S-56, January 8, 1990), the Tax Appeals Commission confronted the question of the potential personal liability of the sole shareholder of a defunct corporation for unpaid sales taxes owed by that corporation. Due to the posture of the case, the 1985 version of section 77.60 (9) Stats., was applied. The Commission discussed, among other things, the question of whether the proper proceedings requirement had been met. In this connection, it said:

"We do not read the statute as requiring endless attempts to collect from the corporation before personal liability attaches. How far these attempts must be carried is something that can't be defined with precision. However, once the Department has come forward with evidence showing that such attempts were made, the burden shifts to the taxpayer to show that attempts were inadequate or perfunctory. Here there was no evidence to show or even suggest inadequate or half-hearted collection efforts. To be sure, additional efforts might have yielded some additional funds. But that's not the proper test. Rather, the test is whether the hypothetically reasonable collection officer, weighing the costs of additional efforts against the potential gains, would have deemed it prudent to proceed."

The Commission recognizes that, in the Lepp case, the collecting agency evidenced a fair degree of aggressiveness. In that case, it actually issued and filed a tax warrant with the register of deeds, and it also garnished a corporate account. However, the Tax Appeals Commission did not hold that the efforts made by the collecting agency in that case were necessary, but simply that they were sufficient. The Commission finds the analysis of the Tax Appeals Commission in Lepp to be persuasive, and it considers the test articulated in Lepp to be a useful one in evaluating the question of "proper proceedings" under section 108.22 (9), Stats.

Here, the Department came forward with evidence showing that attempts were made to collect the liability determined against the corporation. The burden thus shifted to Black to show that such attempts were inadequate or perfunctory. However, the evidence here will not support the conclusion that the Department's efforts were "inadequate or half-hearted." Thus, for example, this is not a case in which the Department abandoned its efforts against the corporation, only to pursue the individual later when the corporation was liquidated. On the contrary, the Department's pursuit of the corporation was essentially constant and persistent. Just as in Lepp, it is now possible to speculate that additional efforts might have yielded some additional funds. But as the Tax Appeals Commission noted, that is not the proper test. Adopting a view that the filing of a tax warrant must always be resorted to where "feasible" is inconsistent with a test that looks at what a hypothetical reasonable collection officer would deem prudent under the circumstances. It is entirely possible that there will be cases in which the filing of a tax warrant, while technically "feasible," might be unhelpful or even counterproductive to the collection efforts underway. Thus, if it appears that it will be possible to successfully negotiate a periodic repayment plan with an

employer, the filing of a tax warrant, which could result in the seizure of assets that effectively shuts the employer down or at least makes it impossible for it to meet a repayment schedule, would not be a wise step in collection efforts. Every case must be evaluated on its own facts. The Commission is satisfied, however, that in this case the steps undertaken by the Department were serious efforts at collection, reasonably calculated to achieve the results sought, and not so "inadequate or half-hearted" under all of the circumstances as to warrant a conclusion that "proper proceedings" did not occur.

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