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TANNHAEUSER INVESTMENT COMPANY, INC.,

Plaintiff,

vs.

Case No. 89-CV-12-655

STATE OF WISCONSIN LABOR AND  
INDUSTRY REVIEW COMMISSION,

Defendant.

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MEMORANDUM DECISION

**ENFORCEMENT  
SECTION**  
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In this case, the plaintiff, Tannhaeuser Investment Company, Inc., seeks judicial review of an August 16, 1989, decision of the Labor and Industry Review Commission. In its decision the Commission modified and affirmed a decision of the Department of Industry, Labor and Human Relations. The Commission assessed the plaintiff for contribution and interest for unemployment compensation taxes on several of its employees.

Findings of Fact

The plaintiff is engaged in the business of real estate sales and property management. William M. Tannhaeuser, Shawn Benevides, and Stephanie and Al Griffin worked for the plaintiff corporation. The plaintiff failed to withhold unemployment compensation tax from the above listed employee's wages: in the case of William Tannhaeuser, on the basis of his alleged exclusion pursuant to sec. 108.02(15)(k)7, Wis. Stats; and in regard to the other named employees, on the ground of their independent contractor-principal relationship. The department maintained that sec. 108.02(15)(k)7, Wis. Stats. was not available to Tannhaeuser because his wages were not solely by way

of commission and that the other named individuals were employees of the corporation within the meaning of sec. 108.02(12)(a), Wis. Stats.

Following an audit, written initial and amended initial determinations, as required by sec. 108.10, Wis. Stats., the Department held the plaintiff liable for contribution and interest in the amount of \$837.68. The plaintiff appealed this determination, resulting in a hearing before an administrative law judge.

The ALJ held in his decision of January 19, 1989, that William M. Tannhaeuser had not been compensated solely by way of commission having received \$150.00 per month as an automobile allowance. Additionally, the ALJ held Benevides and the Griffins were employees and that the plaintiff failed to show that such employees were independent contractors. As a result, the plaintiff is subject to the unemployment compensation tax. Another individual, Andrew Johnson, initially found to be an employee of the plaintiff, was later found by the ALJ to be an independent contractor.

In a decision dated August 16, 1989, the Commission modified, and as modified affirmed the decision of the ALJ. The plaintiff now appeals the decision of the Commission to this court.

The court's scope of review as to the findings of fact made by the Commission is very narrow. "The findings of fact made by the Commission acting within its powers shall, in the absence of fraud, be conclusive." sec. 102.23(i), Stats. The proper test is whether there is relevant, credible and probative

evidence in the record to sustain the Commission's findings.

Princess House v. DILHR, 111 Wis.2d 46,54(1983).

As to issues of credibility, it has consistently been held that the triers of fact are the sole judges of the credibility of witnesses. R.T. Madden, Inc. v. ILHR Dept., 43 Wis.2d 528(1969). Insofar as the Commission is the fact finder in unemployment compensation cases on judicial review, the credibility and the weight of the evidence are the province of the Commission. Kohler Co. v. Ind. Commission, 272 Wis.310(1956). "A reviewing court may not substitute its own judgment in evaluating the weight or credibility of the evidence." Princess House, 111 Wis.2d 46, 54(1983)

This court finds that there is substantial credible evidence in the record to support the findings of the Commission that William M. Tannhaeuser's compensation was not solely by way of commission, and that the plaintiff was the employer of Benevides and the Griffins.

Any amount of payment above and beyond commissions excluded from taxation under sec. 108.02(15)(k)7, Wis. Stats., subjects the entire remuneration to unemployment compensation taxation. By his own testimony at the hearing before the ALJ, William Tannhaeuser stated that he received a set automobile allowance each month in addition to his commission (see Tr.p. 55). The plaintiff now asserts that Tannhaeuser never received any automobile allowance and submitted a letter of an accountant to support that assertion. This evidence, however, was never heard by the ALJ at the hearing, was not determined by the ALJ to be credible evidence, and is, therefore, not part of the record

on which this court may rule.

Since his compensation, according to the record before the Commission, was not solely by way of commission, Tannhaeuser's payment was not excludable under sec. 108.02(15)(k)7, Wis. Stats.

Where a party provides services free from direction or control by the employing unit, and as part of an independently established trade, business or profession, that individual is not an employee, but an independent contractor. sec. 108.02(12)(b)(2), Wis. Stats. Where the individual is an employee, for example, subject to the control or direction over performance of his services by the employing unit, the employing unit is liable for contribution of unemployment compensation tax as the employee's remuneration. sec. 108.02(12), Wis. Stats.

While the plaintiff has asserted that Benevides and the Griffins were independent contractors, thus relieving the plaintiff of the obligation to withhold unemployment compensation tax, the plaintiff failed to establish at the hearing that Benevides and the Griffins acted as part of any independently established trade, business or profession of their own, but rather that they acted at the direction of the plaintiff and were compensated by the plaintiff.

At the hearing before the ALJ, company CEO William G. Tannhaeuser indicated that Benevides and the Griffins were paid by the plaintiff Tannhaeuser Inv. Co., and that none of these parties to his knowledge maintained independently established business such that they would be independent contractors (Tr.pp. 79-81).

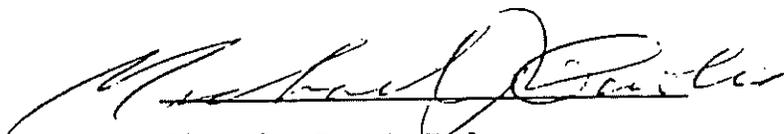
Since the plaintiff failed to show that Benevides and the Griffins were independent contractors, rather than employees, within the meaning of sec. 108.02(12), Wis. Stats., their compensation is subject to unemployment compensation tax.

This court finds that the plaintiff improperly failed to withhold unemployment compensation tax as required by secs. 108.02(12) and 108.02(15)(k)7, Wis. Stats. The decision of the Commission is hereby affirmed.

The respondent shall prepare an order consistent with this decision and submit it to the court for signature in accordance with the rules of the Circuit Court of the First Judicial District.

Dated this 15 day of November, 1990, at Milwaukee, Wisconsin.

BY THE COURT:



Circuit Court Judge