

FEB 2 1988

State of Nebraska

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

FRANK HARDIN AND PEGGY HARDIN, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 THE STATE OF NEBRASKA )  
 DEPARTMENT OF REVENUE, )  
 )  
 Defendant. )

Docket 410

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ORDER

This matter is before the court on appeal from a decision of the State of Nebraska Department of Revenue denying plaintiff's refund claim of Sales and Use Tax paid.

The Court considers this matter under the provision of section 84-917(6), Reissue 1986.

The relevant evidence before the court consists of a letter of denial of the claim signed by the manager of the audit division of the defendant and the refund claim of the plaintiffs and a letter from plaintiffs' accountant.

The facts are undisputed. Plaintiffs sold their business. The sales agreement provided that the purchasers assumed any sales or use tax liability. Because of nonpayment of sales and use taxes, defendant seized plaintiffs' 1984 state income tax refund and an escrow account from the sale of plaintiffs' home.

Section 77-2713(7) Reissue of 1986 provides: "Any corporate officer or employee with the duty to pay taxes imposed upon a corporation or to perform some other act required of a corporation shall be personally liable for the payment of such taxes or penalties in the event of willful failure on his part to perform such act." The word "willful" means "intentionally".

In State v. Coca, 216 Neb. 76, 391 N.W.2d 606, our Supreme Court held that the term intentional was synonymous with willful. "Intentionally means willfully or purposely and not accidentally or involuntarily."

The Court is not able to determine from the record presented if the action of the plaintiffs was or was not willful. The defendant argues in its brief that Frank Hardin received a Notice of Proposed Determination of Personal Liability and Notice and Demand for Payment from the Department of Revenue. If such was the case, then the Court could logically and legally find that plaintiff Frank Hardin was acting intentionally when he failed or refused to pay the sales and use taxes and was, therefore, personally liable for the payment of such taxes for willful failure to pay. See, In re contempt of Sileven, 219 Neb. 34, 361 N.W.2d 189. But said Notices are not part of the record received into evidence.

The order of the Department of Revenue denying the refund claim of plaintiffs is unsupported by competent, material and substantial evidence in view of the entire record as made on review.

IT IS THEREFORE ORDERED that the order of the defendant State of Nebraska Department of Revenue denying the refund claim of plaintiffs Frank and Peggy Hardin is hereby reversed; that said defendant is directed to approve said refund in the amount of \$12,308.75 and to process and return said refund.

Costs are taxed to defendants.

Dated this 29th day of January, 1988.

BY THE COURT:

  
Robert R. Camp  
District Judge