

ILLINOIS INDEPENDENT
TAX TRIBUNAL

ROBERT J. RIESBECK,)
)
 Petitioner,)
)
 v.)
)
 ILLINOIS DEPARTMENT OF REVENUE,)
)
 Respondent.)



PETITION

The Petitioner, Robert J. Riesbeck, by counsel, hereby petitions the Illinois Independent Tax Tribunal to review and withdraw the Assessment and Notice of Intent dated June 11, 2020 (the “Assessment Notice”) issued by the Illinois Department of Revenue (“Department”).

I. INTRODUCTION

1. On June 11, 2020, the Department issued the Assessment Notice, seeking to collect a 100% penalty from Petitioner in the amount of \$728,332.69, representing sales/use taxes, interest and penalties allegedly owed by Gregg Appliances, Inc. (the “Company”) for the tax periods ending June 30, 2016, April 30, 2017, and May 31, 2017. A copy of the Assessment Notice is attached hereto as **Exhibit A**. The Assessment Notice is devoid of merit, and the Department should be ordered to withdraw it immediately.

II. BACKGROUND AND FACTS

2. Petitioner is an individual with his residence in Indianapolis, Indiana.
3. The Company is an Indiana corporation, with its principal place of business in Indianapolis, Indiana. The Company is a wholly owned subsidiary of hhgregg, Inc. (“hhgregg”), formerly a publicly traded company on the New York Stock Exchange.

4. Petitioner was the CEO of hhgregg and the Company for sixteen months, from February 2016 through his termination on June 6, 2017. A copy of hhgregg's Form 8-K reporting the Petitioner's termination date to the SEC is attached hereto as **Exhibit B**.

5. Petitioner's successor, and the current CEO of hhgregg and the Company, is Kevin Kovacs. Mr. Kovacs was the CFO of hhgregg and the Company prior to becoming CEO.

6. The Illinois taxpayer account for the Company is 1946-2387.

7. hhgregg and the Company, operating under the trade name "hhgregg," were founded in 1955 and at one time owned and operated 226 retail stores in 20 states, specializing in the sale of premium appliances and consumer electronics. However, hhgregg and the Company, like many other brick and mortar retailers, suffered financially in recent years due to an increase in on-line shopping and changing consumer preferences.

8. On March 6, 2017 (the "Petition Date"), hhgregg and the Company filed petitions under Chapter 11 of the Bankruptcy Code in the Southern District of Indiana, Indianapolis Division, and the cases were administratively consolidated under Case No. 17-01302-JJG-11. Although the Chapter 11 cases remain pending, substantially all of the Company's assets have been liquidated and all of the former hhgregg stores are closed.

9. Particularly because hhgregg was a public company operating in multiple states, at all relevant times there were formal written policies and protocols in place regarding the collection and payment of sales taxes and the filing of the requisite returns.

10. The actual collection of sales tax by a retailer like hhgregg is done at the store level, at the time individual employees interact with consumers at the point of sale. hhgregg, while still operating, had 1000's of employees at its 200 plus stores.

11. In its last full year of operations (4/1/2015 – 3/31/2016), the Company had 226 stores in 20 states, sales of \$1,959,998,000, and 5,100 employees, including approximately 300 employees at the Company's corporate office. The responsibility and control for the tax reporting and remitting function, including audits, was outside the scope of Petitioner's responsibilities as CEO.

12. The Assessment Notice identifies three months with alleged liabilities: June 2016, April 2017 and May 2017. The Company's records for these periods, which the Petitioner requested and received from Mr. Kovacs, show the following:

June 2016 – Sales and Use Tax Return Filed (ST-1); taxes of \$287,608 owed (excludes prepayments) and paid; payment of \$287,608 cleared bank on July 21, 2016.

April 2017 – Sales and Use Tax Return Filed (ST-1); taxes of \$259,687 owed (excludes prepayments) and paid; payment of \$259,678 cleared bank on May 24, 2017.

May 2017 - Sales and Use Tax Return Filed (ST-1); taxes of \$252,662 owed (excludes prepayments) and paid; payment of \$252,662 cleared bank on June 20, 2017.

13. The Department, during a telephone conversation between Mr. Derringer and Mr. Kovacs, acknowledged that all sales tax returns of the Company were timely filed and all amounts due thereon were timely remitted.

14. The Company's sales tax return for June 2016 was reviewed by the Department as part of a sales tax audit spanning the period July 2011 – June 2016 (the "2011-2016 Audit"). On December 1, 2016, the Department issued a Notice of Proposed Liability to the Company, assessing additional sales tax of \$490,273 (plus penalties of \$39,971 and interest of \$73,540, for a total proposed amount due of \$603,784).

15. On or about March 1, 2017, the Department issued a final Notice of Tax Liability to the Company for the 2011-2016 Audit (the “2016 Company Assessment”).

16. The Company’s sales tax returns for April 2017 and May 2017 were reviewed by the Department as part of a sales tax audit spanning the period July 2016 – May 2017 (the “2016-2017 Audit”). On July 10, 2017, the Department issued a Notice of Proposed Liability to the Company, assessing additional sales tax of \$92,164 (plus penalties of \$13,824 and interest of \$1,734, for a total proposed amount due of \$107,722).

17. On or about September 8, 2017, the Department issued a final Notice of Tax Liability to the Company for the 2016-2017 Audit (the “2017 Company Assessment”).

18. The Petitioner had no knowledge of, and was not aware of, either the 2011-2016 Audit or the 2016-2017 Audit at the time such audits were being performed. The information in paragraphs 14-17 above, including copies of the Notices of Proposed Liability, 2016 Company Assessment and 2017 Company Assessment, was provided to Petitioner for the first time in July 2020 -- in response to a request by Petitioner’s counsel to the Department.

19. According to Mr. Kovacs, the field auditor who oversaw the audits at issue, Ms. Christy Herrin, was aware of the Chapter 11 filings by hhgregg and the Company and she worked closely on the audits with one of the Company’s former corporate office employees, Mr. Brian Gistover, prior to his departure as a consequence of the bankruptcy filings.

20. The Department has filed proof of claims against the Company, seeking to collect as a priority claim under the Bankruptcy Code the same alleged tax liability asserted against the Petitioner in the Assessment Notice.

III. APPLICABLE LAW

21. Under the Bankruptcy Code, a Chapter 11 debtor is prohibited from paying any pre-petition claims, absent a specific order from the Bankruptcy Court. *See generally* 11 U.S.C. §549(a); *In re KMART Corporation*, 359 F.3d 866 (7th Cir. 2004).

22. Any sales tax liability of the Company arising prior to the Petition Date qualifies as a priority claim against the Company. 11 U.S.C. §507(a)(8)(C). Any sales tax liability of the Company arising after the Petition Date qualifies as an administrative claim against the Company. 11 U.S.C. §503(b).

23. Under Illinois law (35 ILCS 735/3-7), the standard for personal liability is as follows:

Any person who has control, supervision, or responsibility of filing returns or making payments for a taxpayer, and who willfully fails to do so, shall be personally liable for a penalty equal to the amount of tax due including penalty and interest.

35 Ill. Comp. Stat. Ann. 735/3-7.

24. Personal liability for a retail corporation's taxes:

may be imposed only upon corporate officers or employees who are responsible for the filing of retailers' occupation tax returns and payment of taxes due, and who have 'willfully' failed to file such returns or remit such taxes.

Cerone v. State, 2012 IL App (1st) 110214, ¶ 15, 974 N.E.2d 377, 382, citing *McLean v. Department of Revenue*, 326 Ill.App.3d at 674, 260 Ill.Dec. 382, 761 N.E.2d 226.

IV. ERRORS

A. Petitioner Did Not Have Or Exercise Control, Responsibility Or Supervision Over The Company's Sales Taxes Or Returns At Issue.

25. The Petitioner did not have or exercise control, responsibility or supervision over the Company's collection or payment sales taxes. The Company's board set the policies and

procedures for the collection and payment of sales taxes and the filing of returns, and other employees of the Company were responsible for implementing those policies and procedures.

26. In his role as CEO of the Company for 16 months, the Petitioner had no involvement in either the 2011-2016 Audit or the 2016-2017 Audit, and he exercised no control or supervision over the sales taxes at issue in those audits.

B. Petitioner Did Not Willfully Fail To Pay Sales Taxes Or File Sales Tax Returns.

27. The Department does not allege that the Company failed to file any sales tax returns, or that the Company failed to remit any collected sales taxes. Rather -- although Petitioner has never seen the audit reports -- it appears that the Department may be challenging decisions made by the Company's store employees not to collect sufficient sales taxes in circumstances where the employees concluded that the sales were partially or completely exempt from sales tax.

28. The Department's estimation of liability, made in hindsight on the basis of ordinary course audits that were not contested because of the taxpayer's insolvency and bankruptcy, cannot meet the requisite legal standard of "willful" failure to pay tax.

C. The Company's Bankruptcy Filing Preempted Illinois' Collection Of Alleged Unpaid Sales Taxes.

29. The 2016 Company Assessment was issued by the Department five days prior to the Petition Date, and relates to pre-petition taxes. As such, the Company was prohibited under bankruptcy law from paying this pre-petition claim prior to confirmation of a plan or other Bankruptcy Court Order. On March 13, 2017, the Bankruptcy Court entered Order allowing the Company to pay pre-petition sales taxes in the ordinary course of business -- but not past due taxes. A copy of this Order is attached hereto as Exhibit C.

30. The compliance by the Company's officers -- including Petitioner -- with federal bankruptcy law and orders entered by the Bankruptcy Court cannot and does not constitute a willful failure to pay taxes.

31. While the 2017 Company Assessment was issued by the Department after the Petition Date, the legally determinative fact is that the Department issued the 2017 Company Assessment three months after the Petitioner was terminated from the Company. There can be no willful failure to pay taxes by an officer who was not an employee of the corporate taxpayer when the taxes were assessed against the corporate taxpayer. Moreover, as a post-petition claim, the Department may apply to the Bankruptcy Court at any time to obtain an order authorizing the payment of the 2017 Company Assessment as an allowed administrative claim against the Company.

V. CONCLUSION AND RELIEF REQUESTED

32. The Assessment Notice against Petitioner should be withdrawn, with prejudice. The Petitioner reserves his right to amend this Petition and assert all other defenses to the Assessment Notice as and when evidence supporting such defenses becomes available to Petitioner, and the omission of any such defense in the Petition shall not be deemed to constitute a waiver of any such defenses.

WHEREFORE, Petitioner, Robert J. Riesbeck, requests that the Illinois Department of Revenue be ordered to withdraw the Assessment Notice, with prejudice.

Respectfully submitted,



Steven D. Groth, III. Bar No. 6196483
Attorney for Petitioner, Robert J. Riesbeck

Representatives:

Steven D. Groth, Illinois Bar No. 6196483

BOSE MCKINNEY & EVANS LLP

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Indianapolis, IN 46204

317-684-5000

317-684-5173 fax

sgroth@boselaw.com

3885559.8

Collection Action

Assessment and Notice of Intent



June 11, 2020



ROBERT J. RIESBECK
225 N NEW JERSEY ST APT 41
INDIANAPOLIS IN 46204-2671

Letter ID: L0314600176

Taxpayer ID: XXX-XX-7359

NPL Penalty ID: 4570271

GREGG APPLIANCE INC
755 W CARMEL DR
207
CARMEL IN 46032-5878

We have determined you are personally liable for a penalty of \$728,332.69.

The penalty is equal to the amount of unpaid liability of GREGG APPLIANCE INC, due to your status as a responsible officer, partner, or individual of GREGG APPLIANCE INC.

Illinois law (35 ILCS 735/3-7) provides that any person who has control, supervision, or responsibility of filing returns or making payments for a taxpayer, and who willfully fails to do so, shall be personally liable for a penalty equal to the amount of tax due including penalty and interest.

Pay us \$728,332.69. Your payment must be guaranteed (i.e., cashier's check, money order) and made payable to the Illinois Department of Revenue. Send or bring it to us at the address below.

If you do not agree, you may contest this notice by following the instructions listed below.

- **If the amount of this liability is more than \$15,000**, file a petition with the Illinois Independent Tax Tribunal within **60 days** of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- **In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal**, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is **August 10, 2020**. Your request must be in writing, clearly indicate that you want to protest, and explain in detail why you do not agree with our actions. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.
- **Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue**, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If the debt remains unpaid and this penalty becomes final, we intend to take collection enforcement action against you personally to collect this debt. Collection action can include the seizure and sale of your assets, and levy of your wages and bank accounts.

JOSEPH DERRINGER
100% PENALTY UNIT
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19035
SPRINGFIELD IL 62794-9035

217 782-9904 ext. 31606
217 785-2635 fax

For information about

- › how to pay
- › submitting proof
- › collection actions



Collection Action
Assessment and Notice of Intent



June 11, 2020



ROBERT J. RIESBECK
225 N NEW JERSEY ST APT 41
INDIANAPOLIS IN 46204-2671

Letter ID: L0314600176

Taxpayer ID: XXX-XX-7359

NPL Penalty ID: 4570271

This statement lists our most recent information about your unpaid balance, available credits, or returns you have not filed.
A payment voucher is included so you may pay the balance due.

Sales/Use Tax & E911 Surcharge						Account ID: 1946-2387
Period	Tax	Penalty	Interest	Other	Payments/Credits	Balance
30-Jun-2016	476,015.00	100.00	117,667.36	-	-	593,782.36
30-Apr-2017	420,081.00	2,233.22	-	-	(420,081.00)	2,233.22
31-May-2017	342,521.00	28,052.32	14,405.79	-	(252,662.00)	132,317.11

IDOR-5P-NPL (R-11/13)

Retain this portion for your records.
Fold and detach on perforation. Return bottom portion with your payment.

Collection Action (R-12/08) (136)



Letter ID: L0314600176
ROBERT J. RIESBECK

Total amount due: \$728,332.69

Write the amount you are paying below.

Mail this voucher and your payment to:
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19035
SPRINGFIELD IL 62794-9035

\$ _____
Write your Account ID on your check.

000 006 015207866965 731 123199 2 0000072833269

To avoid this collection action

Pay

Your payment must be guaranteed (*i.e.* cashier's check, money order) and made payable to the Illinois Department of Revenue.

If you believe you are not personally responsible, send us proof

Send us written proof, documents, or testimony for review. You may provide one or all of the following:

- copies of notarized resignation papers.
- corporate minutes where your resignation was accepted.
- copy of signed agreement to transfer stocks and bonds to another party.
- a notarized affidavit from someone whom we recognize as knowledgeable of the business' operation stating that you were not responsible for filing returns and paying taxes.
- the name of the person who was responsible for filing returns and paying taxes.

Collection action information

Applicable Illinois law

Illinois law (35 ILCS 735/3-7 of the Retailers' Occupation Tax Act) provides that any person who has control, supervision, or responsibility of filing returns or making payments for a taxpayer, and who willfully fails to do so, shall be personally liable for a penalty. The penalty is equal to the amount of tax due including penalty and interest.

More information is on our website at tax.illinois.gov.

Federal Bankruptcy Court

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy "automatic stay" does not relieve your obligations to file tax returns.

Correct our records

If our records are not correct, send us proof of your prior payment, a copy of the return you filed, or other documentations so that we can correct our records.

What other collection actions may we take?

Additional collection action includes, but is not limited to:

- levy of wages and bank accounts.
- withholding of your state payments, tax refunds, lottery winnings, contractual service vouchers, *etc.*
- seizure and sale of your assets.
- referral to a collection agency.
- civil judgments.
- referral for non-renewal or revocation of your
 - Professional license,
 - Certificate of Registration,
 - Liquor license,
 - Corporate Charter with the Secretary of State, or
 - Lottery license.
- prosecution for bad checks and deceptive practice.
- filing a tax lien against your property (the filing of a lien may damage your credit rating for up to seven years, even after the lien is released). If we file a lien against your property, you are responsible for paying the lien filing and release fees and charges.

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**
Washington, D.C. 20549

Form 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): June 6, 2017

hhgregg, Inc.
(Exact name of registrant as specified in its charter)

Commission File Number: 001-33600

Indiana
(State or other jurisdiction
of incorporation)

47-4850538
(IRS Employer
Identification No.)

4151 East 96th Street
Indianapolis, Indiana 46240
(Address of principal executive offices, including zip code)

(317) 848-8710
(Registrant's telephone number, including area code)

(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

EXHIBIT B

Item 5.02. Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

Effective on June 6, 2017, hhgregg, Inc. (the "Company") terminated the employment of each of Robert J. Riesbeck, the Chief Executive Officer and President of the Company; Tom Schuetz, the Chief Information Officer of the Company; and Aaron Trahan, the Chief Merchandising Officer of the Company. On June 6, 2017, Robert J. Riesbeck also tendered his resignation as a director on the Board of Directors of the Company (the "Board"). As a result of the resignation of Mr. Riesbeck, the size of the Board was reduced to two directors. There was no disagreement between any of the individuals and the Company on any matter relating to the Company's operations, policies or practices.

Effective June 7, 2017, the Board appointed Kevin J. Kovacs, the Chief Financial Officer of the Company, to serve as the President and Chief Executive Officer of the Company in addition to his role as Chief Financial Officer of the Company, until his resignation or removal.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

HHGREGG, INC.

Dated: June 7, 2017

/s/ Kevin J. Kovacs

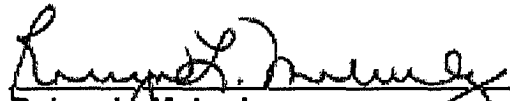
Kevin J. Kovacs

President, Chief Executive Officer and Chief Financial Officer



SO ORDERED: March 13, 2017.




Robyn L. Moberly
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

<p>In re:</p> <p>hhgregg, Inc., <i>et al.</i>,</p> <p style="text-align: center;">Debtors.</p>	<p>Chapter 11</p> <p>Case No. 17-01302-11</p> <p>(Jointly Administered)</p>
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ORDER, PURSUANT TO SECTIONS 105(a), 363(b), 507(a)(8), AND 541 OF THE BANKRUPTCY CODE, (I) AUTHORIZING THE DEBTORS TO PAY PREPETITION SALES AND USE TAXES AND (II) AUTHORIZING BANKS TO HONOR AND PROCESS CHECKS AND ELECTRONIC TRANSFER REQUESTS RELATED TO THE FOREGOING (DOC. NO. 15)

Upon consideration of the motion (Doc. No. 15) (the "Motion")¹ of the Debtors for the entry of an order, pursuant to sections 105(a), 363(b), 507(a)(8), and 541 of the Bankruptcy Code, (i) authorizing, but not directing, the Debtors, in their sole discretion, to pay the Taxes and (ii) authorizing the Banks, when requested by the Debtors in their sole discretion, to receive, process, honor, and pay any and all checks and electronic fund transfers related to the Taxes; and upon consideration of the Motion and all pleadings related thereto, including the First Day Declaration; and it appearing that the Court has jurisdiction to consider the Motion in accordance

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

with 28 U.S.C. §§ 157 and 1334; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED as set forth herein.

1. The Debtors are authorized, but not directed, in their discretion, to pay, in the ordinary course of their businesses, all prepetition Taxes to the Authorities up to an aggregate amount of \$6,500,000.

2. Nothing in this Order shall be construed as authorizing the Debtors to pay any amounts on account of past-due taxes.

3. The Banks are authorized to receive, process, honor, and pay all checks presented for payment of, and to honor all funds transfer requests made by the Debtors related to, the claims paid pursuant to this Order, regardless of whether such checks were presented or funds transfer requests were submitted prior to or after the Petition Date, provided that funds are available in the Debtors' accounts to cover such checks and funds transfers. The Banks are authorized to rely on the Debtors' designation of any particular check or funds transfer as approved by this Order.

4. Nothing in this Order (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors or their estates; (ii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors or their estates with respect to the validity, priority, or amount of any claim against the Debtors or their estates; (iii) shall impair, prejudice, waive, or

otherwise affect the rights of the Debtors or their estates with respect to any and all claims or causes of action against an Authority; or (iv) shall be construed as a promise to pay a claim.

5. The Debtors are authorized to take any and all actions necessary to effectuate the relief granted herein.

6. The requirements of Bankruptcy Rule 6003(b) have been satisfied with respect to the payments authorized by this Order.

7. Notwithstanding any applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be effective and enforceable immediately upon its entry.

8. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

9. Notwithstanding anything to the contrary contained herein, any payment made or to be made under this Order, any authorization contained in this Order, or any claim for which payment is authorized hereunder, shall be subject to the requirements imposed on the Debtors under any orders of this Court approving any debtor in possession financing for, or any use of cash collateral by, the Debtors, and any documents providing for such debtor in possession financing.

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