

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL
NON-PROPERTY TAX APPEAL

Paul G Valentino,
Petitioner,

v

MTT Docket No. 14-005039 -R

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Preeti Gadola

ORDER GRANTING RESPONDENT'S AMENDED MOTION FOR SUMMARY
DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

A petition in this matter was filed on June 21, 2014. The matter was dismissed, reinstated and an answer was filed on December 16, 2014. On June 22, 2015, Respondent filed a Motion for Summary Disposition. On July 20, 2015, the parties filed a Joint Motion to Hold Case in Abeyance, which was granted on July 24, 2015. The matter was held in abeyance because Petitioner previously filed for Chapter 7 personal bankruptcy in the United States Bankruptcy Court in the Eastern District of Michigan on December 16, 2014. In the Joint Motion, the parties asserted, that upon information and belief, some of the tax debt in dispute would be affected in the event the bankruptcy court issued a discharge order and, as such, the outcome of the bankruptcy proceedings may alleviate any need for further proceedings before the Tribunal. On May 5, 2017, Petitioner received a discharge. Respondent alleges, however, that two of assessments, TE45327 and TJ68958, survived Petitioner's bankruptcy discharge because they were exempt from the same.¹ As such, on July 5, 2017, Respondent filed an Amended Motion for Summary Disposition. Petitioner did not file a response to the Motion.

¹ Respondent claims that taxes and interest associated with these assessments, survive the discharge, however, penalties were discharged by the Bankruptcy Court. See Respondent's Brief in Support of its Amended Motion for Summary Disposition ("Brief in Support") at 3.

Respondent's Amended Motion for Summary Disposition ("Motion") was filed pursuant to MCR 2.116 (C) (10). More specifically, Respondent contends that there are no genuine issues of material fact remaining and Petitioner is entitled to judgment in its favor, as a matter of law. Respondent further alleges that it is not within the Tribunal's jurisdiction to determine if the assessments at issue survived the bankruptcy discharge as they are within the purview of the Bankruptcy Court. Respondent claims the Tribunal's only duty here is to affirm or cancel the assessments.

After reviewing the Motion and evidence presented, the Tribunal finds that granting Respondent's Motion is warranted at this time.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner was a corporate officer liable for unpaid sales tax under applicable Michigan law. Respondent claims that Petitioner was a corporate officer of North Oak, Inc. d/b/a Solley's Appliance and Fireplace Center ("Business"). Respondent alleges Petitioner was responsible for tax matters before, during and after the periods in default. Respondent contends that it assessed the Business for sales tax due and when it failed to pay the tax, it assessed Petitioner.² Respondent puts forth that the tax periods at issue are May 2011 through October 2011.

PETITIONER'S CONTENTIONS

As noted above, Petitioner did not file a response to Respondent's Motion.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.³ In this case, Respondent moves for summary disposition under MCR 2.116(C)(10) asserting that no genuine issues of material fact remain.

Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the

² See MCL 205.27a (5).

³ See TTR 215.

documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.⁴ In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.⁵

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party.⁶ The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.⁷ The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.⁸ Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.⁹ If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.¹⁰

CONCLUSIONS OF LAW

Bankruptcy Discharge

As noted above, Respondent contends that it is not within the Tribunal's jurisdiction to rule on whether or not the subject assessments were dischargeable under the Bankruptcy Court's order. The Tribunal agrees and further finds the issue of dischargeability is not before it because it hasn't been alleged by either party that the assessments were dischargeable.¹¹

Corporate Officer Liability

⁴ See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

⁵ See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

⁶ See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

⁷ See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

⁸ *Id.*

⁹ See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

¹⁰ See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

¹¹ The Tribunal does note that the Michigan Court of Appeals ruled in *Henderson v Department of Treasury*, 307 Mich App 1, 858 NW2d 733 (2014), that the Michigan Single Business Tax, because it was excise tax, was not dischargeable under Chapter 11 bankruptcy. The Tribunal was unable to find any other Michigan case in which the issue of dischargeability was discussed. The Tribunal further notes that Petitioner may be able to return to the Bankruptcy Court to get a ruling on this issue, if desired.

Pursuant to MCL 205.27a(5):

If a business liable for taxes administered under this act fails, for any reason after assessment, to file the required returns or to pay the tax due, any of its officers . . . based on either an audit or an investigation, is a responsible person [and] is personally liable for the failure for the taxes described in subsection (14)¹². The dissolution of a business does not discharge a responsible person's liability for a prior failure of the business to file a return or pay the tax due. The sum due for a liability may be assessed and collected under the related sections of this act. The department shall provide a responsible person assessed under this section with notice of any amount collected by the department from any other responsible person determined to be liable under this subsection or purchaser determined to be liable under subsection (1) that is attributable to the assessment. [Emphasis added].

A responsible person may challenge the validity of an assessment to the same extent that the business could have challenged that assessment under sections 21 and 22 when originally issued. *The department has the burden to first produce prima facie evidence as described in subsection (15) or establish a prima facie case that the person is the responsible person under this subsection through establishment of all elements of a responsible person as defined in subsection (15).* [Emphasis added].

Before assessing a responsible person as liable under this subsection for the tax assessed to the business, the department shall first assess a purchaser or succeeding purchaser of the business personally liable under subsection (1) if the department has information that clearly identifies a purchaser or succeeding purchaser under subsection (1) and establishes that the assessment of the purchaser or succeeding purchaser would permit the department to collect the entire amount of the tax assessment of the business. The department may assess a responsible person under this subsection notwithstanding the liability of a purchaser or succeeding purchaser under subsection (1) if the purchaser or succeeding purchaser fails to pay the assessment.

In this matter, Respondent assessed Petitioner with sales tax due after it assessed the Business which failed to pay the tax. Respondent further contends there was no purchaser or succeeding purchaser of the business.¹³ Respondent contends that Petitioner has admitted that he was an officer of the Business before, during and after the time period of default and that he signed the tax returns or negotiable instruments submitted in payment of taxes of the Business

¹² MCL 205.27a(14) includes sales tax, the tax at issue here.

¹³ See Brief in Support at 7 referring to its Exhibit D, paragraphs 25-26.

covering the same default period.¹⁴ As such, Respondent contends it has *prima facie* evidence that Petitioner is a “responsible person” with the corporate officer liability statute.

In 2014, the legislature extended tax liability for a business to a “*responsible person*.”¹⁵

Pursuant to MCL 205.27a (15)(b),

“Responsible person” means an officer, member, manager of a manager-managed limited liability company, or partner for the business who controlled, supervised, or was responsible for the filing of returns or payment of any of the taxes described in subsection (14) during the time period of default and who, during the time period of default, willfully failed to file a return or pay the tax due for any of the taxes described in subsection (14). *The signature, including electronic signature, of any officer, member, manager of a manager-managed limited liability company, or partner on returns or negotiable instruments submitted in payment of taxes of the business during the time period of default, is prima facie evidence that the person is a responsible person.*

The Tribunal finds Respondent has *prima facie* evidence that Petitioner is a responsible person, within the corporate officer liability statute, per Petitioner’s own admission.

Although Petitioner was an officer of the Business and signed tax returns, Petitioner is not liable for the Business’ failure to pay tax unless it is established that he willfully failed to pay the tax due. “Willfully” is defined in MCL 205.27a (15) (d) as “the person knew or had reason to know of the obligation to file a return or pay the tax, but *intentionally or recklessly* failed to file the return or pay the tax.” [Emphasis added.] Respondent alleges Petitioner argues he delegated all the Business’ tax responsibilities to an employee.¹⁶ However, Petitioner admitted the employee, the Business’ manager, resigned in April 2011 and the tax periods at issue are from May 2011 through October 2011. As such, Petitioner and his wife, the only corporate officers, were the liable officers during the periods at issue. Further, “according to Valentino, he authorized his employee to sign checks in his name, ‘Paul Valentino,’ for checks

¹⁴ See Brief in Support at 7-8, Exhibit D, paragraphs 1-9, 13, Exhibit E, paragraph 1.

¹⁵ Public Act 3 of 2014, effective February 6, 2014, amended MCL 205.27a extending tax liability of a business to a “responsible person.” Prior to the amendment, if a business liable for Michigan taxes failed to file a return or pay the tax due, any of its officers (and others, i.e. members, partners, not relevant to the matter at hand) who the Department of Treasury determined had control, supervision, or responsibility for making returns or payments were personally liable for the tax. As amended, the concept of “responsible person,” was added. A responsible person is an officer (relevant in this matter) who *willfully* failed to file a return or pay the tax due. Willfully means the person knew or had reason to know of the obligation to file a return or pay the tax, but *intentionally or recklessly* failed to file the return or pay the tax. See MCL 205.27a (15) (a) and (d).

¹⁶ See Brief in Support at 8.

submitted in payment of Michigan sales tax.”¹⁷ The Court in *Circurel v Department of Treasury*, found:

The intent of the corporate officer liability statute is to assure that taxes assessed to a corporation are ultimately satisfied. To allow plaintiffs, the sole corporate officers and stockholders, to delegate their responsibility for paying taxes to a third party who cannot be held liable “would make a mockery of the statutes and render unchallenged final corporate assessments uncollectible” (internal citations omitted).¹⁸

Respondent notes that the *Circurel* case reflected analysis of a preceding version of the statute, however, contends that the analysis remains applicable here.¹⁹

In the alternative, Respondent contends that even if responsibility to pay tax could be delegated to an employee, “such a purported delegation without supervision and oversight constitutes recklessness.”²⁰ Respondent notes that “recklessness” is not defined within the statute and directs the Tribunal to Black’s Law Dictionary for a definition:

Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing. **2.** The state of mind in which a person does not care about the consequences of his or her actions. [Black’s Law Dictionary, Second Pocket Edition, 2011 p. 587]²¹

Here, the Tribunal finds Petitioner did not desire the tax delinquency, but consciously took the risk that taxes might not be paid by delegating responsibility to an employee.

Respondent also cites to *State v Crawford*, which puts forth that under federal case law, willfulness “requires ‘a voluntary, conscious, and intentional act, but not bad motive or evil intent.’” “Second a responsible person acts ‘willfully’ if he ‘recklessly disregards the risk that the taxes may not be remitted to the government.’” Finally, “[t]he ‘reckless disregard’ standard is met when a responsible person ‘(1) clearly ought to have known that (2) there was a grave

¹⁷ See Brief in Support at 8, referencing Exhibit D, Admissions, paragraph 21.

¹⁸ *Circurel & Primak v Dep’t of Treasury*, unpublished decision per curiam of the Court of Appeals, issued March 10, 1998 (Docket No. 198812), referring to *Livingstone and Wood v Dep’t of Treasury*, 434 Mich 771; 456 NW2d 684 and *Viney v Dept’t of Treasury*, 6 MTTR 709 (Docket No. 106744,111750, October 19, 1990).

¹⁹ Brief in Support at 11.

²⁰ Brief in Support at 10.

²¹ Brief in Support at 11.

risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily.”²²

Here, Petitioner voluntarily, consciously and intentionally delegated responsibility for tax payments to its manager, however, the Tribunal finds this was done without bad motive or evil intent. The Tribunal also finds pursuant to *Crawford*, Petitioner acted willfully because he knew that payments were coming due, but did not supervise his employee, did not look at the Business’ books and records to see what was due, and did not consult the Business’ checking account to see if the taxes were being paid in his signature.²³ As an officer of the Business, Petitioner was in a position to find out if taxes were being paid, very easily. Further, Petitioner, knew the Business had fallen behind on tax payments as it entered into a payment plan, on behalf of the business, with Respondent.²⁴ The Tribunal finds that pursuant to MCL 205.27a (15), Respondent has demonstrated that Petitioner is a responsible person.

As noted above, Petitioner did not file a response to Respondent’s Amended Motion and, as such, has not rebutted its prima facie evidence or case. Here, it is undisputed that the Business did not pay its tax, there was no purchaser or succeeding purchaser of the Business, Petitioner was an officer before, during and after the time period of default, he was a responsible person as he signed the returns or negotiable instruments submitted in payment of taxes of the Business during the time period of default, and he willfully failed to file a return or pay the tax due²⁵

In this matter, Respondent bore the initial burden of supporting its position by presenting its documentary evidence for the court to consider. The burden then shifted to Petitioner, the non-moving party, to establish that a genuine issue of disputed fact exists. Petitioner did not respond in any manner to Respondent’s assertions and after careful consideration of the Motion, Brief in Support and evidence presented, the Tribunal finds that no issue of material fact exists and, as such, it shall grant Respondent’s Motion.

²² *State v Crawford*, 262 SW3d 532, 538 (Texas App 2008).

²³ Brief in Support at 10-11.

²⁴ Brief in Support at 10, referencing Exhibit D, paragraph 11. See also Exhibit F-3.

²⁵ MCL 205.27a(15)(d).

JUDGMENT

IT IS ORDERED that Assessment Nos. TE45327 and TJ68958, assessments and interest,²⁶ are AFFIRMED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties within 20 days of the entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes, interest, and penalties shall collect the taxes, interest, and penalties or issue a refund as required by this Final Opinion and Judgment within 28 days of the entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.²⁷ Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is \$50.00 in the Entire Tribunal and \$25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.²⁸ A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.²⁹ Responses to motions for

²⁶ See Footnote 1, Brief in Support at 3.

²⁷ See TTR 261 and 257.

²⁸ See TTR 217 and 267.

²⁹ See TTR 261 and 225.

reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.³⁰

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an “appeal by right.” If the claim is filed more than 21 days after the entry of the final decision, it is an “appeal by leave.”³¹ A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.³² The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.³³

By Preeti Gadola

Date Entered by Tribunal: October 4, 2017

³⁰ See TTR 261 and 257.

³¹ See MCL 205.753 and MCR 7.204.

³² See TTR 213.

³³ See TTR 217 and 267.