

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Cecily Hoagland,
Petitioner,

v

MTT Docket No. 376462

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Cecily Hoagland, is appealing Final Assessments O544144, O592436, O659466, O741101, O826296, O924996, P005062, P054597, P054598, P363598, P446771, P677808, P677809, P714297, P961447, P884199, P961449 and P961448 issued by Respondent, Michigan Department of Treasury. Petitioner contends that she is not liable for the withholding taxes as a responsible corporate officer under MCL 205.27(a)(5) because she formally resigned from her officer position as Treasurer and Secretary of Jomar Building Company, Inc. (“Jomar”) prior to the tax periods at issue, she did not have any supervising authority over tax issues for the tax periods, nor did she have any tax-specific authority during the same periods. The Final Assessments establish a deficiency for the 2006, 2007, and 2008 taxable periods, in the amount of tax, penalties, and interest of \$71,612.00. The Tribunal agrees with Petitioner and dismisses the assessments.

BACKGROUND

In 1992, Odell Jones, III (“Jones III”) formed Jomar, a closely held corporation in Michigan which was engaged in the business of construction and construction management. Petitioner was employed by Jomar from 1997 through March of 2008. Petitioner served as a corporate officer from 2001 through 2004, and her responsibilities included the functions of Secretary and Treasurer, as well as member of the Board of Directors. Transcript p. 43. Petitioner formally resigned from these roles on April 19, 2004, following prolonged

disagreements with Jones III regarding the direction of the company, its hiring practices, and the types of jobs it was taking on relative to its capacity to perform those jobs with sufficient acumen. Transcript p. 44. However, Petitioner does admit that she continued to identify herself as a Vice President after 2004. Transcript p. 107. Following the death of Jones III's father, Jones Jr., on August 3, 2006, Jomar began to experience additional decline in business and Petitioner had further disagreements with Jones III over the direction of the company. Transcript p. 71. In March of 2008, Jomar declared bankruptcy. Transcript p. 108. Following the dissolution of Jomar, Respondent issued the above Assessments against Petitioner for the 2006, 2007, and 2008 tax years. Respondent predicated these Assessments on the belief that Petitioner was the corporate officer responsible for tax affairs at Jomar, based upon filings that listed her as Secretary and Treasurer prior to her resignation, in conjunction with filings from 2006, 2007, and 2008 that list the corporate officers of Jomar as unchanged. Respondent Exhibit R12.

Fourteen of the assessments were issued on June 16, 2009, and Petitioner filed this appeal on July 21, 2009. On March 16, 2011, Respondent issued Assessment Nos. P884199, P961447, and P961449. Petitioner also received an Intent to Assess No. P961448. On April 19, 2011, Petitioner filed, and the Tribunal granted, a Motion to Amend Petition to add these additional Assessments. Petitioner disputes these assessments, and contends that her role at Jomar subsequent to her resignation as Secretary and Treasurer was sufficiently reduced such that finding her liable as a corporate officer would be inappropriate and contrary to the standard set forth by MCL 205.27a(5).

PETITIONER'S CONTENTIONS

Petitioner appeals the withholding tax assessments and claims that she should not be held liable as a responsible corporate officer. She contends that she was not a corporate officer at Jomar during 2006, 2007, or 2008, nor was she responsible for tax specific duties at the company. Petitioner testified that she "did not control or supervise or [have] responsib[ility] for filing taxes or making payments for taxes." Transcript p. 42. Petitioner primarily relies on a formal letter of resignation from her position as Treasurer and Secretary of Jomar submitted to the Board of Directors on April 19, 2004. Petitioner Exhibit P4. The record indicates that the Board accepted this letter of resignation, and Petitioner contends that she effectively resigned

from her role as a corporate officer at Jomar, as well as a member of the Board of Directors as of Jomar's acceptance of her resignation. Transcript p. 48.

Petitioner testified that, prior to her resignation as Secretary and Treasurer, she had responsibility for development, implementation, control and enforcement of financial and administrative policies and procedures at Jomar. Transcript pp. 41 - 42. She also assisted with long-range strategic planning and business development. She reviewed contracts and counseled the president on legal matters. *Id.* After April 19, 2004, Petitioner was responsible for performing administrative functions, including day-to-day operations, and limited financial and marketing functions under the direction of the President of Jomar. *Id.* Petitioner had signatory authority on one Jomar bank account that required two signatures. *Id.* Petitioner was also responsible for negotiating on Jomar's behalf for penalty waivers, and to prepare documentation for the same waivers. *Id.*

Petitioner contends that her role at Jomar following her resignation from the Board was more akin to that of an administrator, setting up project management software and carting documents to interested parties, than to that of a corporate officer charged with the preparation of taxes. Transcript p. 49. Petitioner's interaction with the CPA who prepared Jomar's taxes was, according to testimony, limited to arm's-length interactions through Jones III, where she merely collected relevant documents and consolidated them for Jones III to discuss with the CPA responsible for the taxes of Jomar. Transcript p. 49. Petitioner further testified that she ceased to have responsibility for tax matters when Jones III "told [her] that he would take over the payment of taxes, the filing of taxes; that he would handle that." Transcript p. 116.

Petitioner also introduced the affidavit of Jones III. Exhibit P1. In this affidavit, Jones III testifies that "I was in charge of the day-to-day operations of Jomar Building Company and controlled the finances including payments of payables, payroll, and taxes." *Id.* Jones III further states "Ms. Hoagland submitted a letter of resignation to the Board and it was accepted... UHY, Jomar Building Company's CPA in 2005, incorrectly listed Cecily Hoagland as an officer in the 2005 Michigan Tax SBT schedule of shareholders and Officers C-8000KC." *Id.* Jones III states that "Ms. Hoagland continued to work at the company until March 2008 *as an employee*" (emphasis added).

Petitioner also introduced as evidenced a Certificate of Death of Mr. Odell Jones, Jr. Petitioner Exhibit P1. She testified that Jones Jr. was the Vice President of Jomar and that he

died in August, 2006. Regardless, his name remained on the Michigan Department of Labor and Economic Growth Profit Corporation Information Update for 2007, which was filed in March of 2007. Transcript p. 11. Petitioner's intent was to demonstrate that the President of Jomar, who signed the corporate update, did so routinely and without making any changes or ensuring the accuracy of these updates. *Id.* Petitioner asserts that, given the death of Jones III's father, his prior and substantial involvement in Jomar's business, and the various issues that arose subsequent to his passing, this sort of fleeting oversight on the part of Jones III is perhaps understandable. There was no indication made by Jones III as to the removal of either Jones Jr. or Petitioner's name from subsequent annual filings. Transcript pp. 67, 68.

Petitioner also contends that her efforts to establish and grow a probate law practice consumed substantial portions of her time each week during the tax years at issue, further showing her reduced involvement at Jomar. Petitioner introduced records from Wayne County's probate court showing that on a variety of occasions throughout the tax years in question she had undertaken a good faith effort to establish a probate practice within Wayne County. Exhibit P6. The Guardianship Review reports that Petitioner has introduced demonstrate that she was indeed practicing probate law at the behest of at least eight separate clients during the tax period at issue. *Id.*

Finally, Petitioner also brought forth evidence in the form of three Notices of Hold on Income Tax Refund or Credit, two of which were dated October 23, 2009, and the third dated November 17, 2010. Transcript p. 13. The documents are notices from Respondent informing Petitioner that her income tax refund or credit had been held to pay an outstanding debt. Petitioner asserts that she does not know whether or not the amounts were actually credited to the assessed liability.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner was a corporate officer responsible for the preparation of tax-related documents and the supervision of tax-related issues at Jomar for the tax periods at issue. Respondent offered evidence in the form of a tax return signed by Petitioner in her capacity as Secretary and Treasurer to establish that she was, at one point, a corporate officer at Jomar. Transcript p. 16. Respondent has formed a foundation for its position on the

basis of this document, as well as Respondent having issued an assessment against Petitioner as a responsible corporate officer in 2003. Transcript p. 24.

Respondent also relies on a Single Business Tax return, as well as 1999 and 2003 SUW tax returns signed by Petitioner as “Vice President” to establish that at some point Petitioner was a responsible corporate officer. Respondent also points to a Michigan SBT Schedules of Shareholders and Officers (Form C-8000 KC) at Jomar for 2005 and 2006, which lists Petitioner as an officer, albeit with 0% stock interest. Respondent Exhibit R7. Respondent also relies on a letter filed by Petitioner on May 18, 2007, wherein Petitioner requests a waiver of penalties for SUW taxes on Jomar’s behalf. Respondent Exhibit R9. Respondent argues that Petitioner’s role in requesting tax penalty waivers on Jomar’s behalf demonstrates her continued supervisory role in managing Jomar’s tax affairs during the subject tax periods, despite Petitioner’s contention that this letter was prepared at the direct request of Jones III.

Respondent also introduced a Michigan Department of Labor and Economic Growth Profit Corporation Information Update filed on May 18, 2005, which lists “no change” from the previous filing regarding corporate officers at Jomar. Respondent Exhibit R13. Respondent contends that despite Petitioner’s formal resignation from the Board of Directors at Jomar, the lack of recognition of such resignation on subsequent corporate filings demonstrates that her role was essentially unchanged and that she carried on her capacity as a responsible corporate officer for the subject tax periods.

In summary, Respondent contends that this evidence collectively demonstrates that Petitioner had the authority and responsibility to ensure the returns were filed and paid via her roles as Secretary and Treasurer of Jomar, and that she continued in these roles despite her formal resignation in 2004.

FINDINGS OF FACT

Jones III served as the President, CEO, and sole shareholder of Jomar from its inception to its bankruptcy in 2008. In this capacity, Jones III was responsible for the day-to-day operations of Jomar and controlled the finances of the company, including payments of payables, payroll and taxes.

Petitioner was an employee of Jomar from 1997 to March of 2008. Petitioner served on the Board of Directors at Jomar from 1999 through 2004. Petitioner also served as Secretary and

Treasurer of Jomar from 1999 through 2004. Petitioner resigned both of these positions via formal letter to Jomar's Board of Directors on April 19, 2004. Prior to her resignation on April 19, 2004, Petitioner was a responsible corporate officer.

Petitioner signed the 2003 Single Business Tax return filed by Jomar on August 2, 2004. Petitioner signed the 1999 Annual Return for Sales, Use and Withholding taxes filed by Jomar on February 28, 2000, as Vice President. Petitioner also signed the 1999 Annual Return for Sales, Use and Withholding taxes filed by Jomar on February 28, 2003, as Vice President. Petitioner signed the September 2002 Combined Return for Michigan taxes filed by Jomar on March 5, 2003, as Vice President. Petitioner also signed the October 2001 Combined Return for Michigan taxes filed by Jomar on December 18, 2001, as Vice President. Petitioner also signed the November 2002 Combined Return for Michigan taxes filed by Jomar on January 15, 2003. Petitioner signed the October 2002 Combined Return for Michigan filed by Jomar on January 15, 2003, as Vice President. Petitioner signed the July 2003 Combined Return for Michigan taxes filed by Jomar on August 29, 2003, as Vice President.

Petitioner signed no less than seven bank checks made payable to the State of Michigan, Michigan Department of Treasury between April 16, 2001 and May 20, 2005; however, there is no evidence that she signed any during the tax periods at issue. Petitioner is listed as an officer on the Michigan form C-8000KC for 2003, 2005, and 2006. At the direction of Jones III, Petitioner also drafted and signed a letter dated May 18, 2007, addressed to the State of Michigan, Michigan Department of Treasury, requesting abatement or waiver of penalties for late payment of SUW taxes. She did not indicate title of authorization from Jomar.

Petitioner is listed as Secretary and Treasurer on the 2000, 2001 and 2003 Bureau of Commercial Services, Corporation Division, Profit Corporation Information Update filed by Jomar for the respective years listed. Petitioner is not listed as an officer on the 2002, 2004, 2005, 2006, or 2007 Bureau of Commercial Services, Corporation Division, Profit Corporation Information Updates filed by Jomar for the respective years listed.

CONCLUSIONS OF LAW

The issue is whether Petitioner is liable as a responsible corporate officer for Assessments filed by Respondent against Jomar under MCL. 205.27a(5). The statute states in pertinent part:

If a corporation . . . liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines . . . have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers...on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns or payments. The dissolution of a corporation...does not discharge an officer's, member's, manager's, or partner's liability. MCL. 205.27a(5)

For an individual to be held liable for the company's taxes, it must be proven based on the department's audit or investigation, that he or she was an officer of the corporation during the periods in question. In addition, liability will arise only if the officer (1) has control over the making of the corporation's tax returns and payments of taxes; or (2) supervises the making of the corporation's tax returns and payments of taxes; or (3) is charged with the responsibility for making the corporation's returns and payments of taxes. *Keith v Department of Treasury*, 165 Mich 105; 418 NW2d 691 (1987). Personal liability will not attach unless the officer's involvement in the financial affairs of a corporation is "tax specific." *Livingstone v Department of Treasury*, 434 Mich 771, 780; 456 NW2d 684 (1990).

Petitioner admits that she was, at one point, an officer of Jomar. However, the evidence does not support a conclusion that Petitioner was liable as a corporate officer under MCL 205.27a(5) for the tax periods at issue. The sworn testimony of Petitioner stands unrebutted by any direct evidence and, indeed, the evidence as a whole introduced by Respondent is insufficient to support a conclusion that Petitioner (1) had control over the making of the corporation's tax returns and payments of taxes; or (2) supervised the making of the corporation's tax returns and payments of taxes; or (3) was charged with the responsibility for making the corporation's returns and payments of taxes. Rather, the evidence supports a conclusion that Jones III supervised the preparation of tax returns and related documents in conjunction with the CPA firm UHY and was the corporate officer with sole responsibility for tax matters, not Petitioner.

Petitioner did, admittedly, hold herself out as a Vice President before and after resigning her position on the Board of Directors and as Secretary and Treasurer of Jomar. Transcript p. 44. Regardless of this representation, Petitioner could not be considered a responsible corporate officer after her resignation; she lacked the requisite degree of responsibility and supervisory

authority for the preparation of tax returns or the payment of taxes required by the aforementioned *Livingstone* standard. Additionally, Jones III hired CPA firm UHY to assist in the preparation of tax documents and returns, which was only necessary after Petitioner resigned in her capacity as Treasurer. While one cannot simply delegate their tax affairs responsibility to intermediaries in order to avoid liability, there is no such inference to be made here. Jones III, in his role as President, not Petitioner, was in a position to hire, supervise, and collaborate with the CPA firm in order to prepare Jomar's tax documentation. Such an arrangement would hardly be necessary if Petitioner had continued in her role as Treasurer, and implies that Jones III had taken steps to delegate Petitioner's prior responsibilities to a new party after her resignation from the Board of Directors at Jomar.

Respondent's witness testified that Treasury does not possess any checks that were filed in payment of taxes for 2006, 2007, or 2008 with Petitioner's signature. Transcript p. 147. The witness further testified that Respondent does not "have any documents, tax documents, sales use and withholding, an annual return, or an SBT return that was filed with Petitioner's signature on it for 2006, '7 or '8." Transcript pp. 147, 148.

Further, Respondent has provided no evidence to demonstrate that Petitioner had any involvement with the tax return preparation, supervision or payment of taxes at any time after May 20, 2005.¹ The only evidence Respondent introduced that could create any reasonable inference to this effect was a letter signed by Petitioner regarding penalty abatement. Respondent Exhibit R8. Petitioner testified that she drafted this particular letter under the direct request and supervision of the President, and that she did not sign this letter as Vice President. Transcript p. 46. This single letter, not signed by Petitioner in any official capacity and prepared under direct request of the President, is entirely inadequate to establish that Petitioner was liable as a corporate officer for the tax affairs of Jomar under *Livingstone*.

To the contrary, the fact that this is the only piece of evidence introduced by Respondent remotely suggesting any connection between Petitioner and Jomar's tax affairs for the period following her resignation from the Board of Directors would imply that her role in tax affairs at Jomar was extremely limited.

Petitioner has, conversely, introduced sufficient evidence to rebut the presumption of liability and demonstrate that her involvement with Jomar was far less substantial than

¹ Exhibit R5 p. 3. Check to the State of Michigan co-signed by Petitioner and Jones III.

Respondent would claim. Petitioner offered into evidence a letter of resignation to the President of Jomar, indicating that she was resigning as the Secretary and Treasurer of Jomar as of April 19, 2004. Petitioner Exhibit P4. The record indicates that the Board accepted, and allowed her to continue on in a reduced, non-officer capacity. Petitioner Exhibit P1. While Petitioner remained an employee of Jomar for several years subsequent to this resignation, her formal filing of a resignation letter and the Board's acceptance of this letter effectively terminated her responsibilities as a responsible corporate officer of Jomar. Transcript p. 12. Petitioner also described her attempts to enter probate practice, and has supplied evidence demonstrating that she spent a substantial amount of her time each week after her resignation attempting to develop a probate law practice completely distinct from and unrelated to her employment at Jomar. Transcript p. 47.

Petitioner's evidence, in combination with the aforementioned testimony and affidavit of Jones III, creates the clear impression that Petitioner was not a corporate officer at Jomar responsible for the preparation of tax-related documents, nor was she responsible for the supervision of tax-related issues or payment of taxes at any time after her resignation. Thus, the Tribunal finds Petitioner has met her burden of proving she is not liable for the corporation's unpaid Withholding Tax liability. The Tribunal also finds that Respondent shall review the notices and address the three tax liens to ensure Petitioner has been given due credit and, if appropriate, a refund shall be issued.

JUDGMENT

IT IS ORDERED that Assessments Nos. O544144, O592436, O659466, O741101, O826296, O924996, P005062, P054597, P054598, P363598, P446771, P677808, P677809, P714297, P961447, P884199, P961449 and P961448 are CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: August 5, 2011

By: Cynthia J Knoll