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

Gregory T. Oleski,
Petitioner,

v

MTT Docket No. 379020

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

FINAL JUDGMENT AND OPINION

INTRODUCTION

Petitioner, Gregory T. Oleski, is appealing Final Assessment P255043 issued by Respondent, Michigan Department of Treasury, on October 7, 2009. Petitioner argues that he is not liable for the taxes as a responsible corporate officer under MCL 205.27(a)(5), as Respondent claims, because: he did not have control over day-to-day operations of the closely held corporation, he did not have any supervising authority over tax issues, and he did not have any tax specific authority. The Final Assessment establishes a Single Business Tax deficiency for the 2001, 2002, and 2003 taxable periods, in the amount of tax, penalties, and interest of $215,383.29.[1] The Tribunal agrees with Petitioner and dismisses the assessment in its entirety.

BACKGROUND

In 1994, Petitioner and Douglas Annas formed a closely held corporation in Michigan named Signature Financial Group, Inc. ("the Company"), which was engaged in the business of commercial equipment leasing and financing. Petitioner and Mr. Annas were the sole equal shareholders of the Company during 2001, 2002, and 2003. Together they agreed that Petitioner would serve as an outside salesperson, spending more than half his time out of the office with clients while Mr. Annas ran the day-to-day operations. At or around the time of formation, the decision was made as the result of a coin flip that Petitioner would be elected President and Mr.

[1] Interest continues to accrue in accordance with MCL 205.23 and MCL 205.24.

Annas was elected Vice President, with both serving as directors. As president of the Company, Petitioner signed the Michigan Annual Report for years 2000, 2001, 2002, 2003 and 2004.

A CPA firm was engaged by the Company to assist in structuring the financial leasing arrangements with customers and vendors, along with issuing year-end bonuses of any profits to the owners, such that little or no taxable net income would result. Despite his belief that the Company had no tax liability, Petitioner was under the impression that any required tax filings were being made by Mr. Annas and the CPA firm. In 2003, with sales slowing, the Company decided to move into a smaller office to increase cash flow for the Company. During the move and without warning, Mr. Annas informed Petitioner that he had created a new company and was planning on taking the Company's support staff, assets, and clients. Petitioner received a letter dated January 24, 2004, from Mr. Annas that stated ". . . I am taking physical possession of all accounting records, bank statements, cancelled checks, financial reports and all other financial records relating to [the Company]." Petitioner and Mr. Annas parted ways and shortly thereafter, Petitioner established his own new competing company and attempted to salvage his customer accounts.

In March of 2007, Petitioner learned from an employee of Mr. Annas that Respondent was inquiring about unpaid SBT taxes. Petitioner engaged legal counsel to assist with investigating the status of any filings and determining what, if any, liabilities existed. His attorney obtained copies of the returns from the CPA firm, which Petitioner forwarded to Respondent. The returns were signed by the CPA; however, they were not signed by Petitioner or Mr. Annas. There is no evidence to show they had been previously filed. On October 7, 2009, Respondent issued the Final Assessment to Petitioner pursuant to MCL 205.27(a)(5), and Petitioner filed this appeal on November 15, 2009.

PETITIONER'S CONTENTIONS

Petitioner appeals the Single Business Tax claiming he should not be held liable as a responsible corporate officer. He contends that he was the outside salesman responsible for generating customers for the Company, and that he had no involvement with tax matters.

Petitioner contends that his role in the Company was "sales, strictly [to] go out there, call on the customers, continue to bring the volume of business that [he] was bringing at [their] previous employer." Transcript, p. 16. Petitioner argues that Mr. Annas was the officer

responsible for all financial matters, including tax filings and payments. He asserts that Mr. Annas was in full control of the payroll, "[w]e had an outside paycheck service that would handle all of the payroll . . . [Mr. Annas] handled the arrangements with them to process the bi-weekly payroll." Transcript, pp. 18-19. Petitioner went on to state he had never signed any monthly Michigan Withholding Tax Returns. Transcript, p. 19. Petitioner also contends Mr. Annas was responsible for supervising the day-to-day accounting, which was outsourced to the CPA firm Lazzara & Associates ("Lazzara"). Transcript, pp. 19-20. Petitioner further claims Mr. Annas was in charge of communications between the Company and Lazzara, and when asked how often Petitioner spoke with Lazzara, his response was "probably once a year." Transcript, p. 20.

Petitioner stated Lazzara was responsible for all of the Company's tax preparations and it was his understanding that there were no taxes due, stating "[Lazzara] basically did some sort of gyrations with the accounting on the way that . . . we would perform the leases and [Lazzara] did some gyrations to them that it would gross-out the entire payment streams." Transcript, pp. 20-21. Furthermore, Petitioner stated that bonuses were distributed between himself and Mr. Annas at the end of each calendar year designed to bring the taxable income of the corporation down to approximately zero. Transcript, p. 21. Petitioner testified that Mr. Annas informed him that all tax matters were taken care of and that he had communicated all of the relevant information to the CPA firm necessary to cause all the tax return filings to be properly completed. He further testified that Mr. Annas ". . . sent a letter to me . . . that said I had no authority to do anything for the company." Transcript, p. 30.

Petitioner contends he only learned about the unfiled and unpaid single business taxes after Mr. Annas took complete control over all of the records of the corporation. Petitioner's Pretrial Brief, p. 2. Petitioner testified that in 2007, he received a fax from a member of Mr. Annas' support staff stating the State of Michigan was inquiring about unpaid Single Business Tax. Petitioner then spoke with the support staff member who relayed a message from Mr. Annas that the tax issue was Petitioner's problem. With assistance from legal counsel, Petitioner obtained copies of SBT returns from the CPA firm, which he submitted to Respondent.

Petitioner relies on the interpretation of MCL 205.27(a)(5) set forth in *Keith v Department of Treasury*, 165 Mich App 105; 418 NW2d 691 (1987); *Peterson v Department of Treasury*, 145 Mich App 445; 377 NW2d 887 (1985); *Bickler v Department of Treasury*, 180

Mich.App. 205; 446 NW2d 644 (1989), stating "an officer cannot be held liable for withholding sales and use taxes not paid by the corporation, unless that officer also satisfies at least one of the following tests:

1. [the officer] [h]as control over preparing and paying taxes; or
2. [s]upervises preparing and paying taxes; or
3. [i]s charged with the responsibility of paying taxes." Petitioner's Pretrial Brief, p. 3.

Petitioner contends that the only prong that is satisfied is that he was an officer of the corporation. *Id*. Petitioner further relies on *Livingstone v Department of Treasury* to prove "personal liability will not attach to corporate officers who simply have significant involvement in the financial affairs of the corporation . . . involvement must be tax specific." *Livingstone v Department of Treasury*, 434 Mich771; 665 NW2d 684 (1990). Petitioner's Pretrial Brief, p. 4. He argues that he had no involvement in the operational or financial affairs of the Company, either tax specific or otherwise during the relevant time periods. Furthermore, Petitioner states the factors used in determining whether a person can be held personally liable pursuant to MCL 205.27(a)(5) are laid out by the Tribunal in *Bedikian v Department of Treasury* as:

1. Signing of the application for the sales tax license;
2. The authority to sign corporate checks;
3. Awareness of the corporation's financial condition and unpaid taxes;
4. The degree of participation in the active management of the company;
5. The appearance of the person's signature on relevant tax returns; and
6. The person's authority to direct payment of taxes. *Bedikian v Department of Treasury*, MTT No. 104045 (July 10, 1991).

Petitioner contends that there is no evidence to show he signed an application for sales tax license. He argues that although he had authority to sign corporate checks, he typically did not sign them and never signed any for payment of taxes. Petitioner was not aware of the unpaid taxes and he had very little day-to-day active management, particularly in the financial aspects.

Petitioner further draws an analogy between the case at hand and the Tribunal's decision in *Schmidt v Department of Treasury*, arguing that as a 50% shareholder, Petitioner has less authority than a sole officer of a corporation, yet the sole officer in *Schmidt* was not held liable

since the sole officer was dispossessed of any real authority by creditors. *Schmidt v Department of Treasury*, MTT No. 274465 (June 27, 2002). Petitioner asserts that he had no authority because Mr. Annas took that upon himself.

RESPONDENT'S CONTENTIONS

Respondent contends the tax assessment is correct and that Petitioner did have control over the taxes and therefore should be held personally liable for the Company's failure to file the Single Business Tax returns. Respondent stated Petitioner was involved in significant decisions such as "[e]mployment, accounts receivable/payable, [and] purchasing." Transcript, p. 56. Furthermore, Respondent contends Petitioner assumed extra authority, as well as duties, by serving as President. *Id.* Respondent argues that Petitioner had authority to sign checks from the corporate account and he also had the ability to pay bills at any particular time on his own authority. Transcript, p. 57. Respondent also contends Petitioner had the responsibility as Treasurer[2] of the Company to oversee tax-related issues for the corporation.

In summary, Respondent contends Petitioner had the authority and responsibility to ensure the Single Business Tax returns were filed and paid under his roles as President and Treasurer of the Company.

FINDINGS OF FACT

Petitioner owned fifty percent (50%) of the stock in Signature Financial Group, Inc. during the tax periods at issue. The other fifty percent (50%) shareholder was Douglas B. Annas, not a party to this appeal. The tax years at issue are years ending in December 2001, 2002, and 2003. Petitioner was an officer of the corporation, holding the position as President, and in one year as President and Treasurer. Petitioner was also a Director of the Company during the tax periods at issue. Petitioner's responsibilities included making contact with vendors that sold equipment and with customers that wanted to finance equipment. His responsibility was to provide sales sheets for his accounts. He prepared a "commission sheet" with the size of the transaction and what the percentage of commission was going to be on that transaction. Petitioner did not have any responsibility for the making of withholding tax returns

[2] The Corporation Information Updates (i.e., Annual Reports) for 2000 and 2001 indicate Petitioner as Treasurer. The Annual Reports for 2002 and 2004 indicate Mr. Annas as Treasurer. The 2003 Annual Report is silent as to the Treasurer.

or payment of the taxes at issue. Petitioner did not have responsibility for or supervision over bookkeeping and accounting within the office on a day-to-day basis. Although Petitioner had authority to issue checks, he only occasionally signed checks for vendors and never signed any for tax payments.

Petitioner was listed as an officer on the form C-8000KC filed with Respondent for the three tax periods at issue. Petitioner was also listed as an officer on the federal form 1120 for the tax years. Petitioner signed and was listed as President and Treasurer on the 2001 Profit Corporation Information Update filed on June 18, 2001. Petitioner signed and was listed as President on the 2002, 2003, and 2004 Profit Corporation Information Updates filed on April 26, 2004, April 29, 2003, and April 26, 2004. Petitioner was listed as President on the 2005 Profit Corporation Information Update, which was signed by Douglas B. Annas as Vice President filed on May 18, 2005. Petitioner was an officer of the Company during the tax years at issue.

In a January 26, 2004 letter to Petitioner, signed by Douglas B. Annas, Vice President of the Company, Petitioner was informed that on that date Mr. Annas took physical possession of all accounting records, bank statements, cancelled checks, financial reports, and all other financial records relating to the company. Petitioner was notified that he would have complete access of all records relating to the Company during normal business hours.

There is no evidence that Petitioner signed Single Business Tax returns for the years at issue. The 2001 Single Business Tax return was signed by David Martin, CPA on March 31, 2003, approximately one year after its original due date. The 2002 Single Business Tax return was signed by David Martin, CPA on December 18, 2003. The 2003 Single Business Tax return was signed by David Martin, CPA on October 20, 2004. There is no evidence that the returns were filed prior to Petitioner's submission thereof to Respondent sometime between March and July 2007.

Petitioner was an "outside salesman" responsible for generating customers for the Company. He had signature power of bank accounts of the company. Petitioner was not aware that the tax returns had not been filed and that taxes had not been paid. There is no evidence that Petitioner had tax-specific duties with respect to the corporation. There is no evidence to show that Petitioner was responsible for day-to-day financial operations or that he had responsibility for payment of accounts receivable, payment of bills, payment of taxes, etc.

CONCLUSIONS OF LAW

The issue is whether under MCL 205.27, Petitioner is personally liable for the Company's failure to file the Single Business Tax returns for tax periods 2001, 2002, and 2003. 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) (Emphasis Added)

For a person to be held liable for the corporation'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 was an officer of the Company. However, the evidence does not support a conclusion that Petitioner was liable as a responsible corporate officer under MCL 205.27a(5). The sworn testimony of Petitioner stands un-rebutted by any direct evidence. There is no documentary evidence bearing the signature of Petitioner on any tax return or negotiable instrument in payment of taxes, and therefore, the statutory presumption does not arise. The evidence as a whole 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 Mr. Annas alone handled the corporate finances with assistance from the CPA and was the corporate officer with sole responsibility for tax matters.

The Tribunal finds Petitioner has met his burden in proving he is not liable for the corporation's unpaid Single Business Tax liability.

JUDGMENT

IT IS ORDERED that Assessment No. P255043 is CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: June 22, 2011 By: Cynthia J Knoll