

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

Alex M. Sova,
Petitioner,

v

MTT Docket No. 383261

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

ORDER GRANTING RESPONDENT’S MOTION TO AMEND
RESPONDENT’S EXHIBIT #3

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Alex M. Sova, is appealing Final Assessment No. P256564 issued by Respondent, Michigan Department of Treasury, on November 3, 2009. A hearing was held in this case on July 12, 2011. 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 or supervision of, or responsibility for, making the returns or payments on behalf of Sova Steel, Inc. (“Sova Steel”). The Final Assessment established a deficiency of Sales and Use Tax for the period October 2003 through December 2006, in the amount of tax, penalties, and interest of \$419,665.15.¹

BACKGROUND

In 1991, Petitioner formed Sova Steel, a closely held Michigan corporation engaged in the business of supplying labor and materials for the purpose of erecting structural steel. As the sole owner of Sova Steel, Petitioner was the President and only officer. In 2002, Petitioner hired Mr. Mark Weisberg (Mr. Weisberg) to function as controller of Sova Steel. Mr. Weisberg was not an officer. Petitioner delegated the responsibility of tax return preparation, along with other

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

financial duties to Mr. Weisberg, until he left the company in March, 2010. At that time, Petitioner discovered “some wrongdoings” of Mr. Weisberg. Transcript (T), p. 45. Petitioner filed civil action complaints against Mr. Weisberg on March 18, 2011, asserting that Mr. Weisberg “used his position as Controller . . . to write checks and send wires drawn on . . . [Sova Steel’s] bank accounts which [Mr.] Weisberg then deposited into his personal back accounts” or those of third parties. First Amended Complaint – *Sova Steel, Inc, et al v Mark Weisberg, et al*, Case No. 10-111710-NZ, Oakland County Circuit Court. (consolidated with case no. 11-118640-NZ). Petitioner also alleges that Mr. Weisberg misrepresented to him the financial condition of Sova Steel “. . . by making incorrect and false entries into the compan[y’s] books and records, so that they showed payments to one person or entity when, in fact, no such payment had been made and the funds had been taken by [Mr.] Weisberg” *Id.*

Respondent audited Sova Steel for sales and use taxes for the period October 2003 through December 2006, resulting in the issuance of a Notice of Intent to Assess on August 15, 2007. Petitioner claims that he delegated the responsibility for handling the audit to the controller, Mr. Weisberg. Petitioner was not involved in the day-to-day discussions or communications with Respondent regarding the audit; but rather, he relied on this controller to handle it. On March 18, 2008, Respondent issued the Notice of Assessment to Sova Steel. On November 3, 2009, Respondent issued the subject Final Assessment to Petitioner under Act 122, Section 27A(5), Public Acts of 1941, as amended, making officers liable for tax debts of the corporation. Petitioner filed this appeal on December 8, 2009.

PETITIONER’S CONTENTIONS

Petitioner appeals the Assessment claiming it relates to an alleged deficiency owed by Sova Steel and he contends that Sova Steel never received a Final Bill for Taxes due; therefore, it never had an opportunity to contest the liability. “Petitioner does not believe that any of the alleged taxes are owed by Sova Steel and, based on his knowledge and belief, denies that they are owed by Sova Steel for numerous reasons,” Petitioner’s Petition (Petition), p. 1. Petitioner lists a number of arguments in his petition against the underlying liability.

Petitioner testified that he was aware of the sales and use tax audit taking place during early 2008 and that he had discussions with Mr. Weisberg about the audit. T, p. 12. However, he further testified that he did not receive a Notice of Assessment or any other correspondence from

Respondent regarding use taxes. *Id.* Petitioner stated that he is “. . . not aware of any notice of final assessment being received by the Company. There is an issue of fact as to whether a notice was sent. If it was not, then the Company may mount its defenses to the assessment and they are substantial.” Petitioner’s Response to Respondent’s Motion for Summary Disposition (P Resp), p 3.

Petitioner further “. . . denies that he is liable for any tax owed by Sova Steel in any case.” Petition, p. 2. He asserts that “Mark Weisberg, a trusted employee of more than 8 years, handled all financial matters including payment of taxes, preparation of tax returns, banking, payment of creditors and suppliers and the like.” Petitioner’s Prehearing Statement (P/H Stmt.) Petitioner contends that:

In March 2010 it was learned that . . . [Mr. Weisberg] had been writing many unauthorized checks to himself and to a company that he created for himself that did not carry on an active business. In addition, it was learned that he did not make payments and did not file numerous documents that were required to be paid and filed by the company in the course of its business. The company’s financial statements were not correct, its bank balances were not reconciled, hundreds of thousands of dollars were taken out of the company by Mr. Weisberg. Mr. Weisberg had not properly or timely organized or reported any of the Michigan sales and use tax data within the company. Others in the company did not know the nature or extent of the issues with the Department of Revenue. Timely responses to the Department had not been provided by Mr. Weisberg. Petitioner did not have knowledge of any of these matters and he relied upon Weisberg to perform the controller function completely and competently. *Id.*

Petitioner stated in an affidavit dated June 15, 2011, that “I did not have control over the Company’s taxes and did not supervise their preparation, nor did I have responsibility for them during the periods of 2004 through May 12, 2010.” Affidavit of Alex M. Sova (Sova Aff.). He asserts that “[a]lthough I signed some tax returns for the Company, I did not understand them and relied upon Mark Weisberg to tell me that they were prepared properly.” *Id.* Petitioner contends that “Mr. Weisberg told me that he was working on the Michigan sales tax matter and that he was handling it.” *Id.* He further stated “[i]n my investigation of Mr. Weisberg’s activities, I also learned that he had not prepared or filed 2008 and 2009 income tax returns for the Company for Federal or State taxes. I did not even have knowledge that the 2008 tax returns were not filed, because I did not keep a record of those things.” *Id.* Petitioner believes that Mr. Weisberg “. . . had isolated me and misled me so much that I had no correct knowledge of the

Company's financial affairs or its taxes and no correct knowledge of what he had done to the Company and to me." *Id.*

Petitioner testified that he was the President and sole officer of Sova Steel at all times. Transcript (T), p. 26. He acknowledged that one of his duties as an officer would be his responsibility to sign corporate information updates sent to the State. T, p. 28. He admitted that Mr. Weisberg and he were both shown as signers on the bank signature cards for Sova Steel. T, p. 41. He testified that Mr. Weisberg was not an officer of the company; he was the controller. T, p. 32. Petitioner testified that he always signed the tax returns because he owned the company. T, p. 46. "I would sign them in the office, and he would mail them. Mark would mail them from the office." T, p. 51.

Petitioner contends that "... there is no way that he was, or could be, the person responsible for taxes for the Company, notwithstanding that he had signed Michigan [Single] Business Tax Returns." (P Resp), p 2. Petitioner's Affidavit states that "Mark D. Weisberg was the Controller of Sova Steel for the period from 2003 until March 15, 2010. As controller, he was responsible for, and supervised the preparation of all tax returns of the Company and handled all financial matters." Sova Aff. Petitioner further contends that he was "being misled by" Mr. Weisberg and therefore he should not be held responsible for the unpaid taxes because he was not responsible for the filing, preparing or supervising of the Company's tax returns. *Id.*

RESPONDENT'S CONTENTIONS

Respondent contends the tax assessment is correct and that Petitioner did have control over the taxes; therefore, he should be held personally liable for Sova Steel's failure to file the returns and pay the taxes. On June 28, 2011, Respondent submitted copies of its exhibits one (1) through four (4). On July 8, 2011, Respondent filed a Motion to Amend Respondent's Exhibit #3, to add the second (signature) page of various returns and documents.

Respondent relies on the following *prima facie* evidence:

- Exhibit R3, pp. 3, 5 - April 1995 Return for Sales, Use and Withholding and Single Business Taxes signed by Petitioner as President
- Exhibit R3, pp. 1, 2 - 1993 form C-8030 signed by Petitioner as President

- Exhibit R3, pp. 13 – 15, 18 - 43 - 1994, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2007 Single Business Tax returns, signed by Petitioner and form C-8000-KC showing Petitioner as the sole officer
- Exhibit R3, pp. 61 - 75 - 2002, 2003, 2004, 2005, 2007 Federal form 1120s showing Petitioner as sole officer
- Exhibit R4, pp. 2, 3 -Articles of Incorporation dated September 11, 1991, signed by Petitioner
- Exhibit R4, p. 7 - 1998 Domestic Corporation Update signed by Petitioner as President on June 4, 1998
- Exhibit R4, p. 8 - 1998 Corporation Information Update signed by Petitioner on February 23, 1998
- Exhibit R4, pp. 11 – 19 - 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009 Profit Corporation Information Updates signed by Petitioner as President

Respondent also offered evidence in the form of certified mail logs to refute Petitioner's claim that Sova Steel did not receive proper notice of the underlying assessment. Exhibit R1, 1.

Respondent contends that Petitioner was the only corporate officer of Sova Steel, Inc. and is therefore solely liable as a corporate officer. Respondent cites *Dep't of Treasury v Collier*, unpublished opinion per curiam of the Court of Appeals, decided March 9, 2004 (Docket No. 244344), in support of its argument that “. . . where the corporation has only one corporate officer . . . the officer is responsible for the corporation's taxes.” Respondent's Brief in Support of Motion for Summary Disposition (Resp. Brief), p. 4. Respondent states that Petitioner “. . . signed most or all of the tax returns. [Therefore,] under the law, he is the only possible responsible corporate officer.” Resp. Brief, p. 6. Respondent finds unpersuasive Petitioner's argument that “. . . he had no particular tax training and that he employed others to prepare and file tax returns,” *Id.*

Respondent further argues that Petitioner cannot challenge the underlying assessment once it is final as to the corporation. Respondent cites *Keith v Michigan Department of Treasury*, 165 Mich App 105; 418 NW2d 691 (1987), and states that “[t]he Tax Tribunal ruled that *Keith* was not able to contest the amount of sales tax liability because the corporation had failed to contest the assessment pursuant to MCL 205.22. The corporation's failure to contest the assessment resulted in the assessment becoming final upon the expiration of the appeal

period.” Resp. Brief, p. 6. As such, Respondent argues that “. . . because a corporate officer’s liability is derivative to a corporation’s liability, once the corporation’s time to appeal has passed, an officer subject to personal liability under MCL 205.27a(5) cannot contest the amount of the corporate underlying tax liability.” Resp. Brief, p. 7.

Respondent’s witness, Angela Helm, Corporation Officer and Successor Liability Technician, testified that she is responsible for reviewing files for liable corporate officers for taxes due. She testified that she reviewed the file and determined “[i]n this case the fact that the very first element for the statute is that you have to be an officer, and since he [Petitioner] was the only officer, based on the audit paperwork I reviewed, various tax returns that he signed, I believe there were some checks that he had signed to the Department of Treasury for tax purposes.” T. p. 70.

FINDINGS OF FACT

Respondent issued a Notice of Intent to Assess on August 15, 2007. Respondent mailed Final Assessment No. P256564 by way of certified mail to Sova Steel on March 18, 2008, to the proper address at the time. Sova Steel failed to timely contest the assessment, which became final.

Respondent issued a corporate officer liability assessment against Petitioner on November 3, 2009. The assessment pertains to sales and use tax deficiencies for the time period of October 1, 2003 through December 31, 2006. The assessment is based on the underlying assessment against Sova Steel and was issued under MCL 205.27a(5).

Petitioner is the owner of Sova Steel. Petitioner was aware of the sales and use tax audit taking place in 2008. Petitioner admits he was the only corporate officer and signed some tax returns for Sova Steel. Mark D. Weisberg was the Controller of Sova Steel; he was not an officer.

CONCLUSIONS OF LAW

At the outset of the hearing, the Tribunal considered Petitioner’s contention that the underlying assessment on Sova Steel may not have been properly served, thereby denying Petitioner and/or the corporation due process. Pursuant to MCL 205.28(1)(a), “Notice, if required, shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer.” Respondent offered a copy of a certified mail log dated March 18, 2008, showing that a mailing was made to “Sova Steel, Inc., 21221 W 8 Mile Rd, Detroit, MI

48219.” However, Petitioner argues that there is nothing to show that the Notice was actually received. Petitioner testified that the address shown on Respondent’s certified mail log was the correct address in 2008, and that it is the same address as was listed on the 2008 Corporate Information Update. T. pp. 29 – 31.

Under the common law “mailbox rule,” proof of mailing of a communication that is correctly addressed and bearing the correct postage creates a presumption that communication reached its destination at the regular time and was received by the person to whom it was addressed. See *Goodyear Tire & Rubber Co v Roseville*, 468 Mich 947; 664 NW2d 751 (2003). This presumption is not a conclusive presumption of law, it is simply an evidentiary presumption - an inference that the law requires the Tribunal to draw, if it finds the existence of a “predicate fact.” See, e.g., MRE 301². Here, filing or receipt of documents is predicated based on the “probability that the officers of the [postal service or employees of a designated delivery service] will do their duty” in the usual course of business. See *Rauch v Michigan Millers’ Mut Fire Ins Co*, 131 Mich 281, 284; 91 NW 160 (1902) citing *Rosenthal v Walker*, 111 US 185, 193 (1884). The Tribunal found Petitioner’s argument unpersuasive during the hearing and so ruled. The underlying assessment is final. Furthermore, Petitioner cannot challenge the amount of tax assessed to the corporation once the assessment becomes final as to the corporation. *Keith v Department of Treasury*, 165 Mich App 105; 418 NW2d 691 (1988). Therefore, any inquiry as to the underlying assessment in question is irrelevant.

Under Michigan Law, a corporate officer who has responsibility for, control over, or supervision of either the preparation of the tax returns or their payment is liable for the payment of state taxes. MCL 205.27a(5); MSA 7.65(27a)(5) states:

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 having control or supervision of, or charged with the 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

² MRE 301 recognizes the operation of presumptions in civil cases where a statute or rule does not otherwise apply. In general the rule provides that “a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or moot the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.” One example of a civil presumption is the “mailbox rule.” Even in 1884, when the Supreme Court decided *Rosenthal*, no one claimed perfection for the post office and the ‘mailbox rule’ was and never has been more than a presumption that may be rebutted by other evidence suggesting that the addressee did not receive the letter. See *id.* at 193-94.

prima facie evidence of their responsibility for making the returns and payments. The dissolution of a corporation does not discharge an officer's liability for prior failure of the corporation to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.

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 payment 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.

Petitioner admits that he was a corporate officer during the tax years at issue so the Tribunal only has to determine whether Petitioner had control or supervision of, or was charged with the responsibility for making the returns or payment of taxes due. Petitioner's signature on the 1995 Sales, Use and Withholding tax return and the numerous SBT returns is *prima facie* evidence of Petitioner's liability. These documents show that Petitioner had the authority to prepare or pay taxes for Sova Steel. No documentation or corroborating testimony was ever presented by Petitioner showing that there was any other officer responsible for Sova Steel's tax obligations. Petitioner's signature on the returns also places the burden of proof on Petitioner to show that he is not derivatively liable. *Sobol v Michigan Department of Treasury*, 9 MTT 321 (1995). "The fact that other persons may also have been in charge of making the return or paying the tax is no defense to petitioner's liability." *Cygan v Michigan Department of Treasury*, 9 MTT 48, 49 (1995). It is settled law that a corporate officer cannot simply delegate responsibility for tax matters to third parties or non-officers. *Cicurel v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided March 10, 1998 (Docket Nos. 198812, 198848). Petitioner cannot delegate his responsibility to the Controller. He did, or at least should have, supervised Mr. Weisberg in the making of the corporation's tax returns and payment of taxes.

Certainly, Petitioner is charged with responsibility for making the corporation tax returns and payment of taxes to the State of Michigan. He is the sole owner and officer of the company. For these reasons, the Tribunal finds Petitioner the liable corporate officer and Respondent's assessment is upheld.

JUDGMENT

IT IS ORDERED that Final Assessment No. P256564 is AFFIRMED.

IT IS FURTHER ORDERED that Respondent's Motion to Amend Respondent's Exhibit #3 is GRANTED.

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

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: August 25, 2011

By: Cynthia J Knoll