

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

James Klecha,
Petitioner,

v

MTT Docket No. 357723

Department of Treasury,
Respondent.

Tribunal Judge Presiding
Paul V. McCord

FINAL OPINION AND JUDGMENT

James Klecha, *pro se*.
Julius O. Curling (P58248), for Respondent.

I. INTRODUCTION

This officer liability matter comes before the Tribunal for decision after hearing on October 14, 2011. Petitioner, James Klecha, seeks reversal of Respondent's determination that Petitioner is liable as a "responsible officer" under MCL 205.27a(5) for Hale Tavern, Inc.'s failure to file or pay monthly Michigan sales taxes relating to the periods ending September 2003 through the quarterly period ending April 2006 (the "relevant periods"). Through 15 individual assessments, Respondent asserts that Petitioner is vicariously liable in the aggregate amount of \$23,580.73 (\$18,921.76 in sales tax, and \$4,658.97 in penalties) with

interest there on. The sole question we are asked to decide is whether Petitioner is a responsible corporate officer of Hale Tavern Inc. as of each of the relevant periods at issue. We hold that he is.

II. FINDINGS OF FACT

The assessments at issue arose from estimated sales tax liabilities incurred by Hale Tavern, Inc., a bar located in Hale, Michigan. Petitioner, James Klecha, an accountant, whose principal residence at the time he filed his Petition in this matter was located at 5061 Melmax, Norton Shores, Michigan.

1. Hale Tavern, Inc.

In or about early 1996, Petitioner and two associates, Richard J. Milletary and Douglas Webb, decided to purchase an existing bar in Hale, Michigan. The three had a gentlemen's agreement; they would each share equally in the profits of the bar. Petitioner and Mr. Webb would contribute the capital necessary to purchase the bar, and Mr. Military would run and manage the bar on a daily basis. In exchange for their capital contribution, Mr. Webb and Petitioner would each receive 50% of the corporation's stock. Both Petitioner and Mr. Webb had full-time employment apart from their investment in the bar. Petitioner lived approximately 250 miles from Hale in Norton Shores, Michigan, and worked full

time for Port City Die Cast Company. Mr. Webb sought to borrow his share of the required capital contribution from his sister, Margaret Goodrow.

According to the testimony at hearing, the Liquor Control Commission objected to Mr. Webb's ownership interest in the bar and would not authorize the liquor license transfer. As a result, Mr. Webb's sister, Margaret Goodrow, contributed the remaining 50% of the required capital to the corporation and was listed as the other 50% shareholder with Petitioner. Whether Ms. Goodrow made this capital contribution on behalf of Mr. Webb and held the other 50% of the corporation's stock as his nominee or whether she owned the shares of the corporation outright is unclear.

On or about May 30, 1996, Articles of Incorporation were filed with the State of Michigan, incorporating Hale Tavern, Inc. The corporation's registered office was listed at 3296 M-65, Hale, Michigan, with Petitioner designated as the corporation's resident agent. A Registration for Michigan Taxes was filed with the Michigan Department of Treasury registering the corporation for sales, use, withholding, and single business taxes. This registration lists Petitioner as the corporation's president and Ms. Goodrow as the corporation's vice president.

At all times relevant, the corporation did not maintain corporate formalities. No annual or special meetings were held. No corporate by-laws were introduced

nor any corporation resolutions. The corporation did not hold any elections of officers or directors. For federal income tax purposes, the corporation made an election under Subchapter S. Despite this election, Petitioner, Mr. Webb, and Mr. Milletary continued their ostensible partnership and divided the profits and expenses of the bar in equal 1/3 shares.

2. Petitioner's Tax Responsibilities

From 1996 until about at least June 1999, Petitioner would travel to Hale, Michigan, and meet with Mr. Milletary to review the bar's records and prepare the corporation's tax returns. Mr. Milletary would bring these records to these meetings. Whether these records were kept at the bar, at Mr. Milletary's house, or at some other location, is unclear. Petitioner prepared the corporation's returns from 1996 through 1999. Petitioner testified that he never signed any corporate checks, whether for taxes or otherwise, that all check writing was done by the bar's manager, Mr. Milletary. During this same period, Petitioner had little contact with Mr. Webb, occasionally seeing him at the bar, and no contact with Ms. Goodrow.

Sometime shortly after July 1997, Petitioner sent a hand written letter to the Department of Treasury regarding the misapplication of various sales, use, and withholding payments for Hale Tavern to another tax account. Petitioner requested

a reapplication of the payments and signed the letter on behalf of the corporation as its president. In February 1998 Petitioner sent a follow up hand written letter to the Department regarding the application of tax payments. Again, Petitioner signed this letter as the corporation's president.

3. Death of Mr. Milletary

In June 1999, Mr. Milletary died. Afterwards, Mr. Webb began managing the operations of the bar. Petitioner stopped visiting the bar around this period. Petitioner's relationship with Mr. Webb was tense at best and he had no contact with Mr. Webb after Mr. Milletary's death. Petitioner did not prepare the corporation's tax returns after 1999, and apparently no tax returns were filed from 2000 until the bar ceased operations sometime in September 2005.

On March 30, 2001, the Department filed a Notice of State Tax Lien against the corporation for \$12,843.65 of unpaid sales, use, and withholding tax for the periods from June 2000 through August 2000 and from October 2000 through January 2001. On or about June 20, 2001, Petitioner's attorney, Mr. Rolf, sent a letter to Ms. Goodrow regarding the state tax lien, indicating that Petitioner had stopped receiving information from the bar necessary to prepare the corporation's taxes and recommending that the shareholders agree to sell the bar and use the sale

proceeds satisfy the outstanding tax liabilities.

Mr. Rolf's June 20, 2001 letter was apparently Ms. Goodrow's first contact regarding the operations of the bar. Prompted by this letter, Ms. Goodrow settled the outstanding sales, use, and withholding tax liabilities with the Department. Other than this one instance, Ms. Goodrow testified she had no involvement with the corporation or its taxes and assumed that Mr. Klecha, being an accountant, was seeing to the corporation's tax compliance. Mr. Klecha asserts that Ms. Goodrow withheld information from him and that she would not furnish him with the necessary book and records to prepare the required return, a point Ms. Goodrow denies. What is clear is that Ms. Goodrow had very little contact with Mr. Klecha and the two shareholders did not get along. Mr. Webb continued to manage the bar through this period until September 2003 when he was involved in a motorcycle accident. Mr. Webb died in November 2003.

4. Petitioner's Efforts to Sell His Interest – The Holzheuer's

By November 2003, Petitioner identified potential purchasers for the bar, Robin L. and Kathleen Holzheuer, and executed a broad Power of Attorney authorizing the Holzheuers to conduct, among other things, the corporation's business, sign and draw checks, sign and endorse stock certificates, vote his shares,

receive dividends, and to perform all acts necessary and proper with full power of substitution and revocation.

In late January 2004, a draft stock redemption agreement had been drawn up to redeem Petitioner's shares in the corporation, resign from the corporation's employment, including his position as President. A draft Quit Claim deed was also drawn, whereby Petitioner would relinquish any interest in the land and building used to operate the bar. This agreement was never executed. Petitioner never revoked the Power of Attorney he issued to the Holzheuers. Petitioner also testified that he never resigned as an officer of the corporation.

The Holzheuers managed the bar's operations from approximately mid-November 2003 until late January 2004, when they decided not to continue with their purchase. Ms. Goodrow testified that when the Holzheuers exited the bar's operations in January 2004, they turned all of the accounts and operations over to Ms. Goodrow.

The bar continued to founder until September 2005 when all operations ceased, the personal property assets were sold, and the land contract for the underlying land and building defaulted and was forfeited back to the Vendor. According to the testimony of Ms Goodrow, after September 2005, the corporation was no longer a going concern. No "Notice of Change or Discontinuance"

(Michigan Department of Treasury form 163) was ever filed; however, it appears that sometime after this date, the Holzheuers reentered the operations of the bar and continued to manage its affairs. The filed Corporation Information Updates on August 5, 2005, covering the 2004 and 2005 years, and a 2006 Corporation Information Update on May 23, 2006, all listing Petitioner as President and providing a registered office address of “PO Box 253, Hale, MI 48739.”

5. Respondent’s Assessment

Respondent sent a Letter of Inquiry – Notice of Corporation Officer Liability addressed to Petitioner at “PO Box 253, Hale, MI 48739,” the mailing address listed on the corporation’s 2006 Corporation Information Update filed with the state on May 23, 2006. Mrs. Holzheuer, who was apparently managing the bar at the time, forwarded a copy of this correspondence to Petitioner by fax on February 2, 2008.

On May 15, 2007, Respondent issued 15 separate “officer liability assessments” to Petitioner as follows:

Assessment No.	Period	Tax	Penalty
M083434	9/03	\$ 400.98	\$ 28.80
N278951	4/05	1,611.05	402.76

N333701	5/05	1,594.54	398.64
N433324	6/05	1,361.14	340.28
N509355	7/05	1,675.87	418.97
N587600	8/05	1,486.49	371.61
N676587	9/05	1,535.53	383.90
N766985	10/05	1,489.77	372.44
N858177	11/05	1,608.49	402.13
O047818	12/05	1,266.52	316.63
O047819	1/06	1,156.97	289.24
O075922	2/06	1,078.75	269.68
O189054	3/06	1,390.09	347.52
O289047	4/06	1,265.57	316.37

Copies of the various assessments indicate that Respondent’s “Final Assessments” against Petitioner stemmed from underlying assessments that had been previously issued against the corporation. The evidence does not indicate, however, when the underlying assessments were issued to the corporation, nor does it indicate whether the assessments were timely appealed by the corporation and therefore became a final and conclusive liability against Hale Tavern, Inc.

Respondent offered the Corporation Information Updates 1998, 1999, 2000,

2001, 2002, 2003, 2004, 2005, and 2006 filed with the State of Michigan. All of these documents state that Petitioner was the President of Hale Tavern Inc. during those years. For each of the years 2000 through 2006, the Corporation Information Updates were signed by Kathy Holzheuer acting under a power of attorney signed by Petitioner. Other than the Corporation Information Updates, no other documentary evidence was offered in support that Petitioner's duties included any tax specific responsibility during the periods in question.

6. Petitioner's Contacts with Respondent's Collection Division

In response to Respondent's Letter of Inquiry, Petitioner had a telephone conference with Respondent's Collection Division on February 23, 2007, where, according to the allegations in his Petition, Petitioner asserts that he had no control over the corporation's books and records, and informed Respondent of his current mailing address. Petitioner then sent a hand written letter to Respondent's Collection Division, dated February 28, 2007, in follow up to the previous telephone conference requesting Respondent to padlock the business and sell its assets in satisfaction of the assessed tax liabilities. Petitioner further disavowed responsibility and implicated Ms. Goodrow as the responsible corporate officer. Petitioner's letter makes no mention of his current mailing address. Respondent

issued its Notices of Intent to Assess against Petitioner on March 5, 2007. These notices were again sent to the corporation's PO Box in Hale, Michigan, which Petitioner did not receive until after expiration of the 60-day period within which to request an informal conference. Petitioner nevertheless filed an untimely request for informal conference which Respondent denied on August 27, 2008. Petitioner then filed this appeal with the Michigan Tax Tribunal by letter dated September 16, 2008. In that letter, Petitioner indicates "[a]fter receiving a denial of a request for informal conference. . . . I am asking for an appeal of a Final Assessment with the Michigan Tax Tribunal." Finally on or about October 9, 2008, Petitioner signed a Power of Attorney, Form 151, on behalf of the corporation covering the taxable periods at issue. Petitioner did not, however, sign this document as an officer of the corporation.

III. CONCLUSIONS OF LAW

1. Responsible Officer Liability

Section 27a(5) of the Revenue Act provides for personal liability of a corporation's unpaid Michigan taxes against that office holder "responsible" for payment of same. Pursuant to the final sentence of MCL 205.27a(5), the so-called

“responsible officer” penalty¹ is to be assessed and collected in the same manner as taxes. Thus, in order to assess Section 27a(5) liability against Petitioner, Respondent had to administratively find that Petitioner was a “responsible officer” required to account for, collect, and pay over the unpaid Michigan taxes of Hale Tavern, Inc.

To this end the statute creates a presumption in favor of Respondent that “[t]he signature of any corporate officers . . . on returns or negotiable instruments submitted in payment of taxes is *prima facie*² evidence of their responsibility for making the returns and payments.” MCL 205.27a(5). This case, however, is made complicated by the fact that the corporation followed no corporate formalities, nor does it appear that the corporation filed any returns during the periods in question or, at least, Respondent did not produce any such returns. In this regard, Respondent did not meet its initial burden of establishing a *prima facie* case by producing Petitioner’s signature on a return or negotiable instrument submitted in payment of the corporation’s taxes. See *Peterson v Dep’t of Treasury*, 145 Mich App 445, 450; 377 NW2d 887 (1985).

1 Although colloquially referred to as a “penalty,” Section 27a(5) is in substance a tax collection device.

2 “Prima facie evidence” is defined as “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.” It is a “rule which does not shut out evidence, but merely declares that certain conduct shall suffice as evidence until the opponent produces contrary evidence.” *Black’s Law Dictionary*, (8th ed, 2004), at 598.

The signature mechanism is merely one way of finding that derivative liability can be supported. Derivative liability can also be supported by competent, material, and substantial evidence that Petitioner exercised supervisory authority over the making of the tax returns. While the statutory law establishes a presumption of liability, the courts of Michigan have embraced a functional test to determine liability under Section 27a(5) and who qualifies as such a “responsible officer.” As our Supreme Court noted in *Keith v Department of Treasury*, 165 Mich 105; 418 NW2d 691 (1987), 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. In other words, so long as the officer has ultimate authority over expenditures of corporate funds and effective power to see to it that state taxes are paid, he or she qualifies as a responsible officer. See *Livingstone v Department of Treasury*, 434 Mich 771, 780; 456 NW2d 684 (1990).

This construction effectuates the underlying purpose of Section 27a(5). The legislative history is uninformative, but it is evident from the face of that statutory section that it was designed to cut through the shield of organizational form to permit the taxing authority to reach and impose liability on those actually

responsible for a business enterprises' failure to pay the taxes that are owing. It is an undisputed fact that business enterprises must act through individuals and where the individuals are the active and controlling officers of the enterprise and they fail to administer the responsibilities of the enterprise, then those individuals responsible for the performance of the business's duty must account. With responsibility comes accountability and the two cannot be separated. And, we note that this is not a responsibility that Petitioner can simply turn his back on and abandon. See, e.g., *Patmon and Young, PC v Dep't of Treasury*, 6 MTT 296 (1995). Based on the evidence present in this case, we find that Petitioner was at least charged with the responsibility for making the corporation's returns.

2. *Corporate President*

Respondent's evidence, specifically the Corporation Information Updates filed with the state for the years 2003 through 2006 establishes that Petitioner was the President of Hale Tavern, Inc. during the periods in question. Petitioner asserts that Mrs. Holzheuer, in signing the various Corporate Information Updates, acted beyond the authority granted her under his Power of Attorney. We disagree. The power granted was broad in its scope, and a reasonable interpretation of the document supports a finding that Ms. Holzheuer was acting within the scope of the

Power Petitioner granted to her when she filed the variously Corporation Information Statements on his behalf. Nor was this Power of Attorney limited in either duration or to a particular purpose and at no time did Petitioner take any affirmative and objective steps to revoke this power. We reject Petitioner's parole evidence for a contrary interpretation and conclude that Petitioner authorized Mrs. Holzheuer to file and sign the various corporate documents. Moreover, Petitioner admits that he was the corporation's President prior to the periods at issue and, on cross-examination, testified that he never resigned as an officer of the corporation. Accordingly, we find that Petitioner was the president of the corporation during the periods at issue.

3. Tax Responsibilities

The statute does not limit the type of "returns or negotiable instruments" that may be considered to those filed at the time the tax was first due. See, *Musser v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Dkt No. 293480). Here, Petitioner does not dispute that he prepared the corporation's returns for the taxable periods before those at issue. Thus, Petitioner exercised responsibility over the corporation's tax affairs.

We are permitted to consider circumstantial evidence in drawing a legitimate

inference from established facts with respect to Petitioner's continuing responsibilities over the corporation's tax functions. "Circumstantial evidence in support of or against a proposition is equally competent with direct evidence." *Ricketts v Froehlich*, 218 Mich 459, 461; 188 NW 426 (1922). "Reasonable inferences drawn from circumstantial evidence are reviewed in the same manner as direct evidence." *People v Murphy (On Remand)*, 282 Mich App 571, 582; 766 NW2d 303 (2009). And we note that, in general, the existence or occurrence of a particular fact, condition, or event may be proved by evidence as to the existence or occurrence of similar facts, conditions, or events under the same, or substantially similar, circumstances. See *Savage v Peterson Distributing Co, Inc*, 379 Mich 197, 202; 150 NW2d 804 (1967). Again, Petitioner clearly exercised control over the corporation's tax functions in the years prior to the tax periods at issue. This finding is based on the exhibits introduced by Respondent and upon Petitioner's own testimony. We also found that Petitioner was the officer having control of and responsibility for the making of the returns and payment of the taxes during the periods at issue. Again, this is a legitimate inference based on the established facts that Petitioner performed these functions in prior years and never affirmatively relinquished this responsibility. Petitioner would have us find otherwise, based on his testimony that others frustrated his exercise of his responsibilities. While

Petitioner's attention to details may have waned as a result of the death of Mr. Milletary and his relationship with the other shareholder, his responsibilities did not. Considering the evidence as a whole, Petitioner's credibility, and drawing reasonable inferences from the evidence with respect to Petitioner's conduct, we are not persuaded that Petitioner relinquished his tax-specific duties during the taxable periods at issue.

As a result, the evidence presented was at least sufficient to shift the burden of proof to Petitioner to rebut that he is responsible for the corporation's failure to pay. *See Drake v Michigan Dept of Treasury*, 9 MTT 51 (1995). In order to meet his burden, Petitioner must produce evidence sufficient to convince the Tribunal that the nonexistence of the presumed fact is more probable than its existence. *See Sobol v Michigan Department of Treasury*, MTT Docket No.190108 (1996).

Competent, material, and substantial evidence that Petitioner had tax specific duties must be weighed against the rebutting evidence.

4. Petitioner's Rebuttal

Petitioner first argues that he was only a "silent partner." However, Petitioner's designation as the corporation's president, registered agent, and active involvement in bar's operation prior to Mr. Milletary's death in 1999, together with his apparent involvement in the preparation of the corporation's returns, is

inconsistent with his claimed status as a “silent partner.”

Petitioner next contends that he lived and worked 250 miles from the bar and that he had no access to the corporation’s book and records. The evidence here is inconclusive. Petitioner testified that he did not know where Mr. Milletary kept the corporation’s books and records. Mr. Goodrow testified that she never withheld or prevented Petitioner from any financial information. She further testified she had little to no contact with Petitioner on this point until his attorney wrote her in 2001. She also testified that the employees managing the bar after Mr. Milletary’s death kept very poor records. Whether Petitioner’s access to the corporation books and records was thwarted or whether Petitioner acted in a deliberately indifferent manner is unclear.

Petitioner asserts that he relied on others to furnish him with the necessary information to prepare the corporation’s returns and, that once he stopped receiving information from Mr. Webb, Ms. Goodrow, or others, he no longer had control over, or supervision of the making of returns or payment of taxes. As a consequence, Petitioner argues that he relinquished his position as an officer of the corporation and with that, his duties and responsibilities over the corporation’s tax affairs.

While Petitioner’s evidence does establish that there was significant discord

among the corporation's shareholders and that Petitioner sought to sell his interest in the corporation, other than his testimony, Petitioner did not offer evidence to prove that his status as a corporate officer or his responsibilities for the corporation changed at any time during the relevant tax periods. In fact, Petitioner admitted on cross-examination that he never resigned as an officer of the corporation. Again it is our conclusion that Mr. Klecha retained primary responsibility to file tax returns and ensure the payment of taxes even while he was away from the business.

In sum, Petitioner's evidence consisted primarily of his testimony that he effectively abandoned his corporate responsibilities and left them up to Ms. Goodrow or others to either furnish the necessary information or prepare the required return and make the necessary payments. Petitioner cites no authority for the proposition that a corporate officer can avoid liability under MCL 205.27a(5) under such circumstances. To recognize the defenses raised by Petitioner would defeat the purpose of the officer liability statute. Moreover, we note that a corporate officer cannot avoid liability under the statute by delegating that authority to a non-officer.

A corporate officer who is charged with the responsibility to collect a state's sales or use taxes is not relieved of liability for failure to collect and pay over the taxes by delegating responsibility for collecting the taxes to subordinates. Hellerstein, *State Taxation*, ¶ 19.06[2] Personal

Liability of Corporate Officers and Employees.

Other state courts have held that the corporate officer cannot avoid officer liability by delegation to a non-officer. “We are not persuaded that the liability imposed by Tax Law § 1133(a) may be evaded by simply delegating responsibility to a subordinate.” See *Matter of Rosenblatt v New York State Tax Commn*, 114 AD2d 127, 130; 498 NYS2d 529 (1986) *reversed on other grounds* 68 NY2d 775; 506 NYS2d 675; 498 NE2d 148 (1986); *Matter of Ragonesi v New York State Tax Commn*, 88 AD2d 707; 451 NYS2d 301 (1982); *Matter of Gardineer v State Tax Commn*, 78 AD2d 928, 929; 433 NYS2d 242 (1980). This principle is sound and fully comports with the letter and spirit of Michigan’s officer liability statute. Also see, *McGlothin v Limbach*, 57 Ohio St 3d 72; 565 NE2d 1276 (1991).

IV. CONCLUSION

The proofs in this case are sufficient to impose corporate officer liability on Petitioner without regard to whether the statutory presumption arose for all periods at issue. The Tribunal finds that Petitioner was a corporate officer during the tax periods at issue and that he never affirmatively resigned, relinquished, or was otherwise relieved of the responsibility for making the returns or payments.

Petitioner attempts to shift responsibility to Ms. Goodrow, the corporation’s other

50% shareholder and Vice President. “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. MCL 205.27(a) clearly states that ‘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.’” *Cygan v Michigan Department of Treasury*, MTT Docket No. 135626 (1996). (Emphasis added). Moreover, the lack of formality and inefficient handling of business and legal affairs or the delegation of tax-related responsibility to other individuals does not eliminate the responsibility of a corporate officer. The facts establish that during the relevant tax periods, Petitioner remained charged with the responsibility for making the corporation’s returns and payments of taxes and that he chose to abandon those responsibilities. Petitioner has raised no viable defense to the assessments at issue. As a result, the Tribunal finds that Petitioner is personally liable for the failure of Hale Tavern, Inc. to make the sales tax payments for the taxable periods at issue.

V. JUDGMENT

IT IS ORDERED that the assessments are AFFIRMED in the aggregated amount of \$23,580.73, with statutory interest calculated under 1941 PA 122.

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

MICHIGAN TAX TRIBUNAL

Entered: March 28, 2012

By: Paul V. McCord