

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Robert Eberhart,
Petitioner,

MTT Docket No. 357863

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION
FOR SUMMARY DISPOSITION

On or about May 25, 2010, the parties filed Cross Motions for Summary Disposition and Petitioner filed a Response to Respondent's Motion for Summary Disposition on June 11, 2010. Although Petitioner admits to being a responsible corporate officer, Petitioner argues that there is no basis for the assessment at issue as Respondent did not have authority to issue the underlying assessment to Wholesale Spa Network, Inc. and both assessments are therefore null and void. Respondent defends the underlying assessment arguing the Tribunal lacks authority to review the original assessment to Wholesale Spa Network, Inc., as that assessment is final and not subject to attack under MCL 205.22, and that Petitioner is liable for the tax, interest and penalties at issue as a responsible corporate officer. The Tribunal agrees. Petitioner may not challenge the integrity of the original assessment once it has become final and, having admitted to being a responsible corporate officer, the underlying assessment against Petitioner is affirmed.

BACKGROUND

From 1993 until 2006, Petitioner owned and managed Wholesale Spa Network, Inc., a retailer of spas and related supplies. The company was based in Mishawaka, Indiana. In May 2004, Respondent conducted a use tax audit of Wholesale Spa Network, Inc. for the period 1/1/1993 through 12/31/2003, and determined that Michigan use tax was due on sales of personal property made to Michigan residents. Respondent issued Assessment No. M378197 against Wholesale Spa Network, Inc. on June 29, 2006. Wholesale Spa Network, Inc. failed to exercise its right to appeal and the assessment became final on September 27, 2006.

On April 6, 2007, Respondent issued to Petitioner an Intent to Assess for the assessment at issue (also Assessment No. M378197) and Petitioner's counsel, David Taylor, timely requested an informal conference with Respondent's Hearings Division. The informal conference was held on June 23, 2008 and Respondent's Hearing Referee concluded that the assessment of tax was proper. On July 23, 2008, Respondent issued its Decision and Order of Determination accepting the recommendation of the Hearing Referee and determined that the Intent to Assess should be assessed as originally determined with interest to be computed in accordance with 1941 PA 122.

As a result, a Bill for Taxes Due (Final Assessment) was issued on August 5, 2008, in the amount of \$152,602.00 plus interest of \$93,780.57 and Petitioner filed this appeal with the Tribunal on September 9, 2008.

PETITIONER'S CONTENTIONS

Petitioner requests the Tribunal grant Summary Disposition in its favor pursuant to MCR 2.611(C)(4) on the basis that the Tribunal lacks jurisdiction of the subject matter. Petitioner contends that "Respondent's Use Tax Assessment # M378197 in all its forms and directed toward each and every one of its several targets is null and void based upon the lack of subject matter jurisdiction of Respondent over the taxation of [Wholesale Spa Network, Inc.]"¹ Petitioner argues that "because it is a void assessment, it need not be contested within 90 days under MCL 205.22(5) or according to any other deadline or fixed timing schedule." *Id.* p. 8 He further asserts that "[v]oid assessments which are void by reason of lack of subject matter jurisdiction may be attack [sic] at any time, both collaterally and directly." *Id.* p. 8

In its response to Respondent's Motion for Summary Disposition, Petitioner reiterates his position that "[t]he lack of Respondent's jurisdiction over the subject matter of a void use tax assessment issued to an Indiana corporation and to Petitioner, its controlling officer and shareholder, may indeed be raised at any time." ²

Petitioner admits to his role as a responsible corporate officer. "Petitioner agrees with...the assertions contained in Respondent's Statement of Facts including the assertion that he admits he was a responsible officer of [Wholesale Spa Network, Inc.], an Indiana corporation, during all relevant periods." PR pp.1 & 2

RESPONDENT'S CONTENTIONS

Respondent contends that the Tribunal is precluded from reviewing the final assessment issued to Wholesale Spa Network, Inc. because the assessment was issued on June 29, 2006³ and the appeal period expired on September 27, 2006.

Respondent asserts that Petitioner cannot challenge the underlying assessment once it is final to the corporation. It relies on *Keith v Michigan Department of Treasury*, 165 Mich App 105; 418 NW2d 691 (1987), in which the Court of Appeals upheld the Tribunal's ruling that the taxpayer could not contest the amount of tax liability because the corporation had failed to contest the assessment pursuant to MCL 205.22. The Court stated "[i]t would be incongruous to find that a corporation's sales tax liability is final as to the corporation, and yet allow a responsible corporate officer to contest individually the amount of the sales tax liability." *Keith*, 165 Mich App at 110. It further stated "[b]ecause 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

¹ Petitioner's Motion for Summary Disposition, (PM) p.7

² Petitioner's Response to Respondent's Motion for Summary Disposition, (PR) p. 2

³ Respondent's Motion, page 7, states May 29, 2006 as the date the assessment was issued however the copy of the assessment included as attachment 1 is dated 6/29/06. The appeal period expired 90 days after the date of issuance.

personal liability under MCL 205.27a(5) cannot contest the amount of the corporate underlying tax liability.” *Id.* at 109 – 111.

Respondent also cites *Department of Treasury v Escanaba Flying Services*, unpublished opinion per curiam of the Michigan Court of Appeals (COA Docket No. 224242), which found that Escanaba’s failure to file an appeal under MCL 205.22 precluded it from challenging the validity of the assessment in an action brought by the Department to collect the unpaid use tax. The Court found that MCL 205.22 unambiguously states that an uncontested assessment is not reviewable by any method of direct or collateral attack.

Respondent contends that Petitioner was a responsible corporate officer for Wholesale Spa Network, Inc. and that he is personally liable for the company’s unpaid taxes. Respondent submitted numerous documents purported to have been signed by Petitioner and which Respondent believes are prima facie evidence of his responsibility as a corporate officer. Those documents included Registration for Michigan Taxes, Annual Returns for Sales, Use and Withholding Taxes, Combined Returns for Michigan Taxes, Notice of Change or Discontinuance, Power of Attorney, Michigan Department of Treasury Nexus Questionnaire, and the Minutes of the Annual Meeting of the Board of Directors for 2003. Respondent also recalled in its Motion for Summary Disposition that “Petitioner’s counsel, at the prehearing conference in this matter, stated that he would stipulate to Petitioner being a responsible officer.” RM pp. 2 & 3.

FINDINGS OF FACT

1. Respondent issued Assessment M378197 for use tax in the amount of \$152,602.00 plus interest of \$80,029.99, to Wholesale Spa Network, Inc. on June 29, 2006, and Wholesale Spa Network, Inc. did not appeal the assessment. As such, that assessment became final on September 27, 2006.
2. Petitioner was the owner and president Wholesale Spa Network, Inc. Petitioner signed the form 518, Registration for Michigan Taxes as owner of Wholesale Spa Network, Inc. on September 9, 2005. Petitioner also signed Sales, Use and Withholding forms as owner, on behalf of Wholesale Spa Network, Inc. in 2004, 2005 and 2006.
3. Respondent issued Assessment M378197 for use tax in the amount of \$152,602.00 plus interest of \$93,780.57 to Petitioner on August 5, 2008, and Petitioner admits that he was a responsible corporate officer of Wholesale Spa Network, Inc.

STANDARD OF REVIEW

Petitioner moves for Summary Disposition pursuant to MCR 2.116(C)(4), which states as a basis for granting a Motion for Summary Disposition “[t]he court lacks jurisdiction of the subject matter.”

Respondent moves for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10). The applicable standard of review for a (C)(8) motion requires the Tribunal to test the legal sufficiency of the Complaint and grant the Motion only if claims are so clearly unenforceable as

a matter of law that no factual development could possibly justify recovery.⁴ As for (C)(10), a motion will be granted if the 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.⁵ The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider.⁶ The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.*

Respondent also contends that there is a basis for a Motion for Summary Disposition under MCR 2.116(C)(4), as the Tribunal lacks subject matter jurisdiction over this appeal due to Petitioner's untimely appeal.⁷

CONCLUSIONS OF LAW

Petitioner asks the Tribunal to grant his Motion for Summary Disposition pursuant to MCR 2.116(C)(4) based on his allegation that the Tribunal lacks subject matter jurisdiction. However Petitioner's arguments are seemingly in support of his contention that Respondent did not have authority to issue the underlying assessment and therefore, the assessment at issue is null and void. Petitioner is, however, confused or, at best, misled over the proper grounds upon which this Tribunal may grant Summary Disposition.

Regardless, Petitioner's challenge of the underlying use tax assessment is misplaced. In fact, the Tribunal does lack jurisdiction to review the validity of the final assessment issued to Wholesale Spa Network, Inc. MCL 205.22 precludes any challenge to the validity of an assessment as a defense in the collection on the assessment once it becomes final. The statute provides in part:

- (1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order...
- (4) The assessment, decision, or order of the department, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.

The statute unambiguously states that an uncontested assessment is not reviewable by any method of direct or collateral attack. Petitioner believes the statute of limitations to appeal the assessment is open ended by virtue of the assessment being void. The Tribunal disagrees.

Petitioner had the opportunity to contest the original assessment but chose not to pursue his appeal rights. The result was a final assessment. Petitioner may have received misguided advice

⁴ *Ladd v Ford Consumer Finance Co, Inc*, 217 Mich App 119; 550 NW2d 826 (1996).

⁵ *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

⁶ *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

⁷ Petitioner's appeal was, however, filed within 35 days of the issuance of the final notice of assessment and was timely.

resulting in his inaction as to contesting the original assessment; however, this does not excuse or countermand his liability as a responsible corporate officer.

The sole issue in front of this Tribunal is whether or not Petitioner was a responsible corporate officer pursuant to MCL 205.27a(5) and is therefore liable for payment of the final assessment issued to and uncontested by Wholesale Spa Network, Inc. Under Michigan law, a corporate officer is derivatively liable for the failure of a corporation to make returns or pay taxes. MCL 205.27(a)(5) states in pertinent part, “[i]f a corporation, limited liability company, limited liability partnership, partnership or a limited partnership 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, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure.”

The Michigan Supreme Court in *Livingstone v Department of Treasury*, 434 Mich 771,783-784; 456 NW2d 684 (1990), set forth the standard for imposing personal liability upon corporate officers. It stated:

In order to hold a person personally liable for a corporation’s tax liability the Department of Treasury must first show that the person is an officer of the corporation. Then it must show either (1) that this officer has control over the making of the corporation’s tax returns and payments of taxes; or (2) that this officer supervises the making of the corporation’s tax returns and payments of taxes; or (3) that this officer is charged with the responsibility for making the corporation’s returns and payments of taxes to the state. *Id.* at 780.

The facts are clear and there is no genuine issue as to any material fact. Petitioner has admitted that he was a responsible corporate officer; a fact that Respondent supported with evidentiary documentation. The Tribunal finds based on the above, that there is no question that Petitioner remains liable for the tax and interest due. Therefore,

IT IS ORDERED that Petitioner’s Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that Respondent’s Motion for Summary Disposition is GRANTED and Assessment No. M378197 is AFFIRMED.

This Order resolves all pending issues and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: July 30, 2010
CJK/pmk

By: Cynthia J Knoll