

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

Jack A. Baas,
Petitioner,

v

MTT Docket No. 385112

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

ORDER GRANTING RESPONDENT'S MOTION FOR
SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

I. INTRODUCTION

Petitioner, Jack A. Baas, is appealing Assessment Nos. O349100, O349101, O349102, O453838, O706920, P076979, P039827, P139041, which imposed sales tax, penalty and interest on Petitioner as a liable corporate officer of Michigan Air Control Distributing, Inc. On June 30, 2011, Respondent filed a motion requesting the Tribunal to grant summary disposition in its favor, pursuant to MCR 2.116 (C)(8) and (C)(10). On July 8, 2011, Petitioner filed a response to Respondent's Motion. The Tribunal has considered the Motion, Response, and supporting documents and finds that granting Respondent's Motion, under MCR 2.116(C)(8) is appropriate for the reasons explained herein.

II. RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner cannot contest the underlying assessments as a result of the sales tax assessments issued against him as a liable corporate officer. Respondent cites *Keith v Michigan Department of Treasury*, 165 Mich App 105; 418 NW2d 691 (1987), which upheld the Tribunal's ruling that Keith was unable to contest the underlying assessment because the corporation failed to contest the assessment, under MCL 205.22. *Keith* also provides that only officers who have responsibility regarding the preparing and paying of taxes can be personally liable for such taxes. *Keith*, 165 Mich App at 110. The court's reasoning behind its ruling was that only those who receive notice of the tax assessment are expected to make sure that the assessment is paid or otherwise taken care of. *Id.* In this case, Michigan Air Control Distributing, Inc. failed to contest its assessment for the 2000 tax year, it subsequently failed to pay its taxes. This resulted in the Department assessing Petitioner for the taxes. Based on the ruling from *Keith*, Respondent argues that Petitioner cannot challenge the amount of taxes he is being assessed.

Respondent also contends that when Petitioner signed the tax returns of Michigan Air Control Distributing, Inc., a rebuttable presumption that he is a responsible corporate officer was created. MCL 205.27a(5) provides that if a

corporation fails to pay any taxes due then “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.”

Respondent also cited *Livingstone v Department of Treasury*, 434 Mich 771; 456 NW2d 684 (1990), where the Michigan Supreme Court created a two-part test for imposing personal liability upon corporate officers. First the Department must 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 payment 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. In this case, Petitioner signed relevant tax returns and does not dispute that he is a responsible corporate officer. Petitioner’s signature on such documents creates a rebuttable presumption that he is liable for the corporation’s non-payment. It is then on Petitioner to rebut the presumption; Petitioner made no attempts to do so.

Lastly, Respondent contends that Petitioner’s statements regarding misapplication of funds is not supported by any facts or evidence. To conclude,

Respondent asks that the Tribunal grant its motion for summary disposition and dismiss the appeal with prejudice.

At oral argument, Respondent argued that “[t]he case law and statutory language is clear. . . . Specifically [MCL] 205.22, Subsection 4 and 5 both speak to the finality of final assessments and how they are not subject to collateral tax. And . . . the issue in this case is limited to Mr. Baas’s liability as a corporate officer, which in fact has been stipulated to.” (Transcript, p 5)

III. PETITIONER’S CONTENTIONS

Petitioner contends that the issue of this case is what he is responsible for, not whether he is a responsible officer. The *Keith* case that Respondent relies upon dealt with the issue of notice not whether a corporate officer can question an assessment. See *Keith*, Supra at 109. Moreover, *Keith* focuses on incongruity as its reasoning for not allowing corporate officers to contest an assessment. *Id.* at 110. Petitioner argues that incongruity is not even a legal doctrine and the presence of it cannot provide an adequate legal rationale.

Petitioner also contents that there is case law supporting the notion that all facts must be known before a final assessment can be final. See *Tyson Foods, Inc. v Department of Treasury*, 276 Mich App 678; 741 NW2d 579 (2007). Petitioner is simply trying to make this happen and get Respondent to acknowledge such facts. Moreover, if a final assessment against a corporation is to be assessed in full

against a corporate officer then why are the assessments against the corporation and the assessments against Petitioner different? Petitioner contends that the answer is that Respondent began to recognize that the errors pointed out by Petitioner were in fact made and such errors were corrected to an extent. To conclude, Petitioner asks that the Respondent finish correcting such errors based on the information that Petitioner provided.

At oral argument, Petitioner's representative stipulated for the record that Petitioner is ". . . a responsible corporate officer as that term is described in Section 2785 of the Revenue Act. . . ." (Transcript, p 4).

IV. FINDINGS OF FACT

Respondent issued eight corporate officer liability assessments against Petitioner on March 10, 2010. Assessment Nos. O349100, O349101, O349102, O453838, O706920, P076979, P039827, P139041 pertain to corporate sales tax deficiencies. The assessments levy tax, penalty, and interest totaling \$193,432.78. All assessments are based on the underlying assessments against Michigan Air Control Distributing, Inc. and are issued under MCL 205.27a(5).

Petitioner admits it was a liable corporate officer with regard to the assessments; however, Petitioner contests the amount of the underlying assessments.

V. APPLICABLE LAW

Respondent moves for summary disposition pursuant to MCR 2.116(C)(8). Motions for summary disposition under MCR 2.116(C)(8) are appropriate when the opposing party has failed to state a claim on which relief can be granted. Summary disposition should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery. *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a motion for summary disposition under this subsection, the court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts. *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

Respondent also moves for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated “[a] motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact.” Under subsection (C)(10), a motion for summary disposition 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.

Smith v Globe Life Insurance, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991). If it appears to the court that the opposing party, rather than the moving party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2) *Washburn v Michailoff*, 240 Mich App 669; 613 NW 2d 405 (2000).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present

documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

V. CONCLUSIONS OF LAW

This Tribunal has carefully considered Respondent's motion for summary disposition under the criteria for MCR 2.116(C)(8) and (C)(10) and based on the affidavits, pleadings, and other documentary evidence submitted by the parties, determines that granting Respondent's Motion, under MCR 2.116(C)(8), is appropriate.

Summary disposition is appropriate under MCR 2.116(C)(8) when the opposing party has failed to state a claim on which relief can be granted.. Tribunal finds that tax assessments were originally issued to Michigan Air Control Distributing, Inc. Michigan Air Control Distributing, Inc. did not file appeals of the assessments, rendering them final. As a result of Michigan Air Control Distributing, Inc.'s nonpayment of tax, Petitioner was assessed as a responsible corporate officer. Respondent issued assessments to Petitioner, pursuant to MCL 205.27a(5), which states in pertinent part:

If a corporation, limited liability company, limited liability partnership, partnership, or 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.

Petitioner does not contest that he was a responsible officer during the tax periods at issue. His contentions relate solely to the underlying assessments against Michigan Air Control Distributing, Inc. However, because the underlying assessments against Michigan Air Control Distributing, Inc. were not appealed and thus became final, Petitioner cannot now challenge the assessments. Petitioner's corporate office liability is derivative of Michigan Air Control Distributing, Inc.'s liability.

Thus, the Tribunal grants summary disposition in favor of Respondent and affirms Final Assessment Nos. O349100, O349101, O349102, O453838, O706920, P076979, P039827, P139041.

VI. JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Assessment Nos. O349100, O349101, O349102, O453838, O706920, P076979, P039827, P139041 are AFFIRMED.

MICHIGAN TAX TRIBUNAL

Entered: January 13, 2012
sms

By: Cynthia J Knoll