

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

Anthony T. Vallone,
Petitioner,

v

MTT Docket No. 385120

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Anthony T. Vallone, is appealing Final Assessments P987325, Q050673 and Q050674 issued by Respondent, Michigan Department of Treasury, on March 4, 2010. A hearing was held in this case on July 19, 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 Cannon Freight Systems, Inc. (“Cannon Freight”). The Final Assessments establish a deficiency of International Fuel Tax Agreement (“IFTA”) for December 2007, and withholding taxes for February and March, 2008, in the amount of tax, penalties, and interest of \$119,194.75.¹ The Tribunal agrees with Petitioner and dismisses the assessment in its entirety.

BACKGROUND

In 1995, Petitioner formed Cannon Freight, a closely held Michigan corporation engaged in the business of transportation and logistics. Cannon Freight enjoyed steady growth with good profit margins for years as an expedite carrier and around 2003, it began to become more involved with truckload business with continued growth until 2007. By 2007, approximately 95% of Cannon Freight’s business was automotive related and the company had grown to approximately 400 employees. Petitioner determined that the company had grown to a size

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

where he felt the need to find an individual or another company to assist with finances needed to sustain the steady growth and take the company “to the next level.”

On October 25, 2007, Petitioner sold 100% of the company stock to a holding company called High Point Transportation, Inc. (“High Point”), which was owned and controlled by an individual named Paul Henley, a resident of Florida. Petitioner stayed with Cannon Freight after the purchase, as an employee and as President. His role was to assist in the transition of Cannon Freight to its new ownership by dealing with customer contacts and managing the day-to-day logistical operations of the company. Mr. Henley named himself chief executive officer of Cannon Freight. Shortly thereafter, Mr. Henley brought in a chief financial officer (Ron Milewski) and an acting chief executive officer, both serving as directors on the Board along with Mr. Henley.

In late 2007 and into 2008, Cannon Freight began experiencing financial difficulties due to various factors including the sharp increase in fuel cost, the general turndown in the economy, particularly in the automotive industry, the exchange rate with the Canadian dollar, and Mr. Henley’s failure to obtain increased funding to handle the growth in the company. These factors led to Cannon Freight falling out of formula in its lending arrangement with Comerica Bank. As a result, Comerica took control over all incoming revenue in early 2008; therefore, Cannon Freight had no direct access to funds. Comerica also required Cannon Freight to retain the turnaround firm of O’Keefe & Associates to oversee the day-to-day finances, as well as assist in negotiating with Comerica on the issue of Cannon Freight’s default.

Eventually, Mr. Henley executed a forbearance agreement with Comerica on behalf of Cannon Freight, including a personal guarantee. Mr. Henley retained responsibility for making the financial decisions of the company. However, Petitioner attempted to communicate to and solicit instruction from Mr. Henley, as well as Comerica and O’Keefe & Associates, as to payment of company obligations including tax liabilities. Petitioner did not receive authorization nor funds to satisfy any of the debts of Cannon Freight, including payroll, which resulted in many employees leaving the company. Ultimately, Petitioner’s employment was terminated by Mr. Henley in April 2008.

Respondent issued the subject Intents to Assess against Petitioner under Act 122, Section 27A (5), Public Acts of 1941, as amended, making officers liable for tax debts of the corporation. Petitioner requested, and was granted an informal conference with Respondent’s Hearing

Division, which was held on September 10, 2009. Respondent's hearing referee concluded that Petitioner failed to rebut the presumption that he had authority as President of Cannon Freight and as such was responsible for the preparation of tax returns and payments of tax during the periods at issue. Respondent accepted the recommendation and on March 4, 2010, issued the Final Assessments against Petitioner. Petitioner filed this appeal on March 31, 2010.

PETITIONER'S CONTENTIONS

Petitioner appeals the Assessments claiming he should not be held liable as a responsible corporate officer. He contends that when he sold Cannon Freight on October 25, 2007, he relinquished all financial control and responsibilities. Petitioner contends that he “. . . remained with the company as an employee in the position of its president and Chief Operating Officer. . . . [He] was allowed to remain with the company because of his relationship with Cannon Freight's customers, and his operational knowledge of the transportation and logistic industry.” Petitioner's Petition (PP), p. 3. He further asserts that his “. . . authority to act on behalf of Cannon Freight was limited . . . to the context of its operations (e.g., day-to-day management of drivers, maintenance and potential growth of existing and new customer business and trucking routes), and the specific direction he received from [Mr.] Henley and [Mr.] Milewski.” *Id.*

Petitioner testified that after the sale of the company, he did not have any responsibility, nor was he charged with, nor did he prepare any of the tax returns for Cannon Freight. Transcript (T) p. 23. Mr. Henley took full control over all financial matters. Petitioner contends that “[as] Cannon Freight endured financial difficulty,. . . [he] sought direction from Henley, Milewski and [the turnaround firm] O'Keefe relative to the payment of outstanding bills and creditors.” PP, p. 3. He testified that he “. . . had no control over the finances. And so I [sought] out Mr. Milewski to help me get some information from the CEO as to how he was going to cover the payroll and the taxes.” T, p. 41. He also submitted evidence in the form of an e-mail dated March 19, 2008, which states “I JUST TALKED TO Ron Milewski from High Point and he advised me that Paul Henley said not to release the payroll checks based on financial status.” [Emphasis in original] Petitioner's Exhibit (PE), 23. In another e-mail dated March 27, 2008, Petitioner wrote to Mr. Henley, “Please advise as to releasing driver payroll[;] today was promised for 3pm, and also office pay to be released today for nights at 1700 today. . . . I will wait for direction from HP [High Point] as to the next step, and will not sign until this is clarified.” PE 27. That e-mail

clearly stated the amount of payroll taxes past due, as did a subsequent email from Petitioner to Mr. Henley on April 10, 2008. He testified that he sent dozens of emails to and had numerous conversations with Mr. Henley and Mr. Milewski regarding the “dire straits of being able to proceed without a substantial cash infusion.” T, pp. 45, 46. And finally Petitioner testified that “[t]here was never a doubt in my mind that the people in control of the funds did not know about the taxes. They all knew.” T, p. 50.

Petitioner admits that he did prepare and sign the IFTA fuel tax license renewal application on October 26, 2007. T, p. 52. This was the day after Petitioner sold his stock to High Point. Petitioner testified that he does not believe this was a tax return; it was a license renewal. He further testified that he called Paul Henley and was advised that he was the only one in Michigan that could sign it. T, p. 53. In regard to the fourth quarter IFTA return, Petitioner testified that his son, Anthony Jr., was general manager and had responsibility for and did prepare the return. He stated that the information was submitted to Mr. Henley, who was advised of the amount due and when the tax was due. T, p. 24. Petitioner testified that the “fuel tax group” from the State of Michigan had communicated that the company was delinquent, and the information was ignored by Mr. Henley. He further testified that even if he wanted to have the tax payments made, he needed approval from Mr. Henley and funds released by Comerica. T, pp. 25, 28.

Petitioner testified that after his employment was terminated, he was informed by his CPA that Single Business Taxes were owed by Cannon Freight for the period January 1, 2007 through October 26, 2007, i.e., the tax period immediately prior to Petitioner’s sale of the stock. Petitioner then wrote a check from his personal account to the State of Michigan to cover these taxes. T, p. 54. He testified that he did this because “I owned the company. It was my responsibility. That’s why I did it.” *Id.*

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 returns. Respondent relies primarily on two documents in its attempt at establishing prima facie evidence: 1) the 2008 IFTA license renewal form prepared and signed by Petitioner on October 26, 2007, and 2) a personal check signed by Petitioner in October 2008, for Single Business

Taxes owed by Cannon Freight. All other evidence submitted by Respondent supports the position that Petitioner was a responsible corporate officer prior to the date of the stock sale, to which Petitioner admits.

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 Respondent considers the renewal application for Michigan IFTA fuel tax license to be either a tax return or a negotiable instrument because ". . . there's terms on the application that the officer that signs it has to agree to, and that is the timely reporting of the payment of tax for fuel, and you're essentially applying for those type of taxes in the State of Michigan." T, p. 81. Respondent determined that because Petitioner was the only officer listed on the renewal, which was dated after the sale, that he was the responsible corporate officer. Ms. Helm further testified that it is not Respondent's position that the IFTA renewal is a "return" but rather a "negotiable instrument." T, p. 89.

FINDINGS OF FACT

Petitioner sold 100% of his interest in Cannon Freight on October 25, 2007. Prior to the sale of the company, Petitioner was the responsible corporate officer. The day after he sold the company, Petitioner signed as President, the 2008 Renewal Application for Michigan IFTA. Petitioner was the President during the tax periods at issue. Petitioner did not sign any tax returns or any negotiable instruments during the tax periods at issue. Petitioner did not have access to corporate funds other than those made available for specifically authorized payments. Petitioner did not have authority to make payments of taxes for the company.

CONCLUSIONS OF LAW

The issue is whether, under MCL 205.27, Petitioner is personally liable for the Company's failure to file the IFTA return for December 2007 and withholding for February and March 2008. 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)

Respondent relies on a plethora of documentation as evidence that Petitioner was the responsible corporate officer. Respondent lays a groundwork for its supposition; however, all but a single document (i.e., the IFTA Annual Renewal form signed the day after Petitioner sold the company) were signed by Petitioner before he sold the company. Petitioner does not dispute he was the responsible corporate officer before the sale. Respondent's reliance on that documentation is completely misplaced. Furthermore, the Tribunal finds that the single potentially prima facie evidence, the IFTA annual renewal form, is neither a tax return nor a negotiable instrument and bears very minimal weight.

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. 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 relevant 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. Henley handled the corporate finances with assistance from Mr. Milewski, Comerica Bank and O'Keefe & Associates.

The Tribunal came to this conclusion during the hearing and so ruled. Nevertheless, pursuant to MCL 205.746, “[t]he tribunal shall make its decision in writing.” As such, the Tribunal determines, as set forth in the findings of facts and conclusions of law herein, that Petitioner has met his burden in proving he is not liable for the corporation’s unpaid tax liability.

JUDGMENT

IT IS ORDERED that Assessment Nos. P987325, Q050673, and Q050674 are CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: August 18, 2011

By: Cynthia J. Knoll