

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

Jeffrey Denha,
Petitioner,

MTT Docket No. 429971

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
B. D. Copping

ORDER AWARDING COSTS TO PETITIONER

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Jeffrey Denha, appeals Respondent's determination that Petitioner is liable as a responsible member under MCL 205.27a(5) for Colony Bindery Services, LLC's (CBS) failure to file or pay withholding taxes relating to April through October 2004 tax periods. Through these seven individual assessments, Respondent asserts that Petitioner is liable in the aggregate amount of \$27,696.26. The sole question is whether Petitioner was a responsible member of CBS, who is individually and severally liable for the subject taxes.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that Petitioner is not liable for the assessments issued by Respondent, as he did not have control, supervision, or responsibility for the

making of returns or payments. Accordingly, Assessment Nos. P482076, P482077, P482078, P482079, P482080, P482081, and P482082 should be cancelled.

BACKGROUND

On February 11, 2004, Petitioner formed CBS with Saul Lazare. Petitioner and Mr. Lazare were each 50% members.

Respondent issued Intents to Assess against Petitioner on October 1, 2010. Petitioner timely requested an Informal Conference, which was held on July 21, 2011, and a Decision and Order of Determination issued on August 17, 2011. On September 16, 2011, Respondent issued the following assessments against Petitioner, as a responsible member of CBS under MCL 205.27a(5), regarding the failure of CBS to remit Michigan payroll withholding tax:

Final Assessment	Tax Period	Amount	Penalty	Interest*	Total
P482076	April 2004	\$1,673.89	\$0	\$29.82	\$1,703.71
P482077	May 2004	\$2,545.18	\$636.30	\$1,177.74	\$4,359.22
P482078	June 2004	\$2,545.18	\$636.30	\$1,167.30	\$4,348.78
P482079	July 2004	\$2,545.18	\$636.30	\$1,156.52	\$4,338.00
P482080	Aug 2004	\$2,545.18	\$636.30	\$1,145.74	\$4,327.22
P482081	Sept 2004	\$2,545.18	\$636.30	\$1,133.57	\$4,315.05
P482082	Oct 2004	\$2,545.18	\$636.30	\$1,122.80	\$4,304.28
TOTALS		\$16,944.97	\$3,817.80	\$6,933.49	\$27,696.26

*Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122.

On October 19, 2011, Petitioner filed this appeal with the Tribunal. Respondent filed its answer to Petitioner's appeal on November 7, 2011. A hearing was held on October 24, 2012. Barry A. Steinway, Attorney, appeared on behalf of Petitioner. Julius O. Curling, Assistant Attorney General, appeared on behalf of Respondent.

PETITIONER'S CONTENTIONS

Petitioner contends that he is not liable for the assessments issued against him. To support this contention, Petitioner asserts that (i) he was a non-active minority member/investor in CBS; (ii) he had no signature rights on any of the company bank accounts; (iii) he made no management decisions and had no authority to control the affairs of the company; (iv) he did not participate in any discussions regarding management of the company; (v) he did not earn a salary from the company because he did not work for the company; and (vi) his personal income tax returns showed his involvement as a passive interest. (Petition, p 2).

PETITIONER'S ADMITTED EXHIBITS

- P-1: Decision and Order of Determination
- P-2: Articles of Organization
- P-3: 2004 U.S. Return of Partnership Income
- P-4: 2005 U.S. Return of Partnership Income
- P-5: 2006 U.S. Return of Partnership Income

P-6: 2004 K-1

P-7: 2005 K-1

P-8: 2006 K-1

P-9: 2004 1040 U.S. Individual Income Tax Return

P-10: 2005 1040 U.S. Individual Income Tax Return

P-11: 2006 1040 U.S. Individual Income Tax Return

P-12: Petitioner's Answers to Respondent's First Set of Interrogatories

PETITIONER'S WITNESSES

Paul Cenko

Paul Cenko is a certified public accountant and prepared the returns for CBS. (Transcript, p 8). He testified that Saul Lazare is designated on the 2004, 2005, and 2006 returns as the tax matters partner. (Transcript, p 11). The K-1's generated with the returns show that Petitioner is a general partner and 50% owner of CBS, but does not show any wage or salary going to Petitioner. (Transcript, pp 12 – 13). Mr. Cenko further stated that the returns were never signed by Petitioner, but were signed by Saul Lazare. (Transcript, p 13). Mr. Cenko never spoke with Petitioner in dealing with the preparation of the tax returns; he spoke with Mr. Lazare or the bookkeeper for CBS. (Transcript, p 13). Mr. Cenko testified that Petitioner was never at the meetings with Saul Lazare regarding finding working capital, had no involvement in the supervision or control of the preparation of returns and payment of taxes, and had no check signing ability. (Transcript, p 13).

Mr. Cenko stated that Petitioner's involvement in CBS was as an absentee investor. (Transcript, p 15). He testified that the registration for taxes tells the State who the members are and does not contain any signatures. (Transcript, p 17).

Mr. Cenko stated that he could not reach Saul Lazare for a couple of years and needed a power of attorney for the State of Michigan to speak to him and provide information regarding CBS. (Transcript, p 16). Mr. Cenko testified that Petitioner signed the power of attorney because Mr. Cenko felt Petitioner had the ability as a general partner to do so. (Transcript, p 21).

On cross-examination, Mr. Cenko testified that he would contact Petitioner to go over the financials of CBS and express his "concerns as to the liquidity of the company and that certain accounts payable were lapsing and sales were going down." (Transcript, p 18). He stated that he felt compelled to discuss the financial situation with Petitioner because he invested in the company and the management was not paying certain liabilities, but Petitioner had no control over Mr. Lazare since he had no check signing ability. (Transcript, pp 19 – 20).

Jason Alkamano

Jason Alkamano is a certified public accountant who prepared income tax returns for Petitioner and some of Petitioner's other companies. (Transcript, p 25). The K-1's prepared show that Petitioner was a passive member of CBS for 2004 – 2006. (Transcript, pp 26 – 27). He testified that Petitioner never received a salary,

wage, or dividend from CBS, and only incurred a loss on the investment.

(Transcript, p 30).

Regarding the power of attorney Petitioner signed in June 2010, Mr. Alkamano stated that he advised Petitioner to go to Mr. Cenko's firm because they handled the returns for CBS and would know if the returns had been filed and if the assessments were accurate. Mr. Alkamano testified that from his experience, if they had a power of attorney for Petitioner personally, the State would have discussed the assessments, but would want a power of attorney for CBS to give more information. (Transcript, p 28).

Jeffrey Denha

Mr. Denha stated that he never worked for CBS, but focused 100% of his time at a manufacturing company owned by his family. (Transcript, p 32). He testified that his initial understanding was that he would invest the money for CBS and Saul Lazare would run the company. (Transcript, p 32). Mr. Denha stated that he had no responsibility to file the tax returns for CBS or pay the taxes, and never did sign any returns or control the filing of the returns or payments. (Transcript, p 33). He never signed a tax return or negotiable instrument for CBS. (Transcript, p 35).

Mr. Denha testified that he first learned of the assessment against him in 2008 and faxed the information to the CPAs. He told the State of Michigan that he was going to have a CPA call them and was told they cannot talk to a CPA unless

there was a power of attorney. (Transcript, pp 34 – 35). Mr. Denha stated that he was told by the State that the power of attorney had to be signed for CBS to authorize an accountant to speak with them. (Transcript, p 35). He testified that he tried to reach Saul Lazare regarding the assessments, but there was no response. (Transcript, p 37). Mr. Denha stated that when he had been able to speak with Mr. Lazare in the past regarding CBS, he was told that “things were okay as far as the accounts payable.” (Transcript, p 38).

RESPONDENT’S CONTENTIONS

Respondent contends that Petitioner (i) was a 50% partner of CBS; (ii) was listed as a partner on schedule of partners in CBS’s 2004, 2005, and 2006 SBT returns; (iii) is listed as a member on CBS’s registration for Michigan taxes; and (iv) executed a power of attorney authorizing another individual to act on behalf of CBS for tax matters. (Respondent’s Prehearing Statement).

RESPONDENT’S ADMITTED EXHIBITS

R-1: June 28, 2010, Power of Attorney by Petitioner on behalf of CBS

R-2: Registration for Michigan Taxes

R-3: 2004 schedule of partners

R-4: 2005 schedule of partners

R-5: 2006 schedule of partners

R-6: 2004 1040 U.S. Individual Income Tax Return

R-7: 2005 1040 U.S. Individual Income Tax Return

R-8: 2006 1040 U.S. Individual Income Tax Return

R-9: 2004 U.S. Return of Partnership Income

R-10: 2005 U.S. Return of Partnership Income

R-11: 2006 U.S. Return of Partnership Income

R-12: Intents to Assess

R-13: Final Assessments

FINDINGS OF FACTS

1. Colony Bindery Services, LLC, was established by Petitioner and Saul Lazare on February 11, 2004.
2. Petitioner and Saul Lazare were each 50% members of CBS.
3. Petitioner was the primary investor in the business and Saul Lazare managed the day-to-day operations of CBS.
4. The registration for Michigan taxes, which is undated and unsigned, lists Petitioner as a member.
5. Petitioner executed a power of attorney on June 28, 2010, authorizing Stephen Cenko to speak with Respondent regarding the 2004 – 2009 tax years for CBS.
6. Respondent issued Intents to Assess against Petitioner on October 1, 2010, regarding liability for withholding tax for the April – October 2004 tax periods.
7. Petitioner did not sign any tax returns or negotiable instruments in payment of taxes for CBS.

CONCLUSIONS OF LAW

MCL 205.27a(5) provides:

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. The signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments.

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 member of the limited liability company. In addition, liability will arise only if the member (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. *Keith v Dep't of Treasury*, 165 Mich 105; 418 NW2d 691 (1987).

The first step for Respondent in proving a member was responsible for the filing of returns or the payment of taxes, is to present into evidence "prima facie" evidence that creates a presumption that a member was responsible for or had control or supervision of an entity's tax returns or payments. "Prima facie

evidence” means “evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.” Black’s Law Dictionary (7th ed), p 460.

Therefore, judgment may be entered against the signing member unless she can produce persuasive evidence that she lacked control, supervision, or responsibility for making the return or payment notwithstanding his signature on a return or negotiable instrument.

In order for Respondent to meet its initial burden of proof, it must establish its prima facie case by producing and having entered into evidence a member’s signature on a return or negotiable instrument submitted in payment of taxes. Once Respondent establishes its prima facie case, the burden of proof shifts to the member to rebut the presumption that he is responsible for the entity’s failure to pay tax by producing “evidence sufficient to convince the Tribunal that the nonexistence of the presumed fact is more probable than its existence.” *Penner v Dep’t of Treasury*, MTT No. 358583 (2010), p 10, citing *Widmayer v Leonard*, 422 Mich 280, 287; 373 NW2d 538 (1985). To rebut the presumption established by a respondent’s prima facie evidence a member may offer various proofs. By creating a rebuttable presumption, the statute plainly provides that a signing member may be able to present facts proving that he did not have control over or responsibility for the entity’s failure to pay tax and, therefore, is not liable. The

member also retains the overall burden of persuasion. *Drake v Dep't of Treasury*, MTT Docket No. 204601 (1995).

The Tribunal finds that Respondent failed to submit prima facie evidence supporting a finding that Petitioner had control, supervision, or responsibility for the making of returns or payments. MCL 205.27a(5) specifically states that “[t]he signature of any corporate officers, members, managers, or partners *on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments.*” [Emphasis added]. Respondent has failed to provide evidence of Petitioner’s signature on returns or negotiable instruments on behalf of CBS for any tax period. Based on the testimony of Petitioner and Petitioner’s witnesses, no such signature exists; Petitioner was a passive investor who had no involvement in the day-to-day activities of CBS, did not sign returns, and had no signatory authority to sign checks in payment of taxes. The only document signed by Petitioner is a power of attorney, dated June 28, 2010, authorizing the Department of Treasury to speak with Stephen Cenko regarding the 2004 – 2009 tax years. Said power of attorney is neither a return nor a negotiable instrument, and does not establish a prima facie case under the statute. In addition, the unsigned registration for Michigan taxes

listing Petitioner as member of CBS, along with Saul Lazare, does not constitute prima facie evidence.

In *Peterson v Department of Treasury*, 145 Mich App 445; 377 NW2d 887 (1985), it was found that “the record does not support a conclusion that petitioner was both an officer *and* responsible for the corporation's making of returns and payments of taxes during any period other than December, 1978, through December, 1979 [tax period in which the petitioner was both an officer and made returns and payments].” Further, in *Kosanke v Dep’t of Treasury*, MTT Docket No. 332392 (2010), the Tribunal stated the issue as follows: “The threshold issue to be determined is when did Trans Industries fail to pay the taxes due and whether Petitioner was, at that time, an officer who had control or supervision of, or responsibility for, making the payments.” In the present case, there is no evidence before the Tribunal of any tax specific involvement by Petitioner for the tax periods at issue.

The Informal Conference Recommendation issued by Respondent relies on *Gudeman v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued December 17, 2009 (Docket No. 284749), in determining that by signing the power of attorney, “Petitioner asserted and represented that he was a member who had responsibility for the company’s tax matters with the authority to

appoint another to represent CBS to the Department.” (P-12). The Tribunal finds, however, that *Gudeman* is inapplicable to the present case, as the power of attorney in *Gudeman* was not used to establish Respondent’s prima facie case. Rather, the petitioner in *Gudeman* was president and chief executive officer and had signed tax returns, in addition to signing the power of attorney. The signature on the tax returns was sufficient to establish Respondent’s prima facie case against Mr. Gudeman as a liable corporate officer. In the present case, no such signature on returns or payments by Petitioner exists, and a prima facie case has not been established and cannot be established by a signature on a power of attorney. Petitioner’s signature on a power of attorney may only be used as one of numerous indicia to potentially establishing liability as an officer who had control, supervision, or responsibility for the making of returns or payments. In this case, however, the power of attorney was signed six years after the tax periods in question and related solely to Petitioner’s desire to understand the underlying CBS tax liability for which he was being assessed member liability.

Given the above, the Tribunal finds that Respondent has failed to establish a prima facie case for the tax periods assessed. Assessment Nos. P482076, P482077, P482078, P482079, P482080, P482081, and P482082 are cancelled.

Further, the Tribunal finds that, in light of the circumstances surrounding Petitioner's signing the power of attorney and the lack of any prima facie evidence, awarding costs to Petitioner is appropriate. TTR 145(1) allows the Tribunal to order costs be remunerated to a prevailing party in an appeal before the Tribunal. The rule itself, however, provides no guidelines or criteria by which the Tribunal is to measure whether costs should be awarded. While MCR 2.625 provides courts with some criteria in determining whether an award of costs is appropriate, such direction is only applicable where an action or defense was frivolous, as provided by MCL 600.2591. (MCR 2.625(A)(2)) MCL 600.2591, contained in the Revised Judicature Act of 1961, however, "applies only to the organization and jurisdiction of the courts and to civil procedure." *Federal-Mogul Corp v Dep't of Treasury*, 161 Mich App 346, 367-368; 411 NW2d 169 (1987), citing *City of Birmingham v Oakland County*, 49 Mich App 299, 306-307; 212 NW2d 51 (1973). "Since this is an administrative proceeding before the Tax Tribunal, the [Revised Judicature Act] does not apply." *Federal-Mogul Corp, supra*, p 368. Thus, the decision to award costs is solely within the discretion of the Tribunal judge.

JUDGMENT

IT IS ORDERED that Assessment Nos. P482076, P482077, P482078, P482079, P482080, P482081, and P482082 are CANCELLED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in this Final Opinion and Judgment within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund within 28 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Petitioner shall be awarded costs pursuant to TTR 145.

IT IS FURTHER ORDERED that Petitioner shall submit to the Tribunal and Respondent within 14 days of the entry of this Final Opinion and Judgment a bill of costs for the costs incurred in the filing and prosecuting of this appeal. The bill of costs shall state separately each item claimed and a detailed description and accounting of the basis for claiming each item of cost. The amounts claimed shall also be verified by an affidavit of the party or authorized representative and the affidavit shall state that each item is correct and was necessarily incurred. See TTR 145.

IT IS FURTHER ORDERED that Respondent may respond to Petitioner's bill of costs within 14 days of the service of the bill of costs.

MICHIGAN TAX TRIBUNAL

By: B.D. Copping

Entered: December 12, 2012