

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

Gandolfo J. Verra,
Petitioner,

v

MTT Docket No. 448641
Assessment Nos. (34 Assessments)¹

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

FINAL OPINION AND JUDGMENT

INTRODUCTION

On November 30, 2012, Respondent filed a Motion for Summary Disposition under MCR 2.116(C)(10). On December 19, 2012, the parties filed a Joint Motion to Extend and Petitioner filed a Motion for Immediate Consideration of the parties' Motion, which were both granted on January 7, 2013. In the interim, on December 21, 2012, Petitioner filed a Response to Respondent's Motion for Summary Disposition, along with a request to supplement its Response consistent with the parties' Joint Motion to Extend filed on December 19, 2012.

¹ Assessment Nos. TG03895, TH08118, TH08119, TH08120, TH08121, TH08122, TH08123, TH08124, TH08125, TH08126, TH08127, TH08128, TH08129, TH08130, TH08131, TH08132, TH08133, TH08134, TH08135, TH08136, TH08137, TH08138, TH08139, TH08140, TH08141, TH34808, TH34809, TH45210, TH45211, TH45212, TH45213, TI53770, TJ21950, and TJ21951

Respondent contends that Petitioner was a corporate officer (i.e., Treasurer) and had control or supervision of, or responsibility for, making the returns or payments of taxes due for Cordia Communications Corporation (“Cordia”), and as such is liable under MCL 205.27a(5) for Cordia’s failure to pay (i) sales tax for the November 2008 to June 2011 tax periods and (ii) Michigan Business Tax (“MBT”) for the December 2009 and December 2010 tax periods. Respondent therefore requests that the Tribunal find that it is entitled to summary disposition pursuant to MCR 2.116(C)(10).

Petitioner contends that, although he was the Treasurer of Cordia for the tax periods at issue, he lacked “meaningful control, supervision or responsibility.” Petitioner therefore requests that the Tribunal deny Respondent’s Motion for Summary Disposition.

An informal conference was held on July 18, 2012. The Informal Conference Recommendation affirmed the assessments at issue. A Decision and Order of Determination, affirming the Informal Conference Recommendation, was issued on July 25, 2012. Respondent then issued the Final Assessments at issue against Petitioner on August 6, 2012, and Petitioner filed his appeal with the Tribunal on September 10, 2012.

The Tribunal has reviewed the Motion, Response, and supporting documentation and finds that granting Respondent's Motion, under MCR 2.116(C)(10), is appropriate.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner is a responsible corporate officer pursuant to MCL 205.27a(5). More specifically, Respondent states:

Petitioner in this case has already admitted all the facts necessary to show that he irrevocably crossed the Legislature's threshold of liability as articulated in [MCL 205.27a(5)]. The Tribunal no longer has the discretion to release the Petitioner from liability. Because of the Petitioner's admissions, there is no longer any genuine issue of material fact. Therefore, there is no reason to proceed to a hearing.

In support of its Motion, Respondent contends that Petitioner admitted, in his petition, which the Tribunal can rely on in rendering its decision on Respondent's Motion, that Petitioner (i) "was the Treasurer of Cordia during the tax periods in question," (ii) "signed tax returns that Cordia filed for most of the tax periods in question," and (iii) "was one of the officers who had check signing authority for Cordia during the tax periods in question." (Respondent's Motion for Summary Disposition and Brief in Support, pp 2-3.) In that regard, Respondent states:

Ordinarily, cases under MCL 205.27a(5) are fact intensive and require discovery proceedings. But the Petitioner in this case has already admitted all the facts necessary to show [that] he irrevocably crossed

the Legislature's threshold of liability as articulated in the statute. The Tribunal no longer has the discretion to release the Petitioner from liability. Because of the Petitioner's admissions, there is no longer any genuine issue of material fact. Therefore, there is no reason to proceed to a hearing. (Respondent's Motion for Summary Disposition and Brief in Support, p 4.)

In furtherance of its position, Respondent states that the statute (i) "does not require individuals to have full control over a company's finances in order for the individual to be liable . . ." and (ii) "does not even require the individual to be 'responsible' for the tax debts at issue." (Respondent's Motion for Summary Disposition and Brief in Support, p 4.) Instead, Respondent states that "he or she only needs have to have responsibility, *or* control, *or* supervision over either the company's tax returns *or* tax payments." (Respondent's Motion for Summary Disposition and Brief in Support, p 4.) (Emphasis included.) Additionally, Respondent states that although "Petitioner alleges in his November 2, 2012 Petition that 'more senior executive and principals' directed Cordia's tax responsibilities[,] . . . under Michigan law, the potential liability of other executives does not release the Petitioner from liability. (Respondent's Motion for Summary Disposition and Brief in Support, pp 6-7.)

Respondent submitted the following documentation to support its Motion for Summary Disposition and contention that Petitioner is liable under MCL 205.27a(5): (1) Cordia's 2008, 2009, and 2010 Annual Returns for Sales, Use, and

Withholding Taxes, signed by Petitioner on October 5, 2011; (2) Cordia's 2008, 2009, 2010, and 2011 Michigan Annual Reports listing Petitioner as Treasurer; (3) Cordia's Annual List of Officers, Directors, and Resident Agent, filed with the State of Nevada, for the July 2007 to July 2008, July 2008 to July 2009, July 2009 to July 2010, July 2010 to July 2011, and July 2011 to July 2012 tax years, listing Petitioner as Treasurer; (4) Cordia's 2008, 2009, 2010, and 2011 Florida Annual Reports listing Petitioner as Treasurer/Chief Financial Officer ("CFO"); and (5) Cordia's 2009 and 2010 U.S. Corporation Income Tax Returns, listing Petitioner as an officer, and evidencing Petitioner's compensation as an officer of the Cordia.

PETITIONER'S CONTENTIONS

Petitioner contends that he is not a responsible corporate officer pursuant to MCL 205.27a(5). Although Petitioner concedes that he was the Treasurer of Cordia during the tax periods at issue, Petitioner contends that he "effectively lacked 'control or supervision of, or responsibility for making the returns or payments' associated with the unpaid taxes at issue, as required by MCL 205.27a(5)." (Petitioner's Response to Respondent's Motion for Summary Disposition, p 1.) More specifically, Petitioner states:

In the context of assessing his control, supervision or responsibility with respect to Cordia's Michigan's Sales Tax and Business Tax returns and payments during the relevant tax periods, his title, check-signing authority and signature on tax returns were meaningless and

belied his utter lack of meaningful control, supervision or responsibility. (Petitioner's Response to Respondent's Motion for Summary Disposition, pp 1-2).

In furtherance of his position, Petitioner contends that he "was directed by more senior executives and principals of Cordia as to the timing of Cordia's tax return filings and the allocation and deployment of Cordia's available funds . . ." and as such, "did not possess the requisite degree of control over Cordia's tax reporting and payment functions" to be liable under MCL 205.27a(5). (Petitioner's Petition, paragraphs 5d-e.)

In Petitioner's response to Respondent's Motion, Petitioner also requested:

Leave of the Tribunal to supplement his response to Respondent's Motion to Dismiss with additional facts in support of this Motion, consistent with the Stipulation between Petitioner and Respondent . . . in which they agreed to extend the due date of Petitioner's response to Respondent's Motion to Dismiss to and including January 22, 2013.²

FINDINGS OF FACT

1. Petitioner is an individual who legal address is 326 Oscawana Lake Rd., Putnam Valley, NY 10579.
2. The taxes in controversy were assessed to Petitioner as a responsible corporate officer for Cordia's failure to file and/or pay tax, pursuant to

² As indicated above, the Tribunal entered an Order on January 7, 2013, granting the parties' Joint Motion to Extend, and Petitioner's Motion for Immediate Consideration, allowing Petitioner to file his response by January 22, 2013. Petitioner, however, filed his response on December 21, 2012. And although Petitioner requested leave of the Tribunal to supplement his response, Petitioner did not file a supplemental response nor would not have been entitled to do so under TTR 230.

MCL 205.27a(5), in the aggregate amount of \$73,076.14, plus interest in the aggregate amount of \$6,901.89, plus penalties in the aggregate amount of \$19,574.77 for sales tax for the November 2008 to June 2011 tax periods and MBT for the December 2009 and December 2010 tax periods.

3. Petitioner was the Treasurer of Cordia during the tax periods at issue and signed, in such capacity, Cordia's 2008, 2009, and 2010 Annual Returns for Sales, Use, and Withholding Taxes on October 5, 2011.
4. Petitioner was one of the officers vested with check signing authority on behalf of Cordia during the tax periods in question.
5. An informal conference was held on July 18, 2012. The Informal Conference Recommendation held that Petitioner was an officer, who had tax specific responsibility, and as such, found Petitioner liable for the assessments at issue.
6. The Decision and Order of Determination, dated July 25, 2012, upheld the Informal Conference Recommendation.
7. Respondent issued the Final Assessments for the subject assessments to Petitioner for the tax periods at issue on August 6, 2012.

APPLICABLE LAW

Respondent 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. See *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. See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

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 nonmoving party. See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider. See *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. See *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. See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

CONCLUSIONS OF LAW

Michigan's corporate officer liability statute, MCL 205.27a(5) 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. 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. (Emphasis added.)

Once prima facie evidence is submitted (i.e., a corporate officer's signature on a return or negotiable instrument submitted in payment of taxes), the burden of proof shifts to the corporate officer to rebut the presumption that he or she is responsible for the corporation's failure to pay tax, by producing "evidence sufficient to convince the trier of fact that the nonexistence of the presumed fact is more probable than its existence." *Widmayer v Leonard*, 422 Mich 280, 287; 373 NW2d 538 (1985).

In this case, Petitioner concedes that he was an officer of Cordia during the tax years at issue and Respondent provided Petitioner's signature on some tax returns during the tax periods at issue. As such, the Tribunal finds that Respondent provided relevant documentary evidence bearing Petitioner's signature on some tax returns and has therefore submitted prima facie evidence to establish the presumption that Petitioner is a responsible corporate officer for the tax periods at issue under MCL 205.27a(5). Accordingly, the burden is shifted to Petitioner to rebut the presumption that he is a responsible corporate officer under MCL 205.27a(5). See *Dore v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2003 (Docket No. 238344).

"Prima facie evidence" is defined as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." Black's Law Dictionary (9th ed, 2009). "Prima facie evidence is that degree of proof which, unexplained or uncontradicted, is alone sufficient to establish the truth of a legal principle asserted by a party." *People v Licavoli*, 264 Mich 643, 653; 250 NW 520 (1933).

As indicated above, there is no dispute that Petitioner was an officer of Cordia during the tax periods at issue. The Tribunal, therefore, must determine

whether Petitioner had control or supervision of, or responsibility for, making Cordia's tax returns or tax payments.

In an effort to rebut the presumption that he is a responsible corporate officer, Petitioner contends that, although admitting to having check signing authority and signing tax returns for the tax periods at issue, he "was directed by more senior executives and principals of Cordia as to the timing of Cordia's tax return filings and the allocation and deployment of Cordia's available funds . . ." and as such, "did not possess the requisite degree of control over Cordia's tax reporting and payment functions" to be liable under MCL 205.27a(5). (Petitioner's Petition, paragraphs 5d-e.)

The statutory presumption is not capricious. An officer's signature on a return is direct indicia that he or she had control or supervision of, or responsibility for, making the returns or payments. Although Petitioner contends that he "did not possess the requisite degree of control," the statute is not bifurcated by different degrees, nor does the statute require "meaningful control, supervision or responsibility." On the contrary, a plain reading of MCL 205.27a(5) indicates that any officer "who the department determines, based on either an audit or an investigation, [has] control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure."

Here, Respondent provided prima facie evidence to establish the presumption that Petitioner is a responsible corporate officer pursuant to MCL 205.27a(5). Although said presumption is rebuttable, Petitioner failed to set forth specific facts and/or present documentary evidence showing that a genuine issue of material fact exists. Petitioner's entire defense hinges on the fact that there were "more senior executives and principals" who determined when and how the company's tax returns and payments would be filed. The Tribunal, however, finds such argument to be unpersuasive, since the statute "does not require that a corporate officer have exclusive authority for all tax affairs of a corporation for derivative liability to apply . . .," see *Rolinski v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2010 (Docket No. 291667), p 3, and the liability of another officer does not relieve a responsible corporate officer's personal liability for the corporation's unpaid taxes since the statute specifically states that "any" officer who "who the department determines . . . [has] control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure."

As such, based on the pleadings and documentary evidence filed by the parties in the light most favorable to Petitioner (i.e., the nonmoving party), the Tribunal finds that Petitioner, as an officer of Cordia, had control or supervision of,

or responsibility for, making Cordia's tax returns or tax payments and is therefore personally liable under MCL 205.27a(5) for Cordia's failure to pay the tax due as represented by the assessments at issue. For the above reasons, the Tribunal finds that granting Respondent's Motion for Summary Disposition under MCR 2.116(C)(10) is appropriate in this case. Therefore,

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

IT IS FURTHER ORDERED that the assessments at issue are **AFFIRMED**.

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

MICHIGAN TAX TRIBUNAL

By: Kimbal R. Smith III

Entered: February 14, 2013