

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

Clifford J. Dovitz,
Petitioner,

v

MTT Docket Nos. 448699

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

ORDER GRANTING RESPONDENT'S MOTION
FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On October 25, 2012, Respondent filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Petitioner filed a response to Respondent's Motion on November 15, 2012.

The Tribunal finds that it has jurisdiction over the subject matter presented in the above-captioned case. Further, the Tribunal finds that Respondent's Motion for Summary Disposition pursuant to MCR 2.11(C)(10) is proper in this instance because there is no issue as to any material fact. More specifically, Petitioner is appealing (1) the assessment of the Michigan Business Tax (MBT) to Cherry Hill Land Development LLC (Cherry Hill) and (2) corporate officer liability, which would require Petitioner to pay the tax which Respondent claims that Cherry Hill

owes. Respondent issued Assessment No. TB35780 on August 27, 2012, and asserts that Petitioner is liable in the aggregate amount of \$4,835.25 (including tax, interest accrued and penalty). The subject taxes are as follows:

Assessment	Date Issued	Tax Period	Tax	Interest*	Penalty
TB35780	8/27/12	12/08	3,137.00	561.00	1,137.25

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

The Tribunal finds that Petitioner's contentions are without merit because Cherry Hill failed to appeal its MBT assessment in a timely manner rendering that assessment final under MCL 205.22, and Petitioner concedes that he is a corporate officer of Cherry Hill, which requires the affirming of his corporate officer liability (i.e., Assessment No. TB35780).

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner is a liable corporate officer of Cherry Hill because Petitioner signed various corporate documents, specifically, the 2008 tax return. As such, Petitioner is liable as a corporate officer for the 2008 taxes, which remain unpaid. Respondent asserts that it sent Petitioner a Letter of Inquiry – Notice of Corporate Officer Liability on March 26, 2012, to which Petitioner did not respond and Respondent issued an Intent to Assess against Petitioner. Respondent further claims that Petitioner requested an Informal Conference, where he

acknowledged that he was a member of Cherry Hill, and did not deny any of the factual elements required under MCL 205.27a(5). He raised only a legal issue, relying on a federal bankruptcy case that was decided before the Legislature amended MCL 205.27a(5) in 1986 to include all “taxes administered under [the Revenue Act].” . . .

Respondent states that at Petitioner’s Informal Conference, Petitioner argued “only that the officer liability statute does not apply to taxes due under the MBT.” As a result, the hearing referee found that the legal argument had no merit and affirmed the assessment at issue. Respondent also states that Petitioner attempted to cite pending legislation, which is not binding, in order to support his case. Finally, Respondent states that the Final Assessment, TB35780, was issued to Cherry Hill on March 28, 2011, and is now final. As a result, Petitioner may not challenge the assessment now as Cherry Hill did not appeal it in a timely manner. As such, Respondent asserts that the appeal should be dismissed pursuant to MCR 2.116(C)(10).

PETITIONER’S CONTENTIONS

Petitioner asserts that he cannot be liable for the MBT because Cherry Hill did not owe taxes to Respondent for the 2008 tax year for various reasons. Petitioner further contends that he “is entitled to judgment under MCR 2.116(I)(2) because the officer liability statute, MCL 205.27a(5), does not apply to the [MBT]. . . .”

Petitioner does not contest that he was a corporate officer of Cherry Hill. Petitioner does not contest that he “signed returns and was listed as the tax matters partner.” Instead, Petitioner claims that the Revenue Administrative Bulletin (RAB) 1989-38 specifically applies corporate officer liability only to those taxes listed in the Bulletin (Sales Tax, Use Tax, Income Tax and Motor Fuel Tax). Petitioner further contends that RAB 1989-38 has not been replaced or updated to include the MBT and therefore, it seems that Petitioner is concluding that the legislature must not have intended corporate officer liability to extend to other taxes, such as the MBT. Petitioner further asserts that corporate officer liability does not attach to MBT as there are no published cases specifically addressing the issue. In addition, Petitioner argues that the officer liability statute of the MBT applies only to trust fund taxes under *In re Robert J. Helder*, 43 B.R. 40 (Bankr W.D. Mich. 1984).

FINDINGS OF FACT

Respondent issued a corporate officer liability assessment against Petitioner on August 27, 2012. Assessment No. TB35780 pertains to Michigan Business Tax for the 2008 tax year. Assessment No. TB35780 assesses tax, penalty, and interest in the amount of \$4,835.25 against Petitioner. The assessment is based on the underlying assessments against Cherry Hill and are issued pursuant to MCL 205.27a(5). Said assessment was not timely appealed and thus is final and binding.

Petitioner further openly acknowledges that he was an officer of Cherry Hill during the relevant tax years at issue.

APPLICABLE LAW

Though Respondent filed a Motion to Dismiss, Respondent presumably moves for summary disposition pursuant to MCR 2.116(C)(10), which provides the following grounds upon which a summary disposition motion may be based: “Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” There is no specific tribunal rule governing motions for summary disposition. As such, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such a motion. TTR 111(4).

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).

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).

CONCLUSIONS OF LAW

Cherry Hill failed to file a timely appeal as to the assessment of the MBTA, and therefore the assessment is final under MCL 205.22. As such, the sole issue before the Tribunal is whether Petitioner is a liable corporate officer. The Tribunal finds Petitioner's arguments to be misguided. When the MBT was enacted on January 1, 2008, it replaced the Single Business Tax Act, Act 228 (1975). Petitioner's reliance on *In re Helder* is misplaced as the 1984 case involved the Single Business Tax Act, which did not address corporate officer liability. The case at bar presents a question of corporate officer liability and MCL 205.27a(5) apply.

Further, the drafters of the RAB could not have contemplated the MBT at the time the RAB was enacted and the RAB does not explicitly exclude any tax not listed. It states that "[t]he officer liability provision of Michigan's Revenue Act [MCL 205.27a(5)], has been extended to all taxes administered by the Revenue Act." (Emphasis added.) Though the RAB does list examples of taxes which apply, the list is not all inclusive. For example, the Tribunal determined that the Single Business Tax Act, which is not one of the enumerated examples in the RAB, is included in the contemplation of the RAB. *See Gilbert v Mich Dep't of Treasury*, MTT Docket No. 328819 (2010). Finally, courts have consistently held that RABs are not law, they are guidelines. *See e.g. One's Travel, Ltd v Mich Dep't of Treasury*, 288 Mich App 48, 65; 791 NW2d 521 (2010); *Kmart Mich Prop*

Servs, LLC v Mich Dep't of Treasury, 283 Mich App 647, 654; 770 NW2d 915

(2009). As such, the Tribunal must follow the applicable statute in this case, MCL 205.27a(5).

The clear language of MCL 205.27a(5) states:

If a . . . limited liability company . . . [is] 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.

See e.g. Livingstone v Dep't of Treasury, 434 Mich 771; 456 NW2d 684 (2009)

(holding that an officer's personal liability for taxes derived solely from the corporation's failure to pay them and was not separate or distinct from the corporation's liability). *See also, Elsheick v Dep't of Treasury*, 225 Mich App 575; 571 NW2d 570 (1997); *Keith v Dep't of Treasury*, 165 Mich App 105; 418 NW2d 691 (1987). Accordingly, as Petitioner was a managing member of Cherry Hill, and signed official documents in his capacity as managing member, he is personally liable for Cherry Hill's failure to pay the 2008 MBT tax as well as interest and penalties.

Finally, courts have consistently held that pending legislation has no effect; therefore, Petitioner's argument regarding SB-1037 is misguided and will not be considered. *See Dean v Dean*, 175 Mich App 714; 438 NW2d 355 (1989).

In conclusion, the 2008 assessment to Cherry Hill was not appealed and therefore, became final. Petitioner does not dispute that he was a managing member of Cherry Hill. Finally, Petitioner does not raise any valid arguments as to his liability of Cherry Hill's unpaid taxes. Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue of material fact. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 655 NW2d 468 (2003). The Tribunal finds that no genuine material fact exists in this case. Therefore, the granting of summary disposition on behalf of Respondent under MCR 2.116(C)(10) is appropriate. Therefore,

IT IS ORDERED that Respondent's Motion for Summary Disposition under MCR 2.116(C)(10) is GRANTED.

IT IS FURTHER ORDERED that Assessment No. TB35780 is AFFIRMED.

MICHIGAN TAX TRIBUNAL

By: Kimbal R. Smith III

Entered: December 10, 2012