

OHIO BOARD OF TAX APPEALS

Terri Johnson,)
) CASE NOS. 2003-M-2113
) 2004-M-605
 Appellant,)
) (SALES TAX PERSONAL
 vs.) LIABILITY)
)
 Thomas M. Zaino,)
) DECISION AND ORDER
 Tax Commissioner of Ohio,)
)
 Appellee.)

APPEARANCES:

For the Appellant - Dean Edward Hines Co., LPA
Dean E. Hines
5335 Far Hills Avenue, Suite 313
Kettering, Ohio 45429

For the Appellee - Jim Petro
Attorney General of Ohio
Duane M. White
Assistant Attorney General
State Office Tower-16th Floor
30 East Broad Street
Columbus, Ohio 43215

Entered December 3, 2004

Ms. Jackson, Ms. Margulies, and Mr. Eberhart concur.

These causes and matters come to be considered by the Board of Tax Appeals upon two notices of appeal filed on December 19, 2003 and July 16, 2004. These appeals are taken from final orders of the Tax Commissioner, appellee, which found appellant, Ms. Terri Johnson, to be liable for the sales tax liability of Childhood Images, Inc. for the periods of July 1998 through August

1998, March 1999 through August 1999, and October 1999 through October 2000.¹

The matter is considered by the Board of Tax Appeals upon the notices of appeal, the statutory transcripts certified to this board by the Tax Commissioner, the record of the evidentiary hearing and the legal argument provided by counsel.

Childhood Images, Inc., a children and family photography studio, was owned by three shareholders: appellant, a 50 percent shareholder, and David Graham and Beth Graham, who together held the remaining shares. Appellant had experience in children's photography, having previously worked for another studio in the area, but little business experience. David Graham is a certified public accountant and Beth Graham is an experienced business office manager. When the business was originally envisioned, each shareholder was to have their respective areas of control. Appellant was to be the photographer, David Graham was to provide financial oversight, and Beth Graham was to schedule appointments, arrange for the purchase of the pictures, and provide day-to-day management of the business operation. David Graham was named secretary/treasurer of the corporation and Beth Graham and appellant agreed to each act as president of the corporation in alternating years.

¹ Two notices of appeal have been filed in this matter because two final determinations were issued. Apparently, the petition for reassessment on assessment no. 7020617393 was not included in the final determination issued October 29, 2003. The petition was found and a final determination was issued May 20, 2004. Appellant challenged the separate final determination by appeal filed July 16, 2004. Counsel then informed the board that the testimony presented by appellant at the evidentiary hearing convened in BTA No. 2003-M-2113 would be essentially the same. Thus, our determination disposes of both appeals.

According to the testimony presented at hearing, the business progressed as planned for a time. Appellant handled the artistic end of the business. While she held the title of president (for at least half of the years the corporation was in existence), and had check-writing authority, appellant paid little attention to the business end of the operation. Bills and financial notices were left in a bin for Beth Graham to take home to her husband. David Graham provided financial services to the corporation when he was home; he was employed fulltime by a local car dealership. Monthly expenses such as rent and utilities were paid by either Beth or David Graham. Appellant wrote checks only when the need was immediate.

Sometime during 2000, appellant realized that certain financial responsibilities of the corporation were not being met. The Grahams were having marriage difficulties and Beth Graham was no longer coming to work regularly. Appellant opened some notices and realized sales tax was not being paid to the state of Ohio. She immediately attempted to rectify the situation by hiring an independent accountant, but could not file the returns until she obtained financial records from the Grahams. She testified that it took her months to obtain those records. Once the records were obtained, sales tax returns were filed, but taxes were not remitted.

For a period of time at the end of 2000 through mid-2001, appellant both reported and paid sales tax. In mid-2001, the corporation's lease was terminated and, instead of moving the business, appellant and Beth Graham made

the decision to close. Sometime after the close, the assessments here under consideration were issued.

The Tax Commissioner found appellant to be responsible under R.C. 5739.33 for the corporation's failure to pay sales tax due the state. That section provides:

“If any corporation *** required to file returns and to remit tax due to the state under this chapter fails for any reason to make the filing or payment, any of its employees having control or supervision of or charged with the responsibility of filing returns and making payments, or any of its officers *** who are responsible for the execution of the corporation's *** fiscal responsibilities, shall be personally liable for the failure.”

We begin our consideration of this matter by acknowledging the duties imposed upon the Board of Tax Appeals when reviewing a decision of the Tax Commissioner. The Tax Commissioner's findings are entitled to a presumption of correctness and it is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

As to the law relating to the responsibilities of corporate officers for the delinquencies of a corporation, the general standard, and the one revealed

through a review of case law on the subject, is that to be held personally responsible for the liabilities of a delinquent corporation, a person must be responsible for or in charge of the corporation's fiscal duties, or charged with supervision of such duties. *Weiss v. Porterfield* (1971), 27 Ohio St.2d 117; *Lenart v. Lindley* (1980), 61 Ohio St.2d 110; *Spithogianis v. Limbach* (1990), 53 Ohio St.3d 55; *McGlothin v. Limbach* (1991), 57 Ohio St.3d 72; *DeLassus v. Tracy* (1994), 70 Ohio St.3d 218.

Even if a person does not actually participate in or supervise the corporation's fiscal duties, if his position is one that would ordinarily be responsible for such duties, then the officer may be found to be responsible to the state. *Spithogianis*, supra; *McGlothin*, supra; *Granger v. Tracy* (June 11, 1999), BTA Nos. 1998-M-242, 577, unreported.

While appellant challenges the commissioner's conclusion that she fell within the ambit of those persons responsible for the execution of Childhood Images, Inc.'s fiscal responsibilities, she provides little evidence which disputes the commissioner's finding. Appellant admits that she held the title of president of the corporation, had check-writing authority, and, when pressed into action, filed sales tax returns and remitted sales tax to the state. Appellant argues, however, that she should be excused from the defaulting corporation's liabilities because she did not intend to manage the business activities of the corporation. She argues that the fiscal responsibilities were assumed by David Graham, a certified public accountant who, as treasurer, was charged with the fiscal affairs of the

corporation. As David Graham accepted the duties of treasurer, appellant argues, he should be the person liable for the sales tax delinquencies.

The Supreme Court has held:

“The General Assembly intended, through the enactment of R.C. 5739.33, to hold those officers or employees who were in charge of the operations of a defaulting corporation personally liable for unpaid sales tax if such persons filed returns or paid taxes, or controlled or supervised others who performed those tasks, or had responsibility for such tasks. R.C. 5739.33 does not permit responsible officers or employees to escape liability by delegating those duties to others.” *Spithogianis*, supra, at 57.

Childhood Images, Inc. was a small operation, with only two employees. Appellant was involved in every aspect of the operation. Appellant was aware of her shortcomings in the business arena and believed her shortcomings would be balanced against the strengths of those she chose to do business with. However, her involvement in the operations of the business, from opening mail, writing checks for certain purchases, and obtaining records, evidences her responsibility for fiscal affairs. Her position as president required her to take an active role in the entire business, or to delegate the responsibilities to others. The Supreme Court has concluded that responsibility for the payment of sales tax cannot be delegated. *Spithogianis*, supra; *McGlothin*, supra.

Our findings herein are not intended to indicate that this board considers appellant to be the only one responsible for the corporation’s unpaid tax liabilities. However, R.C. 5739.33 does not require the commissioner or this board to choose the most responsible person within the corporate hierarchy, but

provides that any officer or employee who is in a position to make tax remittances but fails to do so may be found derivatively liable. *DeLassus*, supra (R.C. 5739.33 is broad in its scope and encompasses those officers who, by virtue of their ownership, title, and authority, possess the requisite responsibility to be held liable.).

Given the testimony, the evidence, and the case law, this board finds that the Tax Commissioner was correct when he found appellant to be a responsible corporate officer. Therefore, the final order of the Tax Commissioner is affirmed.

ohiosearchkeybta