

OHIO BOARD OF TAX APPEALS

Carl Smith,)
)
 Appellant,) CASE NO. 2004-R-371
)
 vs.) (SALES TAX)
)
 William W. Wilkins,) DECISION AND ORDER
 Tax Commissioner of Ohio,)
)
 Appellee.)

APPEARANCES:

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Entered September 30, 2005

Ms. Margulies and Mr. Dunlap concur. Mr. Eberhart dissenting.

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by Carl Smith. Mr. Smith appeals from a decision of the Tax Commissioner, in which the commissioner affirmed three previously issued assessments, nos. 7030615640, 7030615641, and 7030615642, against the appellant. The commissioner found that Mr. Smith was a responsible party liable under R.C.

5739.33 for the unpaid sales tax of Fairfield Wood Products, Inc. for the periods July 1, 1999 through July 31, 1999, August 1, 1999 through August 31, 1999, and September 1, 1999 through September 30, 1999.

The matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript (“S.T.”) certified to this board by the Tax Commissioner, the record of the evidentiary hearing (“H.R.”) held in this matter, including exhibits, and the briefs of counsel. At the hearing, Mr. Smith appeared and testified on his own behalf. The Tax Commissioner was represented by counsel and relied upon the statutory transcript, presenting no additional evidence aside from cross-examination.

We begin by observing that the Supreme Court of Ohio has determined that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is incumbent upon a taxpayer challenging a decision of the Tax Commissioner to rebut the presumption and establish a clear right to the relief requested. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Ball Corp. v. Limbach* (1992), 62 Ohio St.3d 474; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *Natl. Tube v. Glander* (1952), 157 Ohio St. 407. The burden is on the taxpayer to present credible evidence to support its claim that an assessment is in error. *Kern, supra*; *May Co. v. Lindley* (1982), 1 Ohio St.3d 6; *Federated Dept. Stores v. Lindley* (1983), 5 Ohio St.3d 213.

Where no competent and probative evidence is developed and presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern, supra; Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp., supra*. Mindful of such burden, the board proceeds with its determination.

When a corporation fails to make payment of sales tax due the state of Ohio, R.C. 5739.33 imposes personal liability on certain corporate officers and employees deemed "responsible." This liability is derivative in nature and arises from the corporation's primary liability previously found to exist. R.C. 5739.33, as in effect during the period in question, stated as follows:

"If any corporation or business trust required to file returns and to remit tax due to the state under the provisions of this chapter fails for any reason to make such 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 or trustees who are responsible for the execution of the corporation's or business trust's fiscal responsibilities, shall be personally liable for the failure. The dissolution, termination, or bankruptcy of a corporation shall not discharge an officer's, employee's, or trustee's liability for failure of the corporation or business trust to file returns or remit tax due. The sum due for the liability may be collected by assessment."

In interpreting the foregoing statute, the Supreme Court of Ohio determined that officers or employees can be found personally liable only when they "**** have control or supervision of or are charged with the responsibility of filing

returns and making payments.” *Kihm v. Lindley* (1982), 70 Ohio St.2d 76; *Weiss v. Porterfield* (1971), 27 Ohio St.2d 117, 121. See, also, *Oblonsky v. Limbach* (Jan. 29, 1988), Trumbull App. No. 3847, unreported. Liability also extends to those persons who have control over those activities. *Willis v. Lindley* (1980), 61 Ohio St.2d 356. An officer is not liable because of a title alone. *Hile v. Limbach* (1989), 44 Ohio St.3d 197. The officer must exercise sufficient control or supervision over filing returns and making payments to be held liable for the unpaid sales tax obligation of the corporation. *Smith v. Limbach* (1992), 64 Ohio St.3d 473.

The Supreme Court further expanded upon that interpretation by holding that a responsible officer or employee is one who has knowledge of the statutory duty to file taxes and the authority to write checks. See *Lenart v. Lindley* (1980), 61 Ohio St.2d 110. See, also, *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; *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855.

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.

Mr. Smith testified that prior to going into business with Jack Reynolds, he had owned his own woodworking business for thirty-eight years. H.R. 27.

Therefore, as a sole proprietor, Mr. Smith was aware of the need to file sales tax returns and to remit sales taxes collected. Id.

Then, Carl Smith and Jack Reynolds decided to go into business together and formed a corporation, Fairfield Wood Products, Inc. H.R. 10. Carl Smith was vice-president, secretary, and a forty-nine percent shareholder. H.R. 15, 18, 19, 28, 35; Ex. D; Ex. F. Jack Reynolds was president, treasurer, statutory agent, and a fifty-one percent shareholder. H.R. 13-14, 18; Ex. E.

It was Mr. Smith's responsibility to run the production shop, building the product out of wood and delivering it to the customer. H.R. 11; Ex. B. For these services, Mr. Smith was paid a modest salary. H.R. 31. To assist him in producing the product, Mr. Smith had two employees that he hired and supervised, his two sons, whom he paid by check from documents prepared by Jack Reynolds' office. H.R. 33, 37.

Mr. Smith testified that he never had the responsibility of making sales, or billing or collecting from clients. H.R. 20, 29. He never supervised anyone who did. H.R. 21. Mr. Smith stated that he never prepared or signed the sales tax returns, nor wrote checks to the state of Ohio for sales tax. H.R. 21; Ex. A. Although he had check writing authority, and was required to counter-sign checks in excess of \$20,000, Mr. Smith testified that the only checks he ever wrote were payroll checks to his two sons. H.R. 32, 35, 37.

Mr. Reynolds was responsible for doing the marketing, the bookkeeping, customer relations, and corporate oversight. H.R. 14; Ex. B. According to Mr. Smith,

Mr. Reynolds “was supposed to take care of all the paperwork.” H.R. 36. Mr. Reynolds hired a secretary, Mary Hart, to assist him in making sales, billing, and preparing and filing the sales tax returns. H.R. 23, 30, 33. Mr. Smith had no supervisory authority over Ms. Hart. H.R. 23. The books and records were located at Mr. Reynolds’ office for his other business, some three miles away from the production facility where Mr. Smith worked. H.R. 34, 36.

Mr. Smith was unaware that the sales taxes had not been paid until contacted by the Department of Taxation some six months after the business was closed. H.R. 26. While the corporation was still in operation, Mr. Reynolds had informed Mr. Smith that the bills were getting paid. H.R. 31. Since he was getting paid, Mr. Reynolds assured him that the bills were getting paid, and a CPA was compiling and reviewing the paperwork, Mr. Smith saw no reason to doubt that the sales taxes were also getting paid. H.R. 28, 31.

The board finds Mr. Smith’s testimony to be forthright, credible, and truthful. Thus, the board finds that the record in this case does not support a finding that the appellant had the requisite supervision of, or control over, the filing of sales tax returns, or making the associated payments to be deemed to be a responsible party for the payment of sales taxes owed by the corporation, Fairfield Wood Products, Inc., pursuant to R.C. 5739.33. Therefore, based upon the facts before us, we conclude that Mr. Smith has met his burden of proof.

Accordingly, it is the decision of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and hereby is, reversed.

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