

Marjorie Pedala-Kocab,)	
Responsible Party of)	CASE NO. 95-G-223
Chester Scaffolding, Inc.,)	
)	
Appellant,)	
)	(SALES TAX)
vs.)	
)	
Roger W. Tracy,)	DECISION AND ORDER
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	Marjorie Kocab, <u>Pro se</u> 7285 Culver Blvd. Mentor, Ohio 44060
For the Appellee	-	Betty D. Montgomery Attorney General of Ohio By: Janyce C. Katz Assistant Attorney General 16th Floor - State Office Tower 30 East Broad Street Columbus, Ohio 43226-0410

Entered March 14, 1997

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This matter came to be considered by the Board of Tax Appeals upon a notice of appeal filed herein on March 17, 1995, by the above-named appellant from a final order of the Tax Commissioner dated February 2, 1995, wherein said official modified a sales tax assessment previously levied against the appellant as a responsible party of Chester Scaffolding, Inc.

Appellee's decision reads, in pertinent part, as

follows:

"Marjorie Pedala-Kocab was assessed personally as a responsible party of Chester Scaffolding, Inc., pursuant to R.C. 5739.33, for unpaid sales tax liability incurred by the corporation for the period January, 1986 through December, 1988 and April through August, 1989, additional late filing charges for August, 1989, and for preassessment interest on January, 1986 through December, 1988. A timely petition for reassessment was filed.

"It is determined that John Pedala, the owner and operator of the business, died in July, 1988. Therefore, that portion of the assessment which relates to periods prior to August 1, 1988 must be cancelled because the petitioner was not a responsible party. Deduct \$47,180.86 in sales tax, \$7,077.13 in penalty on the tax, \$1,367.77 in preassessment interest, and \$233.16, the penalty on the interest.

"The petitioner contends that she did not work at the Brook Park business location and that she left the company business at Painesville on November 9, 1990. However, as vice-president of the corporation, she was aware of the responsibility of the corporation to remit sales taxes collected to the State of Ohio. The Tax Commissioner finds that Majorie Pedala-Kocab was a party made liable by R.C. 5739.33 for periods assessed after August 1, 1988.

"Therefore, it is the order of the Tax Commissioner that the assessment shall stand as adjusted in the following amounts:

	<u>Assessment</u>	<u>Penalty</u>	<u>Total</u>
(Sales Tax)	\$9,629.05	\$2,560.96	\$12,190.01
(Additional Charge)	289.60	144.80	434.40
(Preassessment Int.)	186.66	-0-	<u>186.66</u>
	Total		\$12,811.07

"The unpaid amount of tax and additional charge shall bear interest as prescribed by law from June 30, 1992 to the date of payment."

The appellants notice of appeal reads, in pertinent part, as follows:

"* * * At this time, I, Marjorie Kocab, the assessee, wishes to appeal this matter as described in the final determination. Through the contents of this letter along with documentation attached it is my belief that the findings in the determination should be reversed. The correct and only responsible party in this matter is Florence Pedala.

"As stated in the determination John Pedala, owner and operator of the business died in July 1988, and the assessee was not responsible party for the time period to that date. The assessee also claims that after that period she did not become the owner or operator of said business. Therefore she should not be held responsible for anytime after John Pedala's death. The party who took over ownership and operation of the business is Florence Pedala.

"Florence Pedala was sole beneficiary of John Pedala's estate and continued to operate the business as sole owner and president of the corporation. This statement can be supported by the corporate record book and papers filed by the corporation. I have recently spoken with the attorney that was involved in the transfer of the estate and corporation. He is currently searching for documentation to support this claim and will forward it to me when he has located it.

"Florence Pedala was active in the corporation on a daily basis, fully knew of all liabilities incurred by the corporation and had the final say in all corporate business. This can be supported by paychecks drawn on the company, letters sent to her by financial institutions and employees of the corporation. Employees have been contacted and are willing to give testimony as to Florence Pedala's involvement in the company.

"Attached to this letter you will find copies of documents in my possession to prove that the sole responsibility lies with Florence Pedala. Exhibit #1 contains copies of paychecks drawn on the corporation at the location where the taxes in question are due. This shows her involvement in the corporation at that location. Exhibit #2 contains a letter dated the 2nd of January 1991 from the company's bank addressed to Florence Pedala as President of the corporation. This proves not only that she is president but was responsible for the corporate affairs and banking of the business. Exhibit #3 contains copies of checks from Florence Pedala's personal account. This shows that Florence Pedala previously paid taxes out of her personal monies and thus admits to being responsible for paying them. Exhibit #4 contains two pages of an assessment sent in 1992 to Florence Pedala for the same taxes in question. According to the information I have received this assessment was not petitioned in a timely fashion and therefore Florence Pedala must be in agreement with her responsibility in this matter.

"Based on the new information provided in this letter, I am appealing the final determination. I believe that the enclosed

information along with future testimony if needed will bring about a reversal of the assessment against myself. * * *."

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript furnished by the Tax Commissioner, the testimony and evidence presented at the hearing before this Board, and the briefs of the parties.

First, the Board notes that the findings of the Tax Commissioner are presumptively valid. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St. 3d 221. Thus, our mandate is to determine whether the Tax Commissioner's actions were performed in good faith and in the exercise of sound judgment. The Board also notes that it is the taxpayer who has the affirmative duty to come forward and prove the Tax Commissioner's action and findings are unreasonable or unlawful. Id.

Appellant was assessed as a responsible party pursuant to R.C. 5739.33, which at the time of the assessment, provided in pertinent part, as follows:

"If any corporation * * * required to file returns and to remit tax due to the state under the provisions of 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 or trustees who are responsible for the execution of the corporation's * * * fiscal responsibilities, shall be personally liable for the failure.
* * *."

The Ohio Supreme Court, in interpreting the foregoing statute, has held that officers or employees can be found personally liable when they "* * * have control or supervision of or are charged with the responsibility of filing returns and making payments." Weiss v. Porterfield (1971), 27 Ohio St. 2d 117, 121. Both this Board and the Supreme Court have 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 Oblonsky v. Limbach (Jan. 7, 1987), B.T.A. Case No. 84-C-666, unreported; Lenart v. Lindley (1980), 61 Ohio St. 2d 110. Further, a corporate officer who either files or pays taxes, or controls or supervises others who perform those tasks, may not escape liability under R.C. 5739.33 by simply delegating those duties to others. Spithogianis v. Limbach (1990), 53 Ohio St. 3d 55; McGlothin v. Limbach (1991), 57 Ohio St. 3d 72.

At the hearing before this Board the appellant testified as to her duties and responsibilities at Chester Scaffolding, Inc." Prior to July, 1988, the appellant's father, John Pedela, was the owner and operator of the business which had four locations, one in Painesville, Akron, Columbus and Cleveland. ¹ After his death in 1988, his wife, Florence Pedela, inherited the business and became president. The appellant was the head administrator and her husband was manager. Although the appellant used the title "vice president," she claims that she was never an officer of the corporation. The title was used merely for convenience when trying

¹The Akron location ceased business operations on June 1, 1988.

to obtain information. When she was shown a corporate resolution in the statutory transcript naming her vice president of administration, the appellant stated that she had never seen the document.

The appellant worked at the Painesville location where the corporate headquarters were also located. She described her duties as compiling information for her mother, Florence; compiling everything for the accountant such as bills, taxes, accounts receivable and accounts payable; paying bills, answering phones and filing. (R. 10) She testified that she had check writing authority for the Painesville branch only. She did not have check writing authority for any of the other branches. Appellant admits she filed and signed sales tax returns for the Painesville Branch, but not for the other two. However, the decision on which bills to pay rested solely with Florence. When questioned whether she could write checks without first going through Florence, she stated:

"No, I could not. If I did that, I would be out the door with no job. Everything had to be listed with the amounts and the pay dates of the due dates of the bills. And she would tell me with a check mark next to them which ones she wanted to send out. After I wrote the checks, I was to give them to her to make sure they were the right amounts, and then I would mail them out."

The appellant eventually quit the company because Florence was not paying the bills. Consequently, although the appellant knew that taxes were due, she was not authorized to pay the bills. She testified that Florence was paying her personal

bills such as American Express and Visa, and taking vacations, however, at the same time she was not paying some of the employees.

The Tax Commissioner asserts appellant's check signing authority and signature on sales tax returns compels us to find appellant liable. However, we do not find these facts to be sufficient grounds to hold appellant responsible for the tax obligations. In Hillard v. Tracy (Feb. 8, 1995), B.T.A. Case No. 93-N-483, unreported, we considered a situation similar to the one in the instant matter. Therein, the assessed party, the general manager of the underlying corporation, had check signing authority and periodically filed tax returns. Nevertheless, we determined that the manager was not responsible for unpaid sales tax because he could not sign checks without his superior's prior approval and because failure to follow the superior's directions would have resulted in the manager's dismissal. See, also, Siss v. Limbach (Nov. 1, 1991), B.T.A. Case No. 90-G-546, unreported (holding a party not liable where he lacked the authority and control to issue corporate checks unilaterally without the prior approval of the company president).

In the instant matter the appellant testified that she had no authority to decide which bills would be paid. Further, the appellant had no authority to write any checks without prior approval from her mother, the president of the company. Giving consideration to the entire record in this matter, we find appellant's testimony to be credible.

Giving consideration to the notice of appeal, the record, the findings of this Board and the statute and case law, it

is the decision and order of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, reversed. ohiosearchkeybta