

Joseph Brown,)
)
 Appellant,) CASE NO. 1997-N-25
)
 vs.)
) (SALES TAX)
 Roger W. Tracy,)
 Tax Commissioner of Ohio,)
) DECISION AND ORDER
 Appellee.)

APPEARANCES:

For the Appellant - Alan R. Kirshner, Esq.
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 Toledo, Ohio 43617

For the Appellee - Betty D. Montgomery
 Attorney General of Ohio
 by: Richard C. Farrin
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Entered: July 17, 1998

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

This matter is before the Board of Tax Appeals upon a notice of appeal filed on behalf of appellant Joseph Brown. The appeal is taken from a final determination of the Tax Commissioner wherein that official determined that Mr. Brown was a responsible

party pursuant to R.C. 5739.33 and liable for unpaid sales tax, additional charge, and penalties. The assessment was originally issued against Paper Clip, Inc., ("Paper Clip", the underlying delinquent corporate taxpayer) and is for the period February 1, 1989 to June 8, 1992.

That final determination, in pertinent part, reads as follows:

"Joseph Brown was assessed personally as a responsible party of Paper Clip, Inc., pursuant to Ohio Revised Code section 5739.33 for unpaid sales tax liability incurred by the corporation. A timely petition for reassessment was filed.

"The petitioner contends that he is not a responsible party for the assessed periods. He asserts that he was president of the company in name only and served basically as a 'front man' in order to get into the minority business program. The petitioner says his position with the company was mainly in a sales capacity. He acknowledges that he had check signing authority, but says that his check writing was limited to some checks made out to suppliers and for payroll. He says he did not sign checks for the payment of sales tax returns. The petitioner also acknowledges that he was a shareholder, but he says he received no profits from the company. The petitioner's objection is denied. R.C. 5739.33 provides that:

"If any corporation, limited liability company, or business trust 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, members, managers, or trustees who are responsible for the execution of the corporation's, limited liability company's, or business trust's fiscal responsibilities, shall be personally liable for the failure."

(emphasis added)

"The evidence in the file indicates that the petitioner was the President of Paper Clip, Inc. It appears that his ownership interest and status as a corporate officer were conveyed to him sometime no later than December, 1990. It is noted that although the periods listed on this assessment include periods prior to this time, the actual liability due is derived from periods after the petitioner's entrance into the business. The petitioner is listed as the President and Treasurer of the Business on the minority business qualification profile application filed with the state of Ohio. The petitioner is also listed as a 67% owner of the business on this application. His signature appears on the bottom of the form under a certification which states that 'I/We, the undersigned making the application, certify that all information is true and accurate ...' The petitioner signed the form as the President and as a 67% owner of the company. Ohio Adm. Code 5703-9-49(F) provides that:

"If the officers of a corporation own, either collectively or individually, more than fifty per cent of the ownership interest in the corporation, the shareholder /officers are responsible for the execution of the fiscal responsibility of the corporation and personally liable under section 5739.33 of the Revised Code, regardless of any attempt to delegate such responsibility, if one or more of the following apply:

"(1) The corporation filed returns required under Chapter 5739. of the Revised Code showing the liability without submitting payment;

"(2) The corporation failed to file returns required under Chapter 5739. of the Revised Code;

"(3) The records of the corporation or other evidence indicates that the corporation collected the tax required under Chapter 5739. of the Revised Code;

"(4) The owner/officer of the corporation actually controlled or supervised the preparation and submission of returns required under Chapter 5739. of the Revised Code.'"

"In the present matter, the petitioner owned more than fifty percent of the ownership interest alone. He is therefore responsible for the execution of the fiscal affairs because the corporation failed to file sales tax returns and because an audit of Paper Clip, Inc. found that sales tax had been collected from customers but was not remitted to the state of Ohio.

"The petitioner is found to be a responsible party under R.C. 5739.33. The petitioner was an owner of the company responsible for the execution of the fiscal affairs of the company under Ohio Adm. Code 5703-9-49(F). The petitioner was President and Treasurer of the Company. He held himself out to the State of Ohio and the public as the President of the company. He acknowledged that he had check signing authority. The petitioner's objection is denied.

"Therefore, it is the order of the Tax Commissioner that the assessment stand as issued in the following amount:

Sales Tax	\$6,167.02	\$3,083.51	\$9,250.53
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Additional Late Filing Charge	661.89	99.28	<u>761.17</u>
		Total	\$10,011.70"

Appellant's notice of appeal, challenging the foregoing decision, sets forth the following allegations:

"1) As the Commissioner noted, Mr. Brown was not an officer, nor was he associated with the company for the entire period of the assessment, and the Commissioner's conclusion that the liability is solely derived after Mr. Brown's entrance into the business has no basis in fact.

"2) The Commissioner refers to an audit, however, all documents concerning this assessment were requested, and no papers pertaining to any audit existed, therefore the amount of any assessment is incorrect.

"3) The assessment failed to reflect joint liability of Robert Koder, the actual operating owner and manager of the business."

The Tax Commissioner certified a "statutory transcript" to this Board of the prior proceedings before that official, together with all material considered thereby. (S.T. 1-63)

By this Board's scheduling letter, the case was set for hearing. Mr. Brown and the Tax Commissioner were represented by counsel. The hearing was transcribed. (R. 1-42) Consequently, this matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript, and the hearing record.

The assessment against Mr. Brown arose pursuant to his asserted liability under R.C. 5739.33 as a responsible party of the

underlying corporation for delinquent corporate sales tax. R.C.

5739.33 provides:

"If any corporation or business trust required to file returns and 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 or business trust's fiscal responsibilities, **shall be personally liable** for the failure. The dissolution, termination, or bankruptcy of a corporation or business trust shall not discharge a responsible officer's, employee's, or trustee's liability for a 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 the manner provided in section 5739.13 of the Revised Code."

(Emphasis added)

In Weiss v. Porterfield (1971), 27 Ohio St. 2d 117, the Supreme Court held that personal liability for sales taxes, collected but which were not remitted to the state, was limited to those corporate officers or employees who have control of, supervision over, or are charged with the responsibility of filing returns and making payments. The court also held that the statute does not include all corporate officers, but only those persons who have a specific connection with the preparation, filing and payment of sales tax returns.

In Evans v. Limbach (June 8, 1990), B.T.A. Case No. 89-C-538, unreported, this Board held that where an individual was made an officer for the convenience of the principal stockholder, and signed checks and tax returns exclusively under the direction of a superior, that individual should not be assessed for employee withholding taxes.

In Siss v. Limbach (Nov. 1, 1991), B.T.A. Case No. 90-G-546, unreported, the assessed party was neither an officer nor a shareholder. This Board found that although he signed checks and signed at least one tax return, he was powerless to issue any checks without the prior approval of the company president. He was therefore not subject to assessment for unpaid sales tax.

In Grove-Meritt v. Tracy (June 30, 1997), B.T.A. Case No. 96-N-468, unreported, the assessed party was a named officer of the underlying assessed corporation at one point in time but ceased being an officer prior to the audit period. He was not an employee, as indicated by his not receiving a pay check or health benefits. He was present at the business nearly every day, primarily because he had loaned money to the business, and was wanting to help it be financially able to repay him. He signed several sales tax returns. He was found not personally liable because he was never an employee and ceased being an officer prior to the audit period.

Turning to the current matter, Mr. Brown met Mr. Koder, the owner of Paper Clip, at a social function. At the time, Mr.

Koder was experiencing poor health. Mr. Koder suggested to Mr. Brown that if he owned part of the company, minority contracts would be available from the state. (R. 12-13) A minority business qualification profile was prepared. (S.T. 26-32) It is dated December 14, 1990, and lists both Mr. Koder and Mr. Brown as officers. It states that Mr. Brown was a 67% owner, and Mr. Koder was a 33% owner. (The application described Mr. Koder as "white-American" and Mr. Brown as "black".) A document was prepared by Mr. Koder giving Mr. Brown an option to buy the business, with Mr. Brown presuming that would be a good opportunity with all the contracts Mr. Koder said would be forthcoming. (R. 12) However, no payments were ever made under the option, and no ownership was ever transferred. (R. 11)

Mr. Brown did not receive any pay from Paper Clip as an employee would. (R. 23, 28) He only helped out when Mr. Koder was sick (R. 13), perhaps three days a month. (R. 22) He would not be there for the entire day, but might come in around opening and closing. (R. 28) Mr. Brown was employed during part of the audit period at Industrial Printing (R. 28), and was unemployed part of the time. Paper Clip did have four or five regular employees. (R. 14) Although the Tax Commissioner claims Mr. Brown was an officer, and signed a document as an officer, there is nothing in the record to indicate he was properly appointed. The record indicates that Mr. Brown was only referred to as an officer for the convenience of

Mr. Koder so that Paper Clip could get minority business contracts. The business was never transferred to Mr. Brown under the option

Mr. Brown's son, Jai, was elected as a member of the board of directors of Paper Clip on April 18, 1991. (S.T. 33)(R. 20-21) Mr. Brown testified that Mr. Koder indicated "we have to have another officer ... we had to have three officers." (R. 24)(R. 32) Jai was 14 years old at the time of his appointment. (R. 24) The questions regarding this and Mr. Brown's answers indicate that Mr. Brown is not aware of the difference between officers and directors, or other business formalities.

The 1989 franchise tax report is dated July 29, 1990, and is signed by Mr. Koder as President, and the only officer. Mr. Koder states in a January 31, 1991 letter that he was the only officer and director up to December of 1990. (R. 34)

There is nothing in the record to indicate that Mr. Brown was ever an employee. Although the Tax Commissioner claims he was an officer, specifically the president, typically the president is an employee, especially a president who oversees the total operations of a business. For the Tax Commissioner to claim Mr. Brown is the president when the record indicates he was never an employee and had little responsibilities within Paper Clip is unreasonable.

The statute assigns responsibility for certain employees or officers that are involved with or have control over the sales tax filing and paying functions. Mr. Brown was never an employee

of Paper Clip, and was never an officer for any reason other than being used to help Paper Clip be labeled a minority business enterprise. This statute can by its terms have no applicability to him.

Therefore, upon consideration of the foregoing, it is the finding and determination of the Board of Tax Appeals that the final decision of the Tax Commissioner is in error and should be, and hereby is, reversed. ohiosearchkeybta