

OHIO BOARD OF TAX APPEALS

Steven B. Mick,)	CASE NO. 2007-H-126
)	
Appellant,)	(SALES TAX PERSONAL LIABILITY)
)	
vs.)	DECISION AND ORDER
)	
William W. Wilkins,)	
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

- | | |
|-------------------|--|
| For the Appellant | - Steven B. Mick, pro se
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| For the Appellee | - Richard Cordray
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Entered January 27, 2009

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

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by Steven B. Mick. The appeal is from a final determination of the Tax Commissioner, in which the commissioner affirmed an assessment against the appellant. Through his final determination, the commissioner found that Mick was a derivatively responsible party liable under R.C. 5739.33 for the unpaid sales tax of

Allied Communications, Inc. (“Allied”) covering the period of October 1999 through April 2001.¹

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, and the briefs filed by the parties. At the hearing, Mick appeared and testified on his own behalf. The Tax Commissioner was represented by counsel and relied on the statutory transcript, presenting no additional evidence.

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. 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.

¹ Allied had changed its name to Allied Communications Consulting Group, Inc. in September 1999. Appellee’s Ex. D.

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, 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, we proceed with our 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 periods in question, stated as follows:

"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. The dissolution, termination, or bankruptcy of a corporation, limited liability company, or business trust shall not discharge a responsible officer's, member's, manager's, employee's, or trustee's liability for a failure of the corporation, limited liability company, 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 has 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. 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 on 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.

As we consider appellant’s position, we note that Mick does not dispute that he was a 50-percent shareholder in the corporation and held the titles of secretary and vice president of Allied from October 1999 until October 2000. H.R. at 15, 52, 71. During this same period, Mick’s business partner Todd Farrell was Allied’s other 50-percent shareholder and its president and treasurer. *Id.* Mick testified that he

performed the duties of managing Allied's sales and operations, which included overseeing the corporation's employees and daily functions. H.R. at 70, 76. Although Mick initially testified that he had no responsibility to file tax returns or authority to sign checks, he later admitted that he did sign tax returns and checks on behalf of Allied when Farrell was unavailable. H.R. at 35-37, 74-75, 78-79; appellant's Exs. 4-6; appellee's Exs. B-C. After Farrell resigned on October 19, 2000, Mick became the corporation's sole shareholder and president until the corporation went out of business in March or April 2001. H.R. at 87, 101-102; appellant's Ex. 16.

Because the assessment against Mick is derivative in nature, i.e., its function is to hold Mick liable for those amounts previously assessed against Allied, our authority is limited to only those issues that specifically challenge Mick's status as a responsible corporate officer. In *Rowland v. Collins* (1976), 48 Ohio St.2d 31, the Supreme Court held that the applicable tax statutes "merely *** allow the corporate officer 30 days after the receipt of the notice of assessment to assert that he is not one of the class of persons chargeable." *Id.* at 313. Consequently, the court found that a corporate officer may not challenge the correctness of the corporate assessment, including the imposition of penalties, by filing a petition for reassessment on the officer liability. "Once the assessment against the corporation becomes conclusive by the failure to present objections thereto the officer is bound by the oscitancy of his corporation." *Id.*

Based upon the foregoing, we first find that Mick is unable to dispute his liability as president and sole shareholder of Allied for the period October 20, 2000

through April 2001, and is, therefore, a responsible party liable under R.C. 5739.33 for all sales tax assessments due for this period. This would include all amounts for which monthly payments were due in 2000 for the semi-annual reporting period ending January 2001, pursuant to R.C. 5739.12.

For the October 1999 through October 2000 period that he held the titles of secretary and vice-president of Allied, Mick asserts that he should not be held liable pursuant to this board's decision in *Smith v. Wilkins* (Sept. 30, 2005), BTA No. 2004-R-371, unreported. Appellant's brief. Mick's primary contention appears to be that, like the appellant in *Smith*, his role was strictly limited to operations while his business partner Farrell was the corporate officer responsible for fiscal matters, such as paying the taxes and bills of the corporation. *Id.* Appellant claims that since he did not manage the financial area, he could not make payment of the sales tax and, therefore, should not be found to be personally liable. *Id.* However, we find *Smith*, *supra*, unpersuasive, since the facts in that case are distinguishable from this matter. *Smith*, with the help of his two sons, operated a woodworking shop and delivered finished products to customers. *Smith*, *supra* at 5-6. *Smith*'s partner marketed the products and ran the business, which included handling all financial matters, out of a separate office. *Smith* credibly demonstrated a clear delineation between his production efforts and his business partner's fiscal responsibilities. *Id.*

In this case, we find the record is not so clear cut when it comes to the responsibilities of Mick and Farrell. While the two may have agreed to delegate responsibilities in principle, the record supports a finding that Mick had enough

supervision and control over the filing of sales-tax returns and check signing to be deemed a responsible party. In fact, Mick signed numerous monthly tax returns and checks. H.R. at 75, 78-79; appellee's Exs. B-C.² We find that Mick can be considered an officer that would ordinarily be responsible for the requirement to file tax returns and remit taxes due and may be found to be responsible to the state. *Spithogianis*, supra; *McGlothin*, supra. Consequently, we further find Mick liable for the tax assessments due for the October 1999 through October 2000 period as well.

Accordingly, based upon the foregoing, we must conclude that appellant has failed to satisfy his burden of proof by providing competent and probative evidence that would support his claims. It is the decision of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

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² In support of his contention that he should not be deemed responsible, Mick presented April 1998 tax returns signed by Farrell and testified "I'm not sure how much weight tax documents in 1998 have to do with what we're talking about, 1999, but Farrell had signed a couple documents for the sales tax. Responsibility goes to responsibility." H.R. at 34; appellant's Ex. 3. We note that Mick signed the same type of returns.