STATE OF MICHIGAN

COURT OF APPEALS

JAMES MUSSER,

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

UNPUBLISHED
October 14, 2010

No. 293480
Michigan Tax Tribunal
LC No. 00-329779

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Petitioner appeals by right the order of the Michigan Tax Tribunal (MTT) granting respondent's motion for summary disposition and holding petitioner personally liable for taxes owed by the corporation of which he was president and chairman of the board. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

This case concerns the withholding tax liability of Hoskins Manufacturing Company (Hoskins) for September 2001 and October 2001. The parties agreed to stipulated facts. In the MTT, respondent supplemented the stipulation with additional documentary evidence. As an initial matter, we agree with respondent that the additional evidence did not impermissibly contradict the stipulated facts, nor did the MTT ignore the stipulation. Rather, the documents provided additional information that supplemented the stipulation. *Kennedy v Auto-Owners Ins Co*, 87 Mich App 93, 98; 273 NW2d 599 (1978); see also *Thomas Canning Co v Johnson*, 212 Mich 243, 249; 180 NW 391 (1920).

Starting in January 2001, and continuing during the period in question, petitioner was chairman of the board and president of Hoskins. For Hoskins's September 2001 withholding tax liability, controller Phil Varvatos prepared and signed the return and submitted a check. The check bounced. The return for October 2001 was not submitted until September 2003. It was prepared by Varvatos and signed by petitioner. No attempt was made to pay the outstanding tax liability for October 2001. By November 2001, the bank had seized Hoskins's account and the company had gone out of business, remaining a corporate entity only to allow liquidation and to monitor environmental matters. Final bills were assessed against Hoskins in 2002; when these were neither paid nor appealed, respondent sent final assessments to petitioner in 2006, deeming him to be the responsible corporate officer under MCL 205.27a(5).

The MTT granted respondent's motion for summary disposition, finding that petitioner was an officer of the corporation with responsibility for taxes. Petitioner argues that this decision was incorrect because there was no evidence that he had any responsibility for preparing returns or paying taxes at any time from July 2001 to November 2001. Instead, he argues that the MTT disregarded the stipulated facts, which showed that the responsibility for preparing returns and paying taxes had been delegated to Varvatos. Petitioner also asserts that the MTT misconstrued the relevant statute when it ruled that he was liable for the October 2001 return that was not filed and signed until two years later. Petitioner reasons that the statute imposes liability only when a corporation "fails for any reason to *file the required returns or to pay the tax due*," MCL 205.27a(5) (emphasis added), and that he therefore could not be held liable on the basis of a return that he signed in 2003 since the tax had actually been "due" two years earlier in 2001.

We generally review the MTT's decisions "for misapplication of the law or adoption of a wrong principle." *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69, 75; 780 NW2d 753 (2010). However, we review de novo the MTT's interpretation and application of a statute. *Id*. Similarly, we review de novo the MTT's decision regarding a motion for summary disposition. *Id*.

MCL 205.27a(5) provides in its entirety:

> If a corporation, limited liability company, limited liability partnership, partnership, or limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments. The dissolution of a corporation, limited liability company, limited liability partnership, partnership, or limited partnership does not discharge an officer's, member's, manager's, or partner's liability for a prior failure of the corporation, limited liability company, limited liability partnership, partnership, or limited partnership to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.

To determine whether petitioner had sufficient tax-specific involvement in the company for personal liability to attach, we apply the three alternative tests set out in *Livingstone v Dep't of Treasury*, 434 Mich 771; 456 NW2d 684 (1990). Under *Livingstone*, respondent must show

> "(1) that this officer has control over the making of the corporation's tax returns and payments of taxes; or (2) that this officer supervises the making of the corporation's tax returns and payments of taxes; or (3) that this officer is charged with the responsibility for making the corporation's returns and payments of taxes to the state." [*Id*. at 780, quoting *Peterson v Dep't of Treasury*, 145 Mich App 445, 450; 377 NW2d 887 (1985).]

The documentary evidence and the corporate bylaws show that petitioner had responsibility for the company's taxes. The evidence showed that although Varvatos may have been the person who prepared and filed most of the company's tax returns, he was not the only person charged with this duty. Petitioner signed various documents as a corporate officer, including the October 2001 tax return, various tax payment checks from December 2001 through June 2002, forms granting two other people (including Varvatos) limited power of attorney, a certificate amending the articles of incorporation to change the company's name, annual reports for 2003 through 2007, and correspondence letters between Hoskins and respondent. These documents were sufficient to create the rebuttable presumption under MCL 205.27a(5) that petitioner was an officer with responsibility for Hoskins's corporate taxes. The corporate bylaws also support this theory. As president and chairman of the board, petitioner was the chief executive officer and chief operating officer "in general and active charge of the business of the Corporation." While petitioner may have delegated tax preparation duties to Varvatos, petitioner remained ultimately responsible.

In addition, we find petitioner's statutory construction argument unpersuasive. We simply cannot agree with petitioner's assertion that MCL 205.27a(5) "does not impose liability on an officer for conduct which occurs [two] years after the returns were due." The word "due" in the first sentence of MCL 205.27a(5) refers to the type of taxes (i.e., those that are *due*) that the company has failed to pay; it does not refer to the time when personal liability attaches. Moreover, the statute states that "[t]he signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments." Despite petitioner's argument to the contrary, the statute does not limit the type of "returns or negotiable instruments" that may be considered to those filed at the time the tax was first due. Reading the words of MCL 205.27a(5) in a commonsense manner, *Recchia v Turner*, 197 Mich App 432, 434; 495 NW2d 807 (1992), we conclude that respondent was free to consider the return that was signed in 2003 as evidence that petitioner was responsible for paying, and therefore personally liable for, the company's 2001 taxes.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ William C. Whitbeck