

[Cite as *Ross v. Levin*, 2010-Ohio-4009.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93760

WILLIAM J. ROSS

APPELLANT

vs.

**RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO**

APPELLEE

**JUDGMENT:
REVERSED**

Appeal from the
Board of Tax Appeals
Case No. 2007-M-117

BEFORE: Sweeney, J., Rocco, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: August 26, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} Appellant, William J. Ross (“Ross”), appeals from the order of the Ohio Board of Tax Appeals (“BTA”) that affirmed the Tax Commissioner’s decision that imposed an assessment against him of \$195,590.27 for employer withholding tax, finding he was a responsible party under R.C. 5747.07(G) for Fairport Yachts, Ltd. (“Fairport”). For the reasons that follow, we reverse.

{¶ 2} The tax period involved in the assessment was January 1, 1999 through December 31, 2002 (the “Audit Period”). Ross petitioned for

reassessment claiming he was not the responsible party for the withholding taxes of Fairport. On December 14, 2006, the Ohio Department of Taxation issued its final determination upholding the assessment against Ross. The Tax Commissioner cited Ross's failure to respond to written questions, the responsible party questionnaire, and his failure to participate in a scheduled hearing. The Commissioner, therefore, relied "upon evidence available" to him. The "evidence" was not described but reportedly "indicates that [Ross] has been both an owner and a responsible officer of the corporation for all relevant periods defined in R.C. 5747.07(G) and Ohio Adm. Code 5703-7-15, and appears to have performed a number of the functions imparting responsibility to an owner and an officer." Ross appealed this decision to the BTA on February 13, 2007.

{¶ 3} On August 30, 2007, the assistant attorney general served discovery requests to Ross, including interrogatories and productions requests. Ross's responses to this discovery were submitted as an exhibit to the BTA. Therein, he claimed that all of Fairport's corporate records were lost or destroyed in a "500-year flood which occurred when the Grand River overflowed in July of 2006."¹ Ross stated that he did not have documents or did not have sufficient information to respond to several interrogatories about Fairport. Ross indicated that he initially served as president of Fairport and that he was an officer "in the investment company that owned the Corporation, and resigned sometime

¹Ross submitted an article from the Cleveland Plain Dealer to substantiate the fact the Grand River flooded in 2006.

between 1999 and 2001 as best as [he] can recall.” Ross described his daily job responsibilities for Fairport as generally overseeing Tristan’s investment in Fairport, he reviewed Fairport’s “business plan and performance to plan.” Later, he testified that his responsibilities included attending meetings from time-to-time as a representative of Tristan. Ross could not locate any of Fairport’s bank records. Ross did not know who prepared Fairport’s tax returns.

{¶ 4} On July 18, 2008 a hearing was held before an attorney examiner.

{¶ 5} Ross testified that Karen Livermore worked in the accounting department of Fairport but could not recall whether she worked there during the Audit Period. Ross also identified the names of other employees he could recall.

Ross testified that the extent of his involvement with Fairport and various other companies was in the capacity of legal representation. Ross said he essentially retired from the practice of law in the late 1990s but continued to provide periodic, sporadic, legal services for his clients after that time.

{¶ 6} Ross said he was not responsible for signing checks for payment of Fairport’s taxes; he did not authorize tax payments for Fairport; he did not believe he had any signatory authority on behalf of Fairport; and he has no personal knowledge of who had signing authority.

{¶ 7} Ross testified “it was not uncommon for me as counsel to be president for purpose of completing the organizational materials of the company. And then immediately, whenever — the other officers when the officers, were appointed, they replaced me. It wasn’t uncommon for me to serve in a multiple

series of offices but that was just in connection with technical formation of the company. I generally withdrew from those positions immediately.” Ross confirmed that Fairport was formed in 1998 and said that his service as president “to the best of [his] knowledge * * * was limited to a period of a month or so in connection with the formation of the business.” Ross emphasized that he did not want the BTA “to think that [his] answer to interrogatory number 5 suggested that [he] undertook any operational management responsibilities other than the simple formation, formative elements of the entity.” Ross could not definitively say whether he was an officer of Fairport in 1999 or thereafter but stated, to the best of his recollection, he was not.

{¶ 8} Both parties submitted briefs after the hearing.

{¶ 9} The record also contains “supplemental transcripts of the record of proceedings before the Tax Commission of Ohio” which, inter alia, includes: an eNewsletter from Sailing World; “information obtained by Agent from the Field Audit”; and “Agent’s Remarks.”

{¶ 10} The eNewsletter was authored by John Burnham on January 17, 2005. A provision in it identifies “Fairport’s owner” as “Bill Ross,” otherwise does not mention Ross. There is no indication that Ross authorized or verified the article or even knew about it. Instead, it purports to be based upon a meeting with Tim Jackett.

{¶ 11} The “information obtained by Agent from Field Audit” is an Ohio Department of Taxation Questionnaire: Responsible Individual. The form

contains handwritten answers to various line items, including that it identifies three individuals as responsible parties, among them “William J. Ross.” The form seeks the identification of Ross’s position(s) with the business and the dates he held said position(s). Notably, the form appears not to make these designations for Ross. Notation on the form indicates it was “prepared by Agent Lisa Hornyak from information obtained at field audit 9/8/03.” There is no authentication of this document anywhere in the record. Likewise, the “Agents Remarks” concerning the alleged audit are not authenticated. There is no sworn testimony offered concerning the allegations set forth in either document. Neither Lisa Hornyak nor Karen Livermore² offered any sworn testimony in this matter by affidavit or otherwise.

{¶ 12} The BTA’s decision cited three sources of information upon which it relied in affirming the assessment against Ross: (1) “the person appointed by the company to discuss financial information with the tax department’s auditor”; (2) “the records held by the Ohio Secretary of State”; and (3) “a sailing publication.” The BTA found that the Articles of Organization filed with the Ohio Secretary of State in 1998 were “the most compelling evidence.”

²Hornyak’s alleged contact at Fairport from whom she derived her findings about the identity of the responsible parties was Karen Livermore.

{¶ 13} Ross has appealed from the BTA order. Each of Ross's assignments of error relate to the propriety of the BTA's decision to uphold the Tax Commissioner's assessment against him and will be addressed together.³

{¶ 14} Pursuant to R.C. 5717.04, if upon consideration of the record and evidence we determine that the BTA's decision is reasonable and lawful, we must affirm; otherwise, we must "reverse and vacate the decision or modify it and enter final judgment in accordance with such modification." If the decision is supported by reliable and probative evidence, the reviewing court is to affirm. *Satullo v. Wilkins*, 110 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶14. "As for the burden of proof, it rests on the taxpayer 'to show the manner and extent of the error in the Tax Commissioner's final determination.' The Tax Commissioner's findings 'are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.'" *Id.* at ¶15, internal citations omitted. If rebutted by testimony by the taxpayer, the burden shifts back to the Tax Commissioner to justify its findings, with any conflicts in the evidence being resolved by the BTA's own factual determinations. *Dearwester v. Limbach* (Apr. 24, 1991), Hamilton App. No. C-900051, citing *Bloch v. Glander* (1949), 151 Ohio St. 381, 388, 86 N.E.2d 318, 321 and *In re Petersilge* (N.D. Ohio 1946), 70 F.Supp. 95.

³The assigned errors are contained in the appendix.

{¶ 15} The crux of the dispute in this matter is that while Ross contends the “evidence” relied upon by the BTA in finding him a responsible party was not probative or reliable evidence to find him a responsible party during the Audit Period, the BTA believes it was.

{¶ 16} We must defer to the BTA’s factual findings that are supported by the record. *Satullo*, surpa. To that extent, we accept BTA’s finding that Ross’s testimony was “calculated and evasive.” However, that does not mean he can be conclusively found to be a responsible party for Fairport during the Audit Period (1999-2002) absent reliable and probative evidence to establish the criteria of R.C. 5747.07(G).

{¶ 17} R.C. 5747.07(G) provides:

{¶ 18} “An employee of a corporation, limited liability company, or business trust having control or supervision of or charged with the responsibility of filing the report and making payment, or an officer, member, manager, or trustee of a corporation, limited liability company, or business trust, who is responsible for the execution of the corporation’s, limited liability company’s, or business trust’s fiscal responsibilities, shall be personally liable for failure to file the report or pay the tax due as required by this section. The dissolution, termination, or bankruptcy of a corporation, limited liability company, or business trust does 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 pay tax due.”

{¶ 19} Clearly, the BTA established that Ross was a responsible party for Fairport in November 1998 based on the records of the Ohio Secretary of State. This is not helpful to determining whether he was still a responsible party for Fairport from 1999-2002. We do not condone obstructionist tactics by any party.

However, we cannot accept the BTA's proposition that a lack of cooperation equates to an admission of liability; this is a proposition which is not supported by any legal authority. The BTA also did not present any evidence to refute Ross's testimony that he never had check-signing responsibilities for Fairport's tax payments and he never authorized tax payments for Fairport.

{¶ 20} Comments contained in unauthenticated documents; specifically, the eNewsletter and notations/remarks attributed to an agent, are simply not sufficient evidence to support the large personal assessment. Indeed, when a party objects to the sufficiency of the evidence presented before the BTA, the evidence must be evaluated in light of the objections. E.g., *Healthsouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009-Ohio-584, 903 N.E.2d 1179, ¶36 (BTA must evaluate evidence in light of Tax Commissioner's objections, including that testifying witness was not competent to authenticate and verify documentation).

{¶ 21} It is acknowledged that the Tax Commissioner's determination enjoys the presumption of correctness, but in this case we cannot discern what "evidence" was relied upon in making the final determination because it is not specifically identified. At the BTA level, Ross objected to the hearsay contained in the documentation that was being offered to establish his status as a

responsible party during the Audit Period, which documents were not authenticated or verified. Where the witnesses are unavailable to testify, the documentary evidence should at the very least be authenticated in order to ensure a modicum of reliability.⁴ At least one appellate district has found the BTA acts in an arbitrary manner when it relies on testimony that is strictly hearsay “without requiring the production of any underlying documents or the testimony of parties” to the transaction, which, in this case, would be the field audit. See *Almondtree Apartments of Columbus, Ltd. v. Bd. of Revision of Franklin Cty.* (June 28, 1988), Franklin App. No. 87AP-1216. In this matter, the BTA explicitly relied on hearsay evidence without requiring the authentication of the documents or the testimony of the persons who prepared them. And, the evidence it found most compelling did not relate to Ross’s position with Fairport, if any, during the Audit Period. For all of the foregoing reasons and a lack of reliable evidence, Ross rebutted the presumption of correctness. The lack of sufficient, reliable evidence in this record that would support a finding of Ross’s liability under R.C. 5747.07(G) during the Audit Period, compels us to reverse the decision of the BTA.

Judgment reversed.

It is ordered that appellant recover from appellee his costs herein taxed.

⁴The BTA does not provide any support in the record for its assertion that “the field audit report was prepared in the ordinary course of the Commissioner’s administration of the Ohio income tax laws.”

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Board of Tax Appeals to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA A. BLACKMON, J., CONCUR

Appendix

{¶ 22} “I. The Ohio Board of Tax appeals erred in concluding that there was sufficient evidence that William J. Ross was an owner and officer of Fairport Yachts, [Ltd.] during the assessment period.

{¶ 23} “II. The Ohio Board of Tax Appeals erred by relying on unreliable, [inadmissible], and non-probative hearsay evidence to affirm the final determination of the Tax Commissioner.

{¶ 24} “III. Assuming [] arguendo, that there was sufficient evidence that William J. Ross was an owner and officer of Fairport Yachts, Ltd., the Ohio Board of Tax Appeals erred in [concluding] that his status as an owner and officer alone was sufficient to establish that he was a responsible person as defined in R.C. 5747.07(G).

{¶ 25} “IV. The Ohio Board of Tax Appeals erred by affirming the final determination of the Tax Commissioner despite the fact that there was no evidence that William J. Ross was responsible for filing tax returns, making payment of taxes, or execution [of] Fairport Yacht, Ltd.’s fiscal responsibilities.

{¶ 26} “V. The Ohio Board of Tax Appeals erred in finding that William J. Ross failed to overcome the ‘presumption of correctness’ afforded the final determination of the Tax Commissioner.

{¶ 27} “VI. The Ohio Board of Tax Appeals erred in purporting to engage in its own independent assessment of witness credibility despite the fact that the members of the Board did not observe the witness that they purportedly were assessing.

{¶ 28} “VII. The Ohio Board of Tax Appeals erred in relying upon evidence [that] violated William J. [Ross’s] due process rights and right of confrontation pursuant to the Ohio Constitution and the U.S. Constitution.”