STATE OF MICHIGAN

COURT OF APPEALS

SOL CICUREL and GERALD PRIMAK,

Plaintiffs-Appellants,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED
March 10, 1998

No. 198812
Tax Tribunal
MTT Nos. 175900 and 175901

SOL CICUREL,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 198848
Tax Tribunal
MTT No. 174091

Before: Michael J. Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiffs, Sol Cicurel and Gerald Primak, appeal as of right from an October 14, 1996, order entered by the Michigan Tax Tribunal, affirming sales and withholding tax assessments issued against them by the Department of Treasury. We affirm.

Plaintiffs were sole stockholders in Towne & Country, a retail furniture sales business. In an attempt to avoid bankruptcy, plaintiffs contracted with liquidation sales specialist, Martin Goodman & Associates (MGA) to conduct a liquidation sale in the Towne & Country stores. After approximately

six months, MGA unexpectedly pulled its personnel and merchandise out of Towne & Country, leaving plaintiffs with unpaid employee payroll and unpaid withholding and sales tax.

Plaintiffs argue on appeal that they should not be held personally liable for Towne & Country's withholding and sales taxes because they did not control, supervise, or maintain responsibility for filing the tax returns and paying the taxes during the periods MGA was running the liquidation sale. We disagree. Upon review, we conclude that the Tax Tribunal's decision to affirm the withholding and sales tax assessments issued against plaintiffs was authorized by law and supported by competent, material, and substantial evidence. *Peterson v Treasury Dep't*, 145 Mich App 445, 449; 377 NW2d 887 (1985).

The statute applied against plaintiffs is MCL 205.27a(5); MSA 7.657(27a)(5), which provides:

> If a corporation 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 having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure. . . . The dissolution of a corporation does not discharge an officer's liability for a prior failure of the corporation 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.

In *Peterson v Treasury Dep't*, this Court applied a similar corporate officer liability statute, MCL 205.65(2); MSA 7.536(2), concluding that in order to hold an officer personally liable for a corporation's tax liability, the Department must first show that the person is an officer of the corporation. *Peterson, supra*, 145 Mich App 449-450. Then it must show either that this officer has control of, supervises or is charged with responsibility for making the corporation's tax returns and payments of taxes. *Peterson, supra*, 145 Mich App 449-450.

The Department has shown and plaintiffs concede that plaintiffs were corporate officers of Towne & Country during the relevant tax periods. However, plaintiffs argue that they did not have control over, or supervise the making of returns or payment of taxes, and thus should not be held responsible for the taxes owned by Towne & Country. Yet, nothing changed during the relevant tax periods to alter plaintiffs' corporate officer liability status except that, in a private agreement, plaintiffs delegated their responsibility for making tax returns and paying taxes to MGA. Plaintiffs cannot shield themselves from tax liability by relying on the self-imposed provisions of their private agreement with MGA. *Canada Creek Ranch Association, Inc v Montmorency Township*, 206 Mich App 498, 504; 522 NW2d 690 (1994); *NeBoShone Ass'n Inc v State Tax Comm*, 58 Mich App 324; 227 NW2d 358 (1975).

The Tax Tribunal has held that an officer cannot escape personal liability by choosing to delegate responsibility to an employee who was not a corporate officer. *Christel v Department of Treasury*, 7 MTTR 196 (Docket No. 148716, June 11, 1992); *Viney V Department of Treasury*, 6 MTTR 709 (Docket Nos. 106744, 111750, October 19, 1990). Plaintiffs assert that their case is distinguishable because MGA directed and controlled them as employees not the other way around.

Despite plaintiff's argument, the agreement between Towne & Country and MGA designated MGA, an agent and representative of Towne & Country, and reserved certain powers in Towne & Country clearly preserving plaintiffs' control over their company. The agreement provided that a going out of business sale certificate would be applied for when MGA and Towne & Country deemed it appropriate, that MGA would keep accurate books to which Towne & Country would have access and that MGA would prepare and submit to Towne & Country a weekly report of all cash receipts and disbursements. The parties agreed that funds would be deposited in a special account from which Towne & Country's secured creditor, Comerica, would be paid on a loan which Comerica had previously granted to Towne & Country.

Plaintiffs' actions also reflected their positions as responsible corporate officers and sole stockholders' actions. Plaintiffs, concerned for the welfare of their company, entered the agreement with MGA to rescue Towne & Country from bankruptcy. When plaintiff Cicurel discovered that MGA was not paying taxes due and owing, he immediately contacted Pat Hefferman, an accountant for MGA, to inquire as to the reason the taxes were not being paid. Cicurel contacted Martin Goodman, president of MGA, and Norman Bundt, a principal in MGA, several times each to inquire about the unpaid taxes. Plaintiffs acted at all times as if they had supervisory authority over MGA's actions. We find that this evidence supports the Tax Tribunal's affirmation of the assessments issued against plaintiffs.

The intent of the corporate officer liability statute is to assure that taxes assessed to a corporation are ultimately satisfied. *Livingstone, supra*, 434 Mich 794. To allow plaintiffs, the sole corporate officers and stockholders, to delegate their responsibility for paying taxes to a third party who cannot be held liable "would make a mockery of the statutes and render unchallenged final corporate assessments uncollectible." *Viney, supra*, 6 MTTR 709.

Plaintiffs also argue that Martin Goodman, president of MGA, was a de facto officer of Towne & Country and since he had responsibility for the filing of the tax returns and the paying of taxes, he should be held liable under MCL 205.27a(5); MSA 7.657(27a)(5). However, plaintiffs offered no evidence to support this contention. The agreement entered into was between Towne & Country and MGA, not between Towne & Country and Martin Goodman. Plaintiffs offered no evidence that Martin Goodman was made an officer of Towne & Country, that he held himself out as an officer or that anyone was induced to believe that he was such an officer.

We find that the Tax Tribunal's opinion and judgment was authorized by law and supported by competent, material and substantial evidence on the whole record.

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Roman S. Gribbs