

ORIGINAL

SUPREME COURT OF OHIO

SUSAN C. CRUZ

Appellant

JOSEPH W. TESTA
Tax Commissioner of Ohio

Appellee

: 14-0513
:
:
: APPEAL FROM TAX COMMISSIONER
: DECISION AND ORDER
: Case No. 2013-1010
:
:

NOTICE OF APPEAL

Filed on Behalf of Susan C. Cruz, Appellant

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SUSAN C. CRUZ

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NOTICE OF APPEAL

Now comes Susan Cruz and notices that she is appealing the Decision and Order of the Tax Commissioner in Ohio Board of Tax Appeals Case No. 2013-1010, a copy of which is attached.

The issue on appeal is whether Appellant, charged with responsible party liability on a sales tax determination against a corporation of which she was president and principal shareholder, can challenge the assessment against the corporation on the sole ground of failure of the Tax Commissioner to notice the corporation at any point.

A request is being made to the Board of Tax Appeals that a transcript of the hearing be provided.

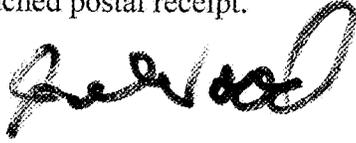
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was served upon Appellee through his attorneys of record, Michael DeWine and Barton A. Hubbard at 30 East Broad Street, 25th Floor, Columbus Ohio, 43215, by United States certified mail this 2nd day of April, 2014, as evidenced by the attached postal receipt.

A handwritten signature in black ink, appearing to read "J. Wood", written in a cursive style.

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OHIO BOARD OF TAX APPEALS

Susan C. Cruz,)	CASE NO. 2013-1010
)	
Appellant,)	(SALES TAX
)	PERSONAL LIABILITY)
vs.)	
)	DECISION AND ORDER
Joseph W. Testa, Tax Commissioner)	
of Ohio,)	
)	
Appellee.)	

APPEARANCES:

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Entered MAR 07 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals from a final determination of the Tax Commissioner wherein he found that appellant was a responsible party for sales tax assessments issued against Cruz-Samsa Corp. for the periods October 2007, and December 2007 through June 2010. We proceed to consider the matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, and the record of the hearing before this board.

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the

taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

When a corporation fails to make payment of sales tax due to 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 primarily liability previously found to exist. R.C. 5739.33 states 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 financial 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, 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."

In her petitions for reassessment, and again on appeal, appellant argues that she was neither responsible for filing tax returns or for paying sales taxes.¹ Although appellant concedes that she was president and majority shareholder of Cruz-Samsa Corporation, she argues that she was never an employee, and that another

¹ Appellant also asserted in her petitions that the underlying sales tax assessments against Cruz-Samsa Corp. were invalid due to lack of proper service on the corporation. In her memorandum in support of her petitions, she argued that service on the minority shareholder of the corporation (Mark Samsa) was improper, because she was the statutory agent for the corporation. The commissioner rejected the argument as not being properly raised; instead, he asserted that such argument should have been made in a proceeding challenging the underlying assessments themselves. We agree. *Rowland v. Collins* (1976), 48 Ohio St.2d 311. Moreover, we find that service on Mr. Samsa was sufficient, as it was "reasonably calculated to give notice of the assessment and allow the taxpayer to present his objections." *Castellano v. Kosydar* (1975), 42 Ohio St.2d 107, 110.

person (Mark Samsa) was responsible for filing sales tax returns.² The commissioner affirmed the assessments, stating:

“During the periods assessed, the petitioner was the 66% owner of the company. The petitioner was the sole incorporator of the corporation and admitted of holding the position of President for the company. The vendor’s License listed the petitioner as the President of the company. Furthermore, the petitioner signed the Franchise Agreement individually dated June 29, 2005 for the operation of a Franchise known as ‘Petland.’ Although the petitioner contends that she was not a paid employee, this alleged fact is not the sole determining factor as to whether a person is a responsible party under R.C. 5739.33. As stated above, the petitioner was the majority owner, President and the operator of a franchise business operation. The evidence shows that she also had authority to hire and discharge employees in the company. Therefore, the petitioner had the authority to control the fiscal responsibilities. R.C. 5739.33 does not permit officers, otherwise responsible for the fiscal responsibilities, to escape liability by delegating those duties to others. See, *Spithogianis v. Limbach* (1990), 53 Ohio St.3d 55, 559 N.E.2d 449. An officer with the authority to control the fiscal responsibilities does not need to exercise that control to be held liable. Thus, the petitioner is a responsible party as contemplated under R.C. 5739.33.” S.T. at 2.

At this board’s hearing, appellant’s counsel essentially reiterated the arguments made in the petition and in the notice of appeal that, because appellant was not personally involved with filing tax returns or paying bills, she is not a responsible party under R.C. 5739.33. We disagree. Although there is little in the record regarding the day-to-day operations of Cruz-Samsa Corp., as president and majority shareholder, appellant was clearly in a position of control over all the

² The statutory transcript contains a notarized statement by appellant stating that: “I am the majority shareholder of Cruz-Samsa Corp., an Ohio for profit corporation; The corporation has a minority shareholder, Mark Samsa; On or about the end of the year 2007, Mr. Samsa resigned from his position in the corporation as an individual who assisted the corporation in the preparation of it’s[sic] Ohio sales tax returns pursuant to his resignation letter, a copy of which is attached hereto. Thereafter, Mr. Samsa had no further role or control in the operation of the corporation.” S.T. at 141.

corporation's activities, including its fiscal responsibilities. As we stated in *Borger v. Levin* (Jan. 10, 2012), BTA No. 2008-A-1905, unreported: "Even in 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." Id. at 4 (citing *Spithogianis v. Limbach* (1990), 53 Ohio St.3d 55; *McGlothlin v. Limbach* (1991), 57 Ohio St.3d 72; *Granger v. Tracy* (June 11, 1999), BTA Nos. 1998-M-242, unreported). We therefore find no error in the commissioner's determination that appellant is a responsible party for Cruz-Samsa Corp.

Accordingly, the commissioner's final determination is hereby affirmed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary