

ESTATE OF MICHIGAN
COURT OF APPEALS

EDWARD J. GUDEMAN,

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

UNPUBLISHED

December 17, 2009

No. 284749

Tax Tribunal

LC No. 00-319694

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Petitioner appeals as of right from a Tax Tribunal decision upholding a single business tax assessment against him as a former officer of HRC4, Inc., for tax year 1997. We affirm.

I. Standard of Review

Our review of the Tax Tribunal's decision is limited. In *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008), this Court set forth the appropriate standard of review as follows:

“This Court’s review of Tax Tribunal decisions in nonproperty tax cases is limited to determining whether the decision is authorized by law and whether any factual findings are supported by competent, material, and substantial evidence on the whole record.” *J C Penney Co, Inc v Dep't of Treasury*, 171 Mich App 30, 37; 429 NW2d 631 (1988); see also Const 1963, art 6, § 28. Issues involving the interpretation and application of statutes are reviewed de novo as questions of law. *Danse Corp v City of Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002).

The requisite “substantial evidence” is “more than a scintilla of evidence, though it may be substantially less than a preponderance of the evidence necessary in most civil cases.” *Keith v Dep't of Treasury*, 165 Mich App 105, 107; 418 NW2d 691 (1987). It is “the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion.” *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 668 NW2d 181 (2003), quoting *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). But the weight to be accorded to evidence is within the Tax Tribunal’s discretion. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 404; 576 NW2d 667 (1998). In reviewing the Tax Tribunal’s decision, this Court will

not assess witness credibility. *Id.* at 408. Further, any error is subject to review under the harmless error standard in MCR 2.613(A). See Tax Tribunal Rule 111 (AC, R 205.1111); *Kern v Pontiac Twp*, 93 Mich App 612, 623; 287 NW2d 603 (1979).

In this case, we initially reject petitioner's claim that the Tax Tribunal failed to comply with its duty to make findings of fact and conclusions of law. The tribunal's 14-page written opinion and judgment comports with the requirements in the Tax Tribunal Act, MCL 205.751(1), and the Administrative Procedures Act (APA), MCL 24.285, that its decision include a concise statement of facts and conclusions of law. The decision is adequate to allow for meaningful review and to enable this Court to determine whether it is authorized by law and supported by competent, material, and substantial evidence. *Great Lakes Div of Nat'l Steel Corp, supra* at 402.

II. Single Business Tax Assessment

The Tax Tribunal relied on MCL 205.27a to find that petitioner was personally liable for the 1997 single business tax assessment. At the time relevant to the assessment, that statute provided, in pertinent part:

(5) 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 signature of any corporate officers 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 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. [Emphasis added.]

The Tax Tribunal found that petitioner was a corporate officer who had control or supervision of, or responsibility for, making the tax returns and payments on behalf of HRC4, in part based on the prima facie case established by petitioner's signature on tax returns.

Petitioner's reliance on the plurality opinion in *Livingstone v Dep't of Treasury*, 434 Mich 771, 780; 456 NW2d 684 (1990), as establishing the appropriate test to apply to MCL 205.27a(5), is misplaced. That case involved a provision of the Use Tax Act, MCL 205.96, which, unlike MCL 205.27a(5), did not contain a means for respondent to establish a prima facie case of responsibility. Statutes that contain the phrase "prima facie evidence" are generally predicated on the existence of a rational connection between what is proven and what, under the statute, is to be inferred. See *People v Kayne*, 286 Mich 571; 282 NW 248 (1938). Such provisions are analogous to statutory presumptions, which permit the opposing party to introduce evidence to rebut the presumption. *American Cas Co v Costello*, 174 Mich App 1, 7; 435 NW2d 760 (1989). "Prima facie evidence is evidence which, if not rebutted, is sufficient by itself to establish the truth of a legal conclusion asserted by a party." *Id.*

Petitioner concedes that respondent established a prima facie case of his responsibility under MCL 205.27a(5), as president and chief executive officer (CEO) of HRC4. The evidence

regarding petitioner's signature on tax returns was sufficient to establish the type of tax-specific involvement that Justice Archer indicated in *Livingstone, supra* at 480, would be required under the former corporate officer liability provision in the Use Tax Act.

Further, petitioner has not established that the Tax Tribunal's determination that he was personally liable for the 1997 single business tax assessment under MCL 205.27a(5) was affected by an error of law. We agree that MCL 205.27a(5) does not require any particular form of evidence to rebut respondent's prima facie case. Rather, the Tax Tribunal Act provides that "[t]he tribunal may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." MCL 205.746(1); see also *Great Lakes Div of Nat'l Steel Corp, supra* at 414. However, neither the record nor the Tax Tribunal's decision indicates that the tribunal attempted to engraft a statutory requirement onto MCL 205.27a(5) that an individual must present a specific type of evidence, namely documentary evidence, to rebut the respondent's prima facie case. Although the Tax Tribunal considered the absence of documentary evidence showing that the corporate structure changed after David Ward became chief financial officer in 1996, it did so in the context of determining the appropriate weight to be given to petitioner's testimony that he was a mere figurehead with no tax-related responsibilities. The essence of the tribunal's decision was that petitioner's evidence was insufficient to rebut respondent's prima facie case.

We also reject petitioner's claim that the Tax Tribunal ignored the deposition testimony. The Tax Tribunal received and considered several types of evidence in reaching its decision, including depositions, petitioner's live testimony, and documentary evidence. It was not necessary that the tribunal provide a complete summation of the depositions or other evidence in its decision. MCL 205.751(1); MCL 24.285. It is apparent from the Tax Tribunal's decision that it complied with its obligation to base its decision on the whole record. MCL 24.285.

With respect to petitioner's claim that the Tax Tribunal misconstrued the required duties of corporate officers under the Business Corporation Act, MCL 450.1101 *et seq.*, petitioner has not established that the tribunal was presented with any specific issue based on that act or that it sua sponte relied on it to determine petitioner's responsibilities. To properly preserve this issue for appeal, it should have been presented to the Tax Tribunal. See *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008). In any event, there is no indication that the Tax Tribunal took the strict approach to a corporate officer's liability under the revenue act, MCL 205.27a(5), that is suggested in petitioner's argument that the tribunal mandated that he be responsible for taxes. We agree that there is no presumption that a corporate officer has any particular power to act on behalf of a corporation, but circumstantial evidence may be used to establish the officer's power or responsibility. *People v Jasman*, 92 Mich App 81, 86; 284 NW2d 496 (1979). The Business Corporation Act, MCL 450.1531(4), provides that "[a]n officer, as between himself and other officers and the corporation, has such authority and shall perform such duties in the management of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board not inconsistent with the bylaws." However, the presumption in this case that petitioner had a particular power to act did not arise from his mere position as an officer, but rather from the prima facie case established by the revenue act, MCL 205.27a(5). Further, absent corporate documents, such as bylaws or express resolutions of the board of directors, petitioner's rebuttal case largely rested on an examination of the testimonial evidence in light of

petitioner's continuing activities in signing tax documents after Ward become chief financial officer.

The deposition evidence included the deposition testimony of Don Lifton, a member of the board of directors, that petitioner, as CEO, had supervisory authority over Ward and others. Petitioner's own testimony supported an inference that he did not engage in the day-to-day financial operations of HRC4 or actually fill out tax returns even before Ward became chief financial officer. Petitioner testified that either another corporate employee, Sandra Wright, or an outside accounting firm handled these tasks, but that he would review the tax returns with Wright before he signed them. Petitioner conceded that he continued to sign tax documents after Wright departed, although he no longer conducted that type of review that he performed with Wright. In addition to signing an annual tax return for sales, use, and withholding taxes in February 2008 for tax year 1997, petitioner executed a power of attorney authorizing an individual to receive information and represent HRC4 "in all Treasury matters." Petitioner has not provided support for his claim on appeal that his execution of the power of attorney involved merely a ministerial act that could have been performed by any officer or employee of the corporation. This Court will not search the record for factual support for an appellant's claim. *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009).

We note, however, that a power of attorney has generally been defined as "a written instrument by which a principal authorizes and appoints an agent, known as an attorney in fact, and delegates to the agent the power to perform acts on behalf of, in the place of, and instead of the principal." *Persinger v Holst*, 248 Mich App 499, 503; 639 NW2d 594 (2001). Regardless of whether the Tax Tribunal chose the proper words to describe the delegation in this case, it was reasonable for the tribunal to infer from the evidence that petitioner had tax-related responsibility and oversight duties to execute the power of attorney on behalf of HRC4.

Considering the record in its entirety, petitioner has not shown that the Tax Tribunal's decision was unauthorized by law or that it was not supported by competent, material, and substantial evidence on the whole record. *Toaz, supra* at 459. Although petitioner might have taken a less active role in tax matters after Ward took over financial affairs, the Tax Tribunal could reasonably infer from the evidence that petitioner was not an officer in name only, but rather remained responsible for making tax returns or payments. The fact that petitioner did not actually perform the financial tasks necessary to gather information to complete the tax returns, or actually fill out the returns, did not preclude the Tax Tribunal from finding that petitioner failed to rebut respondent's prima facie evidence of responsibility.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens