TERRANCE JUDGE	*	IN THE
	*	
v.		MARYLAND TAX COURT
	*	
COMPTROLLER OF THE TREASURY	*	No. 17-IN-00-0724
	*	

MEMORANDUM AND ORDER

This case arises from Petitioner, Terrence Judge, being assessed by the Respondent, Comptroller of Maryland ("Comptroller"), for the unpaid withholding tax of LOCS of Beauty, LLC ("LLC"), for tax years 2012 and 2014. The asserted liability is premised on Petitioner being a partner in the LLC.

Ms. Cheeks was a hair stylist, whose services the Petitioner had used. The LLC was formed in 2010 to secure the purchase of the ongoing hair stylist business, where Ms. Cheeks had worked. Ms. Cheeks wanted to concentrate on the salon and Petitioner planned to "help her out" with the business aspects of the operation.

Petitioner and Ms. Cheeks executed a partnership agreement on May 19, 2010, in which they were designated as the only partners. (Respondent's Exhibit 103.) Ms. Cheeks and Petitioner allocated the partnership interest 60% and 40%, respectively. The agreement provided Ms. Cheeks would be both the Managing Partner and Tax Matters Partner. The Tax Matters Partner was required to "… prepare, or cause to prepared, all tax returns and reports for the Partnership and make any related elections that the Partners deem advisable." Ms. Cheek's Capital Contribution was described as "...providing all Business services necessary to

bring The Best little Hair house in Town to market, while Petitioner' s contribution was solely to "···provide Collateral."

As it had become apparent to Petitioner "that both [were] over our heads," Petitioner "completely withdrew" from the business in 2012. At that time, Petitioner had assumed previously incurred financial liabilities for the business. He had funded business expenses with an American Express card he secured for the business and withdrawals from the retirement account he had as a Federal government employee.

A dissolution agreement for the LLC was executed July 1, 2013. (Respondent's Exh. 104). It noted the partners "...desire to dissolve the partnership and liquidate its affairs." At Appendix A, the agreement apportioned obligations of the LLC, which were incurred before its execution. Petitioner "never went to the shop" and did not talk to Ms. Cheeks after the execution of the dissolution agreement, except for a single conversation three months before the February 7, 2018 Tax Court hearing.

Petitioner had a tax preparer prepare his tax returns. In Petitioner's 2012 and 2013 returns, a loss was reported for the LLC. (Petitioner's Exh. 1 & 2). Petitioner advised his tax preparer that as of June 2013 he "...was out of the partnership." In his 2014 return, the LLC is listed, but no loss is noted. (Respondent's Exh. 107).

In 2014 an Employer Withholding Reconciliation Report was filed for the LLC. (Respondent's Exh. 106). Counsel for the Comptroller conceded that Ms. Cheeks and not the Petitioner signed the Report.

Petitioner noted that while he was engaged in the business, Ms. Cheeks was diverting funds generated by the business to another LLC in which the Petitioner did not have an interest. He premised this suggestion upon him finding a second credit card processing terminal at the salon, which credited payments to the other LLC.

Petitioner does not contest the 2012 assessment, but suggests pursuant to the partnership agreement, he should only be liable for 40 percent of that assessment. He testified though that until he received a March 3, 2017 notice, he had "no clue" of an outstanding tax obligation, having "thought everything was taken care," commensurate with the dissolution agreement's execution.

The Comptroller premises Petitioner's liability for the 2014 withholding tax on *Tax-General Article* § 10-906 (d) (3)(i) which extends liability for income tax withholding of a LLC to "...any person who **exercises direct control** over its fiscal management···" [emphasis added]. The Comptroller asserts this provision extends liability to not only a person who actually exercises "fiscal management," but to a person who simply has that authority.

A statutory construction analysis establishes the Comptroller's assertion of liability is too broad. Applying this analysis to the facts results in a finding that in 2014 the Petitioner did not exercise the requisite direct control of the LLC's fiscal

management. In this regard, these facts convincingly establish Petitioner had no engagement with the LLC that year.[1]

Initially, a statutory analysis begins with a consideration of the plain language of the section 10-906 (d) (3) (i). *Hastings v. PNC Bank, NA*, 429 Md. 5, 36 (2012); *Frey v. Comptroller*, 422 Md. 111, 182-183 (2011). The term "exercise" is defined, in relevant part, as "...to make effective in action···" or "..to bring to bear..." and, the term "direct" is defined, in relevant part, as "···having no compromising or impairing element.." or "...marked by absence of an intervening agency, instrumentality, or influence..." *Merriam-Webster Collegiate Dictionary*, 10th Edition, 438 & 406, respectively, (1999). These terms of common parlance clearly establish, at the least, an actual engagement in fiscal management is required for liability to arise. "When a statute's plain language is unambiguous, we need only to apply the statute as written, and our efforts to ascertain the legislature's intent end there. [citations omitted]" *Hastings PNC Bank, NA, supra.* at 36; See also *Frey v. Comptroller, supra.* 182-183.

If the General Assembly wished to extend liability, as the Comptroller urges, it would have specifically done so, as it did in *Estates & Trusts Article* § 15-113 (1). That provision, in relevant part, extends joint and several liability to an entity that controls a trust company, if the trust company "**[m]ay** exercise trust or fiduciary

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[1] The only evidence Respondent presented to support Petitioner's 2014 involvement with the LLC is the LLC's listing in Petitioner's 2014 return. No loses or gains for the LLC were indicated in that return, as they were in the 2012 and 2013 returns. Hence, the Court concludes the listing was simply a placeholder with no significance. The Petitioner testifying he had advised his tax preparer that as of June 2013 he "was out of the partnership" supports this conclusion.

powers in the State.." [emphasis added]. Hence, the provision envisions liability when a person not only does exercise powers, but also may exercise those powers.

If "exercise" in Section 10-906 (d) (3) (i) had been modified with "may" the Comptroller's suggested interpretation would be convincing. But, it was not and the contrast between the two sections is entitled to weight in rejecting the Comptroller's asserted interpretation. See *Lyon v. Campbell*, 324 Md. 178, 185-186 & 189 (1991); *Rosecroft Trotting & Pacing Association, Inc. v. Prince George ' s County*, 298 Md. 580, 594 (1984); *Fox v. Comptroller*, 126 Md. App 279, 287-288 (1999)

In *Comptroller v. House*, 68 Md. App. 560 (1986) the Court considered statutory language parallel to the language of Section 10-906 (d) (3) (i). The undertaken analysis in the context of facts viewed relevant by the Court indicates the "exercise" of "direct control" requires actual engagement and not just the ability to engage, as the Comptroller suggests."

The then applicable statute before the Court was *Article 81* § 312(h)(4), which, in relevant part, rendered a corporate officer liable for withholding tax if that officer "···exercises direct control over the fiscal management of the corporation. " In affirming the Tax Court's decision that Appellee, Dr. Homer House, exercised sufficient "direct control" to render him liable for the withholding tax, the Court noted that Dr. House "...(1) advised...[the corporations' president] of business opportunities, as well as potential business risks; (2) involved himself in the acquisition of a piece of equipment essential to ···[the corporation's] business; and, (3) played a significant role in attempting to extricate... [the corporation] from it's

financial problems." *Id* .at 568.[2] It is apparent that Dr. House, unlike the Petitioner herein, was actually engaged in the corporation's affairs to the extent that he exercised the requisite "direct control over the fiscal management." [3]

The Comptroller, relying on *Fox v. Comptroller, supra.* at 289, argues an absurdity would arise if actual exercise of fiscal authority were required. That reliance is misplaced, as the absurdity suggested was the ability of corporate officers, in the context of their statutorily unrestricted liability for sales and use tax, to avoid that unrestricted personal liability by assigning tax payment responsibility to a third person. This potential absurdity is avoided in the context of a LLC as *Tax General* §10-906 (d) (3) (ii) imposes liability for unremitted withholding tax on "... any agent of the limited liability company or limited liability partnership who is

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[2] The Court earlier cited the following facts regarding Dr. House's engagement with the corporation:

1. He was a majority shareholder of the corporation;
2. He was listed in filings as the "Owner or Responsible Officer" of the corporation;
3. He offered advise to the Corporation's president regarding the viability of a contract and on several occasions of business opportunities;
4. He directed the president to fire an employee;
5. He raised the need for a computer and was involved in the purchase of that computer;
6. The annual corporate meetings were held at his house; and
7. As the corporation's finances deteriorated, he made loans to the company, had his wife manage check writing, became the sole authorized signatory of checks, and convened a meeting with his accountant and the president. *Id.* At 564-565

[3] The Court did reject "...the circuit court's construction of 'direct control' as meaning day to day control," noting that construction was "...inordinately narrow and contravenes the intent of art. 81, § 312(h)(4)." *Comptroller v. House, supra.* at 568. Regardless, the Petitioner's engagement in the LLC was always markedly less the Dr. House's engagement with the corporation and was non-existent during the time when the 2014 tax withholding obligation was incurred.

required to withhold and pay the income tax."[4] In addition, it is difficult to envision a circumstance when no member of a functioning LLC would exercise direct fiscal responsibility.

Fox is further inapplicable as it concerned a statutory provision that imposed absolute liability on a corporate officer, which Appellant Fox was determined to be, for sales and use tax "...without regard to their ability to control the fiscal management of the corporation." *Id.* At 289, See *Tax General Article* § 11-601 (d) (1). The Court continued in *dicta* to suggest even if fiscal control was required, Appellant Fox would be liable, as he was authorized to sign checks on three corporate accounts without any co-signatory and did so; managed a corporation-owned store; was responsible for collecting sales receipts from that store, including sales and use tax receipts, and depositing those receipts; and guaranteed or assumed personal liability for corporate debt. Hence, the Court's analysis, as did the previously cited analysis in *Comptroller v. House, supra.*, indicates an actual exercise of direct fiscal management is required for liability to arise for the subject 2014 assessment of the Petitioner.

The Comptroller cites two Tax Court decisions to support the contention that mere authority, without the actual exercise of that authority, is sufficient for liability to arise pursuant to Section 10-906 (d) (3)(i). *Roderick v. Comptroller*, 1981 WL 1991 (Md. Tax Ct. 1981) & *Christy v. Comptroller*, 1982 WL 1768 (Md. Tax Ct. 1982).

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[4] In discussing the legislative history of the applicable section, the Court cited Senate Bill 642 of the 1992 Session, which specifically struck a provision imposing liability on "...any agent of the corporation who has to collect or pay the sales and use tax. "

Both cases concerned the statutory provision establishing the corporate officer's withholding tax liability for "...exercising direct control over the fiscal management of the corporation." *Article 81* § 312(h)(4). The Court does not find these administrative decisions instructive, as they were issued before the *House* and *Fox* decisions cited above. Regardless, the facts relied upon by the Tax Court in both cases present a more intense engagement by the Petitioner in the business affairs than the engagement of the Petitioner in the case at bar.

In *Christy v. Comptroller, supra.*, the Tax Court noted the Petitioner "...signed payroll checks and.. [allocated] a $10,000 contribution to bills and expenses **during the period in question..**" [emphasis added]; was the only officer capable of " direct[ing] finances ; co-signed the withholding tax application as 'responsible officer' ; and wrote the amount required to be "...withheld and remitted on the face of checks. *Id.* at 5-6. In *Roderick v. Comptroller*, supra., the Tax Court noted the Petitioner was president of the corporation; owned 60% of the stocks; could cosign checks and "...received a salary during **the subject period.**" [5] [emphasis added] While the Tax Court noted the facts... "[led it] ...to include that Petitioner exercised or was capable of exercising sufficient fiscal control to render him personally liable..." the reference to being "capable" appears as surplusage since the articulated facts evidenced an actual exercise of fiscal control. [6]

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[5] In both cases, the Tax Court appears to have limited its liability analysis to the specific period when the liability was incurred, as does the Court in this liability analysis.

Petitioner complained that before he received a March 3, 2017 notice of assessment, he was not aware of an outstanding tax obligation. He "thought everything was taken care," commensurate with the dissolution agreement's execution. As the Petitioner appeared *pro se* and is not an attorney, the Court views this complaint as a request for an abatement of the interest and penalty up until the March 3, 2017 notice.

The Petitioner's assertion regarding his awareness of the outstanding tax obligation is credible. It was reasonable for him to presume that all pending obligations were addressed with the dissolution agreement. This is borne out as there is no apportionment of liability at Appendix A of the agreement for the withholding tax as there is for other obligations. In addition, Ms. Cheeks, as the designated Tax Matters Partner, was responsible for remitting withheld tax. Hence, the Court must now consider whether this factual predicate establishes sufficient reasonable cause for the requested abatement of interest and penalty. See *Frey v. Comptroller*, 422 Md. 111(2011).

The Court does find there is sufficient reasonable cause to waive penalty accrued before March 3, 2017, as the facts indicate the Petitioner was not aware of the obligation until that date. Insofar as interest, the Court finds convincing the Comptroller's suggestion a more rigorous standard is to be applied than for a penalty waiver, as interest is to compensate for the State's loss of income and not to

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[6] The Comptroller presented a convincing and thorough argument that the dissolution agreement did not extricate Petitioner from the partnership. But, the Court does not address this argument, as the Court's statutory construction analysis is dispositive.

punish. Since Petitioner did not elect to pay the uncontested tax liability upon becoming aware of that liability, the Court does not find sufficient cause to waive interest.

Accordingly, it is this 25th day of September, 2018, by the Maryland Tax Court **ORDERED** that Petitioner is fully liable for withholding tax for 2012[7], but not for 2014; is not liable for any penalty incurred before March 3, 2017, but is fully liable for interest; and is liable for penalty incurred after March 3, 2017. [8]

CC: Terrance Judge
Brian L. Oliner, Esq.

CERTIFIED TRUE COPY
TEST: John T. Hearn, Clerk

NOTICE: You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.

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[7] Petitioner's argument that his liability is limited to forty percent, as that is his interest as defined in the partnership agreement, is rejected, as the partnership agreement cannot take precedence over the statutorily established liability. See *Fox v. Comptroller, supra.* at 288-289

[8] Issues raised not specifically addressed by the Court were deemed de minimis.