STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **DISTRICT COURT**
SIXTH DIVISION

THOMAS A. PALANGIO D/B/A CONSUMER AUTO SALES	:	
	:	
v.	:	**A.A. No. 11-093**
	:	
DAVID M. SULLIVAN, TAX ADMINISTRATOR	:	

JUDGMENT

This cause came on before Clifton, J. on Administrative Appeal, and upon review of the record and memoranda of counsel, and a decision having been rendered, it is

ORDERED AND ADJUDGED

Judgment is entered in favor of the defendant.

Dated at Providence, Rhode Island, this 19th day of October, 2012.

ENTER: **BY ORDER:**

/s/ **/s/**

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DECISION

CLIFTON, J. This matter is before the Court on an appeal by Thomas A. Palangio ("Appellant") seeking judicial review of a final decision rendered by the Division of Taxation. Jurisdiction is pursuant to G.L. 1956 § 44-19-18.

Facts and Travel

On March 19, 2009, the Tax Division issued a Notice of Deficiency Determination against Appellant and his business partner, Nicholas D'Amico (Mr. D'Amico) d/b/a Consumer Auto Sales (Consumer), a licensed used car dealer. The Deficiency Notice provided that the Tax Division was seeking $3082.10 in use tax, interest and penalty for a new motor vehicle purchased in June of 2007. The vehicle was purchased in the name of the business, allegedly for resale in the course of business. The vehicle was then resold to another dealer three weeks later.

A subsequent Tax Division investigation revealed that Consumer made extensive use of the vehicle during the three week period and put approximately 2500 miles on the vehicle. The grounds for the Deficiency Notice provided that the retailer (Consumer) had made a taxable use

of inventory pursuant to § 44-18-26[1] and Regulation 96-138[2]. Appellant protested the Deficiency Notice and requested an administrative hearing[3].

In April 2011, an administrative hearing was held and the Hearing Officer recommended that the Deficiency Notice be upheld. The Tax Administrator adopted the Hearing Officer's findings and issued a Final Decision & Order on June 28, 2011. The total amount due on the tax liability, including accrued statutory interest, totaled $4027.81.

Appellant filed a timely appeal with this Court but did not file a Motion for Prepayment Exemption pursuant to G.L. 1956 § 8-8-25[4]. Upon learning of the appeal, the Tax Administrator filed and served an answer on September 29, 2011. Subsequently on December 5, 2011, the Tax

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[1] Section 44-18-26 provides;

> If a person who gives a certificate consumes or makes any storage or use of purchased property other than retention, demonstration, or display while holding it for sale in the regular course of business, the storage, use, or consumption is subject to the sales or use tax, as the case may be, as of the time the property is first stored, used, or consumed, and the cost of the property to the purchaser is the measure of the tax. G.L. 1956 § 44-18-26.

[2] Regulation SU 96-138 New Motor Vehicle Purchased by Used Car Dealer or Auto Body Mechanic provides;

> When a used car dealer or auto body repairer holding a motor vehicle dealer's license and permit to make sales at retail purchases a new motor vehicle from a new car dealer such used car dealer or auto body repairer shall be deemed liable for the payment of tax thereon unless such used car dealer or auto body repairer can show, by proper records, that the motor vehicle in question was actually purchased for resale in which case the tax shall not apply; provided, however, when the used car dealer or auto body repairer sells the motor vehicle in question within thirty (30) days of its purchase from the new car dealer it shall be presumed that such used car dealer or auto body repairer purchased the motor vehicle for resale. R.I. Admin. Code 60-1-91:1.

[3] Mr. D'Amico did not protest the Deficiency Notice along with Appellant.

[4] Section 8-8-26 provides in pertinent part;

> A taxpayer's right to file a complaint pursuant to § 8-8-25 for review of a final decision of the tax administrator ordering an assessment, deficiency, or otherwise shall be conditional upon prepayment of all taxes, interest, and penalties set forth in the assessment, deficiency, or otherwise; Provided, however, that in lieu of the prepayment, the taxpayer may file together with his or her complaint a motion for an exemption from the prepayment requirement. G.L. 1956 § 8-8-26.

Administrator filed and served an amended answer in which he asserted a counterclaim for frivolous tax appeal pursuant to § 8-8-31[5].

In October 2011, the use tax assessment, accrued interest, and penalties in the amount of $4027.81 was paid by Mr. D'Amico by way of his personal income tax return that was applied by a statutory offset pursuant to § 44-1-11[6]. It is contended by Appellant that only a portion of the tax was paid through the offset to Mr. D'Amico's income tax return and the remainder was paid by him personally and directly to the Tax Administrator by way of a bank check. It is this dispute that provides the basis for the Tax Administrator's assertion that Appellant lacks standing to contest the final decision.

The Tax Administrator asserts that Appellant lacks standing to pursue a de novo tax appeal because he neither paid the contested tax nor filed a prepayment exemption, and that the tax was paid by Mr. D'Amico, a third party not properly before the court. Appellant claims that he not only contested the use tax assessment and filed the instant action d/b/a Consumer, but personally paid over $2000.00 of the tax deficiency by way of a bank check, thus providing him with sufficient standing to appeal the final decision of the Tax Administrator. Furthermore, Appellant contends that he has standing to appeal as a principal/partner of Consumer, the entity

[5] Section 8-8-31 provides;

> Whenever it appears to the court that proceedings before it have been instituted by the taxpayer solely for delay and that the taxpayer's complaint is frivolous and groundless, damages in an amount not in excess of five thousand dollars ($5,000) plus costs may be assessed against the taxpayer by the court. G.L. 1956 § 8-8-31.

[6] Section 44-1-11 provides;

> Whenever an erroneous payment or any payment in excess of the correct amount of any tax, excise, fee, penalty, interest, or other charge is made to the tax administrator, the general treasurer shall, after certification by the tax administrator with the approval of the director of administration, refund the erroneous payment or overpayment, or the tax administrator may credit the erroneous payment or overpayment against any tax then or thereafter due, as the circumstances may warrant. G.L. 1956 § 44-1-11.

against which the tax was assessed[7]. On January 24, 2012, the parties were ordered to submit position papers regarding Appellant's standing to pursue de novo appeal.

Law and Analysis

In order to fall within the purview of the District Court and properly pursue a tax appeal, an appellant must first satisfy the standing requirements. Therefore, to challenge a final decision of the Tax Administrator, the moving party must be a taxpayer within the meaning of § 8-8-25. Section 8-8-25 provides; "[a]ny *taxpayer* aggrieved by a final decision of the tax administrator concerning an assessment, deficiency, or otherwise may file a complaint for redetermination of the assessment, deficiency, or otherwise in the court as provided by statute under title 44. (Emphasis added). Furthermore, § 8-8-26 provides that "[a] taxpayer's right to file a complaint pursuant to § 8-8-25 for review of a final decision of the tax administrator ordering an assessment, deficiency, or otherwise *shall be conditional upon prepayment* of all taxes, interest, and penalties set forth in the assessment, deficiency…." (Emphasis added). Therefore, Appellant must have paid the tax for which he is challenging in order to pursue the tax appeal pursuant to § 8-8-25.

As the party seeking relief, it is Appellant's burden to show that he is a "taxpayer" within the meaning of § 8-8-25. The language of § 8-8-28 provides in pertinent part;

> "In all tax cases before the court, and upon appeal therefrom, a preponderance of the evidence shall suffice to sustain the burden of proof. The burden of proof shall fall upon the party seeking affirmative relief and the burden of going forward with the evidence shall shift as in other civil litigation."

[7] Appellant also makes an assertion, which is supported by Mr. D'Amico's affidavit, that he reimbursed Mr. D'Amico for the setoff amount that had been taken from his income tax return. This assertion is irrelevant in the determination of whether Appellant is considered a "taxpayer" and is therefore of no effect in the analysis. (See Appellant's position paper; Affidavit of Nicholas D'Amico).

Furthermore, "[t]he intent of the Legislature in stating that the 'burden of going forward with the evidence shall shift as in other civil litigation' merely codifies that in tax cases, the burden of production shifts as it does in civil cases generally, but the burden of persuasion or burden of proof on factual issues does not vary from issue to issue." DeBlois v. Clark, 764 A.2d 727, 732 (R.I. 2001). Consequently, as the party seeking relief, Appellant bears the burden of proving—by a preponderance of the evidence—that he did in fact pay the tax directly, thus qualifying him as a "taxpayer" and satisfying the standing requirement.

The Tax Administrator argues Appellant was not the party who paid the tax, but that it was in fact Mr. D'Amico who paid the tax—through an offset to his income tax return—and Appellant therefore is not the proper party to appeal the final decision. Appellant asserts that he paid more than $2000.00 of the tax directly to the Tax Administrator by way of a bank check in October 2011. As the party seeking relief, Appellant bears the burden of proof that he did in fact pay the tax directly. Here, Appellant has failed to provide sufficient evidence that he did pay the tax directly to the Tax Administrator or any portion thereof. The only evidence before the court supporting Appellant's assertion of direct payment—by bank check—is through Mr. D'Amico's affidavit stating that such payment was made. Appellant bears the burden by a preponderance of the evidence that such payment was made. Mr. D'Amico's affidavit is not sufficient evidence to satisfy the preponderance of the evidence standard. Thus, without concrete evidence of the bank check, Appellant lacks standing as a taxpayer to challenge the board's decision.

Appellant further submits that the tax was paid on behalf of Consumer—the taxed entity—and he therefore has standing as a principal/partner. Although Consumer was assessed the tax, it was done so by way of taxing the principal partners (Mr. D'Amico and Appellant). Here, because Consumer is not a separate legal entity such as a corporation or LLP, Appellant

may not purport to have paid the tax on behalf of the entity through his partner. Furthermore, because Consumer is not a separate legal entity the partners are held jointly and severally liable. Both Mr. D'Amico and Appellant were assessed the tax deficiency and the evidence (or lack thereof) provides that it was paid solely by Mr. D'Amico, through the offset to his income tax return. Thus, as the party who paid the tax, Mr. D'Amico would have had to request an administrative hearing—in order to exhaust administrative remedies—and if aggrieved by the final decision, he would then have the right to appeal to this Court with proper standing. However, because Appellant has failed to show that he in fact paid the tax or any portion thereof, he lacks standing to challenge the final decision.

"Doing business as" (d.b.a.) does not create a separate legal entity, thus holding the principals personally liable. Here, because Appellant and Mr. D'Amico are jointly and severally liable for taxes assessed to Consumer, the Tax Administrator may collect the deficiency from either party but may not collect more than the total amount due. Because Mr. D'Amico paid the tax through an offset in his personal income tax return and Appellant failed to provide evidence that he contributed to the deficiency payment, only the party who paid the tax may appeal the decision as a "taxpayer." Here, because Mr. D'Amico failed to appeal the decision of the Tax Administrator, he is not before the Court and Appellant may not appeal on his behalf or on behalf of Consumer because it is not a separate legal entity.

Conclusion

Based on the foregoing analysis, Appellant lacks standing to challenge the decision of the Tax Administrator because he is not a "taxpayer" within the meaning of § 8-8-25 since he did not provide sufficient evidence that he personally paid the tax. Further, Appellant's status as a principal/partner of Consumer does not confer him standing because Consumer is not a separate

legal entity, and Appellant is merely doing business as Consumer. Because the Appellant lacks standing to challenge the decision of the Tax Administrator, it is not necessary to address the merits of Appellant's appeal. Accordingly, the appeal is hereby dismissed.