

FILED

STATE OF WISCONSIN
TAX APPEALS COMMISSION

OCT 25 2023

Wisconsin Tax Appeals Commission
Nicole Ahee - Legal Assistant

TOCCATA GAMING INTERNATIONAL, LLC,

DOCKET NO. 22-I-186

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

ELIZABETH KESSLER, CHAIR:

This matter appears before the Commission based on a Motion for Summary Judgment filed by the Wisconsin Department of Revenue (the "Department") regarding the characterization of funds transferred from Petitioner Toccata Gaming International, LLC ("Toccata") to Todd R. Stimac ("Stimac"), the sole shareholder of Toccata. Petitioner contends that the funds transferred were loans, while the Department argues that they were a shareholder distribution.¹

The Petitioner appears by Gordon L. Meicher, CPA, of Meicher CPAs ("Meicher"). The Department is represented by Attorney Jeffrey A. Evans. The parties

¹ We infer that this is a dispute over whether or not these funds are deductible from Petitioner's franchise tax liability under Wis. Stat. § 71.23(2), however, neither party explicitly addresses the question of why it matters whether these funds were loans or shareholder distributions.

filed briefs, affidavits, and other documents in support of their positions. Additionally, the parties filed a Joint Stipulation of Facts.

FACTS

The following facts are primarily found in the parties' Joint Stipulation of Facts ("Jt. Stip."), filed with the Commission on March 24, 2023:

1. The Petitioner, Toccata Gaming International, LLC, is a manufacturer of amusement machines. Toccata creates software for amusement machines and manufactures cabinets for its amusement machines. (Jt. Stip. ¶ 1).

2. The Department issued a Final Field Audit Notice on January 20, 2022. That notice indicated that, "the audit resulted in no changes to your franchise tax liability because of the tax-option (S) corporation deduction." (Jt. Stip. ¶ 2).

3. Toccata filed a timely Petition for Redetermination on February 7, 2022. (Jt. Stip. ¶ 3).

4. The Department denied the Petition for Redetermination on May 11, 2022. (Jt. Stip. ¶ 4).

5. Toccata filed a timely Petition for Review with the Wisconsin Tax Appeals Commission on June 22, 2022. (Jt. Stip. ¶ 5).

6. Toccata contends that it made loans characterized as demand notes (hereinafter the "Loans") to Todd R. Stimac, personally guaranteed by Stimac, on December 31, 2016, December 31, 2017, December 31, 2018, and December 31, 2019 (the "Audit Years"). The 2016 note was for \$494,310.00. The 2017 note was for \$743,204.00. The 2018 note was for \$1,144,490.00. The 2019 note was for \$1,375,115.00. (Jt. Stip. ¶ 6; Ex. A.)

7. The Loans were executed by Toccata and Stimac after Stimac incurred personal expenses that were unrelated to the business of Toccata and expenses related to Toccata that were non-deductible. (Jt. Stip. ¶ 7.)

8. None of the Loans included a repayment schedule. (Jt. Stip. ¶ 10; Ex. A.)

9. None of the Loans provided for a set maturity date. (Jt. Stip. ¶ 8; Ex. A.)

10. At the end of each Audit Year, each Loan was rolled over into a new Loan executed by Toccata and Stimac. (Jt. Stip. ¶ 9.)

11. Stimac did not make any repayment of the Loans' principal or interest during the Audit Years. (Jt. Stip. ¶ 11.)

12. Stimac made a series of 23 deposits to Toccata accounts between April 6, 2016 and December 3, 2019, which are summarized on a page created by Gordon L. Meicher, titled "Toccata Gaming International: Deposits Made By Todd Stimac 2016-2019." Affidavit of Gordon L. Meicher, June 7, 2023 (hereinafter "Meicher Deposit Aff."). Two of the deposits are listed in a separate column from the remaining 21. The total of all of the deposits is \$216,665.53. Below that total is the number \$211,165.53 with the phrase "REDUCED DRAWS VS. REDUCED NOTE." (Emphasis in original.) The difference between the totals equals the subtotal of the two separated deposits taken away from the total of the remaining 21 deposits. Meicher states that the deposits "were classified as reduction of distributions and have been considered remittances on loans due from shareholder." (Meicher Deposit Aff., 1, 2.)

13. Toccata never took any action during the Audit Years to collect principal or interest from Stimac. (Jt. Stip. ¶ 12.)

14. Toccata did not record or report interest income from any of the Loans during the Audit Years. (Jt. Stip. ¶ 13.)

15. Toccata contends that it maintained a memo account off its balance sheet for accrued interest on the Loans. (Jt. Stip. ¶ 15.)

16. At all times during the Audit Years, Stimac was the sole owner of Toccata and owned 100% of the Toccata stock. (Jt. Stip. ¶ 17.)

17. The only collateral offered by Stimac was Toccata stock. (Jt. Stip. ¶ 16.)

18. During the Audit Years, Stimac lacked the liquid assets to repay the Loans, but held real property assets purportedly in excess of the Loan amounts. (Jt. Stip. ¶ 18.)

19. During three of the four Audit Years (2017, 2018, and 2019), Stimac's reported Adjusted Gross Income ("AGI") was less than the Loan amount. During 2016 Stimac's reported AGI was several thousand dollars higher than the Loan. (Second Affidavit of Gordon L. Meicher, June 7, 2023 ("Meicher Stimac Tax Aff.") and Jt. Stip. Ex. A.)

20. During the Audit Years, Stimac's ability to repay the loan was based on Toccata's income. (Jt. Stip. ¶ 19.)

21. During the Audit Years, Toccata reported losses. (Jt. Stip. ¶ 19.)

22. Stimac was only able to start making payments on the Loans after

the Audit Years, once Toccata began to recover. (Jt. Stip. ¶ 20.)

APPLICABLE LAW

Both parties looked primarily to federal tax decisions for guidance on this matter. For example, *Kelly v. Commissioner of Internal Revenue*, T.C. Memo. 2021-76 (2021) (“*Kelly*”) sets forth an eight-factor list of criteria to be used to determine whether corporate transfers of funds should be treated as loans or as corporate distributions. Taken together, these factors indicate that “an intent to establish a debtor-creditor relationship exists if, when the transfers were made, the debtor intended to repay the funds and the creditor intended to enforce repayment.” *Ibid.* at 20.

The parties discussed several other cases at some length, including: *Dixie Dairies Corp. v. Commissioner of Internal Revenue*, 74 T.C. 476 (1980) (“*Dixie Dairies*”); *Knutsen-Rowell, Inc. v. Commissioner of Internal Revenue*, T.C. Memo. 2011-65 (2011) (“*Knutsen-Rowell*”); *Litton Business Systems, Inc. v. Commissioner of Internal Revenue* 61 T.C. 367 (1973) (“*Litton*”); and *Theodore O. Wentworth and Shirley Morse Wentworth v. Commissioner of Internal Revenue*, T.C. Memo 1966-167 (1966) (“*Wentworth*”). These cases, like *Kelly*, explore elements that indicate whether or not a bona fide debtor-creditor relationship has been established. We also reviewed a number of cases citing those discussed by the parties and will note them below where relevant.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

The party moving for summary judgment has the burden "to establish the absence of a genuine, that is, disputed, issue as to any material fact." *Kraemer Bros., Inc. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). Once a *prima facie* case is established, "the party in opposition to the motion may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." *Board of Regents v. Mussallem*, 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980).

In this case, the parties filed a Joint Stipulation of Facts containing sufficient material facts for the Department to support its Motion for Summary Judgment. Petitioner additionally provided three sworn affidavits relating to financial documents: first, an Affidavit by Mr. Meicher for deposits from Stimac into Toccata accounts ("Meicher Deposit Affidavit"); second, an Affidavit by Mr. Meicher for the IRS Forms 1040 filed on behalf of the Stimac family from 2016-2020 ("Meicher Stimac Tax Affidavit"); and third, an Affidavit by Mr. Meicher for the IRS Forms 1120S filed on behalf of Toccata from 2016-2020 ("Meicher Toccata Tax Affidavit").

Additionally, parts of the document titled Petitioner's Rebuttal to Motion for Summary Judgment introduced a number of other alleged facts. Those alleged facts were not made by affidavit or sworn statements of any kind. A number of those unsworn allegations conflict with both the Joint Stipulation of Facts, signed by Petitioner's representative, and with Petitioner's own Proposed Findings of Fact as filed with its

Rebuttal. In light of all of this, we find that there is no genuine issue of material fact, and that summary judgment is appropriate.

ANALYSIS

Wisconsin law does not provide substantial guidance for determining when a transfer of funds between a business and another entity should be classified as a loan. However, this question has come before the U.S. Tax Court on multiple occasions, providing ample guidance. The core of that court's reasoning comes down to the idea that all of the facts and circumstances should be considered when attempting to determine whether or not two entities have a bona fide debtor-creditor relationship. (Paraphrasing *2590 Assocs., LLC v. Commissioner*, T.C. Memo 2019-3 (2019).) In *Kelly* (supra), the court identified eight objective factors which are to be considered:

1. Whether the promise to repay is evidenced by a note or other instrument that evidences indebtedness,
2. Whether interest was charged or paid,
3. Whether a fixed schedule for repayment and a fixed maturity date were established,
4. Whether collateral was given to secure payment,
5. Whether repayments were made,
6. What the source of any payments was,
7. Whether the borrower had a reasonable prospect of repaying the loan and whether the lender had sufficient funds to advance the loan, and
8. Whether the parties conducted themselves as if the transaction was a loan.

Kelly, *id.* at pp. 57-58.

Critically, *Kelly* does not require that all of these factors be present for a debtor-creditor relationship to exist, nor does it stand for the proposition that if any single factor is present, a debtor-credit relationship must exist. Instead, *Kelly* extends a long line

of federal cases supporting the idea that determination of a bona fide debtor-creditor relationship requires considering many economic and behavioral factors that are rooted in the specific facts of the case.

In this matter, the stipulated facts provide sufficient information to make a determination, using the *Kelly* factors, of whether or not a bona fide debtor-creditor relationship existed between Toccata and Stimac during the Audit Years. However, because Petitioner submitted affidavits containing additional information, and several unsworn additional documents it claims support the existence of a bona fide debtor-creditor relationship, we also consider those documents and grant them appropriate probative value.

Factor 1: Whether the promise to repay is evidenced by a note or other instrument that evidences indebtedness. Exhibit A of the Joint Stipulation of Facts consists of four single-page documents, each titled "Promissory Note." Each document lists a dollar amount, an effective date, and an interest rate. Each document ends with a single signature line containing a single, illegible, identical signature. None of the documents include the name underneath the signature. As the stipulation indicates that the Loans were made by Toccata to Stimac, we presume that the signature is that of Stimac.

Accordingly, we find that Factor 1 is minimally present in this matter. For each Audit year, there is a note which evidences indebtedness. However, the substance of these notes is minimal. Each note has only one signature; the signatures on all four notes appear to be identical, as though made by a signature stamp instead of individually

signed at different times; there are no witness or notary signatures; even the dates on each document are typewritten, not handwritten. We agree with the U.S. Tax Court in *Dixie Dairies*, which stated that “bookkeeping entries can be given little weight unless supported by some other objective evidence showing the advances to be loans.” (*Ibid.*) The evidence of a bona fide debtor-creditor relationship based on Factor 1 is superficially present, but it can be given little weight.

Factor 2: Whether interest was charged or paid. The parties stipulated that Stimac paid no interest on the Loans during the Audit years. (Jt. Stip. at 11.) “Toccatà contends that it maintained a memo account off its balance sheet for accrued interest on the Loans.” (Jt. Stip. at 14.) No evidence supporting that contention was included in the stipulation. The only evidence purporting to indicate that interest was charged are Exhibits E and F to Petitioner’s Rebuttal².

Exhibit E is a single undated page titled “Toccatà Gaming International Loan to Shareholder - Memorandum.” This page lists loan balances for 2016, 2017, 2018, and 2019, along with interest accrued and updated totals. This page is undated, unsigned, and contains no details authenticating it as a record kept in the ordinary course of business. There is no affidavit attesting to its authenticity. Furthermore, it lacks internal consistency: Exhibit E indicates in two places that the balance on December 31, 2019, before interest accrual was added to the 2019 total, was \$1,444,465. Accrued interest of

² Exhibit F is substantially similar to Exhibit E, but it includes time outside of the Audit Years, and information from such time is disregarded since it is not relevant to the current matter.

\$69,350 was listed below this total, however, the final "Per QuickBooks 12/31/2019" entry showing the year-end total was \$1,375,115.

This lower total represents the Loan being reduced by the amount of interest accrued, rather than that interest being charged to the alleged debtor and added to the loan principal. The 2019 IRS Form 1120S attached to Meicher Toccata Tax Affidavit lists the year end "Loans to Shareholders" amount as \$1,375,115 (p. 4, line 7) as does the 2019 promissory note attached to the Joint Stipulation of Facts. There is no evidence anywhere in the record showing that interest was paid, and to the extent that the record shows interest being charged, the documents supporting the claim either contain substantial errors or show that sometimes interest was credited instead of having been charged. Neither of these provide support for the existence of a bona fide debtor-creditor relationship based on Factor 2.

Factor 3: Whether a fixed schedule for repayment and a fixed maturity date were established. The parties stipulated that the Loans did not include any repayment schedule and did not set a maturity date. (Jt. Stip. at 10, 8.) There is no support for the existence of a bona fide debtor-creditor relationship based on Factor 3.

Factor 4: Whether collateral was given to secure payment. The parties stipulated that the only collateral offered to secure the Loans was Stimac's stock in Toccata. While this has the appearance of collateral given to secure payment, it has no substance. Stimac was the sole owner of Toccata. There is no evidence in the record as to the value of the Toccata stock. No one other than Stimac appears to have had the authority to demand the repayment of the loan or "release or impair any collateral security" for the

same purpose. It is not credible to imagine that Stimac would take himself to court to seek enforcement of his contract against himself. This is not sufficient to find a bona fide debtor-creditor relationship based on Factor 4.

Factor 5: Whether repayments were made. The parties stipulated that no payments were made on the principal or interest of the Loans during any of the Audit Years. (Jt. Stip. at 11.) This stipulation should be decisive, however, Petitioner provided additional information which we have reviewed.

Petitioner's affidavit, referred to above as the Meicher Deposit Affidavit, states that it shows "payments which were classified as reduction of distributions during the audit period, and have been considered remittances on loans due from Shareholder."

It is not clear from the record who classified the deposits as reductions of distributions during the Audit period. It is not clear who considered those deposits remittances on the Loans. It is not clear whether that consideration was contemporaneous or after the fact. Looking at the substance of these transactions does not help. There were a total of 23 deposits ranging in size from \$7.74 on October 31, 2016, to \$26,000.00 on February 6, 2018. The deposits were not on any apparent schedule, nor were they consistent dollar amounts. There is no explanation associated with the varied deposits. Although the Meicher Deposit Affidavit included bank records showing that the deposits were made, there is no evidence in the record connecting these deposit transactions to the Loans.

Furthermore, Petitioner itself proposed a finding of fact that “Stimac never made any repayment of the Loans’ principal or interest during the years at issue.” (Petitioner’s Rebuttal at 11.)

The existence of funds deposited by Stimac to Toccata accounts during the Audit Years does not rise to the level of evidence that Loan repayments were made. The mere self-serving statement that the payments “have been considered remittances on loans due from shareholder” does not overcome the joint stipulation or the Petitioner’s proposed finding of fact that no Loan repayments were made. There is not sufficient evidence to support finding a bona fide debtor-creditor relationship based on Factor 5.

Factor 6: What the source of any payments was. Although the Meicher Deposit Affidavit documents the deposits of funds into Toccata accounts, it does not explain the sources of those transactions with any context. We interpret Factor 6 as an open-ended question as to whether the source of funds deposited were sales, leases, licensing fees, bank loans, inheritance, or some other identifiable activity generating money. While it is possible that there are also circumstances in which the question of which account was used to transfer money to which other account is important, in this case that information does not appear relevant to the question of whether or not a bona fide debtor-creditor relationship exists. Furthermore, as described in the discussion of Factor 5, we have not found that there were payments made on the loans. If there were no payments, Factor 6 cannot apply.

Factor 7: Whether the borrower had a reasonable prospect of repaying the loan and whether the lender had sufficient funds to advance the loan. The parties

stipulated that Stimac lacked liquid assets to repay the Loans during the Audit Years. (Jt. Stip. at 16.) Although the parties also stipulated that Stimac held real property which purportedly exceeded the value of the Loans (*Ibid.*) during the Audit Years, this was offset by the stipulation that “Stimac’s ability to repay the loans was based on Toccata’s income.” (Jt. Stip. at 18.) Petitioner itself proposed the same findings of fact. (Petitioner’s Rebuttal at 18-19.) If Toccata’s income were high enough during the Audit Years, it stands to reason that the sole owner of Toccata would have had sufficient liquid assets to repay the loan.

Petitioner’s affidavit described above as Meicher Stimac Tax Affidavit included the Stimac family’s IRS Form 1040 tax filings for 2016 through 2020.³ In none of the Audit Years was the family’s reported AGI equal to or higher than the Loans. Petitioner also offered personal financial statements for Stimac for the years 2018, 2020, and 2021 as exhibits attached to the Petitioner’s Rebuttal to Motion for Summary Judgment. While these documents suggest that Stimac is in good financial health, they do not specifically address the question of whether or not the Loans could have been repaid. None of these proffered documents overcome the stipulated facts.

Although the parties engaged in some discussion of Toccata’s income and losses as a business, there is no serious dispute that Toccata had sufficient funds to advance the Loans that it advanced. The second element of Factor 7 is met, but the first is

³ Both the Petitioner’s Representative and the Department are cautioned that in the future such documents will be rejected and returned to the sender unless sensitive information such as Social Security numbers are properly redacted. The originals of this document have been redacted by the Commission as a courtesy.

not. There is not sufficient evidence to support finding a bona fide debtor-creditor relationship based on Factor 7.

Factor 8: Whether the parties conducted themselves as if the transaction was a loan. A number of U.S. Tax Court decisions have listed this factor, but it has been more generally developed in the negative than in the positive, e.g. *Ronald B. and Annette C. Talmage v. Commissioner*, T.C. Memo, 2008-34 (2008); *Charles L. Garavaglia v. Commissioner*, T.C. Memo 2011-228 (2011); *Knutsen-Rowell, Inc. et al. v. Commissioner*, T.C. Memo 2011-65 (2011). In these cases, the parties were found to have actively engaged in conduct that is unlike the behavior of a debtor and creditor, such as providing funds to a business and taking on a management role in that business, or engaging in fraudulent activity. The Commission does not believe Stimac and Toccata actively engaged in those kinds of behaviors. However, that is not the same thing as having "conducted themselves as if the transaction was a loan."

How parties conducted themselves when a transaction was found to be a loan was described by the U.S. Tax Court on at least one occasion:

The conduct of the parties may indicate the existence of a loan. . . . Petitioner credibly testified that, at the time the disbursements were made, he intended the disbursements to be loans, he believed that interest would be charged, and he understood that he would have to repay the amounts disbursed. During 2000, petitioner paid \$48,344.76 in interest and repaid \$400,000 of the disbursements.

. . .
In addition, Caspian reported petitioner's \$48,344.76 payment as interest income on its 2000 income tax return. Caspian treated the disbursements to petitioner as notes receivable, indicating Caspian's expectation that the amounts would be repaid.

The behavior of the parties weighs heavily in favor of finding a loan.

Nariman Teymourian v. Commissioner, T.C. Memo 2005-232 (2005).

Stimac did not pay interest or principal on the Loans during the Audit Years. Making interest payments on a loan, or setting a date when payments will begin, are the minimum we can imagine meeting the criteria of whether the parties conducted themselves as if the transaction were a loan. Stimac and Toccata did not engage in any conduct suggesting the transaction was a loan. There is no evidence to support finding a bona fide debtor-creditor relationship based on Factor 8.

In summary, the evidence of a bona fide debtor-creditor relationship based on Factor 1 is superficially present but can be given little weight. To the extent that evidence based on Factor 2 is present, it either contains a serious error or supports the opposite conclusion. Factor 3 is not present at all. Factor 4, like Factor 1, is superficially present but can be given little weight. Factor 5 is not supported by evidence. Factor 6 does not apply. Factor 7 is undercut by the sworn evidence. Finally, Factor 8 is not supported by any substantive evidence. Accordingly, we are unable to find that a bona fide debtor-creditor relationship exists between Toccata and Stimac. If there is no bona fide debtor-creditor relationship between Toccata and Stimac, then the funds transferred were not loans and have been properly characterized by the Department as shareholder distributions.

CONCLUSIONS OF LAW

1. No material facts are in dispute and, therefore, this case is ripe for summary judgment.

2. There is insufficient evidence to support Petitioner's claim that the financial distributions at issue, from Toccata to its sole shareholder, were based on a bona fide debtor-creditor relationship. The Department properly characterized those distributions as shareholder distributions.

ORDER

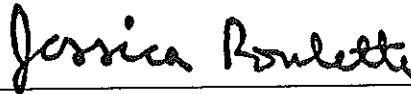
The Department's Motion for Summary Judgment is granted.

Dated at Madison, Wisconsin, this 25th day of October, 2023.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Jessica Roulette, Commissioner



Kenneth Adler, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION