

Jeff Kaiser, P.C. v. State

Court of Appeals of Texas, Third District, Austin

April 20, 2016, Filed

NO. 03-15-00019-CV

Reporter

2016 Tex. App. LEXIS 4074

Jeff Kaiser, P.C. and Jeffery Benedict Kaiser, a/k/a Jeffrey B. Kaiser, Appellants v. The State of Texas, Appellee

Subsequent History: Petition for review filed by, 07/01/2016

Prior History: [*1] FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT. NO. D-1-GV-13-00790, HONORABLE JON N. WISSER, JUDGE PRESIDING.

Disposition: Affirmed.

Counsel: For Appellant: Mr. Jeffery B. Kaiser, Kaiser PC, Houston TX.; Mr. George F. May, Twomey May PLLC, Houston, TX.

For Appellee: Mr. Sean Michael O'Neill, Mr. Kevin Sauer, Assistant Attorney Generals, Austin, TX.

Judges: Before Chief Justice Rose, Justices Pemberton and Field.

Opinion by: Scott K. Field

Opinion

MEMORANDUM OPINION

The State of Texas sued Jeff Kaiser, P.C. and Jeffery Benedict Kaiser a/k/a Jeffrey B. Kaiser (collectively, Kaiser) to collect unpaid franchise taxes. After a bench trial, the district court rendered judgment awarding the State \$34,776.53 for the unpaid franchise taxes, penalties, and interest and \$2,500 for attorneys' fees. In three issues, Kaiser challenges the judgment contending that (1) the suit was barred by limitations, (2) the evidence was insufficient to support the amount awarded for franchise taxes, penalties, and interest, and (3) the trial court erred by awarding attorneys' fees of \$2,500. We will affirm.

BACKGROUND

Jeffery Kaiser was an officer and director of Jeff Kaiser, P.C., an entity whose corporate charter was forfeited in August 2003 for failure to file franchise tax reports. In August 2008, Jeffery Kaiser petitioned a federal bankruptcy court in the Southern District of Texas for bankruptcy relief under Chapter 7 of the United States Bankruptcy Code. [*2] While the bankruptcy case was pending, Jeffery Kaiser filed franchise tax reports for Jeff Kaiser, P.C. for the reporting years of 2004, 2005, 2006, and 2007. The reports showed \$32,579.00 in franchise tax due on gross receipts in excess of one million dollars. Neither Jeffery Kaiser nor Jeff Kaiser, P.C. remitted the franchise tax stated on those reports to the Comptroller. Jeffery Kaiser's bankruptcy proceedings concluded on July 15, 2009 when he received a general discharge.

On April 15, 2013, the Comptroller filed for record a State Tax Lien against Jeff Kaiser, P.C. The lien states that the "Period of Liability" is January 1 through December 31, 2004 and the lien amount is \$5,628.35, which was composed of the franchise tax due for reporting year 2004, penalties, and interest. The lien also states:

Notice is hereby given that a lien exists in favor of the State of Texas for delinquent taxes/fees. All taxes/fees, fines, penalties and interest due to the State of Texas were assessed by statute and were secured as of the assessment date by a statutory lien on all real and personal property owned, claimed or acquired by the taxpayer named below.

This lien is cumulative and in addition [*3] to all other liens provided by law and is sufficient to cover all taxes/fees, fines, penalties and interest of any nature or type which may have accrued before or after the filing of this notice.

On August 2, 2013, the State sued Jeffery Kaiser¹ and Jeff Kaiser, P.C. seeking to collect a total of \$33,113.68 in delinquent franchise tax for reporting years 2004, 2005, 2006, and 2007 plus penalties and interest. In support of its claim, the State attached as an exhibit to its original petition a "Certified Claim for Texas Franchise Tax" form prepared by the Comptroller. Kaiser filed an answer and asserted as an affirmative defense that the State's claim was barred, in whole or in part, by the applicable statute of limitations. After conducting a bench trial, the district court rendered judgment in the State's favor and ordered Kaiser to pay the State \$34,776.53 in delinquent franchise tax plus penalties and interest and \$2,500 for the State's reasonable and necessary attorneys' fees. Kaiser then perfected this appeal.

DISCUSSION

In their first issue, Kaiser contends that the State's suit to collect the delinquent franchise tax was barred by limitations. The Texas Tax Code provides:

At any time within three years after a deficiency or jeopardy determination has become due and payable or within three years after the last recording of a lien, the comptroller may bring an action in the courts of the state, or any other state, or of the United States in the name of the people of the State of Texas to collect the amount delinquent together with penalties and interest.

Tex. Tax Code § 111.202. In the present case, the last recording of a lien occurred on April 15, 2013, and suit was filed in August 2013, well within the three-year limitation period for filing suit to collect the delinquent franchise tax. Kaiser argues, however, that the statute must be read to include a time limit for the State to record a lien because if the State had an indefinite period of time to do so it would serve to extend indefinitely the time for filing suit to collect delinquent taxes thereby essentially eliminating the three-year limitations period.

Kaiser does not identify any statutory provision that imposes a limitations period on [*5] when the State can record a lien. Instead, he relies on this Court's opinion in *Lawyers Surety Corp. v. State*, 825 S.W.2d 802 (Tex. App.—Austin 1992, no pet.). In *Lawyers Surety*, we

considered whether a delinquent taxpayer's surety for tax bonds could assert the affirmative defense of limitations that was available to the taxpayer pursuant to Tax Code section 111.202. *Id.* at 803-04. The parties did not dispute that the three-year limitations period had run. We concluded that permitting such a suit would effectively repeal Tax Code section 111.202 because "the taxpayer would ultimately lose the statutory protection of this legislation because of the surety's contractual right to recover on the bond itself." *Id.* at 803. "The principal would, in effect, be forced to defend a suit for these taxes more than three years after the final deficiency determination, which clearly violates the legislature's language in § 111.202." *Id.* Thus, starting from the premise that the limitations period had run, this Court recognized that permitting a suit against the surety would, essentially, revive the time-barred suit against the taxpayer in contravention of the Legislature's intent. The question presented here, though, is the threshold question of whether the limitations period has expired. Under the plain language of the statute it has not. Thus, Kaiser [*6] did not yet have the "statutory protection" of section 111.202 and permitting the State's suit against Kaiser does not contravene legislative intent.

Our interpretation of section 111.202 is consistent with our previous opinion in *State v. Barbee*, No. 03-99-00560-CV, 2000 Tex. App. LEXIS 3916, 2000 WL 766274 (Tex. App.—Austin June 15, 2000, pet. denied) (not designated for publication). In *Barbee*, we considered whether the State's suit to recover delinquent motor fuel taxes was barred by limitations. Barbee argued that the State had failed to bring suit within three years of a deficiency or jeopardy determination as required by section 111.202. 2000 Tex. App. LEXIS 3916, [WL] at *3-4. The parties disputed which of two notices the Comptroller sent to Barbee constituted the "determination" that triggered the limitations period. The State argued that the "determination" was made in a 1994 "Notice of Tax Due" provided to Barbee one year before suit was filed. Barbee countered that the "determination" was made much earlier in a 1989 "Tax Statement of Account" provided to him more than three years before suit was filed in November 1995 and, therefore, the suit was barred by limitations. *Id.* The State had also recorded a lien against Barbee in February 1995. While concluding that the 1994 "Notice of Tax Due" constituted the "determination" for purposes of section 111.202, this Court also stated:

More importantly, [*7] we observe that no lien was

¹ The State alleged that Jeffery Kaiser was individually liable as an officer and director of a corporation that had forfeited its corporate privileges for failure to file franchise [*4] tax reports. See Tex. Tax Code § 171.255.

filed against Barbee until February 1995. The statute limiting the period allowed for filing suit provides that the State may file suit "[a]t any time within three years after a deficiency or jeopardy determination has become due and payable or *within three years after the last recording of a lien.*" Even if we were to assume Barbee is correct that the October 1989 "Statement of Account" was a deficiency or jeopardy determination for purposes of section 111.202, the State nevertheless filed its lien against Barbee on February 20, 1995, just nine months before it filed suit.

2000 Tex. App. LEXIS 3916, [WL] at *4 (citation omitted) (emphasis in original). Thus, this Court held that the suit was timely even if the lien was filed six years after the date of the "determination." While the suit to collect delinquent taxes must be filed within three years of recording the last lien, this Court found no corresponding statutory time limit on when the lien must be filed relative to the date of the deficiency or jeopardy determination.

Kaiser also argues that a lien must be recorded within the period of time allowed for the Comptroller to "assess" a tax. See Tex. Tax Code § 111.201 ("No tax imposed by this title may be assessed after four years [*8] from the date that the tax becomes due and payable."). Kaiser reasons that "if the State has no enforceable debt, then it has no right to file a lien." But Kaiser's obligation to pay franchise taxes does not arise from a Comptroller's "assessment." Rather, the franchise tax is imposed by statute, specifically Texas Tax Code section 171.001. See *id.* § 171.001(a) ("A franchise tax is imposed on each taxable entity that does business in this state or that is chartered or organized in this state."). A taxable entity doing business in the state must file an annual franchise tax report "and *at the same time* must pay the franchise tax and any applicable penalties and interest due by the taxable entity." 34 Tex. Admin. Code § 3.584(c)(1) (Comptroller of Pub. Accounts, Margin: Reports and Payments). While the State may make an additional assessment within four years of the date the franchise tax was due if it determines that the franchise tax reported is inaccurate, it is not required to do so in order to be entitled to payment by the taxable entity of the amount of franchise tax stated on the report. Furthermore, even if Kaiser were correct that a lien must be recorded within the time period for making an assessment, the record demonstrates that the recording of [*9] the State's lien was done within that time period. The franchise tax reports were filed while Jeffery Kaiser's bankruptcy proceeding was pending. The Tax

Code provides that "[a] bankruptcy case commenced under Title 11 of the United States Code suspends the running of the period prescribed by any section of this title for the assessment or collection of any tax imposed by this title until the bankruptcy case is dismissed or closed." Tex. Tax Code § 111.207(c) (tolling of limitation period). Thus, the limitations period for the Comptroller to make an assessment of additional franchise tax was tolled until July 15, 2009 and did not expire until July 15, 2013. The lien was filed in April 2013, which is within the time period for the Comptroller to have made an assessment of additional franchise tax due.

Finally, Kaiser maintains that if the suit is timely at all, it is only timely with respect to the claim for delinquent franchise tax for reporting year 2004 since that was the only amount stated in the lien recorded by the State. This argument likewise fails because the Texas Tax Code expressly provides that "[o]ne tax lien notice is sufficient to cover all taxes of any nature administered by the comptroller, including [*10] penalty and interest computed by reference to the amount of tax, that may have accrued *before or after* the filing of the notice." *Id.* § 113.006 (emphasis added); see also Tex. Att'y Gen. Op. No. GA-0028, 2003 Tex. AG LEXIS 2159 (2003) ("The legislature has also expressly provided in section 113.006 that a state tax lien notice covers additional amounts not included in the notice."). Thus, the tax lien recorded in April 2013 covers franchise tax due not just for the 2004 reporting year, but also for reporting years 2005, 2006, and 2007. Because the State's suit to collect Kaiser's delinquent franchise tax for all four reporting years was timely filed, we overrule Kaiser's first issue.

In their second issue, Kaiser challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that the amount of franchise tax, penalties, and interest due as of the date of judgment was \$34,776.53. We may sustain a legal sufficiency challenge only if the record discloses one of the following situations: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital [*11] fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). In determining whether a finding is supported by legally sufficient evidence, we view the evidence in the light most favorable to the finding, "crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable

jurors could not." *Id.* at 807. We indulge every reasonable inference that would support the finding. *Id.* at 822.

In reviewing the factual sufficiency of the evidence, we consider and weigh all the evidence presented at trial, including any evidence contrary to the judgment. *Plas-Tex, Inc. v. U. S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We set aside the finding for factual insufficiency if it is "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 709 S.W.2d at 176.

We conclude that the evidence is legally and factually sufficient to support the judgment against Kaiser. At trial, the court admitted as an exhibit the Texas Comptroller's Certificate to Attorney General of Fee Delinquency certifying franchise tax liability in the amount of \$34,271.86. The court also heard testimony from an employee of the Comptroller's office that \$505.08 in additional interest had accrued between [*12] the date of the Certified Claim and the date of trial. Together these add up to the \$32,776 awarded the State. Section 111.013 of the Tax Code provides that a Comptroller's certificate of delinquency "is prima facie evidence" of:

- (1) the stated tax or amount of the tax, after all just and lawful offsets, payments, and credits have been allowed;
- (2) the stated amount of penalties and interest;
- (3) the delinquency of the amounts; and
- (4) the compliance of the comptroller with the applicable provisions of this code in computing and determining the amount due.

Tex. Tax Code § 111.013(a). By admitting the certificate into evidence at trial, the State established a prima facie case for collection of the delinquent taxes from Kaiser. A taxpayer attempting to deny responsibility for taxes faces a heavy burden once the Comptroller produces a certificate showing the amount of taxes that are delinquent. *Sundown Farms, Inc. v. State*, 89 S.W.3d 291, 293 (Tex. App.—Austin 2002, no pet.). "[A] taxpayer has the burden to overcome a deficiency certificate's presumed correctness with such evidence tending to support the contrary as would be conclusive, or evidence which would be so clear and positive it would be unreasonable not to give effect to it as conclusive." *Hylton v. State*, 665 S.W.2d 571, 572 (Tex.

App.—Austin 1984, no writ).

According to Kaiser, the State "itself rebutted the Comptroller's certificate [*13] of deficiency by introducing into evidence [Kaiser's] franchise tax reports processed by the Comptroller." Specifically, Kaiser refers to the testimony of Rose Fitzgerald, an investigator with the Office of the Attorney General, regarding an exhibit identified as the franchise tax reports Kaiser filed in December 2008. On each of the franchise tax reports a line had been drawn through the dollar figure for the amount due and payable and the number "0" had been written next to it. Fitzgerald testified that in her experience working with the Comptroller's office she was aware that when a taxpayer files a franchise tax report but does not remit payment with the report, the investigator would typically "draw a line across the amount that is due and put a zero on there to show no payments were made towards [that] amount." According to Fitzgerald, the zero represents the amount of the franchise tax that was paid by the taxpayer, not the amount that was due. On appeal, Kaiser argues that the exhibit along with Fitzgerald's testimony constitute evidence "contrary to" the Comptroller's certificate of delinquency. He also claims that the State's sole fact witness, Fitzgerald, "admitted that the [*14] Comptroller's office had altered the tax reports to put 'zero' as the tax due without explanation." This mischaracterizes Fitzgerald's testimony in which she plainly stated that the number zero indicated that the taxpayer had made no payment of the tax due, not that the taxpayer owed nothing. Nothing in Fitzgerald's testimony or the exhibit itself constitutes evidence so clear and positive that it overcomes the deficiency certificate's presumed correctness and conclusively establishes that Kaiser does not owe the tax. See Tex. Tax. Code § 111.103(a); *Smith v. State*, 418 S.W.2d 893, 896 (Tex. Civ. App.—Austin 1967, no writ) (citing *Southland Life Ins. Co. v. Greenwade*, 138 Tex. 450, 159 S.W.2d 854 (Tex. 1942)). The trial court expressly found that Kaiser did not offer "evidence sufficient to overcome the statutory presumptions in favor of the State's Certified Claim for Texas Franchise Tax," a finding that is supported by the record. We overrule Kaiser's second issue.

In their third issue, Kaiser challenges the sufficiency of the evidence supporting the trial court's award of attorneys' fees in the amount of \$2,500. Relying on *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012), Kaiser argues that the State did not provide "sufficient evidence for the trial court to provide a meaningful review of its fee application" because it did not offer into

evidence any billing records. *Olivas*, however, addressed a request [*15] for fees under the fee-shifting provisions of the Texas Commission on Human Rights Act under the federal lodestar method. *Id.* at 761. The supreme court expressly noted that in a traditional award of attorneys' fees, Texas law does not require detailed billing records or other documentation as a predicate to an attorneys' fees award, but held that such a requirement "has merit in contested cases under the lodestar approach." *Id.* at 762. The *Olivas* court did not conclude that all attorneys' fees recoveries in Texas would thereafter be governed by the lodestar approach, and we will not draw that conclusion here.

Under the traditional method of awarding attorneys' fees, documentary evidence is not a prerequisite. See *In re A.B.P.*, 291 S.W.3d 91, 99 (Tex. App.—Dallas 2009, no pet.). Texas courts consistently hold that the attorney's testimony about his experience, the total amount of fees, and the reasonableness of the fees charged is sufficient to support an award. See, e.g., *Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013, no pet.). In this case, State's counsel testified regarding his experience, including 15 years of practice with the

Office of the Attorney General, and the complexity of the case, including the need to defend against Kaiser's defense of limitations and the incorrect argument that his franchise tax liabilities [*16] had been discharged in the bankruptcy. Counsel identified the tasks he performed prior to trial, including legal research, drafting documents, and preparing for and attending a hearing on Kaiser's motion for summary judgment. Counsel testified that he spent at least ten hours on the case and that \$250 was a reasonable hourly rate. This evidence was sufficient to support the trial court's award of \$2,500 in attorneys' fees. We overrule Kaiser's third issue.

CONCLUSION

Having overruled Kaiser's three appellate issues, we affirm the trial court's judgment.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Pemberton and Field

Affirmed

Filed: April 20, 2016