

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Keith N. Penner,
Petitioner,

MTT Docket Nos. 328268, 328269, 328270,
328271, 328272, 328273, 328274, 328275, 328276,
328277, 328278, 328279, 328280, 328281, 328282
and 328283

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

ORDER PARTIALLY GRANTING RESPONDENT’S MOTION FOR RECONSIDERATION

ORDER PARTIALLY GRANTING PETITIONER’S MOTION FOR RECONSIDERATION

ORDER CORRECTING FINAL OPINION AND JUDGMENT

On December 17, 2009, Respondent filed a Motion requesting that the Tribunal reconsider the Final Opinion and Judgment entered in the above-captioned case on December 4, 2009. In the Motion, Respondent states:

- a. “This case involves assessments based upon corporate officer liability. A hearing was held on June 24, 2009. The Tribunal issued its Final Opinion and Judgment on December 4, 2009. This Final Opinion and Judgment affirmed 8 of the 16 assessments contested, but these assessments were adjusted. It is the adjustments to penalty that the Respondent is requesting the Tribunal to reconsider.”
- b. “This Tribunal would not have subject matter jurisdiction to review the final assessment issued to Harrison Construction...[Company] and Bell...[Company]. Petitioner’s liability is derivative of Harrison...and Bell...because Harrison...and Bell...failed to challenge the amount of the assessment within the statute of limitations for doing so...[As such], the amounts are final as to the corporate officer, Mr. Penner.”
- c. “...the Legislature has made it clear that if an assessment is not appealed according to the procedures provided in MCL § 205.22, then it is final and cannot be subsequently appealed. Therefore, if an aggrieved taxpayer does not challenge a determination in the manner and time provided, then an attack is prohibited...The Michigan courts have upheld these restrictions. In *Kelser v Dep’t of Treasury*[], 167 Mich App 18; 421 NW2d 558 (1988)], the Court of Appeals affirmed the Tribunal’s grant of summary disposition to the Department...The Court held that an appeal that is not filed within the time limit provided in MCL §205.22 is untimely and affirmed the Tribunal’s holding that the

Tribunal lacked jurisdiction over the appeal due to the untimely filing...Likewise, in *Curis Big Boy Inc v Dep't of Treasury*[, 206 Mich App 139; 520 NW2d 369 (1994)], the Court of Appeals held that the Tribunal had no authority to grant a request for a delayed appeal.”

- d. “In this case, Harrison...and Bell...did not appeal the final assessment in the manner and time provided by MCL §205.22. Therefore, Harrison...and Bell...would be barred from appealing the assessments because the Tribunal would lack subject matter jurisdiction to hear the appeal.”
- e. “Mr. Penner was assessed as a corporate officer responsible for the tax liability for Harrison...Bell...MCL §205.27a(5) provides that if a corporation liable for taxes fails to file a return or pay the tax due any of the corporation’s officers are personally liable for the failure of the corporation.”
- f. “In *Keith v Michigan Department of Treasury*[, 165 Mich App 105; 418 NW2d 691 (1987)], Keith argued that he should have the right to contest the amount of sales tax assessed to the corporation. The Tax Tribunal ruled that Keith was not able to contest the amount of sales tax liability because the corporation had failed to contest the assessment pursuant to MCL § 205.22. The corporation’s failure to contest the assessment resulted in the assessment becoming final upon the expiration of the appeal period...The Court of Appeals upheld the Tribunal’s determination.”
- g. “Because a corporate officer’s liability is derivative to a [corporation’s] liability, once the [corporation’s] time to appeal has passed an officer subject to personal liability under MCL 205.27a(5) cannot contest the amount of the corporate underlying tax liability. Tax has been defined in the act to include tax, interest and penalties. This Tribunal has held that the corporate officer cannot challenge the method of computation once the assessment is final.”
- h. “In this case, the Department assessed Harrison...and Bell...for SUW taxes and Single Business Tax. Harrison...and Bell...did not timely appeal the assessments and they became final and not reviewable by any court for any reason. Harrison...and Bell...did not pay this tax liability.”
- i. “After determining that Mr. Penner was a corporate officer of Harrison...and Bell...responsible for the tax, the Department issued Final Assessments against Mr. Penner. The Tribunal questions the integrity of the penalties as assessed in the Final Assessments as to Mr. Penner...At page 27 of the Final Opinion and Judgment, the Tribunal states that it finds penalties as applied to Final Assessments M013914, M066808 and M013910 inconsistent and troubling. However, assessments M013914, M066808 and M013910 as issued to Mr. Penner are identical – the tax and penalty are identical in each of these assessments – to those issued to the corporation. The Tribunal may not examine the underlying tax liability and make adjustments after these

assessments were never challenged and have become final. The corporate debtor did not challenge the tax, penalty or interest in this case. Therefore, these assessments are final and the amounts of the assessments are not subject to challenge in any way, shape or form. A challenge in this manner would violate MCL 205.22(4) which states that an assessment, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal or other method of direct or collateral attack. Mr. Penner's tax liability is derivative to the corporation. Tax has been defined to include penalty. This Tribunal is precluded from adjusting penalties for these assessments because the penalty as assessed to Mr. Penner is the same amount as assessed to the underlying corporate debtor. Therefore, the Tribunal has committed palpable error in adjusting the penalties issued in these assessments."

- j. "As to Final Assessments L614471 and L652646, the underlying assessments were originally issued in an amount that was higher than what was issued to Mr. Penner. There were adjustments to the amount of tax and penalty. As payments were received and applied by either the corporate debtor or a third party, this would necessarily reduce the liability of Mr. Penner. A reduction in the amount of tax owed would not necessarily reduce the amount of penalty assessed. The amount of penalty would still be based upon the amount originally assessed regardless of payment applications. Because the original assessment contained a penalty of 15% of the tax assessed for assessment L614471, to lower the penalty to 10% of the balance after payments have been applied would necessarily violate the prohibition of allowing Mr. Penner to challenge the amounts of the underlying assessments. In addition, reducing the amount of penalty in assessment L652646 to 10% of the balance after payments have been applied would also violate the prohibition of allowing Mr. Penner to challenge the amounts of the underlying assessments. Regardless, Mr. Penner presented no evidence to show that the adjustments to the underlying assessments were based upon something other than the applications of payments to the underlying debt. To adjust the assessments as to Mr. Penner, the Tribunal must speculate as to whether 15% penalty or 10% penalty is fair. Also, it must determine when the penalty should be calculated, at the time of the original assessment or after payment application. It must also speculate as to the reasons that the tax was adjusted after it was assessed to the corporate debtor. No evidence was submitted to support the Tribunal's determination that the penalties should be adjusted in any manner for these assessments. These are things that the Tribunal may not do. Therefore, the Tribunal committed palpable error in adjusting the penalties for these assessments."

On December 17, 2009, Petitioner filed a Motion requesting that the Tribunal reconsider the Final Opinion and Judgment entered on December 4, 2009. In the Motion, Petitioner states:

- a. "At page 34 of the Final Opinion and Judgment it is stated that the total 'Tax Due' for which judgment is entered in favor of Respondent and against Petitioner is \$243,200.47. The amount stated as 'Tax Due' is facially incorrect. Calculation of the 'Tax Due' based upon addition of the 'Tax Due' for the individually listed assessments...is \$192,295.27."

- b. “Notwithstanding its determination that [Petitioner] ‘ceased to have tax related responsibility’ after December 2002, the Tribunal’s Final Opinion and Judgment imposes tax liability upon Mr. Penner for tax matters relating to periods after December 31, 2002, in connection with Single Business Taxes assessed against him in Assessment Numbers M013914 and M013910. Based upon the Tribunal’s finding that Mr. Penner ‘ceased to have tax related responsibility’ after December 2002, then it is palpable error to impose upon him liability for more than 75% of the assessed amount inasmuch as no duty arose under the then applicable provisions of MCL 208.1501 for payment of the 4th quarter installment for 2002 Single Business Taxes until after December 31, 2002. Therefore, based upon the face of the Tribunal’s decision, the maximum of the Tax Due assessable with respect to Assessment M013914 was \$52,426.50, and with respect to M013910 was \$19,939.50, these amounts representing the 75% of the ultimate 2002 SBT liability which should have been included in installments paid in the 2nd, 3rd and 4th quarters of 2002, prior to December 31, 2002, and prior to the point in time when, as concluded by the Tribunal, Keith N. Penner ‘ceased to have tax related responsibility.’”

On December 29, 2009, Petitioner filed a response to Respondent’s Motion for Reconsideration. In the response, Petitioner states:

- a. “Petitioner submits that, notwithstanding the result in *Keith*, the Tribunal was correct in the result reached in the present cases due to materially differing facts underlying the Penner assessments... Notably, the tribunal concluded...that Keith Penner’s status as a responsible person changed over the period of time covered by the various assessments under consideration, with the Tribunal ultimately holding that Petitioner had [no] tax related responsibility on and after January 1, 2003.”
- b. “Each of the assessments questioned by Respondent in its Motion for Reconsideration was issued during the period of time after Penner’s status as a responsible person had ceased...Moreover, three of the corporate assessments were issued, and presumably received by the corporate taxpayer, not only after Penner ceased having any tax responsibilities but after he was discharged and, as demonstrated by the record, had no further contact of any character with his prior employer.”
- c. “Therefore, and unlike the apparent facts underlying *Keith, supra*, the assessments involved in the Tribunal’s consideration of the penalties billed to Penner were not assessments which had been received by the corporate taxpayer at a time that Penner had tax related responsibilities. To the contrary, the facts as set forth in the Tribunal’s Opinion and Judgment clearly demonstrate that the assessments were not issued to the corporate taxpayer until Penner had been effectively expelled from management of the corporate taxpayer, and that at least 3 of those assessments were not issued and received by the corporate taxpayer until after Penner’s ability to even enter the corporate offices had been terminated...Therefore, and again unlike the individual taxpayer in *Keith*,

Penner did not have the opportunity to bring about any ‘timely’ appeal of the assessments on behalf of the corporation. It thus follows, and particularly so with respect to the SBT assessments...that it would not be incongruous to undertake a review of the underlying assessments at this point.”

- d. “Respondent also claims that the Tribunal committed palpable error by recalculating the amount of penalties to be paid by Penner with respect to those assessments for which his liability as a responsible officer was sustained. Petitioner submits that the Tribunal’s calculations are consistent with the record, and therefore there has been no error.”
- e. “With respect to assessment L552234, L552235, and L565512, the record fully supports the Tribunal’s conclusion that there were no penalties assessed to the corporate taxpayer, Harrison...Inasmuch as it is Respondent’s own position that Penner’s liability is, at best, derivative of the corporate taxpayer it then follows that there existed no subsequent basis for the penalties contained in the final bill issued to Penner as the alleged responsible person.”
- f. “As noted by the Tribunal, the reduction in the tax due on [L614471 and L652646] has nothing to do with payments received. Instead, the original assessments were estimates of tax liability, necessitated by the apparent fact that at the time of the assessments issuance no returns had been filed by the corporation. As is made clear on the billings to Penner with respect to those assessments, the amounts were ‘corrected per actual/amended return(s) or additional information received.’”
- g. “The Tribunal is further correct when it observes that the penalty rates assessed on the assessments differ from those on the final billings to Penner. The rates on the assessments are 10% as contrasted with 25% on the Penner billings. No explanation was offered for this increase above that assessed against the corporation.”
- h. “Finally, and contrary to Respondent’s contention, there is no error in the Tribunal’s adjustment of the penalties, if any, payable by Penner, to reflect the negligence as opposed to intentional disregard standard. As correctly noted by the Tribunal, the proper exercise of the discretionary authority to impose such penalties requires an assessment of the purported responsible person’s state of mind. Here, the record amply reveals Penner’s eroding, and eventually terminated, status within the management of tax related matters for the corporate taxpayers, clearly suggesting that any non-payment chargeable is not a result of intent but, instead, something much less.

On January 7, 2010, Respondent filed a response to Petitioner’s Motion for Reconsideration. In the response, Respondent states:

- a. “It appears that Petitioner is correct in that the assessments listed on page 34 of the Judgment do not add up to \$243,200.27. Instead the listing assessments add up to \$192,295.75.”
- b. “In both *Fortescue v Department of Treasury*[, MTT Docket No. 243194 (1999),] and *Patil v Department of Treasury*[, MTT Docket No. 242619 (1999),] the Tribunal found that the Petitioner officer was liable for the corporate tax debt even though the corporate officer had resigned before the tax return’s due date.”
- c. “Similarly, Mr. Penner was found to be a corporate officer with tax related responsibility through December, 2002. Regardless of whether Mr. Penner resigned or lost control over paying the taxes in this matter, he was a responsible officer for the entire 2002 tax year. Because Mr. Penner was a responsible corporate officer when the tax liability was generated, he is liable for the tax for the entire 2002 tax year.”

The Tribunal, having given due consideration to the Motions, the responses, and the case file, finds:

1. Respondent objects to the decrease in the amount of penalties found by the Tribunal in assessments M013914, M066808 and M013910. Respondent asserts that because Petitioner’s liability is derivative of Harrison Construction and Bell Co., those amounts are final and cannot be adjusted by the Tribunal. The Tribunal has reviewed the original assessments and the assessments issued to Petitioner and finds that the amounts of tax and penalties were the same. As such, the Tribunal finds that there was no basis for decreasing the amount of the penalties, as they did not impose a greater penalty on the corporate officer than that originally assessed to the corporation. Therefore, the Tribunal finds that Respondent has demonstrated a palpable error that misled the Tribunal and the parties and that would have resulted in a different disposition if the error was corrected. See MCR 2.119. The Tribunal finds that the penalties in assessments M013914, M066808, and M013910 are corrected as indicated in the table below.
2. In regard to assessments L614471 and L652646, Respondent had failed to produce evidence sufficient to demonstrate why the amounts originally assessed differ from those amounts as assessed against Petitioner. Respondent stated clearly on the record that it did not know why the assessments differed but hypothesized that perhaps payments had been made. Based on Respondent’s argument that these assessments are derivative, the assessments should have been identical. No corporate assessments were provided to support the assessments against Petitioner. If payments were made, Respondent did not provide information on how such payments had been applied to the underlying assessments, penalties, or interest. Respondent stated that it is its policy to apply payments to penalty and interest first. Thus, the Tribunal must conclude that if payments were made, interest and penalty would first have been reduced to zero, as was the case for assessments L552234, L552234, and L565512 but not for these, before any reduction in

the amount of tax due was possible. There being no way to determine how, or if, the assessments were paid down or simply altered, and Respondent having provided no evidence, testimony, or witnesses at the hearing to explain the discrepancies between the original assessments and those issued to Petitioner, the Tribunal Judge was justified in reducing the amount of the penalties in the above assessments, given the lack of information provided. Therefore, Respondent has failed to demonstrate a palpable error that misled the Tribunal and the parties and that would have resulted in a different disposition if the error was corrected. See MCR 2.119.

3. In regard to Petitioner’s contentions for reconsideration, the Tribunal Judge properly found that Petitioner was a corporate officer through December 2002. Therefore, Petitioner was responsible, as a corporate officer, for the taxes assessed to the corporation for the entire 2002 tax year, regardless of when payments were due or the returns were filed. Petitioner’s contention that he is not responsible for the 4th quarter installment for 2002 lacks merit. While it is true that the 4th quarter installment was not due at the time Petitioner ceased to have corporate officer responsibility, the taxes due related to the business activity that occurred during the 2002 tax year, at a time when Petitioner was responsible as a corporate officer. Therefore, Petitioner has failed to demonstrate a palpable error that misled the Tribunal and the parties and that would have resulted in a different disposition if the error was corrected. See MCR 2.119.
4. The Tribunal does find, however, that an error was made in the total tax due on page 34 of the Final Opinion and Judgment, as noted in Petitioner’s Motion for Reconsideration. The total tax due should have read \$192,295.27.
5. The Final Opinion and Judgment is corrected to state as follows:

Assessment Number	Type	Tax Period	Tax Due	Interest*	Penalty
L552234	SUW	8/02	\$ 5,615.99	\$	\$0
L552235	SUW	9/02	\$ 4,973.53	\$	\$0
L565512	SUW	10/02	\$ 2,873.75	\$	\$0
L614471	SUW	11/02	\$ 18,699.00	\$	\$ 1,870.00
L652646	SUW	12/02	\$ 13,212.00	\$	\$ 1,321.00
M013914	SBT	12/02	\$ 69,902.00	\$	\$33,465.59
M066808	SBT	12/01	\$ 50,433.00	\$	\$ 6,668.70
M013910	SBT	12/02	\$ 26,586.00	\$	\$12,728.05
TOTAL			\$192,295.27	\$ *	\$ 56,053.34

*Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122.

Therefore,

IT IS ORDERED that Respondent’s Motion for Reconsideration is PARTIALLY GRANTED.

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IT IS FURTHER ORDERED that Petitioner's Motion for Reconsideration is PARTIALLY GRANTED.

IT IS FURTHER ORDERED that the December 4, 2009 Final Opinion and Judgment is CORRECTED, as indicated herein.

MICHIGAN TAX TRIBUNAL

Entered: February 24, 2010

By: Rachel Asbury