

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

Shahriar Hedayat,
Petitioner,

v

MTT Docket No. 355447

Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

FINAL OPINION AND JUDGMENT

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY
DISPOSITION

The Tribunal, having given due consideration to the file in the above-captioned case, finds:

1. Administrative Law Judge Thomas A. Halick issued a Proposed Opinion and Judgment consisting of an Order Granting Respondent's Motion for Summary Disposition and an Order Denying Petitioner's Motion for Late Filing of Documents to Respondent's Motion for Summary Disposition on February 8, 2011. The Proposed Opinion and Judgment states, in pertinent part, "[t]he parties have 20 days from date of entry of this Proposed Opinion and Judgment to file any written exceptions to the Proposed Opinion and Judgment."
2. Neither party has filed exceptions to the Proposed Opinion and Judgment.
3. The Administrative Law Judge considered the Motion filed and evidence submitted and made specific findings of fact and conclusions of law. The Administrative Law Judge's determination that Petitioner is a corporate officer liable for payment of Single Business Tax established in Final Assessment Nos. L997475 and M254819 is supported by the testimony and evidence and applicable statutory and case law.
4. The Tribunal adopts the Proposed Opinion and Judgment as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also

incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment in this Final Opinion and Judgment.

5. Given the above:

a. The taxes, interest and penalties as levied by Respondent are:

Assessment Number: L997475

Taxes	Interest	Penalties
\$4,764.00	\$1,672.01	\$0.00

Assessment Number: M254819

Taxes	Interest	Penalties
\$17,172.00	\$6,900.21	\$0.00

b. The taxes, interest and penalties as determined by the Tribunal are:

Assessment Number: L997475

Taxes	Interest	Penalties
\$4,764.00	\$1,672.01	\$0.00

** Interest shall be recalculated in accordance with 1994 PA 122.

Assessment Number: M254819

Taxes	Interest	Penalties
\$17,172.00	\$6,900.21	\$0.00

** Interest shall be recalculated in accordance with 1994 PA 122.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties as indicated herein within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest and penalties or issue a refund as required by this Order within 28 days of entry of this Final Opinion and Judgment.

MICHIGAN TAX TRIBUNAL

Entered: April 8, 2011

By: Kimbal R. Smith III

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

Shahriar Hedayat,
Petitioner,

v

Department of Treasury,
Respondent.

MICHIGAN TAX TRIBUNAL
MTT Docket No. 355447

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S MOTION FOR LATE FILING OF DOCUMENTS TO
RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

On June 24, 2010, Respondent filed a "Motion for Summary Disposition" and a brief in support.

Petitioner did not file a timely written response, which was due on or before July 6, 2010.

On July 19, 2010, Petitioner filed "Petitioner's Motion for Late Filing of Documents to Respondent, State of Michigan, Department of Treasury's [sic] Motion for Summary Disposition" requesting that it be permitted to file a late response to Respondent's motion, claiming that it never received Respondent's motion.

For reasons stated hereafter, Respondent's motion is granted. Petitioner's motion is denied.

PROCEDURAL HISTORY

On August 4, 2008, Petitioner filed this appeal.

On November 12, 2008, Respondent filed an answer to the petition.

On November 19, 2008, Respondent filed with the Tribunal and served upon Petitioner its First Set of Request for Admissions, Set of Interrogatories, and Requests for Production of Documents, with along with copies of certain documents, including the following:

1. 2001 SBT amended return for Excel Tech, Inc. signed by Shahriar Hedayat, dated 6/9/2004, in his capacity as President.

2. Letter to Respondent's SBT Division signed by Brian R. Callaghan as "Controller," written on letterhead of Excel Personnel, Inc, regarding a controlled group of corporations including Excel Tech, Inc.
3. 2002 SBT amended return for Excel Tech, Inc., signed by Shahriar Hedayat, dated 6/9/04, in his capacity as President.
4. 2002 federal 1120S for Excel Tech, Inc. (not signed).
5. 1999 Corporate Information Update for Excel Tech, Inc., signed by Shahriar Hedayat as President, dated 2/15/99.
6. 2000 Corporate Information Update for Excel Tech, Inc., signed by Shahriar Hedayat as President, dated 2/22/00.
7. 2002 Corporate Information Update for Excel Tech, Inc., signed by Shahriar Hedayat as President, dated 4/18/02.

On December 8, 2008, Petitioner responded to Respondent's November 19, 2008 discovery requests.

On January 13, 2009, Petitioner filed with the Tribunal and served upon Respondent its First Set of Interrogatories and Requests for Production of Documents and First Set of Requests for Admissions.

On February 11, 2009, Respondent filed with the Tribunal and served upon Petitioner its answers to Petitioner's January 13, 2009 discovery request. Respondent objected to Requests to Admit nos. 1, 2, 3, 4, 5, 7, 8, 9, 12, 13, 14, and 15, denied nos. 6, 11, and admitted no.10.

On March 16, 2010, the Tribunal issued a notice scheduling a prehearing conference.

On April 1, 2010, Petitioner filed a motion to adjourn the prehearing conference, which was granted by the Tribunal.

On May 4, 2010, the parties appeared at the Tribunal for a prehearing conference.

On May 7, 2010, the Tribunal entered a Scheduling Order requiring the parties to file a witness list and exhibit list on or before July 7, 2010, which also provided notice that failure to do so would disallow a party from offering documentary evidence or witnesses at the hearing (which was scheduled for July 21, 2010).

On May 17, 2010, Petitioner filed its Motion to Compel Answers to Petitioner's Interrogatories, Production of Documents.

On June 3, 2010, Respondent filed its Response to Petitioner's motion to compel dated May 17, 2010.

On June 14, 2010, Respondent filed its Motion for Summary Disposition and Brief in Support. Respondent filed a proof of service indicating that the motion was served upon Petitioner's counsel by mail, addressed to 30685 Barrington Street, Suite 120, Madison Heights, Michigan 48071-5109. Petitioner did not file a written response to Respondent's Motion.

On June 15, 2010, the Tribunal entered an order partially granting Petitioner's motion to compel.

On June 24, 2010, Respondent filed its Motion for Reconsideration and Brief in support (pertaining to the Tribunal's June 15, 2010 order). Petitioner did not file a written response.

Petitioner did not file a witness list or exhibit list on or before July 7, 2010, as required by the Tribunal's Scheduling Order, and would be precluded from offering documentary evidence or testimony if this matter were to proceed to a hearing.

On July 15, 2010, Petitioner filed an untimely witness list, which did not include a "brief summary of the subject matter of the testimony" as required by the Tribunal's Scheduling Order. TTR 252(2).

On July 15, 2010, the hearing officer entered an order to adjourn the hearing pending resolution of outstanding motions, including Respondent's Motion for Summary Disposition.

On July 19, 2010, Petitioner filed a motion requesting that it be permitted to file a late response to Respondent's motion for summary disposition, claiming that it never received Respondent's motion for summary disposition. This filing was defective for failure to pay the filing fee.

On July 20, 2010, the Tribunal issued an Order Denying Respondent's Motion for Reconsideration, which imposed certain sanctions for Respondent's failure to comply with discovery.

On July 26, 2010, the Tribunal notified Petitioner that its filing of July 19, 2010 was defective.

On August 2, 2010, Petitioner mailed the required filing to the Tribunal.

MOTION FOR SUMMARY DISPOSITION

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. The Tribunal must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists requiring trial. *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998). When determining whether there is a genuine issue of any material fact, the admissible evidence must be viewed in the light most favorable to the non-moving party. *Heckman v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005). If the "affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." MCR 2.116(I)(1). "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

There is no genuine issue with regard to the following material facts:

1. The taxes at issue arose from SBT liability of Excel Tech, Inc. for the years 2001 and 2002.
2. On February 15, 1999, Excel Tech, Inc. filed a “1999 corporate information update” signed by Petitioner, Shahriar Hedayat as “President.” Respondent’s Exhibit 4, attached to Motion for Summary Disposition.
3. On February 22, 2000, Excel Tech, Inc. filed a “2000 Profit Corporation Information Update” signed by Petitioner as “President.” Respondent’s Exhibit 4, attached to Motion for Summary Disposition.
4. On April 8, 2002, Excel Tech, Inc. filed a “2001 Profit Corporation Information Update” signed by “Eileen M. Quiroga” as “Controller.” Respondent’s Exhibit 4, attached to Motion for Summary Disposition. On line 5, this document requires the corporation to designate its President, Secretary, and Treasurer. Line 5 is blank.
5. On May 15, 2001, Excel Tech, Inc. filed a “2001 Profit Corporation Information Update” signed by Petitioner as “President.” Respondent’s Exhibit 4, attached to Motion for Summary Disposition. On line 5, this document requires the corporation to designate its President, Secretary, and Treasurer. Line 5 is blank.
6. Petitioner signed the Articles of Incorporation for Excel Tech, Inc. that were filed with the state on April 8, 1998. Petitioner is the “incorporator” of Excel Tech, Inc.
7. On August 28, 2002, Petitioner signed a 2001 SBT return on behalf of Excel Tech, Inc. as its President. The return was prepared by Joseph P. Galasso, Jr.
8. On February 28, 2003, Petitioner signed a 2002 SBT return on behalf of Excel Tech, Inc. as its President. The return was prepared by Joseph P. Galasso, Jr.
9. The file contains a letter dated August 25, 2003, from Joseph P. Galasso, Jr. CPA, on behalf of Excel Tech, Inc., regarding “notices of June 17, 2003.” The letter indicates that a copy was provided to Brian Callaghan. The letter pertains to a dispute regarding the SBT liability for 2001 and 2002, and describes a telephone conversation between Mr. Galasso and Respondent. The letter proposes a settlement of the dispute. The “notices” are not in evidence. The letter did not request an informal conference.
10. Between August 25, 2003 and June 8, 2004, Respondent determined that Excel Tech, Inc. owed tax for 2001 and 2002.
11. Petitioner signed a Certificate of Amendment to the Articles of Incorporation for Excel Tech, Inc., which was filed with the state on May 24, 2004. Petitioner was the President of Excel Tech, Inc. The corporation’s term of existence was amended to terminate on May 31, 2004.
12. On June 8, 2004, Respondent issued Assessment No. M254519 to Excel Tech, Inc. asserting a tax liability for 2001 and 2002. Exhibit 1, attached to Respondent’s Motion for Summary Disposition. Exhibit 2 is a copy Respondent’s “Assessment Certified Mail Log for 6/1/04.”
13. There is no documentary evidence to prove that Excel Tech, Inc. sought an informal conference or appealed the assessment to this Tribunal or to the Court of Claims.
14. On or after June 9, 2004, Excel Tech, Inc. filed an amended 2001 SBT return, signed by Petitioner as “President.” The return indicates it was signed June 9, 2004. The amended return was not signed by a “preparer.” Respondent’s Exhibit 17, attached to Motion for Summary Disposition.
15. The case file contains a letter dated June 8, 2004, addressed to Respondent, which is signed by Brian R. Callaghan, as “Controller” for Excel Personnel, Inc. 1350 Rankin,

Troy, Michigan (not a party to this appeal). (This letter was included with Respondent's discovery request served November 10, 2008.) There is no evidence that this letter was mailed on June 8, 2004, but it appears that it was the letter that accompanied the amended return signed by Petitioner and dated June 9, 2004. Therefore, the letter and amended return were mailed to Respondent after the assessment was issued to Excel Tech, Inc. Respondent issued assessments to the corporation Excel Tech, Inc. for the 2001 and 2002 tax years, and the corporation's remedy was to appeal the assessment as provided by MCL 205.22(1), not to file an amended return with the department. The assessments against Excel Tech, Inc. were issued December 3, 2003 (L997475, for 2002) and June 8, 2004 (M254519, for 2001 and 2002), and were not appealed. Any claims relating to the underlying tax incurred by the corporation are irrelevant to the defense of the officer liability assessments.

16. There is no other documentary evidence regarding any further communication between Petitioner or his representatives and Respondent after June 9, 2004 and before March 7, 2008.
17. On or about March 7, 2008, Respondent mailed a "Letter of Inquiry- - Notice of Corporate Officer Liability" to Petitioner. (See the Notice, which is attached to the original Petition).
18. On March 25, 2008, Petitioner's representative, Joseph P. Galasso, Jr., responded to the above letter of inquiry on behalf of Petitioner and denied corporate officer liability for the taxes. (See the letter, which is attached to Respondent's July 26, 2010 Motion for Reconsideration).
19. On July 22, 2008, Petitioner's representative, Joseph P. Galasso, Jr., wrote to Respondent on behalf of Petitioner seeking "a better explanation of the entity tax due. . . ." and claiming that "we do not know if the tax due is correct without your assistance and disagree with the officer liability assessment."
20. On July 25, 2008, Respondent sent a letter to Petitioner, in response to Petitioner's letter dated July 22, 2008, informing Petitioner that the request for an informal conference was denied with regard to Intent to Assess Nos. L997475 and M254519. The grounds for the denial were that the request for an informal conference was not made within 60 days after receipt of the notice of intent to assess as required by MCL 205.21(2)(c). The letter included a notice of Petitioner's appeal rights.
21. On August 4, 2008, Petitioner filed this appeal by and through his representative, Joseph P. Galasso, Jr.

Analysis

Petitioner was the President of Excel Tech, Inc. in 2001, 2002, 2003, and 2004.

Respondent's motion includes copies of corporation information update forms that were filed with the State of Michigan in 1999, 2000, 2001, and 2002. For 1999, 2000, and 2002, Petitioner signed these documents in his capacity as President of Excel Tech, Inc. The forms require the corporation to list the names of the president, secretary and treasurer, and allow the taxpayer to list other officers and directors. In 2000, Petitioner was also specifically identified as the secretary and treasurer. There is no dispute that these documents originated from the corporation and were signed by Petitioner. There is no reasonable likelihood that any evidence can be

produced, including any documents that may be in Respondent's possession, which would be more conclusive on this issue than the official corporation information updates that were prepared by the corporation and filed with the state. Petitioner has presented no documentary evidence or affidavit to the contrary.

The 2001 corporation information update was signed by Eileen M. Quiroga, and her title is listed as "Controller." Petitioner has not produced any documentary evidence or affidavit to establish that Eileen M. Quiroga was an "officer" of the corporation. The 2001 corporation information update does not identify the president, secretary, treasurer, or any other officer on the lines provided for that purpose (line 5). However, the form allows the filer to check a box indicating that there are no changes from the previous year's filing, which is checked on the 2001 form filed by Excel Tech, Inc. Therefore, the 2001 corporation information update affirms that Petitioner was the president, secretary, and treasurer for both 2000 and 2001. Given that the 2000 and 2002 corporation information updates specifically listed Petitioner as president, and in the absence of any documentary evidence to the contrary, it is concluded that Petitioner was the sole officer of Excel Tech, Inc. during 2001 and 2002. Petitioner, as president, signed the amendment to the articles of incorporation on May 24, 2004. Petitioner, as president, signed amended SBT returns on or about June 9, 2004. This demonstrates that he was also the sole officer during the time that the corporation was assessed tax and was involved in filing returns.

Although Petitioner has alleged that there was an unidentified individual who held the title "general manager" or "vice president of finance," he has produced no documentary evidence whatsoever to establish that this individual was a corporate officer. Even if Petitioner were allowed to offer sworn testimony claiming that there was another corporate officer during the periods in question, there is no reasonable possibility that any such testimony would be more relevant, probative, or credible than the corporation information updates and other documents that were submitted with Respondent's motion.

The documents that Respondent has failed to produce via discovery are described as power of attorney documents and various letters. Petitioner has not claimed that Respondent's files would include any specific document that would be more probative than the corporation information updates with regard to the identity of the officer(s) of Excel Tech., Inc. In a separate order, the Tribunal has determined that certain facts are deemed to be established as a sanction for Respondent's failure to produce certain documents. In the alternative, Respondent was ordered to answer that such documents do not exist. It is established that individuals other than Petitioner communicated with Respondent on tax issues. However, the facts that have been presumptively established as a sanction do not create a genuine issue of material fact on the issue of whether Petitioner was the sole officer of Excel Tech, Inc. at all relevant times. (The facts that have been presumptively established are set forth in the Tribunal's Order Denying Respondent's Motion for Reconsideration.)

The sole officer of a corporation cannot avoid liability under MCL 211.27a(5) by claiming that non-officers exercised tax-specific functions. *Viney v Dep't of Treasury*, MTT Docket No. 106744 and 111750 (1990). A corporate officer cannot avoid liability under MCL 205.27a(5) by delegating authority to a non-officer.

A corporate officer who is charged with the responsibility to collect a state's sales or use taxes is not relieved of liability for failure to collect and pay over the taxes by delegating responsibility for collecting the taxes to subordinates. Hellerstein, *State Taxation*, ¶ 19.06[2] *Personal Liability of Corporate Officers and Employees*.

Other state courts have held that a corporate officer cannot avoid officer liability by delegation to a non-officer. "We are not persuaded that the liability imposed by Tax Law § 1133(a) may be evaded by simply delegating responsibility to a subordinate." *See, Matter of Rosenblatt v New York State Tax Commn*, 114 AD2d 127, 130; 498 NYS2d 529 (1986), *reversed on other grounds* 68 NY2d 775; 506 NYS2d 675; 498 NE2d 148 (1986); *Matter of Ragonesi v New York State Tax Commn*, 88 AD2d 707; 451 NYS2d 301 (1982); *Matter of Gardineer v State Tax Commn*, 78 AD2d 928, 929; 433 NYS2d 242 (1980). This principle is sound and fully comports with Michigan's officer liability statute. Also see, *McGlothin v Limbach*, 57 Ohio St 3d 72; 565 NE2d 1276 (1991).

Petitioner signed the 2001 and 2002 SBT returns, which establishes a prima facie case that he had tax specific responsibility for filing SBT returns and paying tax in those years, and specifically as of the dates the returns were filed. On June 8, 2004, Respondent issued an assessment against the corporation for the 2001 and 2002 tax years, and immediately thereafter, the corporation filed amended SBT returns for 2001 and 2002, which were signed by Petitioner and dated June 9, 2004. This demonstrates that as of the date that the taxes were assessed to the corporation, Petitioner, as the corporation's president, exercised tax specific responsibility for the 2001 and 2002 tax years. Petitioner and the corporation had notice of the corporate assessments, which became final and conclusive when they were not timely appealed.

On March 7, 2008, the department issued a letter of inquiry to Petitioner as a responsible corporate officer.

In response to the "letter of inquiry" Petitioner wrote to Respondent, setting forth the following defenses (letter to Respondent, dated March 25, 2008):

1. "The tax liability in question has not been established. We previously requested page 1 and 2 of the related SBT and a schedule of payments so we can trace to our records."
2. "[Petitioner] was a part owner of the business, but was not active in the day-to-day affairs of the business. He relied on his internal accountant (a former CPA) and his general manager for the filing of returns including the final SBT. Subsequently it was discovered that records were far from perfect."
3. "Copies of page 1 and 2 of the return is necessary to ascertain that the statute of limitations has not run."

Petitioner's defenses set forth above are consistent with the allegations in the Petition and the matters summarized in the Tribunal's Prehearing Conference Summary. The essence of Petitioner's claims is that the underlying assessment issue to Excel Tech, Inc. is incorrect and that there are other officers that are responsible for the taxes at issue. He also claims that the

statute of limitations precludes the assessment of tax against an officer. The merits of claims and defenses are discussed hereafter:

1. It is irrelevant whether Petitioner believed that “the tax liability in question has not been established” or that the corporation had requested a copy of the SBT returns and payments. There is no evidence that the corporation exercised its right to request an informal conference after receipt of an “intent to assess” notice. It is irrelevant whether the corporation requested information (copies of tax returns that the corporation had filed) as this is not a defense to the assessment. Filing amended returns had no effect upon the duty to timely appeal the underlying corporate assessments. The evidence establishes that the corporation was served with the underlying assessments and failed to appeal them at which point they became final and not subject to challenge. MCL 205.22. A final corporate assessment is not subject to challenge in an officer liability case. *Keith v Dep’t of Treasury*, 165 Mich App 105; 418 NW2d 691 (1987).

2. It is somewhat misleading for Petitioner to claim that he was a “part owner of the business” who was not “active in the day-to-day affairs of the business” as it is now established that he was the 90% shareholder and sole officer. The claim that Petitioner was not “active in the day-to-day affairs of the business” is of no consequence, because he was the President and sole officer who exercised tax specific responsibility by signing the corporation’s tax returns. It is not a defense that he may have delegated responsibility for filing returns to a “general manager” or “internal accountant.” As president, Petitioner had control or supervision of preparation of the return and the payment of taxes. There is no documentary evidence that any other individual was an officer of the corporation.

3. The corporate assessments became final liabilities which were not discharged by the running of the statute of limitations. The assessments are valid obligations that remain in effect against a responsible officer as well as the corporation. Collection is not barred by the four-year statute of limitations found at MCL 205.27a(2). *Livingstone v Department of Treasury*, 434 Mich 771; 456 NW2d 684 (1990).

In the letter dated July 22, 2008, Petitioner attempted to dispute the underlying tax liability, but neither the corporation nor Petitioner had a legal right to challenge the tax liability at that time.

On June 9, 2004, Excel Tech, Inc. filed an amended 2001 SBT return, signed by Petitioner as “President.” Respondent’s Exhibit 17, attached to Motion for Summary Disposition. This amended return was filed shortly after Respondent issued an assessment to the corporation for 2001 SBT. The case file contains a letter dated June 8, 2004, addressed to Respondent, which is signed by Brian R. Callaghan, as “Controller” for Excel Personnel, Inc. 1350 Rankin, Troy, Michigan (not a party to this appeal). Petitioner signed the amended returns to “reflect changes in their amended federal returns for the same periods. . . .” Regardless of the reason for the amendments, such matters were required to have been raised as part of a timely appeal of that assessment against the corporation.

For a person to be held liable for the corporation’s taxes, it must be proven based on the department’s audit or investigation, that he or she was an officer of the corporation during the periods in question. In addition, liability will arise only if the officer (1) has control over the

making of the corporation's tax returns and payments of taxes; or (2) supervises the making of the corporation's tax returns and payments of taxes; or (3) is charged with the responsibility for making the corporation's returns and payments of taxes. *Keith v Department of Treasury*, 165 Mich 105; 418 NW2d 691 (1987). Personal liability will not attach unless the officer's involvement in the financial affairs of a corporation is tax specific. *Livingstone v Department of Treasury*, 434 Mich 771, 780; 456 NW2d 684 (1990).

There is no genuine issue of material fact that the corporation of which Petitioner was the sole officer was assessed tax and failed to pay the tax due, within the meaning of MCL 205.27a(5). Respondent issued assessments against the corporation, which were not appealed by the corporation. The assessments became final, conclusive, and not subject to challenge. MCL 211.22(4). There is no genuine issue of material fact that Petitioner had control over the making of the corporation's tax returns and payment of taxes. Petitioner had tax-specific involvement in the financial affairs of the corporation during 2001, 2002, 2003 and 2004. The fact that non-officers employed by or related to the corporation communicated with the department on behalf of the corporation and Petitioner does not demonstrate that Petitioner did not control the making of tax returns or that he did not supervise the making of the tax returns. The presumption of liability under MCL 205.27a(5) applies to this case, and Petitioner has brought forth no documentary evidence or affidavit to rebut that presumption or to create a genuine issue of material fact on the issue of corporate officer liability. Respondent has demonstrated that it is entitled to judgment as a matter of law under TTR 230 and MCR 2.116(C)(10).

Issues Pertaining to Discovery

Discovery is closed as of the date of the prehearing conference, unless extended by leave of the Tribunal. TTR 270(10). The Prehearing Conference Summary and Scheduling Order extended discovery only as necessary to permit Petitioner to file a motion to compel a response to a previous discovery request, which Respondent had answered and asserted objections to. In his untimely witness list, Petitioner asserts that he may call "any witness resulting from discovery which is on going." Discovery is in fact closed.

The Tribunal has entered an Order under TTR 264 addressing Respondent's failure to produce documents by imposing an appropriate sanction. Upon review of the file, the matters sought and produced via discovery, the documents that were appended to Respondent's discovery requests, and giving due consideration to the nature of claims and defenses raised in the pleadings and by this motion, it is determined that there is no genuine issue of material fact, and that further discovery would not produce any evidence that would create a genuine issue of material fact. Judgment is appropriate under MCR 2.116(C)(10).

Petitioner's Motion for Late Filing of Documents

Petitioner's motion that was filed July 19, 2010, is denied. The bare claim that counsel never received Respondent's motion for summary disposition is insufficient to allow a late response to the motion. Respondent's proof of service states that the motion was properly served. There is no evidence that Petitioner has failed to receive other documents served in this case. Upon thorough consideration of the facts and legal issues presented, there are no genuine issues of material fact.

Upon application of settled law, Respondent is entitled to judgment in its favor. Petitioner has been afforded due process. Permitting Petitioner to file a late response to the motion would not change the outcome of this case. A dispositive legal issue in this case was set forth in the Summary of Prehearing Conference, entered May 7, 2010 as follows: “Whether the sole officer of a corporation can delegate tax specific responsibility to a non-officer and thereby avoid liability under MCL 205.27a(5).” The pleadings and documentary evidence establish that Petitioner was the sole officer. There is no authority to support Petitioner’s theory that the definition of “officer” includes an individual not formally appointed to serve as an officer. The authorities cited in this Order establish that the sole officer of a corporation cannot avoid liability under MCL 205.27a(5) by delegating tax specific responsibility to a non-officer. Filing an untimely response to the motion would be unavailing and shall not be permitted.

PROPOSED JUDGMENT

IT IS ORDERED that Respondent’s Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that this case shall be DISMISSED.

IT IS FURTHER ORDERED that Petitioner’s Motion for Late Filing of Documents to Respondent, State of Michigan, Department of Treasury’s Motion for Summary Disposition is DENIED.

MICHIGAN TAX TRIBUNAL

Entered: February 8, 2011

By: Thomas A. Halick

EXCEPTIONS

This Proposed Opinion and Judgment (POJ) was prepared by the State Office of Administrative Hearings and Rules. The parties have 20 days from date of entry of this POJ to notify the Tribunal in writing if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions). The exceptions are *limited* to the evidence submitted prior to or at the hearing and any matter addressed in the POJ. There is no fee for filing exceptions.

A copy of a party’s written exceptions *must* be sent to the opposing party and the opposing party has 14 days from the date the exceptions were sent to that party to file a written response to the exceptions. After the expiration of the time period for the opposing party to file a response to the exceptions, the Tribunal will review the case file, the POJ, the exceptions and responses, if any, and:

- a. Issue a Final Opinion and Judgment adopting the POJ as a Final Decision.
- b. Issue a Final Opinion and Judgment modifying the POJ and adopting the Modified Proposed Opinion and Judgment as a Final Decision.

- c. Issue an Order vacating the POJ and ordering a rehearing or such other action as is necessary and appropriate.