

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
MICHIGAN TAX TRIBUNAL

Stephen M. Layne,  
Petitioner,

MTT Docket No. 383266

v

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Cynthia J Knoll

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY  
DISPOSITION

**I. INTRODUCTION**

Petitioner, Stephen M. Layne, is appealing Final Assessment No. N988214, issued by Respondent, Michigan Department of Treasury, on December 7, 2009. The Final Assessment establishes a Single Business Tax deficiency against Petitioner as a responsible corporate officer of Entigo Corporation for the 2003 taxable-year period. The amount of tax and interest due is \$21,176.00, plus accrued interest. On May 6, 2011, Respondent filed a motion requesting the Tribunal grant summary disposition in its favor, pursuant to MCR 2.116(C)(10). Petitioner filed a response to Respondent's Motion for Summary Disposition on May 27, 2011. The Tribunal finds Petitioner to be liable as a corporate officer for the subject tax year, and grants Respondent's Motion for Summary Disposition.

**II. RESPONDENT'S CONTENTIONS**

On May 6, 2011, Respondent filed a Motion requesting that the Tribunal render summary disposition in favor of Respondent in the above-captioned case pursuant to MCR 2.116(C)(10), asserting that the documentary evidence demonstrates that there is no genuine issue of material fact.

In support of its Motion, Respondent notes that Petitioner was the corporate officer responsible for payment of Entigo Corporation's (the "Company") taxes during the subject year tax period. Under the law, and by his own admission, Petitioner was

the corporate officer responsible for the tax affairs of the Company during the subject tax period.

Respondent further states that under Michigan law, a corporate officer is derivatively liable for the failure of a corporation to make returns or pay taxes. Respondent also notes that the signature of a corporate officer on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of the officer's responsibility for making the returns and payments. Respondent notes that a corporate officer cannot delegate away his or her responsibility for tax liability.

Therefore, Respondent argues, Petitioner's signature on the Company's 2002 and 2003 Single Business Tax returns creates a rebuttable presumption that he is responsible for the corporation's failure to pay.

Respondent asserts that Petitioner's admissions during interrogatory, together with his signature on the Company's tax returns, satisfy the prevailing test for liability and leave no genuine issue of material fact to be resolved by trial.

### **III. PETITIONER'S CONTENTIONS**

Petitioner contends that he was, in essence, a "Rent-a-CEO" brought on to facilitate the liquidation and reorganization process of a technology firm. He claims that his role was merely that of a "figure-head," employed by the venture capitalists spearheading the reorganization so that it appeared as though the Company had a Chief Executive Officer. Petitioner further asserts he was hired as an operations manager based on his knowledge in the field of technology.

Petitioner asserts that he signed the Corporate Tax Returns for the sole purpose of "convenience," based on his relative proximity to the location of the tax filings, as contrasted with other investors and Members of the Board of Directors.

Petitioner acknowledges that the current standard for determining corporate officer liability for tax issues is as follows:

In order to hold a person personally liable for a corporation's tax liability the Department of Treasury must first show that the person is an officer of the corporation. Then it must show *either* (1) that this officer has control over making of the corporation's tax returns and

payments of taxes; or (2) that this officer supervises the making of the corporation's tax returns and payments of taxes; or (3) that this officer is charged with the responsibility for making the corporation's returns and payments of taxes to the state. *Livingstone v Department of Treasury*, 434 Mich at 780; 665 NW2d 684 (1990).

Petitioner makes no argument regarding the first prong of this standard and admits that he served as an officer of the Company during the taxable period at issue. Petitioner contends that the Tribunal's decision in *Robert F Hickey v Department of Treasury*, nonetheless allows the presumption of liability established under the prevailing test to be rebutted where an officer's role in the corporation is not "tax specific" or limited to "book-keeping." *Robert F Hickey v Department of Treasury*, MTT Docket No. 320519 (2009).

Petitioner also argues that since the tax returns in the years at issue were prepared by CPA firm Ernst & Young and overseen by the law firm of Morgan, Lewis, and Bockius, Petitioner had effectively delegated his responsibility for the accuracy of the Company's tax filings to these third parties during the subject tax period.

Finally, Petitioner argues that he signed the tax returns at issue "for convenience purposes only" and that his entire tenure of employment at the Company was "merely for the sake of convenience."

#### **IV. FINDINGS OF FACT**

The tax period at issue is the calendar year ending on December 31, 2003. Petitioner was employed by the Company as Chairman of the Board and Chief Executive Officer for the period between September 1, 2002 and December 30, 2004. In this capacity, Petitioner was responsible for the day-to-day oversight of the Company, as well as management of the Company's operations; employee and business relations; communications and interactions with the board of directors; and formulation and execution of business strategies in order to increase the business. Petitioner also held a .023% stock interest in the Company.

During the above period, Petitioner had the authority to issue and sign checks on behalf of the Company, and did so on multiple occasions. During this same time period, Petitioner signed contract documents on behalf of the Company, including client and vendor agreements, checks and tax documents.

Petitioner's employment contract with the Company is silent as to any duty on his part to either control, supervise, or to be responsible for the making of returns or the payment of taxes.

In his role as Chief Executive Officer of the Company, Petitioner signed and authorized the 2002 Michigan Single Business Tax Return for the Company on September 11, 2003, and later signed an Amended 2002 Michigan Single Business Tax Return as CEO for the same Company on July 12, 2004.

Petitioner also served as Secretary and signed Meeting Minutes of the Board of Directors of the Company on July 22, 2003; January 14, 2004; March 17, 2004; April 15, 2004; and May 19, 2004. Petitioner used these meetings on multiple occasions, including the dates listed above, to provide functional and operational reviews of the Company to the Board of Directors. Petitioner specifically reviewed and provided information to the Board of Directors of the Company regarding strategic, functional, and operational developments in the Company's Finance and Administration divisions during these meetings.

Mahesh Gidwani ("Gidwani") was the only other officer of the Company, and carried the title of Senior Vice President of Professional Services. His responsibilities included the overseeing and delivery of professional services provided by the Company, interactions with clients for whom the Company provided professional services, and management of the service teams. His responsibilities were not tax or finance related.

The Company retained Ernst & Young to prepare tax returns for the tax year at issue. The Company also retained Maurice Guinan of Management Account Services, LLC, to serve as a consultant and perform the job functions of a Chief Financial Officer. Mr. Guinan was not an officer of the Company during the subject tax year. Mr. Guinan worked in tandem with Ernst & Young on all of the Company's tax matters, and was supervised in this capacity by Petitioner.

The Company employed Brian Finneran as Director of Finance Administration until his departure in 2003. The Company employed James Keller as Manager of Financial Analysis until October 20, 2003. Neither of these individuals were officers of the Company. Both Finneran and Keller reported to and were supervised by Petitioner in their respective roles.

The Company was at all times during the subject tax period owned by an assortment of venture capital funds, including Boston Millennia Partners, Advent Venture Partners, Ascent Venture Management, Inc., Birchmere Investments, North Hill Ventures and other private party investors.

## V. APPLICABLE LAW

Respondent moves for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated “[a] motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact.” Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass’n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

## VI. CONCLUSIONS OF LAW

The underlying issue in this case is whether Petitioner is a corporate officer and thereby derivatively liable for payment of Final Assessment N988214 on the Company's behalf. Petitioner does not deny Respondent's assertion that he was a corporate officer of the Company during the subject tax period. Petitioner's contentions relate solely to his liability as a responsible corporate officer of the Company.

For reasons described below, the Tribunal finds Petitioner to be liable as a corporate officer for Final Assessment N988214.

As Petitioner acknowledges, the standard set forth by the Michigan Supreme Court in *Livingstone* controls questions of corporate officer liability for tax issues:

In order to hold a person personally liable for a corporation's tax liability the Department of Treasury must first show that the person is an officer of the corporation. Then it must show *either* (1) that this officer has control over making of the corporation's tax returns and payments of taxes; or (2) that this officer supervises the making of the corporation's tax returns and payments of taxes; or (3) that this officer is charged with the responsibility for making the corporation's returns and payments of taxes to the state. [*Livingstone v Department of Treasury*, 434 Mich at 780].

Petitioner makes no argument regarding his liability under the first prong of the *Livingstone* test, and freely admits that he served as an officer of the Company during the taxable period at issue.

Petitioner instead contends that the Tribunal's decision in *Hickey, supra*, which sets no binding precedent, nonetheless allows the presumption of liability established under the *Livingstone* standard to be rebutted where an officer's role in the corporation is not "tax specific." Petitioner further argues that any ambiguity regarding the tax specificity of an officer's duties may create material questions of fact sufficient to warrant denying Respondent's Motion for Summary Disposition.

However, the record does not leave open an issue upon which reasonable minds might differ. Petitioner was, of his own admission during interrogatories, an

officer at the Company during the time in question. In this capacity he was charged with responsibility for the operation of the business, inclusive of overseeing its compliance with state and federal taxation requirements. In response to Respondent's interrogatory "[p]lease identify the Officer of Entigo Corporation who had responsibility for its corporate tax matters," Petitioner responded that "Petitioner, acting as CEO... was the officer responsible for such matters." The Tribunal shall assume that Petitioner did not intend to perjure himself in making this statement and was indeed the corporate officer responsible for corporate tax matters at the Company.

While this court agrees that "mere proof that an individual was an officer in a corporation is not sufficient" to demonstrate responsibility for corporate officer liability, the record shows not only that Petitioner was an officer of the Company, but also that he has admitted responsibility for "tax matters" during interrogatory. Exhibit 2, pp 10-11, Interrogatory 13.

Petitioner's training or education, or lack thereof, in matters of corporate tax law is irrelevant, as is the fact that Petitioner engaged Mr. Guinan, Ernst & Young, and a law firm to process the corporation's tax documents. It is settled law that a corporate officer cannot simply delegate his responsibility for tax matters to third parties or non-officers. *Cicurel v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided March 10, 1998 (Docket Nos. 198812, 198848).

Petitioner admits that he supervised Maurice Guinan, who worked on behalf of the Company and in conjunction with the accounting firm Ernst & Young to prepare the Company's returns. In this capacity, Guinan reported to Petitioner, and his work was subject to Petitioner's supervision and approval. Such supervision clearly satisfies the second prong of the *Livingstone* standard, whereby corporate officer liability is created where an "officer supervises the making of the corporation's tax returns and payments of taxes." *Livingstone v Treasury*, 434 Mich at 780.

Additionally, the record shows that there were only two officers at the Company: Petitioner, and Mr. Gidwani. Gidwani, in his role as Vice President of Services, was responsible solely for the customer service aspects of the business. Gidwani had no responsibility for tax, finance, or related treasury and compliance functions. Gidwani's narrow responsibilities, coupled with Petitioner's direct supervision and final approval authority over the third parties tasked with processing the

Company's tax returns, support Respondent's assertion that Petitioner was at all times during the subject tax year responsible for the tax matters of the Company.

For the reasons stated above, the Tribunal grants summary disposition in favor of Respondent and affirms Final Assessment No. N988214.

## **VII. JUDGMENT**

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

IT IS FURTHER ORDERED that Final Assessment No. N988214 is AFFIRMED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties as finally shown in Final Assessment N988214 within 20 days of the entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting the affected taxes, interest, and penalties shall collect the taxes, interest, and penalties as required by this Order within 28 days of the entry of this Final Opinion and Judgment.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: June 28, 2011

By: Cynthia J Knoll