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

Werner Beermann,

Petitioner,

v.

MTT Docket Nos. 410958 and 432263 (Consolidated)

Michigan Department of Treasury,

Tribunal Judge Presiding
Steven H. Lasher

-and-

Peter Eggers,

Petitioner,

v.

MTT Docket Nos. 414399 and 435086 (Consolidated)

Michigan Department of Treasury,

Tribunal Judge Presiding
Steven H. Lasher

Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION

CORRECTED FINAL OPINION AND JUDGMENT

On February 6, 2014, Respondent filed a Motion requesting that the Tribunal reconsider the Final Opinion and Judgment entered in the above-captioned case on January 16, 2014. In the Motion, Respondent states that the Tribunal made a palpable error by applying the wrong legal standard to the evidence. More specifically, "[t]he Tribunal cited Michigan's corporate officer liability standard in MCL 205.27a(5), but did not apply it. Instead, without explanation, the Tribunal applied the federal corporate officer liability standard from IRC 6672." Respondent states that Tribunal Member McCord's attempt to bend and manipulate Michigan law to the federal standard is both egregious and improper, as is his use of *Sandberg v Wis Dep't of Revenue*, unpublished Decision and Order of the Tax Appeals Commission of the State of Wisconsin issued November 18, 2011 (Docket No. 08-W-143). Respondent states that MCL 205.27a(5) "applies to any taxes the Department administers under the Revenue Act, including business taxes—and liability accrues if any of six possible liability scenarios occur . . . . [and] in order to avoid liability, an individual . . . must show by a preponderance of the evidence than *none* of the . . . scenarios apply to them." [Emphasis added.] The Tribunal concluded only that Petitioners in this case had no control over tax payments, and "[t]he reality demonstrated by the evidence and the Tribunal's finding of facts is that regardless of whether Mr. Beerman had the

final say over the destination of the company's cash, he still supervised the company's making of tax returns or payments . . . . [Similarly,] even if Mr. Eggers did not have complete discretion to control the company's tax payments, he certainly supervised and had responsibility over the preparation of the company's tax returns . . . . Once the Tribunal applies the correct legal standard to the evidence in this case, the Tribunal must rule in the Department's favor."

No response to the Motion has been filed.

The Tribunal, having given due consideration to the Motion and the case file, finds that Tribunal Member McCord erred by applying the wrong legal standard to the evidence in this case, as Respondent contends. Respondent states that Michigan's standard is very different from the federal standard: "First, liability under MCL 205.27a(5) is not a tax penalty—it is a derivative liability. Second, unlike the federal standard, the Michigan standard does not require individuals to willingly fail to pay so called 'trust fund' taxes. Instead, §27a(5) applies to any taxes the Department administers under the Revenue Act, including business taxes—and liability accrues if any of six possible liability scenarios occur, not just if the individual willing[ly] fails to pay." The Tribunal agrees and finds that Tribunal Member McCord committed a palpable error, under MCR 2.119, when he wrongly applied federal law in his Final Opinion and Judgment

At the time this case was heard and decided, MCL 205.27a(5) provided, in pertinent part, as follows:

> If a corporation, limited liability company, limited liability partnership, partnership, or limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure**.** The signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments. The dissolution of a corporation, limited liability company, limited liability partnership, partnership, or limited partnership does not discharge an officer's, member's, manager's, or partner's liability for a prior failure of the corporation, limited liability company, limited liability partnership, partnership, or limited partnership to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.[1]

[1] Public Act 3 of 2014 took immediate effect on February 6, 2014, resulting in substantial amendments to MCL 205.27a(5). The new act did not contain a formal enacting section with provisions for either retroactive or prospective effect. However, the legislature specifically provided that the new officer liability provisions apply "[t]o all of the following taxes administered under this act: (a) For assessments issued to responsible persons before January 1, 2014, taxes administered under this act." MCL 205.27a(14), as amended by 2014 PA 3. This raises a question as to whether 2014 PA 3 applies to the assessments at issue here, which were issued before January 1, 2014. However, in light of the decision rendered herein under prior law, it is clear that the outcome would not be different under 2014 PA 3. The amendments to the officer liability statute are without exception favorable to

Pursuant to the plain language of the statute, a corporation's failure to pay imposes liability upon the officer or officers that had control, supervision, or responsibility for payment or filing, regardless of the reason for said failure to pay. See also *Livingstone v. Dep't of Treasury*, 434 Mich 771; 456 NW2d 684 (1990), wherein the Michigan Supreme Court set forth the following standard for imposing personal liability upon corporate officers:

> 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 the 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.[2]

Section 6672 of the Internal Revenue Code, on the other hand, does not limit liability to officers of the corporation, but does require willful non-payment. See *King v US*, 914 F Supp 335 (WD Mo 1995), wherein the Court held:

> Section 6672 imposes liability on an individual if two requirements are met: (1) the person must be a 'responsible person,' and (2) the person must act 'willfully' in not paying over the taxes. 'Responsible persons are those who have the status, duty and authority to avoid the corporation's default in collection or payment of the taxes.' No single fact is dispositive as to whether an individual is a responsible person, but such facts include whether a person: (1) is an officer, director or member of the board of directors; (2) owns substantial stock in the company; (3) manages the day-to-day operations of the business; (4) has the authority to hire or fire employees; (5) makes decisions as to the disbursement of funds and payment of creditors; (6) possesses the authority to sign company checks; and (7) signs the employer's tax returns. However, a 'responsible person' need not be an officer, director, shareholder, employee, disbursing officer, or payroll clerk of the employer. The 'responsible person' need only have significant control over disbursement of the employer's funds, not necessarily sole or final authority. It is clear that more than one person can be a 'responsible person.' Moreover, Section 6672 'applies to all responsible persons, not just to the most responsible person. *Id.* at 338-339. [Internal citations omitted.]

Petitioners. Therefore, if Petitioners are found to be not liable under the former officer liability (before 2014 PA 3), they are certainly not liable under the new law.

[2] MCL 205.27(a)(5) was revised by the Michigan legislature in 2003 to update the statute to expand the "corporate officer liability" statute to include members, managers, or partners of new forms of business entities, such as limited liability partnerships and limited liability companies. (Michigan House Fiscal Agency Legislative Analysis, July 10, 2003). Therefore, the term "officer" as used in this Opinion will include members or managers of limited liability companies.

Respondent argues that Tribunal Member McCord, in an attempt to bend Michigan law to the federal standard, makes "several conclusions without any citation to authority, or the conclusions it makes are not supported by the authority it does cite." By way of example, Respondent notes that Tribunal Member McCord cites *Livingstone, supra* "as support for the conclusion that in order . . . to be liable under §27a(5), the person must have the 'effective power to see to it that state taxes are paid.'" The Tribunal agrees that "[w]hile such a finding may be vital to liability under the federal IRC 6672, the *Livingstone* case says no such thing . . . . [and] the plain language of MCL 205.27a(5) does not support it." In fact, this language is notably similar to that found in *Plett v United States*, 185 F3d 216 (4th Cir 1999), wherein the Court stated that the "crucial inquiry is *whether the person had the effective power to pay the taxes*—that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed." *Id*. at 219. [Emphasis added.] The *Plett* quote is cited in *Sandberg v Wis Dep't of Revenue*, unpublished Decision and Order of the Tax Appeals Commission of the State of Wisconsin issued November 18, 2011 (Docket No. 08-W-143), which will be discussed in greater detail below. Respondent states further that Tribunal Member McCord's conclusion that "the inquiry required . . . is a search for the officer with the ultimate authority over the making of returns or expenditures of funds," is similarly not supported by any of the authority cited. The Tribunal has examined the Final Opinion and Judgment and finds that Tribunal Member McCord clearly "bent Michigan law to the federal standard," made unsupported conclusions, and even contradicts his own statement when he later recognizes, as indicated in *King, supra*, that even under the federal standard, an individual "need only have significant control over disbursement of the employer's funds, not necessarily *sole or final authority*" as initially contended in the Final Opinion and Judgment. [Emphasis added].

And, as stated in Respondent's Motion, Tribunal Member McCord makes a number of conclusions defining the scope and purpose of its inappropriately titled "responsible officer" analysis, without citing to any authority at all:

> Responsibility is generally considered to be a matter of status, duty, or authority. In order to determine whether an individual is a responsible officer, the Tribunal must look beyond formal titles and mechanical functions to search for the person or persons with ultimate authority to expend funds. More than one person within the corporation, however, can be "responsible." See *Fortescue v Dep't of Treasury*, 10 MTTR 679 (Docket No 243194, April 14, 1999). In other words, it is not necessary that an individual have the final word as to which creditors should be paid in order to be subject to liability under MCL 205.27a(5). Rather, it is sufficient that the person have significant control over the disbursement of funds in payment of state taxes. The inquiry is necessarily fact intensive.

Notwithstanding references to MCL 205.27a(5) and the *Fortescue* decision, none of these statements accurately describes appropriate considerations under MCL 205.27a(5). Further, a review of *Sandberg, supra*, reveals the following:

> In order to determine whether an individual is a responsible person, the Commission must look beyond formal titles and mechanical functions to search

> for the person or persons with ultimate authority to expend funds. *See Godfrey*, 748 F2d at 1575. More than one person within a corporation, however, can be "responsible." *See White*, 178 Ct Cl at 775, 372 F2d at 518. In other words:
> It is not necessary that an individual have the final word as to which creditors should be paid in order to be subject to liability under (section 6672). Rather, it is sufficient that the person have significant control over the disbursement of funds. *Gephart v United States*, 818 F2d 469, 475 (6th Cir 1987) (citing *Neckles v United States*, 579 F2d 938, 940 (5th Cir 1978)). The inquiry is necessarily fact intensive. The test is whether the Petitioner had the "status, duty and authority to avoid the default." *Sale v United States*, 31 Fed Cl 726, 731 (1994). *See also White*, 178 Ct Cl at 778, 372 F2d 513 (examining "authority, powers, and duties").

The similarities are undeniable, and as contended by Respondent, a close reading of the Wisconsin decision reveals that Tribunal Member McCord lifted almost his entire legal analysis nearly verbatim from the Wisconsin decision. The Tribunal has reviewed Tribunal Member McCord's Final Opinion and Judgment and finds that, without appropriate attribution or citation, he has plagiarized a large excerpt of the Wisconsin decision. Further, and of equal concern, is the alteration of a block quote of this case in which Tribunal Member McCord replaced a citation to IRC 6672 with MCL 205.27a(5) in order to serve his purposes while committing a serious ethical offense. Respondent, in its Motion, states that "the most egregious example of the Tribunal's attempt to jettison Michigan's standard in favor of the federal standard is the Tribunal's alteration of a block quote from a 30 year old federal case. In *Godfrey v United States*, 748 F2d 1568, 1576 (Fed Cir 1984), the U.S. Court of Appeals for the Federal Circuit said the following: [A] person's 'duty' under §6672 must be viewed in light of his power to compel or prohibit the allocation of corporate funds. It is a test of substance, not form." Respondent contends that when Wisconsin used the quote, it got it right. The Final Opinion and Judgment verifies Respondent's allegation in that Tribunal Member McCord misapplies this quote and misappropriates it by replacing the citation to IRC 6672 with a citation to MCL 205.27a(5), despite the fact that §27a(5) did not exist until two years after the *Godfrey* case was decided. And "[t]he Tribunal made its alteration silently, without any indication that it had changed the quote."

Respondent argues that had Tribunal Member McCord applied the correct legal standard to the evidence in this case, he would have been required to rule in Respondent's favor. The Tribunal finds, however, notwithstanding Tribunal Member McCord's plagiarism, that his findings with regard to control over payment of taxes in this case are both relevant under MCL 205.27a(5) and supported on the record. The Tribunal finds further, for the reasons set forth below, that the evidence does not support a finding that either Petitioner supervised or was charged with the making or preparation of the returns or the payment of taxes as Respondent contends. Further, this is not a case where Petitioners seek to avoid responsibility by claiming to have delegated tax-specific responsibility to another officer or employee. See *Cicurel v Michigan Department of Treasury*, 9 MTTR 254 (Docket Nos 174091, 175900, and 175901, October 14, 1996) and *Christel v Michigan Department of Treasury*, 7 MTTR 196 (Docket No 148716, June 11, 1992). Accordingly, while Respondent has demonstrated a palpable error that misled the Tribunal and

the parties relative to the Final Opinion and Judgment, said error would not have resulted in a different disposition if the error was corrected.

Although MCL 205.27a(5) provides that a corporate officer's signature on either a return, or a negotiable instrument, is prima facie evidence of the officer's responsibility to make returns, *Sobol v Michigan Dept of Treasury*, 9 MTTR 321 (Docket No 190108, May 19, 1995), the establishment of the prima facie case then creates a rebuttable presumption. "Prima facie evidence" is evidence which is sufficient to establish a given fact, or the chain of facts constituting a party's claim or defense, which, if not contradicted, will remain sufficient. It is an inference or presumption of law of a fact in the absence of proof to overcome it. *Department of Environmental Quality v Worth Township*, 491 Mich 227, 814 NW2d 646 (2012). It is a rule which does not preclude evidence, but merely declares that certain conduct shall suffice as evidence until the opponent produces contrary evidence. To hold a person personally liable for an entity's tax liability, Respondent must first show that the person is an officer of the corporation. Petitioners here do not dispute that they were officers of G+S during the tax periods at issue: Petitioner Eggers held the titles of Secretary and Treasurer, and Petitioner Beermann held the title of Vice President, and subsequently, President.

The statute's signature mechanism provides for establishing a prima facie case of derivative officer liability. Respondent has met this initial burden by producing signatures on corporate tax returns and/or installment agreements (i.e., negotiable instruments). See *Dore v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided June 10, 2003 (Docket No. 238344). Once the Department's prima facie case is established, the burden of proof shifts to Petitioners to rebut the presumption that they are responsible for the corporation's failure to pay, and to show that they are not corporate officers, or that they were corporate officers without control and/or supervision over or responsibility for making returns or tax payments. See *Drake v Michigan Dept of Treasury*, 9 MTTR 51 (Docket No 204601, December 8, 1995). Petitioners must produce evidence sufficient to convince the Tribunal that the nonexistence of the presumed fact is more probable than its existence. *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985). Competent, material, and substantial evidence that Petitioners had tax specific duties must be weighed against the rebutting evidence.

Although several returns were signed by Peter Eggers, G+S retained an outside accounting firm, C&M, to handle preparation of both its federal and state tax filings. Mr. Eggers, and subsequently Werner Beermann, were responsible for signing engagement letters, but all other duties associated with preparation of the filings were delegated to the local corporate controller, Arnie Kramer, and he was C&M's primary contact throughout his tenure with G+S. Returns were prepared utilizing data downloaded by Mr. Kramer from the company's SAP system, which was maintained on German servers and controlled by the St. Ingbert Accounting Department. G+S's federal corporate income tax returns were filed by C&M electronically pursuant to a Form 8879-C signed by Mr. Schiele, while finalized state returns, including the 2006 and 2007 SBT returns underlying Final Assessment R057083, were delivered to Mr. Kramer, who forwarded them to Germany for approval before presenting them to Mr. Eggers for his signature. Similarly, it was Mr. Kramer who drafted the January 16, 2009 letter to the Michigan Department of Treasury in an effort to get an extension for payment. He explained: "[B]ecause

[Germany] didn't allow us before to pay taxes, so we tried to still maybe make arrangement with the authorities or—it was—I'm pretty sure it was—came out of a discussion with them, what can you do in order to postpone tax payments." TR, pp. 41-42. He forwarded the letter to Peter Eggers for review, who indicated that "in the context of cash management, at that time we were dealing with many different companies in terms of payables, liabilities and such. The State of Michigan was always included in that. And we had been instructed to try to come up with payment plans with our creditors, and ultimately they also had suggested that we approach the State of Michigan to see if we could set up something similar with them. And based on that, Arnie created the initial draft of that letter." TR, p. 125. The draft was reviewed by the head office, and there was approval to send it. According to Mr. Beermann, who along with Mr. Eggers, co-signed the document on January 16, 2009, "we simply—I mean, we felt we needed to make a statement that we have no money to pay it and try to find ways to see what we could do." TR, p. 88. On June 11, 2009, Treasury responded to the January 16, 2009 communication with an installment agreement. Mr. Kramer's successor, Sheri Briskey, completed the Agreement on behalf of the corporation and Mr. Beermann signed it on July 15, 2009. Regarding the circumstances in which he was presented with the installment agreement, Mr. Beermann testified: "Well, if I recall correctly, it was basically a statement of, you know, us saying this is the status of the company. You know, with—Sheri Briskey, if I recall correctly, was the one that came and she said we have to get this somehow out there, you know. And then I asked, you know, is it a –why is my Social Security number on there. And, well, she said that, you know, we have to do this, okay. So I signed it." TR, p. 107.

Given the above, and based on the testimony and evidence presented by Petitioners, the Tribunal finds that although Petitioners were officers of G+ S during the relevant tax periods, the titles and roles assigned to them were mere administrative formalities, lacking any responsibility or control over the filing of tax returns or payment of taxes; both individuals' duties consisted primarily of sales and customer relations. The Tribunal finds further that the following standards for imposing personal liability upon Petitioners have not been satisfied: (1) that these officers had control over the making of the corporation's tax returns and payments of taxes; (2) that these officers supervised the making of the corporation's tax returns and payments of taxes; or (3) that these officers were charged with the responsibility for making the corporation's returns and payments of taxes to the state. Accordingly, while Respondent has demonstrated a palpable error that misled the Tribunal and the parties relative to the Final Opinion and Judgment, said error would not have resulted in a different disposition if corrected. See MCR 2.119. As such, the Tribunal modifies the Final Opinion and Judgment and adopts the modified Final Opinion and Judgment as the Tribunal's final decision in this case. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Final Opinion and Judgment, as modified herein, in this Corrected Final Opinion and Judgment.

Finally, the Tribunal apologizes to the parties for the inexplicable actions taken by Tribunal Member McCord in this case. However, as discussed above, while the misapplication of Federal law constitutes a palpable error, it does not result in a different disposition by the Tribunal with respect to the assessments at issue. Therefore,

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

IT IS FURTHER ORDERED that the Final Opinion and Judgment shall be CORRECTED as indicated in this Corrected Final Opinion and Judgment.

IT IS FURTHER ORDERED that Assessments R057083 and R120396 are CANCELLED with regard to Werner Beermann.

IT IS FURTHER ORDERED that Assessments R057083 and R120396 are CANCELLED with regard to Peter Eggers.

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

By: Steven H. Lasher

Entered:
ejg/sms