

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

Heather P. Gardner,
Petitioner,

v

MTT Docket No. 442338

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
B. D. Copping

FINAL OPINION AND JUDGMENT

SUMMARY OF JUDGMENT

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that Petitioner is not liable for the assessment issued by Respondent, as she did not have control, supervision, or responsibility for the making of returns or payments. Accordingly, Assessment No. Q561140 is cancelled.

INTRODUCTION

Petitioner, Heather Gardner, appeals Respondent's determination that Petitioner is liable as a responsible officer under MCL 205.27a(5) for the failure of HTG Corp., Inc., aka Horizon Technology Group, Inc. ("Horizon"), to pay Single Business Tax ("SBT") relating to its 2007 tax year. Respondent asserts that, as of May 31, 2012, Petitioner is liable in the aggregate amount of \$63,255.24. The sole

question is whether Petitioner was a responsible officer of Horizon, who is individually and severally liable for the subject taxes.

BACKGROUND

Petitioner, Heather Gardner, was the Chief Executive Officer (“CEO”) and Secretary for HTG Corp., Inc., doing business as Horizon Technology Group purportedly until November 6, 2007. Petitioner stated that Horizon was a holding company for a number of entities, including HTG Tiffin, LLC (“Tiffin”) and that Tiffin also did business as Horizon Technology Group. Petitioner further testified that Horizon, the holding company, had no employees or assets and was simply the sole member of the LLCs that were owned by Horizon.

Petitioner also stated that Horizon filed tax returns on behalf of Tiffin, and Horizon’s tax returns reflected the receipts, business income, deductions, and business activity of Tiffin. As confirmed by Petitioner in her testimony during the hearing, Tiffin was a single-member LLC with Horizon as its sole member/owner.

Petitioner in her Response to Respondent’s Motion, stated, “On November 7, 2007, all assets of Horizon were transferred to a Trustee, McTevia & Associates LLC (“McTevia”). McTevia’s Trust Agreement transferred to McTevia the control of all officers and employees and of all money, receipts and the authority to determine and pay all taxes or other debts.”(Petitioner’s Response, p. 2)

Petitioner alleges that for the years prior to 2007, for 2007, and for tax years subsequent to 2007, she had no tax-specific responsibilities with regards to Horizon. Petitioner also asserts that she has no background in taxes, including the SBT or other state taxes, and that while admitting she signed the 2007 SBT return, she claims that she did not prepare the return, nor did she supervise, control, or approve the preparation of the SBT return. Petitioner testified she had signed tax returns in the past at the request of the Treasurer/CFO, Mr. Babcock, and that she merely signed the 2007 SBT return again either at the request of Mr. Babcock or because there were no more officers remaining after the assets had been transferred to McTevia, and she mistakenly believed that the SBT return could not be filed without a signature.

On May 31, 2012, Respondent issued a final assessment against Petitioner pursuant to MCL 205.27a(5) for the unpaid SBT liability of Horizon for the annual tax period ending December 31, 2007, including accrued interest and a failure to pay penalty.

Final Assessment	Tax Period/ Type of Tax	Tax	Penalty	Interest*	Total
Q561140	Officer Liability for 2007 – SBT	\$43,056.00	\$11,156.90	\$9,042.34	\$63,255.24

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

On July 3, 2012, Petitioner filed its appeal with the Tribunal. Respondent filed its answer to Petitioner's appeal on July 16, 2012. A hearing was held on May 9, 2013. Jack Van Coevering and Marcy Rosen, Attorneys, appeared on behalf of Petitioner. Nate Gambill, Assistant Attorney General, appeared on behalf of Respondent.

PETITIONER'S CONTENTIONS

In Petitioner's opening statement, Petitioner contended, in part, that:

Petitioner had no tax-specific responsibility with respect to the entity at issue. She has no background in tax, had no understanding of any of the . . . tax issues. She was . . . during the relevant time period, which is 2007, working for her father, [to] support him while he wound down the business that was his life's work.

She had no ownership interest, she had no control. Any title that she had was on paper only. There was a chief financial officer in place, who was a Treasurer with an extensive background in accounting, tax, audit, corporate restructuring, who was the person that interfaced with the CPA that prepared the returns for the corporation; and he was the person that was responsible for sharing information with the CPA. Miss Gardner had no role in that, and she had no understanding of it.

What we will also demonstrate is that, during this time period when the business was winding down, in conjunction with the sale of the operating entity, that all of the assets were placed in the control of a trustee by virtue of a Trust Mortgage; and we will demonstrate that Petitioner had no role in the decision to appoint the trustee, she had no role in assisting to provide the trustee with information. She didn't work with the trustee, she didn't hire the CFO. In fact, when she got the letter of inquiry from the Department of Treasury, she didn't even understand what it was or why she was receiving it.

The Department's position is that, once they establish that, you know, on some piece of paper it says that Petitioner was an officer, regardless of whether she had actual tax-specific responsibility, that she is on the hook for these tax liabilities. (Transcript, pp. 12-13)

PETITIONER'S ADMITTED EXHIBITS

- P-2: Respondent's Letter of Inquiry, Notice of Corporate Officer Liability issued to Petitioner
- P-3: Petitioner's Response to Respondent's Letter of Inquiry
- P-4: Trust Mortgage Agreement between Petitioner's subsidiary HTG-Tiffin and McTevia & Associates, Trustee
- P-5: Resolution of HTG-Tiffin, LLC, a Michigan limited liability company, to authorize James McTevia and Associates as trustee under a Trust Mortgage with HTG-Tiffin dated November 7th to take whatever steps necessary to file a Chapter 11 Voluntary Bankruptcy.

PETITIONER'S WITNESSES

Angela Helm

Ms. Helm was sworn in as an adverse witness. She testified that she was currently working as a Departmental Technician with the Office of Collections, Financial Services Bureau, Michigan Department of Treasury. She testified her duties included:

when a business fails to file or pay the taxes, it comes over to the Office of Collections, the corporate officer, and successor liability, in which I work in. And I look at documentation to determine officers that could be held liable under the Corporate Officer Liability Statute and send letters to taxpayers and request the issuance of assessments. (Transcript, p. 19)

With respect to her duties as a part of the Corporate Officer Liability Unit, she stated that she was responsible for issuing most of the corporate officer liability assessments that are issued, e.g., Intents to Assess. As to who issued initial letters of inquiry, she testified that there are “three or four assistants in the Corporate Officer Liability Unit that sends those out through the system.” (Transcript, p. 21)

Ms. Helm agreed when asked by Petitioner whether:

[I]f a corporation doesn't pay its taxes, file the required returns, or pay the tax due, any of its officers, members, managers who the Department determines, and now I'm quoting here, "based on either in an audit or an investigation," and then it goes on to say that that officer that you audit and investigate is personally liable, correct? (Transcript, p. 28)

Petitioner then asked, “[T]hen do you make an audit -- you make an additional investigation in determining whether to accept the response to the letter of inquiry, or do you just issue it?” (Transcripts, pp. 29) Ms. Helm responded, “Depending on what the taxpayer -- what the taxpayer says in the correspondence; and I look and see if that is sufficient, based on the evidence we have, to go further with issuing the intent.” (Transcript, p. 29)

Petitioner then asked, “[So] what evidence did you have in Miss Gardner's case?” (Transcript, p. 29) Miss Helm responded, “I can't remember all of them, but I remember that she had signed the tax return at issue today and the Department of Labor and Economic Growth, LARA, known now, corporate

filings; and that's all I can remember off the top of my head.” (Transcript, p. 28)

Petitioner then asked, “if someone then responds to the letter of inquiry, that's where you get involved, and you determine whether the response was accurate;”, Ms. Helm responded, “Correct”. (Transcript, p. 22) Petitioner then inquired, “[I]f you determine that the response is not accurate, Intent to Assess is issued, and you're issuing that Intent to Assess?” (Transcript, p. 22) Ms. Helm responded, “Requesting it to be issued” (Transcript, p. 22).

Ms. Helm again confirmed that the derivative officer liability assessment issued to Petitioner for the 2007 SBT assessment was based on HTG Corp., Inc.'s underlying assessed SBT liability. Petitioner then inquired whether the existence of a Treasurer listed as an officer for the 2007 tax year would make a difference in the determination of officer liability to Ms. Helm. She responded, “[T]he documents signed would matter to me. The tax documents signed would matter.” (Transcript, p. 26)

When asked, “If we called this Treasurer a chief financial officer, you would not know what a chief financial officer does, would you,” Ms. Helm responded she would not know. (Transcript, p. 27)

When asked further questions about what the duties of various other officers might be, based on their respective titles, Ms. Helm testified that she had no idea what any officer's duties or responsibilities included and that she assessed officer

liability based on whether or not an individual was listed as an officer, regardless of title, on a Department of Labor & Economic Growth (DLEG now LARA) *Profit Corporation Information Update* or another form filed with the state listing corporate officers; and whether someone listed as an officer on one of these documents signed any tax returns or certain other documents specified in Revenue Administrative Bulletin (“RAB”) 1989-38.

In the case before the Tribunal Ms. Helm confirmed that Petitioner, Ms. Gardner, was listed as an officer, CEO, Secretary, and a Director, of HTG Corp., Inc. on the 2007 DLEG *Profit Corporation Information Update*, and she signed HTG Corp., Inc.’s. 2007 SBT return as CEO on September 9, 2008.

Heather Gardner, Petitioner

In her testimony Ms. Gardner stated she was not aware that there was such a thing as officer liability and that she did not understand the SBT. When asked about her statement in response to the Respondent’s letter of inquiry, in which she stated, "While I may have nominally held the title as an officer of the above organization in filings with the State, I had no actual responsibility nor exercised any responsibility with regard to Horizon Technology Group." (Petitioner’s Exhibit No. 3), Petitioner responded:

So Horizon Technology Group is -- is a small, family business that's owned by my dad. And -- and so I just worked to help -- I worked with him and helped him and did what needed to be done, in whatever he needed me to help with in the -- in the company. (Transcript, p. 59)

When asked what “nominally held the title as an officer” meant, Ms.

Gardner testified that, “I meant that I -- while I was -- I was recognized as -- as an officer, I just did what I needed -- whatever needed to get done. I wasn't involved in the day-to-day activities and responsibilities.” (Transcript, p. 59-60)

Again, Petitioner’s counsel read from her answer to Respondent’s letter of inquiry, and stated, “My only responsibility in any way related to this entity was as an officer of an operating subsidiary of Horizon Technology Group.” (Transcript, p. 60)

Counsel then asked, “Can I ask you, what's the relationship between Horizon Technology Group and, if you know, the -- at HTG Corp, Inc.?” (Transcript, p. 60)

Petitioner explained that HTG Corp owned 100 percent of a company called HTG-Tiffin, LLC. Again, in her response to Respondent’s letter of inquiry, Petitioner went on to say that, “This operating subsidiary was sold in November 2007, and my responsibility [sic] ceased at that time, prior to the time the taxes in question were due to be filed or paid.” (Petitioner’s Exhibit 3)

Counsel then asked, “Can you tell me what you meant when you wrote that?”, (Transcript, p. 60)

So HG [sic] Corp didn't have any activity. HTG-Tiffin was sold, and so I was involved with -- so, at that time, I was working and involved

and working with things that my dad needed to get things done. And, when that sale transaction occurred, what little involvement I did have completely ceased. And I say from an activity level perspective or a time that -- that my dad needed help. So that's what I was going with on that response. (Transcript, p. 60-61)

Ms. Gardner then testified that Horizon and at least one other entity, Tiffin, the operating entity, filed one SBT return in 2007.

Ms. Gardner again testified that for both Horizon and Tiffin she did not perform as CEO or Secretary; that she had no day-to-day duties or responsibility for either entity; and that she just did things that needed to be done.

She further stated:

We completed those forms, they would get sent in. I knew they had to get filed with the State in order to keep the company in good standing. And so we had an administrative person that would complete them, and then we would sign them and send them in. And, really, it was just to get them turned in to the State. (Transcript, p. 63)

When asked, “[W]ho told the administrative person what to put on the forms” (Transcript, p. 63) Petitioner replied, “Since it was family, she nominally put family. And then as -- or, as she saw fit, people filled in roles. And I'm trying to think of what else, but I -- that's what I recall at this time.” (Transcript, p. 63)

She went on to state that, “Well, Randy Stoller had day-to-day responsibility for the operations and Rob Babcock was the Treasurer and CFO for the organization.” (Transcript, pp. 63-64)

When asked if she had any background or training in accounting or tax matters, Petitioner replied that she did not - that she had never prepared her own tax return; that she had no expertise in financial matters, and that she did not have the expertise to review a tax return or identify errors that may be present.

Ms. Gardner testified that Bob Babcock was the CFO, and he was hired around 2002 or 2003 at the urging of Comerica Bank, Horizon's primary lender. She also stated, "He was responsible for banking relationships, financial return -- financial income statements, financial reporting, and the tax returns and taxes. . . . [and that he had worked at one of the big -- I think the big eight accounting firms in their Audit and Tax Department." (Transcript, pp. 66-67)

When asked who prepared Horizon's corporate tax returns, Ms. Gardner replied it was Jim Rocchio. Mr. Rocchio was identified as a CPA and attorney working for a firm called Strobl and Sharp. Ms. Gardner said that Mr. Rocchio was hired by her father and that Mr. Babcock was responsible for the preparation of the financial records used by Mr. Rocchio to prepare the corporation's tax returns.

When asked if she reviewed the tax returns in 2007 or in any other year before she signed the returns, Petitioner said she did not, as she would not have understood what she was signing. When asked why she signed, attesting to the accuracy of the return under penalties of perjury, without reviewing it, Petitioner stated the return had been prepared by a CPA/attorney, and the information used to

prepare the return was provided by the corporation's CFO. Petitioner said she based her decision to sign the returns "based upon the skills and knowledge of those individuals, when it was sent to me and said to sign and send to the State, I did." (Transcript, p. 85)

When asked why the CFO didn't sign the returns, she stated, "He always had me sign the returns. He just said they needed to be signed and sent in. I don't have an answer other than I never questioned it." (Transcript, p. 86)

When asked if the CFO was employed by Horizon and not by Tiffin and whether he was still employed by the corporation in September of 2008, Ms. Gardner responded that Mr. Babcock was employed by Horizon and not Tiffin and that she did not recall whether or not he was still employed by the corporation as of September of 2008. (Transcript, p. 86)

With respect to the Trustee Mortgage Agreement, Ms. Gardner testified that she had no involvement in the planning or execution of the Agreement. She stated that all the operating assets of Tiffin were sold, many of the employees were hired by the purchasing entity, and the Trustee, not Tiffin, received the proceeds of the sale of the assets. The Trustee then had the responsibility to pay Tiffin's creditors.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner (i) was an officer with various officer titles over the years preceding 2007, including her title in 2007 of CEO; (ii) was

listed as an officer on schedule of officers for Horizon on its 2007 SBT return; and

(iii) signed the 2007 SBT return, as the CEO of Horizon.

Further, per Respondent's opening statement:

[T]he Department will present testimony that Miss Gardner identified herself as a VP, a Secretary, a CEO, and a Director of the assessed company over the course of about eight years on several different official filings.

The Department will also demonstrate that Miss Gardner signed two of this assessed-company's tax returns under the -- over the title CEO. She signed the tax return for the debt at issue, the 2007 SBT return, and she signed it in 2008. And then she also signed a 2009 simplified MBT return. And she signed that in 2010.

So the Department will also introduce evidence showing that when Miss Gardner first responded to the notice of inquiry informing her of the investigation into her liability for this company, at first she said that she had no responsibility over this company and that she was an officer in name only. It was just nominal for her filings with the State.

And then, in her responses to discovery, it turns out that she was -- she acknowledged that she was the CEO of this company and had responsibility characteristic of a CEO for the company, short of tax-specific responsibility is what she said.

* * *

[U]nder [MCL 205.]27a(5), there are actually six different liability scenarios. And Miss Gardner bears the burden of proof to show, by a preponderance of the evidence, that none of those six scenarios applied to her role.

So, even though she was the CEO of this company, even though she had - - even though she was signing tax returns, she has the preponderance in this proceeding to show that she did not have responsibility over the making of tax returns, did not have control over the making of tax returns, and did not even have supervision over the making of tax returns.

If she cannot show by preponderance that none of those scenarios apply to her role as the CEO of this company, then the Tribunal must rule in the Department's favor. (Transcript, pp. 14-17)

RESPONDENT'S ADMITTED EXHIBITS

- R-1: Final Assessment Q561140 sent to Horizon Technology Group Inc.
- R-2: Letter of Inquiry sent to Petitioner
- R-3: October 12, 2011 Letter from Petitioner
- R-4: Determination of Corporate Officer Liability sent to Petitioner
- R-5: (2) Certificate of Assumed Name certificates signed by Petitioner, identified as Exhibits R-5A, page 1, and R-5B, page 2; only Exhibit R-5B was admitted
- R-6: (6) Profit Corporation Information Updates signed by Petitioner
- R-7: 2007 Single Business Tax Return signed by Petitioner
- R-8: 2009 Michigan Business Tax Return signed by Petitioner
- R-9: 2006 and 2007 SBT Schedule of Shareholders and Officers identifying Petitioner as an officer of Horizon Technology Group, Inc.
- R-10: Final Assessment Q561140 sent to Petitioner
- R-11: Petitioner's Responses to the Department's First Discovery Request
- R-12: Petitioner's motion and brief in response to the Department's dispositive motion, along with the four exhibits (Exhibits A – D) the Petitioner attached

RESPONDENT'S WITNESS

Angela Helm

The bulk of Ms. Helm's direct testimony related to Respondent's procedural efforts to get its exhibits admitted by the Tribunal. On cross-examination, Petitioner again made the point over and over again that Ms. Helm did not have an understanding of what the typical duties of corporate officers consisted of.

In furtherance of Respondent's effort to have its exhibits admitted into evidence, Respondent asked whether Petitioner had signed the 2009 Michigan

business tax simplified return for Horizon and Ms. Helm confirmed that Ms. Gardner had signed the return, as CEO, on June 18, 2010.

When Respondent asked Ms. Helm “why did you decide to issue or to recommend issuing an Intent to Assess against Miss Gardner” (Transcript, p. 112) she replied, “Because I believed the elements were met. She was an officer, and she had tax-specific responsibility by signing tax returns and putting herself out to be an officer.” (Transcript, p. 112)

Respondent then asked Ms. Helm, “So Miss Gardner sent you a letter that we've introduced as Petitioner -- or, excuse me, as Department's Exhibit 3; and you testified that you saw that letter. Why weren't you persuaded by that letter not to recommend issuing an Intent to Assess?” (Transcript, pp. 112-113)

Ms. Helm responded, “My understanding of her letter is that she stated she had no actual responsibility to -- with regards to Horizon Technology Group. And I think the documents go against her response. She signed a tax return as an officer.” (Transcript, p. 113)

When asked to “explain what you do when you use these forms [Michigan Profit Corporation Update Forms], what's the purpose of these forms, and how do you interpret them?” (Transcript, p. 129) Ms. Helm answered, “I use these forms to look at if the person was an officer and to see who the officers were. To my understanding, it has to be filed annually so -- and this is the extent of the DLEG,

Department of Labor and Economic Growth's, requirements for this filing.”

(Transcript, pp. 129-130)

Following are questions asked by Petitioner and answered by Ms. Helm:

Q Now, you've heard from Heather Gardner that she was asked to sign this form, okay? She told you, in your letter, that I had no actual responsibility; isn't that correct?

A Part of it, yes.

Q And what's the rest of the part?

A "Nor exercise any responsibility with regard to Horizon Technology Group."

Q Okay. So is it possible that someone could sign a form and not have actual responsibility?

A Yes.

Q Okay. And -- and, knowing that, she's told you she has no actual responsibility. You conducted no investigation after that -- after you received that response from her; isn't that correct?

A Correct.

Q And, likewise, with Exhibit 8. You received -- you had a copy of Exhibit 8, you had her response that you had -- she had no actual responsibility; and, aside from looking at the signature here, you conducted no investigation as to her response; isn't that correct?

A Correct.

Q You're relying entirely on the fact that her -- her name is on a return; isn't that correct?

A And the DLEG filings, correct.

Q The DLEG filings. The DLEG filings showed to you that she's an officer; isn't that correct?

A Correct.

Q They don't show anything about tax-specific responsibility, do they?

A Correct.

* * *

Q So when you said to Mr. Gambill that you assessed her because you believe she had tax-specific responsibility by signing the returns, that statement, that testimony of yours, is based only on looking at the tax returns, isn't it?

A Correct. (Transcript, pp. 132-134)

FINDINGS OF FACTS

1. HTG Corp., Inc., FEIN 38-XXXXXXX, was incorporated by Petitioner's father, Ron Palmer on February 28, 1986.
2. Based solely on the 2007 form C8000KC, SBT Schedule of Shareholders and Officers, Mr. Palmer, apparently through a revocable grantor trust, owned 87.83% of HTG Corp, Inc., the holding company. The remaining 12.16% ownership in HTG Corp, Inc. (two - 6.08% shares), was owned respectively by Bridget and Heidi Palmer, both of whom were presumably related to Mr. Palmer in some way.
3. HTG Corp, Inc. owned two or more subsidiaries, one of which was HTG-Tiffin, which was the primary operating entity, was doing business as Horizon Technology Group, Inc., and was a wholly owned single-member LLC of HTG Corp, Inc.
4. HTG Corp, Inc. itself was a holding company with no employees, no assets, and no business activity.

5. On May 31, 2012, Respondent issued a final assessment, Q561140, against Petitioner pursuant to MCL 205.27a(5) for the unpaid SBT liability of Horizon for the annual tax period ending December 31, 2007, plus accrued interest, and a failure to pay penalty.
6. Petitioner admitted to being the CEO of Horizon, albeit in name only, and to having signed the 2007 SBT tax return on September 9, 2008, purportedly at the behest of the CFO/Treasurer of Horizon, Robert Babcock.
7. While Mr. Babcock was CFO and Treasurer of Horizon, it was not established by testimony or otherwise that he was still employed by Horizon in September of 2008.
8. Based on the testimony of Ms. Helm, the Tribunal finds that the “audit and investigation” conducted by the Respondent in this case, and apparently in most officer liability cases, is limited to first simply determining, based on forms that Treasury has access to, such as in this case the 2007 DLEG *Profit Corporation Information Update*, the 2006 and 2007 SBT form *C-8000KC, Listing of Corporate Shareholders and Officers*, or similar forms filed with the state of Michigan, whether an individual is listed as an officer or not on one of these forms (the title of a particular officer may or may not be taken into consideration in Respondent’s determination), and secondly, determining whether the individual that may be assessed actually signed any tax returns or tax payments at or around the time to which the assessment relates. Once it is established that an officer did sign a tax return or a payment, then a letter of inquiry is sent to a potentially liable officer. Based on Respondent’s evaluation of the response from the potentially liable officer, Respondent may or may not request that an assessment for derivative officer liability be issued.

The standard used by Respondent of whether or not it can establish a prima facie case is, per MCL 205.27a(5), in part, as follows:

(T)he signature of any corporate officers . . . on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments.

Other documents signed by an officer, which may be used to further the Department's ability to present facts regarding officer standing and officer responsibility are listed in the *Evidentiary Standards for Officer Liability* section of RAB 1989-38. However, none of these documents may be used by the Respondent to establish a prima facie case. Only tax returns and tax payments actually signed by an officer may be used for that purpose.

Again, based on the testimony of Ms. Helm in this case, Ms. Helm did not attempt to do any further investigation once she determined that the Respondent had established its prima facie case. Not only is no weight given to what the title of an officer is or what their normal duties may or may not be, Ms. Helm testified that she had no idea what any officers' duties or responsibilities may or may not be. This being the case, any further investigation on her part would have been futile, as she admitted through her own testimony that she didn't really have the background, training, or understanding necessary to make a determination based on anything beyond simply determining, based on forms filed by the underlying business entity that gave rise to the tax liability, whether an individual was listed on said forms as an officer or not, and if so, whether that individual had actually signed a tax return or tax payment at or about the time to which the underlying assessment related.

9. HTG-Tiffin, LLC, d/b/a Horizon Technology Group, entered into a Trust Mortgage Agreement ("Agreement" – Exhibit P-4) with McTevia & Associates, LLC, Trustee ("Trustee"), on November 7, 2007. The purpose of the Agreement was to transfer control of all the assets of Tiffin to the Trustee, so the Trustee could sell the assets to Jacobson, an unrelated third-party, and then handle disbursements of the proceeds of the sale to Tiffin's creditors. Per paragraph 10 on page 7 of the Agreement, the Trustee's primary duty was to:

. . . disburse all monies paid to him by Debtor, or that come into his possession as trustee under the terms of this Agreement, and any and all monies arising from any sales as hereinbefore provided, in the following manner, which is intended to be consistent with the priority provisions of the bankruptcy code:

FIRST: It shall pay valid, perfected secured claims senior to the Trust Mortgage, including any tax claims secured by law.

As the payment of taxes was the first priority for payment by the Trustee, the Trustee should have, had he known about Michigan's claim for outstanding SBT, paid that amount out of the proceeds of sale of Tiffin's assets. Presumably, as the SBT return was not filed until September 9, 2008, the Trustee may have been unaware of the outstanding liability prior to that time. Whether any funds were available to the Trustee to pay the SBT liability at the time the return was filed is unknown. However, had such funds been available, it appears it would have been the primary duty of the Trustee to pay the SBT liability to full extent possible out of any remaining available funds.

10.RAB 1989-38 addresses situations where the entity that originally was assessed the tax may now be in Chapter 11 bankruptcy. Specifically, as to Petitions in Bankruptcy, the RAB states:

Corporate officers may be assessed for tax liability incurred by the corporation prior to the date the corporation filed under Chapter XI of the United State's Bankruptcy Code. Taxes incurred subsequent to filing under the bankruptcy code are the responsibility of the debtor in possession or trustee in bankruptcy. If the corporation is the debtor-in-possession and no bankruptcy trustee is appointed, then the corporate officer(s) retains control of the filing of tax returns and payment of taxes. Therefore, officer liability will attach to any unpaid corporate taxes while the corporation is the debtor-in-possession and no bankruptcy trustee has been appointed. Issuance of an officer liability Intent to Assess may be desirable to preclude the running of the statute of limitations for a particular taxable period, and assure collection.

The Tribunal finds that Tiffin's SBT liability relates solely to the time period that Tiffin was actively conducting business, January 1, 2007, through November 6, 2007, and, as such, it was appropriate, as neither Tiffin nor the Trustee on its behalf had yet entered into the Agreement or filed for Chapter 11 bankruptcy, that any officer determined by Respondent to potentially be a responsible corporate officer should have been investigated and then, if appropriate, been assessed under MCL 205.27a(5).

CONCLUSIONS OF LAW

MCL 205.27a(5) provides, in part:

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.

Thus, 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 a corporate officer at the time the underlying liability was incurred. In addition, liability will arise only if the officer (1) has control over the making of the corporation's tax returns or payments of taxes, or (2) supervises the making of the corporation's tax returns or payments of taxes, or (3) is charged with the responsibility for making the corporation's returns or payments of taxes.

The first step for Respondent in proving an officer was responsible for the filing of returns or the payment of taxes, is to present into evidence "prima facie" evidence that creates a presumption that an officer was responsible for or had control or supervision of an entity's tax returns or payments. "Prima facie evidence" means "[e]vidence that will establish a fact or sustain a judgment unless contradictory

evidence is produced.” Black’s Law Dictionary (7th ed), p 460. Therefore, judgment may be entered against the signing officer unless she can produce persuasive evidence that she lacked control, supervision, or responsibility for making the return or payment, notwithstanding her signature on a return or negotiable instrument.

In order for Respondent to meet its initial burden of proof, it must establish its prima facie case by producing and having entered into evidence an officer’s signature on a return or negotiable instrument submitted in payment of taxes. Once Respondent establishes its prima facie case, the burden of proof shifts to the officer to rebut the presumption that she is responsible for the entity’s failure to pay tax by producing “evidence sufficient to convince the Tribunal that the nonexistence of the presumed fact is more probable than its existence.” *Penner v Dep’t of Treasury*, MTT No. 358583 (2010), p 10, citing *Widmayer v Leonard*, 422 Mich 280, 287; 373 NW2d 538 (1985). To rebut the presumption established by a respondent’s prima facie evidence, an officer may offer various proofs. By creating a rebuttable presumption, the statute plainly provides that a signing officer may be able to present facts proving that she did not have control over or responsibility for the entity’s failure to pay tax and, therefore, is not liable. The officer also retains the overall burden of persuasion. *Drake v Dep’t of Treasury*, MTT Docket No. 204601 (1995).

The Tribunal concludes that Respondent did submit prima facie evidence supporting a finding that Petitioner had control, supervision, or responsibility for the making of returns or payments. MCL 205.27a(5) specifically states that “[t]he 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.*” [Emphasis added.] Respondent has provided evidence that Petitioner was an officer of the underlying corporation upon which the derivative officer liability is based and that Petitioner did sign Horizon’s 2007 SBT return.

Given the above, the Tribunal concludes, that based on the Findings of Fact and the Conclusions of Law, while Respondent did establish a prima facie case for the assessment issued for the 2007 tax period, Petitioner, through her credible , was able to rebut Respondent’s prima facie case by the preponderance of evidence that, while she was an officer of the corporation and did sign the 2007 SBT return, she was not a responsible officer for purposes of officer liability under MCL 205.27a(5). As Ms. Gardner explained in her testimony, she was the CEO in name only; she had no day-to-day responsibilities for the operation of the company; she simply would help her father out on an as-needed basis; she had no background in financial, tax, or accounting matters; she did not understand the SBT and was, therefore, incapable of reviewing it before she signed it; she signed tax returns on a

routine basis at the request of the CFO, Mr. Babcock, who gave no reason why she and not he should be signing tax returns; and she relied on the respective expertise of the CFO, who provided the information used to prepare the returns and also reviewed the returns, and the corporation's outside CPA/Attorney, Mr. Rocchio, who used the information provided by the CFO to prepare the tax returns.

The determination of tax, interest, and penalties is as listed in the Summary of Judgment Section of this Final Opinion and Judgment ("FOJ").

JUDGMENT

IT IS ORDERED that Assessment No. Q561140 is CANCELLED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in this Final Opinion and Judgment 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 within 28 days of entry of this Final Opinion and Judgment.

This Opinion resolves any pending claims in this matter and closes this case.

By: B.D. Copping

Entered: June 28, 2013