

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

Nathan Kolender,  
Petitioner,

MTT Docket No. 307832

v

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Patricia L. Halm

**OPINION AND JUDGMENT**

**INTRODUCTION**

The issue in this case is whether Nathan Kolender (Petitioner) is legally responsible for payment of a corporation's single business tax (SBT) liability for the fiscal year in which he sold 100% of his interest in the corporation and ceased to be an officer of the corporation.

On May 11, 2004, the Michigan Department of Treasury (Respondent) issued a Final Bill for Taxes Due in Assessment Number K834909. The taxes were billed to Petitioner and concerned the business known as "Shears, Inc." The Bill was for the fiscal year ending 06/98 and included \$7,500.00 in single business tax deficiency, \$3,301.41 in interest, and \$3,750.00 in penalties. The Bill stated: "This assessment is issued under Act 122, Section 27a(5), Public Acts of 1941, as amended, making officers/members/managers/partners liable for tax debts of the corporation/limited liability company/limited liability partnership/partnership/limited partnership."

Petitioner timely appealed the Final Bill for Taxes Due. Petitioner asserts that he sold his interest and relinquished his position in Shears, Inc. on May 7, 1998. Therefore, not only was he no longer associated with the corporation, he no longer had access to the corporation's books and

records. Given this, he was unable to file an SBT return for that year. Additionally, Petitioner argues that three quarterly tax payments were made for the fiscal year at issue and the corporation's taxes were current as of the date of the sale of his interest in the corporation. Therefore, even if there was an amount of SBT owing, it wasn't as much as that assessed by Respondent. Finally, Petitioner argues that the corporation's new owner was responsible for filing the SBT return that year and paying any tax due and owing.

A default hearing was held in this matter on November 22, 2005. Attorney Jerrold M. Bigelman represented Petitioner; Assistant Attorney General Michael R. Bell represented Respondent. Based upon the findings of fact, the evidence submitted, the testimony taken and the conclusions of law set forth herein, the Tribunal finds that Petitioner is not liable for payment of the tax and interest and, as such, there is no penalty.

#### PETITIONER'S POSITION

Petitioner and his wife, Nancy Kolender, (the Kolenders) are in the "haircut salon" business. They own, or have co-owned, all or part of several such businesses. In 1998, one of the businesses that they co-owned was Shears, Inc. Together with his wife, Petitioner owned fifty-one percent (51%)<sup>1</sup> of the issued and outstanding shares of Shears, Inc; the remaining shares (49%) were owned by Ms. Nikki Elias-Porter.

Shears, Inc.'s fiscal year ended each year on June 30<sup>th</sup>. For the fiscal year ending June 30, 1996, Shears, Inc. had an SBT liability of \$1,417.00. This liability was offset by a credit for overpayment of taxes in 1994 in the amount of \$1,187.00. For the fiscal year ending June 30, 1997, Shears, Inc. had an SBT liability of \$1,548.00. This liability was offset by a credit for

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<sup>1</sup> Petitioner and his wife each owned 25.5% of the shares.

overpayment of taxes in 1995 in the amount of \$583.00. During the fiscal year ending June 30, 1998, Petitioner made three quarterly estimated payments, totaling \$848.00. Additionally, taxes were overpaid again in 1996 and, as such, there was a \$352 credit to apply to the amount of tax due for the June 30, 1998 fiscal year. (Petitioner's Petition, paragraph 12)

On May 7, 1998, Petitioner entered into a stock purchase agreement with Ms. Elias-Porter wherein the Kolenders sold 100% of the shares they owned in Shears, Inc. to Ms. Elias-Porter for \$40,000.00. (Exhibit P3) The Agreement thereby gave Ms. Elias-Porter sole ownership of Shears, Inc. Pursuant to this Agreement, Petitioner and his wife resigned their positions as officers and directors of Shears, Inc. and transferred all corporate books and records, including all financial and tax records, to Ms. Elias-Porter. Petitioner asserts that it was Ms. Elias-Porter's obligation under the Agreement to file Shears, Inc.'s SBT return for the fiscal year ending June 30, 1998, and to pay any tax due. Moreover, the Agreement required Ms. Elias-Porter to indemnify and hold the Kolenders harmless from any SBT liability that Shears, Inc. may have.

Thereafter, on May 18, 1998, Ms. Elias-Porter incorporated a new haircut salon business called "Salon Nikki, Inc." The location of this new business is the same as that of Shears, Inc. "Shears, Inc. was later dissolved as a Michigan corporate entity for failure to file Michigan Annual updates -- Ms. Porter obviously having abandoned the corporate structure of Shears, Inc. immediately after her acquisition of Kolender's Shears, Inc. stock." (Petition, paragraph 15(c))

An SBT return was not filed for Shears, Inc. for the fiscal year ending June 30, 1998. On May 11, 2004, Respondent issued a Final Bill for Taxes Due, Assessment No. K834909, for Shears, Inc. This bill was sent to Petitioner. According to the Bill, Petitioner owed \$7,500 in deficient SBT for the fiscal year ending June 30, 1998, and interest in the amount of \$3,301.41.

Because Petitioner had not filed an SBT return, Respondent assessed a \$3,750 penalty. The total amount assessed was \$14,551.41.

Petitioner argues that Respondent erroneously assessed Petitioner for payment of Shears, Inc.'s outstanding SBT liability. Petitioner believes that Respondent continually pursued Petitioner simply because he was a former shareholder of Shears, Inc. Petitioner asserts that Respondent refused to discuss this matter with his counsel, despite the numerous times Petitioner's counsel contacted Respondent. In support of this statement, Petitioner attached to Petitioner's Prehearing Statement copies of correspondence to Respondent. This correspondence includes: (1) A copy of a letter to Respondent dated May 20, 2004, including a power of attorney and a copy of the Stock Purchase Agreement. In this letter, Petitioner's attorney asks to speak to someone from the Department about this issue; (2) A copy of a letter dated August 2, 2004, stating that a copy of the Petition was sent to Respondent on June 10, 2004, and requesting again to be contacted about this matter; (3) A copy of a letter dated September 28, 2004, including another copy of the Petition and requesting that "...the State of Michigan cease its actions against Mr. Kolender, with regard to Shears, Inc.'s single business tax, while this case is pending"; (4) A copy of a letter dated March 21, 2005, in which Petitioner "...respectfully requested that collection efforts be discontinued against Nathan Kolender..." Petitioner also submitted a copy of Respondent's "Corporate Officer Final Demand," dated February 9, 2005, that states: "If you fail to make full payment within 10 days of the date of this final demand, the state may take enforcement action...."

Petitioner further argues that, because of the Stock Purchase Agreement, he had no access to any of the subject corporation's books and records after May 7, 1998. This is because the Agreement required Petitioner to turn over all of Shears, Inc.'s books and records to Ms. Elias-

Porter as of that date. As a result, Petitioner could not have filed the 1998 fiscal year end tax return. Additionally, Petitioner argues that he could not have filed a return for a business in which he no longer had an ownership interest.

Petitioner asserts that Respondent blatantly ignored Ms. Porter's culpability, even though Petitioner provided Respondent with a copy of the Stock Purchase Agreement. Petitioner cites MCL 205.27a(1), which states that a purchaser of a going business or its stock of goods is required to escrow "sufficient money to cover the amount of taxes, interest, and penalties *as may be due and unpaid.*" (Emphasis Added) Petitioner also points to language in the statute that states that any purchaser who fails to comply with the escrow requirements will be personally liable for the payment of taxes, interest and penalties accrued and unpaid by the business of the former owner.

Finally, even if it is determined that Petitioner is the party responsible for payment of the tax, Petitioner relies on paragraph 3(iii) of the Stock Purchase Agreement, which states:

Buyer Shareholder shall indemnify and hold harmless Seller Shareholder from any and all claims assessed against Seller Shareholders by any federal or state entity for unpaid payroll or SBT. taxes which were unpaid by Shears, Inc. as a result of the failure of Buyer Shareholder to give accurate records relating to the business operations to Seller Shareholders....

At the hearing, Petitioner called one witness, Mr. Edward Rosenbaum. Mr. Rosenbaum stated that he has been a certified public accountant for 37 years. (T, p12) Mr. Rosenbaum began working for the Kolenders in 1997 and was their CPA at the time of the sale of their ownership interest in Shears, Inc. to Ms. Elias-Porter. (T, p13) According to Mr. Rosenbaum, at one time the Kolenders controlled approximately eight business entities. (T, p12) Three of the eight entities are still operating. (T, p13) Mr. Rosenbaum testified that, based on his personal knowledge, none of the entities have ever had any state or federal income tax problems. (T, p13)

Mr. Rosenbaum described the Kolenders' typical practice for determining and paying quarterly SBT estimates. Mr. Rosenbaum testified that they overpaid Shears, Inc.'s SBT in the 1997 fiscal year. (T, p15) Mr. Rosenbaum further testified that the Kolenders paid approximately \$1,200 in quarterly SBT payments for the 1998 fiscal year, prior to the Agreement transferring ownership of the subject corporation to Ms. Elias-Porter. (T, p15) When asked whether the Kolenders paid the "lion's share" of SBT for the 1998 fiscal year, Mr. Rosenbaum testified "yes." (T, p16) Mr. Rosenbaum then reviewed Shears, Inc.'s 1995 and 1996 tax returns and stated that the average tax for those years was "...in the 14 to \$1500 range." (T, p16)

Finally, when asked whether there was any indication that Ms. Elias-Porter would "abandon" the subject corporation and start her own corporation twelve days later, Mr. Rosenbaum testified "no." (T, p16-17)

While this hearing was a default hearing, the Tribunal determined it would be of assistance to the Tribunal if Respondent were permitted to cross-examine Mr. Rosenbaum. During cross-examination, Mr. Rosenbaum was asked if he was "...aware that there is an actual statute that requires a person selling out their interest in a business to file a final return at least 15 days before the completion of the sale?" (T, p19) Mr. Rosenbaum testified that he was unaware of the statute and that he disagreed with Respondent attorney's interpretation of the statute and its applicability to the subject corporation. (T, p19-20) Finally, when asked whether he would agree that there was an outstanding SBT liability for Shears, Inc. for the fiscal year ending June 30, 1998, Mr. Rosenbaum replied that he "...can't agree, because in the prior years we were way overpaid, and if the trend was continuing, we could have been overpaid, so I can't say that there is still money due. I don't know." (T, p22)

On redirect examination, Mr. Rosenbaum testified that when they received the Department's tax notices, they forwarded them to Ms. Elias-Porter. She always sent them back.

### RESPONDENT'S POSITION

Petitioner filed its Petition in this matter on June 11, 2004. A copy of the Petition was served on Respondent. On June 25, 2004, the Tribunal sent Respondent a Notice of Docket Number. On March 1, 2005, the Tribunal placed Respondent in default for not filing an Answer. Respondent was ordered to file a motion to set aside the default. Respondent did not do so and a default hearing was scheduled. This hearing was held on November 22, 2005. Because Respondent failed to file an Answer or provide any documentary evidence prior to being placed in default, the Tribunal has no documents setting forth Respondent's position in this matter. Therefore, the Tribunal relies on the statement included on the Final Bill for Taxes Due, namely: "This assessment is issued under Act 122, Section 27a(5), Public Acts of 1941, as amended, making officers/members/managers/ partners liable for tax debts of the corporation/limited liability company/limited liability partnership/partnership/limited partnership."

### FINDINGS OF FACT

The Tribunal's factual findings must be supported by competent, material and substantial evidence. *Antisdale v Galesburg*, 420 Mich 265; 362 NW2d 632(1984). In that regard, the Tribunal finds that:

1. Shears, Inc., was a Michigan corporation subject to the SBT. Shears, Inc. was a haircut salon.
2. Shears, Inc.'s 1997 fiscal year ended June 30, 1998.

3. Shears, Inc.'s SBT liability for its 1995 and 1996 tax years were \$1,417.00 and \$1,548.00, respectively.
4. Petitioner and his wife, Nancy Kolender, are the former controlling shareholders of Shears, Inc., owning fifty-one percent (51%) of the issued and outstanding shares.
5. Ms. Nikki Elias-Porter was the sole owner of the remaining forty-nine percent (49%) of the issued and outstanding shares.
6. On May 7, 1998, the Kolenders and Ms. Elias-Porter entered into a stock purchase agreement wherein the Kolenders sold their 51% interest in Shears, Inc. to Ms. Elias-Porter for \$40,000.00. Moreover, as of that date, the Kolenders resigned their positions as officers and directors of Shears, Inc. and transferred all corporate books and records, including all financial and tax records, to Ms. Elias-Porter.
7. Following execution of the Agreement, Ms. Elias-Porter continued to operate the hair salon business under the name of Shears Inc. On May 18, 1998, Ms. Elias-Porter incorporated a new business called "Salon Nikki, Inc." This business was operated at the location of Shears, Inc.
8. There was no SBT return filed for Shears, Inc. for the fiscal year ending June 30, 1998.
9. Petitioner failed to file a final SBT return with Respondent within 15 days after he sold his ownership interest in the subject corporation to Ms. Elias-Porter, as required by MCL 205.27a(1).
10. On July 15, 2000, Shears, Inc. was automatically dissolved.
11. Prior to the May 7, 1998 Agreement, Petitioner made first, second and third quarterly SBT estimated payments to Respondent in the amount of \$848.00. These SBT payments were in addition to a \$352.00 SBT carryover from the 1996 fiscal year. In total,

Respondent had received \$1,200 in SBT payments for Shears, Inc. less than two months before the end of its 1997 fiscal year.

12. On May 11, 2004, Respondent issued the Final Bill for Taxes Due for Shears, Inc. to Petitioner. According to this Bill, Petitioner owed \$7,500 in deficient SBT, \$3,750 in penalty and \$3,301.41 in interest, totaling \$14,551.41. The assessment number was K834909.
13. On June 11, 2004, Petitioner filed a petition with the Tribunal.
14. Respondent failed to file an answer to Petitioner's petition as required by Tax Tribunal Rule 245. Respondent also failed to answer any correspondence sent by Petitioner's attorney.
15. On March 1, 2005, the Tribunal issued an Order of Default placing Respondent in default and ordering Respondent to file a motion to set aside the default. Respondent failed to comply with this Order.
16. Pursuant to MCL 205.27a(1), Ms. Elias-Porter, as the purchaser and sole owner of Shears, Inc., was required to establish an escrow account in order to pay any tax, interest, and penalties unpaid and due for the fiscal year ending June 30, 1998, until Petitioner produced proof of payment or obtained a certification that taxes were not due.
17. Ms. Elias-Porter is liable for all SBT, interest, and penalties unpaid and due for Shears, Inc. for the fiscal year ending June 30, 1998.
18. Petitioner is not liable for any unpaid taxes, interest, and/or penalties for Shears, Inc.'s for the fiscal year ending June 30, 1998.

At the hearing, the following Petitioner's exhibits were admitted into evidence:

1. P-1: Shears, Inc. 1995 SBT return.

2. P-2: Shears, Inc. 1996 SBT return.
3. P-3: Stock Purchase Agreement.

### CONCLUSIONS OF LAW

This case involves interpretation and application of MCL 205.27a(1) regarding the tax liability of a person who "...sells out his or her business or its stock of goods or quits the business...." There are two questions that must be addressed. First, is Petitioner liable for payment of Shears, Inc.'s SBT for the fiscal year ending June 30, 1998? And second, what are the ramifications of Petitioner's failure to file a final SBT return as required by MCL 205.27a(1)?

MCL 205.27a(1) provides that:

If a person liable for a tax administered under this act sells out his or her business or its stock of goods or quits the business, the person shall make a final return within 15 days after the date of selling or quitting the business. The purchaser or succeeding purchasers, if any, who purchase a going or closed business or its stock of goods shall escrow sufficient money to cover the amount of taxes, interest, and penalties as may be due and unpaid until the former owner produces a receipt from the state treasurer or the state treasurer's designated representative showing that the taxes due are paid, or a certificate stating that taxes are not due. Upon the owner's written waiver of confidentiality, the department may release to a purchaser a business's known tax liability for the purposes of establishing an escrow account for the payment of taxes. If the purchaser or succeeding purchasers of a business or its stock of goods fail to comply with the escrow requirements of this subsection, the purchaser is personally liable for the payment of the taxes, interest, and penalties accrued and unpaid by the business of the former owner. The purchaser's or succeeding purchaser's personal liability is limited to the fair market value of the business less the amount of any proceeds that are applied to balances due on secured interests that are superior to the lien provided for in section 29(1).

Thus, MCL 205.27a(1) establishes responsibilities for persons who sell or quit a business and for those who purchase a business.

In *S.T.C. Incorporated v Department of Treasury*, 257 Mich App 528; 669 NW2d 594 (2003), the Court of Appeals was asked to determine the responsibilities of a person who purchased a business. In that case, the respondent, the Michigan Department of Treasury, argued that the petitioner, as the purchaser of the business, was responsible for the tax deficiency, interest and penalties. The petitioner argued "...that it was not required, pursuant to MCL 205.27a(1), to escrow sufficient funds to cover the tax liabilities of its predecessor business because [the predecessor business] did not have taxes 'due and unpaid' at the time petitioner reviewed [the predecessor's] books." *Id.* at 531-532. The court agreed with the respondent.

The plain language of the statute does not limit or prorate the tax liability of the purchaser to the date of purchase. Rather, the purchaser must establish an escrow account to cover taxes, interest, and penalties *until* the former owner produces proof of payment or obtains certification that taxes are not due. The plain language of the statute does not place limitations on the liability of the purchaser based on the timing of the purchase. Instead, the proviso contained in the statute delineates the event that ends the obligation to maintain an escrow account to avoid liability.

A purchaser of an operating business or its assets "shall escrow" sufficient money to cover any taxes, penalties, and interest due and unpaid by the seller to insulate itself from the tax liability of the seller. [MCL 205.27a\(1\)](#). The word "shall" is unambiguous and is used to denote mandatory, rather than discretionary, action. *Roberts v Mecosta County General Hospital*, 466 Mich 57, 65: 642 NW2d 663 (2002). The word "until" means "up to the time that or when." *Random House Webster's Unabridged Dictionary* (2d ed 1998), p 2089. Thus, the clear and unambiguous language of the statute mandates that a purchaser escrow enough funds to cover the taxes, interest, and penalties of the former business owner that may become due and unpaid. This mandatory escrow obligation continues until (1) the former owner produces a receipt from the commissioner showing that the taxes due are paid, or (2) the former owner produces a certificate stating that taxes are not due. [MCL 205.27a\(1\)](#). In the event a purchaser fails to escrow the required funds, a purchaser becomes personally liable for the payment of the unpaid taxes, interest, and penalties accrued and unpaid by the business of the former owner. In the instant case, the facts established that petitioner failed to escrow any funds. Therefore, the tribunal correctly affirmed the tax liability assessments that were levied against petitioner. (Citations omitted.) *Id.* at 536-538.

In the instant case, Shears, Inc.'s SBT liability for the two tax years preceding the year at issue were \$1,417.00 and \$1,548.00. Petitioner's accountant testified that as of May 7, 1998, the date Petitioner relinquished his ownership interest in Shears, Inc., Petitioner had made \$1,200 in SBT payments. There was no evidence presented that suggested that the tax year at issue was significantly different than the two previous years. Therefore, the Tribunal agrees that Shears, Inc.'s SBT liability was current as of May 7, 1998 and that Petitioner is not liable for the remainder of the fiscal year. Moreover, pursuant to MCL 205.27a(1), and *S.T.C. Incorporated*, the Tribunal finds that the party responsible for any remaining tax owed for the fiscal year ending June 30, 1998 is Ms. Elias-Porter.

This analysis is supported by that of several of Respondent's Letter Rulings. For example:

The gist of successor liability is the failure of the successor to withhold sufficient purchase money from the previous (former) owner to satisfy the tax debt of the former owner. Viewed another way, the liability arises when the purchaser gives the purchase money to the seller instead of to the Department in payment for the taxes owed by the seller. In this case, a going business was assumed by Business X. The consideration for the transfer of the business includes the assets...It is the position of the Department that Business X is a successor of Business Y and liable for any unpaid sales tax. (LR 1985-27)

All of the elements necessary for the existence of successor liability are present here. There was a sale of a going concern and consideration was present. The business entity formerly operated by the predecessor was a restaurant business. Your clients (the alleged successors) took over the predecessor business and operated a restaurant business in the same location under the same name. Under the Michigan Sales Tax Act, MCL 205.59(2), your clients would be considered a successor business to the predecessor since there was a sale of a business and/or assets as represented and consideration changed hands. (LR 1985-31)

However, Petitioner is not entirely free of fault. Pursuant to MCL 205.27a(1), Petitioner was required to file "a final return within 15 days after the date of selling or quitting the business." It is undisputed that Petitioner did not do so. Penalties and interest for failure to file a

return are established in MCL 205.24. The penalty is calculated by applying a certain percentage to the tax owed. Similarly, interest is based on the tax owed. Because penalty and interest are based on tax owed, and because Petitioner does not owe the tax at issue, there is no penalty.

If the Tribunal had found that Petitioner was liable for payment of Assessment Number K834909, it is clear that this liability would be limited to the taxes owed as of May 7, 1998.

Again, this conclusion is supported by a Department of Treasury Letter Ruling.

In this case, the president is not liable as an officer of corporation X after February 19, 1974. He was no longer an officer after that date. Facts indicating that your client ceased to be an officer, no longer had access to the corporate records and checking account, and that his resignation was formally agreed to by the other officer, are bases for relieving him of officer liability from that date. He is liable for any tax not paid between September 1973, and February 19, 1974. LR 1974-9.

As to Petitioner's argument that Ms. Elias-Porter was required, pursuant to the Stock Purchase Agreement, to indemnify Petitioner in the event that taxes are owed, the Tribunal notes that there is a Department of Treasury Letter Ruling addressing this situation, with which the Tribunal is in full agreement. "An Indemnification Agreement declares rights between the parties. The State of Michigan is not a party to the indemnification agreement between the buyer and seller. The Department is not bound by the agreement, but must look to applicable statutes to collect the tax." LR 1987-81.

Finally, the Tribunal finds Respondent's actions in failing to cease collection activities, in spite of the numerous times Petitioner informed Respondent of this appeal, in violation of MCL 205.22. For this reason, the Tribunal awards Petitioner the costs incurred in attempting to stop the collection activities. R 205.1145.

JUDGMENT

IT IS ORDERED that Assessment Number K834909 is CANCELLED.

IT IS FURTHER ORDERED that all sums collected from Petitioner in payment of Assessment Number K834909 be refunded to Petitioner with interest at the rate calculated pursuant to MCL 205.30 and MCL 205.23.

IT IS FURTHER ORDERED that Petitioner shall file a bill of costs pursuant to R 205.1145.

IT IS FURTHER ORDERED that Respondent may file objections to the bill of costs pursuant to R 205.1145.

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

MICHIGAN TAX TRIBUNAL

Entered: June 7, 2006

By: Patricia L. Halm