

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

Keith N. Penner,
Petitioner,

v

MTT Docket Nos. 358583, 358584,
359248, 359249, 359250, 359251,
359252, 359253, 359254, 359255,
359256, and 359257

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner appeals Respondent's Assessments, Final Bills for Taxes Due, issued against him as a responsible corporate officer of Dietzel Acquisition Company for the unpaid withholding tax for the periods December 2002 through August 2003 and for unpaid single business tax for the 2001 and 2002 tax years. Petitioner filed separate petitions with the Tribunal for each assessment. The Tribunal entered an order consolidating the cases on March 5, 2010. A hearing in this consolidated matter was held on May 6, 2010. Petitioner was represented by Neill T. Riddell, Dean and Fulkerson PC. Respondent was represented by Amy M. Patterson, Assistant Attorney General.

The assessments herein appealed are as follows:

Assessment Number	Type	Tax Period	Tax Due	Interest*	Penalty
L665115	SUW	12/02	\$ 4,202.00	\$ 1,688.15	\$1,050.50
M312815	SUW	12/02	\$ 5,493.00	\$ 2,167.42	\$1,373.25
L724086	SUW	1/03	\$ 4,554.00	\$ 1,807.11	\$1,138.50
L760707	SUW	2/03	\$ 3,150.00	\$ 1,235.98	\$ 787.50
L804916	SUW	3/03	\$ 3,062.00	\$ 1,186.32	\$ 765.50
L838980	SUW	4/03	\$ 4,117.00	\$ 1,575.45	\$1,029.25

L985031	SUW	5/03	\$ 3,828.00	\$ 1,446.00	\$ 957.00
L985032	SUW	6/03	\$ 4,934.00	\$ 1,841.04	\$ 1,233.50
M008172	SUW	7/03	\$ 6,585.00	\$ 2,426.88	\$ 1,646.25
M008171	SUW	8/03	\$ 7,164.00	\$ 2,607.44	\$ 1,791.00
M066869	SBT	12/01	\$ 20,273.00	\$ 10,125.22	\$ 4,028.82
M013945	SBT	12/02	\$ 15,241.00	\$ 6,354.81	\$ 7,296.63

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

BACKGROUND

Petitioner was Vice President of Dietzel Acquisitions Company. As Vice President, Petitioner signed various corporate information documents, tax returns, and negotiable instruments for the payment of taxes. The payroll withholding taxes and single business taxes, as represented in the assessments which are the subject of this appeal, were not paid by Dietzel Acquisition Company and the assessments for those taxes became final. Respondent subsequently assessed Petitioner for the amount of the unpaid taxes and interest, plus penalties, as a responsible corporate officer under MCL 205.27a(5).

Respondent issued the Bills for Taxes Due (Final Assessments), herein appealed, on November 25, 2008. Petitioner filed an appeal of each Final Assessment on January 2, 2009. In an order entered March 10, 2010, the Tribunal granted the parties' joint motion to consolidate the cases thereafter to be identified under Docket No. 358583.

PETITIONER'S CONTENTIONS

Petitioner offered the following proposed exhibits:

- P-1 Final Bills
- P-2 Guaranty
- P-3 Forbearance Agreement, May 1, 2003
- P-4 Forbearance Agreement, August 1, 2003
- P-5 Surrender Agreement, October 2, 2003
- P-6 Final Bills
 1. As issued against Dietzel Acquisition Company on March 3, 2003
 2. As issued against Dietzel Acquisition Company on May 5, 2003

3. As issued against Petitioner on April 19, 2007
 4. As issued against Petitioner on November 25, 2008
- P-7 Detail Ledger Print of Assessments prepared by Respondent

Petitioner's exhibits 1, 2, 4, 6, and 7 were admitted without objection. Respondent objected to the admission of Petitioner's exhibit 3 on the grounds that the document was not relevant as it was not signed by Henry Bell, the principal shareholder of Dietzel Acquisition Company, and that "[t]here is nothing in paragraph H that would specifically reference the forbearance agreement dated May 1st 2003."¹ The Tribunal sustained Respondent's objection holding that the document was not relevant as it did not contain the language asserted by Petitioner to be present and relevant, was not signed by Petitioner, and was signed by only one party to the agreement. Petitioner's defense that he was unable to find a fully executed copy of a document does not support the admission of a document that clearly had not been signed by both parties or fully executed, for the purpose of establishing the content of the document and the binding nature of that content. Respondent also objected, on the grounds of relevance, to the admission of Petitioner's proposed exhibit 5 on the grounds that the document was executed on October 2, 2003, after Petitioner asserted that he was no longer employed by Dietzel Acquisition Company. Petitioner asserted that the document was intended to support Petitioner's position that Henry Bell had taken full control over Dietzel Acquisition Company and that, although Petitioner was shareholder, he was shut out of management of the financial affairs and operations of the company "up to, through, and past the time of his last day. . . . without consultation with Mr. Penner, all of these things happened and continued to happen with the company. That entire theme is played out starting in December of 2002."² The Tribunal allowed the exhibit for the

¹ Transcript page 48, ll 20-23. The issue being effective dates of the forbearance agreement between the Bank and Henry Bell and Tracy Bell.

² Transcript 52, ll 16-24

“limited purposes of showing that on October 2nd, 2003, Mr. Henry Bell entered into the surrender agreement, and that Tracy Bell, with conditions, signed as well.”³

Petitioner asserted that while he “had a long, long relationship with Dietzel Acquisition as part of . . . Bell companies, the nature of his relationship in the management of those companies changed dramatically starting in December of 2002”⁴ due to Henry Bell, the principle shareholder, asserting complete control over all aspects of the company “taking away from Mr. Penner, any of the indicia of authority, responsibility or control that he may have had prior to that period of time.”⁵

Petitioner called Ms. Angela Hodges, Departmental Technician for the Department of Treasury, as a witness. Ms. Hodges prepared the documents admitted as Petitioner’s exhibit 6 pursuant to a subpoena issued by the Tribunal requiring that the documents be provided and exchanged. Exhibit 6 includes final assessments issued to Dietzel Acquisition Company on May 5, 2003, containing the notation “corrected per actual/amended return(s) or additional information” which the Tribunal identified as Petitioner’s exhibit 6A; final assessments issued to Dietzel Acquisition Company on March 26, 2003, which the Tribunal identified as Petitioner’s exhibit 6B; final assessments issued to Petitioner on November 25, 2008, containing the notation “corrected per actual/amended return(s) or additional information” which the Tribunal identified as Petitioner’s exhibit 6C; and final assessments issued to Petitioner on April 19, 2007, which the Tribunal identified as Petitioner’s exhibit 6D.

³ Transcript page 53, 9-11

⁴ Transcript page 6, ll 20-25

⁵ Transcript page 7, ll 5-7

Ms. Hodges testified as to the “date issued” of each Final Assessment and stated that Final Assessments could be mailed “as early as ten days prior to the date issued date that appears on the assessments.”⁶ In response to Petitioner’s request to explain why there were two sets of assessments against Dietzel Acquisition Company, exhibits 6A and 6B, and two sets of assessments against Petitioner, exhibits 6C and 6D, Ms. Hodges testified that one of each set, the earlier issued one, “is an intent to assess”⁷ and the later issued one is the Final Assessment. Ms. Hodges testified that the “numbers may change from the time of the initial intent to the time of the final assessment.”⁸ Ms. Hodges testified that, as to the assessments reflected in exhibits 6A and 6B, “it appears the final assessment here has been corrected per actual amended returns or additional information received.”⁹ Ms. Hodges further testified that it might be possible that the assessments were corrected due to payments but that if that had been the case, “it would show on this ledger.”^{10,11} Ms. Hodges testified that any payments made with respect to any assessment prior to the issuance of an assessment against Petitioner as a corporate officer would appear on the ledger provided as Petitioner’s exhibit 7.

On cross examination, Ms. Hodges testified that it is Respondent’s policy, when issuing assessments as to corporate officers, that they do not only look “to see if the officer was a corporate officer at the time the Intent to Assess as to the corporation were issued.”¹²

⁶ Transcript page 18, ll 4-6

⁷ Transcript page 19, l 25

⁸ Transcript page 20, ll 6-9

⁹ Transcript page 31, ll 2-4

¹⁰ Petitioner’s exhibit 7

¹¹ Transcript page 31, ll 12-18

¹² Transcript page 33, ll 11-14

Petitioner offered the testimony of Petitioner, Keith Penner. Petitioner testified that he began his relationship with Dietzel Acquisition Company in the early 1990's when the company was incorporated and he was the vice-president and treasurer at that time. Petitioner was a 10% shareholder and Henry Bell was the owner and 90% shareholder. With respect to Dietzel Acquisition Company, when Petitioner was hired by Henry Bell, he was "responsible for the administration, the finance of the company."¹³ Petitioner testified that when his employment was terminated on September 13, 2003, "my title was still officially vice-president and treasurer, but my responsibilities were drastically reduced during the end . . . portion of my employment."¹⁴ Petitioner testified that the "Dietzel Company, along with Bell and Harrison,¹⁵ were part of a consolidated loan agreement with NBD Bank"¹⁶ which conducted annual audits to make sure the companies were in compliance with covenants within the loan agreement. In approximately November of 2002, the auditor determined that the company was not in compliance. Petitioner testified that meetings were held between the Bank and Dietzel Acquisition Company, the first of which, in December 2002, he was asked to attend. Petitioner testified that he was precluded from attending any further meetings and "my responsibilities, my authority were basically taken from me at that point in time."¹⁷

Petitioner testified that Dietzel Acquisition Company was involved in the construction industry. Prior to the November 2002 audit, Henry Bell was involved in "what we would call the field

¹³ Transcript page 36, ll 7-8

¹⁴ Transcript page 36, ll 16-19

¹⁵ Dietzel Acquisition Company was one of three companies identified as the Bell Companies. Henry Bell was the 90% shareholder in all three component companies. The other two companies were Harrison Construction Company and the Bell Company.

¹⁶ Transcript page 36, ll 22-24

¹⁷ Transcript page 37, ll 10-12

operations of all businesses”¹⁸ but that after the meeting with the Bank Henry Bell “became a hundred percent involved with the day-to-day administration of the company.”¹⁹ Petitioner testified that after that meeting “Mr. Bell was responsible for all decisions in releasing payments to anybody,”²⁰ and that Henry Bell made the ultimate decisions.

Petitioner testified that after the first meeting, the Bank required that Michael Sheatzley be hired as a financial consultant. Michael Sheatzley was thereafter “responsible for and reviewed monthly or weekly, . . . cash positions, money coming in and money going out.”²¹ Petitioner testified that after Michael Sheatzley was hired, he had no authority or control over the payment to creditors, including governmental creditors or taxes, no authority or control over negotiations with governmental creditors on tax matters, and no authority over such things as “whether or not to appeal assessments that were issued against the company by taxing authorities.”²² Petitioner further testified that he had no recollection of seeing assessments issued against Dietzel Acquisition Company.²³

Petitioner testified that he continued to be on the company check signing card and retained his check writing authority after the November 2002 meeting with the Bank but he was no longer able to release checks or disburse payments. He testified that after that time, “I was signing checks basically as an administrative task. . . . The checks were being printed by the direction of Mr. Sheatzley and Mr. Bell based upon payments being received and this review of the weekly

¹⁸ Transcript page 37, ll 23-24

¹⁹ Transcript page 38, ll 2-3

²⁰ Transcript page 38, ll 13-14

²¹ Transcript page 39, ll 5-7

²² Transcript page 40, ll 1-3

²³ Petitioner’s exhibits 6A and 6B

cash. Those checks would be printed and I would sign them and Mr. Bell would release those checks.”²⁴

Petitioner asserted that Henry Bell and his wife held personal guarantees on payment bonds and payments were made to reduce their personal debt rather than to pay other obligations. Petitioner testified that he had no authority or ability to stop Henry Bell from making those payments.

Petitioner identified Petitioner’s exhibit 1, Bills for Taxes Due (Final Assessment) issued November 25, 2008.

Petitioner testified that he believed that Henry Bell and his wife were personal guarantors on a \$6,000,000 line of credit. Petitioner identified the Guaranty signed by Henry Bell and Tracy Bell securing a loan or line of credit to the Bell Companies²⁵ and a forbearance agreement dated August 1, 2003 signed by Henry Bell on behalf of Dietzel Acquisition Company.²⁶

Petitioner testified that his last day of employment with Dietzel Acquisition Company was September 13, 2003. A couple of weeks after that he was told to return a company car, and a couple of weeks after that, he was told he was no longer employed. He was not allowed back into the office, his personal belongings were gone, and his last two paychecks bounced. Dietzel Acquisition Company was liquidated sometime in the fall of 2003. Petitioner testified that he was aware of the financial conditions of Dietzel Acquisition Company up until the final 30 days of his employment. Petitioner testified that he believed that as of that time, there were sufficient accounts receivable to cover tax payments. Petitioner testified that after December 2002, he

²⁴ Transcript page 40, ll 18-25

²⁵ Petitioner’s exhibit 2

²⁶ Petitioner’s exhibit 4

played only an administrative role in signing checks and had no ability to release funds, that authority resting solely with Henry Bell. Petitioner testified that it was his understanding that the 2001 single business tax return was under an extension, due at the end of December 2002, and that the return “was signed and mailed and I believe the taxes were fully paid.”²⁷ As to the 2002 single business tax return, Petitioner testified that it was under extension as well and would not have been due until December 2003. Petitioner testified that he was unaware of the single business tax assessments against Dietzel Acquisition Company.

On cross examination, Petitioner testified as to 2001 and 2002 withholding taxes due for Dietzel Acquisition Company, he was “authorized to sign those, proceed with payment on those returns.”²⁸ The returns were prepared by the in-house payroll person based on reports processed by Doeren Mayhew, an outside accounting firm. On cross examination, Petitioner refused to directly answer Respondent’s questions and his answers appeared to be purposefully confusing and incomplete. Despite that, Respondent was able to elicit testimony that Petitioner signed checks in 2001 and 2002 and that returns for withholding were filed. Petitioner would not answer Respondent’s question as to whether he was responsible for making sure that the returns were filed.²⁹

When asked by Respondent if he was responsible for signing and filing Dietzel Acquisition Company’s 2001 single business tax return Petitioner admitted to signing the return and stated that Doeren Mayhew filed the extension for the filing of that return. As to the 2002 withholding tax returns, Petitioner again refused to directly answer Respondent’s question and testified only

²⁷ Transcript page 55, ll 13-14

²⁸ Transcript page 57, ll 5-7

²⁹ Transcript page 57, l 22-page 58, l 3

that the Single Business Taxes return for 2002 was on extension and not due until December 2003.³⁰

Petitioner testified that he was a licensed certified public accountant but was not practicing. He stated that when he became an accountant in 1975 there were “positions on taxes at that time.”³¹

Petitioner responded in the affirmative to the question, “When you were working for Dietzel Acquisition in 2001, were you familiar with the Corporate Officer Liability Statute?”³² He admitted familiarity with that statute for 2002 and 2003.

Petitioner identified and testified to all of the following:

1. He identified his signature, as vice president, on the articles of incorporation for Dietzel Acquisition Company³³ in June 1991, and testified that he was a shareholder at the time of incorporation.
2. He identified an amendment to the articles of incorporation of Dietzel Acquisition Company filed August 2, 1993³⁴ signed by Henry Bell which listed Petitioner as preparer, and testified that he was a shareholder at that time.
3. He identified his signature, as vice president, on information returns of Dietzel Acquisition Company for 1998, 1999, 2000, 2001, 2002, and 2003 and testified that he and Henry Bell were listed as the shareholders of the company on the returns.³⁵
4. He identified his signature, as vice president, on a Certificate of Assumed Name filed or received by the department July 12th, 1991.³⁶
5. He identified his signature, as vice president or otherwise, on two separate Certificates of Renewal of Assumed Name, one showing a file date of 1996, and the other showing a file date of October 1, 2001.³⁷
6. He identified Dietzel Acquisition Company’s employer’s quarterly tax returns for quarters ending March 31, 2002 and June 30, 2003 and testified that the signatures on the returns were not his and that he was aware of the returns. He identified checks dated April 26, 2002 and July 29, 2002 attached to the returns and testified that the signatures

³⁰ Transcript page 58, ll 15-21

³¹ Transcript page 59, l 19

³² Transcript page 59, ll 20-22

³³ Respondent’s exhibit 1

³⁴ Respondent’s exhibit 2

³⁵ Respondent’s exhibit 3

³⁶ Respondent’s exhibit 4

³⁷ Respondent’s exhibit 5

on the checks were his.³⁸ Petitioner asserted that he did not authorized anyone to sign the returns on his behalf.

7. He identified the Michigan Form C-8002 single business tax estimate for the third quarter payment of 2001 and the check attached,³⁹ which he testified he signed as an authorized signer,
8. He identified the Combined Return for Michigan Taxes for November 2002 and December 2002,⁴⁰ and testified that they were signed with his name, but not by him, and they were not signed with his permission. He testified that he was responsible for filing withholding tax returns in 2002 which would have included the November 2002 monthly return but not the December 2002 monthly return as it was not due until after January 1, 2003, when he had “lost the ability to release funds”⁴¹ and only Henry Bell was so authorized.

Petitioner testified that he was responsible for paying the bills for Dietzel Acquisition Company for 2001 and 2002, but not for 2003, and he was authorized to write checks in 2001 and 2002, but was a check signer only for 2003. Petitioner testified that, as of the time of his termination, he was not removed as an authorized signer. Petitioner further testified that he was authorized to instruct staff to issue checks in 2001 and 2002, but that beginning in 2003 only Henry Bell or Mr. Sheatzley could so instruct staff.

On redirect, Petitioner testified it was his opinion that the check for payment of withholding taxes for the December 2002 return period did not clear the bank as the bank processing notation that should have been at the bottom right corner of the check was missing. Petitioner testified that it was probable that at the time, there were no funds available and Henry Bell did not release the check.

Petitioner testified that although he reviewed the mail, it was to identify incoming checks and that he did not remember ever seeing any letters from the Department of Treasury.

³⁸ Respondent’s exhibit 7

³⁹ Respondent’s exhibit 8

⁴⁰ Respondent’s exhibit 9

⁴¹ Transcript page 69, ll 17-18

As to the single business tax returns, Petitioner testified that he signed the return and check for 2001 but as to the 2002 return, he had “no knowledge of that return at all.”⁴² Petitioner testified that he assumed that the 2001 return and check were placed in the mail but he did not have personal knowledge that it was actually mailed.

RESPONDENT’S CONTENTIONS

Respondent offered the following proposed exhibits:

- R-1 Dietzel Acquisition Company Articles of Incorporation dated June 1991
- R-2 Dietzel Acquisition Company Certificate of Amendment to the Articles of Incorporation dated July 1993
- R-3 Annual Corporate Updates for Dietzel Acquisition Company for 1998, 1999, 2000, 2001, 2002, and 2003
- R-4 Certificate of Assumed Name for Dietzel Acquisition Company dated June 1991
- R-5 Certificates of Renewal of Assumed Name Dietzel Acquisition Company for 1996 and 2001
- R-6 Final Assessments L665115, L724086, L760707, L804916, L838980, L985031, L985032, M008170, M008172, M013945, M066869, and M312815
- R-7 Employer’s Quarterly Tax Reports for Dietzel Acquisition Company for March 2002 and June 2002 with checks
- R-8 2001 Estimated Tax Filing Instructions for Dietzel Acquisition Company with check
- R-9 Combined Returns for Michigan Taxes for Dietzel Acquisition Company for November 2002 and December 2002 with checks
- R-10 Check of Dietzel Acquisition Company to Banc One Leasing Corp

Respondent’s exhibits 1 through 9 were offered and admitted without objection.

Respondent offered the testimony of Ms. Angela Hodges. Ms. Hodges testified that the Department of Treasury looks at certain factors to determine whether an officer is liable for a corporate debt including “signatures on checks and payment of taxes. . . . [s]ignatures on returns, [c]orrespondence . . . with the department regarding tax matters,[and] if the corporate officer was

⁴² Transcript page 79, ll 17-18

an officer responsible for the taxes during the time the tax accrued.”⁴³ Ms. Hodges testified that in assessing Petitioner, Respondent relied on the following:

1. Mr. Penner signed as vice-president for various withholding tax returns from December 2000 to October 2002
2. Mr. Penner has communicated with the department representatives regarding taxes
3. Mr. Penner signed corporation information updates filed with the Michigan Department of Labor and Economic Growth as vice-president years 1996 through 2003
4. Mr. Penner is listed as vice-president on the Michigan annual reports filed with the Department of Labor and Economic Growth
5. Mr. Penner signed checks in payment of taxes

On cross examination, Petitioner asked Ms. Hodges if there had been communication with Petitioner regarding taxes during 2003. Ms. Hodges responded that she believed that there had been communication between Petitioner and Respondent but she did not know and could not testify as to whether that communication was in 2003, or when that communication took place because she did not have documentation of that communication with her at hearing.

In response to questioning by the Tribunal requesting clarification of Assessment Nos. L665115, and M312815,⁴⁴ Ms. Hodges testified that “[i]f the individual months would have been short . . . short paid or if they have to file an annual return and monthly and if the two amounts don't match up, then an assessment would have been issued.”⁴⁵ Ms. Hodges testified that she could not answer questions relating whether the assessments for the individual months were duplicative or if there was an assessment for a deficiency in the total annual amount due because the “assessments are issued in the taxing units and I don't work for Sales, Use, and Withholding. . . .

⁴³ Transcript page 93, ll 18-23

⁴⁴ Both Assessments list the taxable period as “12/02” and the tax due as “withholding tax” although Assessment M312815 has the notation “deficiency due to difference in amount claimed paid on annual return and payments received on monthly/quarterly returns and/estimates per review of annual return.” Petitioner's exhibit 1

⁴⁵ Transcript page 100, ll 5-8

I do not review the actual amounts of the assessments.”⁴⁶ Ms. Hodges testified that her review of the case was limited to determining if Petitioner was a corporate officer of Dietzel Acquisition Company. Ms. Hodges testified that Respondent deems Petitioner’s signature on the checks to make tax payments to be his verification of the underlying returns and that the fact that the signature on the returns is not his is not relevant.

FINDINGS OF FACT

The Final Assessments herein at issue are for unpaid withholding tax for December 2002 through August 2003 and for unpaid single business tax for the 2001 and 2002 tax years, assessed against Petitioner as a corporate officer of Dietzel Acquisition Company. Petitioner worked for Dietzel Acquisition Company from 1989 through the middle of September 2003. The Articles of Incorporation, Amendments to those Article, Annual Corporate Updates, and Certificates of Assumed Name submitted by Respondent, and Petitioner’s testimony, support the finding that Petitioner was an officer, vice president, and a 10% shareholder of Dietzel Acquisition Company from 1989 through mid September of 2003.

Respondent submitted several tax-related documents to establish its prima facie case of Petitioner’s tax-related responsibility. The quarterly reports for unemployment taxes submitted were for the quarters ending March 31, 2002 and June 30, 2002.⁴⁷ Both reports were signed with Petitioner’s name but not by Petitioner. Both reports were accompanied by checks signed by Petitioner; however, the face of the check is lacking the expected indicia that it was presented to or accepted by Dietzel Acquisition Company’s bank. There was no signature visible on the 2001

⁴⁶ Transcript page 100, 17-22

⁴⁷ Respondent’s exhibit 7

Dietzel Acquisition Company single business tax estimates filing⁴⁸ submitted by Respondent.

The check that accompanies that filing as part of the exhibit was signed by Petitioner but is also lacking the expected indicia that it was presented to or accepted by Dietzel Acquisition

Company's bank. The combined returns for Michigan Taxes submitted by Respondent are for the November 2002 and December 2002 periods. The returns are signed with Petitioner's name but not by Petitioner. The check attached by Respondent to the November 2002 return is unsigned and the check attached by Respondent to the December 2002 return is signed by Petitioner but is again lacking the expected indicia that it was presented to or accepted by Dietzel Acquisition Company's bank. Petitioner testified that the signatures on the returns were not his and that he never authorized any other person to sign on his behalf.⁴⁹ Respondent offered no tax-related reports, returns, or payments dated after January 15, 2003 for the December 2002 withholding.

Despite Petitioner's testimony that until December 2002, he had been responsible for the administration of the finances of Dietzel Acquisition Company and had authority to sign checks, file returns, disburse funds, and make payments, Respondent's evidence shows a different story. Petitioner testified that he retained his check writing authority after December 2002, but that all checks prepared by Petitioner were given to Henry Bell who determined to whom and when, or if, funds were disbursed. However, no evidence was presented to show that any checks signed by Petitioner were disbursed. Petitioner testified that he was not involved in corporate decisions involving the payment of taxes after December 2002, and he could write a check but could not

⁴⁸ Respondent's exhibit 8

⁴⁹ Transcript page 66, l 10

release the funds.⁵⁰ However, none of Respondent's evidence shows that Petitioner had the authority to release funds prior to that time.

The Tribunal finds that the line of credit for the operation of Dietzel Acquisition Company obtained by Henry and Tracy Bell and the subject of NBD intervention in 2002, and Petitioner's assertion that they, and not he, were personal guarantors of that line of credit, is not relevant to the determination of Petitioner's liability under the statute as a responsible corporate officer. That Henry Bell and not Petitioner signed a forbearance agreement and a financial consultant was brought in to review the requirements of the forbearance agreement is also not relevant to the determination of Petitioner's liability. Even if these facts are supported, it is well established that "[t]he fact that other persons may also have been in charge of making the return or paying the tax is no defense to Petitioner's liability." *Cygan v Michigan Department of Treasury*, MTT Docket No. 135626 (1996).

The copy of a check submitted as an exhibit by Respondent for payment in November, 2002, was written and signed by Petitioner. The check submitted as an exhibit by Respondent for payment in December 2002, was not signed at all. Neither of the checks were paid by the bank. Checks submitted as exhibits by Respondent were not paid by Dietzel Acquisition Company's bank supporting Petitioner's testimony that although he signed the checks in payment of taxes, Henry Bell did not release them. This evidence supports Petitioner's testimony that, at least after 2002, he presented signed checks with related returns or reports to Henry Bell, but was no longer authorized to effectuate payments and had ceased to have tax-related responsibility.

⁵⁰ Transcript page 55, 1 1-2

CONCLUSIONS OF LAW

MCL 205.27a(5) provides:

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 or 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.

“Prima facie evidence” is defined as “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.” Black's Law Dictionary, (7th ed, 2000), page 460. It is a rule which does not shut out evidence, but merely declares that certain conduct shall suffice as evidence until the opponent produces contrary evidence.

The statute's signature mechanism provides the mechanism for establishing a prima facie case of derivative officer liability. Respondent met this initial burden of establishing a prima facie case by demonstrating that Petitioner was a corporate officer and producing Petitioner's signature on a return or negotiable instrument submitted in payment of the corporation's taxes. *Dore v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided June 10, 2003 (Docket No. 238344).

Once the Department of Treasury's prima facie case is established, the burden of proof shifts to Petitioner to rebut the presumption that he is responsible for the corporation's failure to pay.

Drake v Michigan Dept of Treasury, MTT Docket No 204601 (1995). Petitioner 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, 287 (1985). Competent, material, and substantial evidence that Petitioner had tax specific duties must be weighed against the rebutting evidence.

Respondent's witness, Ms. Hodges, testified that she determined that Petitioner was a corporate officer based on the following:

1. *Petitioner's signature as vice-president on various withholding tax returns filed December 2000 to October 2002.* The Tribunal has concluded that the signature on the only two returns submitted by Respondent as exhibits, was not Petitioner's signature and Petitioner's testimony that he did not authorize any other person to sign his name is credible.
2. *Petitioner's signature as vice-president on corporation information updates filed on behalf of Dietzel Acquisition Company with the Michigan Department of Labor and Economic Growth years 1996 through 2003.* The signature on these documents supports a finding that Petitioner was the vice president, thus a corporate officer, of Dietzel Acquisition Company for those years. These signatures do not establish Respondent's prima facie case that Petitioner had tax-related responsibility.
3. *Michigan annual reports filed with the Department of Labor and Economic Growth listing Petitioner as vice president.* The Tribunal concluded that while this evidence indicates that he was a corporate officer, it does not establish Respondent's prima facie case that Petitioner had tax-related responsibility.
4. *Checks signed by Petitioner for payment of taxes.* The statutory criteria is the "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 or payments." Simply signing a check is insufficient. Only five checks were submitted as evidence and only four of those were signed. One was for single business tax estimate filing on October 31, 2001, two were for unemployment payments in April and July, 2002, and one was for withholding taxes for December 2002 for which Petitioner was assessed as they were never paid. All but one of the checks, the one that was never "submitted in payment of taxes," were dated before the tax periods for which Petitioner is being assessed. Further, Petitioner's testimony that after the dates of those checks and returns, his ability to make returns or payments ended, is credible. Thus Respondent's only evidence that could have supported Petitioner's tax-related responsibility after the time Petitioner asserts he was relieved of all such authority was a check that was never submitted or used in payment of the tax involved. Additionally, none of the checks bear the cancellation marks of the bank and Respondent did not provide a reverse side copy to

support that any of the checks had been received and cashed. Based on the evidence and testimony, the Tribunal concludes that the checks in question, while signed by Petitioner, were not “submitted in payment of taxes.” Respondent’s claim that Petitioner’s signature on the checks in payment of the returns was Petitioner’s verification of the accuracy of the return and establish his responsibility for filing the return is strained at best.

Petitioner’s testimony that the signature on the check was an administrative duty and the release of that check and responsibility for the filing of the related return were outside of his control and solely in the hands of Henry Bell was compelling and was unchallenged.

5. *Petitioner communicated with the department representatives regarding taxes.* Ms.

Hodges had no personal contact with Petitioner regarding taxes. She had no information as to who did speak to Petitioner, when those conversations took place, or the nature and content of those conversations. Petitioner did not testify as to any conversations with Respondent related to the tax assessments against Dietzel Acquisition Company.

Petitioner repeatedly objected to Respondent’s questioning of its witness, Ms. Hodges, regarding Department of Treasury’s process for identifying and assessing individuals as responsible corporate officers on relevancy grounds and the grounds that hearsay testimony might ultimately be given. The basis on which Respondent determined whether to assess Petitioner is highly relevant to the determination of whether that process meets the statutory requirements and limitations. Further, to sustain Petitioner’s objection that the testimony of Respondent’s witness is not relevant based on the potential that the witness might offer hearsay testimony would make it difficult, if not impossible, to allow any testimony whatsoever. Petitioner’s option is to object to testimony considered not relevant or to be hearsay and not subject to exception when such testimony is given, rather than to have the Tribunal disallow relevant testimony in anticipation that some future testimony may be subject to objection.

There is no dispute that Petitioner was the vice president of Dietzel Acquisition Company at least through August 2003. Both Respondent’s evidence and Petitioner’s testimony support that fact.

Petitioner signed the Articles of Incorporation as vice president and was listed as the

incorporator.⁵¹ Petitioner also signed Corporate Information Updates for 1998, 1999, 2000, 2001, 2002, and 2003⁵² as vice president. Petitioner signed, again as vice president, a Certificate of Assumed Named relating to Dietzel Acquisition Company in 1991 and the renewal of that Certificate in 1996 and 2001. These documents relate to the corporate status of Dietzel Acquisition Company and are not tax-related documents. Further, they are signed by Petitioner in his capacity as vice president, which does not establish that Petitioner had tax-related responsibility.

Petitioner was assessed for withholding taxes for monthly periods from December 2002 through August 2003 and for a deficiency in Dietzel Acquisition Company's annual withholding payment. Respondent offered as evidence of Petitioner's responsibility for these tax deficiencies, two Combined Returns for Michigan Taxes for Michigan Withholding, one for November 2002 and one for December 2002, both signed by someone other than Petitioner. These documents, on their face, are as returns signed by a corporate officer as required by the statute.

Respondent produced returns signed by someone other than Petitioner for unemployment taxes for the first two quarters of 2002. These documents are returns signed by a corporate officer as required by the statute. The unsigned Michigan Form C-8002 single business tax estimate report dated December 31, 2001, provides no support for a determination of Petitioner's corporate officer status.

⁵¹ Respondent's exhibit 1

⁵² Respondent's exhibit 3

Although all but one was signed by Petitioner, the evidence shows that none of the checks offered as evidence by Respondent were submitted in payment of taxes, the checks were never cancelled or paid.

Petitioner was assessed for unpaid single business tax for the 2001 and 2002 tax years.⁵³

Respondent did not produce the returns to demonstrate that Petitioner had signed them, did not allege that Petitioner had signed the returns, nor offer into evidence checks signed and submitted by Petitioner in payment of taxes due for either year. This in and of itself does not relieve Petitioner of responsibility but, when taken in conjunction with the lack of any other evidence of Petitioner's tax-related responsibility or evidence that he prepared, signed, or submitted returns or payments, supports the finding that Respondent did not meet its burden of proof to establish, prima facie, that Petitioner was a responsible corporate officer subject to assessment under MCL 205.27a(5).

Petitioner argues that liability of a corporate officer:

arises from the idea that the officer was at the company at the time that the assessment came to the company and had the opportunity at that point to appeal that assessment or question that assessment. And if the officer, being in the position to do so, fails to do so, then the rule is that the officer is precluded if there is a subsequent officer liability assessment. That is the way that rule works and that is clear from the cases.⁵⁴

Petitioner offers no case law or statutory interpretation in support of this assertion, only the statement that this principle is true. "It is not sufficient for a party 'simply to announce a position or assert an error and leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or

⁵³ Assessment Nos. M660869 and M013945

⁵⁴ Transcript page 29, 1 19-page 30, 1 3

reject his position.” *Wilson v Tayolo*, 457 Mich 232, 243; 577 NW2d 100 (1998) quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 338 (1959) This argument is misguided and unsupported by the clear language of the statute. The statute requires only that the person assessed be a corporate officer of the entity against which a deficiency has been determined to exist and be a person with responsibility for making returns or payments. Petitioner was a corporate officer during the time that the underlying deficiencies accrued.

Further, the fact that other persons may also have been in charge of making the return or paying the tax is no defense to Petitioner's liability. MCL 205.27(a) clearly states that “ANY of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure.” *Cygan v Michigan Department of Treasury*, MTT Docket No. 135626 (1996). (Emphasis added) That Henry Bell might also have been responsible does not eliminate Petitioner’s responsibility if Respondent can prove that, indeed, Petitioner was a responsible corporate officer during the time that the taxes went unpaid.

As to Petitioner’s question of why no payments were reflected on the assessments, Respondent’s answer that no payments were made was credible and sufficient. It was Petitioner’s burden to prove that payments had been made and not reflected in the assessments and Petitioner did not presented evidence of payments made against the assessments. The Tribunal finds reasonable and credible Respondent’s testimony, and notations on the Final Assessments, that any differences between the initial assessment of Dietzel Acquisition Company and the second, final assessment of Dietzel Acquisition Company were amounts “corrected per actual/amended return(s) or additional information received.” The amounts assessed against Petitioner were, in

every case, equal to or less than the amount initially assessed against Dietzel Acquisition Company.

Based upon the evidence and testimony presented, the case file, and briefs submitted, the Tribunal concludes that Respondent established its prima facie case that Petitioner was a corporate officer of Dietzel Acquisition Company but failed to establish its prima facie case that Petitioner had tax-related responsibility for the 2001, 2002, or 2003 tax years.

JUDGMENT

IT IS ORDERED that Final Assessments L665115, L724086, L760707, L804916, L838980, L985031, L985032, M008171, M008172 M013945, M066869, and M312815 are CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: August 3, 2010

By: Rachel Asbury