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

Michael Limauro,
Petitioner,

v

MTT Docket No. 415784

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

FINAL OPINION AND JUDGMENT

This matter was heard before Administrative Law Judge ("ALJ") Thomas A. Halick. A Proposed Opinion and Judgment ("POJ") was issued on August 31, 2012. The POJ provided, in pertinent part, "[t]he parties shall have 20 days from the date of entry of this Proposed Order to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281)," and "exceptions and written arguments shall be limited to the matters addressed in the motions." In addition, "[t]his Proposed Opinion and Judgment, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Michigan Tax Tribunal Act (MCL 205.726)."

Both Petitioner and Respondent filed exceptions to the POJ on September 20, 2012. Respondent filed a response to Petitioner's exceptions on October 4, 2012.

PETITIONER'S EXCEPTIONS

Petitioner argues, in pertinent part, that:

1. "Respondent did not even establish a *prima facie* case. It produced none of the statutory '*prima facie* evidence' and produced only documents which provide no basis to infer from those documents that the Petitioner was the required 'officer, member, manager' of Enterprises, LLC with 'tax specific responsibilities' during the Tax Periods."
2. The ALJ erred "by presuming (without evidence) Petitioner had acted as Enterprises, LLC's 'president.' . . ."
3. The ALJ erred by "presuming also, without evidence, [Petitioner] had the power to pay taxes and file returns. . . ."
4. The ALJ further erred by "presuming [Petitioner] had delegated power to Enterprises, LLC's Treasurer (without evidentiary support), to file an Annual 2007 Reconciliation Form, which was never introduced as evidence, which [the Administrative Law Judge] incorrectly presumed was a 'tax return.'"
5. "The [ALJ] Ignored (sic) the admitted fact that Petitioner was the Manager of Investors, LLC, which in turn was the manager of its 'subsidiary,' Enterprises, LLC, and in that capacity acted for the manager of Enterprises, LLC as, in effect, the person entitled to manage the business and affairs of

Enterprises, LLC, making it totally unnecessary for Petitioner to usurp the office of 'president,' LLCs being managed under the LLC Act by their members or managers, not by 'officers' as with corporations."

6. "The [ALJ] also ignored the fact that §27a(5) imposes derivative tax liability on only 'members' and 'manager' of LLCs . . . , and the fact that its construction of §271(5) would result in its unconstitutionality."
7. Petitioner is not liable for the 2006 and 2007 taxes because he was not responsible for filing the monthly or annual returns for said tax years.
8. The ALJ erred in not considering *Peterson v Department of Treasury*, 145 Mich App 445; 337 NW2d 887 (1985).

RESPONDENT'S RESPONSE TO PETITIONER'S EXCEPTIONS

Respondent responds, in pertinent part, that:

1. "The ALJ relied on the plain language of MCL 205.27a(5) to hold that the Petitioner was the person responsible for paying HOB Enterprises' tax debts."
2. "The Petitioner knew about the debts, had the authority to pay them, and chose not to."
3. "The Petitioner neither rebutted the Department's *prima facie* evidence, nor carried his burden of persuasion."

RESPONDENT'S EXCEPTIONS

Respondent argues, in pertinent part, that:

1. Petitioner, not Respondent, relied on the footnote in *Livingstone v Department of Treasury*, 434 Mich 780; 456 NW2d 684 (1990).
2. Respondent states that the Administrative Law Judge incorrectly held that "[i]t is undisputed that Petitioner had no affiliation with Enterprises or Investors prior to May 23, 2007." Respondent disputes this finding and states that "the preponderance of the evidence shows that Petitioner was involved with Enterprises and/or Investors before he signed the May 2007 contract. . . ."

CONCLUSION

The Tribunal has reviewed both Petitioner's and Respondent's exceptions, Respondent's response, and the case file and finds that the ALJ's POJ is supported in fact and law. Nevertheless, the Tribunal finds that Respondent, through its exceptions, has shown good cause to revise the POJ. Specifically, the first line of page 18 shall be revised to reflect the following: "Petitioner cites the following footnote from the Supreme Court's non-binding, plurality opinion in *Livingstone, supra*." Further, the Tribunal originally found that it is undisputed that Petitioner had no affiliation with Enterprises or Investors prior to May 23, 2007. Respondent contests this fact and argues that ". . . the preponderance of the evidence shows that

the Petitioner was involved with Enterprises and/or Investors before he signed the May 2007 contract – by his own admission in R-3, at least since February 2007." As such, the Tribunal shall revise the POJ and omit the following sentence: "It is undisputed that Petitioner had no affiliation with Enterprises or Investors prior to May 23, 2007." However, said errors are *de minimus* in nature as they have no bearing on the ALJ's finding that Petitioner is personally liable for HOB Enterprises' taxes as levied in the subject assessments.

Petitioner's argument that Respondent did not establish a *prima facie* case is not persuasive. Specifically, the Tribunal's conclusion that "Petitioner's signature on four checks remitted in payment of taxes made payable to Respondent is prima facie evidence of his responsibility under MCL 205.27a(5)," is justified for the following reasons. First, Petitioner, in his exceptions, argues that ". . . the Department failed to introduce either tax returns or negotiable instruments submitted in payment of taxes, signed by the taxpayer." Petitioner is correct that Respondent did not produce tax returns signed by Petitioner; however, Respondent did produce four checks the Tribunal found were in payment of taxes. The Tribunal cited Angela Helm's testimony that she was ". . . not sure exactly for what taxes," the checks were in payment of. Tr 50, Vol 1. This testimony shows the payments were for taxes, although Ms. Helm was not able to testify what taxes they were in payment of.

Petitioner, in his exceptions, also argues that "§27a(5) does not impose strict derivative tax liability on 'officers, members, managers and partners' who first assumed that position of authority and specific tax responsibility years after the years when the unpaid taxes became delinquent." However, Petitioner fails to consider the Tribunal's reliance on *Musser v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket No. 293480). Here, the Court of Appeals determined that the statute does not limit the type of "returns or negotiable instruments" that may be considered to those filed at the time the tax was first due. Therefore, the Tribunal did not err in finding Respondent met its *prima facie* case by proving Petitioner signed negotiable instruments in payment of taxes after the time the subject taxes were first due. Accordingly, the Tribunal did not err in shifting the burden of proof to Petitioner to rebut that he is responsible for the corporation's failure to pay.[1]

Petitioner justifiably argues that the Tribunal erred in relying on Petitioner's proposed exhibit five, 2007 Annual Return for Sales, Use and Withholding Taxes, in its determination regarding the 2007 tax year. This exhibit was not entered into evidence and the Tribunal committed a palpable error in considering this evidence and relying upon it in the POJ. The Tribunal's ruling that Petitioner had control

[1] In light of the Tribunal's conclusion regarding Respondent's *prima facie* case, the Tribunal need not make a finding with respect to whether Petitioner's signature on installment agreements is sufficient evidence to establish a *prima facie* case.

over the making of the 2007 annual return is not supported because Petitioner's proposed exhibit five was not entered into evidence. Despite this error, the Tribunal's ultimate conclusion regarding the 2007 tax year (i.e., that Petitioner was responsible for the payment of the 2007 taxes for the same reasons as set forth for the 2006 tax year) is supported and the decision withstands this error. As such, the Tribunal shall strike the following portion of the Conclusions of Law and any other excerpts or findings involving the 2007 Annual Return:

> For the 2007 tax year, Petitioner had control over making the returns and payments by having supervision over Mr. Froberg, who signed the annual return for the 2007 tax year. In March 2008, Mr. Froberg signed the 2007 Annual Return for Sales, Use and Withholding Taxes, at which time his official title was Secretary and Treasurer, according to the Amended Operating Agreement. Under Enterprises' Operating Agreement, the Manager, Investors, had "full and complete power, authority, and discretion to manage and control the Company. . . ." Exhibit P3, pp 89, 92. The Agreement provides that the President shall "perform all duties incident to the office of President and such other duties as may be prescribed by the Manager." P3, p 92. Further, the agreement provides that the Treasurer, Mr. Froberg, shall "render to the President and the Manager whenever requested an account of all transactions and of the financial condition of the Company." Exhibit P3, p 93. Moreover, the treasurer "shall perform such other duties as may be delegated by the Manager or President." *Id*. Therefore, the President had authority to delegate duties to the Treasurer. The Treasurer's authority to sign the 2007 Annual Sales Use and Withholding Return was granted to him by either the manager, Investors, or the president, Petitioner. Further, the fact that Mr. Froberg signed the return, and is presumptively liable, is no defense to Petitioner's liability. *Cygan*, *supra*. The law provides for liability of more than one officer or manager.

> Even if the authority to sign the 2007 tax return was granted to Mr. Froberg by the manager (Investors), Petitioner played a role in that decision by virtue of his status as manager of Investors. Therefore, Petitioner had supervision and control over the actions of the Treasurer, Robert Froberg. He had power to control or supervise the tax returns signed by the Treasurer. The Treasurer's duties specifically included disbursing "funds of the Company as may be ordered by the Manager," which naturally includes disbursing funds in payment of taxes. It is apparent that the Treasurer's signing of the tax return was one of the duties that had been delegated to him by the Manager or President. This demonstrates that Petitioner exercised supervisory authority over the Treasurer who signed the return, and failed to pay the taxes due with the 2007 Annual Sales, Use and Withholding Return that was filed in March 2008, while Petitioner was CEO.

Petitioner, in his exceptions, cites *Peterson v Department of Treasury*, 145 Mich App 445; 337 NW2d 887 (1985), and argues the Tribunal is bound by this decision which provides three alternative tests applicable to the personal derivative tax liability determination. In *Peterson*, the petitioner became an officer of Bay Side Door, Inc. after he purchased 49 percent of the stock in October of 1978. Thereafter, in January of 1979 through September 1979, the petitioner signed tax forms as "manager," "agent," or "vice president." In December of 1979, the petitioner decided to depart from Bay Side Door, Inc. The petitioner was held responsible for the company's sales tax liability of the corporation from January 1, 1978, through December 31, 1979. The Court of Appeals held that the plaintiff was only liable for unpaid sales tax for the year in which he was employed at the corporation, concluding that "the record does not support a conclusion that

petitioner was both an officer *and* responsible for the corporation's making of returns and payments of taxes during any period other than December, 1978, through December, 1979." (Emphasis in original.) *Id.* at 450-451.

Peterson was decided prior to the amendment of MCL 205.27a; as such, the Court applied the former MCL 205.27a, which imposed officer liability on an officer responsible for making returns *and* payments of taxes. The statute now states, in pertinent part:

> If a . . . limited liability company, . . . 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 . . . have control or supervision of, or responsibility for, making the returns **or** payments is personally liable for the failure. (Emphasis added.)

The *Peterson* Court placed the emphasis on the liable party being both an officer *and* responsible for making the returns. Although the petitioner was an officer as of October 1978, he was not responsible for making the returns *and* the payments of taxes prior to December 1978. The petitioner left Bay Side Door, Inc., in December 1978; therefore, he was not responsible for paying the taxes as he was no longer employed by or owned the company. The current statute only requires that the liable party make the returns *or* payments. In this case, the Tribunal found that Petitioner was responsible for paying the taxes as the taxes incurred during 2006 and 2007 remained due as of January 1, 2008, when Petitioner became the

CEO/president of Enterprises. Unlike *Peterson,* Petitioner had the control to pay the taxes on January 1, 2008, because he was still an owner and member of Enterprises. Thus, the Tribunal finds that the facts of *Peterson* are distinguished from the facts of this case and *Peterson* is, thus, inapplicable.

In the present case, Petitioner is liable as an officer under MCL 205.27a(5) for HOB Enterprises, LLC's failure to pay Michigan sales, use and withholding taxes relating to the period of October 2006 through December 2007. As the statute clearly states, it is not required that Petitioner be responsible for making the returns *and* the payments; the fact that Petitioner is responsible for making the payments is enough to incur personal liability.

Finally, the Tribunal finds that all remaining exceptions raised by Petitioner have been addressed in the POJ and need not be discussed here. Given the above, both Petitioner and Respondent have shown good cause to justify the modifying of the Proposed Opinion and Judgment limited to the issues discussed above. See MCL 205.762. As such, the Tribunal modifies the Proposed Opinion and Judgment, as indicated herein, and adopts the modified Proposed Opinion and Judgment as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment, as modified herein, in this Final Opinion and Judgment. As a result:

a. The taxes, interest and penalties as levied by Respondent are as follows:

Assessment	Date Issued	Tax Period	Tax	Interest	Penalty
Q223981	4/27/11	12/06	14,852.42	3,994.38	3,713.10
Q223590	4/27/11	12/07	57,298.70	10,116.44	14,324.68
P345909	4/27/11	6/07	31,472.02	7,347.22	7,868.00
P345908	4/27/11	5/07	24,457.31	5,894.52	6,114.32
P345907	4/27/11	4/07	22,733.49	5,654.85	5,683.36
P138919	4/27/11	3/07	26,724.40	6,847.35	6,681.10
P076835	4/27/11	2/07	14,875.22	3,926.24	3,718.80
P001968	4/27/11	1/07	19,649.00	5,323.59	4,912.26
O921362	4/27/11	12/06	36,280.64	10,109.91	9,070.16
O823226	4/27/11	11/06	21,847.07	5,461.76	6,250.88
O737972	4/27/11	10/06	10,000.21	1,614.81	0.00
Total			**280,187.00**	**66,291.07**	**68,336.66**

b. The final taxes, interest and penalties are as follows:

Assessment	Date Issued	Tax Period	Tax	Interest[2]	Penalty
Q223981	4/27/11	12/06	14,852.42	3,994.38	3,713.10
Q223590	4/27/11	12/07	57,298.70	10,116.44	14,324.68
P345909	4/27/11	6/07	31,472.02	7,347.22	7,868.00
P345908	4/27/11	5/07	24,457.31	5,894.52	6,114.32
P345907	4/27/11	4/07	22,733.49	5,654.85	5,683.36
P138919	4/27/11	3/07	26,724.40	6,847.35	6,681.10
P076835	4/27/11	2/07	14,875.22	3,926.24	3,718.80
P001968	4/27/11	1/07	19,649.00	5,323.59	4,912.26
O921362	4/27/11	12/06	36,280.64	10,109.91	9,070.16
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O737972	4/27/11	10/06	10,000.21	1,614.81	0.00
Total			**280,187.00**	**66,291.07**	**68,336.66**

IT IS SO ORDERED.

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.

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

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Order within 28 days of entry of this Final Opinion and Judgment.

MICHIGAN TAX TRIBUNAL

Entered: 10/24/12 By: Kimbal R. Smith III