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

Better Integrated Systems Inc,
Petitioner,

v MTT Docket No. 09-000002

Michigan Department of Treasury, Tribunal Judge Presiding
Respondent. Steven H. Lasher

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING PETITIONER SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On November 30, 2016, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Respondent contends discovery has uncovered additional extrinsic evidence proving Petitioner is a professional employer organization ("PEO"). Further, Respondent claims the Tribunal should uphold the 100% fraud penalty as many "badges of fraud" have been established that justify the imposition of the penalty.

On December 21, 2016, Petitioner filed a response to the Motion arguing summary disposition is premature because Respondent has only presented "hearsay, conjecture, and material inapplicable to Petitioner" in support of its stance that Petitioner is a PEO. Petitioner also argues Respondent cannot bring forward new allegations of fraud to retroactively base its penalty against Petitioner. Rather, the original basis of fraud, the presentation of two different client service agreements ("CSAs") did not result in a tax deficiency and, thus, does not substantiate the penalty.

On March 2, 2017, the Tribunal heard oral arguments in order for the parties to further address the issues raised in Petitioner's response to the Motion and to, ultimately, determine whether there are any outstanding issues of material fact in this case. The Tribunal has reviewed the Motion, response, and the evidence submitted and finds that denying Respondent's Motion for Summary Disposition and granting summary disposition in favor of Petitioner is warranted at this time. The evidence presented proves Petitioner was not a PEO and was, therefore, not required to include compensation it paid to employees in its Single Business Tax ("SBT") base for the 2004 through 2007 tax period. Additionally, the Tribunal finds that under the circumstances of this case, waiver of the 100% fraud penalty is justified.

BACKGROUND

Petitioner is a Michigan corporation[1] originally formed to provide the business of general contracting and to lease employees to its clients. More specifically, Petitioner provides payroll, health and insurance services to its clients so that the clients can properly perform their business. In January of 2008, Respondent conducted an audit of Petitioner in order to determine whether Petitioner's SBT liability was properly reported from the January 1, 2004 through December 31, 2007 tax period. The audit manager, Ms. Sandra Lalonde, determined that Petitioner was the employer of all of its clients' employees and, therefore, should have reported its employees' compensation on the SBT returns for the audit period. As such, Respondent determined that Petitioner was a PEO, while Petitioner maintained that it was a payroll service company. Ms. Lalonde's determination was based on Petitioner's contracts, customer lists, forms filed with the Department of Labor & Economic Growth and various other documentation. Additionally, a

[1] In the original Petition, Petitioner stated that it was a Michigan corporation; however, in Respondent's Answer, it denies that Petitioner is a Michigan corporation because the Corporations and Securities Division of the Department of Labor and Economic Growth lists Petitioner as a Nevada corporation.

100% penalty was imposed after determining that Petitioner provided altered records during the audit period. On April 10, 2009, Respondent issued the Final Assessment assessing a SBT deficiency against Petitioner for $572,886.00 with an interest amount of $95,867.31 and a penalty of $572,886.00. Petitioner filed an appeal with the Tribunal on May 15, 2009. Petitioner contended in its Petition that there was a lack of notice, and Respondent did not provide Petitioner with an opportunity to request an informal conference.

On December 8, 2010, the Tribunal conducted a Prehearing and Scheduling Conference. During the hearing, the parties indicated that Respondent offered to provide Petitioner with an informal conference, as such the parties requested that the matter be placed in abeyance.

On May 25, 2011, an informal conference was held to determine whether Petitioner was a PEO, as opposed to a payroll service provider, and whether Respondent erred in assessing a 100% fraud penalty against Petitioner. The Hearing Referee recommended that the SBT liability be upheld. On August 23, 2011, Respondent issued a Final Assessment assessing a SBT deficiency against Petitioner for $572,886.00, a penalty of $572,886.00, and statutorily-accruing interest of $156,549.86. Respondent adjusted Petitioner's SBT liability for the tax years at issue by adding back compensation that Petitioner had paid on behalf of its clients to its client's employees. The Tribunal held a status conference on August 23, 2011, and held that since the parties filed Motions for Summary Disposition in the companion cases[2], and since the legal issue seemed to be the same, Petitioner was required to file an amended petition and Respondent would file an answer to the amended petition. Petitioner filed its Amended Petition on August 30, 2011, and Respondent filed its Answer to the Amended Petition on September 20, 2011. The

[2] *Beacon Industrial Staffing, Inc v Michigan Department of Treasury*, MTT Docket No. 409417 and *Beacon Enterprises v Michigan Department of Treasury*, MTT Docket No. 371782.

Tribunal placed the above-captioned case in abeyance on October 18, 2011, pending the final determination of the companion cases as the issue in the present appeal involved similar issues.

On April 17, 2014, the case was taken out of abeyance[3] and, subsequently, the Tribunal granted Petitioner's Motion for Summary Disposition on October 2, 2014, finding that Petitioner successfully asserted res judicata and collateral estoppel and the litigation of this case was precluded by those doctrines. Respondent filed a claim of appeal with the Court of Appeals on December 9, 2014. The Court of Appeals reversed the Tribunal's decision finding that res judicata and collateral estoppel did not apply. Further, the Court of Appeals held that the parties should be afforded an opportunity to conduct "fuller discovery in this case" to determine whether Petitioner operated as a PEO.

RESPONDENT'S CONTENTIONS

Respondent argues the evidence presented with its Motion for Summary Disposition conclusively proves that Petitioner was a PEO and Petitioner was, thus, required "to include the millions of dollars in compensation it paid to employees in its SBT base for the 2004 through 2007 tax period." Respondent cites the following three reasons in support of its determination that Petitioner is a PEO: (i) "Individuals associated with Better Integrated admitted that Better Integrated operated as a PEO," (ii) "Better Integrated's contracts with their clients contained language that satisfies the criteria set forth in MCL 208.4(4)," and (iii) "evidence exists proving that Better Integrated operated in accordance with those contracts." Respondent asserts that individuals associated with Petitioner admitted Petitioner is a PEO. Specifically, "Salvatore Manzo . . . admitted in a deposition, during trial, and also in a court pleading that Better

[3] The Tribunal issued decisions in the companion cases on December 29, 2011; however, the parties filed cross claims of appeals with the Court of Appeals. The Court of Appeals rendered their decisions on December 3, 2013.

Integrated operated as a PEO, . . . Patrick Green . . . testified that [he] was the insurance agent for [Petitioner] that operates as [a] PEO, [and] Scott Christie – the president of [Petitioner's] client CMAC Transportation – told Treasury's auditor that his company employ[]s Better Integrated's services as a professional employer organization."

Respondent further argues that the plain language of Petitioner's CSAs show Petitioner was a PEO. In support of this, Respondent states that "the [CSA] clearly provides that Better Integrated had 'the right of direction and control of employees' work," paying wages and employment taxes of the employees out of its own accounts, and reporting, collecting, and depositing state and federal employment taxes for the employees, are also specifically addressed . . . in the [CSA]." Respondent also contends that "Better Integrated operated in accordance with the [CSA]," and "assumed the right to control the leased employee's work . . . ." Petitioner purportedly paid "the leased employees' wages . . . from its own accounts," "reported, collected, and deposited its leased employees state and federal employment taxes," and was solely responsible for "hiring, evaluating, supervising, disciplining, and firing the leased employees with Better Integrated." Respondent contends the foregoing satisfies the criteria set forth in MCL 208.4(4) and proves Petitioner was a PEO.

In addition to the above, Respondent states that Petitioner "assumed and performed other substantial employer responsibilities." These facts are confirmed by "[j]udicial admissions, trial testimony, deposition testimony, affidavits, contracts, and several forms of documentary evidence . . . ."

Regarding the fraud penalty, Respondent argues that "several badges of fraud exist supporting the Department's application of a 100% civil fraud penalty." Petitioner "never reported the compensation it paid to . . . employees on its SBT returns during the four tax years

in issue here," which "resulted in a substantial understatement of . . . business income . . . ." Respondent also argues that "[t]he strongest evidence of fraudulent intent occurred during audit when Better Integrated knowingly and willfully created an invalid contract and provided the Department's auditor a false contract not once, but twice." Respondent states "in addition to creating a fake contract, it appears Better Integrated forged the client's signature," and also "offered implausible and inconsistent excuses for creating and providing the false contract," during the informal conference process. Finally, Respondent argues Petitioner "failed to maintain adequate records," which is "an additional badge of fraud that when considered in combination with the consistent and substantial understatement of compensation, implausible and inconsistent excuses offered during audit, the fake contract provided to Treasury's auditor not once, but twice during audit, Better Integrated's implausible excuses to downplay the false contract during informal conference, offering affidavits that contain knowingly false allegations to Treasury and this Tribunal, establish a pattern of activity by Better Integrated that began in audit and continued through this litigation indicative of an intent to conceal, mislead, or otherwise prevent the collection of its underpaid SBT liability."

PETITIONER'S CONTENTIONS

Petitioner opposes Respondent's Motion as "premature" and argues that "Respondent relies on ambiguous and contradictory contract language, rather than properly applying the true common law employer test." Petitioner cites a 20-factor common law test from *US v Garami*[4] and argues that a "consistent application of Respondent's historic use of the common law employer test would have revealed that it was impossible for Petitioner to be a PEO." Petitioner maintains that Respondent "primarily clings to language in Petitioner's [CSAs];" however, "a simple reading of

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[4] *US v Garami*, 184 BR 834, 837 (MD Fla 1995).

the CSAs, much less a serious audit of them and their actual application, provides ample proof that they are ambiguous, contradictory, and do not reflect a PEO relationship." Regarding the CSAs, Petitioner argues they "cover employees who were hired and working by the client prior to its entering the agreement with Petitioner," "[o]perational matters were handled by the client, which was responsible for verifying all time submissions," "there are no CSA provisions regarding wages and the typical and extensive federal and state laws relating to work hours, overtime, minimum wage, discrimination, and the like," and "there is no provision for Petitioner to pay wages or obtain a reimbursement for wages." Thus, Petitioner argues the CSAs are "ambiguous and contradictory."

Petitioner explains that it "took its client's existing employees and supervisors and then leased these employees back to the client." The client's pre-existing CSAs were accepted and Petitioner "made them its own." Petitioner asserts that "[c]ontact with the clients was nearly exclusively via the client's payroll and human resources departments . . . , Petitioner did not screen employees or fire employees, . . . maintain any employees other than four office workers," and "Petitioner . . . was entirely dependent on its clients' decisions with respect to payroll processing . . . ." Petitioner further contends the fact that it was "paid on a flat per check basis," supports that it was not reimbursed for wages; rather, it "reflected only a payment for payroll services." Additionally, Petitioner claims that all payments "made to its clients' employees and to the tax authorities were reimbursed by clients," "none of Petitioner's employees perceived that they had any authority to hire or fire," Petitioner "accepted the client's supervisors at the job site," and "[t]here is no instance in which Petitioner hired an employee or fired an employee at any of its clients' businesses."

Petitioner contests Respondent's reliance on "inadmissible hearsay and conjecture, and documents unrelated to Petitioner and its practice . . . ." Specifically, Petitioner states that "4 of Respondent's first 5 exhibits to its Motion arise from [a] Florida case which did not involve, and pertained to companies other than, the taxpayer at issue in this case." Petitioner also claims that "Respondent . . . seeks to bootstrap inadmissible hearsay by Salvatore, made in an unrelated proceeding, into admissible admissions by Petitioner."

Finally, regarding the 100% fraud penalty, Petitioner states "Respondent's new allegation of fraud should be rejected, and Petitioner granted summary disposition . . . ." Petitioner claims that "9 years after the audit," Respondent is raising "a new claim of fraud that was not the basis for the Department of Treasury's assessment." Regarding the original claim of fraud, "[t]he erroneous presentation of the CSA to Respondent's auditor did not produce any deficiency." "[T]he Tribunal should reject Respondent's assessment of a fraud penalty as it did in the case of Petitioner's sister companies."

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[5] In this case, Respondent moves for summary disposition under MCR 2.116(C)(10).

Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the

[5] See TTR 215.

moving party is entitled to judgment as a matter of law.[6] In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.[7]

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party.[8] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[9] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[10] Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[11] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[12]

CONCLUSIONS OF LAW

The issue to be determined, whether Petitioner is a PEO, appears straightforward. However, the Tribunal must discern the legislature's intent in the language of the relevant statutes and look to other authorities that are useful in determining whether Petitioner was an "employer" for purposes of the Single Business Tax Act ("SBTA").[13] The primary goal of

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[6] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).
[7] See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[8] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[9] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[10] *Id.*
[11] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[12] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[13] The SBTA was repealed by 2006 PA 325.

statutory interpretation is to give effect to the intent of the Legislature.[14] The first step in determining the intent of the Legislature is to look at the language of the statute.[15] If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted.[16]

Under the SBTA, a business entity's tax base included compensation paid to its employees.[17] MCL 208.5(2) defines an "employer" as "an employer as defined in section 3401(d) of the internal revenue code. A person required to withhold for federal income tax purposes shall prima facie be deemed an employer." Therefore, where one entity is required to withhold federal income taxes for another, it creates a rebuttable presumption that the former is the latter's employer.[18] This presumption applies here; Petitioner paid employee compensation, but argues it was not acting as an employer. Petitioner has the burden of rebutting this presumption.

Section 3401(d) of the Internal Revenue Code defines "employer" as "the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person . . . ." Further, MCL 208.4(4) provides that:

> For tax years that begin after December 31, 2003, for purposes of determining compensation of a professional employer organization, compensation includes payments by the professional employer organization to the officers and employees of an entity whose employment operations are managed by the professional employer organization. Compensation of the entity whose employment operations are managed by a professional employer organization does not include compensation paid by the professional employer organization to the officers and employees of the entity whose employment operations are managed by the professional employer organization. As used in this subsection, "professional employer organization" means an organization that provides the management and

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[14] *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).
[15] *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004).
[16] *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).
[17] MCL 208.4(5).
[18] *Mid America Management Corp v Department of Treasury*, 153 Mich App 458; 395 NW2d 702, 710 (1986)

> administration of the human resources and employer risk of another entity by contractually assuming substantial employer rights, responsibilities, and risk through a professional employer agreement that establishes an employer relationship with the leased officers or employees assigned to the other entity by doing all of the following:
>
> a.) Maintaining the right of direction and control of the employees' work, although this responsibility may be shared with the other entity.
>
> b.) Paying wages and employment taxes of the employees out of its own accounts.
>
> c.) Reporting, collecting, and depositing state and federal employment taxes for the employees.
>
> d.) Retaining the right to hire and fire employees.

The parties agree the foregoing cited statutes are relevant and straightforward. The parties disagree on whether a common law test should be applied to determine whether Petitioner was an employer. At oral argument, Respondent's representative stated the Court of Appeals' mandate was very clear and subsection four, cited above, is the relevant test to apply to determine whether Petitioner was a PEO. Respondent cites to the legislative history of the foregoing section in support of its argument that *Bandit Industries*[19] was overturned by the 2002 legislation and contends that a common law test is not necessary when there is clear legislative direction in MCL 208.4(4).

Petitioner cites a 20 factor common law test from IRS Rev. Rul. 87-41 and adopted in the United States District Court, M.D. Florida case, *US v Garami*.[20] However, the Tribunal finds no support for imposing this test to determine whether a company is a PEO *in Michigan*. Historically, the Tribunal has looked to the published Michigan Court of Appeals case *Mid America Management Corp v Dep't of Treasury,*[21] Federal Regulation 26 CFR 31.3401(c)-1, and

[19] *Bandit Industries v Dep't of Treasury,* Dkt. No. 99-17260-CM, unpublished opinion of the Court of Claims (September 7, 2000).
[20] *US v Garami*, 184 BR 834 (MD Fla 1995).
[21] *Mid America* M*anagement Corp v Dep't of Treasury*, 153 Mich App 458; 395 NW2d 702, 710 (1986).

IRS Revenue Ruling 87-41 for guidance in determining whether an employer-employee relationship exists. However, the Tribunal's reliance on this guidance predated the legislature's amendment to MCL 208.4(4), or in instances where the Tribunal relied on common law after 2002, the *tax years at issue* predated the amendment which provides for the definition of PEO and four factors which must exist in order to deem a company a PEO. The Court of Appeals has also recognized this area of the law "has been an area of unstable law [and the] shifting legal framework does not provide longstanding and unmistakably evident precedent."[22] As such, the Tribunal shall determine whether Petitioner is a PEO utilizing the definition mandated by MCL 208.4(4).

First, Petitioner argues that Respondent is merely relying on the CSAs and did not "interview and depose material witnesses." However, as Petitioner has repeatedly pointed out, the two most integral witnesses, Vincent Manzo, Petitioner's CEO, and Marcel Thirman, Petitioner's CPA, passed away during the pendency of this appeal. Further, Respondent attempted to take the depositions of seven individuals who, Respondent believed, would be potential witnesses in this matter; however, the witnesses were not produced for depositions. Interviewing and deposing material witnesses is not the sole method for either Petitioner or Respondent to gather information regarding this case. Respondent gathered additional extrinsic documentary evidence, as guided by the Court of Appeals, in support of its position.

Some of the additional extrinsic evidence referenced above is Petitioner's Annual Federal Unemployment Tax Returns, Quarterly Federal Tax Returns, and State of Michigan Quarterly Tax Reports, submitted as exhibits to Respondent's Motion. The Tribunal finds that these tax returns show Petitioner paid wages and unemployment taxes of the employees out of its own

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[22] *Adamo Demolition Company v Dep't of Treasury*, 303 Mich App 356; 844 NW2d 143 (2013).

accounts (MCL 208.4(4)(b)) and reported, collected, and deposited state and federal employment taxes for the employees (MCL 208.4(4)(c)).

The original six affidavits of Vincent Manzo, Marcel Thirman, Vitalba Ahee, Elizabeth Dimkoski, Sharon McGraw, and Lyn Sengstock support Petitioner's position that it is not a PEO. Specifically, the affidavits show Petitioner did not maintain the right of direction and control of the employees' work (MCL 208.4(4)(a)), and even though evidence shows Petitioner did hire employees, Petitioner did not retain the right to fire employees (MCL 208.4(4)(d)). The Court of Appeals held that Respondent must be provided an "opportunity to present arguments and evidence that were not proffered in the Beacon cases,"[23] when it reversed and remanded the Tribunal's prior opinion. The vast majority of Respondent's additional exhibits consists of irrelevant admissions.[24] Specifically, Respondent's affidavit, depositions, and transcripts show reference to Petitioner as a PEO and that Petitioner employed individuals. However, this evidence derives from litigation in Florida and Kentucky. There has been no indication that Florida, Kentucky, and Michigan statutes all possess parallel definitions of "PEO" and "employer" for state tax purposes. Rather, merely because someone stated Petitioner was a PEO or referenced someone being employed by Petitioner does not conclusively establish Petitioner was a PEO under the SBTA. Even though Respondent's evidence is credible, it is not reliable for purposes of this litigation and does not refute Petitioner's affidavits.

The Court of Appeals recognized that "the ultimate substantive analysis by the MTT of the issues [in the Tribunal's previous opinion] might perhaps result in the same outcome as that

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[23] Better Integrated Systems Inc v Dep't of Treasury, unpublished opinion per curium opinion of the Court of Appeals, issued March 22, 2016 (Docket No. 325001).

[24] Petitioner argues Respondent's evidence is mainly hearsay and not admissible. However, as Respondent pointed out at oral argument, the Tribunal is not bound by the Michigan Rules of Evidence. Rather, the Tribunal "may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." MCL 204.746.

reached in the Beacon cases . . . ."[25] The Tribunal has reviewed the voluminous casefile and finds that Respondent has proven that no genuine issues of material fact remain regarding whether Petitioner is a PEO. However, the weight of the evidence shows that Petitioner did not "contractually assume[] substantial employer rights, responsibilities, and risk through"[26] its CSAs as evidenced by the extrinsic evidence submitted in this case.

Finally, even though the Tribunal has determined the assessment at issue shall be cancelled, the Tribunal shall determine whether waiver of the fraud penalty is warranted. Petitioner previously filed a Motion for Partial Summary Disposition regarding this issue, but the Tribunal denied the Motion because "there has yet to be any documentary proofs or testimonial evidence submitted regarding whether Respondent has met its burden to establish fraudulent intent on the part of Petitioner." As stated in the Tribunal's November 10, 2016 Order, Respondent bears the burden to establish fraudulent intent on the part of Petitioner to sustain a 100% fraud penalty assessment.[27]

After Respondent's Auditor determined Petitioner was a PEO, the Auditor also added a 100% fraud penalty, under MCL 205.23(5), to the assessment because the "taxpayer acted in a manner to commit fraud by knowingly and willfully changing the client service agreements provided to auditor. . . . By altering the client service agreements taxpayer tried to put forward that they were a payroll service company and not a [PEO], thus not having to report compensation thereby reducing amount of tax due."[28] MCL 205.23(5) states that "[i]f any part of the deficiency or an excessive claim for credit is due to fraudulent intent to evade a tax, or to

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[25] *Id.*
[26] MCL 208.4(4).
[27] See *Armada Oil and Gas Co v Dep't of Treasury*, (1994) MTT No. 185625 and *Summerville v Dep't of Treasury* (1994) MTT No. 149724.
[28] Respondent's Exhibit F, Michigan Department of Treasury Audit Report of Findings.

obtain a refund for a fraudulent claim, a penalty of 100% of the deficiency, plus interest . . . , shall be added."

Petitioner's former CEO, Vincent Manzo, stated in his affidavit that he "was advised by [his] accountant, Marcel Thirman, that the client service agreements should be revised because [his] companies do not lease employees but are the employers only for the purpose of payroll servicing."[29] Mr. Manzo further stated that he "asked Marcel Thirman to begin revision of the client service agreements and that revision was on-going at the time that the instant audit commenced."[30] The Affidavit of Marcel Thirman corroborates these statements and further states that he "provided the auditor with the documents that she requested," he "believed these documents were accurate and complete," and "[a]t no point, [had he] ever sought to mislead the auditor or present a false picture of Mr. Manzo or his business but rather to present the business as it is, namely a payroll services company."[31]

The audit report shows that the Auditor, suspicious of the agreements provided by Petitioner, requested a copy of the CSA from Petitioner's client which "confirmed taxpayer and client has the relationship of a [PEO]."[32] The fact that the Auditor disregarded Petitioner's erroneous CSA shows that the Auditor did not determine the deficiency based on any fraudulent intent. Further, the Tribunal finds that the Affidavits of Vincent Manzo and Marcel Thirman prove Petitioner did not "knowingly and willfully act in a manner to commit fraud" under RAB 2005-3.

The final issue to be determined is whether Respondent can present additional allegations of fraud in an attempt to establish fraudulent intent on the part of Petitioner. Respondent's

[29] Affidavit of Vincent Manzo.
[30] *Id.*
[31] Affidavit of Marcel Thirman.
[32] Respondent's Exhibit F, Michigan Department of Treasury Audit Report of Findings.

representative stated during oral argument that the Tribunal is allowed to consider subsequent events and evidence when establishing fraud, or, rather, "badges of fraud", as opposed to focusing on the initial fraud that gave rise to the fraud penalty. However, Respondent has never cited any authority for its stance. Instead, Respondent chose to focus on the purported "badges of fraud" which do not pertain to the Auditor's clear reasoning behind the fraud penalty and those "badges of fraud" which occurred *after* the assessment. The Tribunal finds Respondent's additional allegations of fraud irrelevant. Since Respondent has failed to establish that the underlying tax deficiency was based on an intent to evade a payment of tax, the Tribunal waives all assessed penalties.

JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that Summary Disposition is GRANTED in favor of Petitioner.

IT IS FURTHER ORDERED that Assessment Number Q746377 is CANCELLED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the cancellation of the assessment within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall issue a refund as required by this Opinion within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes the case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[33] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[34] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[35] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[36]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[37] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on

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[33] See TTR 261 and 257.
[34] See TTR 217 and 267.
[35] See TTR 261 and 225.
[36] See TTR 261 and 257.
[37] See MCL 205.753 and MCR 7.204.

appeal.[38] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[39]

By __________Steven L Lasher___________

Entered: April 4, 2017
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[38] See TTR 213.
[39] See TTR 217 and 267.