Better Integrated Systems, Inc,
Petitioner,

v

Michigan Department of Treasury,
Respondent.

MICHIGAN TAX TRIBUNAL

MAHS Docket No. 09-000002-R

Presiding Judge
David B. Marmon

ORDER DENYING PETITIONER'S MOTION FOR IMMEDIATE CONSIDERATION

ORDER PARTIALLY GRANTING PETITIONER'S MOTION IN LIMINE

FINAL OPINION AND JUDGMENT

INTRODUCTION

This controversy has so far, outlived the Petitioner, its Principal, its accountant, the Single Business Tax Act upon which the tax was based,[1] as well as the successor Michigan Business Tax Act. This case has migrated through three law firms, while several assistant Attorneys General have represented Respondent. This case, involving the same witnesses, the same principals, and sharing the same business, as well as much of the same evidence as Beacon Enterprises and Beacon Industries, was originally decided summarily, based upon the Court of Appeals' decision in *Beacon Enterprises Inc v Dep't of Treasury*.[2] In *Beacon*, the Court of Appeals reversed in part the Tribunal's decision, holding inter alia, that the Tribunal erred in applying the parol evidence rule and thus refusing to look outside of written agreements between Beacon and its clients to determine whether Beacon was a payroll service company (PSC) or a

[1] Repealed by P.A. 2006, No. 325, §1

[2] *Beacon Enterprises, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2013 (Docket No. 308170). The present case was placed in abeyance pending final resolution of *Beacon*.

professional employer organization (PEO). That distinction is critical, as the SBT tax base includes compensation paid by PEOs for its officers and employees, while PSCs do not. The Tribunal originally granted summary disposition in the present case on November 18, 2014, in favor of Petitioner, concluding that based upon its nearly identical facts and issues it shared with *Beacon*, the doctrines of collateral estoppel and res judicata precluded further litigation of the appeal. Respondent appealed the Tribunal's decision to the Michigan Court of Appeals on December 9, 2014, and on March 22, 2016, the Court reversed and remanded the case back to the Tribunal for further proceedings consistent with its opinion.[3] The Court held that because Petitioner was a separate legal entity, the doctrines of collateral estoppel and res judicata did not apply, and that summary disposition was not appropriate because the evidence was conflicting and discovery incomplete.

On remand, the Tribunal entered a scheduling order that set forth deadlines for the completion of discovery and the filing of dispositive motions and prehearing statements.[4] Respondent filed a motion for summary disposition on November 30, 2016. In the motion, which was filed pursuant to MCR 2.116(C)(10), Respondent argued that it was entitled to judgment as a matter of law because there were no genuine issues of material fact with respect to Petitioner's status as a PEO, and that the 100% fraud penalty should apply as a matter of law. The Tribunal entered an order denying Respondent's motion and granting summary disposition in favor of Petitioner on April 4, 2017. On August 10, 2017, the Tribunal granted Respondent's Motion to Reconsider and vacated its April 4, 2017 judgment, holding that there was a question of

[3] *Better Integrated Sys, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2016 (Docket No. 325001).
[4] The scheduling order was revised on September 6, 2016.

material fact as to whether Petitioner was a PEO or PSC, and reinstated this case. A hearing was then scheduled for November 28, 2017.

Despite its victory in setting aside the Judgment in favor of Petitioner, Respondent filed an Application for Leave to Appeal on August 31, 2017,[5] arguing that the Tribunal erred in not granting summary disposition in its favor. The Tribunal placed this matter into abeyance pending the decision by the Court of Appeals. After six months, the Court of Appeals denied Respondent's Application for failing to persuade the court of the need for immediate appellate review.[6] On May 11, 2018, the Tribunal removed this matter from abeyance, held a scheduling conference, and again set this matter for hearing.

On August 3, 2018, Petitioner filed a motion requesting that the Tribunal exclude certain witnesses identified in Respondent's witness list. Petitioner also requested immediate consideration of its Motion in Limine. Respondent filed a response to the motion on August 10, 2018. As explained below, that motion was partially granted.

Petitioner, Better Integrated Systems, Inc, appeals Final Assessment No. Q746377 levied by Respondent, Michigan Department of Treasury, on April 10, 2009. The Final Assessment established that Petitioner owes Single Business Tax in the amount of $572,866, plus interest in the amount of $95,867.31 and penalties in the amount of $572,866 for tax years 2004, 2005, 2006 and 2007. Stephen W. Smith, attorney of Foster Swift Collins & Smith PC represented Petitioner, and David W. Thompson and Scott Damich, attorneys of Michigan Department of Attorney General, represented Respondent.

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[5] COA # 339947.
[6] COA Docket No 339947, Order issued March 15, 2018

A hearing on this matter was held on August 13 and 14, 2018. At hearing, Petitioner's witnesses were Elizabeth Dimkoski and Lyn Sengstock. Respondent's sole witness at hearing was Sandra LaLonde. Respondent also presented the video testimony of Scott Christie via a deposition *de benne esse* taken August 9, 2018.

Based on the evidence, testimony, and case file, the Tribunal finds that while Respondent's assessment regarding tax liability and interest is proper, the 100% fraud penalty should not be imposed, and the assessment is MODIFIED to remove this penalty.

PETITIONER'S CONTENTIONS

Petitioner contends that it is not liable for the assessment, as it was a payroll service company, rather than a professional employee organization. In support, it argues that it had only 3-5 employees, no managerial training, and did not maintain the right of direction and control of employees. Alternatively, Petitioner contested the 100% fraud penalty because any misrepresentation it may have made during the audit was not intentional wrongdoing or done to evade a tax it believed was owing.

PETITIONER'S ADMITTED EXHIBITS

P-1 2011 Affidavit of Vincent Manzo, (admitted over objection).

P-2 2010 Affidavit of Vincent Manzo, (admitted over objection).

P-3 2011 Affidavit of Marcel Thirman, (admitted over objection).

P-4 2010 Affidavit of Marcel Thirman, (admitted over objection).

P-5 2011 Affidavit of Lyn A. Sengstock, (admitted over objection).

P-6 2010 Affidavit of Lyn A. Sengstock, (admitted over objection).

P-7 2011 Affidavit of Sharon McGraw, (admitted over objection).

P-8 2010 Affidavit of Sharon McGraw, (admitted over objection).

P-9 2010 Affidavit of Vitalba Ahee, (admitted over objection).

P-10 2011 Affidavit of Elizabeth Dimkoski.

P-11 2010 Affidavit of Elizabeth Dimkoski, (admitted over objection).

P-12 Respondent's Responses to Petitioner's Discovery Requests.

P-14 2011 Informal Conference Recommendation.

P-15 Respondent's 2010 Docketing Statement to Court of Appeals, (admitted over objection).

Respondent objected to all the affidavit exhibits on the basis of hearsay. In overruling Respondent's objections, the Tribunal notes that these same affidavits were part of the record in both *Beacon Enterprises, Inc and Beacon Industrial Staffing Inc.* In fact, the Court of Appeals referenced these same affidavits and relied upon them in reversing the Tribunal's initial decision in favor of Respondent in the *Beacon* cases.[7] Many of these same affidavits were part of the record in the present case, having been relied upon in the Tribunal's initial decision granting summary disposition to the Petitioner, and after remand, again relied upon in opposition to Respondent's Motion for Summary Disposition.

The Tribunal accepted these affidavits into evidence relying in part on MRE 804(b)(7), which provides for admissibility in relevant part:

> if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

[7] *Beacon*, COA #s 308170, 308171, Slip Op at 4-5.

Here, the tax years at issue are 2004, 2005, 2006 and 2007. This case has been pending since 2009. Vincent Manzo, Petitioner's principal is dead. Marcel Thirman, Petitioner's accountant is dead. Sharon McGraw and Vitalba Ahee were unavailable. Because of the remoteness of events from the date of hearing, this evidence was adjudged to be more probative than any other evidence that Petitioner was able to procure. That being said, the Tribunal did have live testimony from Dimkoski and Sengstock, although neither was in the position of Manzo the owner, or Thirman the accountant as to knowledge of Petitioner's activities. Further, the affidavit evidence was more contemporaneous with the events than was the live testimony.

The Tribunal also relied upon §46 of the Tax Tribunal Act, which states in relevant part, "[t]he 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."[8] This echoes the same language found in §75 of the Administrative Procedures Act, which states in relevant part:

> In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.[9]

The latter provision has long been cited by appellate courts in allowing evidence which would be inadmissible in a court proceeding to be allowed in an administrative proceeding.[10] Further, to abate the prejudice to Respondent of only having documents to cross examine, the Tribunal allowed in hearsay affidavits and other evidence in

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[8] MCL 205.746(1).
[9] MCL 24.275
[10] See *Viculin v Dep't of Civil Service*, 386 Mich 375; 192 NW2d 449 (1971), *Becker-Witt v. Board of Examiners of Social Workers*, 256 Mich App 359; 633 NW2d 514 (2003).

support of Respondent's case to rebut Petitioner's hearsay. In the end, the Tribunal allowed in most of what was offered by each party, to be weighed accordingly in reaching this final opinion and judgment.

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner is a Professional Employee Organization under the SBT, as defined under MCL 208.4(4). As such, Petitioner was liable for the assessment, as such organizations must include employee compensation as part of the tax base. Additionally, Respondent contends that Petitioner committed fraud in submitting at the audit a purported signed contract, which had a different signature for the Petitioner's client than the signature on the actual contract, as well as a different FEIN number. Respondent also contends that the state returns filed were false.

RESPONDENT'S ADMITTED EXHIBITS

R001 Audit Diary

R003 Email communication between Sandra LaLonde and Henry Wagner, dated 5/16/08 and 5/19/08.

R005 Copies of checks for State of Michigan withholding payments.

R006 6/27/08 Request for Records.

R010 1/5/09 Preliminary Audit Determination letter and supporting schedules.

R012 2/23/09 Notice of Preliminary Audit Determination and supporting schedules.

R013 Affidavit of Sandra LaLonde and exhibits attached thereto, dated 7/30/14, (over objection).

R014 Audit Report of Findings and supporting schedules.

R016 2004 Federal Form 940.

R017 2005 Federal Form 940.

R018 2006 Federal Form 940.

R019 2007 Federal Form 940.

R020 2003 Federal Forms 941.

R021 2004 Federal Forms 941.

R022 2005 Federal Forms 941.

R023 2006 Federal Forms 941.

R024 2007 Federal Forms 941.

R027 2005 State of Michigan UIA Quarterly Tax Reports.

R028 2006 State of Michigan UIA Quarterly Tax Reports.

R029 2007 State of Michigan UIA Quarterly Tax Reports.

R030 2004 Michigan Single Business Tax Annual Return.

R031 2005 Michigan Single Business Tax Annual Return.

R032 2006 Michigan Single Business Tax Annual Return.

R033 2007 Michigan Single Business Tax Annual Return.

R034 2008 Michigan Single Business Tax Annual Return (over objection).

R035 2009 Michigan Single Business Tax Annual Return.

R036 2010 Michigan Single Business Tax Annual Return.

R038 2004 Federal Form 1120.

R039 2005 Federal Form 1120.

R040 2006 Federal Form 1120.

R041 2007 Federal Form 1120.

R042 2008 Federal Form 1120 (over objection).

R043 2009 Federal Form 1120.

R044 2010 Federal Form 1120.

R045 2011 Federal Form 1120.

R046 Client List for Better Integrated Systems, Inc dated 8/22/08.

R047 Better Integrated Trial Balance reports/General Ledger worksheets.

R048 7/25/08 Response to SBT Audit Questionnaire re: health and life insurance.

R049 10/23/08 Letter from Marcel Thirman to Sandra LaLonde re: 2004, 2005, and 2006 sales figures.

R051 Better Integrated Invoice to Rye Gentry Trucking Inc dated 7/26/07.

R052 Better Integrated Invoice to Diane's Trucking/Load One dated 7/26/07.

R053 Better Integrated Invoice to Steel Transport dated 7/2/07.

R054 Better Integrated Invoice to Shea Expediting, dated 7/2/07.

R055 2006 Invoice Report.

R056 2007 Invoice Report.

R057 Unsigned client agreement dated 8/01/07 from Beacon Industrial Staffing.

R058 Purported Client Services Agreement ("CSA") between Better Integrated and American Iron and Aluminum provided to Sandra LaLonde by Petitioner in August 2008.

R059 Sandra LaLonde's notes re: conversation with American Iron and Aluminum in December 2008.

R060 12/08/08 Fax from Sandra LaLonde to Angela/Tim Oberly re: American Iron and Aluminum contracts with Better Integrated.

R062 Contract attached to 12/12/08 Fax from BIS to Sandra LaLonde between American Iron and Aluminum and Better Integrated Systems.

R064 10/16/08 Fax from C-MAC Transportation to Sandra LaLonde re: PEO Contract.

R065 Contract attached to 10/16/08 Fax from C-MAC Transportation to Sandra LaLonde re: PEO Contract.

R066 Intent to Assess No Q746377 dated 1/30/09.

R067 Better Integrated Informal Conference Memorandum dated 2/18/10.

R068 Decision and Order of Determination dated 8/10/11.

R069 Final Assessment No Q746377 dated 8/23/11.

R071 Vincent Manzo Deposition Transcript dated 7/20/09 and deposition exhibits attached thereto, (admitted over objection).

R072 Complaint, filed 9/26/08 by Gary Clunie against Better Integrated.

R073 Motion to Dismiss filed by Petitioner in *Clunie v Better Integrated.*

R074 Opinion and Order dated 11/5/08 entered in *Clunie v Better Integrated.*

R075 Answer of Defendants to Plaintiff's Complaint in *Clunie v Better Integrated Systems.*

R077 2011 Affidavit of Elizabeth Dimkoski.

R078 Linked-In Profile of Elizabeth Dimkoski.

R079 2016 Affidavit of Elizabeth Dimkoski.

R081 2008 Affidavit of Charles Garavaglia.

R082 October 6, 2008 letter from Garavaglia to B. Lewis, attorney.

R083 October 6, 2008 letter from Garavaglia to Alan Rubin.

R084 August 27, 2008 letter from Garavaglia to Elissa Keichler.

R085 Charles Garavaglia Deposition Transcript, dated 7/20/09.

R087 Salvatore Manzo Deposition Transcript dated 9/13/11 Vol I in *American Homes Assurance Co v Manzo, et al.*

R088 Duplicate deposition of Sal Manzo (same as R087).

R089 Salvatore Manzo Deposition Transcript dated 9/14/11 Vol II in *American Homes Assurance Co v Manzo, et al*.

R090 Respondent's Fourth Discovery Request and responses.

R091 2/29/08 fax from Salvatore Manzo to William Hubbard re: EL-2 forms.

R092 3/6/08 fax from Salvatore Manzo to Elissa Kleicher re: Four Star Contract and attachments.

R093 5/5/08 fax from Salvatore Manzo to Katie Graves re: Kentucky Registration Forms and attachments.

R094 Trial Transcript excerpt, Salvatore Manzo testimony, *American Home v Weaver Agg Transport* dated 1/23/14.

R095 12/8/15 Response to Judgment Creditor's Motion for Proceedings Supplementary.

R097 Nevada State Business License Renewal.

R098 Nevada State Business License.

R099 Nevada Secretary of State Business Entity Information.

R101 Vitalba Ahee LinkedIn profile dated 7/7/16.

R104 Employee Application dated 4/16/12.

R105 Patrick Green Deposition Transcript.

R106 3/10/08 Email from Kate Graves to William Hubbard.

R107 ERM-14 attached to Kate Graves email.

R108 Certificate of Insurance attached to Kate Graves Email to Hubbard.

R109 Copies of EL-1 form attached to Kate Graves 3/10/08 Email to Hubbard.

R110 Copies of EL-2 forms attached to Kate Graves 3/10/08 Email to Hubbard.

R111 4/23/08 letter from Kathryn Graves to Tonia Keith re: employee leasing company registration form.

R112 Correspondence from Hubbard to Graves.

R113 Certificate of Liability Insurance dated 11/26/07.

R120 Petitioner's Supplemental Responses to Treasury's Second Discovery Requests, signed 9/20/16.

R121 Petitioner's Response to Respondent's Third Discovery Requests dated. 11/28/16.

R134 Annotated affidavit of Sandra LaLonde.

R135 DVDs of Scott Christie Deposition.

R136 Transcript of Christie Deposition.

Petitioner strenuously objected to depositions, pleadings and transcripts concerning other legal matters involving Better Integrated Systems, and its officers. For the same reasons that the Tribunal admitted Petitioner's affidavits, the Tribunal admitted these out of court statements offered by Respondent. Additionally, these same documents were part of the record and were referred to by the Court of Appeals in its remand. The Court of Appeals held:

> The evidence is conflicting regarding whether petitioner was a PEO or a PSC. The affidavits of petitioner's owner, CPA, and employees all effectively asserted that petitioner was a PSC. However, the Department introduced evidence suggesting that in past federal court filings and in

> various other state and federal filings, petitioner made statements consistent with it being a PEO, such as statements in a federal court case that a party was its employee and in federal tax filings indicating that petitioner had over 600 employees and not the four or five claimed here. Therefore, conflicting evidence existed and granting petitioner summary disposition under MCR 2.116(C)(10) would not have been improper.[11]

Accordingly, in deciding a case in 2018 based upon facts in 2003 through 2007, the Tribunal finds that the admission of out of court statements is allowable and necessary; especially because it extended the same courtesy to Petitioner.

FINDINGS OF FACT

1. Petitioner entered into agreements with several clients that gave it the ultimate power to maintain the right and control of its employees.
2. Petitioner paid wages and employment taxes of the employees out of its own accounts.
3. Petitioner reported, collected and deposited state and federal employment taxes for the employees.
4. Per its written agreements, Petitioner retained the right to hire and fire its employees.
5. Petitioner's witnesses established that it worked out of a 5-person office in Shelby Township.
6. Petitioner's witnesses, as well as through affidavits, testified that none of them hired, fired or supervised employees other than each other at the office.
7. Although Petitioner's late accountant Marcel Thirman stated to the contrary in a sworn statement, Petitioner leased employees back to its customers.

[11] *Better Integrated*, slip op at 8.

8. Scott Christie, President of C-MAC Transportation, a client of Petitioners testified that he and every officer of C-MAC were employed by Petitioner and leased back to C-MAC.
9. Christie also testified that Petitioner had terminated C-MAC's Director of Operations.
10. As leased employees of Petitioner, Christie and other officers of C-MAC had the authority to hire, fire, direct and control the work of employees leased to C-MAC.
11. Christie testified that all major personnel decisions were performed in conjunction with Petitioner.
12. Petitioner's CPA, Marcel Thirman, submitted a false document during the audit, which was a purported client service agreement with changed terms and a false FEIN and false signature of one of Petitioner's clients.

CONCLUSIONS OF LAW

PETITIONER'S MOTION FOR IN LIMINE

As noted above, Petitioner filed a motion on August 3, 2018, requesting that the Tribunal exclude certain witnesses identified in Respondent's witness list. Petitioner also requested immediate consideration of its Motion in Limine. Petitioner's Motion for Immediate Consideration is properly denied as it did not include a statement indicating whether Respondent would be filing a response as required by TTR 225.[12] As for the

[12] Petitioner stated in its Motion that "counsel for Petitioner attempted to contact both of Respondent's co-counsel by telephone, to advise that Petitioner would be filing the instant motion and asking that it be immediately considered, and to determine whether Respondent will be filing a response to the motion, but was not able to reach either attorney. Counsel for Petitioner left a voicemail so advising counsel for Respondent, but has not been able to determine at the time of filing whether Respondent will be filing a response to the instant motion."

Motion in Limine, "preliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the Rules of Evidence except those with respect to privilege."[13] MRE 402 states that "all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court."[14] Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more . . . or less probable than it would be without the evidence."[15] As indicated at the hearing, the Tribunal is persuaded that all witnesses identified by Respondent, with the exception of "any and all employees, former employees, agents, representatives and records custodians of Daniel Peters Process Service," could provide additional information relevant to this case. As such, Petitioner's motion is granted only with respect to those individuals: Daniel Peters & Ted Wrubel.

SBT LIABILITY

At issue in this case is liability under the long-repealed Single Business Tax.[16] Specifically, §4(4) sets forth additions to a tax base if the taxpayer is considered a professional employment organization, ("PEO"). This subsection also defines a PEO. This subsection states:

> (4) 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

[13] MRE 104(a).
[14] *Id*.
[15] MRE 401.
[16] Former MCL 208.1 et seq.

> 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 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 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.*[17]

Petitioner contends that with a staff of only 3-5 persons, it could not maintain the right of direction and control of employees under subsection (a) or retain the right to hire and fire employees as required under subsection (d).

In support of its contention, Petitioner offered affidavits as well as testimony. Exhibits P-1 and P-2 are affidavits of the late Vincent Manzo, Petitioner's principal. In P-1, executed on May 10, 2011, Manzo states in relevant part:

> 8) [Better Integrated] Systems and the other payroll services entities (Enterprises and industrial) provide payroll services, process and monitor workers compensation claims and provide insurance services.
> 9) None of the payroll services entities provide any human resources management for clients.
> 10) None of the payroll services entities supervise any aspect of the work of my clients or persons working at their job sites.
> 11) As reflected in my general ledger, none of the payroll services entities train or provide work tools to any of the persons working at my clients' job sites.

[17] *Id*. (emphasis added).

12) As reflected in my records, none of the payroll services entities evaluates, determines wage incentives or wage or salary Increases or decreases.
13) None of the payroll services entities have ever advertise[d] to fill jobs and have never hired or fired the persons working at my clients' job sites but instead receive hiring and termination papers after the persons have been hired or terminated by my clients.. [sic]
14) Neither I nor any of the employees working in my office have specialized training or experience in human resource management or have specialized training in my client's businesses.
15) All of my employees perform bookkeeping and accounting duties related to payroll services and Insurance.

Manzo's affidavit in P-2 executed on February 16, 2010 and submitted in *Beacon Industrial Staffing* is substantially identical to P-1.

Exhibits P-3 and P-4 were executed by Marcel Thirman, Petitioner's late accountant and corroborate Manzo's statements. P-3, executed on May 10, 2011 states in relevant part:

9) The payroll services entities provide services that are similar to other payroll companies, Iike for example, ADP and Paychecks, that is, they issue checks and make a payment of applicable employment taxes.
10) All payments are made with client funds as the payroll services entities bill client companies for the amount of the paycheck and the taxes and receive reimbursement from the client companies for the paychecks, taxes, plus a service fee for each check issued.
11) Throughout my entire work for [Beacon] Enterprises, [Beacon] Industrial, and [Better Integrated] Systems, the payroll services entitles have been staffed with four or five clerical staff working for all of the entities at the same office.
12) The office has never had more than three to five total employees, performing bookkeeping and clerical work.
13) I have never seen supervisory persons at the office.
14) I have never seen anyone at the office conduct interviews for clients.
15) I have never heard of or seen the four employees of Enterprise, Industrial, or Systems, hiring, supervising, training, or firing a client's employees.
16) I have never been asked to review the returns of the payroll services client's clients.
17) Mr. Manzo has never discussed with me the payroll services entities' hiring, firing, and training of their clients' employees; and I have never seen any accounting for hiring, firing, training, or related expenses

> other than those expenses related to providing payroll services and insurance.
> 18) Enterprises, Industrial, and Systems are not professional employer organizations and do not, contrary to the earlier drafted client service agreements, lease employees.

Exhibit P-4 is also an affidavit executed by Marcel Thirman, but concerning Petitioner's sister-LLC, Beacon Industrial Staffing. This document, executed on February 16, 2010 states substantially identical allegations to those made in P-3. Exhibits P-5 and P-6 signed by Lyn Sengstock, P-7 and P-8, signed by Sharon McGraw, P-9 signed by Vitalba Ahee and P-10 and P-11 made by Elizabeth Dimkoski are affidavits with substantially similar averments as Manzo's and Thirman's affidavits. While hearsay, the Tribunal admitted these affidavits for the reasons stated above.

The Tribunal also admitted numerous out of court statements offered by Respondent, and strongly objected to by Petitioner.[18] R071 is a deposition taken of Vincent Manzo on behalf of Petitioner in a worker's compensation case on July 20, 2009. Manzo contradicts Thirman's statement that Petitioner does not lease employees.[19] Manzo also stated that Petitioner had 400 employees.[20] However, in the context he was speaking, he implies that the employees were part of a client's operation.

Also part of R071 is a deposition exhibit titled "Client Service Agreement." The following excerpt is relevant this proceeding:

> SECTION 1, STAFFING AND SUPERVISION OF EMPLOYER'S EMPLOYEES.
> A. SUPERVISION, EMPLOYER [Better Integrated] agrees to designate supervisors to perform any and all administrative and personnel matters on client's premises during the normal business hours.

[18] See exhibits R071-R075, T at 304-307; exhibits R-081 -R089, T at 308-314 and exhibits R091-R095, T at 316-323.
[19] R071 at 16. This same agreement was admitted as a separate exhibit, R092.
[20] R071 at 20.

> B. CONTROL OF EMPLOYER EMPLOYEES, The EMPLOYER supervisor shall determine the procedures to be followed by EMPLOYER employees regarding the performances of their duties. CLIENT agrees to permit EMPLOYER to implement EMPLOYER's policies and procedures relating to EMPLOYER employees. CLIENT shall make all non-routine directives only through the designated EMPLOYER supervisor.[21]

Section 4 of this same agreement is also relevant to the controversy in this case. The following subsections state:

> C. CONTROL OF EMPLOYEES.
> 1. EMPLOYER shall provide employees who are duly qualified and skilled in the area in which their services are to be utilized. EMPLOYER will consult with CLIENT in filling its Job Function Positions, but EMPLOYER shall retain the sole and exclusive right to determine which of EMPLOYER's employees shall be designated to fill CLIENT Job Function Positions. CLIENT has no right to approve such determination, but nonetheless possesses the right to recommend, replacement or substitution of any employee so furnished, if dissatisfied with such employee's qualifications and/or performance. If any EMPLOYER employee is recommended by client for replacement or substitution due to dissatisfaction of such employee's qualifications and/or performance, EMPLOYER agrees, if such recommendation is reasonable and practical, to furnish a suitable replacement within a reasonable time.
>
> 2. EMPLOYER shall have the sole responsibility of hiring, evaluating, supervising, disciplining and firing individuals assigned to fill CLIENT'S Job Function Positions. Under no circumcises shall CLIENT have the right to terminate an EMPLOYER employee. It is understood and agreed that EMPLOYER shall retain full control over all personnel decisions.[22]

Vincent Manzo identified this document and acknowledged the signature upon it as his own.[23] These terms clearly establish m*aintaining the right of direction and control of employees' work, although this responsibility may be shared with the other entity* and *retaining the right to hire and fire employees.* A nearly identical agreement caused the Tribunal in *Beacon* to originally grant summary disposition to Respondent. However, the Court of Appeals reversed, and on remand, some of the affidavits listed above were

[21] R071 at 29.
[22] R071 at 33-34.
[23] R071 at 8.

enough for the Tribunal to grant summary disposition in favor of Beacon. The Tribunal then relied upon the same affidavits to initially find in Better Integrated's favor in the current litigation. However, the Tribunal was again reversed for its finding of res judicata, and on remand, was ordered to consider Respondent's evidence.

As to hiring and firing, Exhibit R085 contradicts Vince Manzo's statement regarding hiring and firing. This exhibit is a deposition of Charles Garavaglia, the former owner of Petitioner, and a consultant working for Petitioner. Garavaglia was deposed as a representative of Petitioner and admitted that the Plaintiff truck driver in a worker's compensation case (Hoskins), looking for a job filled out an application belonging to Better Integrated Systems,[24] and that Better Integrated had employment applications in over 15 states.[25] He also testified that Hoskins was a direct employee of Petitioner.[26] He then testified that Petitioner leased Hoskins to its sister company, Beacon for insurance reasons.[27]

Respondent also provided various documentary evidence showing Petitioner to be an employer including an employee welcome letter and State of Kentucky Employee Leasing Registration forms.[28] Moreover, Petitioner's Quarterly Federal Tax Returns from 2003-2007 list the number of employees ranging from 258 to 664.[29] Similar numbers are reflected in Petitioner's UIA Quarterly Tax Reports for 2004 through

[24] R085 at 24-25. The deposition also discussed the spelling of Petitioner's name on various corporate documents at 41.
[25] R085 at 22.
[26] R085 at 27.
[27] R085 at 32.
[28] R104, R109 and R110
[29] Form 941, Exhibit 021 to 024.

2007.[30] While these forms and returns establish two of the 4 elements of the PEO definition,[31] they do not establish direction and control, or the right to hire and fire.

Petitioner's live witnesses testified that there were only a handful of employees in their Shelby Township office, and neither of them hired, fired, or supervised employees. Elizabeth Dimkoski, a bookkeeper, testified that she was one of five people employed there.[32] Dimkoski testified that she knew what each of the other office employees did, and none of them supervised, hired or fired employees.[33] As to terminating employees, Dimkoski testified that it was the client, rather than Better Integrated.[34]

On cross examination, Respondent attempted to make much of a 10-year-old Linked-In profile which did not accurately state the name of her employer.[35] Respondent also attempted to undermine her credibility by bringing up the filing of registration forms in Nevada in 2015 at the behest of her subsequent employer after Petitioner stopped doing business.[36] However, the Tribunal did not find either line of questioning to be determinative of Dimkoski's credibility. Nonetheless, Dimkoski only began working for Petitioner in 2007, and was likely not familiar with every act that Vincent Manzo performed.

Petitioner's second witness was Lyn Sengstock, who began working for Petitioner in 2004, and whose job in that small office was inputting data.[37] She testified that she did not know for sure whether anyone at Better Integrated hired, fired or

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[30] Exhibits R026-R029.
[31] Former MCL 208.4(b) Paying wages and employment taxes of the employees out of its own accounts and (c) Reporting, collecting, and depositing state and federal employment taxes for the employees.
[32] T at 27
[33] T at 34-38.
[34] T at 41-42.
[35] T at 75-80.
[36] T at 199-203.
[37] T at 266-268.

supervised client employees.[38] She did testify that she was 95% sure that no hiring, firing, vetting or supervising was occurring at Petitioner's office.[39]

In summary, Petitioner put forth convincing evidence that the Shelby Township headquarters had 5 employees, mostly performing work that is consistent with a payroll servicing company rather than a PEO. The client agreements on the other hand, clearly indicate that Petitioner maintained the right of direction and control of the employees work and retained the right to hire and fire employees. The Court of Appeals in *Beacon* however held that the Tribunal must look beyond the contracts to determine if Petitioner maintained these rights.

Dispositive evidence on these issues was provided by Respondent in the form of a video deposition *de bene esse* of Scott Christie on August 9, 2018. Christie testified that he was President of C-MAC Transportation, a trucking company, and a customer of Petitioner. He testified to the authenticity of the client agreement entered into in 2006 between C-MAC and Petitioner.[40] The terms of this agreement are identical to the agreement with Four Star Trucking, which is quoted from above. Christie agreed that Petitioner was responsible for hiring, terminating and disciplining employees.[41] He testified that "it was a joint effort between both us and (Petitioner)," to control the work performed by employees.[42] As to discipline of employees, Christie testified "it was a combination of both."[43] Christie elaborated:

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[38] T at 272-274.
[39] T at 288-289, 297-298.
[40] A copy of that agreement may be found at R065, and as Attachment 1 to the deposition transcript, admitted as R136.
[41] R136, Deposition T at 15.
[42] *Id*. at 16.
[43] *Id*. at 16-17.

> We . . . would track the discipline. We would reach out to our representative at [Petitioner] and we would work together to figure out the next steps for that – for that person, whether it was to reassign them, educate them, discipline, whatever that may be.[44]

Christie further testified that it would be Petitioner's job to reassign employees and that it was Petitioner's job to terminate the employee.[45] Finally on Direct Examination, Respondent had Christie identify an employment application from BIS that asks for qualifications of the prospective employee.[46] Christie agreed that his company relied upon Petitioner to ask background questions of prospective employees, and to go out and identify people who meet C-MAC's needs.[47]

On cross examination, Christie testified that although he was President of C-MAC, he considered himself an employee of Petitioner.[48] He testified further that "we do not have any employees at C-MAC.[49] He reiterated that his company worked jointly with Petitioner when it came to discipline.[50] He indicated that C-MAC would sometimes hire other employees of Petitioner that worked for one of Petitioner's other clients. He did concede that C-MAC did not always hire those recommended employees.[51] He also stated that he couldn't recall if Petitioner ever intervened between the manager or supervisor and an employee.[52]

On Redirect, Christie had the following exchange with Respondent:

> Q. Did [Petitioner] have any authority to discipline you?
> A. If I did something wrong.

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[44] *Id.* at 17.
[45] *Id*.
[46] Exhibit 3 to R136. The Tribunal notes that the date of this agreement is April 16, 2012, well after the last tax year at issue in this appeal.
[47] R136 T at 27.
[48] *Id*. at 33.
[49] *Id*. at 34.
[50] *Id.* at 54.
[51] *Id*. at 76.
[52] *Id*. at 80.

Q. Okay. Did they have the authority to fire you?
A. I'm sure if my partners presented a case, yes, they did.
Q. Okay. So and that would be true of all the other employees and officers in the – in the company as well?
A. Correct.

* * *

Q. So just like the truck driver who could be hired and fired by [Petitioner], that's true of you as well and all the other officers in the company?
A. Correct.
Q. Okay. Were — were there occasions when an officer was disciplined by B.I.S.?
A. Yes.
Q. Okay. And did that happen in conjunction with C-MAC?
A. Yes.
Q. Okay. I guess we don't need any names in particular, but what -- what would the title have been for someone at the -- at the officer level who was disciplined?
A. Director of Operations.
Q. Okay. So let's take that as an example.
A. Okay.
Q. So just to keep it simple, so presumably the Director of Operations does something wrong?
A. Okay.
Q. Whatever that may be. We don't have to define what it is. Is that -- is that something that the other officers in the company would notice?
A. Yes.
Q. Okay. And then the other officers in the company would -- would — would do an investigation report?
A. So we would get Mr. Girard involved because he handled that part of our company —
Q. Okay.
A. — and he would do his investigation. He would be working with the PEO to go through any of the -- the setup and discipline based on what we had told them, yes.
Q. Okay. So then it — it goes to the PEO?
A. Correct. [53]

Christie's deposition ended with Respondent's final 4 questions:

Q. Could C-MAC hire anyone?
A. No.
Q. Could C-MAC discipline anyone?
A. No.
Q. Could C-MAC train anyone?

[53] *Id*. at 103-105.

> A. In conjunction with [Petitioner], yes.
> Q. Okay. But they're not C-MAC employees so you couldn't hire or fire them?
> A. No.[54]

In *Beacon*, the Court of Appeals held:

> extrinsic evidence may indeed demonstrate that the agreements between petitioners and their clients were, in fact and in substance, different from those suggested by the language employed in the CSAs.[55]

In the present case, Petitioner failed to demonstrate that the facts and substance of their service agreements were different from what was written. From Christie's testimony, he, and everyone working for the company of which he is President is an employee of Better Integrated and is leased to that company. Accordingly, any act of hiring, firing, disciplining or training is performed by a leased employee of Better Integrated. Therefore, any decision by the leased employees, including supervisors, would be a decision by an employee of Petitioner. His testimony confirmed the terms of the contract, giving the ultimate authority of Petitioner to supervise, hire and fire to Petitioner. While it is true that Christie as an officer of C-MAC could ultimately terminate its relationship with Petitioner, Better Integrated had the authority to hire, fire and supervise while that agreement was in effect. Moreover, if the test of ultimate authority over personnel is whether a client could terminate a contract with a PEO, then no organization would ever qualify as a PEO. Accordingly, Better Integrated meets the terms of repealed §4, and is a PEO, rather than a mere PSA.

The *Beacon* court also held that the affidavits relied upon, which are the same or similar to affidavits presented by Petitioner in the present case raised a question of fact

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[54] *Id*. at 122.
[55] *Beacon* slip op at 4.

as to whether the CSAs actually set forth the arrangement between Petitioner's sister company and its clients. However, the arrangement testified to by Christie is not inconsistent with the testimony of Dimkoski or Sengstock, or the affidavits of anyone but Thirman,[56] as it is not necessary for any of the five office personnel to actually hire, fire, screen or train any of the truck drivers and other workers. Rather, their leased employee officers and supervisors are in position to perform each of those tasks, all while wearing their hats as Better Integrated employees. Accordingly, the Tribunal must affirm Respondent's assessment.

Fraud Penalty

The second issue is whether Respondent is entitled to the 100% fraud penalty. MCL 205.23(5) states:

> If any part of the deficiency or an excessive claim for credit is due to fraudulent intent to evade a tax, or to obtain a refund for a fraudulent claim, a penalty of 100% of the deficiency, plus interest as provided in subsection (2), shall be added. The penalty becomes due and payable after notice and informal conference as provided in this act.

Respondent argued that the CSA submitted at audit was fraudulent in that the terms consistent with Petitioner's PEO status were omitted, and a fraudulent signature of Petitioner's client was affixed, presumably by Marcel Thirman. Respondent further argues that Thirman's lack of cooperation and slowness to meet Respondent's requests all point to fraud. Additionally, Thirman's statement in his affidavit that Petitioner does not lease employees was clearly false and establishes fraud.

[56] Thirman's affidavit averring that Petitioner did not lease employees was contradicted not only by Christie's testimony, but by Lyn Sengstock in this proceeding, and the employee leasing forms filed in the state of Kentucky. See R109, R110, R111.

In reviewing published opinions, the standard for proving fraud under this statute is articulated in *Eaton v Dep't of Treasury*,[57] which involved a strip club called "Centerfolds" and featured a prostitution ring. Here, the Court of Appeals states:

> Because fraudulent intent can rarely be established by direct evidence, it may be inferred from several kinds of circumstantial evidence or 'badges of fraud,' including: '(1) understatement of income, (2) inadequate records, (3) failure to file tax returns, (4) implausible or inconsistent explanations of behavior, (5) concealing assets, and (6) failure to cooperate with tax authorities.'

Applying the standard out of federal tax law, the elements that arguably apply are failure to cooperate, and implausible or inconsistent explanations of behavior. As to failure to cooperate, there was testimony from LaLonde regarding various requests that went unanswered or partially answered by Marcel Thirman.[58] As to implausible explanation, there was the purported CSA which had a different signature from Petitioner's client than what appeared on the actual CSA that respondent received directly from the client. The testimony given was that a false signature and false FEIN number were provided to the auditor by Marcel Thirman.[59] Unlike *Eaton*, the fraudulent behavior took place during the audit. Having taken place at the audit, it is unclear that the complained of behavior caused "any part of the deficiency."

The situation in the present case is the exact situation the Court of Appeals confronted in *Beacon.* While unpublished, it nonetheless looked at the same set of facts and while the parties were different they both were managed by the same personnel. In *Beacon*, the Court of Appeals stated:

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[57] *Eaton v Dep't of Treasury,* unpublished per curiam opinion of the Court of Appeals decided May 8, 1998 (Docket No 202742) citing *Bradford v Comm'r of Internal Revenue,* 796 F2d 303, 307–308 (CA 9, 1986) (citations omitted).
[58] T at 368, 370-394.
[59] T at 434

> As noted, MCL 205.23(5) states that a fraud penalty shall be added '[i]f any part of the deficiency or an excessive claim for credit is due to fraudulent intent to evade a tax . . . .' The alleged 'deficiency' in this case arose before the audit and before the submission of the CSA that respondent claims was fraudulent. Accordingly, the statute was simply not applicable.

As in *Beacon*, all of the alleged fraudulent activity took place during or after the audit, while the deficiency arose before the audit. Though Respondent also argued that inclusion of the compensation excluded from Petitioner's SBT returns on its federal and other state returns justified the fraud penalty, this did not serve as the basis of its decision to impose the same; Respondent's auditor added the penalty because the "taxpayer acted in a manner to commit fraud by knowingly and willfully changing the client service agreements provided to the 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 the amount of tax due."[60] Further, Thirman's affidavit states that it was his "understanding that under the Single Business Tax Act ("SBTA"), a payroll services company should exclude the client's employees from the calculation of the payroll services company's SBT tax base," which explains the inconsistency of the filings and the manner in which they were prepared. Accordingly, the Tribunal holds that the 100% fraud penalty is inapposite.

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Immediate Consideration is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion in Limine is PARTIALLY GRANTED.

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[60] R014, Audit Report of Findings.

IT IS FURTHER ORDERED that Final Assessment Q746377 is MODIFIED as set forth in the Introduction section of this Final Opinion and Judgment.

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

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.

This Final Opinion and Judgment resolves the last pending claim and closes this 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.[61] 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.[62] A copy of the motion must be served on the opposing party by mail or personal service or

[61] See TTR 261 and 257.
[62] See TTR 217 and 267.

by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[63] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[64]

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."[65] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[66] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[67]

By David B. Marmon

Entered: October 23, 2018

[63] See TTR 261 and 225.
[64] See TTR 261 and 257.
[65] See MCL 205.753 and MCR 7.204.
[66] See TTR 213.
[67] See TTR 217 and 267.