Kyle D Crossman,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MOAHR Docket No. 17-005055

Michigan Department of Treasury,
Respondent.

Presiding Judge
Steven M. Bieda

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment ("POJ") on June 14, 2019. The POJ states, in pertinent part, "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing, by mail or by electronic filing, if available,** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

On July 5, 2019, Petitioner filed exceptions to the POJ. In the exceptions, Petitioner states that Tribunal incorrectly concluded that Petitioner was responsible for J&K's 2010 sales tax liabilities because its sales and use tax returns were filed on a monthly basis and its December 2010 return would have been due no later than January 20, 2011. This was prior to the point where the Tribunal determined that Petitioner was a "responsible person." The Tribunal erred when it determined that Petitioner willfully failed to pay J&K's sales tax liabilities because (1) Shatonya Wilkins testified that there was not intentional conduct from anyone at J&K and no evidence that J&K's corporate officers knew or had reason to know about the tax liabilities resulting from the audit, (2) Petitioner was unaware of the liabilities until the April 20, 2015 final audit determination letter, and (3) Petitioner knew of the obligation after the final assessment was issued on June 16, 2015, but this does not coincide with the "time period of default," which ended, at the latest, two years before the final audit determination letter. The Tribunal erroneously determined that J&K operated as a retailer because it operated as a service company and was thus only required to pay six percent of the cost of materials used because it operated as a real property contractor. The Tribunal failed to instruct Respondent to revise the final assessments to account for payments Petitioner already made. The Tribunal placed undue weight on Wilkins's testimony that the 2009 and 2010 federal income tax returns accurately reflected cost of goods sold and that she could not accurately calculate cost of goods sold. The cost of goods sold calculation on a federal return includes the cost of labor, but that number is excluded from Respondent's formulas when calculating sales or use tax. The Tribunal disregarded rebuttal evidence

that Petitioner testified that J&K included overhead and profit in the cost of labor when it quoted jobs to customers. This explains the discrepancy between the cost listed in J&K's software and the actual cost of used materials.

On July 18, 2019, Respondent filed a response to the exceptions. In the response, Respondent states that Petitioner is attempting to reargue contentions addressed at the hearing. Taxpayers that pay sales tax monthly must still file an annual return under MCL 205.54(5) and those returns are due February 28. The taxes at issue did not become due at the time of the final assessment. Rather, they became due on their due date. The auditor did not use final transaction prices in the audit, but attempted to "back out" labor costs based on J&K's federal returns. Petitioner has been provided with an account summary of Petitioner's tax liabilities, including payments. Respondent has provided Petitioner information that Petitioner's payments have been applied. The finder of fact may make credibility determinations of witnesses and the Administrative Law Judge was justified in seeking corroboration beyond Petitioner's statements.

The Tribunal has considered the exceptions, response, and the case file and finds that the Administrative Law Judge ("ALJ") properly considered the testimony and evidence submitted in the rendering of the POJ. More specifically, the ALJ concluded that Petitioner became a "responsible person" on February 9, 2011. The "time period of default" is "the tax period for which the business *failed to file the return* or pay the tax due under subsection (5) and through the later of the date set for the filing of the tax return or making the required payment."[1] Annual sales tax returns are due February 28 after the close of the tax year.[2] The annual sales tax return for 2010 was thus due on February 28, 2011, after the time Petitioner became a responsible person. With respect to Petitioner's argument that it was a service company, as the ALJ explained, citing IPD 2005-3 and RAB 2016-18, the policy of the State of Michigan is that it treats contractors that collect sales tax as liable for sales tax when they "consistently hold themselves out to the public as retailers, and therefore collect and remit sales tax pursuant to the sales tax act. . . ."[3] The reason behind this policy is that the State will receive at least as much sales tax as use tax.[4] The evidence provided, including the testimony of Wilkins that J&K collected and reported sales tax,[5] shows that Petitioner collected sales tax and thus treating J&K as a retailer was appropriate. Petitioner's arguments concerning the appropriate source for cost of goods sold misapprehends the Tribunal's reasoning in the POJ. This section addressed whether J&K's liability would have been different if it were appropriate to calculate the liability under the use tax. The Tribunal explained that the cost of goods sold as reported on J&K's returns for 2009 and 2010 were $1,172,916.00 and $1,827,221.00, respectively, and that based on these numbers, the use tax would have been higher than what J&K actually paid. The Tribunal accepted these figures as the cost of goods sold based on Wilkins's testimony that labor and materials were

[1] MCL 205.27a(15)(c) (emphasis added).
[2] See Michigan Department of Treasury, *Filing Deadlines*, <https://www.michigan.gov/taxes/0,4676,7-238-43519_43522---,00.html> (last accessed July 30, 2019).
[3] Rev Admin Bull 2016-18, p 14.
[4] Rev Admin Bull 2016-18.
[5] Tr, 128.

improperly entered, misclassified, and/or overstated, and noted that Petitioner had failed to provide contrary evidence. Petitioner points to his testimony that the discrepancy between the cost of goods sold in the job costing software and cost of goods sold on the invoice was because J&K included overhead and profit on quotes. However, this testimony was merely speculative, as Petitioner stated "[t]he only reason I can think of is my understanding, from listening to the testimony is they kept referring to cost of labor that was removed."[6] Even if the Tribunal's determination that Petitioner failed to rebut Respondent's evidence of cost of goods sold was erroneous, that error would be *de minimis* given that the Tribunal properly determined that J&K's tax liability was properly calculated under the sales tax formula, not the use tax formula.

The Tribunal has the authority to affirm, reverse, or modify the "final decision, finding, ruling, determination, or order" of Respondent.[7] At issue in this proceeding is whether the assessments were proper and whether Petitioner is personally liable. Ordering Respondent to take into account any payments already made by Petitioner is outside the scope of the Tribunal's authority because it has nothing to do with Petitioner's liability, only whether he has satisfied that liability.

Given the above, Petitioner has failed to show good cause to justify the modifying of the POJ or the granting of a rehearing.[8] As such, the Tribunal adopts the POJ as the Tribunal's final decision in this case.[9] The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the POJ in this Final Opinion and Judgment. As a result:

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

Assessment Number: UJ56940

Taxes	Interest	Penalties
$134,282.00	$37,327.63	$0.00

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

Assessment Number: UJ56940

Taxes[10]	Interest	Penalties
$100,893.00	$36,272.00	$0.00

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

[6] Tr, 192.
[7] MCL 205.732(a).
[8] See MCL 205.762.
[9] See MCL 205.726.
[10] In response to the Tribunal's August 1, 2019 Order Requiring information, Respondent provided documentation on August 14, 2019 recalculating the sales tax and interest due as a result of the Tribunal's determination that Petitioner was not a responsible person until February 9, 2011.

Judgment within 20 days of entry 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.[11] 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.[12] 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.[13] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[14]

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."[15] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[16] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[17]

By 

Entered: August 20, 2019
wmm

[11] See TTR 261 and 257.
[12] See TTR 217 and 267.
[13] See TTR 261 and 225.
[14] See TTR 261 and 257.
[15] See MCL 205.753 and MCR 7.204.
[16] See TTR 213.
[17] See TTR 217 and 267.

Kyle D Crossman,
Petitioner,

v

Michigan Department of Treasury,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 17-005055

Presiding Judge
Peter M. Kopke

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Kyle D. Crossman, appeals Final Assessment No. UJ56940 levied by Respondent, Michigan Department of Treasury, on October 11, 2017. The Final Assessment established that Petitioner owes sales tax in the amount of $134,282 plus interest for the period 11/1/2008 to 10/31/2012. Daniel Weininger and Sheldon Mandelbaum, Attorneys, represented Petitioner. James A. Ziehmer, Assistant Attorney General, represented Respondent.

A hearing on this matter was held on March 19, 2019. Petitioner's witnesses were Kyle Crossman, Julie Lanzesira, Alexander Lusk, Ryan Dailey, Shatonya Wilkins, and Kimberly Knoll. Respondent did not present any witnesses.

Based on the evidence (i.e., testimony and documentation) and case file, the Tribunal finds that:

1. Petitioner is **not** personally liable under MCL 205.27a for taxes that were required to be paid **prior to February 9, 2011** and any interest or penalties relating to the non-payment of taxes prior to that date. [Emphasis added.]

2. Petitioner **is personally liable** under MCL 205.27a for taxes that were required to be paid **on or after February 9, 2011** and any interest or penalties relating to the non-payment of taxes on or after that date. [Emphasis added.]

3. The underlying assessment is correct. Nevertheless, Respondent is required to revise that assessment to reflect **only** those taxes not paid on or after February 9, 2011 **and** any interest or penalties relating to the non-payment of taxes on or after that date. [Emphasis added.]

FINDINGS OF FACT

The following facts were proven by a preponderance of the evidence (i.e., testimony and admitted exhibits) and concern only the evidence and inferences found to be significantly relevant to the legal issues involved:[1]

1. Respondent issued Final Assessment No. UJ56940 to J & K Mechanical Inc. on June 16, 2015.
2. Payment on Final Assessment No. UJ56940 was due on or before July 21, 2015.
3. Respondent issued Final Assessment No. UJ56940 to Petitioner pursuant to MCL 205.27a on October 11, 2017.
4. The tax period at issue is 11/1/2008 to 10/31/2012.
5. Petitioner was a corporate officer (vice president) of J & K Mechanical before, during, and after the tax period at issue.
6. Petitioner signed some tax related documents for J & K Mechanical beginning in 2011.
7. Petitioner signed a power of attorney on behalf of J & K Mechanical on February 9, 2011.
8. Petitioner signed a check in payment of Michigan taxes on behalf of J & K Mechanical on April 28, 2011.
9. Petitioner signed an installment agreement with Treasury for unpaid taxes on behalf of J & K Mechanical in 2011.
10. Petitioner signed two Michigan Offers in Compromise on behalf of J & K Mechanical on April 17, 2015 and February 23, 2016.

ISSUES AND CONCLUSIONS OF LAW

The issues in this matter are:

Whether Petitioner is a "responsible person" and liable for the tax debts of the business and whether the underlying assessment is correct.

In that regard, MCL 205.27a(5) provides, in pertinent part:

> **If a business liable for taxes administered under this act fails**, for any reason after assessment, **to file the required returns or to pay the tax due**, any of its officers, members, managers of a manager-managed limited liability company, or partners **who the department determines**, based on either an audit or an investigation, **is a responsible person is**

[1] The Tribunal has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to these findings.

> **personally liable for the failure for the taxes** . . . . A responsible person **may** challenge the validity of an assessment to the same extent that the business could have challenged that assessment under sections 21 and 22 when originally issued. The department **has the burden to first produce prima facie evidence** as described in subsection (15) **or establish a prima facie case** that the person is the responsible person under this subsection through establishment of all elements of a responsible person as defined in subsection (15).[2]

A "responsible person" is "an officer, member, manager of a manager-managed limited liability company, or partner for the business who controlled, supervised, or was responsible for the filing of returns or payment of any of the taxes . . . during the time period of default and who, during the time period of default, willfully failed to file a return or pay the tax due . . . ."[3] MCL 205.27a(15)(b) further states that

> The signature, including electronic signature, of any officer, member, manager of a manager-managed limited liability company, or partner on returns or negotiable instruments submitted in payment of taxes of the business during the time period of default, is prima facie evidence that the person is a responsible person. A signature, including electronic signature, on a return or negotiable instrument submitted in payment of taxes after the time period of default alone is not prima facie evidence that the person is a responsible person for the time period of default but may be considered along with other evidence to make a prima facie case that the person is a responsible person.[4]

"Time period of default" is defined as "the tax period for which the business failed to file the return or pay the tax due under subsection (5) and through the later of the date set for the filing of the tax return or making the required payment."[5] "Willfully" is defined to mean that "the person knew or had reason to know of the obligation to file a return or pay the tax, but intentionally or recklessly failed to file the return or pay the tax."[6] A "negotiable instrument" is "a written instrument that (1) is signed by the maker or drawer, (2) includes an unconditional promise or order to pay a specified sum of money,

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[2] *Id*. (Emphasis added).
[3] See MCL 205.27a(15)(b).
[4] *Id*.
[5] See MCL 205.27a(15)(c).
[6] See MCL 205.27a(15)(d).

(3) is payable on demand or at a definite time, and (4) is payable to order or to bearer."[7] There are various types of such instruments, including "bills of exchange, promissory notes, bank checks, certificates of deposit, and other negotiable securities."[8]

Finally, the Michigan Court of Appeals in *Kostyu v Dep't of Treasury* held that "the Tax Tribunal has authority to allocate the burden of proof in a manner consistent with the legislative scheme."[9] The Court further stated:

> Although the revenue statute at issue . . . does not state which party has the burden of proof, **imposing the burden on the taxpayer is consistent** with the overall scheme of the tax statutes and the Legislature's intent to give the Department a means of basing an assessment on the best information available to it under the circumstances.[10]

Here, Respondent, in support of its position that Petitioner is a responsible person within the meaning of MCL 205.27a(15)(b), relies on Petitioner's responses to its Requests for Admission, in which Petitioner admitted that he was a corporate officer of J & K Mechanical before, during and after the tax period at issue, that he signed some tax related documents on its behalf beginning in 2011, and that he signed all of the following: (1) a power of attorney form, (2) a check in payment of Michigan taxes, (3) an installment agreement with Treasury for unpaid taxes, and (4) two Michigan Offers in Compromise. The Offers in Compromise were executed in 2015 and 2016, but the Power of Attorney form, check, and installment agreement were all executed in 2011. Inasmuch as the latter two documents are negotiable instruments submitted during the relevant tax period, the Tribunal finds that Respondent has met its burden of producing prima facie evidence that Petitioner is a "responsible person" under MCL 205.27a(15)(b). Although Petitioner's Counsel made a point of noting that this evidence and the associated conduct relates only to remediation of a delinquency, the Tribunal

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[7] See NEGOTIABLE INSTRUMENT, Black's Law Dictionary (10th ed. 2014). "When determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate." *Title Office, Inc v Van Buren Co Treasurer,* 469 Mich 516, 522; 676 NW2d 207 (2004).
[8] *Id*.
[9] See *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988) citing *Zenith Industrial Corp v Dep't of Treasury,* 130 Mich App 464; 343 NW2d 495 (1983).
[10] See *Kostyu*, supra at 130 citing *Vomvolakis v Dep't of Treasury*, 145 Mich App 238; 377 NW2d 309 (1985), *lv den* 424 Mich 887 (1986) (emphasis added).

finds this fact irrelevant under the plain language of the statute,[11] which requires nothing more than a signature on the specified documents, submitted during the relevant timeframe. As noted by the Michigan Court of Appeals:

> Prima facie evidence is evidence which, if **not** rebutted, is **sufficient by itself** to establish the truth of a legal conclusion asserted by a party. *People v Licavoli,* 264 Mich 643, 653; 250 NW 520 (1933). Statutory language making proof of one fact prima facie evidence of another fact is analogous to a statutory rebuttable presumption. See, e.g., *Raptis v Safeguard Ins Co,* 13 Mich App 193, 199; 163 NW2d 835 (1968).
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> In civil matters, a presumption operates to shift the burden of going forward with the evidence. *McKinstry v Valley Obstetrics–Gynecology Clinic, PC,* 428 Mich 167, 180; 405 NW2d 88 (1987). In *Widmayer v Leonard,* 422 Mich 280, 289; 373 NW2d 538 (1985), our Supreme Court stated:
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> 'It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.
>
> []Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence.'[12]

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[11] As stated by the Court of Appeals in *Spartan Stores, Inc v City of Grand Rapids*, 307 Mich App 565, 569; 861 NW2d 347 (2014):

> The primary goal of statutory interpretation "is to discern and give effect to the intent of the Legislature." *Lafarge Midwest, Inc v Detroit,* 290 Mich App 240, 246; 801 NW2d 629 (2010). "When ascertaining the Legislature's intent, **a reviewing court should focus first on the plain language of the statute in question** . . . . " *Fisher Sand & Gravel Co v Neal A. Sweebe, Inc,* 494 Mich 543, 560; 837 NW2d 244 (2013) (citations omitted). The contested portions of a statute "must be read in relation to the statute as a whole and work in mutual agreement." *US Fidelity & Guarantee Co v Michigan Catastrophic Claims Ass'n (On Rehearing),* 484 Mich 1, 13; 795 NW2d 101 (2009).

[12] See *Am Cas Co v Costello*, 174 Mich App 1, 7; 435 NW2d 760 (1989) (emphasis added).

As such, there is no dispute that Petitioner was an officer who controlled, supervised, or was responsible for the filing of returns or payment of J & K's taxes as of February 9, 2011.

Nevertheless, Petitioner contends that he is not a "responsible person" because he did not control, supervise, or have responsibility for the filing of returns or payment of taxes prior to that date, and because there is no evidence establishing that he "willfully" failed to pay the tax that was the subject of the audit. With respect to the former argument (i.e., prior to February 9, 2011), the Tribunal agrees. More specifically, Petitioner did not assume responsibility for the filing and payment of J & K's taxes until February 9, 2011, and, as a result, he cannot be held personally liable for taxes that were required to be filed or paid prior to that date.[13] Annual sales and use tax returns must be filed and paid no later than February 28th each year and Petitioner is therefore liable, if at all, only for deficiencies relating to the 2010 (which would have been filed February 2011) and subsequent tax years. As for the latter argument, Petitioner's reliance on the purported lack of evidence is misplaced because he was required to provide affirmative evidence establishing the lack of any willfulness to file and/or pay in light of Respondent's establishment of a prima facie case that he was a responsible person under the statute. Petitioner's Counsel did point to Ms. Wilkins' testimony and

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[13] See *Shotwell v Dep't of Treasury*, 305 Mich App 360, 853 NW2d 414 (2014), *judgment vacated in part, appeal denied in part,* 497 Mich 977, 860 NW2d 623 (2015), wherein the Court of Appeals held that:

> an officer may only be held personally liable when he or she controlled, supervised, or was responsible for filing returns or paying taxes during 'the time period of default,' which consists of the relevant tax period extending to 'the later of the date set for the filing of the tax return or making the required payment.' Conversely, it follows that an individual who did not control, supervise, or bear responsibility for filing returns or paying taxes during the relevant timeframe may not be held personally liable. Thus, an officer assuming his or her position after taxes come due and after the date for filing the return has passed, is not a responsible person for the corporation's failures in respect to these obligations and is, therefore, not personally liable under § 27a(5). Applying this conclusion to petitioner's case, the date for the collection and reconciliation of the equity assessment owed under the TPTA is April 15 of the applicable tax year, meaning that the sums PTT owed for the 2006 and 2007 equity assessments were due on April 15, 2007, and April 15, 2008, respectively. MCL 205.426d(4). Because petitioner's appointment as president occurred in 2010, long after the date for making the required payments had passed, she cannot be held personally liable on the basis of her official appointment as president of PTT. [*Id*. at 369–70.]

audit report, wherein she stated that she found no intentional conduct from anyone at J & K and noted the lack of a penalty for willful failure to file or pay. Pursuant to the above definition, however, conduct does not need to be intentional or deliberate and actual knowledge is not required. Rather, it is sufficient if an individual had reason to know of the obligation to file a return or pay the tax. Similarly, failure to file or pay need not be intentional, recklessness will suffice. And while Counsel also pointed to Mr. Crossman's testimony that he did not know that these liabilities existed until the final determination letter was issued in 2014, he clearly knew of the obligation to pay the tax after the final assessment was issued on June 16, 2015 and failed to explain or even address the failure to pay the final assessment, which was issued at a time when he was responsible for filing returns and payment of taxes and fell within the "time period of default."

As for the underlying audit, the Tribunal notes that assessments levied under the General Sales Tax Act ("GSTA") are considered prima facie correct, and that the burden of refuting such assessments is on the taxpayer.[14] Taxpayers are required to keep "an accurate and complete beginning and annual inventory,"[15] and "the Legislature has granted the department wide discretion in the selection of auditing methods."[16] The taxpayer is required to establish, by way of sufficient and reliable evidence, actual inaccuracy in the audit results.[17] Petitioner's primary argument in this case is that Respondent used an incorrect formula and that it should have calculated the tax as 6% of the cost of goods sold or of the materials that are used on a job. In support, Petitioner cites Internal Policy Directive (IPD) 2005-3, Revenue Administrative Bulletin (RAB) 2016-18, and the audit conducted by Alexander Lusk for the 2014-2016 tax years.

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[14] "If the taxpayer fails to file a return or to maintain or preserve sufficient records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on an indirect audit procedure or any other information that is available or that may become available to the department. That assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer." MCL 205.68(4).

[15] MCL 205.68(1).

[16] *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 42; 703 NW2d 822, 838 (2005). See also *Vomvolakis v Dep't of Treasury*, 145 Mich App 238; 377 NW2d 309 (1985).

[17] *Id*. at 42.

Pursuant to IPD 2005-3,

> . . . real property contractors that consistently hold themselves out to the public as retailers, and who consistently collect and remit sales tax in a manner consistent with the General Sales Tax Act . . . are liable for sales tax on the appropriate 'sales price' measurement of those sales as though the contractor were making 'sales at retail' within the meaning of the General Sales Tax Act.[18]

The directive further states:

> A real property contractor is statutorily considered a consumer of the materials used in the activities of constructing, altering, repairing, or improving real estate for others. Its sales and use tax obligation is generally . . . 6% of the cost of materials used in the job.
>
> This policy of allowing contractors who consistently hold themselves out as retailers to treat themselves as retailers who are making sales at retail is grounded in the fact that the State of Michigan will receive at least as much sales tax revenue from the contractor as it would receive should the contractor pay sales or use tax on its purchases. IT IS IMPORTANT TO NOTE THAT WHERE THIS IS NOT THE CASE THE ADMINISTRATIVE POLICY WILL NOT BE FOLLOWED.[19] [Emphasis in the original.]

RAB 2016-18 similarly states:

> Contractors that consistently hold themselves out to the public as retailers, and therefore collect and remit sales tax pursuant to the sales tax act, are liable for sales tax based on the sales price of the property. However, if the amount remitted as sales tax from the contractor is less than the amount that would be remitted if the contractor paid sales or use tax on its purchases in performing its contracts, the contractor is liable for the difference.

Petitioner interprets these publications to mean that so long as a contractor who is remitting taxes to the State for sales or use tax uses a formula of six percent of the cost of material used on the job, they have satisfied their obligations and their liabilities to the State. The Tribunal disagrees, as the publications clearly state that it is the policy of the Department of Treasury to treat contractors that consistently hold themselves out

[18] *Id*.
[19] *Id*.

to the public as retailers and consistently collect and remit sales tax are liable for sales tax notwithstanding that they are statutorily considered consumers of the materials used in the job and would otherwise be liable for use tax. The publications further state that this policy is grounded in the fact that the State will receive **at least as much** sales tax as it would if the contractor were paying use tax. Consequently, the sales tax cannot be less than what would be owed in use tax, but it can be more. Despite Petitioner's assertion to the contrary, use tax provides a baseline measure of liability in these circumstances, not a cap. As such, and inasmuch as the admitted exhibits and the testimony provided by both Petitioner and Respondent's auditor, Shatonya Wilkins, establish that Petitioner consistently collected and reported sales tax, Respondent's use of a sales tax formula was appropriate. Even assuming that a use tax formula should have been utilized, Ms. Wilkins testified that Petitioner's use tax liability would have been more than the $65,000 that they paid based upon her review of the cost of goods sold reported on the federal income tax returns.[20] This testimony is supported by the admitted returns for the 2009 and 2010 tax years, which indicated the cost of goods sold as $1,172,916 and $1,827,221, respectively. Ms. Wilkins also testified that she did not use the cost of goods sold as identified in J & K's records because labor and materials were improperly entered, misclassified, and/or overstated.[21] More importantly, Petitioner failed to provide any evidence to the contrary, and the Tribunal cannot, therefore, find that Respondent erred in its determination. The same is true of the labor deductions, which were disputed, but unrefuted.[22]

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[20] TR at 130.
[21] TR 165-171.
[22] With respect to the labor deductions, the Audit Report states as follows: "The taxpayer does not agree with Audit Determination. The taxpayer states that the labor/service allowance is not accurate. Auditor allowed an extended amount of time for the taxpayer to provide documentation to the contrary. An Information and Document Request was sent on 1-11-2013 asking for the taxpayer to provide the information that was used in accruing and submitting sales tax payments; however the taxpayer did not provide information. The auditor sent on 8-26-2013 another Information and Document Request for documentation to verify labor, exempt sales/services and bad debt deductions. The taxpayer provided the auditor with Federal 941's for 2008-2010. The auditor determined that this information was not sufficient for verifying allowable labor deduction. The taxpayer could not provide any other information to verify or determine labor deduction. The Auditor met with taxpayer's attorney several times to discuss what information would reduce the deficiency. The auditor explained to the taxpayer that sales/use tax should have been paid for all materials used during construction jobs in Michigan. The determination is reflective of tax that should have been paid on these materials." *Id*.

Based on the above, the Tribunal concludes that Petitioner's liability for the assessment at issue is as indicated in the Introduction Section of this Proposed Opinion and Judgment (POJ).

PROPOSED JUDGMENT

This is a proposed decision and not a final decision.[23] As such, no action should be taken based on this decision. After the expiration of the time period for the opposing party to file a response to the exceptions, the Tribunal will review the case file, including the POJ and all exceptions and responses, if any, and:

1. Issue a Final Opinion and Judgment (FOJ) adopting the POJ as the final decision.
2. Issue an FOJ modifying the POJ and adopting the Modified POJ as the final decision.
3. Issue an Order vacating the POJ and ordering a rehearing or such other action as is necessary and appropriate.

EXCEPTIONS

This POJ was prepared by the Michigan Administrative Hearings System. The parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing, by mail or by electronic filing, if available,** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions).

Exceptions are **limited** to the evidence submitted prior to or at the hearing and any matter addressed in the POJ. There is no fee for filing exceptions and the opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions.[24]

Exceptions and responses filed by *e-mail or facsimile* will **not** be considered in the rendering of the Final Opinion and Judgment.

A copy of a party's written exceptions or response **must** be sent to the opposing party **by mail or email, if** email service is agreed upon by the parties**,** and proof must be submitted to the Tribunal demonstrating that the exceptions or response were served on the opposing party.

Entered: May 14, 2019 By Peter M. Koglin

pmk/ejg

[23] See MCL 205.726.
[24] See MCL 205.762(2) and TTR 289(1) and (2).