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

Paul A. Snow,
Petitioner,

v

MTT Docket No. 304542
Assessment No. J067905

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner appeals Respondent's Assessment No. J067905 for single business tax liability for the period December 1993 through December 1996. Petitioner filed an appeal with the Tribunal on February 20, 2004. A hearing was held on January 25, 2008. Petitioner represented himself. Respondent was represented by Michael R. Bell, Assistant Attorney General.

BACKGROUND

On January 10, 1994, Respondent sent an "Inquiry concerning Michigan Single Business Tax" to Petitioner notifying Petitioner that Respondent was in possession of information from the Internal Revenue Service that indicated Petitioner may be subject to the single business tax for tax years 1988 through 1992. Petitioner responded with questions and on March 30, 1994, Respondent sent a request to Petitioner for his US-1040 and Schedule C for the years at issue. On April 4, 1994, Petitioner responded that he was "not an 'independent contractor' nor an 'insurance agent' but rather a regular 'common-law employee'"[1] and not subject to the single business tax.

[1] Letter dated April 4, 1994 to Respondent from Petitioner

On November 27, 1995, Respondent sent Petitioner an "Inquiry concerning Michigan Single Business Tax" for the review period, December 31, 1990 through December 31, 1994 and requested copies of Petitioner's federal schedule C for calendar years 1990 through 1994. In a letter dated November 28, 1995, Petitioner stated that he was "not an 'independent contractor' nor an 'insurance agent' but rather a regular 'common-law employee.'"[2] On November 10, 1997, and February 20, 1998, Respondent sent Petitioner a third and fourth "Inquiry concerning Michigan Single Business Tax" requesting copies of Petitioner's Schedule C for calendar years 1993 through 1996. On November 13, 1997 and February 28, 1998, Petitioner sent letters in response to Respondent's inquiries stating that he was not subject to the single business tax.

On March 3, 1998, Respondent informed Petitioner that "[b]ased on the gross receipts that you received as a statutory employee… for 1993 through 1995, you are required to file a Single Business Tax return." Respondent's letter stated that if returns were filed, penalties would be waived. Respondent further informed Petitioner that returns for the 1988 through 1992 tax years were also expected if gross receipts thresholds were exceeded and failure to respond would result in the issuance of a Notice of Intent to Assess. On March 6, 1998, Petitioner's manager sent a letter to Respondent stating that The Equitable was Petitioner's employer. On March 11, 1998, Petitioner requested a day 30 extension in which to file the "multiple years of SBT returns" and asked for an information conference. On April 27, 1998, Respondent issued an Intent to Assess in the amount of $9,636.00, for single business tax plus interest for tax years 1993, 1994, 1995, and 1996.

[2] Letter dated November 28, 1995 to Respondent from Petitioner

On May 18, 1998, Petitioner filed a request for an informal conference. On November 25, 1998, Respondent sent Petitioner a letter stating "based upon further research of the statutory employee issue, we have placed your account in an abeyance status…. Your conference will be delayed awaiting that decision."

A notice of conference, dated June 24, 2003, was sent to Petitioner scheduling an informal conference for August 13, 2003. Respondent issued its Decision and Order of Determination of Petitioner's liability for single business tax for tax years 1993, 1994, 1995, and 1996 on January 30, 2004. Respondent issued a Final Assessment on February 10, 2004. Petitioner filed a petition with the Tribunal appealing that Final Assessment on February 14, 2005.

The tax, interest, and penalty due as assessed by Respondent herein appealed are:

Assessment No. J067905

	1993	1994	1995	1996
Tax	$ 1,784.00	$ 2,284.00	$ 2,784.00	$ 2,784.00
Interest	$ 1,487.47*	$ 1,731.77*	$ 1,848.31*	$ 1,584.75*
Penalty	$ 0	$ 0	$ 0	$ 0
TOTAL	$ 3,271.47	$ 4,015.77	$ 4,632.31	$ 4,368.75

*Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122. The interest is computed as of 7/18/07.

PETITIONER'S POSITION

Petitioner offered the following exhibits:

P-1 Letter dated 2/13/2007 from Paul Stephan, Assistant Vice President, Equitable
P-2 Letter dated 3/11/1998 from Petitioner to Respondent
P-3 Letter dated 3/6/1998 from Paul Stephan, Manager, Equitable
P-4 The Equitable Life Assurance Society of the U.S. Contract dated 12/1/1981
P-5 Letter from Petitioner's CPA and Schedule C with respect to tax year 1996

P-6 Notice of Conference from Elizabeth P. Neuhoff, Michigan Department of Treasury Referee dated 6/24/2003
P-7 Letter dated 11/25/1998 from June Summers Haas, Michigan Department of Treasury, to Paul and Leisa Snow

All exhibits except Exhibits P-1 and P-3 were admitted without objection. The admission of Exhibits P-1 and P-3 were qualified and limited as the author of the documents was not available for cross-examination as to the content and accuracy of the statements.

Petitioner testified that the "single business tax is to impose a tax upon the privilege of conducting business activity . . . a consumption type value added tax. . . . imposed . . . upon the privilege of doing business in the State of Michigan and not upon income."[3] Petitioner asserts that Respondent is attempting to tax his income under the single business tax but he does not have business activity in the state. Petitioner asserts that "the act says business activity shall not include the services rendered by an employee this employer and that's what I'm suggesting that I am. I'm an employee. . .."[4] Petitioner testified that mandatory federal income tax was withheld from only part of his income. As "a senior district manager . . . I get a base salary. I have override compensation on many, many reps that I supervise. . . and all that income . . . did, in fact, have mandatory federal and state withholding and both salary and the override were treated that way."[5] Some of his income was designated as earned as a statutory employee and only FICA was withheld, not federal or state taxes, on that compensation.

[3] Transcript page 10, ll 3-9
[4] Transcript page 10, l 23- page 11, l 1
[5] Transcript page 11, ll 17-25

Petitioner asserted that he was a "common law employee."[6] Petitioner contends that he meets the "common law tests . . . for determining whether there is an employer-employee relationship"[7] as his employer, "the person for whom the services are performed has the right to control and direct the individual. . . not only as to the result to be accomplished but also as to the details and means. . . [he] is subject to the control or direction of another."[8] Petitioner points out that, in determining if there is an employer-employee relationship based upon common law tests, "it is not even necessary that the [employee] actually direct or control the manner in which the services are performed. It is sufficient that he has the right to do so. The right to discharge is also another important factor."[9] In further support of his contention that he meets the criteria of a common law employee, Petitioner testified that he had a full benefit package, a noncontributory cash balance pension plan and matching 401(k) plan. His employer provided "a secretary, my office, all related equipment. . . My employer can terminate my employment and support at any time if I'm not meeting . . . their directives."[10] Petitioner testified further that his compensation was included in the single business tax base of his employer and to tax him separately and additionally on the same compensation would be "double dipping."[11]

On cross examination, Petitioner testified that he worked during the tax years at issue, and continues to work, for The Equitable. He was a District Manager and subsequently, Senior District Manager. His position required him to "recruit, hire, train, work jointly with, sell

[6] Transcript page 12, ll 1-2
[7] Transcript page 13, ll 3-5
[8] Transcript page 13, ll 9-16
[9] Transcript page 14, ll 6-10
[10] Transcript page 15, ll 1-13
[11] Transcript page 16, l 23

products, supervise, manage an office, secretarial staffing . . ."[12] Petitioner testified that there was a contract that "lays it out. . . I cannot tell you how many managers I've seen terminated based on lack of performance and delivering the results that are expected."[13] Petitioner testified that "a vice president who's in Detroit. . . regularly evaluates [his] performance"[14] and there was "constant. . . pressure and expectation that you will perform and there's reports that need to be filed and filled and how many recruits . . . how many have you talked to, how many have you interviewed, . . . what stage of development are they."[15] Petitioner explained that he was a manger for western Michigan, he had a manager who manages his activity in Detroit, the regional president is in Chicago, the "boss throughout the Midwest. . . a national manager then in New York."[16] Petitioner testified in response to questions from Respondent that he is required to have an office and the "New York office"[17] pays the lease. The company provides the secretary and all office equipment, "computers, fax machines, again, voice mail phone system. . . copiers."[18] Additionally, The Equitable pays the salary of the secretaries at the office and if Petitioner was not satisfied with a secretary's performance, he "would have to go through a procedure"[19] to put someone on probation and that "has to be approved ultimately by New York."[20] Petitioner is required to use only company sales literature in sales presentations and there "is nothing we can create ourselves."[21]

[12] Transcript page 21, ll 21-23
[13] Transcript page 27, ll 8-11
[14] Transcript page 27, ll18-19
[15] Transcript page 28, ll2-9
[16] Transcript page 29, l 20-page 30, l 2
[17] Transcript page 38, l 8
[18] Transcript page 38, ll17-18
[19] Transcript page 40, ll 19-20
[20] Transcript page 40, ll 22-23
[21] Transcript page 42, l 24

In his role as manager, Petitioner recruits insurance agents. Additionally, Petitioner testified that he rarely, if ever, actually "performed the duties of an agent going out and prospecting for . . . clients and making . . . sales of financial products."[22] The majority of Petitioner's products are "sale of lump sum distribution from pension, profit sharing, and 401(k) plans, . . . not a traditional . . . life insurance application."[23]

Petitioner testified that The Equitable issued a "policy and procedures manual. . . . updated each year"[24] that includes what his duties are "from advertising, sales literature, recruiting, sales practices, compliance, office administration. It's everything."[25] Petitioner has to sign a form that he has reviewed it and send that form to New York each year.

Respondent questioned Petitioner regarding his tax returns. Petitioner testified that "my accountant prepares it, I sign it, and that's about it."[26] Respondent showed Petitioner his Michigan income tax return for 1993 with the Schedule C[27] that was attached. Petitioner reported advertising expense of $1,341. He explained that "it may have been . . . I had a client who had a function you want to sponsor a donation"[28] but this was a personal expense and "above and beyond what the advertising the company provides for recruiting."[29] Petitioner testified that the mileage he claimed was mileage not reimbursed by the company,[30] the professional liability insurance he claimed as a deduction was for insurance in addition to the minimal level provided

[22] Transcript page 47, ll 11-15
[23] Transcript page 51, ll 2-5
[24] Transcript page 52, ll 22-25
[25] Transcript page 53, ll 7-10
[26] Transcript page 67, ll 11-12
[27] Federal Schedule for reporting profit or loss from business
[28] Transcript page 69, ll 14-16
[29] Transcript page 69, ll 21-23
[30] Transcript page 71, ll 18-21

by the company,[31] office expenses were gift, he purchased for staff,[32] and awards and prizes were incentives he used and were separate from any company program.[33]

Respondent showed Petitioner "the W-2 that has box 15 [was] checked for statutory employee."[34] Petitioner testified that he had "two types of pay. . . a base salary and override."[35] The override earnings are the wages in question and Petitioner contends "are the result of successfully doing my task as a common law employee. . . earnings for sales of products and services working joint with my guys."[36] Petitioner testified that "[t]he company designated. . . earnings as statutory because they were produced and split with agents who are statutory employees, . . . based on their system limitations they told me [they] were only able to provide me with statutory earnings the same way they provide it to the agent when I work joint with an agent."[37] Petitioner testified that he used Schedule C and not Schedule A for these expenses on the advice of his accountant who told him it was in his "best interest to do so. . . I just follow my accountant's advice."[38] Petitioner stated his accountant told him "[s]omething to the effect that if you use a Schedule A some of these small expenses. . . would not be eligible to be deducted because they have to hit a minimum threshold of a percent of your adjusted gross, which would render them nondeductible on a Schedule S. By using a Schedule C. . . the small deductions that I have would benefit me."[39]

[31] Transcript page 71, ll 16-18
[32] Transcript page 72, ll1-2
[33] Transcript page 73, l 22-page 74, l 8
[34] Transcript page 77, ll 10-11
[35] Transcript page 75, l 5
[36] Transcript page 75, ll 8-12
[37] Transcript page 77, ll 2-9
[38] Transcript page 89, ll 2-4
[39] Transcript page 89, l 25-page 90, l9

Petitioner introduced into evidence a letter from Mr. Paul Stephan, AXA Equitable New York headquarters, stating that "Paul Snow . . .is an employee of the company and his activities are controlled and reviewed by the company. He renders service solely to the company . . . and is prohibited from selling away."[40] Petitioner read from other letters,[41] also from Mr. Paul Stephan, stating that Petitioner is paid managerial compensation and "[a]dditionally, he's paid commissions which are reported on a statutory W-2. Note Equitable pays the single business tax as an employer."[42] Petitioner offered the contract he signed with the company indicating that he was to "serve them exclusively and they have authority over my activities, and they have an ability to terminate me."[43]

Petitioner asserts that, if the Tribunal finds that he is liable for the tax as assessed, he should not be subject to interest and penalties for the 5 years during which Respondent placed the case in abeyance to research his issue. Further, Petitioner asserts that if the Tribunal finds that he is liable for the tax as assessed, the 1996 tax year should not be included as his income for that year did not meet the single business tax filing threshold. Additionally, Petitioner argued that although he did use Schedule C for federal income tax purposes for the tax years at issue, it was "out of ignorance"[44] of the implications related to business taxation and he was following his accountant's advice.

RESPONDENT'S POSITION

Respondent offered the following exhibits:

R-1 The Equitable Life Assurance Society of the U.S. Contract dated December 1, 1981
R-2 Notice of Inquiry Concerning Michigan Single Business Tax, Review, dated 1/10/1994

[40] Petitioner's Exhibit P-1
[41] Petitioner's Exhibits P-2 and P-3
[42] Transcript page 93, ll 17-24
[43] Petitioner's Exhibit P-4
[44] Transcript page 18, l 6.

R-3 Letter dated 1/28/1994 to Respondent from Paul Snow
R-4 Letter dated 2/19/2004 to Tax Tribunal from Petitioner
R-5-1 Letter dated 3/30/1994 to Petitioner from Robert Burke, Auditor, Michigan Department of Treasury
R-5-2 Letter dated 4/4/1994 to Respondent from Paul Snow
R-6 Letter dated 5/21/2004 to Petitioner from Michigan Tax Tribunal
R-7 Michigan Department of Treasury Current Liability Summary as of 1/31/2005
R-8 Notice of Inquiry Concerning Michigan Single Business Tax dated 11/27/1995
R-9 Letter dated 11/28/1995 to Respondent from Petitioner
R-10 Notice of Inquiry Concerning Michigan Single Business Tax dated 11/10/1997
R-11 Letter dated 11/13/1997 to Michigan from Petitioner
R-12 Request for Single Business Tax Returns from Treasury to Petitioner dated 2/20/1998
R-13 Letter dated 2/26/1998 to Respondent from Petitioner
R-14 Letter dated 3/3/1998 from Respondent to Paul & Leisa Snow
R-15 Letter dated 3/6/1998 from Paul Stephan, Manager, Equitable
R-16 Letter dated 3/11/1998 from Petitioner to Respondent
R-17 Bill for Taxes Due dated 4/27/1998
R-18 Monthly Statement of Account as of 4/30/1998
R-19 Letter dated 5/18/1998 to Respondent from Petitioner
R-20 Letter dated 11/25/1998 from June Summers Haas, Michigan Department of Treasury, to Paul & Leisa Snow
R-21 Document from Respondent: Procedures to Follow If You Have Questions Or Wish To Appeal
R-21-1 Michigan Department of Treasury Decision and Order of Determination dated 1/30/2004
R-21-2 Informal Conference Recommendation
R-22-1 Bill for Taxes Due – Taxable period 12/1995 – 12/1996
R-22-2 Bill for Taxes Due – Taxable period 12/1993 – 12/1994
R-23 Letter dated 2/13/2007 from Paul Stephan, Equitable
R-24 1993 Michigan Income Tax Return, Schedule C, and W-2s
R-25 1994 Michigan Income Tax Return, Schedule C, and W-2s
R-26 1995 Michigan Income Tax Return, Schedule C, and W-2s
R-27 1996 Michigan Income Tax Return
R-28 Official Michigan Tax Guide, Single Business Tax 1995

Exhibits R-1, R-2, R-5-1, R-8, R-10, R-17, R-18, R-24, R-25, R-26, and R-27 were admitted without objection.

Respondent contends that Petitioner's employer classified Petitioner as a "statutory employee"[45] for a significant portion of his income, which income exceeded the filing threshold for single business tax for the tax years at issue. Respondent asserts that because "the SBTA hinges on a person's calculation of federal taxable income under the Internal Revenue Code, and the SBTA includes parallels between the two taxing schemes, the Department requires consistency . . .between claims made for federal tax purposes and for state tax purposes."[46] Respondent asserts that for the tax years at issue, The Equitable provided two separate W-2 statements, one of which classified Petitioner as an employee and showed withheld federal, state, and local taxes. The other W-2 statement indicated that Petitioner was a statutory employee and did not indicate that federal, state, or local taxes had been withheld. Respondent contends that federal withholding is required from an employee, and it can assume that Petitioner is not an employee because there was no withholding.

Respondent further argues that Petitioner used a Schedule C to report the portion of income reported on the W-2 that identified Petitioner as a statutory employee and to deduct expenses in determining adjusted gross income related to that income. Respondent asserts that only "a statutory employee or independent contractor is allowed to use Federal Form Schedule C, Profit and Loss from Business, to calculate deductions from income for federal tax purposes."[47] Employees are required to use Schedule A for itemizing deductions. Because The Equitable Company classified his employment as a 'statutory employee'. . . "[48] Petitioner cannot be a common law employee. Respondent's "position on which it issued the assessments is based on . .

[45] Respondent's Brief, page 2
[46] Respondent's Brief, page 2
[47] Respondent's Brief page 2
[48] Respondent's Brief page 2

. representations through W-2's and federal tax returns showing Mr. Snow to be considered a statutory employee. . . [that] Mr. Snow is not a common law employee. . . [and] is subject to the SBTA, individually."[49]

Respondent offered the testimony of Robert Burke, audit manager for the Michigan Department of Treasury. Mr. Burke testified that he worked in the "discovery division and basically we do . . . mass mailings. . . send out large numbers of letters . . . and then handle the responses."[50] Mr. Burke testified that he is not a "typical field auditor that goes out and audits a business."[51] Mr. Burke further testified that Respondent sent Petitioner a Notice of Inquiry Concerning Michigan Single Business Tax for tax years 1988 through 1993.[52] Mr. Burke testified that the Notice of Inquiry Concerning Michigan Single Business Tax was a document sent by Respondent, based upon information received from the Internal Revenue Service, to individuals who received compensation reported on the 1099-MISC that exceeds the single business tax gross receipts filing threshold for the tax year.[53] For the tax years at issue in this matter, Mr. Burke testified that the filing of a Schedule C generated the Notice of Inquiry. Respondent considers wages reported on a 1099-MISC for someone "who's deemed not an employee,"[54] would be considered "business income under the single business tax act."[55] Mr. Burke testified that a Schedule C "cannot be filed by employees, so we would expect anybody that filed a Schedule C. . . would be subject to the single business tax,"[56] if gross receipts exceeded the applicable filing threshold.

[49] Respondent's Brief page 17
[50] Transcript page 104, ll 18-21
[51] Transcript page 104, ll 22-23
[52] Respondent's Exhibit 2-1.
[53] Transcript page 106, ll 2-11
[54] Transcript page 111, l 2
[55] Transcript page 111, ll 5-6
[56] Transcript page 115, ll 4-8

Mr. Burke further testified that "business activity does not include services rendered by an employee to his employer. . . and [a]n individual can be an employee with. . . activity not subject to SBT and conduct a separate activity that is subject to SBT."[57]

Respondent introduced the Official Michigan Tax Guide for Single Business Tax.[58] Mr. Burke read a question and answer in the guide in reference to an insurance agent. The guide provides that "[a]n insurance agent who is an employee is not subject to SBT."[59] An insurance agent who is not an employee is subject to single business tax to the extent commissions exceed the filing threshold. Respondent uses the IRC section 3401(c) definition of employee, "any person subject to federal income tax withholding,"[60] as required by the single business tax act, to determine if a taxpayer is an employee. Further, the guide provides that "[a] person from whom an employer is required to withhold for federal income tax purposes shall prima facie be deemed an employee."[61] Respondent's position is that the employer must be required under the Internal Revenue Code to withhold federal income tax for an individual to be in an employer/employee relationship."[62]

Respondent acknowledged that, in response to Petitioner's request for an informal hearing, it issued a letter to Petitioner[63] in 1998, "saying that they're in the process of evaluating this position that treasury's taken and advising him. . . not to pay."[64] The letter advising Petitioner

[57] Transcript page 112, ll 7-15
[58] Respondent's Exhibit 28
[59] Transcript page 119, ll 10-11
[60] Transcript page 119, ll18-19
[61] Transcript page 120, ll 13-16
[62] Respondent's Exhibit 28.
[63] Petitioner's Exhibit 7
[64] Transcript page 137, ll 3-7

not to pay was dated November 25, 1998. Respondent issued a notice of informal conference dated June 24, 2003, and the final bill for taxes due was issued February 10, 2004.

In support if its position in its hearing brief, Respondent relies on Internal Revenue Code provisions, federal Revenue Rulings, and United States Tax Court cases. Specifically, Respondent relies upon *Wickum v Comm'r of Internal Revenue*[65] and *Hudack v Comm'r of Internal Revenue*.[66] *Wickum* was an income tax action in the United States Tax Court. The Petitioner appealed the Internal Revenue Service's determination that he was a common-law employee rather than a statutory employee as he claimed. The Court held that, based upon the facts and circumstances of that case, the Petitioner was not a statutory employee but was, under common-law standards, an independent contractor. The Tax Court determined, after an analysis of Petitioner's contract with the company for which he worked and the employment related costs paid for by the Petitioner and not the company, that he was an independent contractor and not an employee. The decision appears to rest on an analysis of whether the Petitioner met the qualifications of a "full-time life insurance salesman" for inclusion under the federal provisions as a statutory employee. The Court decided that he also did not meet the criteria for a common-law employee. Rather, based upon a careful review of the facts and circumstances of the case, the Petitioner was an independent contractor. The Court focuses on the standard to be used to determine if the Petitioner sold "life insurance." In the *Hudack* case, the Tax Court clearly and unequivocally states that the decision "MAY NOT BE TREATED AS PRECEDENT FOR ANY OTHER CASE. . . The decision to be entered is not reviewable by any other court, and this

[65] Respondent's Prehearing Brief, Exhibit 6
[66] Respondent's Prehearing Brief, Exhibit 7

opinion should not be cited as authority. "[67] (emphasis in original) That notwithstanding, the Tax Court in *Hudak* decided, based upon the specific facts and circumstances of that case, that the Petitioner, a life insurance salesman, was a common law employee. The Tax Court's remedy was to disallow Petitioner's use of Schedule C to report gross income and expenses. The Tax Court held that the "crucial test to determine the nature of a working relationship is the employer's right to control the manner in which the taxpayer's work is performed."[68] Additionally, the Tax Court looked at the Petitioner's investment in the facilities in which he conducted his work, the opportunity for profit or loss, the permanency of the relationship between the company and the Petitioner, the Principal's right to discharge, how integral to the business the Petitioner's work was, the relationship the parties believed they had created, and employee benefits provided and determined that the Petitioner was an employee.

Respondent also cited a third case, *Byer v Comm'r of Revenue*. This case again involved an insurance salesman who asserted that he was a statutory employee and not liable for self-employment taxes on his net earnings. The Tax Court issued the same caveat as to the nonprecedential nature of the opinion as it had in its *Hudak decision*. Again, notwithstanding that limitation, the Tax Court's decision was based upon the definition of a full-time life insurance salesman for purposes of determining if the Petitioner's business met the full-time life insurance salesman criteria under the definition of "employee" under section 3121(d) of the internal revenue code. The Court determined that he did not, but that he was engaged in self-employment activity. The Tax Court's opinion then included appropriate adjustments to the Petitioner's Schedule C.

[67] Respondent's Prehearing Brief, Exhibit 7
[68] *Hudak v Comm'r of Revenue*

Respondent argues the distinction between common law employees, statutory employee, and independent contractors. Statutory employees and independent contractors may use Schedule C, common law employees must use Schedule A. A person cannot be a statutory employee and a common law employee with respect to the same compensation. And, if Schedule C is used, the taxpayer is not a common law employee.

FINDINGS OF FACT

Petitioner worked for The Equitable for more than 20 years. He was first a District Manager and later a Senior District Manager. It is unclear whether Petitioner received two W-2 forms or a W-2 and a 1099-MISC for the tax years at issue. Neither party presented the underlying tax documents. It is not contested that Petitioner received compensation on a W-2 as an employee and Petitioner received either a W-2 or 1099-MISC for the tax years at issue indicating that he received compensation as other than an employee. Petitioner further acknowledged that he used Schedule C to report some of his income and expenses for the tax years at issue. Petitioner asserts that, despite this evidence, the facts and circumstances of his case support his claim that he is and always has been a common law employee.

For tax years 1993, 1994, and 1995, Petitioner's income reported as that of a statutory employee exceeded the single business tax filing threshold. Petitioner's income reported as that of a statutory employee for 1996, was below the single business tax filing threshold for that tax year.

The Equitable paid Petitioner a salary and override compensation, provided a "full benefit package, including life, health, dental, vision insurance, disability,"[69] a noncontributory cash balance pension plan, a matching 401(k) plan, stock option grants, and a company stock share plan. Petitioner was required to follow and implement The Equitable's policy and procedure manual, which set required office practices and days and hours of operation. Petitioner was a captive agent in that he could sell only The Equitable products. Petitioner and The Equitable had a contract that established their professional relationship. Either party could terminate that employment contract with 15 days written notice. The Equitable could "walk in any time and audit [his] files and [did] so regularly. Every time a case [was] turned in [he had] a suitability form that [needed] to be filled out, a computer validating the justification for the transaction."[70] Petitioner's clients were not his own; the clients belonged to the company. Petitioner had no ownership in the company. If Petitioner was fired, he would lose his secretary, office, and clients.

Petitioner argues that the compensation reported as that of a statutory employee was derivative income based upon his assistance with sales made by agents who were statutory employees and, that because The Equitable reported that income as statutory income to the agents, their accounting system reported that income in the same way to him. Petitioner asserts that the use of Schedule C was his accountant's decision, and both he and his accountant state that, based upon the true nature of his compensation, this was a mistake. Utilization of the Schedule C allowed Petitioner a tax advantage as he could claim deductions from income in excess of the 2% cap to

[69] Transcript page 15, ll 1-3
[70] Transcript page 15, ll 14-19

which he would have been subject if he had used a Schedule A, and the Schedule C adjustments effected adjusted gross income, while Schedule A adjustments would not.

Petitioner maintained that, regardless of the way in which his compensation was reported to the Internal Revenue Service, the duties he performed were those of a common law employee.

Respondent did not refute Petitioner's testimony and evidence that The Equitable included all compensation paid to Mr. Snow in its tax base for single business tax purposes.

CONCLUSIONS OF LAW

The single business tax is a value added tax imposed upon the privilege of doing business in Michigan.[71] The tax is levied against the adjusted tax base of taxpayers. Adjusted tax base is defined as business income or federal taxable income after statutory adjustments.[72] One of the adjustments to business income is the addition of compensation paid to employees.[73] Employees are not required to pay single business tax on compensation earned as an employee.

Section 5 of the single business tax act defines employee as "an employee as defined in section 3401(c) of the internal revenue code. A person from whom an employer is required to withhold for federal income tax purposes shall prima facie be deemed an employee."[74]

[71] MCL 208.1 *et seq*.
[72] MCL 208.9(1).
[73] M.C.L. § 208.9(5).
[74] MCL 208.5(1).

Both Petitioner and Respondent rely on IRS Publication 15-A and 26 CFR 31.3401(c)-1 in determining whether a person, who does not meet the general definition of employee under 26 USC 3401(c), is an employee based upon a common law employment relationship. 26 CFR 31.3401(c)-1(b) provides:

> (b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.
>
> . . .
>
> (d) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.
>
> (e) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like. [75]

If an employer-employee relationship exists, it makes no difference how it is labeled. The substance of the relationship, not the label, governs the worker's status.

Based upon the facts that Petitioner received year end tax forms for the tax years at issue, whether these were 1099-MISC or W-2's with the statutory employee designation, and that

[75] 26 CFR 31.3401(c)-1(b).

Petitioner filed a Schedule C for the tax years at issue, Respondent established its prima facie case that Petitioner was subject to the single business tax for that compensation for those years. Petitioner has the burden of proof to convince the Tribunal that he is a common law employee. Petitioner contends that he presented sufficient evidence to rebut that presumption and show that the true nature of the compensation he received for those years was paid to him as a common law employee.

The Michigan Court of Appeals held in *Mid America Management Corp v Dep't of Treasury*,[76] that "an individual is an employee for federal employment tax purposes if he has the status of an employee under the usual common-law rules applicable in determining the employee-employer relationship."[77]

At the outset, the Tribunal concludes that Petitioner is not a full time life insurance salesman. Thus, the statutory provisions related to persons in that occupation do not apply and are not discussed in this opinion.

The criteria outlined in the cases submitted by Respondent offer a concise enumeration of the criteria used by the courts in this analysis. The employer's right to control the manner in which Petitioner's work is performed is the crucial test. "It is not necessary for the employer to exercise control over the details of the taxpayer's work; rather, all that is necessary is that the employer

[76] 153 Mich App 446, 395 NW2d 702 (1986).
[77] *Id* at 460.

have the right to control the details of the taxpayer's work."[78] The Tax Court looks at the following criteria when determining if taxpayer is an employee:3

- The employer's right to control
- Taxpayer's investment in the facilities
- Opportunity for profit of loss
- Permanency of the relationship
- Petitioner's right to discharge
- Integral part of the business
- The relationship the parties believe they created
- Employee benefits

A court might also consider the procedures for hiring and firing staff and the extent to which the company and the taxpayer's financial and accounting processes are integrated.

IRS Publication 15-A (2009) provides additional guidance for determining whether an individual is an employee or an independent contractor under the common law. That publication requires that the relationship of the worker and the business must be examined and all information that provides evidence of the degree of control and the degree of independence must be considered. The Rules provide three categories of evidence to explore, behavior control, financial control, and the type of relationship.

Behavioral control is the inquiry into the extent to which the business has a right to direct and control how a worker does the task for which the worker is hired. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right. Key factors to examine include:

[78] *Hudack v Comm'r of Internal Revenue*

1. Instructions that the business gives to the worker, such as what workers to hire or to assist with the work, where to purchase supplies and services, when and where to do the work, or what tools or equipment to use.
2. Training that the business gives to the worker.

Financial control is the inquiry into the right the business has to control the business aspects of the worker's job including:

1. The worker's unreimbursed business expenses.
2. The extent of the worker's investment in the facilities he or she uses in performing services for someone else.
3. The extent to which the worker makes his or her services available to the others in the same market, i.e. is the worker free to seek out other business opportunities
4. How the worker is paid.
5. The extent to which the worker can realize a profit or loss.

The inquiry into the type of relationship under which the parties function includes:

1. Written contracts describing the relationship the parties intended to create.
2. Employee benefits, such as insurance, a pension plan, vacation pay, or sick pay to the worker provided by the business.
3. If a worker has an expectation that the relationship will continue indefinitely.
4. Services performed by the worker that are a key aspect of the regular business of the company indicate an employer-employee relationship.

In this case, Petitioner's employer regularly and continually evaluates his performance. He was required to fill out reports on sales results, recruiting new employees, and his joint work with new and experienced agents. The contractual arrangement between Petitioner and The Equitable outlines Petitioner's duties and that he can be fired if he failed to perform those duties. The Equitable considers Petitioner an employee of the company. Petitioner renders service solely to the company, exclusively through the company's broker-dealer, and is prohibited from selling products from any other company. Petitioner has mandated production requirements and his client files and office are subject to an annual audit by company compliance officers. The Equitable provided Petitioner with a policy and procedures manual that he, and all agents with whom he worked, were required to follow that related to sales and office management.

Petitioner's files and clients belong to The Equitable and if he were to leave the company's employment, he would leave files and clients. The totality of the evidence supports the conclusion that The Equitable had the right to control, and exercised that right to control, Petitioner's work.

Further, The Equitable is responsible for the lease of Petitioner's office space, the hiring and firing of Petitioner's staff, the purchase or lease of equipment and supplies, maintenance of telephone and fax for use by Petitioner, support staff, and insurance agents who use the office space. Petitioner does not pay to use these facilities or equipment. The deductions that Petitioner took for business expenses were to enhance his personal insurance coverage and provide gifts and incentives to the staff and agents who worked for and with him. The amount spent on these items was de minimis in comparison to the amount contributed by The Equitable for facilities, equipment, benefits, and other similar expenses. Petitioner and The Equitable believe that they have an employee-employer relationship. Petitioner works exclusively for The Equitable under an employment contract, at the will of The Equitable, and is paid for all of the work he does by The Equitable. The Equitable provides a substantial benefit package that includes life, health, dental, vision insurance, disability,[79] a noncontributory cash balance pension plan, a matching 401(k) plan, stock option grants, and a company stock share plan. The Equitable includes all of the compensation paid to Petitioner, regardless of whether it is reported on a W-2 or a 1099-MISC, in its tax base for single business tax purposes. Petitioner has worked for this company for over 20 years, which is indicative of the permanency of the relationship. The totality of the

[79] Transcript p-15, ll 1-3

evidence supports the conclusion that Petitioner meets these additional indicia of a common law employee.

Petitioner has provided sufficient credible evidence to overcome the presumption that the use of a Schedule C for the tax years at issue made Petitioner liable for single business tax. As in *Hudak v Comm'r of Revenue,* the remedy for using the wrong Schedule might be to disallow the use of that Schedule for calculating Petitioner's income tax for the tax years at issue. However, that issue is not before the Tribunal. The Tribunal concludes that, as to the assessments here at issue, Petitioner is a common law employee and Petitioner is not liable for single business tax for tax years 1993, 1994, 1995, and 1996.

IT IS ORDERED that Assessment No. J067905 is CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: May 20, 2009 By: Rachel J. Asbury