

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

Robert F. Hickey,
Petitioner,

v

MTT Docket No. 320519

Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

CORRECTED FINAL OPINION AND JUDGMENT

The Tribunal, having given due consideration to the file in the above-captioned case, finds:

1. Administrative Law Judge John S. Gilbreath, Jr. conducted a hearing in this case on October 15, 2007, and issued a Proposed Opinion and Judgment on March 17, 2009. The Proposed Opinion and Judgment stated, in pertinent part, “[t]he parties have 20 days from date of entry of this Proposed Opinion and Judgment to notify the Tribunal in writing if they do not agree with the Proposed Opinion and why they do not agree . . . The exceptions are limited to the evidence submitted prior to or at the hearing and any matter addressed in the Proposed Opinion.”
2. Respondent filed exceptions to the Proposed Opinion and Judgment on March 27, 2009. In its exceptions, Respondent states:
 - a. “The Administrative Law Judge concluded that Mr. Hickey had overcome the presumption that he was personally liable as a corporate officer for the Michigan Single Business Tax assessed to EFX Systems, Inc. . . . Respondent contends that Mr. Hickey failed to overcome this presumption and should be held liable for the tax in question.”
 - b. “In *Christel v Department of Treasury* the Tribunal listed several factors that the Michigan Court of Appeals and the Michigan Tax Tribunal accord weight in determining corporate officer liability. These factors assist in determining whether the officer controls, supervises or is responsible for making the returns and paying taxes.”
 - c. Respondent’s contentions, which include the application of the factors used in *Christel*, are as follows:
 - i. “*Designation of the officer on an application for sales, use and withholding tax registration as one in control of or charged with responsibility of preparing the relevant tax returns. . . .* In this case, Mr. Hickey signed the Michigan Tax registration form. The registration for

Michigan taxes that Mr. Hickey signed specifically states that a corporate officer may be held liable for the debts owed by their corporations. This is written on the same page that Mr. Hickey signed. The area in which Mr. Hickey signed the Michigan tax registration indicates that it is signed by an officer or owner who controls or is responsible for filing returns and making payment of Michigan taxes. Michigan courts have held that a party who executes a written agreement is charged with knowledge of the contents of the agreement.”

- ii. *“Authority of the officer to sign corporate checks and the officer’s authority to direct payment of taxes.* Mr. Hickey had check approval on research and development contracts. Another factor that is looked at in determining officer liability is authority of the officer to sign corporate checks. Mr. Hickey testified that he could not recall if he signed checks in payment of taxes though he may have, however he stated that he did approve checks and signed checks going out on behalf of EFX Systems, Inc.”
- iii. *“The officer’s awareness of the financial condition of the corporation and the degree of participation the officer had in active management of the corporation.* In *Heinz v Department of Treasury*, the Tribunal examined the extent of the Petitioner’s involvement with the corporation. The Tribunal found it important that Petitioner[’s] signature was on several tax documents, including several of the unpaid tax returns, and the Articles of Incorporation. She was listed as the sole incorporator on the Articles of Incorporation. Much like the Petitioner in the *Heinz* case, Mr. Hickey signed the Articles of Incorporation. He was listed as the sole incorporator. This is not the only document that Mr. Hickey signed. . . . A man of Mr. Hickey’s intelligence should have been aware that he was agreeing to be responsible for EFX Systems, Inc.’s tax returns. . . . Hr. Hickey was actively involved with the establishment of the business. . . . [He] was able to discuss at great length the organizational structure of EFX Systems. . . . He was charged with negotiating . . . contracts . . . [which] show[s] that Mr. Hickey had an understanding of contract negotiation and demonstrate his ability to under aspects of the business that do not involve engineering.”
- iv. *“The appearance of the officer’s signature on relevant tax returns.* Mr. Hickey’s signature on the tax documents is an indication that his involvement with EFX Systems, Inc. was tax specific. In *Berliner v Department of Treasury*, the Tribunal found that Petitioner, by signing corporate tax documents . . . has demonstrated her involvement to be tax specific. The Tribunal found that Petitioner accepted the duty to act over corporate activities, which included signing tax returns. This act is within

the capacity of an acting officer of a corporation having control, supervision, and responsibility.”

- v. “Petitioner claims that he had no way of knowing if the returns were accurate. In *McFarlane v Department of Treasury*, the Tribunal stated that Petitioner’s claimed lack of familiarity with the SBT and reliance on others to prepare tax returns does not relieve him of personal liability as a responsible corporate officer.”
 - vi. “Mr. Hickey relied heavily on the claim that only an officer located in Michigan could sign tax returns. In addition, the Administrative Law Judge relied on this concept at pages 5, 8, and 12 of his opinion. This concept is erroneous at best. MCL § 208.73 contains the requirements for Single Business Tax returns. MCL § 208.73 merely states that an annual or final return shall be filed with the department in the form and content prescribed by the by the last day of the fourth month after the end of the taxpayer’s tax year. . . . There is no requirement that the form be signed by an officer or an officer located in Michigan.”
 - vii. “Mr. Hickey presented Exhibit 10 to demonstrate the manner in which tax returns were signed and filed. This exhibit was a letter from the preparer to Mr. Dascal indicating what to do with the return. Mr. Hickey stated that this was the same manner in which he filed returns. He testified that the letter stated please find the Michigan Single Business Tax return, sign in the space provided and send certified mail/return no later than March 15th, 2002. Mr. Hickey stated that he signed the 2000 Single Business Tax returns and that a similar letter with instructions was sent to him with the return. Mr. Hickey signed the return on April 27, 2001.”
3. Petitioner filed a response to Respondent’s exceptions on April 14, 2009. In its response, Petitioner states:
- a. “The Administrative Law Judge correctly concluded that Petitioner has overcome the presumption that Petitioner is responsible as a corporate officers when Petitioner signed EFX Systems, Inc.’s (hereinafter EFX) 2000 Single Business Tax Annual return as vice president. The Administrative Law Judge correctly concluded that Petitioner was a corporate officer who’s [*sic*] involvement at EFX was not tax specific.”
 - b. “Petitioner was the vice president of research and development at EFX at the time of incorporation. Roger Owens was the president, and William Dascalopoulos was the treasurer. Both Mr. Owens and Mr. Dascalopoulos were at all times located in New York. Petitioner was the only corporate officer located in Michigan. Being the only corporate officer located in Michigan, Petitioner was given the responsibility of signing the Michigan Single Business Tax Returns.

The tax returns were prepared by a bookkeeper, Andy Arbiter, who worked in New York. The information for the Michigan Single Business Tax is provided by the bookkeeper and Mr. Owens. Petitioner never assisted in the preparation or review of the tax documents. Petitioner just signed the return since he was the only corporate officer located in Michigan.”

- c. “Respondent has not stated why Petitioner meets the test set forth in *Peterson v Treasury Dep’t*. Petitioner does not meet the first requirement because all Michigan tax returns are prepared by an account in New York. Further, Petitioner had no accounting or bookkeeping responsibilities, Petitioner would simply sign the returns where a posted ‘sticky’ designated where Petitioner has to sign. Petitioner does not partake in the preparation or actual payment of the state income taxes. Petitioner simply follows corporate protocols and signs the returns as he is the only corporate officer in Michigan.”
 - d. “Lastly, Respondent has not stated how Petitioner meets the third test, as Petitioner simply signs the corporation’s tax returns and the corporation’s checks made in payment. Again, since Petitioner is the only corporate officer located in Michigan, Petitioner had to assume these responsibilities. Further, Respondent has not stated how Petitioner’s involvement in the financial affairs of EFX is tax specific.”
 - e. “Respondent’s legal arguments in its Objection are the same ‘strict liability’ arguments contained in its Post Trial Brief, for example, Respondent cites *Christel v Department of Treasury* in its Objection to Proposed Opinion and Judgment. Respondent states that Petitioner should be charged with the responsibility of preparing Michigan State taxes since he signed the form. As stated in the Administrative Law Judge’s Opinion, Petitioner cannot be charged with preparing the state taxes since the accountant prepared them in New York. Petitioner’s authority to sign checks does not mean that Petitioner prepared the tax returns. Respondent has failed to state any facts as to how Petitioner was involved in the preparation of the Michigan Income Tax. The ability to understand contract negotiation **does not** relate in any way to the preparation of the corporation’s income tax return. As stated in the Administrative Law Judge’s Opinion, Petitioner was EFX’s authorized agent who signed the Single Business Tax Forms. Petitioner was the only authorized agent in Michigan who could sign the Single Business Tax Form.” [Emphasis added in original].
4. The Administrative Law Judge (ALJ) properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment. More specifically:

Respondent claims that the ALJ erred in finding that Petitioner successfully rebutted the presumption of corporate officer liability, as set forth in MCL 205.27a(5), in its Proposed Opinion and Judgment. Upon review of such contentions, the Tribunal finds that the ALJ

properly considered the evidence and testimonies provided at the hearing in determining the finding of facts and conclusions of law.

In light of the facts and evidence provided at the hearing and in the parties' Post Hearing Briefs, the ALJ held that a prima facie finding of a rebuttable presumption that Petitioner was personally liable as a corporate officer was created through his responsibilities as vice president of EFX Systems, Inc. Upon review of Respondent's contentions with respect to Petitioner failing to properly rebut that presumption, the Tribunal finds that the ALJ properly considered and gave the appropriate weight to the facts and evidence provided in his determination that Petitioner successfully rebutted the presumption of corporate officer liability. Specifically, the ALJ properly applied the standards under which a corporate officer may be held personally liable for unpaid corporate taxes outlined in *Peterson v Treasury of Department* to the facts and evidence in the instant case. In that regard, Respondent has failed to demonstrate how the ALJ erred in its application of the three *Peterson* tests in its exceptions. Instead, Respondent cites *Christel v Dep't of Treasury* and contends that if the Tribunal gave the appropriate weight to the factors listed in that case, Petitioner should be found personally liable as a corporate officer for the tax deficiency of EFX Systems, Inc. Although the ALJ did not specifically refer to the factors enumerated in *Christel*, his findings of facts and conclusions of law engaged in the application of each issue raised by Respondent in its exceptions.

Furthermore, Respondent highlights specific facts that allegedly evidence the ALJ's error in not finding Petitioner personally liable for EFX's tax deficiency through his corporate officer capacity. In particular, Respondent asserts that the fact that Petitioner signed the Michigan tax registration form and had the authority to sign tax returns, Articles of Incorporations, and other corporation documents, evidences the fact that Petitioner has not rebutted the presumption of his liability. Respondent also argues that Petitioner's awareness and knowledge of the corporation's financial conditions is further support that the ALJ incorrectly held that the presumption of Petitioner's personal liability as corporate officer had been rebutted. After careful consideration of Respondent's exceptions, the Tribunal finds Respondent's contentions are without merit. Specifically, Respondent has not demonstrated how Petitioner's activities in his capacity as vice president of EFX Systems Inc. rose to the standards in *Peterson*. More importantly, Respondent's contentions do not establish that Petitioner's duties as vice president of the corporation involved significant "tax specific" financial affairs.

Moreover, it is evident that Respondent is merely reiterating points that were previously considered through its Post Hearing Brief and addressed by the ALJ in the Proposed Opinion and Judgment. In that regard, the ALJ stated on page 12 of the Proposed Opinion and Judgment that "Petitioner's activities may have been tax specific with respect to a ministerial act, but these actions did not constitute significant involvement in tax specific activities such as tax return preparation." As such, it was within the ALJ's discretion to give the appropriate weight to the evidence and testimony provided in reaching its conclusion, and the Tribunal does not find any error or abuse of discretion in those determinations.

5. Given the above, Respondent has failed to show good cause to justify modifying the Proposed Opinion and Judgment. As such, the Tribunal adopts the Proposed Opinion and

Judgment as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law in the Proposed Opinion and Judgment in this Final Opinion and Judgment.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Assessment No. L228024 is CANCELLED.

MICHIGAN TAX TRIBUNAL

Entered: July 21, 2009
sm

By: Kimbal R. Smith III

* * *

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL
NON-PROPERTY TAX APPEAL

Robert F. Hickey,
Petitioner,

v

MTT Docket No. 320519

Department of Treasury,
Respondent.

Administrative Law Judge Presiding
John S. Gilbreath, Jr.

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

This real property tax valuation case came before the Michigan Tax Tribunal for hearing on Monday, October 15, 2007, in Lansing, Michigan. Thomas A. Klug represented Petitioner, Robert F. Hickey. Amy M. Patterson and Heather Durian represented the Michigan Department of Treasury.

At issue is the personal liability or officer liability for a single business tax for the 2000 tax year imposed pursuant to the Revenue Act, MCL 205.27(a)(5). The specific issues in this matter are:

1. Whether Petitioner can challenge the amount of tax once it is final to the corporation.
2. Whether Petitioner has overcome the presumption that Petitioner is responsible as a corporate officer when Petitioner signed the 2000 Single Business Tax Annual return for EFX Systems, Inc. as vice president.

Each party offered testimony and documentary evidence. Petitioner's Exhibits P-1-P-20 through P-3, P-5, P-6, P-8 through P-10, and P-12 through P-17, were admitted into evidence.¹

¹ Petitioner's exhibits consisted of the following:

Exhibit 1	Organizational Chart.
Exhibit 2	EFX Board and Key staff.
Exhibit 3	Memo dated August 12, 1994 re: EFX business proposal.
Exhibit 4	Letter dated December 15, 1994 on Bio-Business of Michigan letter head re: the use of space and equipment.
Exhibit 5	Subleases between Bio-Incubator and EFX dated January 1, 1995.
Exhibit 6	Sublease between Biobusiness Incubator and EFX dated May 23, 2000.
Exhibit 7	Memo dated September 21, 2000 re: Review of Dow Agrosience need for Anaerobic System (EFX proposal No. P-1003).
Exhibit 8	Memo dated December 19, 2000 re: Negotiations of Dow Agrosience need for Anaerobic System (EFX proposal No. P-1003).
Exhibit 9	Fax transmittals from 2000 and 2001 re: payroll information accounting issues
Exhibit 10	Transmittal letter from Mr. Arbiter to Mr. Dascalopoulos with Michigan SBT Tax return and Federal Corporate tax return attached.
Exhibit 11	Grid of EFX articles prepared by Petitioner.
Exhibit 12	Front page of contract research reports authored or co-authored by Petitioner.
Exhibit 13	Front page of field manual for a project in Albany, New York.
Exhibit 14	Front page of a work implementation plan for a project in Sacramento, California.
Exhibit 15	Cover page of a report submitted to the U. S. Air Force.
Exhibit 16	Cover page of a report on treatment of groundwater.
Exhibit 17	Report on the long terms effects of substrate perturbation on an anaerobic community.
Exhibit 18	Single Business Tax Annual return for 2000.
Exhibit 19	Letter dated February 12, 2004 to the Corporate Office Liability Unit from William Dascal saying that Petitioner had resigned.
Exhibit 20	Single Business Tax Adjustment Payment dated February 6, 2002.
Exhibit 21	Letter dated March 4, 2002 from Mr. Owens to the Department of Treasury questioning Exhibit 20.
Exhibit 22	Letter of Inquiry, Notice of Corporate Officer Liability dated October 31, 2003 and sent to Petitioner and various other correspondences between the Department of Treasury and Petitioner.

Respondent's Exhibits R-1, R-5, R-10, R-167 and R-168 were admitted into evidence.² Each party filed a post hearing briefs and reply briefs.

PROPOSED JUDGMENT

Based on the findings of fact and conclusions of law, The Tribunal concludes that Petitioner is not personally liable as a corporate officer for the Michigan Single Business Tax Assessment number L228024.

PROCEDURAL HISTORY

Petitioner was vice president and resident agent of EFX Systems, Inc. (hereinafter EFX) from December 20, 1994 to the date of his resignation on June 5, 2001. As vice president of EFX, Petitioner signed and filed a Single Business Tax Annual return for 2000. Respondent reduced the small business credit claimed by EFX and issued a Single Business Tax Annual Return Notice for Adjustment for a tax deficiency for \$3,918 plus penalty and interest. A letter of inquiry was sent to Petitioner on October 31, 2003 requesting information to determine Petitioner's liability as a corporate officer for EFX. After investigation, Respondent determined that Petitioner was a corporate officer responsible for the tax deficiency and a Final Assessment was issued.

On November 10, 2005, Petitioner filed a Petition with the Tribunal. Respondent filed a timely answer on December 7, 2005.

PARTIES' CONTENTIONS OF TAX LIABILITY

Petitioner's contention of the tax, interest, and penalties for the 2000 tax year is as follows:

² Respondent's exhibits consisted of the following:

- | | |
|-----------|--|
| Exhibit 1 | Single Business Tax Annual return for 2000. |
| Exhibit 2 | EFX Systems, Inc. Corporate Identity Details from DLEG. |
| Exhibit 3 | Articles of Incorporation for EFX Systems, Inc. filed on December, 20, 1994. |
| Exhibit 4 | 1996 Michigan Annual Report, Domestic Profit Corporation for EFX Systems, Inc. |
| Exhibit 5 | 1998 Corporate Information Update for EFX Systems, Inc. |
| Exhibit 6 | 2000 Corporate Information Update for EFX Systems, Inc. |
| Exhibit 7 | Registration for paying Michigan Taxes for EFX Systems, Inc. |

Assessment Number	Tax Type	Tax	Interest	Penalties
L228024	SBT Tax for 2000	\$0	\$0	\$0

Respondent's contention of the tax, interest, and penalties for the 2000 tax year is as follows

Assessment Number	Tax Type	Tax	Interest	Penalties
L228024	SBT Tax for 2000	\$3,918.00	\$594.53	\$1,143.49

PETITIONER'S EVIDENCE

TRIAL TESTIMONY

Sworn testimony was provided by Petitioner, **Robert F. Hickey**. Mr. Hickey testified that by education and training he is a civil and environmental engineer. He became associated with EFX when it was incorporated in 1995. He left the company in June, 2001. EFX evolved from the Michigan Biotechnology Institute (hereinafter referred to as MBI). Both are located in Michigan. EFX is a subsidiary of a New York company known as Ecolotrol.

Mr. Hickey testified that he became the vice president of research and development at the time of incorporation. Roger Owens was the president and the treasurer was William Dascalopoulos. Both Mr. Owens and Mr. Dascalopoulos were located in New York. During Mr. Hickey's tenure he held no other position other than that of vice president. Everybody in the organization reported to Mr. Owens. The organizational charts and information was developed from memory because Mr. Hickey did not have the specific documents on hand when he left the organization. The chart shows a position of vice president of technology, which was essentially the same job he held for MBI.

Mr. Hickey testified that he was involved in the negotiation of research and development contracts, but was not involved in negotiating with the business contracts that were handled in New York. He principally worked on environmental engineering projects including ones at Michigan State University, University of Michigan, Wurtsmith Air Force Base, McAllister Ammunitions Plant in Oklahoma, Dow contracts and Albany County Airport in New York. He made sure that testing was done properly according to the contract in place. Virtually all of his daily work was devoted to these activities.

Mr. Hickey testified that the physical location of EFX was on Collins Road and this space was subleased from MBI at the start up of EFX in 1994-1995. EFX evolved from MBI and

Seaflower Associates was a group hired by MBI to help look for new business. EFX leased equipment and space used by MBI. The lease evolved through Bio-Incubator which worked on behalf of MBI. Because MBI was a non-profit organization it was precluded from entering into such leases. The lease was for essentially that space already used by MBI. He had nothing to do with the preparation of the leases, and they were all signed by Mr. Owens. Involved in this leasing up operation was a confidentiality agreement regarding proprietary information. This was signed by Mr. Owens. Later in 2000, another lease was signed with the same parties and negotiated in the same way that the others had been. Mr. Hickey was not involved in the process.

Mr. Hickey testified that regarding Exhibit 7 (Memo dated September 21, 2000 re: Review of Dow Agrosience need for Anaerobic System (EFX proposal No. P-1003)) he had nothing to do with the negotiation of this contract.

Mr. Hickey testified that with regard to bookkeeping activities the person in charge of those activities in the Lansing office was the bookkeeper who reported directly to Mr. Owen. Initially that person was Dr. Raj Rajan who was followed by Brian Cybul who was followed by Paula Kelly. Ms. Kelly performed the accounting duties through 2000. Dr. Rajan took over those responsibilities after Ms. Kelly left. During this time he would have participated in the accounting for the billing of research contracts and employee time but he did not assist on any business decisions. He did not develop any information for the tax returns; this was done by the bookkeepers who reported to Mr. Owens. All the checks for payables were prepared by the bookkeeper. While he reviewed and signed the checks on the research and development side, the business, including the marketing and sales part of the business, the checks were handled signed by Mr. Owens. The tax returns were prepared by the bookkeeper, Andy Arbiter, who worked for Ecolotrol in New York. The tax returns for the State of Michigan were those needed for the Single Business Tax and the information for those returns were provided by the bookkeeper and Mr. Owens.

Mr. Hickey testified that he signed the returns because he understood that only an officer could sign the returns and he was the only officer in Michigan. He received the returns from New York with a “sticky” on them designating where he had to sign the return, and he would then sign them. He testified that he had no way of knowing whether the returns were accurate or

not but he assumed that they were because the return that was a problem was in 2000. The check for the tax would have been prepared by the “accountant” and he may have signed the check.

Mr. Hickey testified that he was able to secure fax information from Dr. Rajan reflecting how the payroll and fixed assets statements and other accounting information were prepared. He never assisted with the preparation or review of these documents.

Mr. Hickey testified that he resigned as an officer in April of 2001 and at that time his name was removed as a signatory from the bank account. As far as the check writing responsibilities were concerned, the checks would be preprinted to the various vendors and he would sign them. He signed them rather than someone in New York because he knew what specific project the checks were being used for. The checks related to marketing and advertising were signed by Mr. Owens.

Mr. Hickey explained that EFX had a business location in New York and a research location in Michigan. In terms of the Single Business Tax Annual return for 2000, he only signed it. He contributed nothing to the preparation of that return. All that needed to be done in terms of collecting information and preparing the return took place in New York and he was told to sign the return only when it was completed. The only check he would have signed in conjunction with this return was for the tax liability.

Mr. Hickey learned that in 2005 he was being pursued for the 2000 adjusted tax. This is when he first saw the Single Business Tax Adjustment Payment dated February 6, 2002. Mr. Hickey testified on cross examination that he signed the articles of incorporation for EFX and that he signed the Registration for paying Michigan Taxes for EFX Systems, Inc. Additionally, he signed the 1996 Michigan Annual Report, Domestic Profit Corporation for EFX Systems, Inc., the 1998 Corporate Information Update for EFX Systems, Inc. and the 2000 Corporate Information Update for EFX Systems, Inc.

PETITIONER’S POST HEARING BRIEF

Petitioner emphasized in his post hearing brief that, due to the organizational structure of EFX, he had nothing to do with the creation and preparation of the subject tax return and that according to *Livingstone v Department of Treasury*, 434 Mich 771, 456 NW2d 684 (1990), he should not be liable for the adjusted tax.

RESPONDENT'S EVIDENCE

TRIAL TESTIMONY

Sworn testimony was provided by **Brian Grumeretz**. Mr. Grumeretz testified that he is currently employed by the Michigan Department of Treasury Collection Division and has been for the last two and one half years. He represents the Division in the informal hearing process.

Mr. Grumeretz testified that he reviewed the account in this case and he issued an assessment number of L228024. Mr. Grumeretz explained that in order to assess an officer of a corporation the Division looks at documents such as the registration for Michigan taxes and the filing of annual reports. In this case, Mr. Hickey was identified as the officer/owner on the registration for Michigan responsible for paying taxes and for filing returns. Additionally, he was listed as an officer on the 2000 Single Business Tax schedule of shareholders and officers. He was listed as an officer on the 2000 and 2001 Federal Tax returns schedule of compensation of officers. He is listed and signed as a vice president of EFX on the annual reports for 2000 and 2001.

Mr. Grumeretz testified that the assessment is based upon statutory authority: MCL 205.27a(5). He also relied upon Revenue Administrative Bulletin 1989-38 regarding officer liability.

On cross examination, Mr. Grumeretz testified that on the registration for Michigan taxes originally filed in 1995 there is a proviso that an officer "may" be held responsible for paying the taxes and the proviso extends into the future. He also testified with regard to correspondences from Mr. Rajan and Mr. Dascalopoulos that stated that an accountant prepared the single business tax returns.

RESPONDENT'S POST HEARING BRIEF

Respondent argues that Petitioner cannot challenge the amount of tax once it is final to the corporation, citing MCL 205.22(5).

Additionally, Respondent argues that because Petitioner was an incorporator and vice president of EFX, he signed Registration for paying Michigan Taxes for EFX, he regularly signed the Single Business Tax Returns, and he signed checks that this is not only prima facie evidence that he is a liable corporate officer but also proves that he is a liable corporate officer in spite of his status as the vice president in charge of research for EFX.

FINDINGS OF FACT³

The parties stipulated to the following findings of fact at the hearing: (1) Petitioner was a corporate officer of EFX; (2) Petitioner signed and filed a 2000 Single Business Tax Annual return for EFX; (3) the tax in controversy is a single business tax; and (4) the only tax year in controversy is the 2000 tax year.

EFX was a for-profit company incorporated in 1994. The company was involved in environmental research and development. EFX evolved from Michigan Biotechnology Institute, a non-profit company. EFX marketed and sold the technology it developed to such entities as DOW Agrosiences. Some of the personnel involved in MBI became involved in EFX engaging in the same functions but with differing titles. Petitioner was one such individual. By education and training, Petitioner is a civil and environmental engineer.

Both MBI and parts of EFX are physically located in Michigan. EFX is a subsidiary of a New York company known as Ecolotrol. EFX was divided into two groups; the group in Michigan was involved in environmental research and development while the business group involved with marketing and sales was located in New York.

Petitioner became the vice president of research and development at the time of incorporation. Roger Owens became and was the president, and the treasurer was William Dascalopoulos (aka Mr. Dascal). Both Mr. Owens and Mr. Dascal were at all times relevant hereto located in New York. Petitioner was the only corporate officer located in Michigan and as such he was given the responsibility of signing Michigan Single Business Tax Returns.

All Michigan tax returns were prepared by the accountant in New York. Petitioner had nothing to do with the compilation of data for preparation of the returns. Data from Michigan would be compiled by a bookkeeper in Michigan who thereafter sent the material to New York. Once the return would be completed in New York, it would be sent to Petitioner with a “sticky” on it designating where he had to sign the return, and he would then sign them. This was the case in 2000.

With regard to bookkeeping activities in the Lansing office, the bookkeeper reported

³ This section is a “concise, separate, statement of facts” within the meaning of MCL 205.751; and, unless stated otherwise, the matters stated or summarized are “findings of fact” within the meaning of 1969 PA 306, MCL 24.285.

directly to Mr. Owen. Petitioner's only participation was in the accounting activities associated with the billing of research contracts and employee time, but he did not assist on any business decisions. He did not develop any information for the tax returns. He never checked to determine whether the returns were accurate; he only assumed that they were because there never was a problem with any of the returns until 2000.

Petitioner was a signatory on a bank account until he left his employment in 2001. As far as these check signing responsibilities were concerned, the checks would be preprinted to the various vendors and he would sign them. He signed them rather than someone in New York because he knew what specific project the checks were being used for. Checks related to marketing and advertising were signed by Mr. Owens. The only check he would have signed in conjunction with Michigan Single Business Tax Return was for the tax liability.

CONCLUSIONS OF LAW

There are two issues that have been raised in this case, both associated with corporate liability. The first is whether Petitioner, as a corporate officer, can challenge the amount of tax once that tax is final as assessed to the corporation. This issue pertains to the amount of the assessment. The next issue is whether Petitioner has overcome the presumption that Petitioner is responsible as a corporate officer when Petitioner signed EFX Systems' 2000 Single Business Tax Annual return as vice president. The issue pertains to the potential liability of the corporate officer once the assessment has been finally adjudicated.

Challenge to Final Assessment

MCL 205.1 et seq. provides a set of procedures that affords the Michigan Department of Treasury the ability to collect taxes. To this end, within these procedures, a taxpayer is given the right to contest an assessment with the ability ultimately to challenge that assessment to the Michigan Tax Tribunal. To this end, it is undisputed that Respondent reduced the small business credit claimed by EFX and issued a Single Business Tax Annual Notice of Assessment for a tax deficiency for \$3,918 plus interest and penalties for the 2000 tax year. EFX failed to protest the tax and ultimately failed to pay the tax.

MCL 205.22(5) states that:

An assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or order of the department, and a person is not entitled to a refund of any tax, interest, or penalty paid

pursuant to an assessment unless the aggrieved person has appealed the assessment in the manner provided by this section.

In this case, EFX did not challenge the final assessment prior to “90 days after the issuance of the assessment.” Furthermore, MCL 205.22(1) states that “a taxpayer aggrieved by an assessment, . . . may appeal the contested portion of the assessment, . . . to the tax tribunal within 35 days, . . . the assessment.” EFX neither challenged the assessment to Respondent nor appealed the assessment the Tribunal; as such the assessment is final. Since Petitioner’s liability is potentially derivative from EFX as a corporate officer (see MCL 205.27a) the amount of the assessment cannot now be challenged in this hearing.

Corporate Office Liability

The Department of Treasury’s authority to assess a corporate officer derives from the officer liability provision of the Revenue Act, MCL 205.27(a)(5). Section 27(a)(5) states in pertinent part that, “the signature of any corporate officers, . . . on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments.”

The Court of Appeals in *American Casualty Co v Costello*, 174 Mich App 1, 7; 435 N.W.2d 760, 763 (1989) stated that:

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).

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:

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.

In the case at hand, Petitioner was designated, in his corporate capacity as vice president, to be the signatory for the yearly Michigan Single Business Tax filing made by EFX. He did this for the 2000 tax year as well as for prior years. He also signed checks for the payment of these taxes. These facts provided the “prima facie evidence of [Petitioner’s] responsibility for making the returns and payments,” thus creating a rebuttable presumption of corporate office liability.

To rebut this presumption Petitioner argues that he cannot be held liable for the tax liability and he cites *Livingstone v Department of Treasury*, 434 Mich 771; 456 NW2d 684, 687 (1990). The Michigan Supreme Court in *Livingstone, supra* at 780, came to the following conclusion relative to corporate officer liability:

The first, and perhaps, least difficult aspect of the task before us concerns the determination of exactly when and under what circumstances a corporate officer may be held personally liable for unpaid corporate use taxes. In addressing this question, the Court of Appeals in *Peterson v Treasury Dep’t*, 145 Mich App 445, 450; 377 NW2d 887 (1985), held:

In order to hold a person personally liable for a corporation’s tax liability under [MCL 205.96(3); MSA 7.555(6)(3)], the Department of Treasury must first show that the person is an officer of the corporation. Then it must show either (1) that this officer has control over the making of the corporation's tax returns and payments of taxes; or (2) that this officer supervises the making of the corporation's tax returns and payments of taxes; or (3) that this officer is charged with the responsibility for making the corporation's returns and payments of taxes to the state.” See also *Keith v Dep’t of Treasury*, 165 Mich App 105, 108; 418 NW2d 691 (1987).

We agree that personal tax liability will not attach to corporate officers who simply have significant involvement in the financial affairs of a corporation. **The involvement must be tax specific.** (Emphasis added)

Using this test, the first question becomes whether Petitioner officer has control “over the making of the corporation’s tax returns and payments of taxes.” On the basis of the evidence presented the answer is no. The Tribunal has found that all Michigan tax returns were prepared by the accountant in New York. Petitioner had no accounting or bookkeeping responsibilities

save those associated with the billing of research contracts and employee time. The organizational structure was such that information flowed to New York and therefore data from Michigan would be compiled by a bookkeeper in Michigan who thereafter sent the material to New York to be used in the preparation of the returns. Once the returns were completed in New York, the returns would be sent to Petitioner with a “sticky” on them designating where he had to sign the return.

For the reasons just stated the second test supports Petitioner’s contention that he should not be liable; because he did not supervise “the making of the corporation’s tax returns and payments of taxes.” Whether in the preparation of the taxes or the actual payment, he followed a corporate protocol assuming on faith that others were taking the appropriate steps necessary to assure that the tax was paid and paid on time.

As for the third test, Petitioner was not “charged with the responsibility for making the corporation’s returns and payments of taxes to the state” but he was charged with being a signatory to the “corporation’s returns” and to the checks made in payments “of taxes to the state.” He assumed this status by default because he was the only corporate officer in the State. Had all the corporate officers been located in Michigan, undoubtedly another executive such as the treasurer would have performed the ministerial tasks that he agreed to assume. His responsibilities from the inception of EFX were to build upon the engineering expertise and technological developments he and others created while working in the non-profit MBI. In the swirl of activity that resulted from this evolution, various principals were given tasks associated with marketing and selling their expertise ultimately leading to the necessity of accounting for their newfound income generation. For expedience sake, Petitioner was assigned the task of signing tax returns, a task not consistent with his educational expertise.

Respondent argues that by signing the returns and checks, he assumed knowledge of the contents of each and that by signing these documents he was contributing to the creation of the documents. This argument is not consistent with the evidence and the proviso that “personal tax liability will not attach to corporate officers who simply have significant involvement in the financial affairs of a corporation. The involvement must be tax specific.” Petitioner’s activities may have been tax specific with respect to a ministerial act, but these actions did not constitute significant involvement in tax specific activities such as tax return preparation.

CONCLUSION

Based on the findings of fact and conclusions of law, the Tribunal concludes that Petitioner has overcome the presumption as described above and Petitioner is not personally liable as a corporate officer for the Michigan Single Business Tax Assessment number L228024.

JUDGMENT

IT IS ORDERED that the property's assessed and taxable values for the tax years at issue are as set forth in the *Summary of Judgment* and *Conclusions of Law* sections of this Proposed Opinion and Judgment unless modified by the Tribunal in the Final Opinion and Judgment.

By: John S. Gilbreath, Jr., Administrative Law Judge

Entered by Chief Clerk: March 17, 2009

This Proposed Opinion and Judgment ("Proposed Opinion") was prepared by the State Office of Administrative Hearings and Rules. The parties have 20 days from date of entry of this Proposed Opinion to notify the Tribunal in writing if they do not agree with the Proposed Opinion and why they do not agree (i.e., exceptions). After the expiration of the 20-day time period, the Tribunal will review the Proposed Opinion and consider the exceptions, if any, and:

- a. Adopt the Proposed Opinion as a Final Decision.
- b. Modify the Proposed Opinion and adopt it as a Final Decision.
- c. Order a rehearing or take such other action as is necessary and appropriate.

The exceptions are limited to the evidence submitted prior to or at the hearing and any matter addressed in the Proposed Opinion. There is no fee for the filing of exceptions. A copy of a party's written exceptions must be sent to the opposing party.