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

Keith N. Penner, Petitioner,	MTT Docket Nos. 328268, 328269, 328270, 328271, 328272, 328273, 328274, 328275, 328276, 328277, 328278, 328279, 328280, 328281, 328282 and 328283
v	
Michigan Department of Treasury, Respondent.	Tribunal Judge Presiding Rachel J. Asbury

ORDER PARTIALLY GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION

ORDER PARTIALLY GRANTING PETITIONER'S MOTION FOR RECONSIDERATION

ORDER CORRECTING FINAL OPINION AND JUDGMENT

On December 17, 2009, Respondent filed a Motion requesting that the Tribunal reconsider the Final Opinion and Judgment entered in the above-captioned case on December 4, 2009. In the Motion, Respondent states:

a. "This case involves assessments based upon corporate officer liability. A hearing was held on June 24, 2009. The Tribunal issued its Final Opinion and Judgment on December 4, 2009. This Final Opinion and Judgment affirmed 8 of the 16 assessments contested, but these assessments were adjusted. It is the adjustments to penalty that the Respondent is requesting the Tribunal to reconsider."

b. "This Tribunal would not have subject matter jurisdiction to review the final assessment issued to Harrison Construction…[Company] and Bell…[Company]. Petitioner's liability is derivative of Harrison…and Bell…because Harrison…and Bell…failed to challenge the amount of the assessment within the statute of limitations for doing so…[As such], the amounts are final as to the corporate officer, Mr. Penner."

c. "…the Legislature has made it clear that if an assessment is not appealed according to the procedures provided in MCL § 205.22, then it is final and cannot be subsequently appealed. Therefore, if an aggrieved taxpayer does not challenge a determination in the manner and time provided, then an attack is prohibited….The Michigan courts have upheld these restrictions. In *Kelser v Dep't of Treasury*[, 167 Mich App 18; 421 NW2d 558 (1988)], the Court of Appeals affirmed the Tribunal's grant of summary disposition to the Department…The Court held that an appeal that is not filed within the time limit provided in MCL §205.22 is untimely and affirmed the Tribunal's holding that the

Tribunal lacked jurisdiction over the appeal due to the untimely filing…Likewise, in *Curis Big Boy Inc v Dep't of Treasury*[, 206 Mich App 139; 520 NW2d 369 (1994)], the Court of Appeals held that the Tribunal had no authority to grant a request for a delayed appeal."

d. "In this case, Harrison…and Bell…did not appeal the final assessment in the manner and time provided by MCL §205.22. Therefore, Harrison…and Bell…would be barred from appealing the assessments because the Tribunal would lack subject matter jurisdiction to hear the appeal."

e. "Mr. Penner was assessed as a corporate officer responsible for the tax liability for Harrison…Bell…MCL §205.27a(5) provides that if a corporation liable for taxes fails to file a return or pay the tax due any of the corporation's officers are personally liable for the failure of the corporation."

f. "In *Keith v Michigan Department of Treasury*[, 165 Mich App 105; 418 NW2d 691 (1987)], Keith argued that he should have the right to contest the amount of sales tax assessed to the corporation. The Tax Tribunal ruled that Keith was not able to contest the amount of sales tax liability because the corporation had failed to contest the assessment pursuant to MCL § 205.22. The corporation's failure to contest the assessment resulted in the assessment becoming final upon the expiration of the appeal period…The Court of Appeals upheld the Tribunal's determination."

g. "Because a corporate officer's liability is derivative to a [corporation's] liability, once the [corporation's] time to appeal has passed an officer subject to personal liability under MCL 205.27a(5) cannot contest the amount of the corporate underlying tax liability. Tax has been defined in the act to include tax, interest and penalties. This Tribunal has held that the corporate officer cannot challenge the method of computation once the assessment is final."

h. "In this case, the Department assessed Harrison…and Bell…for SUW taxes and Single Business Tax. Harrison…and Bell…did not timely appeal the assessments and they became final and not reviewable by any court for any reason. Harrison…and Bell…did not pay this tax liability."

i. "After determining that Mr. Penner was a corporate officer of Harrison…and Bell…responsible for the tax, the Department issued Final Assessments against Mr. Penner. The Tribunal questions the integrity of the penalties as assessed in the Final Assessments as to Mr. Penner…At page 27 of the Final Opinion and Judgment, the Tribunal states that it finds penalties as applied to Final Assessments M013914, M066808 and M013910 inconsistent and troubling. However, assessments M013914, M066808 and M013910 as issued to Mr. Penner are identical – the tax and penalty are identical in each of these assessments – to those issued to the corporation. The Tribunal may not examine the underlying tax liability and make adjustments after these

assessments were never challenged and have become final. The corporate debtor did not challenge the tax, penalty or interest in this case. Therefore, these assessments are final and the amounts of the assessments are not subject to challenge in any way, shape or form. A challenge in this manner would violate MCL 205.22(4) which states that an assessment, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal or other method of direct or collateral attack. Mr. Penner's tax liability is derivative to the corporation. Tax has been defined to include penalty. This Tribunal is precluded from adjusting penalties for these assessments because the penalty as assessed to Mr. Penner is the same amount as assessed to the underlying corporate debtor. Therefore, the Tribunal has committed palpable error in adjusting the penalties issued in these assessments."

j. "As to Final Assessments L614471 and L652646, the underlying assessments were originally issued in an amount that was higher than what was issued to Mr. Penner. There were adjustments to the amount of tax and penalty. As payments were received and applied by either the corporate debtor or a third party, this would necessarily reduce the liability of Mr. Penner. A reduction in the amount of tax owed would not necessarily reduce the amount of penalty assessed. The amount of penalty would still be based upon the amount originally assessed regardless of payment applications. Because the original assessment contained a penalty of 15% of the tax assessed for assessment L614471, to lower the penalty to 10% of the balance after payments have been applied would necessarily violate the prohibition of allowing Mr. Penner to challenge the amounts of the underlying assessments. In addition, reducing the amount of penalty in assessment L652646 to 10% of the balance after payments have been applied would also violate the prohibition of allowing Mr. Penner to challenge the amounts of the underlying assessments. Regardless, Mr. Penner presented no evidence to show that the adjustments to the underlying assessments were based upon something other than the applications of payments to the underlying debt. To adjust the assessments as to Mr. Penner, the Tribunal must speculate as to whether 15% penalty or 10% penalty is fair. Also, it must determine when the penalty should be calculated, at the time of the original assessment or after payment application. It must also speculate as to the reasons that the tax was adjusted after it was assessed to the corporate debtor. No evidence was submitted to support the Tribunal's determination that the penalties should be adjusted in any manner for these assessments. These are things that the Tribunal may not do. Therefore, the Tribunal committed palpable error in adjusting the penalties for these assessments."

On December 17, 2009, Petitioner filed a Motion requesting that the Tribunal reconsider the Final Opinion and Judgment entered on December 4, 2009. In the Motion, Petitioner states:

a. "At page 34 of the Final Opinion and Judgment is it stated that the total 'Tax Due' for which judgment is entered in favor of Respondent and against Petitioner is $243,200.47. The amount stated as 'Tax Due' is facially incorrect. Calculation of the 'Tax Due' based upon addition of the 'Tax Due' for the individually listed assessments…is $192,295.27."

b. "Notwithstanding its determination that [Petitioner] 'ceased to have tax related responsibility' after December 2002, the Tribunal's Final Opinion and Judgment imposes tax liability upon Mr. Penner for tax matters relating to periods after December 31, 2002, in connection with Single Business Taxes assessed against him in Assessment Numbers M013914 and M013910. Based upon the Tribunal's finding that Mr. Penner 'ceased to have tax related responsibility' after December 2002, then it is palpable error to impose upon him liability for more than 75% of the assessed amount inasmuch as no duty arose under the then applicable provisions of MCL 208.1501 for payment of the 4th quarter installment for 2002 Single Business Taxes until after December 31, 2002. Therefore, based upon the face of the Tribunal's decision, the maximum of the Tax Due assessable with respect to Assessment M013914 was $52,426.50, and with respect to M013910 was $19,939.50, these amounts representing the 75% of the ultimate 2002 SBT liability which should have been included in installments paid in the 2nd, 3rd and 4th quarters of 2002, prior to December 31, 2002, and prior to the point in time when, as concluded by the Tribunal, Keith N. Penner 'ceased to have tax related responsibility.'"

On December 29, 2009, Petitioner filed a response to Respondent's Motion for Reconsideration. In the response, Petitioner states:

a. "Petitioner submits that, notwithstanding the result in *Keith*, the Tribunal was correct in the result reached in the present cases due to materially differing facts underlying the Penner assessments… Notably, the tribunal concluded…that Keith Penner's status as a responsible person changed over the period of time covered by the various assessments under consideration, with the Tribunal ultimately holding that Petitioner had [no] tax related responsibility on and after January 1, 2003."

b. "Each of the assessments questioned by Respondent in its Motion for Reconsideration was issued during the period of time after Penner's status as a responsible person had ceased…Moreover, three of the corporate assessments were issued, and presumably received by the corporate taxpayer, not only after Penner ceased having any tax responsibilities but after he was discharged and, as demonstrated by the record, had no further contact of any character with his prior employer."

c. "Therefore, and unlike the apparent facts underlying *Keith, supra,* the assessments involved in the Tribunal's consideration of the penalties billed to Penner were not assessments which had been received by the corporate taxpayer at a time that Penner had tax related responsibilities. To the contrary, the facts as set forth in the Tribunal's Opinion and Judgment clearly demonstrate that the assessments were not issued to the corporate taxpayer until Penner had been effectively expelled from management of the corporate taxpayer, and that at least 3 of those assessments were not issued and received by the corporate taxpayer until after Penner's ability to even enter the corporate offices had been terminated…Therefore, and again unlike the individual taxpayer in *Keith*,

Penner did not have the opportunity to bring about any 'timely' appeal of the assessments on behalf of the corporation. It thus follows, and particularly so with respect to the SBT assessments…that it would not be incongruous to undertake a review of the underlying assessments at this point."

d. "Respondent also claims that the Tribunal committed palpable error by recalculating the amount of penalties to be paid by Penner with respect to those assessments for which his liability as a responsible officer was sustained. Petitioner submits that the Tribunal's calculations are consistent with the record, and therefore there has been no error."

e. "With respect to assessment L552234, L552235, and L565512, the record fully supports the Tribunal's conclusion that there were no penalties assessed to the corporate taxpayer, Harrison…Inasmuch as it is Respondent's own position that Penner's liability is, at best, derivative of the corporate taxpayer it then follows that there existed no subsequent basis for the penalties contained in the final bill issued to Penner as the alleged responsible person."

f. "As noted by the Tribunal, the reduction in the tax due on [L614471 and L652646] has nothing to do with payments received. Instead, the original assessments were estimates of tax liability, necessitated by the apparent fact that at the time of the assessments issuance no returns had been filed by the corporation. As is made clear on the billings to Penner with respect to those assessments, the amounts were 'corrected per actual/amended return(s) or additional information received.'"

g. "The Tribunal is further correct when it observes that the penalty rates assessed on the assessments differ from those on the final billings to Penner. The rates on the assessments are 10% as contrasted with 25% on the Penner billings. No explanation was offered for this increase above that assessed against the corporation."

h. "Finally, and contrary to Respondent's contention, there is no error in the Tribunal's adjustment of the penalties, if any, payable by Penner, to reflect the negligence as opposed to intentional disregard standard. As correctly noted by the Tribunal, the proper exercise of the discretionary authority to impose such penalties requires an assessment of the purported responsible person's state of mind. Here, the record amply reveals Penner's eroding, and eventually terminated, status within the management of tax related matters for the corporate taxpayers, clearly suggesting that any non-payment chargeable is not a result of intent but, instead, something much less.

On January 7, 2010, Respondent filed a response to Petitioner's Motion for Reconsideration. In the response, Respondent states:

a. "It appears that Petitioner is correct in that the assessments listed on page 34 of the Judgment do not add up to $243,200.27. Instead the listing assessments add up to $192,295.75."

b. "In both *Fortescue v Department of Treasury*[, MTT Docket No. 243194 (1999),] and *Patil v Department of Treasury*[, MTT Docket No. 242619 (1999),] the Tribunal found that the Petitioner officer was liable for the corporate tax debt even though the corporate officer had resigned before the tax return's due date."

c. "Similarly, Mr. Penner was found to be a corporate officer with tax related responsibility through December, 2002. Regardless of whether Mr. Penner resigned or lost control over paying the taxes in this matter, he was a responsible officer for the entire 2002 tax year. Because Mr. Penner was a responsible corporate officer when the tax liability was generated, he is liable for the tax for the entire 2002 tax year."

The Tribunal, having given due consideration to the Motions, the responses, and the case file, finds:

1. Respondent objects to the decrease in the amount of penalties found by the Tribunal in assessments M013914, M066808 and M013910. Respondent asserts that because Petitioner's liability is derivative of Harrison Construction and Bell Co., those amounts are final and cannot be adjusted by the Tribunal. The Tribunal has reviewed the original assessments and the assessments issued to Petitioner and finds that the amounts of tax and penalties were the same. As such, the Tribunal finds that there was no basis for decreasing the amount of the penalties, as they did not impose a greater penalty on the corporate officer than that originally assessed to the corporation. Therefore, the Tribunal finds that Respondent has demonstrated a palpable error that misled the Tribunal and the parties and that would have resulted in a different disposition if the error was corrected. See MCR 2.119. The Tribunal finds that the penalties in assessments M013914, M066808, and M013910 are corrected as indicated in the table below.

2. In regard to assessments L614471 and L652646, Respondent had failed to produce evidence sufficient to demonstrate why the amounts originally assessed differ from those amounts as assessed against Petitioner. Respondent stated clearly on the record that it did not know why the assessments differed but hypothesized that perhaps payments had been made. Based on Respondent's argument that these assessments are derivative, the assessments should have been identical. No corporate assessments were provided to support the assessments against Petitioner. If payments were made, Respondent did not provide information on how such payments had been applied to the underlying assessments, penalties, or interest. Respondent stated that it is its policy to apply payments to penalty and interest first. Thus, the Tribunal must conclude that if payments were made, interest and penalty would first have been reduced to zero, as was the case for assessments L552234, L552234, and L565512 but not for these, before any reduction in

the amount of tax due was possible. There being no way to determine how, or if, the assessments were paid down or simply altered, and Respondent having provided no evidence, testimony, or witnesses at the hearing to explain the discrepancies between the original assessments and those issued to Petitioner, the Tribunal Judge was justified in reducing the amount of the penalties in the above assessments, given the lack of information provided. Therefore, Respondent has failed to demonstrate a palpable error that misled the Tribunal and the parties and that would have resulted in a different disposition if the error was corrected. See MCR 2.119.

3. In regard to Petitioner's contentions for reconsideration, the Tribunal Judge properly found that Petitioner was a corporate officer through December 2002. Therefore, Petitioner was responsible, as a corporate officer, for the taxes assessed to the corporation for the entire 2002 tax year, regardless of when payments were due or the returns were filed. Petitioner's contention that he is not responsible for the 4th quarter installment for 2002 lacks merit. While it is true that the 4th quarter installment was not due at the time Petitioner ceased to have corporate officer responsibility, the taxes due related to the business activity that occurred during the 2002 tax year, at a time when Petitioner was responsible as a corporate officer. Therefore, Petitioner has failed to demonstrate a palpable error that misled the Tribunal and the parties and that would have resulted in a different disposition if the error was corrected. See MCR 2.119.

4. The Tribunal does find, however, that an error was made in the total tax due on page 34 of the Final Opinion and Judgment, as noted in Petitioner's Motion for Reconsideration. The total tax due should have read $192,295.27.

5. The Final Opinion and Judgment is corrected to state as follows:

Assessment Number	Type	Tax Period	Tax Due	Interest*	Penalty
L552234	SUW	8/02	$ 5,615.99	$	$0
L552235	SUW	9/02	$ 4,973.53	$	$0
L565512	SUW	10/02	$ 2,873.75	$	$0
L614471	SUW	11/02	$ 18,699.00	$	$ 1,870.00
L652646	SUW	12/02	$ 13,212.00	$	$ 1,321.00
M013914	SBT	12/02	$ 69,902.00	$	$33,465.59
M066808	SBT	12/01	$ 50,433.00	$	$ 6,668.70
M013910	SBT	12/02	$ 26,586.00	$	$12,728.05
TOTAL			**$192,295.27**	**$ ***	**$ 56,053.34**

*Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122.

Therefore,

IT IS ORDERED that Respondent's Motion for Reconsideration is PARTIALLY GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion for Reconsideration is PARTIALLY GRANTED.

IT IS FURTHER ORDERED that the December 4, 2009 Final Opinion and Judgment is CORRECTED, as indicated herein.

MICHIGAN TAX TRIBUNAL

Entered: February 24, 2010 By: Rachel Asbury

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL
NON-PROPERTY TAX APPEAL

Keith N. Penner,
Petitioner,

v

MTT Docket Nos. 328268, 328269, 328270, 328271, 328272, 328273, 328274, 328275, 328276, 328277, 328278, 328279, 328280, 328281, 328282, and 328283

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner appeals Respondent's Decision and Order of Determination dated May 26, 2006, finding Petitioner liable, as a responsible corporate officer, for the unpaid withholding tax for August 2002 through August 2003 and unpaid single business tax for the 2001 and 2002 tax years of Harrison Construction Company for the period July 1992 to March 1996. Petitioner also appeals Respondent's Assessment No. M013910 for unpaid single business tax for the 2002 tax year of The Bell Company. Petitioner filed separate petitions with the Tribunal for each

assessment on July 14, 2006. The petitions were consolidated and a hearing in this consolidated matter was held on June 24, 2009. Petitioner was represented by Neill T. Riddell, Dean and Fulkerson PC. Respondent was represented by Amy M. Patterson, Assistant Attorney General.

BACKGROUND

Petitioner was a Vice President of Harrison Construction. As Vice President, Petitioner signed various corporate information documents, tax returns, and negotiable instruments for the payment of taxes. The payroll withholding taxes and single business taxes, as represented in the assessments which are the subject of this appeal, were not paid by Harrison Construction and the assessments for those taxes became final. As a result, Respondent assessed Petitioner for the amount of the unpaid taxes, interest, and penalties as a responsible corporate office under MCL 205.27a(5).

Petitioner appeals Respondent's Assessment Nos. L552234, L552235, L565512, L614471, L652646, L717693, L754578, L804471, L838328, L867538, L957917, M008120, M008121, M013914, and M066808 are for unpaid withholding tax for August 2002 through August 2003 and unpaid single business tax for the 2001 and 2002 tax years assessed against Petitioner as a corporate officer of Harrison Construction and Respondent's Assessment No. M013910 for unpaid single business tax for the 2002 tax year assessed against Petitioner as a corporate officer of The Bell Company. Respondent issued L552234 and L552235 on February 25, 2003; L565512 on March 5, 2003; L614471 on April 23, 2003; L652646 on May 5, 2003; L717693 on June 3, 2003; L754578 on June 30, 2003; L804471 on August 4, 2003; L838328 on September 1, 2003; L867538 on October 6, 2003; L957917 on November 03, 2003; M008120 and M008121

on November 10, 2003; M013914 on December 23, 2003; M066808 on February 24, 2004; and M013910 on June 8, 2006.

Petitioner requested an informal conference to contest Assessment Nos. L552234, L552235, L565512, L614471, L652646, L717693, L754578, L804471, L838328, L867538, L957917, M008120, M008121, M013914, and M066808. The conference was conducted by phone on February 23, 2006 and completed in person on May 5, 2006. Respondent's hearing referee's recommendation upheld the assessments. Respondent issued a Decision and Order of Determination on May 26, 2006, adopted the referee's recommendation and issued final assessments against Petitioner. Respondent issued Assessment No. M013910 on June 8, 2006, which Petitioner appealed to the Tribunal.

In an order issued August 18, 2008, the Tribunal granted Respondent's motion to consolidate the cases filed under Docket Nos. 328268, 328270, 328271, 328272, 328273, 328274, 328275, 328276, 328277, 328278, 328279, 328280, 328281, 328282, and 328283. On April 22, 2009, the Tribunal entered an Order including Docket No. 328269 in the consolidated case.

At the prehearing conference held on April 21, 2009, Petitioner moved to consolidate MTT Docket Nos. 359248, 359249, 359250, 359251, 359252, 359253, 359254, 359255, 359256, 359257, 359283, and 359284. Respondent filed a response in opposition to Petitioner's motion. The Tribunal entered an Order denying Petitioner's motion on May 13, 2009.

The assessments herein appealed are as follows:

Assessment Number	Type	Tax Period	Tax Due	Interest*	Penalty
L552234	SUW	8/02	$ 5,615.99	$ 941.37	$ 0561.58
L552235	SUW	9/02	$ 4,973.53	$ 904.00	$1,492.02
L565512	SUW	10/02	$ 2,873.75	$ 522.34	$1,005.75
L614471	SUW	11/02	$ 18,699.00	$ 3,540.22	$4,674.75
L652646	SUW	12/02	$ 13,212.00	$ 2,435.12	$3,303.00
L717693	SUW	1/03	$ 15,181.00	$ 2,723.26	$3,795.25
L754578	SUW	2/03	$ 13,558.00	$ 2,371.83	$ 3,389.50
L804471	SUW	3/03	$ 14,156.00	$ 2,406.67	$ 3,539.00
L838328	SUW	4/03	$ 13,906.00	$ 2,297.86	$ 3,476.50
L867538	SUW	5/03	$ 18,210.00	$ 2,919.40	$ 4,552.50
L957917	SUW	6/03	$ 15,507.00	$ 2,414.70	$ 3,876.75
M008120	SUW	7/03	$ 15,143.00	$ 2,288.55	$ 3,785.75
M008121	SUW	8/03	$ 16,477.00	$ 2,414.57	$ 4,119.25
M013914	SBT	12/02	$ 69,902.00	$ 13,947.74	$33,465.59
M066808	SBT	12/01	$ 50,433.00	$ 13,591.49	$ 6,668.70
M013910	SBT	12/02	$ 26,586.00	$ 5,304.81	$12,728.05
TOTAL			$314,433.27	$131,680.75	$94,433.95

*Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122.

PETITONER'S CONTENTIONS

Petitioner offered the following proposed exhibits:

P-1 Final Bills
P-2 Guaranty
P-3 Forbearance Agreement, May 1, 2003
P-4 Forbearance Agreement, August 1, 2003
P-5 Surrender Agreement, October 2, 2003
P-6 Assets
P-7 Post Surrender Paydowns
P-8 Opinion and Judgment, MTT Docket Nos. 311009, 311017, and 311018
P-9 Orders Granting Motions to Dismiss, MTT Docket Nos. 307418, 307416, and 307417
P-10 Motions to Dismiss

Petitioner's exhibits 1, 2, 3, 4, 5 were admitted. Respondent noted on the record that Petitioner's exhibit 2 was executed eight years prior to the tax years at issue and that Petitioner's exhibit 3

was not signed by both parties. Respondent did not object to the admission of these exhibits but placed its reservations on the record. Respondent objected to the admission of Petitioner's exhibit 5 as not relevant to the tax periods at issue. The Tribunal overruled Respondent's objection "because . . . it does speak to the obligations of the company during this period of time and payment of indebtedness, and the liability of parties and signators."[1] Respondent objected to the admission of Petitioner's exhibit 6, a typed document that Petitioner asserted was a list of assets of Bell/Harrison/Dietzel as of October 2, 2003, prepared by the bank and a consultant. The Tribunal stated that

> [t]here is no bank heading . . . no signature. There is nothing on this document to tell me who prepared it, how it was prepared. And there is no underlying documents to show me where these figures came from and the person who prepared this. . . . and we don't have them here to discuss . . . the preparation of this document.[2]

The Tribunal sustained Respondent's objection and the exhibit was not admitted. Respondent objected to the admission of Petitioner's exhibit 7 as not relevant to the time period at issue and the preparer was not present. The Tribunal sustained Respondent's objection stating "it's unsigned. There is no caption. There is no signature. There is not even a date as to when this was prepared. And I have no authentication as to this document."[3] The exhibit was not admitted. Respondent objected to the admission of Petitioner's exhibit 8 as having no relevance to this proceeding and, based upon the Tribunal ruling that the principles of *res judicata* and collateral estoppel, as argued by Petitioner, are not applicable to the instant matter. The Tribunal overruled Respondent's objection and admitted the exhibit as a document issued by the Tribunal but "not

[1] Transcript page 61, ll 14-19
[2] Transcript page 57, l 21-page 58, l 4
[3] Transcript page 64, l 25-page 65, l 4

admitting in any way that it has any precedential value."[4] Respondent objected to the admission of Petitioner's exhibit 9,[5] stating "I see no relevance to this case whatsoever."[6] Petitioner asserts that with this exhibit, along with the underlying motions to dismiss,[7] "we have a judicial finding that Mr. Penner was not a responsible person."[8] Respondent objected to the admission of Petitioner's exhibit 10, stating that the exhibit had not been exchanged prior to the hearing and was not listed on Petitioner's exhibit list. The Tribunal overruled Respondent's objection to Petitioner's exhibit 9, an order of the Tribunal, and stated "[t]he documents that you have submitted as your exhibit 9, do not in any way address Mr. Penner's responsibility as a corporate officer for any of the assessments listed in these three documents. They simply . . . granted Respondent's motion to dismiss." The Tribunal allowed Petitioner's exhibit 10 for the narrow purpose of acknowledging that

> Treasury . . . moved to dismiss the case in these particular docket numbers for these particular assessments related to this particular company. Again with no precedential value as to Mr. Penner's responsibility as a corporate officer for the assessments in front of today. The motion to dismiss is not a determination on the facts and evidence, and testimony related to . . . the particular assessment in a full hearing or adjudication in the Tribunal.[9]

Petitioner contends that "the assessment . . . of him pursuant to either MCL 205.27a(5) . . . is erroneous in that he was not, during the relevant times, an officer having control, or supervision of, or charged with the responsibility for filing the subject returns or making the subject payments."[10] Petitioner contends that,

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[4] Transcript page 76, ll 2-4
[5] Tribunal's orders granting Respondent's motions to dismiss in MTT Docket Nos. 307416, 307417, and 307418
[6] Transcript page 77, ll 4-5
[7] Petitioner's proposed exhibit 10, see discussion on page 3
[8] Transcript page 79, ll 10-12
[9] Transcript page 85, ll 4-14
[10] Petitioner's petition paragraph 5

> although at one time Mr. Penner was at one time functioning in a role as the vice-president and treasurer of the involved companies in a manner which one would ordinarily assume a person holding that title to function exercising authority and discretion over various matters, including certain financial matters, that Mr. Penner's position changed. . . . [and] the affect . . . was to leave him essentially with a naked title . . . and that he ceased to have any control of a discretionary nature over which he could control the financial dealings of this company.[11]

Petitioner asserts that although he had financial involvement in the past, for the tax periods at issue, authority and responsibility to "either file returns or pay corporate obligations had been taken from him by the corporate President"[12] and that he functioned in an administrative capacity only. The corporate President, because the company was in financial difficulty, took over "full administrative and executive control of the operation of the company." Petitioner asserts that during the "assessment periods Mr. Penner did not have the status or the control that would be required under the statute to impose officer liability on him."[13]

Petitioner further contends that the "Opinion and Order in MTT Docket Nos. 311009, 311017, and 311018 are entitled to *res judicata* or collateral estoppel effect in the present proceeding."[14] Petitioner argues that, as to the assessments for withholding for August, 2003, Mr. Penner had been fired by that date. Further, based upon the filing extension for the 2002 single business tax return, Mr. Penner had been gone from the company for five months at the time that return was due.

[11] Transcript page 16, l 23-page 17, l 11
[12] Petitioner's petition paragraph 6
[13] Transcript page 18, ll 15-17
[14] Petitioner's prehearing brief page 2

Petitioner testified that he was employed from 1989 through 2003 by the Bell Company and Harrison Construction. He was the controller and his responsibilities were "[t]he financial."[15] Mr. Penner was hired by Henry Bell, president of the Bell Company and testified that "[a]t the time I was hired I was the vice-president and treasurer."[16] A stock option plan was part of the offer of employment by the Bell Company, Harrison Construction, and later the Dietzel Company, to Petitioner. Petitioner exercised the options and obtained a 10 percent ownership interest in each company during the mid to late 1990's. Petitioner testified that his last day of work for Harrison Construction, Bell Company, and Dietzel was September 13, 2003.[17]

Petitioner testified that his duties from the beginning of his involvement with the companies until the time he left "were drastically different."[18] When he was hired, he testified that he was responsible for the administration and Mr. Bell was responsible for the operation. Petitioner testified that at the end of his employment "[a] hundred percent of [Mr. Bell's] time was devoted to . . . the administration of the company. . . . I was there and basically doing as I was being directed by Mr. Bell to do."[19] Petitioner stated that Mr. Bell made the decisions with respect to payments of debts of the companies and he had no input.

Petitioner testified that Mr. Bell and his wife executed "covenant agreements"[20] with NBD and were given a $6 million line of credit for which they were "personal guarantees."[21] NBD

[15] Transcript page 22, l 3
[16] Transcript page 22, ll 23-24
[17] Transcript page 26, ll 2-10
[18] Transcript page 29, l 18
[19] Transcript page 29, l 24-page 30, l 4
[20] Transcript page 31, l 6

conducted annual audits of the companies and "would review the various covenants within the loan documents to make sure that we were still in compliance."[22] In November or December of 2002, NBD did their annual audit and found that the companies were out of compliance and held a meeting which Petitioner attended. Petitioner testified that he was told by Mr. Bell not to attend future meetings. Petitioner testified that Mr. Bell and his wife entered into forbearance agreements[23] and that they had given "a personal guarantee on the line of credit"[24] on those agreements. Petitioner testified that at the point in time at which the forbearance agreements were in force, the bank schedule was in place, and Mr. Sheatzley became the "financial consultant"[25] and reviewed the cash flow schedule on a weekly basis, his "authority was taken away . . . I was not able to make decisions of funds to be released."[26] Petitioner testified that the role he played after that time was "because of the accounting [I] was given the information of the debts . . .I signed checks . . . but that was just pure administrative. . . . And a decision was then made by Mr. Bell what checks would then be released."[27]

Petitioner testified that at "certain times . . . [Mr. Bell] would disburse checks . . . ahead of actually getting paid"[28] with Petitioner's knowledge. Mr. Bell would have the controller or assistant controller prepare the checks and he would release them. Petitioner testified that "we had daily reporting of cash balances"[29] so that he became aware that "all of the sudden there was

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[21] Transcript page 31, l 15
[22] Transcript page 32, ll 3-5
[23] Petitioner's exhibits 2 and 3
[24] Transcript page 37, ll 9-10
[25] Transcript page 35, ll 16-23
[26] Transcript page 39, ll 16-19
[27] Transcript page 40, ll 2-16
[28] Transcript page 41, ll 5-10
[29] Transcript page 41, l 23

no cash available."[30] After the bank came in, Petitioner testified, "there was just very little involvement between Mr. Bell and myself."[31] Petitioner further testified that Mr. Bell had him investigated by an outside investigation firm to "find out if there was any fraudulent activity going on, any embezzlement"[32] which Petitioner found out about in "negotiations or prehearings with the Internal Revenue Service."[33]

Petitioner testified that his last working day with "the companies"[34] was September 13, 2003, which was a Friday. He was told on the following Monday, by Mr. Bell, that the "banks did shut the companies down"[35] and he left. Petitioner returned two or three weeks later to return a company vehicle. Petitioner testified that he was told not to come back and that his personal property was never returned. Eventually, "[Mr. Bell] told me I was terminated"[36] in late September. Petitioner testified that he did not remember the last pay period for which the paycheck he received did not bounce.

Petitioner moved admission of the second forbearance agreement.[37] Petitioner testified that he was not involve in the negotiations with the bank related to the agreement but that Mr. Bell had given it to him to review. Petitioner testified that he told Mr. Bell that the agreement "would have caused severe difficulties for the companies."[38]

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[30] Transcript page 41, l 21
[31] Transcript page 43, ll 9-10
[32] Transcript page 43, ll 20-21
[33] Transcript page 43, ll 24-25
[34] Transcript page 44, l 17
[35] Transcript page 45, ll 1-2
[36] Transcript page 46, ll 16-17
[37] Petitioner's exhibit 4
[38] Transcript page 49, ll 5-6

Petitioner testified that the single business tax return for 2002 had an original due date of April 30, 2003, and that the "final due date after extension would have been December 31st . . . of 2003."[39] The single business tax return for the 2001 tax year had an original due date of April 30, 2002, and "under an extension . . . December 31, 2002."[40] As to the 2001 single business tax return, Petitioner testified that "I signed the return and at that point in time it was to my knowledge appropriately done and paid."[41] Petitioner further testified that, based on his "involvement with 2002 single business taxes, . . . to my knowledge an extension was there with the return."[42] Petitioner testified that Mr. Bell entered into an agreement[43] that "surrendered all assets of the companies and assets of Henry and Tracy Bell to the bank."[44]

Petitioner testified that he did not "play any role in fundamental corporate decisions involving the payment of corporate obligations"[45] during calendar year 2003, which included tax obligations. Petitioner further testified that he "prepared and tendered to . . . the State of Michigan Department of Treasury, checks in payment of taxes"[46] when those taxes were due but that he did not play any role "in making the decision to pay those [taxes]."[47] Petitioner testified that the Department of Treasury came to his office and "requested money."[48] He "went to Mr.

[39] Transcript page 50, ll 14-15
[40] Transcript page 50, ll 23-25
[41] Transcript page 51, ll 6-7
[42] Transcript page 52, ll 12-16
[43] Petitioner's exhibit 5
[44] Transcript page 53, ll 6-7
[45] Transcript page 67, ll 8-10
[46] Transcript page 68, ll 22-24
[47] Transcript page 69, ll 4-6
[48] Transcript page 69, l 15

Bell and he . . . told me to go ahead and pay them what they requested."[49] Petitioner testified that prior to 2003, as to his position on the payment of taxes, "I was responsible."[50] As to the assessment for withholding taxes for August 2003, Petitioner testified that those would have been due on September 15, 2003, and his last day of employment was September 13, 2003, although the pay period that included his last day ended on September 17, 2003. Petitioner responded "[n]o, I did not."[51] to the question "[i]n 2003 did you function as the vice-president and treasurer of the Bell companies?"[52] and further testified that he "could sign checks, but everything had to be approved by Mr. Bell to be released."[53]

Petitioner moved for admission of the Tribunal's opinion and judgments in three small claims division cases regarding assessments of Petitioner for withholding tax liability of The Bell Company,[54] the Tribunal's orders granting Respondent's motions to dismiss[55] in three other small claims division cases regarding unspecified assessments of Petitioner by Respondent, and Respondent's motion to dismiss in the second grouping of cases. Petitioner's counsel asserted that, based upon the small claims opinion and judgments, Petitioner was not a responsible person for the tax periods there involved, the Tribunal must find that Petitioner was not responsible for the "liability for the similar assessments for the other Bell companies."[56] Further, Petitioner

[49] Transcript page 69, ll 16-17
[50] Transcript page 70, ll 22-25
[51] Transcript page 71, l 12
[52] Transcript page 71, ll 10-11
[53] Transcript page 71, ll 18-19
[54] Petitioner's exhibit 8, see discussion on page 3
[55] Petitioner's exhibit 9
[56] Transcript page 75, ll 4-5

asserted that the Tribunal must accept the orders of dismissal in the other small claims cases as a "judicial finding that Mr. Penner was not a responsible person"[57] in this matter.

On cross examination, Petitioner testified that it was his signature on the "2001 Michigan Single Business Tax return"[58] of Harrison Construction. Petitioner testified that Doran Mahieu would prepare the company's return using the trial balance he gave them and "the information that they would obtain during the audit, and . . . I gave them the information to prepare the returns."[59] Petitioner further testified that it was the "automatic practice"[60] of Doran Mahieu to request an extension if the returns were not done.

Petitioner testified that it was not his signature on Harrison Construction's combined returns for February 2000, January 2001, December 2001, January 2002, May 2002, June 2002, July 2002, August 2002, September 2002, October 2002, and April 2003[61] and that he did not authorize or request anyone to sign tax returns on his behalf. Petitioner testified that the CPA firm prepared the returns based on payroll information provided by Mary Ann Hogely but that he did not "instruct Melissa Roth, Mary Ann Hogely, Katherine Anatee or Susan Dunn to sign corporate documents on his behalf."[62]

[57] Transcript page 79, ll 11-12
[58] Respondent's exhibit 3, Transcript page 90, l 6
[59] Transcript page 92, ll 9-15
[60] Transcript page 93, l 6
[61] Respondent's exhibit 4. See discussion on page 10
[62] Transcript page 95, ll 16-18

In the following exchange, Respondent questioned Petitioner about his tax related responsibility for the tax periods February 2000, January 2001, December 2001, January 2002, May 2002, June 2002, July 2002, August 2002, September 2002, October 2002, and April 2003,

> Q: I am asking Mr. Penner if you are admitting that you were responsible for the filing of tax returns and payment of taxes between August 2002 and February of 2003?
> A: I was not in February 2003 or January of 2003. The period that you mentioned for August and September of 2002, yes.
> Q: What about October, November, and December of 2002?
> A: For October and November, yes.
> Q: And December of 2002?[63]
> A: Okay. Then yes.[64]

Petitioner identified his signature on "checks from Harrison Construction payable to the State of Michigan for the periods . . . September 2002, October 2002, November 2002, March 2000, August 2002, and January 2003."[65] Petitioner testified that the check for January 2003 was never cashed. Petitioner identified the "corporate information updates . . . [f]or Harrison Construction, for the years 1999, 2000, 2001, 2002 and 2003"[66] and acknowledged it was his signature on each form, he signed each document, and his job title on each update was vice-president. Petitioner admitted that his signature appeared on an installment agreement for Harrison Construction with the Department of Treasury, Internal Revenue Service for tax period "200306" dated August 26, 2003. Petitioner asserted that "Mr. Bell thought it would be easier if I were to sign it because my father did work for the Internal Revenue Service in the Mount Clemens office in which this document was signed."[67] Petitioner stated that he did not remember in response to Respondent's

[63] Transcript page 97, ll 9-17
[64] Transcript page 99, l 8
[65] Respondent's exhibit 5; Transcript page 100, ll 15-18
[66] Respondent's exhibit 6; Transcript page 101, ll 15-18
[67] Transcript page 104, ll 1-4

question "did you state during the informal conference process that you thought that it would be easier to enter into an installment agreement with the IRS?"[68]

Petitioner identified "four checks[69] that are payable to the Michigan Regional Council of Carpenters Fringe Benefits Funds . . . on behalf of Harrison Construction. One is dated May 23, 2003, March 20, 2003, June 20, June 26 . . . 2003."[70] Petitioner acknowledged his signature on the checks and testified, "I was told to sign the checks."[71] Petitioner next identified "payment and performance bonds that are required for any public job in which the contractor does business"[72] were issued to Harrison Construction by Hartford Casualty Insurance Company.[73] One of the bonds was dated November 11, 2002, and two were dated January 31, 2002. Petitioner acknowledged that it was his signature on the bonds and that "he requested that they be prepared for projects that Harrison Construction was awarded in 2002."[74]

Petitioner identified a letter[75] from Petitioner to the collection division of the Department of Treasury dated June 17, 2004 with his signature. Petitioner identified a notice of determination from the workers' and unemployment compensation stating that he was discharged from his job on September 17, 2003 from The Bell Company.[76] Petitioner acknowledged his signature on

[68] Transcript page 104, ll 5-8
[69] Respondent's exhibit 9. See discussion on page 10
[70] Transcript page 105, ll 1-8
[71] Transcript page 105, ll 10-11
[72] Transcript page 107, ll 23-25
[73] Respondent's exhibit 10
[74] Transcript page 108, ll 5-6
[75] Respondent's exhibit 13
[76] Respondent's exhibit 13

and identified "two Bell company checks.[77] The first one is dated May15, 2002, payable to the State of Michigan. The second one is again a Bell Company check dated July 15 payable to the State of Michigan."[78] Petitioner further testified that during 2002, he was authorized to sign checks on behalf of Bell Company and his "authorization to sign checks on behalf of the bank as a check signer never ended. I was not allowed to disburse funds without Mr. Bell's approval."[79] Petitioner identified Commercial Services Corporate Division Profit Corporation Information Updates for The Bell Company 2001, 2002, and 2003.[80] Petitioner acknowledged that it was his signature as vice-president on each document. The 2001 Update was dated April 18, 2001, the 2002 Update was dated May 3, 2002, and the 2003 Update was dated March 24, 2003. Petitioner identified a payment bond issued to The Bell Company by Hartford Casualty dated April 30, 2001, a performance bond issued to The Bell Company by Hartford Casualty dated January 28, 2002, a payment bond issued to The Bell Company by Hartford Casualty dated April 30, 2001, a performance bond issued to The Bell Company by Hartford Casualty dated April 17, 2002, a labor and material bond issued to The Bell Company by Hartford Casualty dated April 17, 2002, and a maintenance bond issued to The Bell Company by Hartford Casualty dated April 17, 2002.[81] Petitioner acknowledged that it was his signature as vice-president on each document.

On cross-examination Petitioner admitted that he had responsibility for paying bills for both The Bell Company and Harrison Construction until "the end of December 2002 . . . beginning

[77] Respondent's exhibit 15
[78] Transcript page 109, ll 20-23
[79] Transcript page 110, ll 1-8
[80] Respondent's exhibit 16
[81] Respondent's exhibit 18

January 2003."[82] Petitioner asserted that he "signed based upon what I was told to do."[83] Petitioner further stated that he exercised control over incoming mail for Bell Company and Harrison Construction and reviewed it prior to distributing it to staff.[84]

On redirect, Petitioner testified that, upon review of Respondent's exhibit 18, none of the documents pertained to periods after 2002. Upon review of Respondent's exhibit 16, Petitioner asserted that no financial commitments were created as a result of his "execution and filing of these annual returns."[85] He clarified that, although the documents in the exhibit were labeled returns, they were only informational returns. Reviewing Respondent's exhibit 15, Petitioner testified that based on the bank encoding on the checks, they had been processed and paid. Petitioner testified that, based upon the dates and amounts, the checks "would have been Michigan withholding . . . in 2002."[86] Petitioner reviewed Respondent's exhibit 10 and testified that all of the documents related to 2002, and none of the "documents related to time periods in 2003."[87] Petitioner testified that as to Respondent's exhibit 9, checks dated March 20, 2003, May 23, 2003, and June 20, 2003, he had signed the checks but, based on the lack of bank encoding on the checks, they had not been processed or paid by the bank. He signed them but "Mr. Bell would have had to have approved them"[88] before they were released.

[82] Transcript page 113, ll 17-18
[83] Transcript page 113, ll 21-22
[84] Transcript page 114, ll 4-10
[85] Transcript page 125, l 23-page 124, l 1
[86] Transcript page 127, ll 12-17
[87] Transcript page 128, line 25-page 129, l 2
[88] Transcript page 130, l 1

Petitioner testified that he signed the installment agreement with the IRS, because Mr. Bell told him to. Petitioner responded in the negative when asked, "[c]ould you have gone off on your own at this point in time and negotiated with IRS and gotten an agreement of this character signed without Mr. Bell's direction"[89] and that had he attempted to do so, he would have been fired.

Petitioner testified that as to the assessment for August 2002, "to my knowledge, you know, the taxes were paid based upon the returns that were filed. The assessment indicates that it is a revised assessment."[90] Petitioner asserts that he paid the withholding taxes due, but that Respondent subsequently issued new bills in 2003 which he was unable to pay because he no longer had control over the disbursement of funds, that responsibility was in the control of Mr. Bell.

On re-cross, Respondent reiterated Petitioner's admission that he had responsibility for filing tax returns and payment of taxes for periods August 2002 through December 2002 and asked if he also had responsibility for filing tax returns and payment of taxes for tax year 2001. Petitioner responded "[f]or 2001, yes."[91]

In his closing argument, Petitioner asserted that

> there is clearly a change. . . . It is clear from the testimony of Mr. Penner that while he bore this title, and no one is trying to dance around that issue, he bore the title of vice-president and treasurer during this period of time. There is sort of a cliff where you get up to the end of 2002, the bank is starting to assert its

[89] Transcript page 130, ll 12-16
[90] Transcript page 136, ll 6-8
[91] Transcript page 140, ll 10-11

> creditor's rights . . . and, Mr. Bell then not dealing with Mr. Penner . . . that Mr. Penner was in a position where he couldn't act.[92]

Petitioner admits that there are no documents, "they are just nowhere to be found, it's just the way that this happened."[93]

RESPONDENT'S CONTENTIONS

Respondent offered the following proposed exhibits:

- R-1 Decision and Order of Determination dated May 26, 2006
- R-2 Final Assessments L552234, L552235, L565512, L614471, L652646, L717693, L754578, L804471, L838328, L867538, L957917, M008120, M008121, M013914, and M066808
- R-3 2001 Single Business Tax return for Harrison Construction Co. signed by Petitioner with Schedule of Shareholders and Officers
- R-4 August 2002, September 2002, October 2002, February 2000, January 2001, January 2002, December 2001, May 2002, June 2002, July 2002, April 2003
- R-5 Copies of various check drawn on the Account of Harrison Construction Company signed by Petitioner in payment of Michigan taxes
- R-6 1999, 2000, 2001, 2002, 2003 Michigan Annual Reports filed with the Michigan Department of Consumer and Industry Services signed by Penner
- R-7 Employer Record of Federal Tax Liability for June 30, 2003
- R-8 Installment agreement between the Internal Revenue Service and Harrison Construction signed August 26, 2003
- R-9 Checks signed by Petitioner on behalf of Harrison Construction Co. payable to the Michigan Regional Council of Carpenters Fringe Benefit Fund between March and June 2003
- R-10 Various Performance Bonds issued to Harrison Construction Co. in 2002 signed by Petitioner

Respondent's exhibits 2, 3, 5, 6, 8, 10, 13, 15, 16, 18 were admitted without objection. Although initially offered, Respondent withdrew proposed exhibit 4.[94] Petitioner objected to Respondent's exhibit 9 based upon writing on the pages, separate from the copies of the checks, of unidentified origin. Respondent agreed that the unrelated writing should have been redacted. Respondent agreed that there was no signature on check 1126, dated June 20, 2002, and that document was

[92] Transcript page 167, l 18-page 168, l 7
[93] Transcript page 168, ll 13-14
[94] See discussion on page 8

withdrawn. The Tribunal allowed the exhibit with the unidentified writing redacted and without check 1126.

Respondent asserts that Petitioner was a corporate officer of Harrison Construction Company and signed documents on behalf of Harrison Construction Company, including tax returns and checks in payment of taxes. "Mr. Penner was responsible for the making of Harrison Construction Company's tax returns or payment of taxes or he had control over the making of the returns or payment of taxes or he supervised the making of the returns or payments of taxes for the tax periods in issue."[95]

Respondent declined to make an opening statement and did not call any witnesses at hearing. In closing, Respondent stated that

> because Mr. Penner has basically admitted that he was responsible for filing the tax returns and paying the taxes for all periods prior to January 2003, that those assessments really shouldn't be in dispute. . . . [a]s to the assessments after January 2003 . . . he has not established that he was no longer responsible for filing the taxes and paying.[96]

FINDINGS OF FACT

Final Assessment Nos. L552234, L552235, L565512, L614471, L652646, L717693, L754578, L804471, L838328, L867538, L957917, M008120, and M008121, are for unpaid withholding tax for August 2002 through August 2003 against Petitioner as a corporate officer of Harrison Construction Company. Final Assessment Nos. M013914 and M066808 are for unpaid single business tax for the 2001 and 2002 tax years assessed against Petitioner as a corporate officer of

[95] Respondent's prehearing statement
[96] Transcript page 168, ll 15- 24

Harrison Construction Company. Final Assessment No. M13910 is for unpaid single business tax for the 2001 and 2002 tax years assessed against Petitioner as a corporate officer of The Bell Company. Petitioner worked for The Bell Company and Harrison Construction Company from 1989 through 2003.[97] At the time he was hired, he "was vice-president and treasurer."[98] When he was hired, part of his "offer of employment was an employee stock purchase plan . . . and was a five year option plan."[99] Petitioner exercised this option prior to the expiration of the five year period and acquired a 10% interest in both The Bell Company and Harrison Construction Company. Petitioner was employed by The Bell Company and Harrison Construction Company until September 13, 2003. The Tribunal finds that Petitioner was a corporate officer of and had an ownership interest in both The Bell Company and Harrison Construction Company during the tax periods at issue.

Respondent submitted a copy of Harrison Construction Company's 2001 single business tax annual return signed by Petitioner as vice-president.[100] Respondent testified that the 2002 single business tax return was signed by Mr. Bell,[101] not by Petitioner. Respondent submitted copies of the Combined Returns of Harrison Construction Company for tax periods February, 2000; January and December, 2001; January, May, June, July, August, September, October, 2002,[102] and December, 2002.[103] All of the returns are signed with Petitioner's name and the denotation of Vice President, however the signature is clearly not that of Petitioner. Although Petitioner

[97] Transcript page 21, ll 22-24
[98] Transcript page 22, l 23-24
[99] Transcript page 24, ll 17-20
[100] Respondent's exhibit 3
[101] Transcript page 149, ll 8-13
[102] Respondent's exhibit 4
[103] Respondent's exhibit 5, page 5

testified that the signatures were not his and that he "did not request anybody to sign my name to tax returns,"[104] he admitted that for "[t]he period . . mentioned for August and September of 2002, yes"[105] he was responsible for the filing of tax returns and payment of tax. Petitioner further admitted tax related responsibility for Harrison Construction Company for October and November, 2002.[106]

Respondent submitted copies of Harrison Construction Company checks made payable to State of Michigan dated March 15, 2000, August 16, 2002, September 26, 2002, October 15, 2002, November 15, 2002, and January 15, 2003.[107] The signature on all of the checks is that of Petitioner. Respondent submitted copies of The Bell Company checks made payable to State of Michigan dated May 15, 2002 and July 15, 2002.[108] The signature on both checks is that of Petitioner.

Respondent submitted copies of Corporation Information Updates for 1999, 2000, 2001, 2002, and 2003 for both Harrison Construction Company and The Bell Company. All Updates are signed by Petitioner as "V Pres." The 2003 Updates were signed on March 24, 2003.

The Tribunal finds that, based upon the evidence presented and Petitioner's testimony, Petitioner was a corporate officer of Harrison Construction Company and The Bell Company with tax related responsibility through December, 2002. Petitioner signed checks for the payment of

[104] Transcript page 95, ll 2-3
[105] Transcript page 97, ll 13-15
[106] Transcript page 97, l 17
[107] Respondent's exhibit 5
[108] Respondent's exhibit 15

taxes, corporate updates, and remained vice-president and treasurer of Harrison Construction Company. Final Assessments L552234, L552235, L565512, L614471, L652646, M013910, M013914, and M066808 should be affirmed.

The Tribunal finds that the line of credit obtained by Mr. and Mrs. Bell in 1994 and Petitioner's assertion that they, and not he, were personal guarantors of that line of credit, is not relevant to the determination of Petitioner's liability under the statute as a responsible corporate officer. Further, that Mr. Bell and not Petitioner signed a forbearance agreement and a financial consultant was brought in to review the requirements of the forbearance agreement is not relevant to the determination of Petitioner's liability. Even if these facts are supported, it is well established that "[t]he fact that other persons may also have been in charge of making the return or paying the tax is no defense to Petitioner's liability." *Cygan v Michigan Department of Treasury*, MTT Docket No. 135626 (1996).

The Tribunal finds that Petitioner's exhibit 7, an unsigned, undated, unverified list of sales dates, payments, principle, and descriptions, that Petitioner did not prepare and had no authentication for, and for which he did not produce the preparer, lacked credibility and was unreliable. Petitioner's good faith efforts and diligent attempts to verify the financial information notwithstanding, the Tribunal finds that the information contained in this document is unrelated to the determination of Petitioner's liability for the assessments at issue. Further, that assets of The Bell Company were sold, even if, as Petitioner testified, for less than he believed they were worth, is not relevant to the criteria on which Petitioner's liability must be determined.

Petitioner argued that after December 2002, his responsibilities changed. Petitioner admitted signing checks during and after January 2003 but asserted "I signed based upon what I was told to do."[109] Although he continued to prepare checks, and sign them, Petitioner asserted that they were held by Mr. Bell and not released. In order for checks to be given to payees in 2003, Petitioner testified that "Mr. Bell would have had to have approved them."[110] However, Petitioner admitted he signed, as vice-president, the installment agreement on behalf of Harrison Construction Company with the Internal Revenue Service on August 26, 2003. Although Petitioner asserted that he was told to negotiate and sign by Mr. Bell, Petitioner clearly held himself out to the Internal Revenue Service as vice-president of Harrison Construction Company as late as August 23, 2003, with the authority to negotiate the agreement. That he would not have done this on his own initiative, even if, as he asserted, he would have been fired had he done so, does not alter the fact that he held himself out as representing Harrison Construction Company and that he could have refused if indeed he was no longer authorized. It would be disingenuous of Petitioner to now say that although he held himself out as a corporate officer with the authority to negotiate and sign the agreement to the Internal Revenue Service in negotiations, he was not.

However, the Tribunal finds Petitioner's explanation that when he was hired, he "was responsible for the administration and Mr. Bell was responsible for the operation. At the end of it, . . . [a] hundred percent of his time was devoted to . . . the administration of the company. . . . I

[109] Transcript page 113, ll 21-22
[110] Transcript page 130, l 1

was . . . doing as I was being directed by Mr. Bell"[111] to be credible. Petitioner asserts that as of November or December of 2002 he had no input "with respect to the payments of debts of the Bell Companies."[112] The checks submitted by Respondent signed by Petitioner before 2003, were all presented to the bank for payment. The copies of checks submitted by Respondent for payment after December, 2002, were written and signed by Petitioner but were not paid by the bank. This evidence supports Petitioner's testimony that after 2002, he presented signed checks and withholding returns to Mr. Bell, and he was no longer authorized to effectuate payments. Thus, he ceased to have tax related responsibility.

Further, the Tribunal finds that Respondent's exhibits, except the 2003 Corporation Information Updates for both companies and the settlement agreement with the Internal Revenue Service, were dated prior to 2003.

The Tribunal finds that Respondent is within its authority to change the assessment after audit and partial payment. Petitioner signed the return, Respondent determined that the return was incorrect and that additional monies were owed for that same period, and Petitioner, if he is responsible for that tax period, is responsible for the correct amount of tax due. That the audit occurred after he left the company is not a defense to responsibility, if established, for amounts that reflect the correct remittance for the tax period at issue.

[111] Transcript page 29, l 20- page 30, l 4
[112] Transcript page 30, ll 5-16

The Tribunal finds the discrepancies in penalties charged against Petitioner and those charged against Harrison Construction Company and The Bell Company to be troubling. Although assessments are given a presumption of validity, values and amounts, the basis of which are unclear and that cannot be explained, are subject to scrutiny. The Tribunal accepts Respondent's assertion that payments were made on some assessments and were applied first to interest and penalties, as is the Department's standard practice. In determining penalties, the Department of Treasury relies on RAB 2005-3, which provides in pertinent part:

> Discretionary Penalties
>
> Facts, circumstances and taxpayer intent must be examined using the best information available. If the examination reveals that a discretionary penalty applies, then a determination is made as to which penalty applies. This determination is made in descending order of the severity of the penalty.
>
> > First - Fraud 100% (no minimum)
> > Second - Intentional Disregard 25% (minimum of $25.00)
> > Third - Negligence 10% (minimum of $10.00)

The Tribunal takes notice that the taxpayer is actually Harrison Construction Company in all but one of the assessments at issue and The Bell Company is the taxpayer in the last assessment.

Final Assessment L552234 for the tax period August 2002, as assessed against Harrison Construction Company, indicated an amount due for taxes of $9,119.18, interest of $0, and penalty of $0. When assessed against Petitioner, the Final Bill indicated an amount due for taxes of $5,615.99, interest of $941.37, and penalty of $561.58. Respondent testified that the reduction in this assessment was "because a payment was made. . . . between the time he was assessed and

the time Harrison Construction was assessed."[113] Respondent did not know why there was no penalty in the assessment of Harrison Construction Company but a penalty was assessed against Petitioner. The Tribunal finds that the penalty related to this assessment was paid in full prior to Petitioner's assessment and, as Petitioner's liability is completely derivative, no additional penalty should be applied against Petitioner subsequent to the original assessment becoming final. Respondent was further unable to advise the Tribunal as to what period the interest on Petitioner's assessment covered. The Tribunal further finds that interest should only be charged against Petitioner for the amount of tax outstanding after payment by Harrison Construction Company, from the date of the determination of the additional tax due, and from the date interest was paid in full as indicated by the $0 on the assessment of Harrison Construction Company.

Final Assessments L552235 and L565512 indicated the same amount of tax due for the assessments against Harrison Construction Company as against Petitioner. However, both assessments have a $0 penalty amount for Harrison Construction Company and penalty amounts of $1,492.02 and $1,005.75 against Petitioner. The Tribunal finds these unexplained penalties assessed against Petitioner, when there are no penalties outstanding against Harrison Construction Company for these tax periods, to be unsupported. The same finding as to interest is made with respect to these assessments.

Final Assessments L614471, L652646, L717693, L754578, L804471, L838328, L876538, and L957917, when issued against Harrison Construction Company, appear to be in the nature of

[113] Transcript page 145, ll 5-9

jeopardy assessments. They are all for the exact same amount of tax due and that amount is significantly in excess of any of the other assessments. These Final Assessments, when issued against Petitioner, were for very different amounts of tax due, a more realistic amount based on Harrison Construction Company's history. In the Final Assessments issued against Harrison Construction Company, Respondent applied a 10% penalty, except for Final Assessment L614471 in which a 15% penalty was assessed. When these Final Assessments were issued against Petitioner, they all included a 25% penalty.

The Tribunal finds that the statute and case law are clear that, in assessments of responsible corporate officers, the assessments are derivative in nature. Respondent admitted that payments had been made on these assessments and applied against the penalty amounts. Therefore, the Tribunal finds that, as to Final Assessment L552234 in which the amount of tax assessed against Petitioner is less than that assessed against Harrison Construction Company indicating that a payment was made, and as to Final Assessments L552235 and L565512, in which the amount of tax due as assessed against Harrison Construction Company and Petitioner are the same, that the penalty amount assessed against Harrison Construction Company at $0, is the maximum penalty that can be assessed against Petitioner.

The Tribunal finds that as to Final Assessments L614471, L652646, L717693, L754578, L804471, L838328, L876538, and L957917, the penalty amount as assessed against Harrison Construction Company was, with one exception of a 15% penalty, a 10% negligence penalty. Respondent provided no explanation for the increase in the penalty percentage to a 25%

intentional disregard penalty when the assessment was issued against Petitioner. The assessment being derivative, Petitioner's state of mind is irrelevant. Therefore, the Tribunal finds that the maximum penalty that can be assessed against Petitioner pursuant to Final Assessments L614471, L652646, L717693, L754578, L804471, L838328, L876538, and L957917 is a 10% negligence penalty.

The Tribunal finds penalties as applied to Final Assessments M013914, M066808, and M013910 inconsistent and troubling as well. Final Assessment M066808 for a deficiency of $50,433 in single business tax was assessed against Harrison Construction Company for the 2001 tax year. Interest was charged against the deficiency but no penalty was applied. The Final Assessment included a separate portion indicating 0.00 single business tax due, 0.00 underpaid estimate, but included a 10% penalty for underpayment of estimated tax and a 3% penalty for late payment of tax. The Tribunal finds that if the 3% penalty was applied for late payment of the single business tax, it should have been reflected in the section of the Final Assessment related to that deficiency and interest. If the 3% penalty was based upon the underpayment of estimated tax, that amount is clearly 0.00 on the bill. In the alternative, to apply a 3% plus a 10% penalty to underpayment and late payment of the estimate appears to apply a penalty twice for the same deficiency. When questioned, Respondent was unable to explain the basis for the 3% penalty or what period or tax amount it was based on. The total penalties in this assessment were the same for Harrison Construction Company and Petitioner. The Tribunal finds that only one penalty, a 10% negligence penalty, for the underpayment of estimate is appropriate.

Final Assessment M013914, for a deficiency of $69,902.02 in single business tax assessed against Harrison Construction Company for the 2002 tax year included a 25% penalty for failure to file or pay and a 23% payment for underpayment of estimated tax. Respondent was unable to explain or support the change from a negligence penalty to that of intentional disregard. The Tribunal finds that a 10% negligence penalty should be applied.

Final Assessment M013910 was issued against The Bell Company and, subsequently, against Petitioner as a responsible corporate officer for The Bell Company. The Final Assessment indicated a deficiency of $26,586.00 in single business tax for the 2002 tax year and included a 25% penalty for failure to file or pay and a 25% payment for underpayment of estimated tax. Respondent was unable to explain or support the change from a negligence penalty to that of intentional disregard. The Tribunal finds that a 10% negligence penalty should be applied.

CONCLUSIONS OF LAW

MCL 205.27a(5) provides:

> If a corporation, limited liability company, limited liability partnership, partnership, or limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns or payments. The dissolution of a corporation, limited liability company, limited liability partnership, partnership, or limited partnership does not discharge an officer's, member's, manager's, or partner's liability for a prior failure of the corporation, limited liability company, limited liability partnership, partnership, or limited partnership to make a return or remit the tax due.

"Prima facie evidence" is defined as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." Black's Law Dictionary, (7th ed, 2000) page 460. It is a rule which does not shut out evidence, but merely declares that certain conduct shall suffice as evidence until the opponent produces contrary evidence.

The statute's signature mechanism provides the mechanism for establishing a prima facie case of derivative officer liability. Respondent met this initial burden of establishing a prima facie case by demonstrating that Petitioner was a corporate officer and producing Petitioner's signature on a return or negotiable instrument submitted in payment of the corporation's taxes. *Dore v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided June 10, 2003 (Docket No. 238344).

Once the Department of Treasury's prima facie case is established, the burden of proof shifts to Petitioner to rebut the presumption that he is responsible for the corporation's failure to pay. *Drake v Michigan Dept of Treasury*, MTT Docket No 204601 (1995). Petitioner must produce evidence sufficient to convince the Tribunal that the nonexistence of the presumed fact is more probable than its existence. *Widmayer v Leonard*, 422 Mich 280, 287 (1985). Competent, material and substantial evidence that Petitioner had tax specific duties must be weighed against the rebutting evidence.

Petitioner asserts that the principle of *res judicata* requires the Tribunal to find that Petitioner is not a responsible corporate officer as to all of the assessments at issue. Petitioner asserts that the

Tribunal's opinion and judgments in small claims division cases, MTT Docket Nos. 311017, 311018, and 311019 finding Petitioner not responsible as corporate officer for the withholding tax deficiency of The Bell Company[114] for the months of March, April, and May, 2003, require the Tribunal to find Petitioner not responsible in the instant cases in the Entire Tribunal Division. MCL 205.765 provides that a small claims decision is not precedential unless so designated. The Legislature was very clear about its intent as to this standard. The language in section 65 is unambiguous and needs no interpretation. Further, the Administrative Law Judge presiding in those matters stated unequivocally, "[t]his opinion makes no legal conclusion with regard to the periods before March 2003 or after May 2003."

Petitioner further contends that the Tribunal's orders granting Respondent's motions to dismiss[115] in MTT Docket Nos. 307416, 307417, and 307418, three other small claims division cases regarding unspecified assessments of Petitioner by Respondent, are a "judicial finding that Mr. Penner was not a responsible person"[116] in this matter. Petitioner's counsel asserts that, based upon the small claims opinion and judgments in those cases, that Petitioner was not a responsible person for the tax periods there involved, the Tribunal must find that Petitioner was not responsible for the "liability for the *similar* assessments for the other Bell companies."[117] (Emphasis added.)

[114] Petitioner's exhibit 8, see discussion on page 3
[115] Petitioner's exhibit 9
[116] Transcript page 79, ll 11-12
[117] Transcript page 75, ll 4-5

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Mgt, Inc,* 463 Mich 569, 575; 621 NW2d 222 (2001). *Res judicata* requires proof of four elements.

> (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first case; and (4) both actions involved the same parties or their privies. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

The burden of establishing the applicability of res judicata is on the party asserting it. *Baraga County v State Tax Comm,* 466 Mich 264, 269; 645 NW2d 13 (2002).

Petitioner's argument as to the orders of dismissal fail to meet the first criteria above. A dismissal is not a decision on the merits. MCL 205.765 bars the use of the small claims opinions as precedent in this matter. Additionally, except for Final Assessment M031910 which pertains to The Bell Company, the parties are not the same in these matters.

Notwithstanding that the Tribunal in this matter is not bound by the small claims decisions, the underlying tax liability for the tax periods at issue related to different corporations and different tax periods. Further, a Tribunal Judge may find the testimony and evidence presented at a hearing in the Entire Tribunal persuasive arguments that lead to an opinion different from that in the small claims matter. Officer liability is a fact driven determination. The facts as they relate to each separate corporation, Petitioner's actions on behalf of that corporation, for each specific tax

period at issue must be separately and individually examined. Petitioner did not present any evidence at hearing to support the application of *res judicata* to this matter.[118]

Although Petitioner asserts collateral estoppel, Petitioner uses the term in the conjunctive with *res judicata* and makes no argument as to its application to the matters at issue. Collateral estoppel, even as defined by Petitioner, is inapplicable. The parties in this matter are not "seeking to re-litigate issues which they have had a full and fair opportunity to litigate in a prior court or agency proceeding."[119] This action was brought by Petitioner and had he wished to litigate these assessments in conjunction with the previous cases, it was his choice. He separated his actions. The parties have not previously had a full and fair opportunity to litigate these assessments and there are clear issues of fact to be independently determined in these consolidated cases.

In the instant case, Petitioner signed single business tax returns and checks for payment of taxes, which establishes, prima facie, his liability. Petitioner must rebut the presumption of liability by demonstrating that, despite these facts, he should not be liable. *See Sobol v Michigan Department of Treasury*, MTT Docket No.190108 (1996). "The fact that other persons may also have been in charge of making the return or paying the tax is no defense to Petitioner's liability. MCL 205.27(a) clearly states that 'ANY of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure.'" *Cygan v Michigan Department of Treasury*, MTT Docket No. 135626 (1996). (Emphasis added.)

[118] See discussion, transcript pp 4-8
[119] Petitioner's brief page 4

Based upon the evidence and testimony presented, the case file, and briefs submitted, the Tribunal concludes that Petitioner was a responsible corporate officer with tax related responsibility for the 2001 and 2002 tax years. Further, the Tribunal concludes that, although Petitioner was a corporate officer from January 1, 2003 through September 17, 2003, he presented sufficient credible evidence and reliable testimony to rebut the presumption established by Respondent that he had tax related responsibility during that time period. The Tribunal comes to this conclusion taking into consideration Petitioner's August, 2003, signature on the settlement agreement with the Internal Revenue Service on behalf of Harrison Construction Company.

The Tribunal further concludes that, as the penalties assessed against Petitioner are significantly higher than the negligence penalties in the underlying assessments, penalties against Petitioner should not exceed a 10% negligence assessment for Final Assessments L552234, L552235, L565512, L614471, and L652646. Respondent assessed a 10% negligence penalty in the underlying assessment, M066808, for single business tax due. The Tribunal concludes that the 10% negligence penalty assessment should be applied against Petitioner for Final Assessment M066808 and M013914. Respondent issued Final Assessment M013910 against Petitioner for the 2002 single business tax deficiency of The Bell Company. Petitioner was a responsible corporate officer for The Bell Company for the 2002 tax year. Except as otherwise determined in this Final Opinion and Judgment, the Tribunal affirms the penalties for fail to file, underpayment

of estimate, and late payment. Interest is to be computed as provided in the *Findings of Fact* section of this Final Opinion and Judgment. The following assessments are affirmed as follows:

Assessment Number	Type	Tax Period	Tax Due	Interest*	Penalty
L552234	SUW	8/02	$ 5,615.99	$	$ 0
L552235	SUW	9/02	$ 4,973.53	$	$ 0
L565512	SUW	10/02	$ 2,873.75	$	$ 0
L614471	SUW	11/02	$ 18,699.00	$	$ 1,870.00
L652646	SUW	12/02	$ 13,212.00	$	$ 1,321.00
M013914	SBT	12/02	$ 69,902.00	$	$ 13,980.00
M066808	SBT	12/01	$ 50,433.00	$	$ 5,025.63
M013910	SBT	12/02	$ 26,586.00	$	$ 5,318.00
TOTAL			$243,200.27	$ *	$ 27,514.63

*Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122.

JUDGMENT

IT IS ORDERED that Final Assessments L552234, L552235, L565512, L614471, L652646, M066808, M013910, and M013914 are AFFIRMED as modified in the *Conclusions of Law* section of the Final Opinion and Judgment.

IT IS FURTHER ORDERED that Final Assessments L717693, L754578, L804471, L838328, L867538, L957917, M008120, and M008121 are CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: December 4, 2009 By: Rachel Asbury