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

Kai R. Kosanke, Petitioner,	MTT Docket No. 332392 Assessment Nos. N974463, O113103, O240470, O324353, O335533, O526009, O526010 and O559160
v	
Michigan Department of Treasury, Respondent.	Tribunal Judge Presiding Cynthia J Knoll

ORDER PARTIALLY GRANTING
PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER PARTIALLY GRANTING
RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

I. SUMMARY

Petitioner, Kai R. Kosanke, is appealing tax assessments issued by Respondent, Michigan Department of Treasury. Petitioner argues that he is not liable for the taxes as a responsible corporate officer, as Respondent claims, because he was not in a position of authority at the time the underlying assessments were issued to the corporate taxpayers. Petitioner believes that he should not be held liable as a corporate officer under MCL 205.27a(5) in that subsequent to the bankruptcy filing by the corporations, he no longer had control of, supervision over, or responsibility for the payment of the taxes in question. Respondent disagrees noting that a person can be held derivatively liable as a responsible corporate officer for taxes that are incurred and due during the time period that he or she was a responsible corporate officer. Respondent argues that Petitioner was not relieved of responsibility until the corporations' bankruptcy converted from Chapter 11 to Chapter 7, which was subsequent to the time periods that the taxes were incurred, due and assessed.[1] The Tribunal partially agrees with both parties, as indicated herein.

II. BACKGROUND

Petitioner is appealing the liabilities resulting from various Bills for Taxes Due for Single Business Tax, Sales and Use Tax, and Withholding Tax, plus penalties and accrued interest. The assessments were based on Petitioner's position as a corporate officer of Trans Industries, Inc. and its three subsidiaries, Transign, Inc., Transmatic, Inc., and Vultron, Inc. Trans Industries, Inc. and its subsidiaries ("Trans Industries") filed Chapter 11 bankruptcy protection on April 3, 2006, which was converted to a Chapter 7 liquidation of the corporations' assets in October 17, 2006.

[1] Five assessments were for periods prior to the filing under Chapter 11 and three assessments for taxes incurred during the period after the bankruptcy filing and before conversion to Chapter 7.

Respondent conducted an audit of the corporations during the period January through April, 2006, and determined tax deficiencies. The tax periods at issue are February 2002 through December 2005 for sales and use tax; the years 2001 through 2005 for Single Business Tax, and withholding tax for August through October, 2006. (Note: The withholding assessments were for periods after the corporations filed under Chapter 11 but before conversion to Chapter 7.) The unpaid taxes were levied on the corporations but were left unpaid and uncontested, becoming final after the statutory appeal period expired. The subject Assessments were subsequently issued to Petitioner as a responsible corporate officer.

On May 10, 2007, Petitioner submitted a Petition requesting a redetermination of Respondent's Bills for Taxes Due (Assessment Nos. N974463, O113103, O240470 and O335533) issued on April 9, 2007 and April 27, 2007. On August 30, 2007, Petitioner submitted an Amended Petition to add Assessment No. O324353, which was issued on August 22, 2007. On August 22, 2008, Petitioner filed a Second Amended Petition adding Assessment Nos. O058361, O526009, O526010, O559160 and O629805, which were issued on May 19, 2008.[2]

On June 8, 2010, the Tribunal held a Prehearing Conference to discuss the status of this case, the filing of cross motions for summary disposition and to set a date certain for hearing or oral argument. On August 5, 2010, the parties submitted a Second Joint Stipulation of Facts upon which they intended the Tribunal to decide subsequent cross-motions for summary disposition. The parties stipulated that two of the assessments (numbers O629805 and O058361) have been cancelled as to Petitioner. On or around August 6, 2010, the parties filed cross-motions for summary disposition pursuant to MCL 2.116(C)(10). Respondent also filed its motion pursuant to MCR 2.116(C)(8). Petitioner requested oral argument be held. The parties filed responses on August 18 and 19, 2010, and Respondent filed a Statement Regarding Oral Argument, suggesting such proceedings were unnecessary. Oral argument took place at the Tribunal on August 26, 2010.

III. STIPULATED FINDINGS OF FACT

The parties stipulated to the following findings of fact and the Tribunal finds:

1. Petitioner, Kai R. Kosanke, resides at 4430 Lamson Drive, Waterford, Michigan 48329.
2. The issue in this case is the corporate officer liability assessed against Mr. Kosanke for the corporations Transign Inc., Transmatic Inc., Vultron, Inc., and Trans Industries Inc.
3. Transign Inc., Transmatic Inc., Vultron, Inc. and Trans Industries Inc. were all assessed for the taxes at issue and did not appeal said final assessments and the underlying assessments and liability which form the basis for the assessments asserted against Mr. Kosanke are final and not subject to further review or collateral attack.
4. Kai R. Kosanke was assessed under the statute providing for assessment of officers, members, managers, and partners liable for tax debts of a corporation, limited liability company, limited liability partnership, partnership, or limited partnership which owe taxes to the State of Michigan.

[2] Petitioner filed a Motion for Leave to Amend Petition on May 19, 2008, to add Assessment Nos. O629805; O058361; O526009; O526010; and O559160, and the Tribunal granted Petitioner's Motion on August 15, 2008. As such, Petitioner's Amended Petition was timely filed.

5. The assessments at issue in this matter are:

Assessment No.	Corp. Assessment Date	COL Issued	Tax	Amount
N974463	5/3/06	4/9/07	SBT	$ 29.59
O058361	Cancelled as to Mr. Kosanke			
O113103	7/6/06	4/27/07	USE	$ 2,338.17
O240470	9/12/06	4/9/07	SBT	$18,608.10
O324353	10/17/06	8/22/07	SBT	$ 6,594.50
O335533	10/18/06	4/27/07	SBT	$ 3,728.58
O526009	11/28/06	5/19/08	WTH	$ 5,313.22
O526010	11/28/06	5/19/08	WTH	$ 5,287.54
O559160	12/08/06	5/19/08	WTH	$ 5,261.02
O629805	Cancelled as to Mr. Kosanke			

Total amount in controversy with interest calculated to the date of the assessments: $ 47,160.72.

6. On April 3, 2006, Trans Industries, Inc. filed for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Michigan as a Chapter 11 Bankruptcy also known as a debtor in possession.
7. On April 3, 2006, Vultron, Inc. filed for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Michigan as a Chapter 11 Bankruptcy also known as a debtor in possession.
8. On April 3, 2006, Transmatic, Inc. filed for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Michigan as a Chapter 11 Bankruptcy also known as a debtor in possession.
9. On April 3, 2006, Transign, Inc. filed for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Michigan as a Chapter 11 Bankruptcy also known as a debtor in possession.
10. On April 11, 2006, all four bankruptcies were ordered jointly administered under the Trans Industries, Inc. case by the U.S. Bankruptcy Court for the Eastern District of Michigan being case number 06-43993-TJT.
11. Transign, Inc., Transmatic, Inc., and Vultron, Inc., are one hundred percent (100%) owned by Trans Industries, Inc.
12. On October 17, 2006 the bankruptcy case was converted from a Chapter 11 debtor in possession bankruptcy to a Chapter 7 liquidation bankruptcy.
13. Upon the conversion David W. Allard was appointed trustee of the debtor and its subsidiaries in the bankruptcy case.
14. Kai Kosanke signed numerous documents on file with Treasury, including, but not limited to:
    a. 2004 SBT Annual Return for Trans Industries, Inc.;
    b. Trans Industries, Inc. check number 1617 dated October 28, 2005;
    c. 2006 Foreign Corporation Information Update for Trans Industries, Inc. dated May 23, 2006;
    d. 2002 SBT Annual Return for Transign, Inc.;
    e. Application for Extension to File Michigan Tax Returns for Transign, Inc.;
    f. 2003 SBT Annual Return for Transign, Inc.;
    g. 2002 SBT Annual Return for Transmatic, Inc.;

h. Application for Extension to File Michigan Tax Returns for Transmatic, Inc.;
i. 2003 SBT Annual Return for Transmatic, Inc.;
j. 2004 SBT Annual Return for Transmatic, Inc.;
k. Foreign Corporation Information Update for Transmatic, Inc. dated May 23, 2006
l. 2002 SBT Annual Return for Vultron, Inc.;
m. Foreign Corporation Information Update for Vultron, Inc. dated May 23, 2006.

15. During the pendency of the bankruptcy proceeding numerous orders were entered in the U.S. Bankruptcy Court for the Eastern District of Michigan, which speak for themselves and are admissible without objection provided they are Orders of the United States Bankruptcy Court for the Eastern District of Michigan.
16. Petitioner was a corporate officer who had control or supervision of and was responsible for making the returns or payments of Trans Industries, Inc. and its subsidiaries (Transign, Inc.; Transmatic, Inc.; Vultron, Inc.) up until the filing of bankruptcy on April 3, 2006.
17. The issue regarding liability during the pendency of the Chapter 11 bankruptcy proceedings is subject to disagreement by the parties.

IV. PETITIONER'S CONTENTIONS

Petitioner filed a motion for summary disposition based upon MCL 2.116(C)(10), asserting that there are no genuine issues of material fact and this case may be decided as a question of law. More specifically, Petitioner asserts that "the Joint Stipulation of Facts indicates that the assessments at issue were issued post petition, and at the time they were issued the corporate taxpayers were operating under the orders of the United States Bankruptcy Court for the Eastern District of Michigan." [3] Petitioner therefore contends that "he could not, as a matter of law, be responsible for payment of the assessments in question." *Id.*

Petitioner acknowledges that he was the Chief Financial Officer of Trans Industries during the tax periods at issue, up to and until Trans Industries filed a Chapter 11 bankruptcy proceeding on April 3, 2006. Petitioner contends that at that time, Trans Industries was "forced to enter into a stipulated agreement giving the Huntington Bank (hereinafter the 'Pre-Petition Lender') a super priority lien covering all of the [Trans Industries'] assets. The Pre-Petition lender allowed [Trans Industries] to continue to operate using funds advanced under a post petition promissory note." (PB p. 2) Petitioner further asserts that the "Pre-Petition Lender insisted on [Trans Industries] retaining Amherst Financial Partners, L.L.C. ('Amherst') to assist them in managing their finances during the pendency of the Chapter 11 proceeding." *Id.* Amherst was responsible for preparing an operating budget, which had to be reviewed and approved by the Pre-Petition Lender, and all expenses had to be allocated in the budget and approved by the bank. (PB pp. 2 & 3)

Petitioner admits that he was fully aware that Respondent's audit, which was completed after the filing of the Chapter 11 petition, had tax issues that needed to be addressed. (PB p. 3) He claims that he sought to have monies allocated in the budget for the engagement of accountants to review Respondent's findings and to prepare the necessary tax documents to address the audit

[3] Petitioner's Brief in Support of Motion for Summary Disposition, (PB) p. 1

issues. Petitioner argues that the Order entered by the United States Bankruptcy Court on May 30, 2006, prohibited him from paying any deficiencies unless approved by the Pre-Petition Lender and ordered by the Court.[4] He claims that the Pre-Petition Lender and Amherst "repeatedly denied [his] request[s] for funding arguing that under the Bankruptcy Court orders, no funds advanced under the promissory note which constituted post petition funding, could be used to pay pre petition debts." (PB p. 3) Petitioner maintains that with no funds available to hire accountants or attorneys to contest Respondent's findings, the tax deficiencies were finalized, and much later issued against him in the form of corporate officer assessments.

Petitioner claims that he resigned his position as corporate CFO on October 13, 2006, and four days later, October 17, 2006, the Chapter 11 proceeding was converted to a Chapter 7 liquidation of Trans Industries' assets.

Petitioner asserts that the threshold question in determining whether he is liable as the responsible officer under MCL 205.27a(5) is when do taxes become "due." Petitioner looks to the case of *Xerox Corporation v Oakland County*, 191 Mich App 433; 478 NW2d 702 (1991), "in which the Court determined that interest began to accrue when the assessment was issued or, if challenged and upheld by a judicial or administrative tribunal, when that adjudication is made." (PB p. 6) Petitioner contends that:

> It is apparent that the assessments which Respondent relies upon in the instant matter as to both [Trans Industries] and Petitioner encompass pre petition deficiencies and were issued post petition. The audit conducted by Respondent did not conclude until after [Trans Industries] had filed for bankruptcy on April 3, 2006. Applying the *Xerox* holding to these facts, it would appear that the taxes covered by the assessments in question did not become due until after [Trans Industries was] in bankruptcy and under the orders and control of the Bankruptcy Court for the Eastern District of Michigan. . . . While the tax deficiencies uncovered by Respondent's January-April, 2006 audit may have been delinquent, they were not 'due' until assessed against the corporate Taxpayers. (PB p.7)

Petitioner argues that "[it] is a Cardinal Rule of statutory construction that statutes will not be read to yield absurd or unjust results." (PB p.7) He maintains that he cannot be held liable under MCL 205.27a(5) where the facts show that he was not in control of or had supervision or responsibility for making the returns or payments due. He asserts that Trans Industries "…(then operating as Debtors in Possession) could not contest the Intents to Assess because the *Final Order Authorizing Post-Petition Financing and Granting Adequate Protection*…provided that no monies could be expended by [Trans Industries] without the prior approval of the Pre-Petition Lender and the Court." (PB pp. 8 & 9) He therefore argues that the lack of funding made it impossible for him to meet his responsibilities under MCL 205.27a(5), and to hold him personally liable under the statute would lead to an absurd and unjust result not contemplated by the legislature. *Id.*

[4] Petitioner's Answer to Respondent's Motion for Summary Disposition, p. 3

Petitioner cites the case of *Schmidt v Michigan Department of Treasury* [5] in which the Tribunal found that a petitioner with the title of President and CEO was stripped of control and was no longer responsible for the financial activities of a corporate taxpayer during the tax period in question. Petitioner argues that the finding in *Schmidt* is "instructive in that it stands for the proposition that once control over the financial operations of the corporate debtor has been lost, the officer cannot be held liable for corporate defalcations." (PB p. 10) He contends that while he was the CFO of Trans Industries, "he complied with the requirements imposed by statute as tax returns were prepared and the appropriate taxes were paid. The deficiencies which were later converted into assessments arose as a result of an audit by Respondent. . . ," which were not issued until after control over the financial operations were transferred to the Pre-Petition Lender. (PB p. 10)

Petitioner also asks the Tribunal to "take judicial notice of and be guided by the reasoning and the result obtained by. . ." Respondent's Letter Ruling ("LR") 1985-25[6]. Petitioner believes that the situation in LR 1985-25 was "remarkably similar to the one at bar." (PB p.11) In that case, the question posed was whether a president could be held liable for taxes which arose during the period the company was in bankruptcy. The Acting Revenue Commissioner Thomas Hoatlin wrote:

> Where the corporation is in bankruptcy and the corporate officer does not have control of the business, the officer cannot be held liable as a responsible officer. At the time the taxes became due the corporation was under the complete control of the Bankruptcy Court. The president had no access to corporate funds or the records necessary to file the required returns. . . .[7]

Despite Petitioner's observation that a letter ruling with respect to one taxpayer does not in any way bind Respondent with respect to another, he argues that the facts in LR 1985-25 are so similar to the facts in this case that the ruling should apply in the instant matter as well. (PB p. 12) Petitioner argues that because he had no control over or access to the corporate funds after the Chapter 11 was filed and had to request approval for every expenditure, he should not be held liable for any of the tax liabilities.

In reply to Respondent's Brief in Support of Its Motion for Summary Disposition, Petitioner responds to several issues raised by Respondent. First, Petitioner maintains that:

> **THERE WAS NO FAILURE TO FILE THE RETURN OR PAY THE TAX DUE**. The liability asserted by Respondent has its genesis in Respondent's audit which disclosed deficiencies. When the deficiencies were assessed against the corporate taxpayers and they failed to pay the assessments, the liability, which is derivative, was assessed against Petitioner. It was only then that any possible liability with respect to Petitioner could attach. [Emphasis in original][8]

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[5] MTT Docket No. 274465 (August 20, 2002)
[6] Issued on January 10, 1985 by Acting Commissioner of Revenue Thomas M. Hoatlin.
[7] Petitioner's Brief in Support of Motion for Summary Disposition, pp. 11 & 12, citing *Official State of Michigan Department of Treasury Michigan Tax Guide, 2009-2010* (West Publishing Company), Vol 6, p. 663.
[8] Petitioner's Reply to Respondent's Brief in Support of Its Motion for Summary Disposition, (PRRB) p. 2

He further asserts that "when Respondent issued its assessments against Petitioner, he was no longer employed by nor did he have access to the books, records or funds of the corporate taxpayers." (PRRB p. 4) He argues that Respondent did not issue its first assessment against Petitioner until a year after the filing of the Chapter 11. He maintains that "[h]ad Respondent issued its assessment against Petitioner in a timely fashion, Petitioner would have been put on notice of his liability while he was still in a position to mount a defense." (PRRB p.4) Petitioner disputes Respondent's reference to and reliance on RAB 89-38, arguing that is does not control the instant situation. He states

> [t]he thrust of the RAB is that corporate officer liability will attach to unpaid corporate taxes which arise while the corporation is in a debtor in possession status. **The taxes which are being assessed against Petitioner were deficiencies uncovered by Respondent's audit of pre petition tax years and did not represent liabilities which arose while the corporate taxpayers were in a Chapter 11 status.** [Emphasis added] (PRRB p.4)

Finally, Petitioner contends that Respondent "misses the point of this litigation." He argues that "the lack of authority to pay as determined by a federal bankruptcy court's order . . . is controlling." (PRRB p. 3)

V. RESPONDENT'S CONTENTIONS

Respondent filed a motion according to TTR 111(4), MCR 2.116(C)(8) and MCR 2.116(C)(10). Respondent contends that because Petitioner admits liability for the tax periods in question, Respondent's assessments should be upheld as legitimate.[9] Respondent argues that "[r]egardless of whether or not the corporation was in bankruptcy, Petitioner's liability is not contingent or precluded upon the bankruptcy and the orders of the bankruptcy court or the issuance of the assessments against him." *Id.*

Respondent states that "Petitioner admits to signing numerous tax documents" and "admits that he was indeed a corporation officer who had control or supervision of and was responsible for making the returns or payments of the entities at issue up until April 3, 2006." (RB p. 5) Respondent argues that it "has established a *prima facie* case and the burden shifts to Petitioner to prove that he was not a responsible corporate officer." *Id.* It is Petitioner's burden to rebut the presumption.

Respondent asserts that Petitioner's claim that he is not liable because subsequent to the filing of the bankruptcy petition he no longer had control of, supervision over, or responsibility for payment of taxes is without merit and is not a defense to Petitioner's corporate officer liability. Respondent argues that MCL 205.27a makes no exception for liability regarding payment, and points out that "the ability to pay is not a factor that this Honorable Tribunal may review or consider." (RB p. 5) Respondent contends that, with the exception of three assessments,[10] the

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[9] Respondent's Brief in Support of its Motion for Summary Disposition, (RB) p. 9

[10] Assessment numbers O526009, O526010 and O559160 are for withholding taxes assessed and due in August, September, and October 2006, subsequent to filing under Chapter 11 and before conversion to Chapter 7.

taxes were due prior to the filing of the bankruptcy under Chapter 11, despite being assessed against Petitioner on April 9, 2007, April 27, 2007, and August 22, 2007.

Respondent looks to its Revenue Administrative Bulletin, RAB 89-38, which states in part:

> Petitions in Bankruptcy
>
> **Corporate officers may be assessed for tax liability incurred by the corporation prior to the date the corporation filed under Chapter XI of the United State's Bankruptcy Code**. Taxes incurred subsequent to filing under the bankruptcy code are the responsibility of the debtor in possession or trustee in bankruptcy. If the corporation is the debtor-in-possession and no bankruptcy trustee is appointed, then the corporate officer(s) retains control of the filing of tax returns and payments of taxes. Therefore, officer liability will attach to any unpaid corporate taxes while the corporation is in the debtor-in-possession and no bankruptcy trustee has been appointed. Issuance of an officer liability Intent to Assess may be desirable to preclude the running of the statute of limitations for a particular taxable period, and assure collection. **[Emphasis added]**[11]

Respondent believes that its "RAB is clear that not only may Petitioner be assessed for the unpaid taxes which pre date the bankruptcy but also may be assessed for the post petition taxes incurred by the corporation during the pendency of the bankruptcy since no trustee was appointed." (RB p. 6) Respondent maintains that "the RAB uses the word 'incurred' not 'assessed' [and] taxes are incurred when the return and payment are due." (RB p. 7) It asserts that its "assessment is a collection measure [used] when taxes are unpaid and Treasury finds a liability." *Id.* Respondent argues that "[t]o accept the Petitioner's premise would shield anyone who is liable as a corporate officer when a company later files bankruptcy. The bankruptcy in this case has no relevance to the Petitioner and his liability." (RB p. 7)

Respondent argues that Petitioner's reliance upon *Xerox, supra*, in his assertion that taxes are not due until Treasury issues an assessment, is misplaced.[12] Respondent maintains that *Xerox* does not support Petitioner's assertions regarding his corporate officer liability; rather, the issue in *Xerox* was a limited and narrow question: "when [is tax] 'due' in situations where the taxpayer's challenge of an assessment results in a finding of underassessment."[13] Respondent contends that the question "involved the finality of a tax which is subject to litigation and when that tax would be 'due' subjecting the taxpayer to interest on the unpaid assessment. *Xerox* does not involve corporate officer liability and when that liability attaches." (RRB p. 4) Respondent contends that *Xerox* involves taxes actively in litigation, and the Court of Appeals said the taxes become due, "once the order is issued, the final adjudication of those assessments. We don't have that here. These assessments were issued against the corporation. They were not challenged. They become final, not subject to further review or collateral attack, and the derivative liability attaches."[14]

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[11] Revenue Administrative Bulletin 1989-38
[12] Respondent's Reply Brief in Support of its Motion for Summary Disposition, (RRB) p. 3
[13] *Xerox*, 191 Mich App at 434.
[14] Transcript of Oral Argument, (Trans) p. 23

Respondent also disputes Petitioner's reliance on *Schmidt, supra*, arguing that the facts in this case are very different. In *Schmidt*, the Tribunal agreed that the petitioner would not be liable for taxes incurred, due and assessed during the time period he had no involvement in the operational or financial affairs of the corporation. In this case, Respondent argues that Petitioner was not relieved of responsibility until October 17, 2006, the date the bankruptcy was converted to Chapter 7, which was subsequent to the time periods that the taxes were incurred, due and assessed. (RRB p. 6)

In response to Petitioner's statement that "to read and enforce the statute as written would lead to an unjust and absurd result," Respondent countered by stating "[t]o read into the statute what Petitioner suggests would lead to an unjust and absurd result." (RRB p. 5) Respondent contends that Petitioner "is suggesting that a corporation can file returns and fail to pay the correct amount of tax and then once the corporation has filed for bankruptcy protection those prior tax periods cannot be assessed against corporate officers." (RRB p. 5) Respondent argues that to accept this position leads to the conclusion that a corporate officer would have an incentive to underreport and pay less than a corporation owes, with no consequence to the corporate officers. *Id.* Respondent also notes that, "[d]espite Petitioner's assertions to the contrary, he did not pay the 'appropriate' amount of tax as evidenced by Treasury's audit and assessments . . . ."(RRB p.5)

VI. STANDARD OF REVIEW

Petitioner filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Respondent filed a motion according to TTR 111(4), MCR 2.116(C)(8) and MCR 2.116(C)(10). TTR 111(4) provides that "[i]f an applicable entire tribunal rule does not exist, the 1995 Michigan Rules of Court, as amended, and the provisions of chapter 4 of Act No. 306 of the Public Acts of 1969, as amended, being §§24.271 to 24.287 of the Michigan Compiled Laws, shall govern."[15]

Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991). If it appears to the court that the opposing party, rather than the moving party is entitled to judgment, the court may render judgment in favor of the opposing party. *Washburn v Michailoff*, 240 Mich App 669; 613 NW2d 405 (2000) (citing MCR 2.116(I)(2)).

Respondent also moves for summary disposition pursuant to MCR 2.116(C)(8). A motion brought according to MCR 2.116(C)(8) permits summary disposition when "the opposing party has failed to state a claim upon which relief may be granted."[16] MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's (Petitioner's) claim and results in a determination whether the plaintiff's allegations are sufficient to establish a prima facie case.[17]

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[15] Tax Tribunal Rule 111(4)
[16] MCR 2.116(C)(8)
[17] *Spiek v Department of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

It is well established that a statute granting a tax exemption must be strictly construed against the taxpayer and in favor of the taxing authority. [18] In *Elias Bros Restaurants Inc v Dep't of Treasury*, the Michigan Supreme Court states that "[b]ecause tax exemptions are disfavored, the burden of proving entitlement to an exemption rests on . . . the party asserting the right to the exemption."[19] There is no doubt that the entity claiming a tax exemption has the burden to prove that it is entitled to the exemption, and ". . . if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant." [20]

VII. CONCLUSIONS OF LAW

The Tribunal has carefully considered the parties' Motions under MCR 2.116(C)(10), and finds that there is no genuine issue in respect to any material fact. The Tribunal finds that pursuant to MCR 2.116(C)(8), Petitioner has failed to provide any basis for relief in his Petition, which cites no legitimate legal authority or any factual basis as to why Petitioner is not responsible for five of the assessments at issue. However, Petitioner has brought forth sufficient and credible evidence to prove that he is not responsible for three withholding tax assessments issued during the period after Trans Industries filed bankruptcy under Chapter 11.

Michigan's corporate officer liability statute, MCL 205.27a, states in subsection (5):

> (5) **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 and 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. The sum due for a liability may be assessed and collected under the related sections of this act. [Emphasis added.]

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[18] *Michigan Baptist Home & Development Co v Ann Arbor*, 396 Mich 660, 670; 242 NW2d 749 (1976); *Nomads Inc v City of Romulus*, 154 Mich App 46, 55; 397 NW2d 210(1986).
[19] *Elias Bros Restaurants Inc v Dep't of Treasury*, 452 Mich 144, 150; 549 NW2d 837 (1996) (referencing *Terchek v Dep't of Treasury*, 171 Mich App 508, 510-511; 431 NW2d 208 (1988).
[20] *Evanston YMCA Camp v State Tax Comm*, 369 Mich 1, 8; 118 NW2d 818 (1963) [citing *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737(1948)].

The Michigan Supreme Court in *Livingstone v Department of Treasury*, 434 Mich 771, 783-784; 456 NW2d 684 (1990), set forth the following standard for imposing personal liability upon corporate officers:

> In order to hold a person personally liable for a corporation's tax liability, 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.

MCL 205.27a(5) provides that a corporate officer's signature on either a return, or a negotiable instrument, is prima facie evidence of the officer's responsibility to make returns. *Sobol v Michigan Dept of Treasury*, 9 MTT 321, May 19, 1995. The establishment of the prima facie case then creates a rebuttable presumption. Petitioner has the burden of proof of showing that he is not a corporate officer, or that he was a corporate officer without control over or responsibility for making returns or tax payments, i.e., that he did not have tax-related responsibility. The *Livingstone* Court further explained that the standard for imposing personal liability upon corporate officer under MCL 205.27a(5) is strictly and solely derivative. See *Livingstone* at 782.

Petitioner admits and acknowledges that he was a responsible corporate officer as defined under MCL 205.27a until April 3, 2006. This fact is not in dispute. The threshold issue to be determined is when did Trans Industries fail to pay the taxes due and whether Petitioner was, at that time, an officer who had control or supervision of, or responsibility for, making the payments. Petitioner asks the Tribunal to consider the findings in *Xerox, supra,* and conclude that the taxes covered by the assessments at issue did not become due until Trans Industries received and failed to pay, which was after it filed bankruptcy. The Tribunal finds the facts in *Xerox,* which relate to the accrual of interest on a tax assessment in controversy, are so different that a comparable analysis is not appropriate.

The Legislature used the word "due." If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *Turner v Auto Club Ins Ass'n,* 448 Mich 22, 27; 528 NW2d 681 (1995). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. *Luttrell v Dep't of Corrections,* 421 Mich 93; 365 NW2d 74 (1984). The term "due" is not defined in the statute; however, Black's Law Dictionary, (8th ed), p 538, defines the term to mean "owing or payable; constituting a debt." A "debt" is defined as a "liability on a claim." MCL 205.23(1) provides that:

> If the department believes, based upon either the examination of a tax return, a payment, or an audit authorized by this act, that a taxpayer has not satisfied a tax liability . . . the department shall determine the tax liability and notify the taxpayer of that determination.

The plain reading of this language is clear that a tax liability, one that a taxpayer has not satisfied, must have been previously incurred and was therefore "due" at some earlier moment. The statute provides that a responsible corporate officer is one with control and authority **at the time the tax liability is incurred**. Petitioner acknowledges that "the taxes which are being assessed against Petitioner were deficiencies uncovered by Respondent's audit of pre petition tax years and did not represent liabilities which arose while the corporate taxpayers were in a Chapter 11 status." (PRRB p. 4) Petitioner cites no statutory authority to support his position that a responsible corporate officer is not liable in such a case.

Petitioner contends that while he was the CFO during the tax periods involved in this matter, he complied with the requirements imposed by statute as tax returns were prepared and the appropriate taxes were paid. (PB p. 10) This argument is difficult to accept because if the appropriate taxes were paid, the audit would have resulted in no deficiency and this issue would be moot. However, Respondent did find that Trans Industries did not pay the proper amount of tax at a time when Petitioner was admittedly in a responsible position. The Tribunal finds that the taxes at issue were incurred but the liability was not satisfied when the original returns were filed and taxes due.

The fact that Petitioner was not an employee of Trans Industries at the time he was personally notified of his assessment is not relevant. Petitioner commented that had he known about the assessment against him in a timely fashion, he would have been in a position to mount a defense. This is counter to his argument. Petitioner maintains that he had no authority to fight the assessments issued to Trans Industries; how then could he have been in a position to mount a defense? The Tribunal is of the position that Petitioner either knew or should have known that he was derivatively liable for the unpaid taxes of Trans Industries. In *Heinz v Michigan Department of Treasury*, MTT Docket No. 286514 (2003), the petitioner argued that she did not receive notice of unpaid liabilities until after the business was closed. The Tribunal determined that this argument does not shield a petitioner from liability. MCL 205.27a(5) does not specify any particular time period for notice of an unpaid assessment. All it says is that the officer who had control, supervision, or responsibility for filing or paying the taxes is liable for the unpaid tax bill. In fact, it states that the responsible officer remains responsible even after the corporation is dissolved.

Notwithstanding Petitioner's statement in his Brief in Support of Motion for Summary Disposition that "withholding tax assessments for the months of August-October, 2006, were cancelled as [Trans Industries] had no payroll after June 2006," (PB p. 3) these assessments were not cancelled. Petitioner's representative argued that the assessments are "void ab initio. They never should have been issued in the first place and it's like they were never there." (Trans p. 19) The issue as to whether the assessments were valid or invalid as to Trans Industries is not before the Tribunal because they were issued and not contested, thereby becoming final. The issue is whether or not Petitioner was a responsible corporate officer, with responsibility and control of taxes and financial matters at the time the taxes were incurred.

Respondent relies on its RAB to support its position that Petitioner must be held liable as responsible corporate officer for the three assessments incurred from August to October, 2006. RAB 89-38 states in relevant part:

> Corporate officers may be assessed for tax liability incurred by the corporation prior to the date the corporation filed under Chapter XI of the United State's Bankruptcy Code. Taxes incurred subsequent to filing under the bankruptcy code are the responsibility of the debtor in possession or trustee in bankruptcy. **If the corporation is the debtor-in-possession and no bankruptcy trustee is appointed, then the corporate officer(s) retains control of the filing of tax returns and payments of taxes. Therefore, officer liability will attach to any unpaid corporate taxes while the corporation is the debtor-in-possession and no bankruptcy trustee has been appointed.** [Emphasis added]

Respondent acknowledges that when a corporation enters bankruptcy and a court appointed trustee is named, any failure to pay taxes that accrue become payable under the responsibility of the trustee and will relieve the officers of personal liability for those taxes. Respondent argues that because a bankruptcy trustee was not assigned until the conversion to Chapter 7, Petitioner remained in a position of control or supervision of and responsible for making the returns or payments of the taxes until October 17, 2006.

Respondent indicates that the significance of the RAB is to provide direction to the Tribunal. It admits that an RAB is not law, "it's how Treasury administers the law . . . ." (Trans p. 26) Respondent contends that during the Chapter 11 bankruptcy, Petitioner was a responsible corporate officer because "[t]here was no trustee appointed. It was the debtor in possession, and Trans Industries managed and operated itself in the Chapter 11." (Trans p. 27)

The notion of responsible corporate officer is rebuttable. Petitioner submitted an affidavit stating that "Huntington Bank ('the pre petition lender') was given a super priority lien by the Bankruptcy Court and under the terms of that Order which was entered on May 30, 2006, no expense could be paid unless approved by the pre petition lender." Petitioner's affidavit that he did not have authority to pay taxes was corroborated by documentary evidence in the form of the Bankruptcy Order dated May 30, 2006. Petitioner argues that he "did everything in his power to pay these taxes." (Trans p. 14) "[A]fter April 3, 2006 and up until October 13, 2006, when he resigned, [Petitioner] did not have the requisite control over the assets, over the funds of the corporate debtors, corporate taxpayers, if you will, and therefore, he cannot be held liable under 205.271(5)." (Trans p. 22) Respondent was not able to rebut Petitioner's affidavit that he resigned. (Trans p. 30)

With respect to these three assessments, the issue is not whether the corporation had the ability to pay, as argued by Respondent, it is that Petitioner was prohibited by the bankruptcy order and the Pre Petition Lender to pay. He clearly did not have control or supervision of, or was charged with the responsibility for making the returns or payment of taxes.

The Tribunal finds that Petitioner has proven that he did not have control of or supervision of the payment of taxes incurred during the Chapter 11 pendency despite the lack of an appointed trustee. The Pre Petition lender was clearly in control.

VIII. JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is PARTIALLY GRANTED.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is PARTIALLY GRANTED.

IT IS FURTHER ORDERED that Assessment Nos. N974463, O113103, O240470, O324353 and O335533 are AFFIRMED.

IT IS FURTHER ORDERED that Assessment Nos. O526009, O526010 and O559160 are CANCELLED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties as finally shown in this Final Opinion and Judgment within 20 days of the entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting the affected taxes, interest, and penalties shall collect the taxes and interest as required by this Order within 28 days of the entry of this Final Opinion and Judgment.

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

MICHIGAN TAX TRIBUNAL

Entered: October 26, 2010 By: Cynthia J Knoll