



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

ORLENE HAWKS
DIRECTOR

Jeffery C Mertz,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MOAHR Docket No. 21-002888

Michigan Department of Treasury,
Respondent.

Presiding Judge
Steven M. Bieda

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S MOTION TO STRIKE PETITIONER'S
RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On May 25, 2022, both Petitioner and Respondent filed cross motions requesting that the Tribunal enter summary judgment in their favor in the above-captioned case. More specifically, Petitioner relies on MCR 2.116(C)(10), and pursuant to that rule, requests dismissal of Respondent's Order and Determination concerning Corporate Officer Liability for Withholding Tax in its entirety. Respondent, also relying on MCR 2.116(C)(10), requests this Tribunal to grant summary disposition in its favor as there is no genuine issue of material fact and Respondent is entitled to judgment upholding the subject's assessments as a matter of law.

On June 15, 2022, Respondent filed a response to Petitioner's Motion for Summary Disposition; Petitioner filed its response to Respondent's Motion for Summary Disposition on June 23, 2022.

Respondent filed a Motion to Strike Petitioner's Response to Respondent's Motion for Summary Disposition on June 27, 2022, asserting that Petitioner was late in filing its Response to Respondent's Motion for Summary Disposition. Petitioner thereupon filed a response to Respondent's Motion to Strike Petitioner's Response to Respondent's Motion for Summary Disposition on July 11, 2022, asserting an honest error in miscommunication with the Tribunal, as well as the fact that the arguments in Petitioner's response were largely identical as those Petitioner had set forth in its own Motion for Summary Disposition. Petitioner also asserted that once the error was discovered, action was taken immediately to timely address the issue.

**PETITIONER'S CONTENTIONS IN SUPPORT OF SUMMARY DISPOSITION
IN ITS FAVOR**

In support of his Motion, Petitioner contends that Respondent erred in its allegation that "Petitioner served, at a minimum, as an officer of Howard Finishing, LLC during the relevant taxation period. Petitioner asserts that neither the facts nor any documents offered by Respondent demonstrate that at all relevant times Petitioner was in actuality an officer of Howard Finishing, LLC or an officer responsible as required by law to assess corporate officer liability." Furthermore, Petitioner argues that "Treasury cannot establish a prima facie case against Petitioner for Corporate Officer Liability as Petitioner can properly rebut all prima facie evidence Treasury has presented."

Petitioner asserts that "Treasury's investigation into who is liable was further flawed by its failure to identify actual successors to Howard Finishing's tax liabilities including, Beacon Park, LLC, among others." Petitioner asserts that Michigan Department of Treasury (herein after referred to as Treasury) did a poor job in

investigating the matter, consequently, Treasury's assessment of Petitioner is erroneous and premised solely on circumstantial evidence incapable of reaching a conclusion that Petitioner is a "responsible officer" of Howard Finishing LLC.

Petitioner contends that this action was brought due to Treasury's error in assigning Corporate Officer Liability against Petitioner for the 2016 tax year. Petitioner asserts that none of the facts nor any documents offered by Treasury demonstrate that at all times relevant Petitioner was in actuality an officer of Howard Finishing, LLC, or an officer responsible as required by law to assess Corporate Officer Liability and that Petitioner can properly rebut all prima facie evidence that Treasury has presented. Petitioner asserts that he began working for Howard Finishing as a Production Manager in 2009, transferred to the position of Director of New Business Development in 2010, but that this position *was not an officer* position. Petitioner subsequently assumed the position of Controller within Howard Finishing in 2014 because the previous Controller resigned, and that this position was intended to be temporary until a new Controller could be appointed. However, due to the company's financial constraints, Petitioner's tenure as acting Controller continued for many years. Petitioner contends that this was not an officer position and that Petitioner's role was primarily data entry and that Petitioner supplied the data used by the company's outside accountant and tax preparer. Petitioner asserts that 2016 was a challenging year for the company, and that due to managerial lapses attributable to Richard Mertz, the company failed to properly file taxes in 2016, along with certain tax related liabilities. The company was also on the verge of bankruptcy.

Petitioner contends that the case should be dismissed because Respondent cannot satisfy the elements of a prima facie case for Corporate Officer Tax Liability. Specifically, Respondent cannot determine through prima facie evidence that Petitioner was a responsible person for purposes of Corporate Officer Tax Liability, and that Respondent cannot establish liability through a prima facie case under the circumstances, and that Petitioner was neither a *de jure* nor *de facto officer*. Petitioner also denies any officer role, contending that he did not control, supervise, nor was he responsible for the filing and/or payment of the company's taxes. Additionally, Petitioner denies that he was an Officer during the time period of the default, and thus he did not willfully or recklessly fail to pay the taxes.

Additionally, Petitioner asserts that Respondent failed to assess successor liability against Beacon Park Finishing, LLC and that judgment against Petitioner must be dismissed as a matter of law.

RESPONDENT'S RESPONSE TO PETITIONER'S SUMMARY DISPOSITION

On June 15, 2022, Respondent filed a response to the Motion. Respondent contends that Petitioner's Motion for Summary Disposition "is premised on recharacterization of certain facts and inapposite authority." Respondent argues that Petitioner's assertions "that his titles with Howard Finishing, LLC were mere formalities and that he did not actually act in the capacity of a corporate officer" for the company. Respondent asserts that the "record contradicts this false narrative," with Respondent noting that the record demonstrates that Petitioner was, in fact, an officer of the company with "tax-specific responsibility who willfully failed to file returns or pay the tax due." Respondent points to the fact that Petitioner was the only officer who signed all

Sales, Use and Withholding returns for the years 2014 to 2017 on behalf of the company; that he held himself out as an officer of the company; that he was intimately involved with financial matters of the company and that the company represented him as a responsible official of Howard Finishing with the State of Michigan Department of Environmental Air Quality. Respondent asserts that the signed tax returns, coupled with other evidence, establish that Petitioner was an officer of Howard Finishing with tax responsibilities before, during, and after the period of default, and that he willfully failed to file returns or pay the tax due.

Respondent disagrees with Petitioner's position that "Treasury failed to assess successor liability against a successor purchaser of the company." Respondent notes that it assessed a successor purchaser after Petitioner was already assessed. Respondent did not have information that clearly identified a successor, as required by statute, until after Petitioner was assessed. Respondent notes that the "fact that another assessment was issued for a different entity potentially responsible for Howard Finishing's outstanding tax liability under a successor liability theory does not serve as a "get out of jail free" card for Petitioner in this matter because the Revenue Act clearly contemplates that multiple assessments may be issued.

Respondent contends that the assessments at issue must be upheld because the record evidence demonstrates that Petitioner was an officer of Howard Finishing with tax-specific responsibility, that documentary evidence establishes that Petitioner willfully failed to file returns or pay the tax due, and that Respondent has established a prima facie case under MCL 205.27a(5) that Petitioner is personally liable for all tax periods at issue. Respondent notes that although Petitioner attempts to rebut Treasury's

prima facie case by claiming that he was first appointed as an officer in 2017, Petitioner's signature on tax returns before that date disprove that claim.

**RESPONDENT'S CONTENTIONS IN SUPPORT FOR SUMMARY DISPOSITION
IN ITS FAVOR**

Respondent also filed a Motion for Summary Disposition on the same day as Petitioner. In its motion, Respondent contends that summary disposition should be granted in its favor pursuant to MCR 2.116(C)(10) and moves that this Tribunal should grant its motion in this corporate officer liability case because the record evidence demonstrates that Petitioner was an officer of Howard Finishing with tax-specific responsibility and that Petitioner willfully failed to file returns or pay the tax due. Respondent asserts that it has established a prima facie case under MCL 205.27a(5) and that Petitioner is personally liable for all tax periods at issue.¹ Respondent notes that Petitioner's allegations that he was first appointed as an officer in 2017 is rebutted by Petitioner's signature on tax returns before that date.

Respondent notes that during discovery, Petitioner produced the same documents he had submitted to the Treasury referee hearing, all of which do nothing to show that Petitioner is not a liable corporate officer for the tax periods at issue. Respondent noted that the Petitioner described his involvement in tax matters with the company as "one who puts entries into the system." However, Respondent asserts that

¹ MCL 205.27a(5) states in part: "If a corporation, limited liability company, limited liability partnership, partnership or a 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."

documentary evidence as well as Petitioner's own testimony show his significant involvement in all matters of the company from 2015 to 2018.

Respondent contends that one of Petitioner's responsibilities was to work on all tax matters, state and federal, of the company. Respondent noted that "although Petitioner claims that his father Richard Mertz had tax responsibilities between 2015 and June 2017 as well as supervision over him, Petitioner was not able to point to any document that supported his contention that his father supervised him." Respondent further asserted that **no other officer of the company signed SUW returns on behalf of the company for the tax years of 2014 to 2017**. Additionally, Petitioner discussed tax matters with other officers from 2015 to 2017 and provided to the company CPA data to prepare the company tax returns.

Respondent asserts that it has established a prima facie case that Petitioner is a responsible person under MCL 205.27a(15)(b) and Howard Finishing is a "business" as used in MCL 205.27a(15)a.² Furthermore, Respondent notes that Michigan withholding taxes are the type of taxes to which MCL 205.27a(5) applies.

Respondent notes that Treasury's RAB 2015-23 "summarizes the MCL 205.27a(15)(b) definition of responsible person in the following way: (1) an officer of the business; (2) the officer controlled, supervised, or was responsible for the filing of returns or payment of taxes; (3) the officer was an officer during the time period of default; and (4) the officer willfully failed to file a return or pay the tax due." In further support, Respondent notes that the statutory language of MCL 205.27a(15)(b) provides:

A signature, including electronic signature, on a return of negotiable instrument submitted in payment of taxes after the time period of default

² See also MCL 205.27a(14)(b)(vi); MCL 205.27a(15)(a).

alone in not prima facie evidence that the person is a responsible person for the time period of default but may be considered along with other evidence to make a prima facie case that the person is a responsible person. With respect to a return or negotiable instrument submitted in payment of taxes before the time period of default, the signature, including electronic signature, on that document along with evidence, other than that document, sufficient to demonstrate that the signatory was an officer, member, manager of a manager-managed limited liability company, or partner during the time period of default is prima facie evidence that the person is a responsible person.

Respondent further cites MCL 25.27a(15)(c) for the definition of “time period of default” as meaning “the tax period for which the business failed to file the return or pay the tax due under subsection (5) and through the later of the date set for the filing of the tax return or making the required payment,” and “willful” or “willfully” meaning the person “knew or had reason to know of the obligation to file a return or pay the tax, but intentionally or recklessly failed to file the return or pay the tax.”³

Respondent argues that there is circumstantial evidence that Petitioner signed negotiable instruments for payment of taxes in 2016, acknowledging that Petitioner did not sign SUW tax returns during the periods of default, but that the absence of such evidence does not prevent properly assessing Petitioner as a corporate officer. Respondent is arguing that a prima facie case is established because (1) Petitioner was an officer of Howard Finishing with tax responsibilities before, during, and after the period of default, January 1, 2016 through January 20, 2017; (2) Petitioner signed all the SUW returns of Howard Finishing and “willfully failed to file a return or pay the tax due” and that Petitioner testified that there was “a decent possibility” that he countersigned checks for payment of taxes, thereby strengthening the prima facie case

³ Respondent’s Motion for Summary Disposition, page 11.

for the tax periods at issue; (3) Petitioner provided financial support to Howard Finishing during 2016 and made significant withdrawals, strengthening the prima facie case for the tax periods at issue.

Additionally, Respondent contends that Petitioner's signature on SUW Returns of Howard Finishing before and after the period of default, along with Petitioner's testimony and other documentary evidence establish that he was an officer of Howard Finishing before, during, and after the period of default. Respondent notes that Petitioner's signature on the SUW returns of Howard Finishing between 2015-2018, public documents, and testimony, "clearly and unambiguously establish that he was an officer" of Howard Finishing for "many years before, during, and after the period of default." Respondent noting that the plain language of MCL 205.27a(15)(b) provides, "in part, that a signature on a return before and after the time period of default alone is not prima facie evidence that Petitioner is a responsible person but may be considered along with other evidence to make Treasury's case that Petitioner is a responsible person." Respondent pointing out that evidence shows that Petitioner "was an officer" of the company for the period before the default, and that Petitioner signed the Michigan 2014 SUW Annual return, on behalf of the company on March 27, 2015, the Michigan SUW Monthly return for January 2015, on behalf of the company, and on February 20, 2015, as a controller of Howard Finishing. Respondent also noted that the signature line where Petitioner signed "clearly states that the Official Representative must be 'Owner, Officer, Member, Manager, or Partner.'" Additional information identifying Petitioner as an officer includes Petitioner being listed as President of Howard Finishing in a trade magazine dated April 2015, being listed as a responsible official for Howard Finishing

on the MDEQ Environmental Calendar with a March 2014 deadline to comment, and that it was clear that Petitioner was an officer of Howard Finishing for many years before the claimed June 2017 date of appointment as an officer.

Respondent asserts that in 2016, during the period of default, Petitioner is listed as a responsible official for Howard Finishing on a State of Michigan Activity Report, under the title Director of New Business Development, and that Petitioner held the title of “controller” in 2016. Respondent contends that the same job title was reflected on the January 2015 SUW return of Howard Finishing in which Petitioner certified that he was an “Owner, Officer, Member, Manager, or Partner” of Howard Finishing. Additionally, Respondent asserts that there is “no evidence that Petitioner affirmatively relinquished his responsibility in 2016.”

Respondent also asserts that “Petitioner testified that ‘[i]f there was a payment made by check, there is a decent probability’ he ‘and an officer of the company signed the check’ for payment of taxes between 2015-2018. Petitioner also confirmed that there is a ‘high chance’ he was one of the parties who countersigned check Nos. 129552 and 130932 to the Department of Treasury in 2016.” Additionally, Respondent notes that Petitioner provided financial support to Howard Finishing in 2016 totaling \$825,000 and stated that similar deposits were probably made in 2017 and 2018, and that Petitioner withdrew approximately \$492,000 in 2016 for reimbursement of loans made to Howard Finishing, at the same time the company failed to pay withholding taxes.

Respondent notes that in September 2017, Petitioner signed the remaining 2015 SUW returns and the 2016 SUW returns on behalf of Howard Finishing, additionally,

Respondent notes that Petitioner signed the tax clearance request, signed the installment agreement for the taxes of Howard Finishing, Power of Attorney form, communicated with Treasury regarding the taxes at issue, and signed the corporate Annual statements for the 2017 tax year. Furthermore, Petitioner drew a significant salary from Howard Finishing between 2015-2018, and in 2018-2020, Petitioner signed the 2017 SUW returns as well as corporate Annual statements for tax years 2018-2020.

Respondent asserts that Petitioner's signature on SUW Returns of Howard Finishing before and after the period of default, along with Petitioner's testimony, establish the Petitioner controlled, supervised, or was responsible for the filing of returns or payment of taxes because he was the officer who signed SUW returns on behalf of Howard Finishing for tax years 2014-2017. In support of this assertion, Respondent notes that Petitioner signed the 2014-2017 SUW returns on behalf of Howard Finishing in 2015, 2017 and 2018; that Petitioner discussed tax matters from 2015 through June 2017 with other officers of Howard Finishing and has worked on all tax matters, state and federal, of Howard Finishing between 2015-2018, provided to the company CPA data to prepare the company tax returns between 2015-2018, and that tax preparation engagement letters name Petitioner as a representative of Howard Finishing and authorized him to provide instructions to the CPA during the 2015 and 2016 tax periods.

Respondent addresses Petitioner's contention that his father, Richard Mertz, had tax responsibilities between 2015 and June 2017 and supervised him, however, Respondent notes that the evidence only points to the Petitioner, nor was Petitioner able to provide any document in support of his contention that Richard Mertz supervised him. Respondent further asserts that "no other officer" of Howard Finishing signed

SUW returns on behalf of the company for tax years 2014-2017. Additionally, Respondent maintains that even if Petitioner's father had tax responsibilities during the period of default, more than one officer can be proven to have tax specific responsibility.⁴ In further support that the evidence and Petitioner's conduct show that Petitioner controlled, supervised, or was responsible for filing of returns or payment of taxes, Respondent notes that Petitioner's testimony supports the conclusion that he made payment of taxes, and "[i]f there was a payment made by check, there is a decent probability" he "and an officer of the company signed the check" for tax payment between 2015-2018, and that there was a "high chance" that he was one of the parties who countersigned check numbers 129552 and 130932 made out to the Michigan Department of Treasury.

Additionally, Respondent contends that Petitioner willfully failed to file SUW returns or pay the tax due, noting that Petitioner's actions and testimony demonstrate that he knew that Howard Finishing was obligated to file SUW returns, but intentionally or recklessly failed to file. Respondent cites MCL 205.27a(15)(d) which provides that for an officer's action to be "willful," the officer "knew or had reason to know of the obligation to file a return or pay the tax." Additionally, Respondent relies on Treasury's RAB 2015-23 which provides guidance and states that "willfulness" – "does not require a bad purpose, intent, or motive as may be required in a criminal prosecution." Respondent cited a recent Tribunal case in which held that "conduct does not need to be intentional or deliberate and actual knowledge is not required."⁵ "Rather, it is

⁴ Respondent cites *Rolinski v Treasury*, Opinion of the Tax Tribunal, July 23, 2012 (Docket No. 357830).

⁵ Respondent's Motion for Summary Disposition, page 18, citing *Crossman v Treasury*, Proposed Opinion of the Michigan Tax Tribunal, issued June 14, 2019, Docket No. 17-005055, page 7.

sufficient if an individual had reason to know of the obligation to file a return or pay the tax. Similarly, failure to file or pay need not be intentional, recklessness will suffice.”⁶

Respondent recounts that Petitioner signed the 2014 SUW Annual return in March 2015 and the January 2015 Monthly SUW return in February 2015; that Petitioner acknowledged that he knew that SUW returns had to be filed, and that he also discussed tax matters with other officers in 2016 and provided to the company CPA data to prepare the Howard Finishing tax returns. Respondent summarizes that Petitioner clearly “knew of the obligation to file SUW returns and intentionally or recklessly failed to file the returns or pay the taxes at issue.” Lastly, Respondent notes that the RAB states that “payment of any other debt... when the officer knew, or should have known, there was an outstanding tax liability constitutes willfulness” and that in the case at bar, Petitioner withdrew from Howard Finishing approximately \$492,000 in 2016 for reimbursement for loans he made to the company while Howard Finishing failed to pay withholding taxes. Thus, Respondent asserts that it has met the fourth element of the responsible person test and that it has presented sufficient evidence to support its prima facie case that Petitioner is a responsible corporate officer.

Lastly, Respondent argues that Petitioner has failed to rebut Treasury’s prima facie case, noting that (1) Petitioner’s evidence “at best” shows that there was another officer of Howard Finishing, but does not prove the Petitioner was not a responsible person; (2) Petitioner’s signature on SUW returns for Howard Finishing “clearly and unambiguously establishes that he was an officer of Howard Finishing many years before June 28, 2017,” noting specifically that Petitioner signed the Michigan 2014 SUW

⁶ *Id.*

Annual Return on behalf of Howard Finishing on March 27, 2015 as an officer of Howard Finishing, and Petitioner signed the Michigan SUW monthly return for January 2015 for Howard Finishing on February 20, 2015 as a controller on behalf of Howard Finishing. Respondent concluding that Petitioner's appointment as an officer did not begin on June 28, 2017, but many years before, and that the presumption that Petitioner is a responsible person who is personally liable for the unpaid taxes of Howard Finishing has not been disproven or rebutted, thus Petitioner must be held liable for Howard Finishing's failure to remit withholding taxes at issue in the case at bar.

**RESPONDENT'S MOTION TO STRIKE PETITIONER'S RESPONSE TO
RESPONDENT'S MOTION FOR SUMMARY DISPOSITION AS UNTIMELY**

On June 27, 2022, Respondent filed a motion entitled, Respondent Michigan Department of Treasury's Motion to Strike Petitioner's Response to Respondent's Motion for Summary Disposition. In Respondent's motion, it was noted that Petitioner responded to Respondent's Motion for Summary Disposition on June 23, 2022, and that the Tribunal's revised scheduling order dated February 22, 2022, set the deadline for the parties to file their respective motions for summary disposition on May 25, 2022.

Both parties filed their respective motions for summary disposition on May 25, 2022. As correctly asserted by Respondent, under the Tribunal's rules, specifically, TRR 225 (4), the response to the parties' respective motions for summary disposition would have been due 21 days after service of the motion, in this case, on or before June 15, 2022. Respondent timely filed its response brief on June 15, 2022, in accordance with the deadline provided for in TRR 225(4). Petitioner filed eight days late on June 23,

2022. Petitioner filed without the leave of the Tribunal, nor did Petitioner request an extension, or attempt to reach out to Respondent's counsel for additional time.

Moreover, Petitioner's own response brief made it clear that the untimely response was due to a failure to consult Tribunal Rules.

Respondent seeks to strike Petitioner's response, noting authority upholding a trial court's proper refusal to consider an untimely response.⁷

Petitioner, in his reply brief to Respondent's motion to strike, asserts that he "acted on a good faith belief that a scheduling order was to be issued by the Tribunal regarding the time for responding to the Motions for Summary Disposition, when Petitioner's counsel called the Tribunal and was directed that the question of a scheduling order with regard to the motion would be handled at the prehearing conference." Petitioner asserts that this "good faith" reliance is consistent with TTR 225(4) which states that "[w]ritten opposition to motions, other than motions for which a motion for immediate consideration has been filed or motions for reconsideration, shall be filed within 21 days after service of the motion, **unless otherwise provided by the tribunal.**" (Petitioner's emphasis added). Petitioner asserts that when it became aware of the potential misunderstanding, Petitioner immediately remedied the mistaken reliance by filing a Response the same day. Petitioner also asserts that its response was also very similar to the arguments already stated in Petitioner's initial argument set forth in its own motion for summary judgment.

⁷ EDI Holdings LLC v Lear Corp, 469 Mich 1021 (2004), reinstating an order granting summary disposition entered after the opposing party failed to timely respond, and Wright v Hark Orchid Corp, per curiam opinion of the Michigan Court of Appeals, March 11, 2021 (Docket No. 351667) "[w]hen a party fails to respond to a motion for summary disposition within that time period, a trial court may exclude any response and supporting evidence from consideration."

**PETITIONER’S RESPONSE TO RESPONDENT’S MOTION FOR
SUMMARY DISPOSITION**

Petitioner reiterates and incorporates the facts and arguments originally made in its timely filed Motion for Summary Disposition filed on May 25, 2022.

Petitioner asserts that he was not an “officer responsible for tax matters” prior to June 2017, asserting that Respondent “conflates a colloquial understanding of officer with a de jure officer.” Petitioner further elaborates that a de jure officer is properly appointed in the Articles of Incorporation or in the Operating Agreement (hereinafter collectively referred to as the “Articles”). Petitioner states that the “Articles don’t say who cannot be an officer, but they do say who is an officer. Logically, whoever is not listed as an officer in the articles is therefore not an officer.” Petitioner further notes that the Articles prior to June 2017 only name Richard Mertz and James Grimes (the only owners), as officers, with Richard Mertz (Petitioner’s father) specifically appointed in the Articles as being the Manager. Petitioner further asserts that the distinction was made clear that Richard Mertz was appointed to the position of “Tax Matters Member,” and “his own colloquial posts which did not have tax responsibility or final authority.”

Petitioner asserts that Respondent’s contention that Petitioner’s appointment as “Director of New Business Development” made prior to June 2017 is inaccurate, as the title was a “colloquial position,” not a “de jure officer position, or else it would have been recorded in the articles.” Further arguing that the position of Director of New Business Development was not a position responsible for tax but one for generating new business. Petitioner also takes issue with Respondent’s contention that Petitioner was “Controller” prior to June 2017, asserting that “Controller” was a “colloquial position, not

a de jure officer position or else it would have been recorded in the articles.” Petitioner arguing that Respondent “conflated” a colloquial position, that of a “Controller with an officer responsible for tax matters.”

Similarly, Petitioner asserts that Respondent exaggerates the “controller role” to be Officer Responsible for Tax matters by stating the Petitioner “discussed tax matters with other officers in 2016 and provided to the company CPA data to prepare the company tax returns, noting that deposition testimony clearly established that the Petitioner only put accounting data into the accounting system and conveyed that information to Richard Mertz and Mr. Rinesmith CPA, contending that there is a massive difference between accounting income and taxable income for income tax purposes, as there is a difference between accounting revenue and taxable sales for sales and use tax purposes, stating that Respondent exaggerated what the Petitioner said during deposition and conflated accounting roles and tax roles as being synonymous.

Petitioner also takes issue with Respondent’s observation that Petitioner had been named as “President” of Howard Finishing in an April 2015 trade magazine. Petitioner asserts that this is a colloquial position, not a de jure officer position, noting that it would have been recorded in the Articles. Furthermore, Petitioner notes that the article was written by a third party and not by Petitioner. Petitioner points out that at the time the article was written, Petitioner was involved directly in pricing Howard Finishing products and was looking for someone to buy Howard Finishing. In any event, Petitioner contends that the article does not elevate Petitioner to a de jure officer position, let alone an officer responsible for tax matters.

As to Respondent's argument that Petitioner was a "Responsible Official" for the "MDEQ Environmental Air Quality Division" prior to June 2017, Petitioner likens this to a "red herring," noting that "Responsible Official" is not a "Responsible Officer" for purposes of tax and is not a de jure officer position, which would have been recorded in the Articles, and that "Responsible Official" for the "MDEQ Environmental Air Quality Division" is, as the name implies, not a position responsible for tax.

Additionally, Petitioner points out that "Respondent erroneously points out" that "Petitioner was not able to point to any document that supported his contention that his father Richard Mertz supervised him." Petitioner contends that he was not an officer and had no ownership interest, asserting that "the contention by the Respondent that no probative documentary evidence provided that Richard Mertz supervised the respondent is false, and irrelevant to show who was actually a responsible officer."

As to the matter of check signing, Petitioner notes that prior to June 2017, only two checks of nominal amounts were co-signed by the Petitioner to pay taxes, and that prior to 2017, for a period little more than a month, the Petitioner signed two tax returns. However, after June 2017, the Respondent contends that in less than 4 months, Petitioner took responsibility for all delinquent tax filings and oversaw their filing, and in less than five months the Petitioner is filing tax clearance certificates and negotiating payment of outstanding taxes payable. Petitioner also contends that Respondent was informed in October 2017, on the clearance certificate applications, that the business was being sold, and that Respondent never inquired as to who purchased the company.

Petitioner asserts that Respondent is trying to claim that since the Petitioner didn't name the purchaser, then Respondent was not required to assess the purchaser first.

Petitioner rhetorically asks why if Respondent was interested in who acquired the company, it didn't inquire as to the identity of who had purchased the company. Petitioner asserts that this was not the shortcoming of Howard Finishing, and "certainly not the shortcoming of the petitioner, who was not an Officer Responsible for Tax Matters when the liability arose."

Petitioner also takes issue with Respondent's proposed application of *Klecha v Treasury*, Opinion of the Michigan Tax Tribunal, (issued March 28, 2012 Docket No. 357723) to develop and inference that Petitioner had tax functions in prior years and it should be assumed to have been responsible for doing so in subsequent years holding that Petitioner did not have tax responsibilities prior to 2017, drawing a distinction with *Klecha*, noting that *Klecha* deals with an individual who prepared the corporation's tax return in a prior year but didn't prepare the returns in subsequent years. Thus drawing a distinction with *Klecha*, as Petitioner notes that he didn't prepare tax returns, supervise the preparation of tax returns, but only prepared financial information as controller. Petitioner also points out that Respondent "admits that a CPA firm prepared the tax returns," and noted that RAB-89-38 cited by Respondent is not law, but an administrative circular and is not legal authority to be followed by the Tribunal.

Petitioner counters Respondent's assertion that a prima facie case that may be made in 2014 and 2015 should be carried over to apply to the 2016 tax liabilities, noting an important distinction that the "period in default" as acknowledged by the Respondent,

covers the period of January 1, 2016, to January 20, 2017. Petitioner, noting that “[o]nly an ‘Officer Responsible for Tax Matters’ for the period of default can be held liable for the 2016 tax liability.”⁸ Petitioner contends that Respondent cannot meet the higher standard for a prima facie case, and because of that is attempting to carry forward a potential prima facie case from 2014 and 2015 at a lower standard and apply it in 2016 where there is a higher standard. Petitioner contends that only two tax returns were signed, and that Respondent seeks an expansion of what its RAB administrative circular states as opposed to what the statute and the “poorly applied *Klecha v Treasury* actually state.”⁹

Petitioner also draws a distinction between the case at bar and Respondent’s assertion that this Tribunal should apply *Rolinski v Treasury* (issued July 23, 2012, Docket No. 357830). *Rolinski* is put forth for the proposition that more than one officer can be proven to have tax specific responsibility. Petitioner notes that “Respondent forgets that only an officer responsible for tax matters can be held liable for the period of default.” Further noting that Petitioner was not an officer responsible for the period of default, that being Petitioner’s father, Richard Mertz. Petitioner also reasserts that “the successor purchaser whose identity the Respondent knew or should have known, holds precedence over said Officer when it comes to being liable for tax liabilities, asserting that Respondent’s “application of *Rolinski v Treasury* is irrelevant.”

Petitioner also asserts that he was not an “officer responsible for tax payments prior to June 2017,” noting that even though Respondent pointed out that Petitioner

⁸ Petitioner Jeff Mertz’s Response to Respondent’s Motion Summary Disposition Pursuant to MCR 2.116(C)(10). June 23, 2022, page 11.

⁹ Id.

signed two checks (Nos. 129552 and 130932) prior to June 2017, the checks were co-signed (meaning no single person could issue a check) and that paying vendors is not the same as paying tax. “[T]herefore shouldn’t be conflated with being responsible for paying taxes.” Furthermore, Petitioner asserts that he was simply a co-signer of the checks, and not an officer (the other co-signer was), and that Petitioner only co-signed checks with officer direction or consent for payment of Howard Finishing vendors.

Petitioner also addressed Respondent’s contention that Petitioner provided financial support by way of loans to Howard Finishing in order for the company to pay its liabilities to other vendors (but not taxes), and that the loans and withdrawals, totaling \$492,000 somehow suggest that Howard Finishing “was used by the petitioner like his own personal piggy bank, to withdraw funds as he wished.” Petitioner noted that there had to be a co-signer to receive such payments, and that the co-signer (not Petitioner) was an officer of the company. Petitioner also asserts that Respondent “attempts to expand the words of the statute and the court not only to apply to filings and payments of liabilities in the relevant 2016 ‘period or default’ by citing its own RAB administrative circular stating, ‘payment of any other debt...when the officer knew, or should have known, there was an outstanding tax liability constitutes willfulness.’ “

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.¹⁰ In this case, both Petitioner and Respondent move for summary disposition under **MCR 2.116(C)(10)**.

¹⁰ See TTR 215.

MCR 2.116(C)(10) provides for summary disposition when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.”¹¹ The Michigan Supreme Court, in *Quinto v Cross and Peters Co.*,¹² provided the following explanation of MCR 2.116(C)(10):

MCR 2.116 is modeled in part on Rule 56(e) of the Federal Rules of Civil Procedure . . . [T]he initial burden of production is on the moving party, and the moving party may satisfy the burden in one of two ways.

First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.¹³

¹¹ *Id.*

¹² *Quinto v Cross and Peters Co.*, 451 Mich 358 (1996) (citations omitted).

¹³ *Id.* at 361-363. (Citations omitted.)

“A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.”¹⁴ In evaluating whether a factual dispute exists to warrant trial, “the court is not permitted to assess credibility or to determine facts on a motion for summary judgment.”¹⁵ “Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial.”¹⁶

CONCLUSIONS OF LAW

The Tribunal has carefully considered both the Petitioner’s and Respondent’s separate Motions under MCR 2.116(C)(10) and finds that denying the Petitioner’s Motion for Summary Disposition, denying Respondent’s Motion to Strike Petitioner’s Response, and granting Respondent’s Motion for Summary Disposition is warranted.

In denying Petitioner’s Motion for Summary Judgment, it is noted that Petitioner does not go further than denying Respondent’s claim that it had established a prima facie case that Petitioner was a responsible person, i.e., an officer with tax-specific responsibility. Petitioner does not go beyond the mere allegations or denials in its Motion for Summary Disposition, and does not set forth any specific facts, or, more importantly, refute that any genuine issue of facts exist, that would establish grounds for Summary Disposition in its favor.

Petitioner notes that Respondent presented three documents prior to the time period of default in support of its intent to assess the Petitioner, including: (1) 2014

¹⁴ *West v General Motors Corp*, 469 Mich 177 (2003).

¹⁵ *Cline v Allstate Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued June 21, 2018 (Docket No. 336299) citing *Skinner v Square D Co*, 445 Mich 1 (1994).

¹⁶ *Id.*

Sales, Use, and Withholding Tax Annual Return (SUW); (2) 2014 responsible official for Howard Finishing on the MDEQ Calendar; and (3) Petitioner listed as the President of Howard Finishing in 2015 in a Top Shops Benchmarking Survey. Petitioner asserts that only one of those documents is related to tax matters, that being the 2014 Sales, Use and Withholding Tax Annual Return. Petitioner asserts that this was signed as Petitioner's role as Controller, a non-officer position Petitioner defined in his testimony as being 'resigned to data entry...put[ting] the information in...pull[ing] the information out of the software...and present[ing] it [to those in charge of Howard Finishing].'" Petitioner asserts that Treasury has no evidence to the contrary, and that the other two documents do not qualify as prima facie evidence under the law.¹⁷

Petitioner contends that Respondent's "prima facie evidence is in reality not evidence at all" and that "[n]one of the documents put forward by Respondent can be considered prima facie evidence of Petitioner being a 'responsible person' at all times relevant."

Petitioner also points to a Michigan Revenue Administrative Bulletin (RAB) 2015-02 which provides that to establish a prima facie case of corporate officer tax liability, "Treasury must make a showing that the Petitioner is a 'responsible person' that: (1) was an officer of the business; (2) controlled, supervised, or was responsible for the filing of returns or payment of taxes; (3) was an officer during the 'time period of default'; and, (4) 'willfully' failed to file a return or pay the tax due."

¹⁷ The two documents being the MDEQ calendar and the Top Shops Benchmarking Survey. Both of which Petitioner asserts are not tax related.

In reviewing the claims in the light most favorable to the non-moving party, while two of the documents (MDEQ Calendar and Top Shop Benchmarking Survey) titles are not related to tax specific roles, the signing as an “officer” of the Sales, Use and Withholding returns presents a substantial question making it insufficient to grant summary disposition in favor of Petitioner regarding Petitioner’s role in the signing of the Sales, Use and Withholding Tax Return as “officer” and that this signing wasn’t something more significant than Petitioner’s argument that it was simply a formality.¹⁸

Petitioner’s assertions that Respondent failed to satisfy the other remaining prongs of a prima facie case, when similarly viewed in the light most favorable to the non-moving party, are similarly non-dispositive.

In denying Respondent’s Motion to Strike Petitioner’s Response to Respondent’s Motion for Summary Disposition, it is noted that Petitioner discovered its honest mistake of missing the deadline previously established by the Tribunal, had been candid with the Tribunal in admitting the mistake, and had promptly sought to rectify its error, filing its responses within eight days of the missed deadline. Moreover, as the delay in filing the motion did not impair Respondent’s ability to prepare for a hearing, or present any issue regarding due process, and much of the information in the response was previously covered in Petitioner’s own timely Motion for Summary Disposition, the tardy filing was allowed to be considered. Moreover, as it relates to the potential final disposition of the case, the consideration of the arguments and evidence discussed therein was important to determining whether any genuine issue of material facts exist in the consideration of

¹⁸ It is also noted that Petitioner’s signature appears on various Sales, Use and Withholding annual and monthly/quarterly reports for 2015, 2016, and 2017 tax periods as President in 2017 and 2018.

the disposition of the case, and for all of these reasons, Petitioner's response to Respondent's Summary Disposition motion was considered and Respondent's Motion to Strike denied.

In discussing Respondent's Motion for Summary Disposition, it is noted that MCL 205.27a(5) establishes a specific burden of proof that the State must use in proving who is a responsible person. MCL 205.27a(5) states:

The [Treasury] department has the burden to first produce prima facie evidence as described in subsection (15) or establish a prima facie case that the person is the responsible person under this subsection through establishment of all elements of a responsible person as defined in subsection (15).

Thus, in order for a person to be held liable for the company's unpaid tax liabilities, said person must be a responsible person for the company as defined and determined by Treasury through prima facie evidence or established in a prima facie case.¹⁹ Further, MCL 205.27a(15)(b) defines a "responsible person" as an officer who was responsible for the filing of returns or payment of sales, use, and withholding taxes "during the time period of default and who, during the time period of default, willfully failed to file a return or pay the tax due for any of the taxes" The statute indicates that the "time period of default" is the "tax period for which the business failed to file the return or pay the tax due,"²⁰ or the 2016 tax year in this appeal.

In granting Respondent's Motion for Summary Judgment, the facts and evidence presented establish that Petitioner was an officer of Howard Finishing, LLC in 2016 with

¹⁹ A responsible person is defined in MCL 205.27a(15) as "[A]n officer, member, manager of a manager-managed limited liability company, or partner for the business who controlled, supervised, or was responsible for the filing of returns or payment of any of the taxes described in subsection (14) during the time period of default and who, during the time period of default, willfully failed to file a return or pay the tax due for any of the taxes described in subsection (14).

²⁰ MCL 205.37a(15)(c).

tax-specific responsibility. The documentary evidence presented indicates that Respondent established a prima facie case against Petitioner, and that Petitioner willfully failed to file returns or pay the tax due. For example, Petitioner asserts that he was first appointed as an officer in 2017, but Petitioner's signature on tax returns filed before that date as Controller and Officer, as identified on the 2014 return, disprove that claim. Respondent may also make a prima facie case that Petitioner is a responsible person by establishing he was an officer who signed returns before and after the time period of default along with other evidence.²¹ The facts indicate that Petitioner was the only officer who signed all SUW returns during the time period in question for Howard Finishing; held himself out as an officer of Howard Finishing, and was intimately involved with financial matters of Howard Finishing. Additional supporting evidence includes the fact that Howard Finishing represented Petitioner as a responsible official of Howard Finishing with the State of Michigan Department of Environmental Air Quality (MDEQ), and while Petitioner asserts that this is not the same as "Responsible Officer" for purposes of tax, viewed in light of Petitioner's signing of tax returns, supports the proposition that Petitioner was a responsible officer.

Lastly, as to Petitioner's argument that Respondent failed to assess successor liability against a successor purchaser of Howard Finishing, the facts demonstrate that Respondent assessed a successor purchaser after Petitioner was already assessed. The facts also demonstrate that Treasury was not accorded information that clearly identified a successor, as required by statute, until after Petitioner was assessed. It is

²¹ See MCL 205.27a(15)(b).

also noted that the Revenue Act clearly contemplates and allows that multiple assessments may be issued.

Having made a prima facie case for corporate officer liability, Respondent's Motion for Summary Disposition is properly granted and the assessments at issue shall be affirmed.

JUDGMENT

IT IS ORDERED that PETITIONER'S Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that RESPONDENT'S Motion to Strike Petitioner's Response to Respondent's Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that RESPONDENT'S Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Assessment Numbers UZ54976, UZ54977, VA0ES1Z, VA0ES2A, VA0ES2B, VA0ES2C, VA0ES2D, VA0ES2E, VA0ES2F, VA0ES2G, VA0FF8I, and VA0FF8J are AFFIRMED.

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

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Opinion within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes the case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A motion for reconsideration must be filed with the Tribunal with the required filing fee within 21 days from the date of entry of the final decision. Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is \$50.00 in the Entire Tribunal. You are required to serve a copy of the motion on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion. Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.

A claim of appeal must be filed with the Michigan Court of Appeals with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave." You are required to file a copy of the claim of appeal with filing fee with the Tribunal in order to certify the record on appeal. The fee for certification is \$100.00 in the Entire Tribunal.

By  _____

Entered: January 31, 2023

PROOF OF SERVICE

I certify that a copy of the foregoing was sent on the entry date indicated above to the parties or their attorneys or authorized representatives, if any, utilizing either the mailing or email addresses on file, as provide by those parties, attorneys, or authorized representatives.

By: Tribunal Clerk