STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Deena Shotwell,
Petitioner,

v

MTT Docket No. 432519
Assessment Nos.
P244392 and Q049923

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S REQUEST FOR COSTS AND ATTORNEY FEES

ORDER DENYING RESPONDENT'S REQUEST FOR COSTS AND ATTORNEY FEES

ORDER GRANTING PETITIONER'S EX PARTE MOTION TO FILE A REPLY TO RESPONDENT'S RESPONSE BRIEF

FINAL OPINION AND JUDGMENT

INTRODUCTION

Final Assessments P244392 and Q049923 were issued against Petitioner as a responsible corporate officer of People's True Taste, Inc. ("PTT") on February 21, 2012. Petitioner filed her appeal with the Tribunal on March 27, 2012.

In response to the Tribunal's Order dated October 29, 2012, Petitioner filed her Motion for Summary Disposition on November 9, 2012. Respondent filed its

Brief in Opposition to Petitioner's Motion on December 5, 2012. Petitioner filed an Ex Parte Motion to File a Reply Brief to Respondent's Response Brief on December 12, 2012. Respondent filed its Response to Petitioner's Ex Parte Motion to File a Reply and Request to Strike on December 13, 2012. Oral Argument on Petitioner's Motion for Summary Disposition was subsequently heard on December 17, 2012.

Petitioner contends that she was not an officer of PTT and did not have tax specific responsibilities for PTT for the tax periods at issue, April 2007 and December 2007, and therefore, cannot be found derivatively liable under MCL 205.27a(5) for PTT's failure to remit tobacco tax equity assessments as required under the Tobacco Products Tax Act, Act 327 of 1993, ("TPTA"). Petitioner therefore requests Summary Disposition under MCR 2.116(C)(10), contending that there is no genuine issue of material fact, and also requests costs and attorney fees pursuant to MCL 600.2591.

Respondent contends that Petitioner was a corporate officer (whether de factor or de jure) and had control or supervision of, or responsibility for, making the returns or payments of taxes due for PTT, and as such is liable under MCL 205.27a(5) for PTT's non-payment of equity assessments as required under the TPTA for the tax periods at issue. Respondent therefore requests that the Tribunal

find that it is entitled to (i) summary disposition pursuant to MCR 2.116(I)(2) and (ii) costs and attorney fees pursuant to TTR 145(1).

The Tribunal finds that granting Petitioner's Ex Parte Motion to File a Reply Brief to Respondent's Response Brief is appropriate in this case. The Tribunal further finds that Petitioner is not a responsible corporate officer for the assessments at issue under MCL 205.27a(5). Therefore, the Tribunal grants Petitioner's Motion for Summary Disposition and cancels the subject assessments. And although Petitioner is the prevailing party in this case, the Tribunal finds no basis upon which to award Petitioner costs and attorney fees.

PETITIONER'S CONTENTIONS

Petitioner contends that she was not an officer of PTT, nor did she have tax specific responsibilities for PTT during the tax periods at issue and, therefore, cannot be held liable for PTT's failure to pay tobacco tax equity assessments, as required under the TPTA, as a responsible corporate officer pursuant to MCL 205.27a(5). In support of her contentions, Petitioner contends that (i) her husband, William Shotwell, was PTT's sole shareholder and sole officer prior to his death on March 17, 2007; (ii) she had no involvement in PTT prior to his death; (iii) since her husband had no will, she and her stepdaughter, Suzanne Shotwell, were jointly appointed as co-administrators of her husband's estate via court order by the Pulaski County (Kentucky) District Court, Probate Division on March 29,

2007; (iv) as co-administrator, she was responsible for preserving the assets of her husband's estate, including PTT; (v) a co-administrator is "not an officer" (Transcript, p 19); (vi) following her husband's death, PTT ran on "auto pilot" (Transcript, p 9); (vii) although she "had no understanding of the business," she began working for PTT some time between October 2007 and December 2007 (Transcript, p 7); (viii) she had no tax specific responsibility at PTT, which the Michigan Supreme Court has held is required in order to be found liable under MCL 205.27a(5);[1] (ix) she "was asked to sign documents periodically by [PTT's] staff, without having any actual knowledge about the documents" (Petitioner's Brief in Support of her Motion for Summary Disposition, p 13); (x) she became an officer of PTT on October 29, 2010, after her husband's estate settled, via Board Resolution (i.e., Action of Shareholders Without a Meeting and Action of Directors Without a Meeting) ("Resolution"); (xi) there were no officers during the administration of Mr. Shotwell's estate, which closed on March 26, 2008; (xii) the Resolution merely ratified her "actions;" it did not "retroactively make [her] an officer" (Transcript, p 28); (xiii) "[t]he fact that the assessments continue to be due after [her husband's] death is based upon his failure," since her husband failed to pay the prepayment of tobacco tax equity assessments, as required under MCL 205.426d(5), on March 1, 2006, and March 1, 2007, which are the key dates for

[1] See *Livingstone v Dep't of Treasury*, 343 Mich 771, 780; 456 NW2d 684 (1990).

determining when the tax was due, for cigarettes anticipated to be sold by PTT in 2006 and 2007 (Petitioner's Brief in Support of her Motion for Summary Disposition, p 9); (xiv) since her husband is the "liable corporate officer," Respondent should have issued an assessment against the estate, but failed to do so (Transcript, p 22); (xv) "Michigan courts have consistently held that a person is not liable for taxes for periods prior to becoming a corporate officer"[2] (Petitioner's Brief in Support of her Motion for Summary Disposition, p 10); (xvi) although *Peterson, supra*, dealt with a different statute, "that statute was taken verbatim and put into [MCL 205.27a(5)]" (Transcript, p 32); (xvii) to find her liable under MCL 205.27a(5) "merely because she was the widow who inherited . . . half ownership of the company goes way beyond the purpose and the language of [the] statute" (Transcript, pp 18-19); (xviii) although an unpublished Court of Appeals case[3] talks about de facto officers, the individual in that case "wasn't held liable as a de facto officer because he wasn't made an officer" (Transcript, p 31); (xix) "[i]f the legislature meant acting like an officer [i.e., dejure/defacto], . . . they would have said that" (Transcript, p 32); (xx) MCL 205.27a(5) is not "a successor corporate officer liability" statute (Transcript, p 70); and (xxi) Respondent failed to establish

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[2] See *Peterson v Dep't of Treasury*, 145 Mich App 445; 377 NW2d 887 (1985).
[3] *Cicurel v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 1998, (Docket Nos. 198812 and 198848).

a prima facie case and therefore, it is Respondent's burden to prove that Petitioner is liable under MCL 205.27a(5).

With regard to her Ex Parte Motion to File a Reply to Respondent's Response Brief and request for costs, Petitioner contends that she is entitled to file a reply brief "[b]ecause [Respondent] asked for summary disposition" and concedes that her request for costs is "routine" and that she "can't say [Respondent's] position is frivolous because she should have been way more careful on how she signed documents and she made some representations that were not accurate." (Transcript, pp 38, 41-42) (Petitioner's Brief in Support of her Motion for Summary Disposition; Petitioner's Ex Parte Motion to File a Reply to Respondent's Response Brief; Transcript, pp 6-42, 65-75)

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner was a corporate officer (whether de factor or de jure) and had control or supervision of, or responsibility for, making the returns or payments of taxes due for PTT, and as such is liable under MCL 205.27a(5) for PTT's non-payment of equity assessments as required under the TPTA for the tax years at issue. In support of the assessments, Respondent contends that (i) under MCL 205.426d(4), "equity assessments for PTT were to be reconciled by April 15, 2007[,] and by April 15, 2008[,] for PTT's 2006 and 2007 sales years, respectively" (Respondent's Brief in Opposition to Petitioner's Motion

for Summary Disposition, p 1); (ii) "the word 'due' in the first sentence of MCL 205.27a(5) [refers] to the type of taxes that the company [fails] to pay, not the time when personal liability attaches to the corporate officer" (Respondent's Brief in Opposition to Petitioner's Motion for Summary Disposition, p 8); (iii) the reconciliation dates (April 15, 2007, and April 15, 2008) are the key dates to determine when the tax at issue was due for purposes of MCL 205.27a(5); (iv) Mr. Shotwell died intestate, and on April 9, 2007, Petitioner was appointed as a "de jure corporate officer" when the Pulaski District Court in Kentucky "entered an order conveying on Petitioner and Suzanne Shotwell authority and power to administer the estate, including 'the power to conduct any business that decedent could have conducted' concerning Mr. Shotwell, PTT, and other entities" (Respondent's Brief in Opposition to Petitioner's Motion for Summary Disposition, p 2); (v) the April 9, 2007 Order by the Pulaski District Court made Petitioner an officer because "[s]he was appointed to step into [Mr. Shotwell's] shoes . . . [and] elected to remain the corporate officer through out the period of this estate" (Transcript, pp 45-46); (vi) "the word 'officer' is commonly understood in Michigan jurisprudence (informed by the common law) to include 'de facto' officers" (Respondent's Brief in Opposition to Petitioner's Motion for Summary Disposition, p 14); (vii) "Petitioner immediately assumed the roles of co-owner and officer when she began to manage and control the various businesses"

(Respondent's Brief in Opposition to Petitioner's Motion for Summary Disposition, p 2); (viii) Petitioner submitted various documents to Respondent in her capacity as "co-owner" and "President"; (ix) Petitioner held herself out as a corporate officer in other jurisdictions; (x) although Petitioner contends that she did not become an officer until October 29, 2010, Respondent asserts that PTT's Resolution speaks to the contrary since it ratifies all prior actions in her capacity as President; (xi) "MCL 205.27a(5) may impose liability for an officer for conduct occurring after the returns were due" (Respondent's Brief in Opposition to Petitioner's Motion for Summary Disposition, p 7); and (xii) contrary to Petitioner's contentions, *Peterson, supra*, is irrelevant since it involved a different statute. In sum, Respondent asserts that it has established its prima facie case, specifically with regard to Exhibits 5, 13, 16, 17, and 44, and as such, it is now Petitioner's burden to rebut the presumption that she is liable as a corporate officer under MCL 205.27a(5).

With respect to Petitioner's Ex Parte Motion to File a Reply to Respondent's Response Brief and its requests for costs, Respondent contends that "under no circumstances was she to file a reply brief" and that it is requesting costs "[f]or the reply brief," but in the "normal course of pleading" for the case as a whole. (Transcript, pp 63-64.) (Respondent's Brief in Opposition to Petitioner's Motion

for Summary Disposition; Respondent's Response to Petitioner's Ex Parte Motion to File a Reply and Request to Strike; Transcript, pp 42-65, 74-75)

STATEMENT OF FACTS

1. Petitioner is a resident of Florida, residing at 2924 Sea Oats Circle, Daytona Beach, Florida 32118.

2. Respondent is an administrative department of the State of Michigan and is charged with the duty of administering the Revenue Act, Act 122 of 1941.

3. The controversy in this case involves corporate officer derivative liability under MCL 205.27a(5) for tobacco equity assessment taxes under the TPTA for the April 2007 and December 2007 tax periods.

4. Tobacco equity assessment tax, MCL 205.426c, is authorized under the TPTA.

5. PTT was incorporated under the laws of Kentucky on April 14, 2003, by William A. Shotwell, Jr.

6. PTT was in the business of making wholesale sales of roll-your-own tobacco to retailers throughout the United States, including Michigan.

7. Mr. Shotwell died intestate on March 17, 2007.

8. Petitioner was married to Mr. Shotwell.

9. During his lifetime, Mr. Shotwell was the sole shareholder, director, and officer of PTT.

10. On or about March 29, 2007, Petitioner and Suzanne Shotwell (Petitioner's stepdaughter) were appointed co-administratrixes of Mr. Shotwell's estate by the Pulaski County District Court, Probate Division.

11. In her court appointed role as co-administratrix of Mr. Shotwell's estate, Petitioner was required to preserve the assets of the estate.

12. PTT was a major asset of Mr. Shotwell's estate.

13. Petitioner had no involvement in the business of PTT or its operations during Mr. Shotwell's lifetime.

14. Suzanne Shotwell began working at PTT in April 2007.

15. Petitioner began working as an employee of PTT "[s]ometime between October 2007 and December 2007." (Petitioner's Exhibit 1, pg 5)

16. In the course of performing her duties and responsibilities as co-administratrix, Petitioner signed documents relating to Mr. Shotwell's assets, including PTT.

17. By order of the Pulaski County District Court, Mr. Shotwell's estate was closed on March 26, 2008, at which time Petitioner's duties as co-administratrix and fiduciary of Mr. Shotwell's estate were discharged.

18. Petitioner and Petitioner's stepdaughter each received 500 shares of PTT as part of the settlement of Mr. Shotwell's estate. (Petitioner's Exhibit 1, p 5)

19. PTT engaged in sales in Michigan through May 2007. After May 2007, PTT ceased all sales in Michigan.

20. On April 13, 2007, both Petitioner and Suzanne Shotwell signed Michigan Tobacco Products Tax Electronic Filing Application as "co-owner."

21. On April 24, 2007, both Petitioner and Suzanne Shotwell signed Michigan Tobacco Products Tax License Application as "co-owner."

22. On June 25, 2007 and August 8, 2007, Petitioner signed correspondence to Respondent as co-administratrix.

23. On September 13, 2007, both Petitioner and Suzanne Shotwell filed a Certificate of Withdrawal of Assumed Name as "co-administratrix of Estate of William Shotwell."

24. Petitioner signed a Power of Attorney on October 23, 2007, as "President" of PTT authorizing an agent to speak to Respondent regarding unpaid taxes of PTT.

25. Petitioner signed PTT's 2007 Kentucky annual report on November 27, 2007, as "co-administratrix."

26. On March 16, 2008, Petitioner signed a Kentucky Non-resident income tax withholding form as a "partner, member or shareholder."

27. Petitioner signed PTT's 2007 U.S. Income Tax Return on March 17, 2008, as co-administratrix of the estate of Mr. Shotwell.[4]

28. On March 17, 2008, Petitioner signed a Kentucky S Corporation Questionnaire as "Principal officer or chief accounting officer."

29. Petitioner filed PTT's 2008 Kentucky annual report on April 11, 2008, as President and Director.

30. Petitioner signed PTT's 2009 Kentucky annual report on June 19, 2009, as President.

31. Petitioner was formally elected as President and Director of PTT on October 29, 2010, via Board Resolution. The Resolution further states:

> [A]ll acts of Deena Shotwell and/or Suzanne Shotwell [sic] heretofore taken in their capacity as officers of the Corporation be and are ratified and approved.

32. Respondent issued Final Assessment No. P244392 to Petitioner for the 04/07 tax period on February 21, 2012, in the amount of $616,039.00, penalty of $21,127.18, and statutory interest in the amount of 149,678.89 for a total assessment of $786,845.07 for PTT's failure to remit tobacco tax equity assessments as required under the TPTA.

33. Respondent issued Final Assessment No. Q049923 to Petitioner for the 12/07 tax period on February 21, 2012, in the amount of $55,965.47,

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[4] Documents provided by the parties also include a 2007 U.S. Income Tax Return for PTT signed by Petitioner on March 7, 2008, that provided no designation for Petitioner.

> penalty of $13,991.35, and statutory interest in the amount of $11,241.53 for a total assessment of $81,198.35 for PTT's failure to remit tobacco tax equity assessments as required under the TPTA.

APPLICABLE LAW

Petitioner moves for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, ___ MTT ___ (Docket No. 292745, March 4, 2004) (Tax Tribunal Reports), the Tribunal stated "[a] motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact." 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. See *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. See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the nonmoving party. See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). The moving party bears the initial burden of supporting its position

by presenting its documentary evidence for the court to consider. See *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. 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. See *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Alternatively, Respondent requests that the Tribunal find that Respondent is entitled to summary disposition pursuant to MCR 2.116(I)(2). Pursuant to MCR 2.116(I)(2), 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. See also *Mascia v IDS Property Casualty Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2012 (Docket No. 304607), citing *Jaguar Trading Ltd Partnership v Presler*, 289 Mich App 319; 808 NW2d 495 (2010).

CONCLUSIONS OF LAW

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

> **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. (Emphasis added.)

Once a prima facie case is established, by producing a corporate officer's signature on a return or negotiable instrument submitted in payment of taxes, the burden of proof shifts to the corporate officer to rebut the presumption that he or she is responsible for the corporation's failure to pay tax, by producing "evidence sufficient to convince the Tribunal that the nonexistence of the presumed fact is more probable than its existence." *Penner v Dep't of Treasury*, 18 MTT 136, 154 (Docket No. 358583, August 3, 2010) (Tax Tribunal Reports), citing *Widmayer v Leonard*, 422 Mich 280, 287; 373 NW2d 538 (1985).

In this case, although Petitioner signed PTT's 2007 U.S. Income Tax Return, Petitioner signed the tax return as "co-administratrix," not in a capacity as an

officer of PTT. As such, contrary to Respondent's contentions, the Tribunal is not persuaded that Petitioner's signature on said tax return, along with other documentation where Petitioner either signed or is listed as "President" or in her capacity as an "officer" of PTT,[5] establishes Respondent's prima facie case. As a result, it is Respondent's burden to establish Petitioner's liability under MCL 205.27a(5).[6]

To hold a person personally liable for an entity's tax liability under MCL 205.27a(5), Respondent must first show that the person is an officer of the corporation. Here, the testimony and evidence provided show that Petitioner was not an officer of PTT during the relevant time periods.

Petitioner contends that the tobacco tax equity assessments required under the TPTA were due on March 1, 2006, and March 1, 2007, the date the prepayments for cigarettes that are anticipated to be sold in the current calendar year were due under MCL 205.426d(5), and as such, in order to be derivatively liable for PTT's failure to pay such tax, Petitioner would have had to have been an officer of PTT at that time, to which Petitioner denies. Alternatively, Respondent

[5] Respondent's Power of Attorney form signed on October 23, 2007; PTT's 2008 Kentucky Annual Report signed on April 11, 2008; PTT's 2007 U.S. Income Tax Return signed on March 7, 2008; PTT's Kentucky S Corporation Questionnaire signed on March 17, 2008; PTT's Foreign Corporation Application with the State of Ohio on November 18, 2009.

[6] Even if it were found that Respondent met its prima facie case in establishing liability under MCL 205.27a(5), the Tribunal would reach the same conclusion since the Tribunal finds sufficient and credible testimony and evidence to rebut the presumption that Petitioner was an officer of PTT during the relevant time periods, as determined in this Final Opinion and Judgment.

contends that the tobacco tax equity assessments were due on April 15, 2007, and April 15, 2008, the date the equity assessments were to be collected and reconciled for cigarettes sold in 2006 and 2007, as required under MCL 205.426d(4), and as such, these are the dates to look at when determining who was an officer of PTT. The Notices of Final Assessment, for the assessments at issue, however, indicate that the tax periods at issue are April 2007 and December 2007. As discussed below, the Tribunal finds that the appropriate dates to determine when the tobacco tax equity assessments were "due" and to determine when PTT failed to pay such tax to ascertain when corporate officer liability attached in this case are March 1, 2006, and March 1, 2007.

MCL 205.426d(5) states, in pertinent part, "[A] nonparticipating manufacturer selling cigarettes in this state *shall* prepay the equity assessment imposed in subsection (4) *not later than March 1* for all cigarettes that are anticipated to be sold in the current calendar year." (Emphasis added.) MCL 205.426d(4), on the other hand, states, in pertinent part, "The equity assessment shall be collected and reconciled by April 15 of each year for cigarettes sold in the previous calendar year."

Although MCL 205.426d(4) requires final collection and reconciliation of tobacco tax equity assessments by April 15 of each year for cigarettes sold in the

previous calendar year, according to MCL 205.426d(5), prepayments of such tax shall (i.e., must) be paid by March 1 of the year in which the cigarettes are sold.

While the first sentence of MCL 205.27a(5) refers to "tax due," a definition of when a tax is "due" for purposes of determining when officer liability attaches is not prescribed in the Revenue Act. In *Kosanke v Dep't of Treasury*, 19 MTT 364 (Docket No. 332392, October 26, 2010) (Tax Tribunal Reports), the Tribunal was faced with this same issue—when do taxes become "due" for purposes of determining when liability attaches under MCL 205.27a(5). Although the facts differ, the Tribunal finds that *Kosanke* provides guidance as to when taxes are "due" for purposes of MCL 205.27a(5).

In *Kosanke*, the Tribunal held that taxes are due "at the time the tax liability is incurred." See *Kosanke*, 19 MTT at 373, see also *Rolinski v Dep't of Treasury*, ___ MTT ___ (Docket No. 357830, July 23, 2012) (Tax Tribunal Reports), and *Mahrle v Dep't of Treasury*, ___ MTT ___ (Docket No. 435038, December 20, 2012) (Tax Tribunal Reports). Here, a tax liability was incurred on March 1, 2006, and March 1, 2007, when PTT was required to pay its tobacco tax equity assessments for cigarettes it was anticipated to sell in 2006 and 2007. As a result, the Tribunal finds that March 1, 2006, and March 1, 2007, are the dates corporate officer liability attached in this case and are the dates to use in determining whether Petitioner (i) was an officer of PTT and (ii) had "control or supervision of,

or responsibility for, making the returns or payments" at that time. See MCL 205.27a(5).

The Tribunal's conclusion as to when taxes are due for purposes of MCL 205.27a(5) is further supported by MCL 205.29 which states that taxes become a lien when taxes or returns are due; not, for example, when a final assessment is issued, or, as in this case, when reconciliation is to be made. Additionally, just because MCL 205.426d(5) gives Respondent authority to adjust the equity assessment prepayment amount during the year if the increase is justified by the nonparticipating manufacturer's actual sales of cigarettes, the Tribunal is not persuaded that the ability to adjust a payment modifies the date as to when the taxes were "due" for purposes of liability under MCL 205.27a(5).

According to Petitioner's Affidavit, filed as Exhibit 1 to Petitioner's Brief in Support of her Motion for Summary Disposition, Petitioner "was not employed during [her] marriage to William Shotwell. [She] was a housewife, and . . . was not involved in PTT's business in any respect." (Petitioner's Exhibit 1, p 2.) Furthermore, Petitioner contends that she had no involvement in PTT prior to her husband's death, which occurred on March 17, 2007. As a result, based on the testimony, via affidavits attached to Petitioner's Brief in Support of her Motion for Summary Disposition, and evidence provided, Petitioner was "not involved in PTT's business in any respect" as of March 1, 2006, and March 1, 2007, and as

such, was not an officer of PTT at the time the prepayment of tobacco tax equity assessments were due pursuant to MCL 205.426d(5). Hence, because Petitioner was not an officer at the time PTT failed to pay the tax at issue, Petitioner is not a responsible corporate officer for the assessments at issue under MCL 205.27a(5).

Nonetheless, however, if it is later determined that the appropriate dates to determine when corporate officer liability attached for PTT's nonpayment of tobacco tax equity assessments is April 2007 and December 2007, which is reflected as the tax periods at issue on the Notices of Final Assessment, the Tribunal would reach the same conclusion.

Since PTT and the orders by the Pulaski District Court are governed by Kentucky law, we look to Kentucky law for further guidance. According to KRS 395.001, a "fiduciary" is "any person, association, or corporation meeting the requirements of KRS 395.005 . . . appointed by, or under the control of, or accountable to, the District Court, including executors, administrators, administrators with the will annexed, testamentary trustees, curators, guardians and conservators." Furthermore, pursuant to KRS 395.105, "[t]he duties of a fiduciary shall be such as are required by law, and such additional duties not inconsistent therewith as the court may order."

By court order, Petitioner was appointed as co-administratrix to maintain all assets of Mr. Shotwell's estate, including PTT, during the time in which Mr.

Shotwell's estate was open. Although Petitioner signed some documents during this time as "President" and "co-owner" of PTT, Petitioner signed most documents as "co-administratrix" of the estate. Further, the Tribunal finds that Petitioner did not have authority to appoint or elect herself as an officer of PTT from March 29, 2007, to March 26, 2008, since PTT remained an asset of Mr. Shotwell's estate and Petitioner was only appointed as "co-administratrix" of the estate.

Furthermore, an administrator's actions are taken on behalf of the estate in their capacity as a shareholder of the company, not on behalf of the company as a director and/or officer, absent an appointment/election as such. Here, there was no election until October 29, 2010. In addition, contrary to Respondent's contentions, Petitioner was neither a "de factor" nor a "de jure officer" since Petitioner's role in administering the estate was solely that of administering a shareholder of PTT. While the estate, as shareholder of PTT, could have appointed a Board, who in turn could have elected officers, no such events took place during the time in which the estate was open. And although Respondent contends that the Resolution retroactively appointed Petitioner President of PTT, pursuant to Black's Law Dictionary (9th ed. 2009), ratification is the "[c]onfirmation and acceptance of a previous *act*, thereby making the *act* valid from the moment it was done." (Emphasis added.) As a result, as Petitioner proposes, the Tribunal finds that PTT's October 29, 2010 Resolution did not retroactively make Petitioner President

of PTT as of April 2007 and December 2007, but instead ratified (i.e., approved) only the actions taken.[7]

Although the parties were specifically advised at the Prehearing Conference, held on October 29, 2012, that reply briefs were not allowed, the Tribunal finds that granting Petitioner's Ex Parte Motion to File Reply to Respondent's Response Brief is appropriate, given the fact that nothing new was raised that the Tribunal determined to be pertinent in this case, nor was Respondent prejudiced by the filing of said Motion.

The Tribunal further finds that although Petitioner is the prevailing party, in consideration of the above, awarding costs and attorney's fees to Petitioner is not appropriate. With respect to Petitioner's request for costs associated with this tax appeal, TTR 145(1) allows the Tribunal to order costs be remunerated to a prevailing party of a decision or order. The rule itself, however, provides no guidelines or criteria by which the Tribunal is to measure whether costs should be awarded. In *Aberdeen of Brighton, LLC v City of Brighton*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 301826), the respondent contended that the Tribunal ". . . may only award costs under TTR 145 if the requesting party shows good cause or the action or defense was

[7] Even if the Board had authority to retroactively appoint Petitioner as President of PTT prior to October 29, 2010, the Tribunal finds that such authority would have been limited to the time after the estate closed on March 26, 2008, which is after the relevant dates as determined in this Final Opinion and Judgment, and as such, would have no impact on the Tribunal's decision in this case.

frivolous." *Id*. at 5. The Court held that the language of TTR 145 is unambiguous and its plain language indicates that a prevailing party may request costs and does not indicate that a showing of good cause or a frivolous defense is necessary.

With regard to the awarding of attorney fees, TTR 111 states that "[i]f an applicable entire tribunal rule does not exist, the . . . Michigan Rules of Court . . . 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." While the Michigan Court Rules and the Administrative Procedures Act provide the Tribunal with some criteria in determining whether an award of fees is appropriate, the decision to award fees is solely within the discretion of the Tribunal judge.

MCR 2.114 provides that a signature on "pleadings, motions, affidavits, and other papers" by a party:

> constitutes a certification by the signer that (1) he or she has read the document; (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCR 2.114(E) provides that if:

> a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who

> signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees.

An award of fees is supported by MCR 2.114 if it is found that pleadings, motions, affidavits, or other papers are not grounded in fact and law or are interposed for an improper purpose. Also applicable is MCL 24.323(1), which states that "[t]he presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous."

The Administrative Procedures Act defines "agency" as a ". . . state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action." MCL 204.303(2).

MCL 24.323 states that:

> To find that an agency's position was frivolous, the presiding officer shall determine that at least 1 of the following conditions has been met: (a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party, (b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true, (c) The agency's legal position was devoid of arguable legal merit.

Again, as indicated above, although Petitioner is the prevailing party in this case, the record does not support a finding that Respondent had no reasonable basis

to believe that the facts underlying its legal position were true and its legal position was not devoid of arguable legal merit. Respondent believed its assessment was grounded in fact and law and was not established nor defended by Respondent to harass, embarrass, or injure Petitioner. Furthermore, Petitioner conceded to the merits of Respondent's position "because she should have been way more careful on how she signed documents and she made some representations that were not accurate." (Transcript, pp 38, 41-42) Therefore,

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

IT IS FURTHER ORDERED that Petitioner's Request for Costs and Attorney Fees is DENIED.

IT IS FURTHER ORDERED that Respondent's Request for Costs and Attorney Fees is DENIED.

IT IS FURTHER ORDERED that Petitioner's Ex Parte Motion to File a Reply to Respondent's Response Brief is GRANTED.

IT IS FURTHER ORDERED that Assessment Nos. P244392 and Q049923 are CANCELLED.

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

MICHIGAN TAX TRIBUNAL

By: Steven H. Lasher

Entered: January 30, 2013