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

Family Home Health Services of Michigan,
Petitioner, MTT Docket No. 451412

v

Michigan Department of Treasury, Tribunal Judge Presiding
Respondent. Steven H. Lasher

FINAL OPINION AND JUDGMENT

This matter was heard before Administrative Law Judge ("ALJ") Thomas A. Halick. A Proposed Opinion and Judgment was issued on August 20, 2014. The Proposed Opinion and Judgment provided, in pertinent part, "the parties shall have 20 days from date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the evidence admitted at the hearing. This Proposed Opinion and Judgment, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act (MCL 205.726)."

Neither party has filed exceptions to the Proposed Opinion and Judgment.

CONCLUSION

The Tribunal has reviewed the Proposed Opinion and Judgment and the case file and finds that the ALJ properly considered the evidence and testimony in the rendering of the Proposed Opinion and Judgment. Further, the ALJ made specific findings of fact and conclusions of law. The ALJ's determination is supported by the testimony, evidence, and applicable statutory and case law. As such, the Tribunal adopts the Proposed Opinion and Judgment as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment in this Final Opinion and Judgment.

Given the above, the Tribunal finds that the taxes, interest and penalties, as levied by Respondent, are:

Assessment Number: TS80920

Taxes	Interest	Penalties
$866,031.00	$315,352.01	$216,031.00

The taxes, interest and penalties as determined by the Tribunal are:

Assessment Number: TS80920

Taxes	Interest[1]	Penalties
$563,545.00	To be recalculated per 1941 PA 122	$56,354.00

Therefore,

IT IS ORDERED that the ALJ's Proposed Opinion and Judgment is ADOPTED by the Tribunal as the Final Opinion and Judgment.

IT IS FURTHER ORDERED that Assessment No. TS80920 shall be MODIFIED as indicated above and in the Proposed Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in the Proposed Order, 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 Final Opinion and Judgment, within 28 days of entry of this Final Opinion and Judgment.

[1] Interest continues to accrue per 1941 PA 122. Interest shown above is current as of the date of the assessment.

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

By: Steven H. Lasher

Entered: Sept 23, 2014
krb

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
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Family Home Health Services of Michigan, Inc.,
Petitioner,

v

MTT Docket No. 451412

Michigan Department of Treasury,
Respondent.

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED OPINION AND JUDGMENT

Introduction

A hearing was held May 21, 2014, on Petitioner's appeal of Respondent's assessment of use tax. Petitioner filed its Petition on May 6, 2013. Attorney Brian T. Quinn of Honigman, Miller, Swartz, and Cohn LLP, appeared on behalf of Petitioner. Assistant Attorney General Emily C. Zillgitt appeared on behalf of Respondent. The parties presented testimony, documentary evidence, and legal argument at the de novo hearing. The final assessment at issue was originally issued as follows:

Assessment No.	Tax	Penalty	Interest
TS80920	$866,031.00	$216,031.00	$315,352.01

During the course of this litigation, Respondent obtained additional information and recalculated the tax due as follows:

Assessment No.	Tax	Penalty	Interest
TS80920	$802,061.00	$80,207.00	To be recalculated per 1941 PA 122.

Based upon the Tribunal's Findings of Fact and Conclusions of Law, the assessment shall be affirmed in part and cancelled in part as follows:

Assessment No.	Tax	Penalty	Interest[2]
TS80920	$563,545.00	$56,354.00	To be recalculated per 1941 PA 122.

[2] Interest continues to accrue per 1941 PA 122. Interest shown above is current as of the date of the assessment.

The assessment shall be affirmed for the periods of 2005, 2006, 2007, 2008, and 2009. The tax, penalty, and interest assessed for the periods prior to 2005 shall be cancelled.

The original audit schedules (R9) and the final audit determination letter (R12) indicate that a 10% penalty was imposed, whereas, the final assessment imposed a 25% penalty. The audit schedules (R9) show calculations of tax for the years 2001 through 2004 in the amount of $66,737 per year, for a total of $266,948 for 2001 through 2004, with a 10% penalty. The revised audit schedules (R13) show tax due for each of the years 2001 through 2004, in the amount of $59,629, for a total of $238,516 for those years, with a 10% penalty. The projected expense amounts for the years 2001-2004, as indicated in R13, totaling $238,516, shall be subtracted from the revised tax amount of $802,061, for tax due of $563,545, with a 10% penalty, and interest to be calculated pursuant to the revenue act.

Petitioner's Exhibits

The following exhibits are admitted into evidence:

P1 – Deposition testimony of Kevin Ruark, Petitioner's former CEO.

P2 – Form 8-K; March 16, 2005.

P3 – Form 8-K/A; March 30, 2005.

P4 – Form 10-QSB; August 15, 2005.

P5 – Form 8-K/A; August 15, 2005.

P6 – Loan Agreement; November 10, 2005.

P7 – Form 10-QSB; November 14, 2005.

P8 – Form NT 10-K; March 30, 2006.

P9 – Form 10-KSB; May 22, 2006.

P10 – Form 10-QSB; July 7, 2006.

P11 – Form 10-QSB; November 20, 2006.

P12 – Certificate of Amendment.

P13 – Amended and Restated Bylaws.

P14 – 2005 U.S. Corporation Income Tax Return, Form 1120.

P15 – 2006 U.S. Corporation Income Tax Return, Form 1120.

P16 – 2007 U.S. Corporation Income Tax Return, Form 1120.

P17 – Audit Confirmation Letter.

P18 – Email Exchange.

P19 – Audit Report of Findings.

P20 – Final Bill for Taxes Due (Final Assessment) No. TS80920.

Respondent's Exhibits

The following exhibits were admitted into evidence by stipulation of the parties[3]:

R1 – Audit Pre-Confirmation Letter dated August 17, 2011.

R2 – Tax Compliance Bureau Records Request for use tax audit.

R3 – Michigan Department of Treasury Change of Address Request sent to Post Office, dated October 25, 2011.

R4 – Audit Diary.

R5 – No Response to Audit letter issued by Treasury to Family Home Health Services, Inc., dated January 3, 2012.

R6 – Audit confirmation letter dated January 31, 2012.

R7 – Email between Tiffany Smith and Kevin Ruark.

R8 – Audit Report of Findings.

[3] Transcript at 4.

R9 – Auditor use tax workbook from use tax audit of Family Home Health Services, Inc.

R10 – Petitioner's federal income tax returns of Family Home Health Services, Inc., for the 2005 -2009 tax years.

R11 – Notice of Preliminary Audit Determination dated September 19, 2012.

R12 – Final Audit Determination Letter dated January 15, 2013.

R13 – Amended auditor use tax workbook from use tax audit of Family Home Health Services, Inc.

R14 – Letter from 2020 Tax Resolution to Treasury dated March 25, 2013.

R15 – SEC Form 10KSB for Family Home Health Services, Inc., for the period ending 12/31/05.

R16 – Loan Agreement between Family Home Health Services, Inc. and Comerica Bank, dated 11/10/05.

R17 – SEC Form 10QSB for Family Home Health Services, Inc., for the period ending 9/20/05.

R18 – Petitioner's responses to Treasury's first requests to admit, interrogatories, and request for production of documents.

R19 – Transcript of deposition of Kevin Ruark.

R20 – Intent to Assess and Final Assessment TS80920.

R21 – Petitioner's Petition and Treasury's Answer filed in this matter.

Findings of Fact

Introduction and Overview

Petitioner, Family Home Health Services of Michigan, Inc., was incorporated on November 17, 2000, under the laws of the state of Nevada, with its corporate headquarters located in Plymouth, Michigan. In 2005, Petitioner acquired its subsidiary, Family Home Health Services, LLC (also referred to as "FHHS, LLC" and "FHHS Michigan"), which had one office in Michigan where approximately 30 health care professionals were employed. (See R15, p 12.)

In August of 2011, Respondent commenced an audit of Petitioner for compliance with the Use Tax Act (1937 PA 94), the Michigan Business Tax Act (2007 PA 36), and the Single Business Tax Act (1975 PA 228[4]), for the period January 1, 2001, to December 31, 2009. Respondent determined that Petitioner was not registered for use tax and failed to file returns or pay use tax for the entire audit period, and issued final assessment TS80920, which is the subject of this appeal.

Corporate Formation and Structure

Petitioner described its corporate background in a form 10-KSB that it filed with the United States Securities and Exchange Commission:

> The company was incorporated in Nevada in 2000 under the name Myocash, Inc. as a special purpose acquisition entity that had no operations or business activity. On January 17, 2005, the Company closed on a reverse merger with Family Home Health Services, LLC, a Delaware limited liability company ("FHHS") owned by our largest stockholders, Kevin R. Ruark and James H. Pilkington, that had been engaged in providing home health care services since September 2003. Following the reverse merge, the Company changed its corporate name to its current name.
>
> The Company is primarily an inactive holding company and our main operations are conducted through our subsidiaries. The largest subsidiary, FHHS, is licensed by the state of Florida, Agency for Health Care Administration, to service patients with home health care services in 25 counties throughout south Florida. FHHS is also certified by the CMS to provide Medicare home health care services to Medicare accreditation through the Community Health Accreditation Program, a national accrediting organization.
>
> Over 90% of our outstanding shares of common stock are beneficially controlled by Messrs. Ruark and Pilkington, each a director and respectively the Chairman, Chief Executive Officer and President, and the Chief Development Officer of the Company.
>
> Recent Events. We have experienced significant growth in our business. FHHS reported approximately $11.5 million in revenues in 2004 (prior to the reverse merger), and we reported over $15 million in revenues in 2005. During that same period, the number of our employees increased from approximately 200 to approximately 350 in Florida, Michigan and Illinois.
>
> Our growth strategy has been focused primarily on acquisitions. On July 1, 2005, we acquired from Messr's Ruark and Pilkington and from Home Care Partners, LLC, a Michigan limited liability company ("Home Care"), all issued and outstanding units of FHHS, LLC a Michigan limited liability company ("FHHS

[4] The SBTA was repealed for tax years beginning after December 31, 2007. See 2006 PA 325.

> Michigan") which is a provider of a variety of home health care services, primarily in Southeastern Michigan . . . . FHHS Michigan had one office in its region and employed approximately 30 health care professionals. On April 5, 2006, we purchased substantially all of the assets of Coastal Health Care Solutions, LLC, Florida limited liability company, and Professional Therapy & Rehab Services, Inc., a Florida corporation. The acquired entities were all related companies engaged in the health care staffing business in Florida.
>
> Organizational Structure. We provide our services from 16 branch offices located in Florida, Michigan and Illinois. Each office is led by a regional administrator who is responsible for both clinical and administrative operations. Those administrators are supported by teams of clinicians and business development staff who help coordinate each step in our health care delivery system.
>
> Our corporate office is located in Michigan and supports our regional operations with common administrative functions such as Medicare billing and collections, accounting, purchasing, payroll, human resources, information technology and other administrative and investor services. (R15, p 4-5.)

In answers to interrogatories, Petitioner states that it (Family Home Health Services of Michigan, Inc.) was a "holding company that does not engage in business activity." (R18, Interrogatory 8.) Petitioner also states that "it *used to be* an inactive public shell company . . . that was incorporated on November 17, 2000, in Nevada under the name Myocash, Inc., as a special purpose acquisition entity that had no operations or business activity." [Emphasis added]. (R18 Interrogatory 9.) On January 17, 2005, Petitioner acquired 100% ownership of Family Home Health Services, LLC (a Delaware limited liability company) in what it describes as a "reverse merger" and changed its name from Myocash, Inc. to Family Home Health Services, Inc. The sole shareholders of Myocash, Inc. were Mr. Ruark and Mr. Pilkington, who were also the members of Family Home Health Services, LLC, prior to the merger.

On or about November 3, 2004, Myocash, Inc. filed a Certificate of Amendment to Articles of Incorporation with the Secretary of State for the state of Nevada, changing the name of the corporation to Family Home Health Services, Inc. (See P 12.)

After the acquisition of Family Home Health Services, LLC, Petitioner claims that it was a "holding company with no separate business operations." (P3.)

On July 1, 2005, Petitioner acquired FHHS, LLC, ("FHHS Michigan"), which at that time had annual revenue of $1.2 million. (See R15, p 5.)

In 2005, Petitioner owned 100% of the membership interest in Family Home Health Services, LLC (a Delaware limited liability company, 6320 Venture Drive, Suite 205, Lakewood Ranch, Florida) and FHHS, LLC (a Michigan limited liability company, 801 West Ann Arbor Trail, Suite 200, Plymouth, Michigan 48170). In answers to interrogatories, Petitioner states that these single-member limited liability companies are "federally disregarded entities." (R18, Interrogatory 4.) FHHS, LLC operated in Michigan. (R18, Interrogatory 6.)

At his deposition, Mr. Ruark stated that he was the chief executive officer of Family Home Health Services of Michigan, Inc., from 2005 to January 2010, when that entity ceased operations. (P1, p 6.) At the time of the deposition (February 7, 2014), Mr. Ruark stated he was unemployed.

The auditor testified that she initially established the audit period through December 2010, but based on Mr. Ruark's statement that the business closed in January 2010, she eliminated 2010 from the audit period. (See Transcript, p 87.) The auditor determined that the audit period should commence with 2001 because Mr. Ruark "never stated in 2000 – that 2001 through 4 was – he had no operations." (Transcript, p 87.) The auditor testified that there was no affirmative evidence that Petitioner was in business for the years 2001 through 2004, but that the first evidence of operations came in the form of business tax returns in 2005. (See Transcript, p 89.) The auditor stated that the taxpayer may have conducted business prior to 2005 but failed to file SBT returns, perhaps because the gross receipts were below the $350,000 filing threshold.

Petitioner's Business Activity

Respondent's Audit Report of Findings ("Audit Report") describes Petitioner's business activity as *providing personal home health care services*. (See R8.) This is consistent with Petitioner's federal income tax returns. (See, R8, p 94.) Petitioner filed a form 10-KSB with the United States Securities and Exchange Commission, which states, "[F]amily Home Health Services Inc., including its subsidiaries, is a leading provider of home health services in Florida, Michigan and Illinois." (R15, p 3.) The 10-KSB states further that, "[W]e are engaged primarily in the home health skilled services sector of the home health care business. We offer all six disciplines reimbursable under Medicare, thereby providing comprehensive care and 'one-stop' shopping convenience for our customer base . . . The services we offer include: skilled nursing, physical therapy, occupational therapy, speech therapy, medical social work, and home health aids." (R15, p 4.)

In a form 10-QSB, filed with the federal Securities and Exchange Commission, Petitioner stated that "[W]e purchased new software programs and implemented new systems for processing billings and collections." (R18, p 61.) This action was taken to remediate "the deficiencies that were identified in its review of disclosure controls and procedures. . . ." (R18, p 61.)

In a tax return filed with the state of Illinois, Petitioner reported that its "accounting records are kept" in Michigan. (R18, p 152.)

In a tax return filed with the state of Ohio, Petitioner reported that the "[C]orporation tax records are in care of . . . Kevin Ruark." (R18, p 174.)

The federal corporation income tax return, form 1120, for 2009 reported that Kevin R. Ruark devoted 100% of this time to the business and held 51.94% of the stock. James H. Pilkington devoted 100% of his time to the business and held 34.42% of the stock.

The Audit

On August 17, 2011, Respondent sent an audit pre-confirmation letter to "Family Home Health Services" at 801 W. Ann Arbor Trl Ste 200, Plymouth, MI 48170, which is the address of the corporate headquarters of Family Home Health Services, Inc. (R1.) The letter also identified Petitioner by its account number (020718322), which also appears on its state and federal tax returns. This audit confirmation letter notified Petitioner that the department would conduct an audit for Use Tax, SBT, and MBT, and also asked Petitioner to fill out a "tax audit questionnaire" and return it to Respondent. Respondent also requested that Petitioner supply it with records of utility bills, depreciation schedules, trial balances, and company credit cards, for the period January 2009 through December 2009. Respondent's witness testified that Petitioner did not respond to this letter.

On or about October 25, 2011, Respondent submitted a written request to the Postmaster for the City of Plymouth to verify that mail was being delivered to Family Home Health Services at 801 W. Ann Arbor Trl Ste. 200, Plymouth, MI 48170. See R3. Respondent's "Address Information Request" form shows that on October 29, 2011, the Postmaster confirmed that "Mail is delivered to address given." The audit confirmation letter and other correspondence to Petitioner consistently included "account # 020718322," which is Petitioner's federal tax identification number and also its account number used for state tax purposes. (See Transcript, p 104-105.)

On January 3, 2012, Respondent sent a letter to Petitioner at its address in Plymouth, Michigan, indicating that Petitioner had failed to respond to prior notices and that the department had authority under the revenue act to "establish tax deficiencies based on available information . . ." and that "[F]ailure to respond by 1/17/2012 will result in a computed assessment based on available information." (R5.)

During January of 2012, Respondent's auditor contacted an individual, Jeff Bonham, who had been the controller of Family Home Health Services, Inc. Mr. Bonham informed the auditor that Petitioner ceased business in Michigan in 2010 and that the company had a new address in Lakewood Ranch, Florida. (See R4.)

On January 31, 2012, the department sent an audit confirmation letter to Family Home Health Services, 6230 Venture Dr. Suite 205, Lake Wood Ranch, FL 344202, indicating that the audit would commence February 13, 2012.

Respondent's "Audit Diary" (R4) states that the deadline for providing records was February 13, 2012, and that the auditor needed the records to identify "accounts of interest" and to request further copies of invoices for review.

On or about March 6, 2012, the auditor notified Petitioner by email that if records were not provided, the auditor would determine the tax based on the best available information. Two days later, Kevin Ruark sent an email to the auditor indicating that he would be in charge of handling the audit. The auditor was unable to reach Mr. Ruark by telephone, but left a voice message reiterating the request for records. Mr. Ruark sent an email to the auditor stating that "the business was discontinued in 2010" and that the auditor needed to change the audit period to reflect this. The auditor sent an email and followed up with a telephone call to Mr. Ruark again requesting the records. According to the Audit Diary, Mr. Ruark stated that the records were in Plymouth, Michigan and in Naples, Florida, and that he needed to conduct further investigation regarding the availability of the records. This series of communications occurred in March of 2012. As of April 16, 2012, the records were still not located, and the auditor sent an email to Mr. Ruark warning that if records were not provided the audit would be based on available information, which at that time was limited to state business tax returns and federal income tax returns. The next day, Mr. Ruark replied by email, stating that he had spoken with the owner and operator of the "Plymouth Facility and determined that they do not have the records . . . since the business was closed in January of 2010." Mr. Ruark further stated that the company's former accountant would not release any records due to a dispute regarding payment for accounting services. From this and other facts in evidence, it can be inferred that the “new owner and operator” of the “Plymouth facility” was Mr. Pilkington, a person with whom Mr. Ruark had engaged in various business endeavors since at least the year 2000.

In an email dated April 17, 2012, Mr. Ruark stated that he had spoken with Mr. Pilkington, who stated that he did not have “the old records for Family Home Health Services, Inc. Since the company has been shut down for quite a while (has not [sic] employees, operations, etc.) I am not sure how to proceed. I talked with the old accountant but they are still owed some money so will not cooperate with any document requests.” (R7.)

The audit commenced. The auditor concluded that Petitioner had purchased tangible personal property and that there were no records showing that sales or use tax had been paid or that returns had been filed. (See Audit Report, R8, p 2 and 3.) Based on the taxpayer’s statement that the business had discontinued on January 1, 2010, the audit period was limited to the period ending December 31, 2010. Nevertheless, the auditor determined that the audit period should be 10 years, due to Petitioner’s status as a non-filer, consistent with the department’s policy and the revenue act. The auditor testified that she traveled to Petitioner’s address in Plymouth, Michigan, guided by GPS, but that she was unable to find Petitioner’s place of business. (See Transcript, p 101.)

The only available records at that time were Petitioner’s Single Business Tax returns for 2005, 2006, and 2007, Michigan Business Tax returns for 2008 and 2009, and federal corporate income tax returns for 2005 through 2009. The SBT and MBT returns reported purchases of capital assets for which the taxpayer had claimed an investment tax credit (“ITC”). (See R8.) The federal returns reported deductions for “office expense, vehicle expense, utility expense, computer expense, medical expense and other expenses.” The total of these items was $4,449,112, which was determined to represent taxable purchases for the years 2005 through 2009. The auditor used the average annual purchases ($1,112,278) to estimated annual purchases for the years 2001, 2002, 2003, 2004, and 2005. The taxpayer did not maintain invoices or other records of purchases. There is not a single invoice in evidence showing that sales or use tax was paid to any state on these purchases.

Capital asset purchases were based on the actual assets claimed for ITC purposes on the SBT and MBT returns for 2005, 2006, 2007, 2008, and 2009. However, "For the years 2001-2004, no ITC was reported in bridge and none was determined." (R8.)

For the tax year 2005, Petitioner filed a U.S. Corporation Income Tax Return, form 1120, under the name "Family Home Health Services, Inc., (Formerly Myocash, Inc.), 801 W. Ann Arbor Trail, Ste 200, Plymouth, MI 48170. In 2005, Petitioner reported gross receipts of $17,366,074. Under "other deductions" (form 1120, statement 2) the taxpayer reported a total of $5,907,112, which included deductible expenses for purchases of goods and services. The auditor determined that a total of $1,160,324 represented purchases of taxable property in 2005, with tax due related to these items of $107,782. The 2005 form 1120 includes a statement indicating that on January 17, 2005, Family Home Health Services, Inc. (formerly Myocash, Inc.) acquired from Kevin Ruark and James Pilkington all of their membership interests in Family Home Health Services, LLC. On form 4562 (Depreciation and Amortization), Petitioner reported that it placed assets in service totaling $720,209. (See R10, p 96.) The auditor determined that capital asset purchases in 2005 were $649,092, based on amounts claimed for the ITC on the SBT return. The SBT returns are not in evidence, but the capital asset purchases set forth on R13 (Audit Workpapers, Schedule B, page 1 of 2) are taken from the taxpayer's SBT returns, according to the auditor's testimony.

Petitioner's 2006 form 1120 includes a page entitled "2007 Income from Passthroughs" which states that Petitioner reported a loss of $166,776 attributable to Illinois Family Home Health Services, LLC, 801 W. Ann Arbor Trail, Ste 200, Plymouth, MI 48170. (R18, p 29.)

The auditor reviewed the SBT, MBT, and federal corporate income tax returns for 2005 through 2009 and determined the use tax due.

On September 19, 2012, the auditor sent a letter to Mr. Ruark, President, Family Home Health Services, 6230 Venture Dr. Suite 205, Lake Wood Ranch, FL 34202, which provided notice of the preliminary audit determination in the amount of $866,031 in tax, with penalty of $216,507, and interest of $299,145, for a total amount due of $1,381,683.

On or about January 15, 2013, Respondent sent a Final Audit Determination Letter to Family Home Health Services, 801 W Ann Arbor Trl Ste 200, Plymouth, MI 48170. (R12.) The Final Audit Determination Letter stated the same amount of tax and interest, but reduced the penalty to $86,605.

On January 21, 2013, Respondent issued an Intent to Assess tax, in the amounts originally determined in the Preliminary Audit Determination Letter.

On April 1, 2013, Respondent issue a Final Assessment number TS80920 to Family Home Health Services, Inc., 801 W Ann Arbor Trl Ste 200, Plymouth, MI 48170. (R 20.)

On May 6, 2013, Petitioner filed this appeal in the Tax Tribunal challenging the assessment.

Procedural History and Facts Pertaining to Motion to Adjourn the Hearing

Because the motion to adjourn was premised upon the alleged unavailability of Mr. Ruark, it is necessary to discuss the history of his involvement in this case, including relevant events during the audit that led to the assessment. As outlined above, Petitioner was first notified of a possible use tax liability on August 17, 2011, when Respondent sent an "Audit Pre-Confirmation" letter to Petitioner's headquarters in Plymouth, Michigan. The letter requested that Petitioner complete and return an audit questionnaire, but Petitioner did not respond. After a second letter was sent on January 3, 2012, an individual named Jeff Bonham contacted the auditor by telephone in response to the letter. According to the auditor's account of that email, Mr. Bonham indicated "[t]hat the company capitalized everything in 2010 and their new location is" in Lakewood Ranch, Florida. (R4.)

In March 2012, Respondent's auditor established communications with Mr. Kevin Ruark, Petitioner's president and majority shareholder, and made repeated attempts to obtain the necessary records. Despite Mr. Ruark's assurances that the records were kept in Plymouth, Michigan and also in Florida, Mr. Ruark eventually claimed that "the old business closed in January 2010" and the records could not be produced.

Other facts in the record indicate that prior to the acquisition in 2005, Mr. Ruark was a principal member of FHHS, LLC, a Michigan limited liability company ("FHHS Michigan") which had engaged in home health care services in Michigan prior to the acquisition, after which time it appears that FHHS Michigan continued to operate under the control of Petitioner until January 2010. It appears that FHHS Michigan conducted business under the assumed name Family Home Health Services, LLC, which is confusing because that is also the name of another one of Petitioner's subsidiaries, which is a Delaware limited liability company. Mr. Ruark was the controlling stockholder of Petitioner and also a member of FHHS Michigan at the time of the acquisition on July 1, 2005.

The 2005 form 10-KSB, states that: "Over 90% of our outstanding shares of common stock are beneficially controlled by Messrs. Ruark and Pilkington, each a director and respectively the Chairman, Chief Executive Officer and President, and the Chief Development Officer of the Company." (R15, p 4.) There is no question that the "Company" was placed on actual notice of an impending audit in 2011 and 2012. It its form 10-KSB, Petitioner refers to itself as being engaged in business with its subsidiaries.

> Family Home Health Services, Inc., including its subsidiaries, is a leading provider of home health care services in Florida, Michigan, and Illinois. In this report, the terms 'the company,' 'we,' 'us,' and 'our' refer to Family Home Health Services, Inc. and all subsidiaries included in its consolidated financial statements. (R15, p 3.)

There was little or no communication between Mr. Ruark and the auditor after April 17, 2012, and prior to the issuance of the final assessment. However, it appears that Petitioner retained a tax advisor ("20/20 Tax Resolution") in March of 2013. The record includes a copy of a letter to Respondent from 20/20 Tax Resolution, dated March 25, 2013, accompanied with a power of attorney form, indicating that Petitioner had retained the services of 20/20 Tax Resolution. However, the letter is written in generalities and boilerplate and makes no specific reference to the subject use tax audit. (See R14.)

The audit that commenced in August 2011 culminated with the issuance of preliminary and final audit determination letters sent September 19, 2012 and January 15, 2013, respectively. (See R11 and R12.) The final assessment was issued April,1, 2013. This appeal was filed on or about May 6, 2013, under the representation of the law firm of Honigman Miller Swartz and Cohn, LLLP, by attorney Patrick R. Van Tiflin.

The Tribunal held a scheduling conference with counsel on August 13, 2013, and the parties agreed to certain deadlines. The Tribunal consented to a six-month discovery period based on representations that several rounds of discovery, including depositions, might be required. The parties were informed that a hearing would be scheduled within 60 days of the prehearing conference date, which was scheduled for March 25, 2014. Therefore, at that time Petitioner and its representatives were on notice that a hearing would be held in April or May of 2014. Respondent issued discovery requests to Petitioner requesting, among other thing, production of all relevant documentation, records, and invoices. Respondent deposed Mr. Kevin Ruark on February 7, 2014. On March 25, 2014, the presiding administrative law judge ("ALJ") conducted a prehearing conference which was attended by counsel[5] for each party. At that time, there was a pending motion for summary disposition and the deadline for filing the answer to the motion had not yet expired. Based on representations from counsel regarding the complexity of the facts and the number of potential witnesses, two full days were allotted for the hearing on May 21, and 22, 2014.

Petitioner's Prehearing Statement indicated that the sole issue for the evidentiary hearing is whether a holding company with no business activity, business operations, payroll, or expenses, can be subject to Michigan use tax. (Petitioner's Prehearing Statement, p 4.) Petitioner also indicated that it would file a motion for summary disposition. Petitioner disclosed two witnesses in its Prehearing Statement: "Kevin Ruark, unemployed, former CEO of Petitioner between 2005 and 2010, former CEO of Family Home Health Services, LLC between 2004 and 2012. Mr. Ruark will testify that Petitioner was a holding company, and therefore, did not have any operations, activities, or other active business, rather, Petitioner owned membership interests in the operating entities." (Petitioner's Prehearing Statement, p 5.) Petitioner also listed as a witness, Mr. Jeff Bonham, Controller, Family Home Health Services, LLC. Prior to the hearing, Respondent filed its Exhibit List, which included 21 exhibits, including the transcript of the deposition of Mr. Kevin Ruark.

On April 17, 2014, the Tribunal entered an Amended Scheduling Order, which scheduled the hearing for one day, rather than two: May 21, 2014. This date was agreed to during a telephonic status conference with counsel on April 15, 2014. Petitioner intended to call only one witness, Mr. Ruark, and it was agreed that the hearing would likely be completed in one day.

On May 13, 2014, the ALJ issued an order denying Petitioner's Motion for Summary Disposition, finding that there existed genuine issues of material fact regarding the nature of Petitioner's activities. There were issues of credibility with regard to certain statements in the documentary evidence regarding Petitioner's direct involvement in the use of property and statements made during discovery with regard to Petitioner's status as a "holding company." Although all parties and witnesses were on notice regarding the hearing date of May 21, 2014, the denial of Petitioner's motion made it clear that a hearing would be necessary. On May 13, 2014, Petitioner faxed a copy of a motion to adjourn the hearing to the Tribunal. The grounds for the motion had nothing to do with the availability of witnesses, but rather Petitioner took the

[5] Daniel L. Stanley appeared for Petitioner and Emily C. Zillgitt appeared for Respondent.

position that it was entitled to file a motion for reconsideration of the order denying its motion for summary disposition and that it had the right to file exceptions to the order and have them acted upon by the Tribunal before an evidentiary hearing. The Tribunal denied the motion to adjourn for the reason that there is no legal right to file exceptions to a non-dispositive order under the Administrative Procedures Act or the Tax Tribunal Act. Further, a motion for reconsideration would be heard by the presiding ALJ, and, in its motion to adjourn, Petitioner identified no palpable error that could provide a basis for a motion for reconsideration.

Petitioner's Motion to Adjourn on the Record on May 21, 2014.

At the commencement of the hearing, Petitioner moved to adjourn "due to the unavailability of its witness, petitioner's former CEO, Kevin Ruark . . . [who is] currently out of the state right now." (Transcript, p 4.) Counsel argued that Petitioner did not receive actual notice of the Tribunal's Order denying its motion for adjournment, which was entered May 15, 2014, until one day prior to the hearing. However, Petitioner's first motion was not based on the alleged unavailability of the witness, but rather on its claimed right to file a motion for reconsideration or exceptions to the Tribunal's Order Denying Petitioner's Motion for Summary Disposition, entered May 13, 2014. Again, the hearing was originally scheduled for two days, but the parties subsequently agreed that one day would be sufficient. The Amended Scheduling Order set the hearing for May 21, 2014, and further stated that an additional day could be scheduled *if necessary*. However, it was clear that Respondent had a conflict on May 22, and that if an extra day was needed, it would not be May 22. Therefore, counsel's statement that Mr. Ruark could not be present on May 22 is irrelevant, if not disingenuous, given the fact that it was known that the hearing could not be held on that day. Given the fact that each party intended to call only one witness, it was highly unlikely that the hearing would extend beyond May 21.

The record also indicates that the ALJ and counsel held a status conference in the afternoon of May 20, 2014, which included a discussion of the fact that Mr. Ruark was in Florida and he would not attend the hearing. As stated earlier, Petitioner has represented that Mr. Ruark is unemployed. Counsel did not indicate at that time that it would move for an adjournment and Petitioner offered no good cause for Mr. Ruark's absence. The ALJ indicated that the hearing would go forward as scheduled and that Petitioner would be afforded the opportunity to offer into evidence any documentary evidence that it had identified on its exhibit list, including the transcript of the deposition of Mr. Ruark. (See Transcript, p 13, 14, and 15.) Therefore, on the eve of the hearing, Petitioner was on notice that the Tribunal expected to hold the hearing whether or not Petitioner's witness elected to appear. There was no indication during the status conference or at the hearing that Mr. Ruark's absence was anything other than a voluntary choice on his part. On May 21, 2014, Respondent appeared for the hearing with its witness. The court reporter was present. The Tribunal was prepared for the hearing that had been scheduled by the Tribunal's Scheduling Order entered April 1, 2014, by agreement of the parties. Petitioner had the burden to go forward with evidence, and therefore, was well aware that it had to be prepared to put on its case on May 21, not May 22, and yet the witness was absent with no excuse. There was no reason to adjourn the hearing and Petitioner's motion was denied.

There is No Right to File Exceptions to a Non-Final Order

There is no right to file exceptions to a non-dispositive order entered by a hearing officer in a proceeding in the Entire Tribunal Division of the Michigan Tax Tribunal. This is the Tribunal's longstanding position, which is supported by the Administrative Procedures Act and the Tax Tribunal Act. Therefore, there is no merit to Petitioner's claim it had a right to an adjournment to allow it to file exceptions to the order denying its motion for summary disposition within the standard 21-day period.

There is no provision in the Entire Tribunal Rules pertaining to the filing of exceptions. The applicable small claims rule, TTR 289, appears in Part 3 (Small Claims Division Rules), which, by its own terms applies only to proceedings pending in the small claims division. Therefore, the primary governing provision regarding exceptions appears in the Tax Tribunal Act. The Tax Tribunal Act does not include a provision applicable to filing exceptions in the Entire Tribunal Division. However, with regard to proposed decisions of a hearing officer, the Tax Tribunal Act provides:

> The tribunal may appoint 1 or more hearing officers to hold hearings. Hearings, except as otherwise provided in chapter 6, shall be conducted pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287, and the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. Public notice of the time, date, and place of the hearing shall be given in the manner required by the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. A proposed decision of a hearing officer or referee shall be considered and decided by 1 or more members of the tribunal. MCL 205.726.

Therefore, the Administrative Procedures Act governs the filing of exceptions to decisions of a hearing officer[6] in the Entire Tribunal Division.

> (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.
> (2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.
> (3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.
> (4) The parties, by written stipulation or at the hearing, may waive compliance with this section. MCL 24.281.

Section 81 of the APA applies to a proposed final decision and not every order entered by an ALJ in the course of a contested case. See MCL 24.281. The first sentence of section 81 plainly refers to cases where "the final decision" is to be made by officials of the agency who did not hear the case. Under such circumstances, a proposed decision must first be served on the parties before entry of the Tribunal's final decision. These provisions appear in the same sentence, and it is clear from the context that the requirement to issue a *proposed decision* relates back to the first reference to a "final decision" that is to be made by the official who did not hear the case. The right to file "exceptions and present written arguments to the officials who are to make *the decision"* refers to a final decision. Also, section 81 provides that the proposed decision "shall become the final decision of the agency in the absence of filing of exceptions or review by action of the agency . . . ." MCL 205.281(3). This further supports the position that a proposed decision means a proposed *final* decision, because it says that the "decision . . . shall

[6] Under the Tribunal's rules, the term "administrative law judge" means "[a]ny person assigned by [the Michigan Administrative Hearings System] to preside over and hear a tribunal proceeding, including but not limited to, tribunal members and hearing officers." TTR 203(b). Also see MCL 205.726, pertaining to the appointment of "hearing officers." Therefore, the person assigned to preside over this appeal may be referred to as a "hearing officer" or an "Administrative Law Judge" ("ALJ"). However, it is legally incorrect to refer to the ALJ as a "referee," which term only applies to a contractual small claims hearing referee. See TTR 203(j).

become the final decision." *Id*. A proposed non-final decision does not become a final decision. "Final decision" refers to a decision that closes the case, which is appealable as a matter of right to the court of appeals. See MCL 205.753(2) and (3), pertaining to appeals from of a "final decision of the tribunal." The term "final decision" in section 81 is used to differentiate a *final* decision from a *non-final* decision or order entered by a hearing officer in the course of a contested case. To permit exceptions to be filed for non-final orders would needlessly delay the proceedings by weeks or months while the Tribunal acts upon exceptions, which could potentially be filed for every order entered in the case. Therefore, there was no basis for an adjournment to allow the Tribunal to consider exceptions to the non-final order denying summary disposition.

The Tribunal Properly Permitted Petitioner to Present its Evidence in Written Form

The denial of the motion to adjourn did not deny Petitioner the right to present its case, and was a reasonable, lesser sanction (as opposed to excluding all evidence or outright dismissal). Neither did the admission of documentary evidence unduly prejudice Respondent's defense of the assessment. The Tax Tribunal Act provides that hearings in the Entire Tribunal Division "shall be conducted pursuant to chapter 4 of the administrative procedures act." MCL 205.726. The Tax Tribunal Act specifically incorporates the APA provisions on contested cases, which generally apply in a proceeding in the Tax Tribunal. However, the Tax Tribunal's administrative rules state that the contested case provisions of the APA apply "[i]f an applicable entire Tribunal Rule does not exist. . . ." TTR 215. Therefore, a relevant Tax Tribunal Rule takes primacy over a rule on the same subject in the APA. Both the Tax Tribunal rules and the Tax Tribunal Act include a provision on the admissibility of evidence, and therefore, there is no need to resort to the APA. The rule is TTR 255, which is consistent with the Tax Tribunal Act, which contains a single subsection regarding admissibility of evidence:

> In a proceeding before the tribunal all parties may submit evidence. The tribunal shall make its decision in writing. *The tribunal may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs*. Irrelevant, immaterial, or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. An objection to an offer of evidence may be made. MCL 205.746(1). [Emphasis added.]

The above statute from the Tax Tribunal Act is modeled after the following APA section, but with a few notable differences:

> *In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable*, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form. MCL 24.275. [Emphasis added.]

The first sentence in the subsection immediately above was enacted by 1969 PA 306, and took effect July 1, 1970, exactly four years before the related provision in the Tax Tribunal Act, 1973 PA 186, which took effect July 1, 1974. It is apparent from the text of the Tax Tribunal Act that the legislature expressly did not include the APA's requirement that *the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable*. This omission is substantive. Therefore, where the legislature provided, on the one hand, that Tribunal hearings are to be conducted pursuant to the APA and also included a specific, but different provision on the admissibility of evidence, the proper harmonization of these provisions is that the legislature intended the specific provision in the Tax Tribunal Act to control. Furthermore, the Tribunal has stated by rule that the contested case provisions of the APA govern where there is no applicable Tax Tribunal Rule. The applicable Tax Tribunal Rule is TTR 255(5), which also omits the reference to the rules of evidence. Where it was expressly omitted by the legislature, the Tribunal may not re-insert into the Tax Tribunal Act the provision that "the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable." MCL 24.275. The APA requires most agencies to consider admissibility issues in light of the Michigan Rules of Evidence ("MRE's"), but also reserves discretion to follow them only so far as *practicable*. More significantly, the APA establishes the "reasonably prudent" person standard, which has its roots in the development of federal administrative law. In *NLRB v Remington Rand*, 94 F2d 862, 873 (1938), cert. den. 304 US 576, in relation to an objection that an agency examiner improperly based a finding of fact on hearsay evidence, Judge Learned Hand wrote:

> [The examiner] did indeed admit much that would have been excluded at common law, but the act specifically so provides . . . [N]o doubt, that does not mean mere rumor will serve to "support" a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs. McCormick on Evidence (3d ed), p 1013.

This standard has been adopted by many state statutes, in order "to permit agency departures from the exclusionary rules where compliance is impracticable and where the evidence is 'of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. See, e.g., *Ring v Smith*, 5 Cal App 3d 197, 204; 85 Cal Rptr 227, 232 (1970).'" McCormick on Evidence (3d ed), p 1013, fn 6. Note that McCormick identifies two separate concepts: an exclusionary rule of evidence may be avoided where 1) *impracticable*, and 2) if the evidence is *reliable* ("commonly relied upon by reasonably prudent men".) The Tax Tribunal Act includes only the "reliability" test, and does not include a requirement to follow rules of evidence as far as *practicable*. Therefore, there is no rule of evidence that would preclude the Tribunal from admitting the deposition transcript at issue in this case, as long as the hearing officer reasonably concluded that it contained reliable, relevant facts. This does not mean that all statements in the deposition are found to be credible or probative.

The Tribunal's rules state that "[I]f an applicable entire tribunal rule does not exist, the 1995 Michigan rules of court, as amended, and sections 71 to 87 of the administrative procedures act (apa), MCL 24.271 to 24.287, and sections 21 to 128 of the apa, MCL 24.321 to 24.328, shall govern." TTR 215. The Tax Tribunal's rules of procedure contain the following, single provision on depositions:

> Parties may stipulate to take depositions or may, by written motion, request to take the testimony of any person, including a party, by deposition for the purpose of discovery or for use as evidence in the proceeding, or for both purposes, and the tribunal, in its discretion, may order the taking of depositions. TTR 241.

Because an applicable Tribunal Rule on depositions exists, there is no need to resort to the Michigan Court Rules with regard to matters specifically addressed in the rule. However, where the Michigan Court Rules provide specific provisions not addressed in the Tribunal's rule, it requires a legal determination as to whether TTR 241 intentionally omits certain provisions. If the intent of the TTR's is to incorporate all of the Michigan Court Rules on depositions, then there would be no reason to promulgate TTR 241, which would apply by default. A major difference between the Tribunal's rules and the MCR's is that depositions in the Tribunal are only by stipulation or by order of the Tribunal. A party cannot simply issue a notice requiring attendance at a deposition. More relevant to our case is that the rule contains no express restrictions upon the use of a deposition transcript at a hearing, but does recognize that depositions may be taken for either discovery purposes or for use as evidence in the proceeding.

Discovery closed on February 11, 2014. On January 29, 2014, Respondent's counsel contacted Petitioner's counsel in an attempt to stipulate to the taking of the deposition of a corporate representative of Family Home Health Services, Inc., but was informed that the witness, Mr. Ruark, would not be available to discuss the matter with counsel until February 3, 2014, at 4:00 p.m. On January 30, 2014, Respondent filed its motion seeking an order to compel the deposition of Mr. Ruark, pursuant to TTR 241.The motion did not request that that deposition be taken in lieu of testimony at a hearing, but stated that the deposition was necessary for "further discovery" regarding factual issues that were not fully addressed in answers to interrogatories. (See Motion to Order Deposition, paragraph 4.) On February 5, 2014, counsel for the parties held a telephonic status conference where the ALJ was informed that they agreed to the taking of a deposition on February 7, 2014. The Tribunal entered an order granting Respondent's motion to order deposition.

The Tribunal's rule on depositions is arguably broad enough to permit a deposition transcript to be admitted at a hearing for any purpose, including "as evidence in the proceeding" without regard to whether the deposition was stated in advance to be taken solely for discovery purposes. (See TTR 241.) In the context of this case, it is fair to say that Respondent requested an order for a discovery deposition, and the Tribunal granted that order, without further restriction or elaboration. At that time, it was not contemplated that the deposition was taken for trial purposes.

Assuming arguendo that MCR 2.308 is applicable to any extent, the Tax Tribunal Act and rules supersede certain provisions of the court rule. MCR 2.308 generally provides that depositions are admissible at trial "only as provided in the Michigan Rules of Evidence." *Id*. Given the above discussion regarding the inapplicability to the MRE's to Tax Tribunal proceedings, it would appear that MCR 2.308 reference to the MRE's is generally inapplicable in our case. In an administrative proceeding, the right to cross-examination does not preclude the admissibility of statements by out of court declarants. "Hearsay, of course, is not subject to cross-examination, but that limitation affects the weight the evidence carries, not its admissibility." McCormick on Evidence (3d ed), p 1011.

In any event, MRE 804 provides for an exception to the hearsay rule in cases where the declarant is unavailable (as defined in the rule), which permits admission of a deposition transcript. Furthermore, under MRE 804, a deposition transcript is admissible if the party against whom it is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." For purposes of this hearsay exception, the definition of "unavailability" is expanded to include a witness who is more than 100 miles away from the location of the hearing (Mr. Ruark was in Florida) or "[O]n motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." MRE 804(b)(5). The 100 mile rule does not apply where "it appears that the absence of the witness was procured by the party offering the deposition" which appears to be the case here, which means the distance alone would not warrant admission of the deposition under MRE 804. With regard to the second exception, Respondent was on notice, albeit only one day before the hearing, that Mr. Ruark would not attend the hearing and that the deposition would likely be offered into evidence.

Considering the various options, it was within the sound discretion of the hearing officer to admit the deposition, having determined that there were no grounds for an adjournment and that the deposition contained relevant evidence that may be important to the resolution of the legal issues. Further, given the nature of the legal and factual issues in this case, it appeared reasonably likely that the direct and cross examination in the deposition would be consistent with testimony that would have been offered at the hearing had Mr. Ruark taken the stand.

The APA states that "The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact." MCL 24.272(3). Petitioner was given "opportunity to present evidence" in the form of sworn testimony, but Petitioner's sole witness, its president, chief operating officer, and shareholder, declined that opportunity, but rather chose to remain in Florida on the day of the hearing. During the telephonic status conference held the day before the hearing, Petitioner's counsel indicated that its witness would not appear for the hearing on May 21. Petitioner's counsel did not indicate that it would move to adjourn the hearing during that conference. The

ALJ indicated that in the absence of the witness, the hearing would go forward, and that Petitioner could move to offer evidence in written form. This is consistent with the APA, which provides, "Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form." MCL 24.275.

The grounds for Respondent's objection to the admissibility of the deposition transcript are set forth on the record. (See Transcript, p 18-24.) Respondent argued that under the court rules and rules of evidence, a deposition transcript is not admissible as a substitute for sworn testimony, unless the deposition was expressly noticed for that purpose.

At the hearing, the Tribunal admitted the deposition transcript as a written statement of alleged facts from the perspective of Petitioner's CEO. Although Mr. Ruark was under oath at the deposition and was subject to cross examination, there was no notice to Respondent that Petitioner intended to offer this deposition in lieu of sworn testimony at the hearing. There was no opportunity for the Tribunal to observe the demeanor of the witness, nor could the Tribunal examine the witness. Therefore, although admissible, the deposition transcript is more in the nature of an affidavit. It is not the equivalent of sworn testimony in open court, which may diminish its probative value. Furthermore, the trier of fact may draw negative inferences from a party's decision not to offer testimony. See, e.g., *Allen* v *Michigan Basic Property Ins Co*, 249 Mich App 66, 75; 640 NW 903(2002). See also, *Deihm* v *Estate of Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995), where a party refused to testify in a civil case based on the Fifth Amendment right against self-incrimination, it was held that the trial court may draw adverse inferences from the decision not to testify. This principle has greater force in our case where there is no apparent risk of self-incrimination, but where the witness simply chose not to appear.

Respondent cites *Petto v The Raymond Corp*, 171 Mich App 688; 431 NW2d (1988). In that case, the defendant in a personal injury case deposed the plaintiff's expert witness pursuant to a notice that the deposition was for discovery purposes only. In arguing for admissibility of the transcript lieu of the expert's testimony in open court, the plaintiff contended that "discovery only depositions" were only permitted if ordered by the court.

After the trial started, the plaintiff announced that the expert would not appear and moved that the transcript be read to the jury. The defendant objected and the court excluded the deposition, and then granted the defendant's motion for a directed verdict. On appeal, the Court noted that, "A trial court's determination concerning the admissibility of a deposition will not be overturned absent an abuse of discretion. *In re Deeren,* 158 Mich App 539, 541–542; 405 NW2d 189 (1987). The burden of establishing admissibility rests on the party seeking admission of the deposition. *Valley National Bank of Arizona v Kline,* 108 Mich App 133, 141; 310 NW2d 301 (1981)." *Petto v The Raymond Corp*, 171 Mich App 688, 690-691; 431 NW2d 44, 45 (1988). The Court of Appeals held that the trial judge's exclusion of the deposition was not an abuse of discretion, because the deposition was clearly noticed for discovery purposes, and the defendant was led to believe that the witness would testify at trial. In reliance on that representation, counsel had conducted extensive preparations to cross-examine the witness based on the facts obtained in the deposition. The trial court exercised discretion to disallow the reading of the deposition to the jury in light of the strategic disadvantage to the defendant's case.

The applicable court rule was amended in 1989 because it "mostly duplicated provisions in the Michigan Rules of Evidence" and now the rule expressly defers to the MRE's. See MCR 2.308 and "Staff Comment to 1989 Amendment." As stated above, given the fact that the Tax Tribunal Act does not require adherence to the MRE's, and because the Tribunal has promulgated its own rule on depositions, there is no need to look to the court rules for our present purposes.

In our case, the transcript was admitted over Respondent's objections, but the Tribunal noted on the record that the deposition was not the equivalent of sworn testimony offered in open court, and would not be afforded equivalent evidentiary weight.

> . . . with regard to [Petitioner's counsel's] statements that Mr. Ruark testified, he testified in the context of a discovery deposition. He's not sworn here as a witness today offering sworn testimony subject to cross-examination in this proceeding. So, therefore, I'm accepting the statements made in [the transcript] as statements he made at a deposition that are reduced to writing, just like there are statements . . . that purport to be under the signature of Mr. Kevin R. Ruark, chief executive officer and president of the entity that filed the form 8-KA with the Securities and Exchange Commission, which is Exhibit 3. (Transcript p, 42.)

Considering the nature of Petitioner's claims, the Tribunal is convinced that had Mr. Ruark appeared for the hearing, his testimony would have closely tracked the matters stated at his deposition. Petitioner moved that the deposition be admitted for the purpose of Mr. Ruark's "testimony regarding the history of petitioner and the fact that it was an inactive holding company whose only business activity was holding membership interests in four limited liability companies." (Transcript, p 18.) The deposition transcript was admitted as a statement by Mr. Ruark for those limited purposes. The Tribunal shall weigh these statements along with other evidence.

It is significant, that in *Petto, supra*, the court prohibited the reading of the deposition of the expert witness to the jury. Reading the testimony, opinions, and conclusions, of the expert witness to the jury, without the scrutiny of cross-examination, would create a substantial risk that the jury would be misled or confused by the untested statements. Of course, "[a]n administrative hearing is tried to an *administrative law judge* and never to a *jury*. Since many of the rules governing the admissibility of proof in judicial trials are designed to protect the jury from unreliable and possibly confusing evidence, the rules need not be applied with the same vigor in proceedings solely before an administrative law judge . . . . Consequently, the technical rules governing the *admissibility* of evidence have generally been abandoned by administrative agencies." McCormick on Evidence (3d ed), p 1000-1006 [Emphasis original].

Both the APA and the Tax Tribunal Act state that the Tribunal *may* exclude evidence that is "Irrelevant, immaterial, or unduly repetitious . . . ." MCL 205.746. Before the hearing, the ALJ had reviewed the entire deposition transcript in the context of ruling on Petitioner's motion for summary disposition, and determined that it contained relevant evidence. Many of the statements by Mr. Ruark in the deposition are relevant to Petitioner's legal theory. The deposition contained relevant statements, factual in nature, offered by Petitioner's chief executive officer, which are similar to other documentary evidence that was properly admitted in this case. There is no undue prejudice to Respondent. The fact that the documents were admitted does not establish their veracity.

Conclusions of Law

The gravamen of Petitioner's claim is set forth in the following paragraphs of the petition:

> 4. . . . Petitioner was a holding company and did not have any operations, activities, or other active business; rather, Petitioner owned membership interests in federal disregarded entities.

5. As a holding company, Petitioner was not liable for use tax during the years in issue because Petitioner did not use, store, or consume "tangible personal property in this state. . . " MCL 205.93(1).

6. The department audited Petitioner for the years at issue.

7. The Department did not conduct a field audit and, instead, conducted its audit by mere paper review.

8. Because the Department conducted its audit by mere paper review and did not acquire an adequate factual foundation for this matter, the Department failed to correctly find that Petitioner was a holding company despite the fact the Department was so informed by Petitioner.

Petitioner claims that a *holding company* that allegedly had no operations or activities (other than holding ownership interests in federally disregarded entities) cannot, as a matter of law *use* property in this state within the meaning of MCL 205.92(b). Furthermore, Petitioner alleges that it did not engage in a taxable use of the property identified on its SBT, MBT, and federal income tax returns, because all of that property is attributable to its subsidiaries, which were treated as disregarded entities for federal income tax purposes.

There is no definition of the term *holding company* in the use tax act, and Petitioner cites no definition or other rule of law to support the notion that by designating itself as a "holding company" it cannot use property as a matter of law. The use tax act does not support this position. Any "person" who stores, uses, or consumes property in this state is subject to the tax.

> "Person" means an individual, firm, partnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether or not organized for profit, company, limited liability company, estate, trust, receiver, trustee, syndicate, the United States, this state, county, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. MCL 205.92(a).

Therefore, the designation as a "holding company" does not create a legal defense to the imposition of use tax. Petitioner is a corporation and a person as defined by the use tax act. Furthermore, as a matter of fact, Petitioner was actively involved in the management of the subsidiaries. Petitioner's own evidence indicates that it maintained its headquarters in Michigan and engaged in purchasing on behalf of its subsidiaries. Petitioner shared the same address with

FHHS, LLC ("FHHS Michigan). Petitioner's business tax returns reported that it purchased tangible personal property, which it claimed as "other deductions," and it has offered no documentary evidence to prove its claims regarding the use of the property. Petitioner's form 10-KSB states that "*We* provide *our* services from 16 branch offices located in Florida, Michigan and Illinois." (R15, p 5 [Emphasis added].) Petitioner's 2009 federal income tax return states that Kevin R. Ruark and James H. Pilkington devoted 100% of their time to the business. The form 10-KSB states further that, "Our corporate office is located in Michigan and supports our regional operations with common administrative functions such as Medicare billing and collections, accounting, purchasing, payroll, human resources, information technology and other administrative and investor services." (R15, p 5.) The record supports a finding that Petitioner, acting on behalf of its subsidiaries, purchased tangible personal property. Assuming arguendo that Petitioner did not actually possess the property, this is no defense to the assessment. It has been held that actual possession of property is not required for use. As our Supreme Court recently ruled, "[W]e hold that petitioner 'used' the aircraft in question for purposes of the UTA when it executed a lease of the aircraft in Michigan, regardless of whether it ever had actual possession." *NACG Leasing v Department of Treasury*, 495 Mich 26, 31; 843 NW2d 891(2014). By acquiring property and permitting the subsidiaries to use it, Petitioner exercised a right or power incident to ownership, within the meaning of the use tax act. The audit report sets forth an adequate factual and legal foundation for the assessment. The amount of the tax was based on Petitioner's SBT, MBT, and federal income tax returns, which indicate that Petitioner acquired property and claimed tax benefits based thereon. There are sufficient facts to prove that petitioner engaged in taxable use of property within this state and failed to file returns or pay tax.

Petitioner offered evidence of a statement in its form 10-QSB that it filed with the federal Securities and Exchange Commission. (See P10.) That document states that *as of the date that Petitioner acquired FHHS Florida*, it was an "inactive shell company formerly known as Myocash, Inc." (P10.) This statement only applies to periods prior to January 2005.

Petitioner offered no credible evidence regarding how or where the subject property was used. Statements made in discovery regarding the alleged use or non-use of the property do not outweigh the findings summarized herein, which are based on documentary evidence. However, proof of such facts is not prerequisite to the imposition of use tax. *In Fisher & Company, Inc. v Dep't of Treasury*, 282 Mich App 207; 769 NW2d 740 (2009), the Court of Appeals upheld the assessment of use tax upon the taxpayer's purchase of an aircraft, which never entered the state of Michigan. "Thus, 'use' in the context of the UTA is not limited to physical actions performed directly on the property. It includes any exercise of a right that one has to that property by virtue of having an ownership interest in it. Something need not necessarily be physically present in Michigan for it to be 'used' in Michigan." *Id*, p 212. There is evidence that Petitioner maintained its corporate headquarters in Michigan, it purchased property, and permitted one or more of its subsidiaries to use the property. This is sufficient to support the assessment and to cast the burden upon Petitioner to prove that the use tax obligations are satisfied.

In our case, the department exercised its authority under the use tax act and revenue acts to determine the tax due. See MCL 205.104 and 104a, and MCL 205.21. The department audited Respondent's only available records (its state business tax returns and federal income tax returns) and determined that a taxable use occurred, requiring the tax due to be estimated from the available records. As such, the assessment is presumed valid and Petitioner has the burden to rebut that presumption. At the close of Petitioner's proofs, the Tribunal found that Petitioner had presented evidence sufficient to meet its burden of going forward so as to survive a motion for involuntary dismissal. This does not mean that Petitioner proved it was entitled to relief, but merely that it could not be determined at that point in the proceedings that Petitioner had demonstrated no right to relief. See MCR 2.504(B)(2).

There is no merit to Petitioner's claim that the assessment is invalid because the department conducted a "mere paper review." An audit necessarily involves a "paper review." At all relevant times the use tax act required Petitioner to maintain copies of invoices (and other "papers" that Respondent is required to review upon audit.) See MCL 205.104 and MCL 205.104a. "If the taxpayer fails to file a return or maintain or preserve proper records . . . the department may assess the amount of the tax due from the taxpayer based on information that is available . . . ." MCL 205.104. The substantive language, which now appears in MCL 205.104a, was in effect during all times relevant to these proceedings. This section authorizes Respondent to review any available documents in order to estimate the tax due, that is, to conduct a "mere paper review." The revenue act authorizes the department to "examine the books, records and papers and audit the account of a person or any other records pertaining to the tax." MCL 205.21(1). Therefore, by law, an audit involves the examination and review of papers, and does not necessarily require the auditor to visit the taxpayer's place of business (or the business of others that may have been involved in the transactions). The statute does not distinguish between a "mere paper review" and a "field audit." There is no legal basis for Petitioner's allegations in this point in paragraphs 7 and 8 of its petition. In our case, where the taxpayer was for the most part non-cooperative with the requests to produce records, it was reasonable, and in fact, necessary, for Respondent to base the assessment on the available business tax returns.

It has been held that a taxpayer that fails to keep adequate records has no right to demand a particular audit method. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19; 703 NW2d 822 (2005). The necessity of estimating purchases from the business tax returns was created by Petitioner's failure to maintain records of purchases as required by law. See, MCL 205.68(1).

Petitioner claims that, when the auditor requested the records in 2012, it had previously sold all its interests in FHHS, LLC (Michigan) in 2010, and that the records were at the address of its former headquarters in Plymouth, Michigan. On or about March 29, 2012, the auditor spoke with Kevin Ruark by telephone, and he told her that the records were in Plymouth, Michigan and Naples, Florida. (See R4.) On or about April 17, 2012, according to the auditor's audit diary, Mr. Ruark sent her an email stating that he spoke with the "owner that was operating the Plymouth facility and determined that they do not have the records . . . and that the business closed in January of 2010." (R4.) A copy of this email is in evidence. (See R7.) The email from Mr. Ruark states that he spoke with Mr. Pilkington. It is disingenuous for Petitioner to now contend that Respondent should have sought the records from either Mr. Pilkington or from FHHS, LLC. Furthermore, to the extent that the records actually exist, but that the custodian was unwilling to cooperate, Petitioner could have obtained a subpoena from the Tribunal ordering "production of the evidence." See MCL 205.736(1). However, there is no apparent reason why Mr. Ruark's long-time business partner, Mr. Pilkington, would be unwilling to cooperate with the audit when asked. Mr. Ruark identified himself to the auditor as the person in charge of handling the audit. It does not require a strained inference to conclude that either the records do not exist or that Petitioner (acting through Mr. Ruark) was unwilling to produce them.

In its Prehearing Statement, Petitioner represents that "The books and records of the respective operating entities were transferred to the purchaser." (Petitioner's Prehearing Statement, p 4.) This is an apparent admission that Petitioner once had relevant "books and records" but transferred them to others and did not retain copies. If so, Petitioner cannot avoid tax liabilities by transferring records to the purchaser. Petitioner had a duty to keep all relevant records, “for a period of 4 years after the tax imposed under this act to which the records apply is due or otherwise provided by law.” MCL 205.104. Even if Petitioner sold all the interests in the “operating entities” in 2010, it was required by law to keep the records for at least four years. In order to defend against an audit that could have commenced in 2010, Petitioner should have retained all relevant records for all years that remained subject to audit.

The Michigan Supreme Court recently issued a ruling, which involved a discussion of the taxpayer’s burdens to produce records that may be under the control of a third party. See *Andrie, Inc v Dep’t of Treasury*, ___ Mich ___; __ NW2d___ (2014). This ruling is relevant to Petitioner’s claim in our case that Respondent had a duty to audit the records of the operating entities. In *Andrie, supra*, the Court reversed the Court of Appeals ruling that the taxpayer did not have a burden to prove that sales tax was paid on a transaction, in order for the taxpayer to avoid use tax. In that case, the department audited the taxpayer’s invoices of purchases of tangible personal property from vendors in Michigan and assessed use tax upon transactions for which the invoice did not show that sales tax was collected at the time of purchase. The Supreme Court held that the taxpayer had the burden to prove either that it paid sales tax to the seller or that the seller remitted the sales tax. The Court noted that “[t]he department concedes that it is unaware whether any of these Michigan retail sellers had, in fact, remitted sales tax to the department.” *Id*. The ruling in *Andrie, supra*, recognizes that the taxpayer has a duty to obtain necessary records to prove that the sales tax was actually paid at the time of sale, even if the taxpayer must obtain records or other evidence from the seller.

In our case, Petitioner’s business tax returns show that it reported purchases of tangible personal property and there is no evidence that sales or use tax was paid on these purchases. As the taxpayer that reported the purchases for business tax purposes, it is reasonable to expect that Petitioner would retain records of these transactions (regardless of whether the purchases were related or made on behalf of the disregarded entities). Had Petitioner retained invoices of these purchases, it could have proven either that sales tax was paid to the seller, or that the property was not subject to use tax. The department did not have a duty to seek the records from others. The ruling in *Andrie, supra*, reinforces the principle that persons who use, store, or consume property in this state have a duty to retain records in order to prove in an audit that tax was paid.

Although *Andrie, supra*, involved the taxpayer’s burden to prove that it is entitled to an exemption, the court’s comments regarding record keeping and the duty to produce evidence apply to our case. The assessment is presumptively valid and the statute places the burden of proof on Petitioner in "refuting the assessment." MCL 205.104 and MCL 205.104a(4). The fact that the purchases occurred is not genuinely in dispute. It is Petitioner's burden to prove that the property is not subject to use tax. The statute requires the taxpayer to meet this burden of proof by the production of documentary evidence, not testimony or legal argument.

In its motion for summary disposition, Petitioner cited law pertaining to the rules of statutory construction, which require an ambiguity in a tax statute to be resolved in favor of the taxpayer; and that the taxing authority has the burden to identify express language authorizing the tax. This case does not require the Tribunal to interpret an ambiguous statute so there is no reason to invoke this rule of statutory construction. Furthermore, with regard to identifying the authority for imposing tax, there is no mystery surrounding the relevant use tax statutes, which are cited herein.

On cross-examination, Petitioner's attorney asked the auditor whether she was aware that the expenses "reported on the federal return represent activities of the operating entities, not petitioner?" (Transcript, p 99.) Petitioner also made this argument in its Prehearing Statement. However, the ultimate use of the property by the "operating entities," even if true, is irrelevant to the imposition of use tax upon Petitioner.

As discussed above, the act of purchasing the property and permitting the other entities to use it is a taxable use. Petitioner has offered no substantial evidence to show where the property was acquired or how it was used, other than the general representation that Petitioner could not have used the property because it was a holding company. Petitioner's implication that Respondent had a duty to audit the subsidiaries is likewise unavailing. Petitioner was in control of all of the records of the subsidiaries, and after persistent efforts by the auditor to obtain relevant records, Mr. Ruark, after first indicating the records were in Plymouth, Michigan, eventually concluded that they did not exist.

Federally Disregarded Entities

Petitioner argues that, "On Petitioner's federal tax returns, all of the items of income and expense represented activities of the Operating Entities." (Petitioner's Prehearing Statement, p 3.) Without citation to any specific authority, Petitioner asserts that, "[I]t is well-established that if a single-member limited liability company (like the Operating Entities) does not elect to be treated as a corporation, the limited liability company is a 'disregarded entity' and the limited liability company's activities are reflected on its owner's (i.e. Petitioner's) federal tax return. For example, in the Other Deductions section of its federal tax return, Petitioner listed 'medical supplies,' which were medical supplies used by the Operating Entities in the course of delivering medical services to patients by the Operating Entities." (Petitioner's Prehearing Statement, p 3.) Had Mr. Ruark appeared for the hearing, he likely would have testified consistently with his deposition, in which he stated that Petitioner owned no property other than the ownership interests in the Operating Entities. Mr. Ruark stated in his deposition that "Every bit of this tax return represents an operating entity." (P1, p 31.) Respondent correctly contends that mere testimony is insufficient as a matter of law to meet the statutory burden of proof, given that the *statute requires documentary evidence to refute the assessment*. Petitioner has no documentation whatsoever to support its claim that the operating entities purchased and used the property at issue. Furthermore, Mr. Ruark's deposition testimony is vague, merely stating that the federal 1120 returns "represent[s] an operating entity." This does nothing to disprove that Petitioner purchased the property that is reported on its business tax returns and permitted its solely owned and controlled LLC's to use to the property. The mere act of acquiring the property and permitting another person to use it is a taxable use – it is the "the exercise of a right or power over tangible personal property incident to ownership of that property including a transfer of the property in a transaction in which possession is given." MCL 205.92(b).

Petitioner cites *Kmart Michigan Property Services, LLC v Dep't of Treasury*, 283 Mich App 647; 770 NW2d 915 (2009), which held that an LLC was a "person" required to file a separate SBT return. Under the plain language of the SBTA, a single-member LLC was a "person" that was required to file a separate SBT return apart from its single member, Kmart Corporation, notwithstanding that Kmart Corporation treated its LLC as a division (a disregarded entity) for federal income tax purposes. The Department of Treasury took the position that the LLC could not file a separate SBT return due to Kmart's federal filing election. The issue turned upon the definition of "person" in the SBTA, which specifically identified many types of entities and business organizations, but having been enacted prior the Michigan Limited Liability Company Act, did not include limited liability companies. However, the definition included an all-encompassing reference to "any other group or combination acting as a unit." MCL 208.6 (repealed). The court agreed with the Tax Tribunal's interpretation that the phrase "group or combination acting as unit . . . cover[s] the same kind, class, character or nature as those entities specifically enumerated or lack precise legal identification." *Id*., p 652. As such, a limited liability company was a "person" whether it had one or more members. Under the SBTA, any "person" with business activity was subject to the tax and was required to file a separate tax return. The ruling in *Kmart, supra,* does not apply to this use tax case. That case simply interpreted the provisions of the former SBTA regarding the duty of each "person" to file a separate tax return and the lack of statutory authority to permit a taxpayer to file a consolidated SBT return.

The Tax Years 2001 through 2004

During closing arguments, Petitioner asserted that there is no evidence that Petitioner was in business during the years 2001 through 2004 and that the assessment is invalid for those years. Petitioner filed no federal returns for those years. As Respondent's counsel pointed out during closing argument, it is Petitioner's burden to prove that it did not use property for the years 2001 through 2004. In light of the fact that Petitioner did not acquire Family Home Health Services, LLC (a Delaware limited liability company, 6320 Venture Drive, Suite 205, Lakewood Ranch, Florida) and FHHS, LLC (a Michigan limited liability company, 801 West Ann Arbor Trail, Suite 200, Plymouth, Michigan 48170), until 2005, and the lack of any evidence of any storage, use, or consumption of property prior to 2005, the assessment cannot stand for those years.

There is evidence that Family Home Health Services, LLC, a Delaware limited liability company, which was formerly owned by Kevin R. Ruark and James H. Pilkington, had been engaged in home health care services since September 2003. However, Petitioner did not acquire this entity until January 2005, and any use tax for the period of September 2003 to December 2004 would be the liability of Family Home Health Services, LLC. Respondent has asserted no claim for successor liability.

The audit report states that the tax due for 2006 through 2009 was based on property reported on business tax returns for those years. "The auditor reviewed federal returns for years, 2006-2009 to determine expenses that were purchased under the 'other deductions' section, which were classified as office expense, vehicle expense, utility expense, computer expense, medical expense and other expenses." (R8.) The expense amounts for the years 2001 through 2005 were based on average annual expenses reported for the years 2006 through 2009. (See R8, "Sampling Methodology.") The auditor testified that during the audit the taxpayer had never indicated that it did not exist during the years 2001 through 2005. (See Transcript, p 78-79.)

After the audit, the auditor obtained a copy of Petitioner's 2005 federal income tax return and this data was used to recalculate the tax due for expenses reported on that return. The tax due related to expenses for 2001, 2002, 2003, and 2004, was also recalculated based on the additional information in the 2005 income tax return, as set forth in the Amended Work Papers. (See R13.)

For capital asset purchases, the auditor used amounts claimed for the "ITC" (Investment Tax Credit) on the state business tax returns for the years 2005 through 2009. (Also see, Transcript, p 76.) During this litigation, the taxpayer produced a 2005 SBT return, from which the auditor recalculated the use tax based on the 2005 expenses reported on that return, as indicated on the "Amended Work Papers." (See, R13, and Transcript, p 84.) "For the years, 2001-2004, no ITC was reported . . . and none was determined." (R8.)

In summary, the subject assessment consists of 1) capital asset purchases for the years 2005, 2006, 2007, 2008, and 2009, based on state ITC claims; 2) actual "expense" purchases for the years 2005, 2006, 2007, 2008, and 2009, based on federal income tax returns; and 3) "expense" purchases for the years 2001, 2002, 2003, and 2004, based on an extrapolation of average reported purchases. No tax was assessed for capital assets for the years 2001-2004, because none were claimed for ITC purposes for those years. The lack of any evidence of purchases for the years 2001 through 2004, together with the evidence that Petitioner had no operations, compels a conclusion that the assessment must be cancelled for those years.

Under the revenue act, "A person who has failed to file a return is liable for all taxes due for the entire period for which the person would be subject to the taxes." MCL 205.27a(2). In other words, the four-year statute of limitations does not apply to the assessment of tax upon a person who fails to file a required return. For example, if a person has received wages in Michigan but failed to file a required income tax return, the department may assess tax for as many years as the person "would be subject to the taxes" and the taxpayer may not assert a statute of limitations defense. However, if the taxpayer can prove that it would have been impossible for him to have earned wages 10 years ago (for example, he was 8 years old and unemployed) and had no duty to file a return, there would be no grounds for estimating tax due and issuing an assessment to that person for that period. If assessed, the person could refute the assessment with evidence that he did not earn wages for certain years at issue.

There is no question that Petitioner did not file a use tax return for any year at issue. The evidence shows that for the years 2005 through 2009, Petitioner acquired tangible personal property, and failed to file use tax returns. During audit, and through the course of the litigation, Petitioner failed to present sufficient evidence to rebut the presumptive validity of the assessment for those years. Petitioner failed to maintain any records to demonstrate that sales or use tax was paid to Michigan or another taxing jurisdiction. However, the years prior to 2005 are different. There are no tax returns for business or income tax in evidence. The assessment for those years is based on unsupported assumptions that Petitioner was an operating business that was subject to use tax and that Petitioner used, stored, or consumed property in an amount equal to the average purchases during the years 2005 through 2009.

The relevant statute does not state that any person who does not file a tax return in Michigan is liable for taxes. Rather, it states that a person who has failed to file a return is liable for "all taxes for the entire period for which *the person would be subject to the taxes*." MCL 205.27a(4) [Emphasis added]. This is an exception to the four-year statute of limitations. The phrase "failed to file a return" means that the person was required to file, not merely that no return was filed. Therefore, if Petitioner can prove that it would not be "subject to the taxes" during 2001 to 2004, it could successfully refute the assessment for those periods. In other words, the assessment of tax is not merely a matter of applying an exception to the statute of limitations, but the question becomes whether there is any substantive basis to conclude that Petitioner was actually a taxpayer subject to a tax and failed to file a required return.

In our case, prior to January 2005, Petitioner was known as Myocash, Inc. The evidence indicates that Myocash, Inc., was a "special purpose entity" created by Mr. Ruark and Mr. Pilkington, which prior to the time it acquired two other entities in 2005, conducted no business activity. There is no evidence that Myocash, Inc. ever acquired, used, stored, or consumed any tangible personal property from 2001 to 2004. The evidence set forth in the form 10-KSB, regarding Petitioner's activity before 2005, supports a finding that Petitioner was incorporated in Nevada in 2000 as a special purpose acquisition entity that had no operations or business activity. On January 17, 2005, Petitioner acquired 100% ownership of Family Home Health Services, LLC, a Delaware limited liability company ("FHHS"), which was owned by Kevin R. Ruark and James H. Pilkington. That entity had been engaged in home health care services since September 2003. In 2005, Petitioner, Family Home Health Care, Inc., changed its name from Myocash, Inc. Petitioner maintained its headquarters in Michigan during years prior to 2005. On July 3, 2005, Petitioner acquired from Mr. Ruark and Mr. Pilkington and Home Care Partners, LLC, a Michigan limited liability company ("Home Care"), the entity known as FHHS, LLC a Michigan limited liability company ("FHHS Michigan"), which was at that time operating as a provider of home health care services, primarily in Southeastern Michigan, with an office and approximately 30 health care professionals in this state. According to statements contained in Petitioner's Prehearing Statement, FHHS Michigan had a business address of 801 W. Ann Arbor Trail, Suite 200, Plymouth, Michigan, the same address as Petitioner's. Petitioner claims that FHHS Michigan began conducting business in Michigan in 2004. Without regard to how long FHHS Michigan conducted business, there is no evidence that Petitioner purchased taxable property for FHHS Michigan prior to the date it acquired it in July of 2005.

Petitioner has rebutted the presumption of validity, and proven by a preponderance of the evidence that the assessment for the years prior to the acquisition of the operating entities must be cancelled. Based on an estimate that was extrapolated over the years 2001, 2002, 2003, and 2004, Respondent's auditor assessed tax in the amount of $59,629 for each of those years (total use tax of $238,516), as set forth on the amended audit schedules. (See R13.) With interest and penalty, the "net tax due for each year was: $120,008 (2001), $114,202 (2002), $110,299 (2003), and $106,830 (2004). The assessment shall be recalculated with these amounts, and related penalty and interest, subtracted. The balance of the assessment shall be affirmed.

Judgment

IT IS ORDERED that Assessment No. TS80920 shall be AFFIRMED in part and CANCELLED in part, consistent with this Proposed Opinion.

IT IS FURTHER ORDERED that the parties shall have 20 days from date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the evidence admitted at the hearing. This Proposed Opinion and Judgment, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act (MCL 205.726).

Entered: Aug 20, 2014 By: Thomas A. Halick