

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

John Clark,  
Petitioner,

v

Michigan Department of Treasury,  
Respondent.

MTT Docket Nos. 358682 and 358954  
Assessment Nos. L629095 and M338550

Tribunal Judge Presiding  
Cynthia J Knoll

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

**I. INTRODUCTION**

Petitioner, John Clark, is appealing Final Assessments L629095 and M338550, both issued by Respondent, Michigan Department of Treasury, on November 25, 2008. The Final Assessment for Assessment No. L629095 establishes single business tax deficiency for the 12/99, 12/00, and 12/01 taxable periods. The amount of tax and interest due is \$34,126.39. The Final Assessment for Assessment No. M338550 establishes use tax liability for the 12/01 taxable period. The amount of tax, interest, and penalties due is \$2,628.97. On May 14, 2010, Respondent filed a motion requesting the Tribunal grant summary disposition in its favor, pursuant to MCR 2.116(C)(10). Petitioner did not file a response to Respondent's Motion for Summary Disposition.

**II. PARTIES' CONTENTIONS**

On May 14, 2010, Respondent filed a Motion requesting that the Tribunal render summary disposition in favor of Respondent in the above-captioned case pursuant to MCR 2.116(C)(10). In support of its Motion, Respondent states:

The subject of this case is two corporate officer liability assessments issued against the Petitioner, John Clark (Mr. Clark). The first, Final Assessment No. L629095, pertains to corporate single business tax deficiencies for tax year 1999, 2000, and 2001. The second, Final Assessment No. M338550, pertains to corporate use tax for the tax year 2001. Both subject corporate officer liability assessments are based on underlying assessments against National Restaurant Enterprises, Inc./Ameriking Corporation (National).

Respondent further contends that Final Assessment No. L629095 against National was sent via certified mail on April 21, 2003, and supports this with evidence in the form of a Certified Mail log dated April 21, 2003. Respondent also claims that Final Assessment No. M338550 against National was issued on August 12, 2004, and was sent via U.S. Mail, because it was for less than \$5,000. Respondent contends that National did not appeal the underlying assessments, resulting in the assessments becoming final upon the expiration of the appeal periods.

Respondent further asserts that Mr. Clark was assessed as a corporate officer responsible for National's tax liability pursuant to MCL 205.27a(5), which states that, "if a corporation liable for taxes fails to file a return or pay the tax due, any of its officers is personally liable for the failure of the corporation." Respondent states that "Mr. Clark does not appear to contest the fact that he was a responsible corporate officer." Respondent further alleges that Mr. Clark's signature as vice-president on National's tax return creates a rebuttable presumption that he is responsible for the corporation's failure to pay.

Respondent relies on *Keith v Michigan Department of Treasury*, 165 Mich App 105; 418 NW2d 691 (1987), in support of its position that Petitioner cannot contest the underlying assessment. The *Keith* Court held that, "if a corporate officer – for whatever reason – fails to contest the tax on behalf of the corporation, it does not violate due process to thereafter deny the corporate officer the right to contest the amount when he is personally assessed for the tax."<sup>[1]</sup> Respondent argues that "[b]ecause a corporate officer's liability is derivative of a corporation's liability, once the corporation's time to appeal has passed, an officer subject to personal liability under MCL 205.27a(5) cannot contest the underlying corporate tax liability," citing *Keith, supra* at pp. 109-111.

Petitioner did not file a response to Respondent's Motion.

### **III. FINDINGS OF FACT**

Respondent issued two corporate officer liability assessments against Petitioner on November 25, 2008. Assessment No. L629095 pertains to corporate single business tax deficiencies for tax years 1999, 2000, and 2001. Assessment No. L629095 assesses tax, penalty, and interest in the amount of \$34,126.39 against Petitioner for the 1999, 2000, and 2001 tax years. M338550 pertains to corporate use tax for the 2001 tax year. Assessment No. M338550 assesses tax, penalty, and interest in the amount of \$2,628.97 against Petitioner for the 2001 tax year. Both assessments are based on the underlying assessments against National Restaurant Enterprises, Inc. (National) and are issued under MCL 205.27a(5).

Petitioner, in his initial letter of appeal, states that "I acknowledge I was an officer with National Restaurant Enterprises during the time frame of the claim made."

### **IV. APPLICABLE LAW**

Respondent moves for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated "[a] motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact." Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich

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<sup>[1]</sup> *Keith v Michigan Dept of Treasury*, 165 Mich App at 110.

446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

## V. CONCLUSIONS OF LAW

The underlying issues in this case relate to the assessment of single business and use tax against Petitioner and whether Petitioner is a corporate officer liable for payment of this tax.

In his first letter to the Tribunal, dated December 23, 2008, Petitioner “acknowledge[s] I was an officer with National Restaurant Enterprises during the time frame of the claim made.” He contends, however, that he was not provided any rights to defend himself against the claim. Petitioner states:

- No information has been provided despite promises made during the [informal] conference.
- No back [sic] has been provided showing that I was a signor on any relevant tax forms (business, use payroll tax, etc.).
- No reason for the tax difference in the first place (i.e., what is the tax discrepancy even about).

In a letter dated March 25, 2010, Petitioner further states:

Since I am being asked to . . . pay the debts of another, I have a right to receive the information that caused the Department of Treasury to determine that [National] owed it in the first place.

The Department of Treasury has failed in its duty to provide proper reason for the deficiency of tax owed.

At [the time of the audit, National] was still in existence (it filed for Chapter 11 bankruptcy in December 2002) and noticed all vendors of its status. The State of Michigan would have been noticed of this fact and received from the Bankruptcy Trustee notices of any pending claims. The Department of Treasury failed in its responsibility to notice the Bankruptcy Trustee which would have required [National] to resolve its liability with the Department of Treasury prior to final liquidation in late 2004/2005.

Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue of material fact. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.”<sup>[2]</sup> The Tribunal finds that no genuine material fact exists in this case. Tax assessments were issued to National and National did not file appeals of the assessments, rendering them final. As a result, Petitioner was held responsible for the assessments as a corporate officer. Respondent issued assessments to Petitioner, pursuant to MCL 205.27a(5), which states in pertinent part:

If a corporation, limited liability company, limited liability partnership, partnership, or limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure.

Petitioner does not contest that he was a responsible officer during the tax periods at issue. His contentions relate solely to the underlying assessments against National and the lack of information available to him in support of those assessments. However, because the underlying assessments against National were not appealed and thus became final, Petitioner cannot now challenge the assessments. Petitioner’s corporate office liability is derivative of National’s liability.

For the reasons stated above, the Tribunal grants summary disposition in favor of Respondent and affirms Final Assessment Nos. L629095 and M338550.

## **VI. JUDGMENT**

IT IS ORDERED that Respondent’s Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that the Assessment Nos. L629095 and M338550 are AFFIRMED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties as finally shown in Assessment Nos. L629095 and M338550 within 20 days of the entry of this Final Opinion and Judgment.

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<sup>[2]</sup> West v General Motors Corp, 469 Mich 177, 183; 655 NW2d 468 (2003).

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

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

MICHIGAN TAX TRIBUNAL

Entered: July 16, 2010

By: Cynthia J Knoll