

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

Stephen J. Quinn,  
Petitioner,

v

MTT Docket No. 322718  
Assessment No. I117286

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner appeals Respondent's Decision and Order of Determination dated April 13, 2006, finding Petitioner liable, as a responsible corporate officer, for unpaid sales tax of Metro Cell, Inc. for the period July 1992 to March 1996. Petitioner filed a petition with the Tribunal on May 17, 2006. A hearing in this matter was held on October 18, 2007. Petitioner was represented by Matthew G. McNaughton and Mark J. Zausmer, Zausmer, Kaufman, August, Caldwell & Tayler. Respondent was represented by Julius O. Curling, Assistant Attorney General.

BACKGROUND

Respondent issued Assessment No. I117286 against Metro Cell, Inc. (MCI) for \$412,498.33 in unpaid sales tax for the period of July 1992 to March 1996. MCI appealed that Assessment to the Tribunal. (MTT Docket No. 279090) On April 1, 2002, MCI and Respondent entered into a settlement agreement in which MCI agreed to pay \$50,000 plus penalties and interest. No tax liability was admitted. The stipulation for consent agreement filed by the parties provided that "the Tax Tribunal enter a Consent Judgment in this case canceling the sales tax Final Assessment from which Petitioner appealed with prejudice, according to the terms and conditions outlined in

... [the] ‘Settlement Agreement’”<sup>1</sup> The consent judgment ordered that “Petitioner ...pay to Respondent ... the amount of \$50,000 in twelve equal monthly installments beginning April 1, 2002, and ending March 1, 2003, in full and complete satisfaction ... with respect to Assessment No. I117286” and dismissed “the case with prejudice.”<sup>2</sup> MCI made some payments but defaulted on the agreement leaving a balance of \$33,332.00.

On April 20, 2004, Respondent issued a Notice of Intent to Assess to Petitioner, as a responsible corporate officer of MCI, for the amount owing on the Agreement. Respondent held an informal conference on March 8, 2006. The hearing referee’s recommendation to uphold the corporate officer liability Intent to Assess was affirmed in Respondent’s Decision and Order of Determination dated April 13, 2006. Petitioner appealed Respondent’s Decision to the Tribunal.

The amount assessed and herein appealed is \$45,833.34, the amount remaining unpaid under the agreement between MCI and Respondent, plus interest.

On April 9, 2007, Petitioner filed a Motion for Summary Disposition and Request for Oral Argument. On April 30, 2007, Respondent filed a response to Petitioner’s Motion for Summary Disposition. The Tribunal denied Petitioner’s Motion stating that “there are genuine issues of material fact that can only be resolved through a full hearing.”

#### PETITIONER’S CONTENTIONS

Petitioner offered the following exhibits, which were admitted without objection,

- P-1. Decision and Order of Determination from the Department of Treasury Dated April 13, 2006

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<sup>1</sup> Petition, Exhibit F

<sup>2</sup> Petition, Exhibit D

- P-2. Settlement Agreement between Metro Cell, Inc. and the Michigan Department of Treasury for Tax Tribunal Docket Number 279090
- P-3. Stipulation for Consent Judgment for Metro Cell, Inc. and the Department of Treasury for Tax Tribunal Docket Number 279090
- P-4. Consent Judgment for Tax Tribunal Docket Number 279090
- P-5. Final Bill for Taxes Due for Assessment Number I117286 dated April 4/27/06
- P-6. Final Bill for Taxes Due for Assessment Number I117286 dated April 4/27/06
- P-7. MCL 205.65 (2002)
- P-8. Enrolled House Bill No. 4568 of 2003
- P-9. Calculation of Interest on the Amount Allegedly Due

Petitioner puts forward several arguments to support his contention that he is not liable as assessed. Petitioner contends that,

1. [t]he “Department’s sole cause of action to collect the money owed... is to file a breach of contract action against MCI because the debt is a contractual debt, not a sales tax debt.”<sup>3</sup>
2. “The Agreement and the Consent Judgment extinguished the underlying tax debt.”<sup>4</sup>
3. “Petitioner cannot be liable ... because he was not an officer of MCI.”<sup>5</sup>
4. “Even if Petitioner is deemed to have been an officer of MCI... [he] did not have the requisite authority to sign checks or to direct how corporate funds were to be spent.”<sup>6</sup>
5. “Even if Petitioner is found to be an officer of MCI and even if he is found to generally have been a responsible corporate officer...he was not a responsible corporate officer when the Agreement was executed.”<sup>7</sup>
6. “Petitioner did not receive ... an assessment until April 20, 2004... nearly seven years after the date the return for the latest audited year was filed... subsequent to the expiration of the applicable statute of limitations.”<sup>8</sup>

Petitioner argues that the “underlying liability is derived from the department’s assessment of Metro Cell, Inc., after an audit for the time period covering July of 1992 to March 1996.”<sup>9</sup>

Petitioner further stated that Metro Cell, Inc. “denied that it owed the unpaid taxes, because it strongly disagreed with the department’s interpretation of the tax code.”<sup>10</sup> Metro Cell appealed that assessment to the Tribunal and “[b]efore there was a hearing on the issue in 2002, the

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<sup>3</sup> Petition, page 3-4, #17

<sup>4</sup> Petition, page 4, #19

<sup>5</sup> Petition, page 5, #26

<sup>6</sup> Petition, page 6, #32 and #33

<sup>7</sup> Petition, page 7, #40

<sup>8</sup> Petition, pages 8-9, #50-52

<sup>9</sup> Transcript, p 7, ll 1-3

<sup>10</sup> Transcript, p 7, ll 7-9

department settled its claim of four hundred thousand dollars plus significant interest for a mere fifty thousand dollars.”<sup>11</sup> Petitioner contends that “the settlement converted the underlying sales tax debt into a contractual debt owed by Metro Cell, not [Petitioner].... The settlement agreement supersedes, substitutes for and extinguishes the antecedent claim, and the only cause of action that’s available if the settlement agreement is breached is a breach of contract law.”<sup>12</sup> Further, “[Petitioner] didn’t enter the agreement, and the law doesn’t allow the department or the state to hold him liable for the corporation’s breach of contract.”<sup>13</sup>

Petitioner testified that he was employed by Metro Cell, Inc. from December 1992 until April 1997, as “their accountant, and ... had the title vice president finance.”<sup>14</sup> He testified that there were several vice presidents and that he was “responsible for the preparation of financial statements, budgeting, cash flow management and various compliance reports.”<sup>15</sup> Petitioner testified that Metro Cell “was a family owned company principally owned by Duane Rao, who was one of the gentlemen I reported to. . . . And they made the policies with respect to the calculation and remittance of sales tax.”<sup>16</sup> Petitioner stated that he had no input into those policies. The procedure for calculating sales taxes due were “past practice and practice while I was there as well.”<sup>17</sup>

Petitioner testified regarding the procedure related to the calculating of sales tax due. Petitioner stated that an applicable transaction

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<sup>11</sup> Transcript, p 8, ll 11-14

<sup>12</sup> Transcript, p 11, ll 3-11

<sup>13</sup> Transcript, p 11, ll 12-15

<sup>14</sup> Transcript, p 13, ll 21-22

<sup>15</sup> Transcript, p 14, ll 21-23

<sup>16</sup> Transcript, p 16, ll 13-17

<sup>17</sup> Transcript, p 1, l 25- p, 17, l 1

would be facilitated on a general ledger, one of which was a sales tax payable account. On a monthly basis, I would look at the amount of money that was collected in the sales tax payable account, and I would complete the sales tax coupon. I would sign the coupon. And then I would hand the coupon to our payables person, who would prepare a check to hand to Duane Rao, who would sign the check and remit it.<sup>18</sup>

Petitioner testified that he had no authority to change the amount on the coupon and that he did not have authority to sign checks on behalf of MCI.

When Petitioner left the employ of MCI he knew that the sales tax issue was unresolved but “had no knowledge after the fact that it was subsequently resolved pursuant to the terms of the settlement agreement until [he] received a notice of taxes due.”<sup>19</sup> Petitioner testified that he received two bills from Respondent, one for \$727,179.74<sup>20</sup> and the other for \$66,087.63.<sup>21</sup> Both bills were dated April 20, 2004. Petitioner sought a copy of the settlement agreement and, based upon payments made by MCI, made “a calculation of the interest due on the alleged liability, the principal balance of the remaining payments that...were not made”<sup>22</sup> to arrive at an amount of interest due that was different from Respondent’s.<sup>23</sup>

On cross examination, Respondent asked Petitioner to identify, review, and explain several documents offered as Respondent’s exhibits. These exhibits included:

1. The letter Petitioner “sent to the Michigan Department of Treasury that discussed a late filing of February 1996 for sales, use, withholding and single business tax return”<sup>24</sup> signed as vice president of finance dated September 5, 1996. Petitioner explained that the

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<sup>18</sup> Transcript, p 17, ll 8-18

<sup>19</sup> Transcript, p 18, ll 22-25

<sup>20</sup> Petitioner’s Exhibit P-6

<sup>21</sup> Petitioner’s Exhibit P-5

<sup>22</sup> Transcript, p 21, ll 7-10

<sup>23</sup> Petitioner’s Exhibit P-9

<sup>24</sup> Respondent’s Exhibit R-B

letter was related to an issue with the Michigan Department of Treasury's automated collection system he was attempting to resolve.

2. A letter he received from the Department of Treasury<sup>25</sup> in response to his letter of September 5, 1996.
3. A letter<sup>26</sup> dated April 4, 1996, to the Michigan Department of Treasury, single business tax division, that bore his signature, which he described as relating to a "single business tax annual return" sent as "part of [his] duties at the time at Metro Cell."<sup>27</sup>
4. Petitioner's letter dated June 29, 1994,<sup>28</sup> to the Department of Treasury pertaining to sales and use tax returns and the Department of Treasury's response letter.<sup>29</sup> When asked by Respondent if Petitioner was "corresponding ... with the Michigan Department of Treasury because you had the authority on behalf of Metro Cell to resolve tax issues such as that; is that a fair..."<sup>30</sup> Petitioner responded "[n]o, it's not. I was responding on behalf of Metro Cell, because it was my duty and responsibility in my position to respond. But I didn't have the authority to settle matters."<sup>31</sup> Respondent continued by asking Petitioner "[a]nd you had the authority to pay matters or..."<sup>32</sup> to which Petitioner responded "[n]o, I did not."<sup>33</sup>
5. Petitioner agreed that he signed a letter to the Department of Treasury dated August 25, 1994,<sup>34</sup> concerning a Metro Cell tax liability and testified that "the Hearings Division had agreed to waive penalties if we were to make an interest payment. And upon conversing with my superiors, they agreed to do that, and I sent the corresponding letter."<sup>35</sup>
6. Metro Cell's 1995 sales, use, and withholding annual return,<sup>36</sup> 1995 single business tax annual return,<sup>37</sup> 1994 single business tax annual return,<sup>38</sup> 1993 single business tax annual return,<sup>39</sup> 1992 single business tax annual return,<sup>40</sup> a sales tax coupon for February 1997,<sup>41</sup> a sales tax coupon for March 1997,<sup>42</sup> and a Metro Cell sales tax coupon for January 1997<sup>43</sup> all of which bore his signature.
7. Metro Cell's Michigan annual report for domestic profit corporations for 1996 signed by Petitioner as authorized officer and preparer using the title, "VP-Finance."<sup>44</sup> Petitioner is listed as Vice President on the report and stated that he "would have discussed with

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<sup>25</sup> Respondent's Exhibit R-C

<sup>26</sup> Respondent's Exhibit R-D

<sup>27</sup> Transcript, p 27, ll 3-4

<sup>28</sup> Respondent's Exhibit R-E

<sup>29</sup> Respondent's Exhibit R-F

<sup>30</sup> Transcript, p 29, ll 12-15

<sup>31</sup> Transcript, p 29, ll 16-19

<sup>32</sup> Transcript, p 29, ll 20-21

<sup>33</sup> Transcript, p 29, l 22

<sup>34</sup> Respondent's Exhibit R-G

<sup>35</sup> Transcript, p 30, ll 21-24

<sup>36</sup> Respondent's Exhibit R-H

<sup>37</sup> Respondent's Exhibit R-I

<sup>38</sup> Respondent's Exhibit R-J

<sup>39</sup> Respondent's Exhibit R-K

<sup>40</sup> Respondent's Exhibit R-L

<sup>41</sup> Respondent's Exhibit R-M

<sup>42</sup> Respondent's Exhibit R-N

<sup>43</sup> Respondent's Exhibit R-O

<sup>44</sup> Respondent's Exhibit R-P

Duane Rao, who was the chairman and owner of Metro Cell, who to list... and would have followed his instructions.”<sup>45</sup>

8. Metro Cell’s Michigan annual report for domestic profit corporations for 1995 signed by Petitioner as authorized officer and preparer using the title, “VP-Finance.”<sup>46</sup> Petitioner is listed as Vice President on the report.

On cross examination, Petitioner testified that he was employed with Metro Cell from 1992 to 1997,<sup>47</sup> he was hired as a vice president of which “there were several,”<sup>48</sup> and he resigned as vice president when he resigned from Metro Cell.<sup>49</sup> Petitioner testified that the only “preconceived notions” of what his job would require “were the notions that were given to me in the interview process with Duane Rao and Jim Jung.”<sup>50</sup> He had no other notion of what the VP of finance might be doing. Petitioner testified that he “was told that I would be responsible for the preparation of financial statements, that I would be responsible for budgeting, forecasting, cash compliance and other compliance activities.”<sup>51</sup> Although Petitioner eventually prepared tax returns, that was not one of the duties explained to him during the interview process. Petitioner testified that he was “responsible to prepare tax returns”<sup>52</sup> and he did sign and submit these to the Michigan Department of Treasury. He further testified that he “had no check signing authority . . . I had no authority to direct disbursement of funds in any regard.”<sup>53</sup>

Petitioner asserts that the applicable statutory provision for the tax years at issue is MCL 205.65. Prior to the amendment of that section by 2003 PA 25, section 65 of the Sales Tax Act provided the standard for determining officer liability for failure or refusal to file a return required under

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<sup>45</sup> Transcript, p 38, ll 19-23

<sup>46</sup> Respondent’s Exhibit R-Q

<sup>47</sup> Transcript, p 40, l 16

<sup>48</sup> Transcript, p 40, l 23

<sup>49</sup> Transcript, p 41, l 22

<sup>50</sup> Transcript, p 44, l 23

<sup>51</sup> Transcript, p 45, ll 4-7

<sup>52</sup> Transcript, p 45, ll 18-19

<sup>53</sup> Transcript, p 46, ll 1-3

the sales tax act. Petitioner asserts that section 205.27a(5) was not the appropriate standard for sales tax liabilities. Petitioner contends that under 205.65, an officer “having control, or supervision of, or charged with the responsibility for making the returns and payments is personally liable for the failure [to file the required returns or to pay the tax due].”<sup>54</sup>

In addition to the above argument, Petitioner asserts that the agreement between MCI and Respondent extinguished the underlying sales tax claim. Although Respondent may have been able to assess Petitioner for the sales tax liability if Respondent could establish that the standard under MCL 205.65 had been met, Respondent is here “seeking to collect on MCI’s contractual debt under the Agreement, not its tax debt.”<sup>55</sup>

#### RESPONDENT’S CONTENTIONS

Respondent offered the following exhibits which were admitted without objection:

- R-B. Letter from Stephen J. Quinn, Vice President Finance, Metro Cell, Inc., to the Michigan Department of Treasury dated 09/05/1996
- R-C. Response to September 5, 1996 Letter from Michigan Department of Treasury to Mr. Quinn dated October 7, 1996
- R-D. Letter from Stephen J. Quinn, [Vice] President Finance, Metro Cell, Inc. to Michigan Department of Treasury dated April 4, 1996
- R-E. Letter from Stephen J. Quinn, Vice President Finance, Metro Cell, Inc. to Michigan Department of Treasury dated June 29, 1996
- R-F. Response to letter dated June 29, 1994 from Michigan Department of Treasury to Mr. Quinn dated August 17, 1994
- R-G. Letter from Stephen J. Quinn, Vice President Finance, Metro Cell, Inc. responding to the August 17, 1994 letter from the Michigan Department of Treasury dated August 25, 1994
- R-H. The 1995 Annual Return for Sales, Use and Withholding Taxes for Metro Cell, Inc., signed by Stephen J. Quinn, VP Fin dated February 28, 1996
- R-I. The 1995 Single Business Tax Annual Return for Metro Cell, Inc. signed by Stephen J. Quinn, VP Finance dated October 11, 1996
- R-J. The 1994 Single Business Tax Annual Return for Metro Cell, Inc. signed by Stephen J. Quinn, Vice President-Finance
- R-K. The 1993 Single Business Tax Annual Return for Metro Cell, Inc. signed by

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<sup>54</sup> Petitioner’s trial brief, p 4

<sup>55</sup> Petitioner’s trial brief, p 5



- Stephen J. Quinn, Vice President-Finance dated June 30, 1995
- R-L. The 1992 Single Business Tax Annual Return for Metro Cell, Inc. signed by Stephen J. Quinn, Vice President-Finance dated June 30, 1994
  - R-M. The February 1997 Combined Return for Michigan Taxes, signed by Stephen J. Quinn, Vice President-Finance dated March 10, 1997
  - R-N. The March 1997 Combined Return for Michigan Taxes, signed by Stephen J. Quinn, Vice President-Finance dated April 10, 1997
  - R-O. The January 1997 Combined Return for Michigan Taxes, signed by Stephen J. Quinn, Vice President-Finance dated 02/14/1997
  - R-P. The 1996 Michigan Annual Report for Metro Cell, Inc., listing Stephen J. Quinn, as V.P. signed by Stephen J. Quinn, V.P. Finance dated June 10, 1996
  - R-Q. The 1995 Michigan Annual Report for Metro Cell, Inc., listing Stephen J. Quinn, as V.P. signed by Stephen J. Quinn, V.P. Finance dated May 10, 1995
  - R-R. Letter from Stephen J. Quinn to Michigan Department of Treasury contesting his liability as a responsible corporate officer, dated July 25, 2005

Respondent contends that Petitioner admits that he was the accountant at Metro Cell from December 1992 to April 1997 and further that he was a corporate officer of Metro Cell during the tax period in question.<sup>56</sup> Respondent asserts that various documents submitted to the Tribunal clearly indicate Petitioner's position as Vice-President of Finance for Metro Cell, making his position as a corporate officer undeniable under MCL 205.27a(5), which provides, "[t]he signature of any corporate officers on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments." Further, Respondent asserts that Petitioner was an individual with "control or supervision of, or who is charged with the responsibility for making the returns or payments..."<sup>57</sup> Respondent contends that it has presented the required prima facie case which Petitioner will be unable to rebut.

Further, Respondent's Hearing Referee concluded that Petitioner is "liable for the tax debt of

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<sup>56</sup> Respondent's Trial Brief, p 3

<sup>57</sup> Respondent's Trial Brief, p 8

MCI and is now liable for the reduced stipulated amount.”<sup>58</sup> And that “Petitioner is liable for the tax period involved with this deficiency and thus he benefits from the reduction evidenced by the stipulation.”<sup>59</sup>

Respondent presented no witnesses.

#### FINDINGS OF FACT

The Tribunal's factual findings must be supported by competent, material and substantial evidence. *Antisdale v Galesburg*, 420 Mich 265 (1984).

In that regard, the Tribunal finds Respondent issued two Final Assessments against Petitioner, both identified as Assessment No. I117286. The first was issued on April 20, 2006 for sales tax for “07/92 thru 03/96.”<sup>60</sup> The amount of tax due on the bill was \$395,839.33 with interest as of that date of \$331,349.41. The Final Assessment issued by Respondent on April 27, 2006, was also for sales tax for “07/92 thru 03/96.” The amount of tax due on that bill was \$33,204.33 with interest as of that date of \$33,883.33.<sup>61</sup> Both assessments were issued under “Act 122, section 27a(5), Public Acts of 1941,... making officers/members/managers/partners liable for tax debts of the corporation...”<sup>62</sup> Respondent, in its Informal Conference Recommendation, affirmed in Respondent’s Decision and Order of Determination dated April 13, 2006, stated that “the stipulated amount is the only legal amount owing on Intent I117286. It is noted that Intent to Assess I117286 was adjusted by the Department to reflect this stipulated amount.”<sup>63</sup>

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<sup>58</sup> Petitioner’s Trial Brief, exhibit A

<sup>59</sup> Petitioner’s Trial Brief, exhibit A

<sup>60</sup> Petitioner’s exhibit 6

<sup>61</sup> Respondent’s exhibit A and Petitioner’s exhibit 5

<sup>62</sup> Respondent’s exhibit A

<sup>63</sup> Petitioner’s exhibit 1

The Tribunal finds that Respondent issued Final Assessment I117286 against MCI for unpaid sales taxes on September 1, 2000. MCI appealed that Assessment to the Tribunal and, prior to hearing, the parties entered into a Settlement Agreement.<sup>64</sup> Pursuant to the parties' Stipulation, the Tribunal entered a Consent Judgment and "[d]ismissed with prejudice"<sup>65</sup> the proceedings. The Settlement Agreement between Respondent and MCI provided that "a full and complete settlement in this matter...resolving all issues in dispute"<sup>66</sup> had been reached. The original assessment, at the time, was an aggregate amount of tax and interest of \$412,498.33. The parties agreed that MCI would pay \$50,000 in twelve installments. MCI paid only four installments.

The Tribunal finds that Petitioner held the title of Vice President of Finance for Metro Cell Inc. throughout his employment with MCI. Petitioner was listed as a Vice President of MCI on required Michigan corporate filings. Petitioner signed many of MCI's tax related documents during his employment. And he signed those documents as the Vice President of Finance. Respondent offered substantial evidence of Petitioner's status as a corporate officer including Petitioner's signature on single business tax returns, sales tax coupons, annual corporate filings, annual reports, and correspondence between Respondent and Petitioner related to tax matters and signed by Petitioner as Vice President – Finance.

The Tribunal finds that for the period during which the taxes at issue accrued, Petitioner was a corporate officer of Metro Cell, Inc.

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<sup>64</sup> Petitioner's exhibit 2

<sup>65</sup> Petitioner's exhibit 4

<sup>66</sup> Petitioner's exhibit 2

The Tribunal further finds that the applicable statutory standard for determining officer liability for unpaid sales tax for the tax years at issue is section 65 of the sales tax act, 1933 PA 67, MCL 205.65, as that section was effective for the tax years at issue. MCL 205.27a(5), which Respondent asserts is applicable to this appeal, provides the general standard for establishing corporate officer liability and applies when there is not a more specific statutory provision. Until MCL 205.65 was amended in 2003 removing the language relating to officer liability, that section provided the applicable standard for corporate officer liability for unpaid sales tax.

To establish liability, Section 65 requires a showing that the assessed corporate officer had control or supervision of, or was charged with the responsibility for making the returns and payments. (emphasis added)<sup>67</sup>

The Tribunal finds that Respondent has established its prima facie case that Petitioner was a corporate officer who had control or supervision of and who was charged with making tax returns. The Tribunal further finds that Respondent did not establish that Petitioner had responsibility for making payments. Petitioner testified that, although he signed returns, he did not have check signing authority or authority to make disbursements of any kind. No evidence was offered of Petitioner's name on signature cards for bank accounts or on any negotiable instruments used as payment for any tax liability. Section 65 requires that both criteria be met to establish liability. Respondent offered no evidence and was unable to elicit or provide any

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<sup>67</sup> Prior to the 2003 amendment pursuant to 2003 PA 25, MCL 205.65(2) read: If a corporation licensed under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control, or supervision of, or charged with the responsibility for making the returns and payments is personally liable for the failure. The dissolution of a corporation does not discharge an officer's liability for a prior failure of the corporation to make a return or remit the tax due. The sum due for the liability may be assessed and collected as provided in sections 23 and 24 of 1941 PA 122, MCL 205.23 and 205.24.

testimony to support a finding that Petitioner had responsibility for making payments.

In further support of his position that he is not liable for the Assessment, Petitioner asserts that the provisions of both MCL 205.65 and 205.27a(5) “imputes officer liability for a corporation’s unpaid tax debts, not its contractual debts,”<sup>68</sup> and contends that both statutes refer to a failure to file the required returns or pay the tax due. (emphasis in original)<sup>69</sup> Petitioner argues that the Settlement Agreement entered into by Respondent and MCI, and subsequently included in the Consent Judgment issued by this Tribunal, is not a final assessment or determination of a tax due and therefore is not enforceable against Petitioner.

In that regard, the Tribunal finds that the Settlement Agreement entered into on April 1, 2002 between Respondent and Metro Cell to settle the \$412,498.33 sales tax liability for \$50,000.00, on its face manifests an exclusive and complete agreement. The agreement between the parties settles the original tax assessment for a sum certain, and provides adequate remedies.

Respondent and Petitioner have both agreed and admitted that this present claim is for the balance due on the defaulted agreement and not for the amount owed from the original assessment.

The Settlement Agreement clearly states that the Agreement settled the dispute of that tax liability for all the tax years.<sup>70</sup> The Agreement includes the provision, “this Agreement is the exclusive and complete agreement between the parties, that is entered into for the purposes of

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<sup>68</sup> Petitioner’s trial brief, p 5

<sup>69</sup> Petitioner’s trial brief, p 5, footnote 5

<sup>70</sup> Petitioner’s exhibit 2, Settlement Agreement paragraph 3

completely and finally resolving this tax assessment appeal . . . ”<sup>71</sup> The Court of Appeals has ruled that, “[A]n agreement to settle a lawsuit constitutes a contract, and therefore [a settlement] agreement is governed by legal principles applicable to the interpretation and construction of contracts.” *Columbia Associates LP v Department of Treasury*, 205 Mich App 656, 668; 649 NW2d 760 (2002). However, while the assessment based on this agreement would be final and could no longer be challenged before the Tribunal, Respondent would still have the authority to issue further assessments as necessary to collect taxes owed by Metro Cell to the State. *Tyson Food Inc v Department of Treasury*, 2007 WL 2736682 (Mich App 2007). Nevertheless, in regard to this present claim, Respondent is not asking for a remedy in reference to the original assessment, rather Respondent is requesting remedy of the amount owed under the contractual agreement.

Petitioner contends that he was not a party to the agreement. In support of his assertions, Petitioner testified that, while employed as Vice President of Finance for MCI, he had no authority to make settlements or make payments.

A contract cannot impose liability on one who is not a party to the contract’s formation. *See, e.g., Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 325; 685 NW2d 221 (2004) (“because the local government units are not parties to the contract, it would not be possible for the [contract] to impose *any* obligations on the local governments.” (emphasis in original)). To be liable for Metro Cell’s contractual obligation created by the Settlement Agreement, Petitioner would have to have been a party to the contract or, in some manner, made himself personally liable for the contractual debt. Petitioner was not an officer or employee of Metro Cell at the time

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<sup>71</sup> Petitioner’s exhibit 2, Settlement Agreement paragraph 8

of the Agreement nor when Metro Cell stopped making payments pursuant to the terms of the Agreement. He had not been employed by Metro Cell for five years prior to the execution of the Agreement, and is not a named party in the Agreement, or in any other related document. There is no evidence that Petitioner was a party to the Agreement.

The Tribunal finds that the Agreement provides:

8. Taxpayer and Department further agree that this Agreement is the exclusive and complete agreement between the parties, that it was entered into for the purposes of completely and finally resolving this tax assessment appeal involving Final Assessment No. I117286, and that the Agreement cannot be amended without the express, written consent of both parties.

The Stipulation for Consent Judgment entered into by MCI and Respondent, provides:

It is hereby stipulated by and between the parties hereto that the Tax Tribunal enter a Consent Judgment in this case canceling the sales tax Final Assessment from which Petitioner appealed, with prejudice, according to the terms and conditions outline in a separate agreement entitled "Settlement Agreement" Between Metro Cell, Inc. and The Michigan Department of Treasury.

1. Subject to the rights of the parties to enforce the terms of the Settlement Agreement, this matter shall be settled and the sales tax final assessment which Petitioner appealed shall be cancelled, with prejudice and without costs to either party.

Based upon the facts to which both parties agree, the present disputed amount is based on the remaining the amount due from the Contractual Agreement that settled the Initial Assessment, not the amount of the Initial Assessment. The Tribunal cannot enforce the contractual obligation or the terms of the Agreement against the Petitioner.

#### CONCLUSIONS OF LAW

MCL 205.65(2), as effective for the tax years at issue, is the applicable statutory provision for resolution of this matter and it provides,

If a corporation licensed under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control, or supervision of, or charged with the responsibility for making the returns and payments is personally liable for the failure. The dissolution of a corporation does not discharge an officer's liability for a prior failure of the corporation to make a return or remit the tax due. The sum due for the liability may be assessed and collected as provided in sections 23 and 24 of 1941 PA 122, MCL 205.23 and 205.24.

Based upon the evidence and testimony presented, the case file, and brief, the Tribunal concludes that Petitioner was a corporate officer during the tax period at issue. However, the Tribunal finds no documentary evidence nor was any testimony offered to support a conclusion that Petitioner had control of, supervision of, or responsibility for making tax payments. Both criteria must be met to find liability under MCL 205.65(2). Thus, Petitioner is not responsible for the tax due pursuant to MCL 205.65(2).

Further, the Tribunal concludes that Petitioner is not liable for the unpaid amount resulting from MCI's breach of the Settlement Agreement. Respondent's remedy to enforce that agreement does not lie with the Tribunal.

IT IS ORDERED that Assessment No. I117286 is CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: March 31, 2009

By: Rachel Asbury