

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

Rick Milner,
Petitioner,

v.

Michigan Department of Treasury,
Respondent.

MTT Docket No. 329606

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

INTRODUCTION

A hearing was held in the above-captioned case on January 7, 2008. The issue in this case is whether Petitioner is liable as a corporate officer of Grand Haven Big Boy, Inc., for its unpaid sales tax liability, for the period May 2003 through October 2003, under MCL 205.27a(5). Petitioner was President of the Grand Haven Big Boy, Inc., during the tax periods at issue. Petitioner was represented at the hearing by James M. Shade, Attorney. Respondent was represented by Heather Durian, Assistant Attorney General.

BACKGROUND

On September 16, 2004, Respondent sent a Letter of Inquiry to Grand Haven Big Boy, Inc. regarding a sales tax deficiency for tax year 2003. Final assessments were issued against Grand Haven Big Boy, Inc., which were not paid and not appealed.

On February 7, 2005, Respondent sent Petitioner a Letter of Inquiry relating to final assessments for sales tax that had not been paid by Grand Haven Big Boy, Inc. for March, 2003; May through December, 2003; and January through October, 2004. On April 5, 2005, Respondent issued

Intents to Assess against Petitioner for March, 2003; May through December, 2003; and January through October, 2004. On April 14, 2005, Respondent sent Petitioner a Determination of Corporate Officer Liability for March, 2003; May through June, 2003; and September through October, 2003. On October 9, 2006, Respondent issued Final Assessments against Petitioner for unpaid sales tax for the period May through 2003 and September through October, 2003. Petitioner filed a petition with the Michigan Tax Tribunal appealing Respondent's Final Assessments on November 10, 2006. On November 1, 2007, Respondent sent Petitioner a Letter of Inquiry relating to August, 2003, and on December 26, 2007, Respondent issued a Final Assessment against Petitioner for unpaid sales tax for August, 2003.

The tax, interest, and penalties due as assessed by the Michigan Department of Treasury for the sales tax liability of Grand Haven Big Boy, Inc., assessed against Petitioner are:

Assessment	Principle	Penalty	Interest ¹
May 2003 - M492753	\$7,729.71	\$1,932.42	accruing
June 2003 - M492754	\$7,729.71	\$1,932.42	accruing
July 2003 - M492755	\$7,729.71	\$1,932.42	accruing
August 2003 - M492756	\$7,729.71	\$1,932.42	accruing
September 2003 - M492757	\$7,729.71	\$1,932.42	accruing
October 2003 - M492758	\$7,729.71	\$1,932.42	accruing

¹ Interest accruing and to be computed in accordance with §§ 23 and 24 of 1941 PA 122.

The parties in this matter stipulated that Petitioner signed and filed sales tax returns through April, 2003, and that Petitioner was liable as a corporate officer for those tax periods.² Petitioner contends that he is not liable for sales tax, penalties, and interest levied against the corporation for May, 2003 through October, 2003. Respondent contends that Petitioner is liable as a corporate officer of Grand Haven Big Boy, Inc. for sales tax, penalties, and interest levied against the corporation for May, 2003 through October, 2003 pursuant to MCL 205.27a(5).

PETITIONER'S CONTENTIONS

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

1. Exhibit P-1: Grand Haven Big Boy, Inc. Articles of Incorporation.
2. Exhibit P-2: Grand Haven Big Boy, Inc. Minutes.
3. Exhibit P-3: Grand Haven Big Boy, Inc. Bylaws.
4. Exhibit P-6: Chemical Bank Documents.
5. Exhibit P-7: Grand Haven Big Boy, Inc. 2003 Corporation Information Update.
6. Exhibit P-12: Hayes Street II, LLC Articles of Organization.
7. Exhibit P-13: Resignation Letter of Rick Milner.
8. Exhibit P-15: Michigan Department of Treasury letter of inquiry dated February of 2005.
9. Exhibit P-16: Michigan Department of Treasury letter of cancellation dated April 14, 2005.

Petitioner, testifying on his own behalf, indicated that he established Grand Haven Big Boy, Inc.,

² Joint Stipulation of Uncontroverted Facts ¶¶ 5, 9, 25, 26, 27, 32, 33 filed July 3, 2007.

of which he was President, and secured a franchise for the Grand Haven Big Boy restaurant. Petitioner was a 60% shareholder in the company and he signed a stock pledge to Mr. Ramzi Karachy for a 40% share in the company. Petitioner contends that although he was technically the President of the corporation, he was not in actuality a corporate officer and that he did not have responsibility for the preparation or payment of taxes. Petitioner asserts that in reality he was only an employee, a manager, at the Grand Haven Big Boy, Inc. establishment.

Petitioner testified that he was not aware that he was the President, he was never elected President, and he only signed as President because he was told to do so.³ Petitioner stated that he did not sign the corporate bylaws, but rather signed a piece of paper that was subsequently attached to the bylaws. Petitioner also testified that he did not know the company had bylaws, and that he did not even know what bylaws were until after he talked with his attorney. Petitioner contended that all significant business decisions were made by Ramzi Karachy.

Petitioner emphasized that he was simply one of three managers at the restaurant, none of whom prepared the taxes, but any one of whom could write checks to pay the taxes. This was his responsibility as a manager and not as a corporate officer.⁴ Petitioner also stated that he never filed the end of year returns or any federal returns.

Petitioner offered the testimony of Gary Vandenberg, owner of the land on which the Grand

³ Transcript p 68, ll 9-11; p 74, ll 12-14; p 76, ll 24-25; p 77, ll 1-9.

⁴ Transcript p 52, ll 1-8.

Haven Big Boy restaurant is located. Mr. Vandenberg testified that while he was building the restaurant, he mainly dealt with Ramzi Karachy, and that the payments received for the lease came from Ramzi Karachy. Once the restaurant was up and running, Mr. Vandenberg's dealings with Petitioner increased.

Petitioner offered the testimony of Susan Thrash and Clarence Madema, Jr., accountants at Lettinga & Associates. Ms. Thrash and Mr. Madema worked with Mr. Karachy and prepared the monthly tax coupons for Grand Haven Big Boy, Inc. Mr. Madema stated that the year end returns, the coupons, and the financial statements were sent to Mr. Karachy. The Form 941, Employer's Quarterly Federal Tax Return deposit coupons, and monthly sales tax coupons were sent to Petitioner at the store.⁵ Mr. Madema didn't know where Petitioner sent them after that.

Petitioner asserted that he was not really a corporate officer, and that even if he was, he did not have control, or supervision of, and was not charged with the responsibility for making tax returns or payments. In support of his position, Petitioner relies on the facts that he did not sign the tax returns for May through October 2003⁶; he officially resigned from the corporation in October, 2003⁷; and that he effectively resigned on June 6, 2003, when he turned over the checkbook to his co-managers at the Grand Haven Big Boy, Inc. and significantly reduced his hours and physical presence at the Grand Haven Big Boy restaurant.

⁵ Transcript p 132, ll 21-24.

⁶ Joint Stipulation of Uncontroverted Facts ¶ 28, filed July 3, 2007.

⁷ Joint Stipulation of Uncontroverted Facts ¶ 30, filed July 3, 2007; P-13: Petitioner's resignation letter.

RESPONDENT'S CONTENTIONS

Respondent offered the following exhibits:

1. Exhibit R-1: Final Assessment M535644.
2. Exhibit R-2: Final Assessment M492753.
3. Exhibit R-3: Final Assessment M492754.
4. Exhibit R-4: Final Assessment M492755.
5. Exhibit R-5: Final Assessment M492757.
6. Exhibit R-6: Final Assessment M492758.
7. Exhibit R-7: Petitioner Rick Milner's Sworn Deposition taken April 25, 2007 with exhibits.
8. Exhibit R-8: 2003 Profit Corporation Information Update.
9. Exhibit R-9: Combined Michigan Tax Return for February through March 2003, signed by Petitioner Rick Milner as President of Grand Haven Big Boy, Inc.
10. Exhibit R-10: Combined Michigan Tax Return for March through April 2003, signed by Petitioner Rick Milner as President of Grand Haven Big Boy, Inc.
11. Exhibit R-11: Combined Michigan Tax Return for April through May 2003, signed by Petitioner Rick Milner as President of Grand Haven Big Boy, Inc.
12. Exhibit R-12: Annual Tax Return for 2003 Sales, Use and Withholding, filed on February 28, 2004, signed by an accountant for Grand Haven Big Boy, Inc.
13. Exhibit R-13: Letter dated October 8, 2003, copied to James Shade, Gary Vandenberg, Dale Breen, Mike Gibbs and Amy Gray containing Petitioner Rick Milner's signature.
14. Exhibit R-14: Check dated March 15, 2003 for payment of February sales tax owed to the State of Michigan on behalf of Grand Haven Big Boy, Inc.
15. Exhibit R-15: Check dated April 15, 2003 for payment of March sales tax owed to the State of Michigan on behalf of Grand Haven Big Boy, Inc.

16. Exhibit R-16: Check dated May 15, 2003 for payment of April sales tax owed to the State of Michigan on behalf of Grand Haven Big Boy, Inc.

17. Exhibit R-17: Minutes of First Meeting of Incorporator of Grand Haven Big Boy, Inc.

Respondent offered the testimony of Brian Grumeretz, Department Technician for Respondent. Mr. Grumeretz testified that Respondent issued a letter of inquiry to Petitioner for taxes due for the periods March, 2003 through October, 2004. Respondent determined that Petitioner was not liable for the assessments for January, 2004 through October, 2004 based upon Petitioner's resignation letter and the assessments for periods after October, 2003 were cancelled. Mr. Grumeretz also testified that the August assessment was not mentioned in the determination of corporate officer liability letter, Exhibit P-16, because of a clerical error, but that the intended message of Respondent's letter of inquiry was that Petitioner was not liable for the periods after October, 2003. Based on his initial review of the documents in the file and Petitioner's letter of resignation, Mr. Grumeretz recommended assessment of Petitioner for the tax liability of Grand Haven Big Boy, Inc. through October, 2003. Mr. Grumeretz was asked to review the file prior to the hearing related to the assessment for August 2003. He determined there had been a clerical error, in that August, 2003 should have been included in the final assessment, and requested that one of the support unit individuals issue a final assessment against Petitioner for August, 2003. Mr. Grumeretz testified that he believed that this final assessment was timely issued. Mr. Grumeretz testified that he called Petitioner's counsel, Mr. Shade, to discuss the August assessment. Mr. Shade stated that there wasn't a need for an informal conference. The August assessment could be resolved with the other assessments already pending before the Tribunal.

Respondent argued that Petitioner is a corporate officer of Grand Haven Big Boy, Inc. and liable for the unpaid taxes at issue under MCL 205.27a. Respondent offered the following documents with Petitioner's signature:

1. February, 2003, SUW return, signed as President of Grand Haven Big Boy, Inc.
2. March, 2003, SUW return signed as President of Grand Haven Big Boy, Inc.
3. April, 2003, SUW return signed as President of Grand Haven Big Boy, Inc.
4. Check drawn on Grand Haven Big Boy, Inc.'s account dated March 15, 2003 for sales tax
5. Check drawn on Grand Haven Big Boy, Inc.'s account dated April 15, 2003 for sales tax

Respondent asserted that Petitioner's signature, with the title of President, on these tax returns and checks for payment of taxes is sufficient to establish the required *prima facie* case establishing that Petitioner was a corporate officer with tax specific responsibility.

FINDINGS OF FACT

Petitioner established Grand Haven Big Boy, Inc., which held the franchise for the Big Boy restaurant in Grand Haven. The Articles of Incorporation filed with the Michigan Department of Labor & Economic Growth on January 3, 2002, list Petitioner as President and Director.

Petitioner used the title of President when signing tax returns filed with Respondent. Petitioner testified that he had formed corporations in the past, one of which was for a Big Boy restaurant with his father;⁸ had numerous business dealings over several years with Ramzi Karachy; secured the franchise for the restaurant on behalf of Grand Haven Big Boy Inc.; negotiated a

⁸ Joint Stipulation of Uncontroverted Facts ¶¶ 13-16, filed July 3, 2007; Transcript p 36, ll 8-15.

stock option agreement as part of the financing for Grand Haven Big Boy, Inc.; and signed the leasing agreements related to the land and building for the Grand Haven restaurant as President of Grand Haven Big Boy, Inc. Based on this testimony, the Tribunal finds that Petitioner had significant business expertise and does not find credible Petitioner's testimony that he was not aware of how a business operated or what a President is.⁹

Petitioner signed Combined Michigan Tax Returns for February through March 2003, for March through April 2003, and for April through May 2003, as President of Grand Haven Big Boy, Inc. on behalf of the corporation. Petitioner was authorized to sign checks for taxes and other corporate checks on behalf of Grand Haven Big Boy, Inc. Petitioner's testimony as to who had check signing responsibility was contradictory. Initially, Petitioner testified that when he reduced his hours at the Grand Haven restaurant and went back to the Greenville restaurant, he handed over the checkbook to the other managers because he thought they could write checks.¹⁰ Subsequently, he testified that when he returned to the Grand Haven Big Boy he took the checkbook to review it. He was aware that the other managers had written checks and did not have check writing authority.¹¹ Petitioner admitted that he knew by July 2003 that sales taxes were not being remitted by Grand Haven Big Boy, Inc. Petitioner represented Grand Haven Big Boy Inc., as its President, with the Internal Revenue Service and with Respondent on tax related

⁹ Transcript p 45, ll 3-7.

¹⁰ Transcript p 52, ll 1-8, ll 21-23; p 53, ll 19-23; p 54, ll 18-21.

¹¹ Transcript p 94, ll 4-8, p 54, ll 2-13 (although Petitioner testified to the contrary, no evidence was presented to corroborate Petitioner's contentions.).

issues as late as September 2003.¹²

Petitioner was a corporate officer at Grand Haven Big Boy, Inc. responsible for the preparation of tax returns and payment of taxes during the tax periods at issue. Petitioner was a corporate officer, President, of Grand Haven Big Boy, Inc. from the time of its formation until his resignation on October 8, 2003.

Respondent's initial letter of inquiry included the August 2003 tax period. Respondent issued a final assessment against Petitioner for taxes due for August, 2003. Respondent did not include the August, 2003, assessment in its Determination of Corporate Officer Liability notice.

Although Respondent's initial final assessment did not include August 2003, it included the three previous months and two subsequent months and the statement that this "documentation was sufficient to show you are not responsible for the liability remaining after October 2003."

Respondent issued a final assessment for that period and the documentation is sufficient to support Respondent's assessment for August, 2003. The Tribunal finds Respondent's argument that Petitioner's agreement to contest that assessment at the Tribunal hearing scheduled within one month of the issuance of the final assessment and not proceed separately with an administrative appeal process "waived any argument" to be without merit. Petitioner has appealed that assessment to the Tribunal and Respondent agreed to the inclusion of that issue within the already scheduled hearing. Respondent's assertion that Petitioner has thus waived his right to appeal is disingenuous at best.

¹² Transcript p 109, ll 16-25, p 110, ll 1-12.

CONCLUSIONS OF LAW

MCL 205.27a(5) provides the standard for determining the liability of a corporate officer for the tax liability of a corporation:

If a corporation, limited liability company, limited liability partnership, partnership, or limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns or payments. The dissolution of a corporation, limited liability company, limited liability partnership, partnership, or limited partnership does not discharge an officer's, member's, manager's, or partner's liability for a prior failure of the corporation, limited liability company, limited liability partnership, partnership, or limited partnership to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.

MCL 205.68(4), section 18(4) of the General Sales Tax Act, grants the Department of Treasury specific authority to assess based on a sales tax liability and establishes the standard of proof when appealing an assessment:

If the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on information that is available or that may become available to the department. That assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer.

“Prima facie evidence” is defined as “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.” It is a “rule which does not shut out evidence, but merely declares that certain conduct shall suffice as evidence until the opponent produces

contrary evidence.” *Black's Law Dictionary*, (8th ed, 2004) p 598.

The statute's signature mechanism establishes a prima facie case of derivative officer liability. Respondent met this initial burden of establishing a prima facie case by demonstrating petitioner was a corporate officer and producing petitioner's signature on a return or negotiable instrument submitted in payment of the corporation's taxes. *Dore v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided June 10, 2003, (Docket No. 238344).

Once the Department of Treasury's *prima facie* case is established, the burden of proof shifts to Petitioner to rebut the presumption that he is responsible for the corporation's failure to pay. *See Drake v Michigan Dept of Treasury*, MTT Docket No 204601 (1995). Petitioner must produce evidence sufficient to convince the Tribunal that the nonexistence of the presumed fact is more probable than its existence. *Wildmayer v Leonard*, 422 Mich 280, 287 (1985). Competent, material and substantial evidence that Petitioner had tax specific duties must be weighed against the rebutting evidence.

In the instant case, Petitioner signed tax returns and checks for payment of taxes, which establishes, prima facie, his liability. Petitioner must rebut the presumption of liability by demonstrating that despite these facts, he should not be liable. *See Sobol v Michigan Department of Treasury*, MTT Docket No.190108 (1996). “The fact that other persons may also have been in charge of making the return or paying the tax is no defense to Petitioner's liability. MCL 205.27(a) clearly states that ‘ANY of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure.’” *Cygan v Michigan Department of Treasury*, MTT Docket No. 135626 (1996). (emphasis added)

Petitioner first asks the Tribunal to look at the totality of the circumstances to find that he was not an officer of this corporation in the true sense of the term. Petitioner argued that he was not an officer in the “true sense of the term, full sense of responsibilities that goes with that.”¹³

However, the lack of formality and inefficient handling of business and legal affairs or the delegation of tax-related responsibility to other individuals does not eliminate the responsibility of a corporate officer.

Petitioner also argues that once he turned over the checkbook to the restaurant’s co-managers and reduced his work hours to one day per week, he no longer had control over, or supervision of the making of returns or payment of taxes. Petitioner did not offer evidence to prove that his status as a corporate officer or his responsibilities for the corporation changed at any time during the relevant tax periods. Petitioner testified that there were three individuals on the signing card for the corporate bank account, himself, Ramzi Karachy, and Dale Breen. Petitioner admitted that he knew that the other managers were not on the signature authorization card. Petitioner had actual knowledge that the other managers were unable to sign checks, contrary to his testimony.

Given the facts presented, the Tribunal finds that Petitioner was a corporate officer who had control or supervision of, or responsibility for making the returns or payments. The Tribunal further finds that Petitioner is personally liable for the failure of Grand Haven Big Boy, Inc. to make the sales tax payments for May, 2003 through September, 2003. Petitioner resigned on October 8, 2003, and is not responsible for the sales tax liability for October, 2003, which would

¹³ Transcript p 14, ll 3-4.

have been due on November 15, 2003. After October 8, 2003, Petitioner would have had no ability to make the payment on behalf of Grand Haven Big Boy, Inc. Respondent did not prove that, after October 8, 2003, Petitioner was an officer of the corporation who had control over the preparing of the corporation's tax returns and the payment of taxes; Petitioner supervised the preparing of the corporation's tax returns and payment of taxes; or Petitioner was charged with the responsibility of preparing the corporation's tax returns and payment of taxes.

Respondent's Assessment M492753, M492754, M492755, M492756, and M492757 are upheld.
Respondent's Assessment M492758 is cancelled.

JUDGMENT

IT IS ORDERED that tax assessments M492753, M492754, M492755, M492756, and M492757 are AFFIRMED.

IT IS FURTHER ORDERED that tax assessment M492758 is CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: April 30, 2008

By: Rachel Asbury