

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

Michael J. Absher,
Petitioner,

MTT Docket No. 329021

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner appeals Respondent's Assessment Nos. L188256 and L230556 for failure to pay withholding taxes for the tax periods ending January, 2002 and February, 2002. An informal conference was conducted by the Department of Treasury on June 21, 2006. The Hearing Referee recommended that the "corporate officer liability Intents to Assess . . . be upheld"¹ against Petitioner. The Department of Treasury adopted the Hearing Referee's Recommendation and issued its Decision and Order of Determination on July 13, 2006. A hearing was held in the above-captioned case on December 17, 2007. Petitioner was represented by Ralph Safford, Safford & Baker, PLLC. Respondent was represented by Amy M. Patterson, Assistant Attorney General.

BACKGROUND

Petitioner was the Chief Financial Officer of StaffPro, Inc. from April 1999 through March 2003² and performed "a variety of administrative and accounting tasks, including completing

¹ Petition, exhibit 5

² Transcript page 8, 123 – page 9, 19

various [tax] returns.³ Petitioner performed accounting functions, made general ledger entries, listed accounts payable, and prepared checks for signature to make payments for Staff Pro Leasing, Inc. but was never an employee of that entity.⁴ Petitioner “did not have any role in the management of either Staff Pro or SLI. . . . [and] was not authorized to, and did not, sign checks for either StaffPro or SLI.”⁵ Both entities were owned by “Lester W. Brann.”⁶

Petitioner prepared the monthly withholding tax returns for January, 2002 and February, 2002. In February 2002 and March 2002, Petitioner “completed and signed a monthly withholding tax return⁷ and gave them to Mr. Brann “so that Brann could make the payments.”⁸ The full amount due for the periods at issue, based upon those returns, was not paid. Respondent sought payment for the unpaid taxes, plus interest and penalty in the Assessments herein appealed.

The tax, interest, and penalty due as assessed by the Michigan Department of Treasury are:

Assessment No. L188256 for sales Taxes, Period January, 2002:

Tax	\$7,236.23
Penalty	\$2,340.27
Interest *	\$1,633.68
Total	\$11,210.18

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

³ Joint stipulation of uncontroverted facts, paragraph 6

⁴ Transcript page 9, l 19- page 10, l16

⁵ Joint stipulation of uncontroverted facts, paragraphs 5 and 8

⁶ Transcript page 9, l 16

⁷ Joint stipulation of uncontroverted facts, paragraph 13

⁸ Petition paragraph 5(h)

Assessment No. L230556 for SUW Taxes, Period February, 2002:

Tax	\$3,707.60
Penalty	\$1,853.80
Interest *	\$961.65
Total	\$6,523.05

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

PETITIONER'S POSITION

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

- P-1 Withholding Tax Returns for Staff Pro Leasing, Inc. for February, 15, 2002
- P-2 Withholding Tax Returns for Staff Pro Leasing, Inc. for March, 15, 2002
- P-3 Affidavit of Steve Frank
- P-4 Affidavit of Stacy Garber
- P-5 Affidavit of Jeff Gruca
- P-6 Michigan Annual Corporation Information Updates for StaffPro, Inc. for 1999-2003
- P-7 Michigan Annual Corporation Information Updates for StaffPro Leasing, Inc. for 1999-2003

Petitioner contends that he is not a corporate officer and that did not meet the statutory requirement of having responsibility for or control over the making of returns or the paying of the tax due. Based on this, he asserts that he should not have been personally assessed. Petitioner contends that he “directed the company controller to determine the amount of withholding tax owed . . . and fill out the monthly . . . tax returns.”⁹ Petitioner would sign the returns and give them “to Brann so that Brann could review them, submit them to the Department of Treasury, and make the necessary payments.”¹⁰ William Brann had that “final authority.”¹¹ Petitioner contends he “played an administrative role in preparing SLI’s tax returns”¹² and that even if the Tribunal “were to conclude that Petitioner was a corporate officer,”¹³ he did not have

⁹ Petitioner’s trial brief, page 2

¹⁰ Petitioner’s trial brief, page 2

¹¹ Petitioner’s trial brief, page 2

¹² Petitioner’s trial brief, page 7

¹³ Petitioner’s trial brief, page 7

“responsibility for either filing SLI’s tax returns or making payments of taxes to the state.”¹⁴

Petitioner testified that he was the Chief Financial Officer of StaffPro, Inc.¹⁵ from April of 1999 to March 15, 2003.¹⁶ Petitioner further testified that he had an “involvement” with StaffPro Leasing, Inc. but that he was never an employee or officer of StaffPro Leasing, Inc. Both companies were owned by Lester W. Brann.¹⁷ The services he performed for StaffPro Leasing, Inc. were “basically accounting kind of procedures, the same thing that somewhat I did for StaffPro, Inc.; that is, we had one – we had a general ledger system, . . . [that] would keep track of the invoices. . . [and] we would make a list of those things that had to be paid. . .”¹⁸ Based on the list, a check would be printed and it was “set . . . on Bill Brann’s desk . . . for him to sign.”¹⁹ Petitioner testified that he did not ever have check writing authority for “either StaffPro or StaffPro Leasing, Inc.”²⁰

Petitioner testified that “when the returns were due . . . [Petitioner] would go to the computer, and the computer would say this is the amount of state taxes that were withheld, so that number would be written on that form. . . . and a check would be cut, and then that form and that check would be taken to Bill, who would sign those and sign the check.”²¹ This same procedure was used for StaffPro, Inc.²²

¹⁴ Petitioner’s trial brief, page 7

¹⁵ Transcript page 8, l 23

¹⁶ Transcript page 9, ll 8-9

¹⁷ Transcript page 9, l 16

¹⁸ Transcript page 9, l 25-page 10, l 11

¹⁹ Transcript page 10, ll 17-19

²⁰ Transcript page 10, ll 19-24

²¹ Transcript page 11, ll 12-23

²² Transcript page 10, ll 1-2

At some point, Petitioner did not remember exactly when, Mr. Brann “asked if [he] would sign them [returns] because he wasn’t always there.”²³ Petitioner identified the withholding tax return for StaffPro Leasing, Inc., for February, 2002²⁴ which he admitted signing using the title CFO. Petitioner testified that he signed similar documents on behalf of StaffPro, Inc. and “probably just signed them that way.”²⁵ The numbers, \$26,078.65 on this return, came from the computer program and it was “Jeff Gruca’s responsibility to see to the preparation of this return.”²⁶ Petitioner testified that the same circumstances applied to the withholding tax return for StaffPro Leasing, Inc. for February, 2002.²⁷

Petitioner testified that:

1. After he gave the return and check to Mr. Brann he had “nothing” to do with either the making of the return or sending the return in, or the paying of the tax.
2. Mr. Brann never indicated to Petitioner if he did or “didn’t submit the return and check that had been prepared.”
3. He had no knowledge of any notice received by Mr. Brann indicating that the amount shown on the return had not been paid.
4. He believed that the amounts he submitted to Mr. Brann were accurate.²⁸

Further, Petitioner testified that:

1. He did not “ever file a Michigan withholding tax return on behalf of Staff Pro or StaffPro Leasing.”
2. He did not “ever write a check to pay a StaffPro or Staff Pro Leasing tax of any kind.”
3. He did not have “any authority to decide how much of the tax to pay, or whether to pay it.”
4. He did not ever “exercise authority over whether to pay any taxes on behalf of Staff Pro Leasing.”²⁹

On cross examination, Petitioner acknowledged signing, as CFO, “the single business tax annual

²³ Transcript page 12, ll 1-2

²⁴ Petitioner’s exhibit 1

²⁵ Transcript page 13, ll17-18

²⁶ Transcript page 14, ll 6-8

²⁷ Petitioner’s exhibit 2

²⁸ Transcript page 15, l 25- page 16, l 22

²⁹ Transcript page 17, ll 3-25

return. . . for 2000”³⁰ for “Staff Pro Leasing.”³¹ Petitioner testified that this was “the first one I’ve ever done in my life,”³² and that it was not his duty to prepare returns. Petitioner identified his signature, as CFO, on combined returns for sales, use, and withholding for StaffPro Leasing, Inc. for several months during calendar years 2001, 2002, and 2003.³³ In response to Respondent’s questions, Petitioner stated that he was requested to prepare the returns he signed and that he “willfully performed the functions of CFO for Staff Pro Leasing.”³⁴

In closing arguments, Petitioner reiterated that Respondent stipulated to the following facts:

1. Petitioner had no role in the management of StaffPro or StaffPro Leasing.
2. Petitioner’s duties were administrative and accounting tasks.
3. Petitioner had no duty to make tax payments.
4. Petitioner did not have authority to, and did not, sign checks for either entity.³⁵

Petitioner further argued that “the decision to either send the return in, or send a check with it, or the amount of payment. . . . was Mr. Brann’s decision exclusively.”³⁶ Petitioner argued that he is in an even stronger position than the petitioner in *Rogers v Department of Treasury*, 165 Mich App 105 (1987), a 2001 Michigan Tax Tribunal decision, which he cited in support of his position. In that case, although Mr. Rogers was the named treasurer of the corporation, and had check writing authority, the Tribunal found that insufficient to establish his liability “in view of the evidence that the company’s president . . . was the sole decision maker with regard to all disbursements, including those to the State of Michigan.”³⁷ Petitioner asserts that a CFO is not a corporate officer. He was not listed in the forms “that you have to file in Lansing to tell . . .

³⁰ Respondent’s exhibit 1; Transcript page 22, ll 2-4

³¹ Transcript page 22, ll 6

³² Transcript page 23, l 1

³³ Respondent’s exhibit 2

³⁴ Transcript page 27, ll 2-4

³⁵ Transcript page 66, ll 4-11

³⁶ Transcript page 66, ll 18-21

³⁷ Respondent’s trial brief, page 6

everybody who your officers are.”³⁸

RESPONDENT’S POSITION

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

- R-1: 2000 Single Business Tax return, Staff Pro Leasing
- R-2: Combined Return for Michigan Taxes for periods 06/01, 01/02, 02/02, 04/02, 05/02, 07/02, 08/02, 09/02, 11/02, and 12/02, Staff Pro Leasing
- R-3: Annual Return for Sales, Use, and Withholding Taxes for 2002, Staff Pro Leasing
- R-4: Final Assessment Nos. L188256 and L230556.
- R-5: Michigan Department of Treasury, Decision and Order of Determination dated July 13, 2006
- R-6: Affidavit of Michael J. Absher
- R-7: Affidavit of Jeff Gruca
- R-8: Affidavit of Stephen A. Wheeler
- R-9: Affidavit of Steve Franke
- R-10: Amended Articles of Incorporation for Staff Pro Leasing
- R-11: Annual Report for StaffPro Leasing, 2002

Respondent contends that Petitioner was a corporate officer of and signed tax returns for StaffPro Leasing, Inc., formerly SES Staffing, Inc. Respondent further contends that Petitioner “was responsible for the making of SES Staffing Inc’s tax returns or he had control over the making of the returns or he supervised the making of the returns for the tax periods at issue.”³⁹ Respondent asserts that a CFO of a company is a corporate officer.⁴⁰

Respondent asserts that “the signature of a corporate officers on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of the officer’s responsibility for making the returns and payments.”⁴¹ Respondent contends that Petitioner’s signature on StaffPro Leasing, Inc.’s January, 2002 and February, 2002 monthly withholding tax returns as CFO indicates that Petitioner is holding himself out as an executive “in charge of making [the]

³⁸ Transcript page 68, ll 22-24

³⁹ Respondent’s Prehearing statement

⁴⁰ Respondent’s trial brief page 3

⁴¹ Respondent’s trial brief, page 2

company's accounting and fiscal decisions,"⁴² and further "demonstrated that his involvement with the corporation was tax specific."⁴³ Respondent cites Black's Law Dictionary where executive is defined as, "a corporate officer at the upper levels of management."⁴⁴ Based on the above reasoning, Respondent asserts it has established the required prima facie case and Petitioner has the burden to "rebut the presumption that he is a responsible corporate officer in this case."⁴⁵

Respondent offered the testimony of Brian Grumeretz, Department Technician, Michigan Department of Treasury. Mr. Grumeretz testified that he "assembled the information . . . to help the department to determine corporate officer liability,"⁴⁶ and represented Respondent at Petitioner's informal conference. Mr. Grumeretz testified that to determine when to assess corporate officers, Respondent looks at "registration of Michigan taxes, . . . returns and checks submitted in payment of taxes, Michigan annual reports, auditor reports, collector reports, payment arrangement agreements, correspondence."⁴⁷ Mr. Grumeretz further testified that Petitioner was assessed based on the finding that he "signed several documents as CFO. . . 2001 sales use and withholding annual report[s]. . . the single business tax return, and several . . . sales use and withholding monthly returns . . . [and] 2002 sales use and withholding return."⁴⁸

Mr. Grumeretz testified that he based the assessment upon statutory authority pursuant to MCL 205.27a(5) for the assessment of a corporate officer and the Department of Treasury's Revenue

⁴² Respondent's trial brief, page 3

⁴³ Respondent's trial brief, page 2

⁴⁴ Respondent's trial brief, page 2

⁴⁵ Respondent's trial brief, page 4

⁴⁶ Transcript page 50, ll 2-4

⁴⁷ Transcript page 51, ll 2-6

⁴⁸ Transcript page 51, ll 11-17

On cross examination, Mr. Grumeretz testified that he did not know if Petitioner signed the tax registration information as he did not have that document with him. Further, Mr. Grumeretz testified that he did not have any checks signed by Petitioner and Petitioner's name was not on the Michigan Annual Reports. Mr. Grumeretz testified that there is no correspondence showing Petitioner as an officer and that he is not listed as an officer of StaffPro Leasing, Inc. for any year. In response to the question, "You as the representative of the department, you don't have any personal knowledge that he was responsible for either the making of the return or the payment of the taxes, is that right?"⁴⁹ Mr. Grumeretz testified that "according to statute, the signature on the return are negotiable instruments prima facie of their evidence. . . . and seeing as how he signed many of these returns, yes, I would have to say yes."⁵⁰

In closing arguments, Respondent emphasized the Department of Treasury's position that a "CFO [is] an executive . . . [and] . . . [a]n executive is defined as a corporate officer in upper levels of management."⁵¹ Further, Respondent contends that Petitioner signed returns for StaffPro Leasing, Inc. as CFO. Respondent argues that the statute "does not require that the corporate officer . . . both be responsible for making the returns and the payments. It's an and/or situation. . . . And in this case he was responsible for making the returns."⁵² Respondent argued that Petitioner "failed to carry their burden to rebut the presumption that was created by him

⁴⁹ Transcript page 59, ll 14-16

⁵⁰ Transcript page 59, ll 18-21

⁵¹ Transcript page 69, ll 21-23

⁵² Transcript page 70, ll 7-12

signing the tax returns as CFO of Staff Pro Leasing, Inc.”⁵³

FINDINGS OF FACT

The parties agree⁵⁴ to all of the following:

1. Petitioner was the Chief Financial Officer of StaffPro, Inc.⁵⁵
2. Petitioner “did not have any role in the management of either StaffPro or SLI [StaffPro Leasing, Inc.]”⁵⁶
3. Petitioner’s duties “did not include making tax payments for either StaffPro or SLI . . . and [he] was not authorized to, and did not sign checks for either [entity].”⁵⁷
4. “Petitioner completed monthly withholding tax returns for both StaffPro and StaffPro Leasing, Inc.,” which he gave “to Brann so that Brann could make the payments reflected in the returns.”⁵⁸
5. “Petitioner completed and signed a monthly withholding tax return . . . for . . . January 2002 . . . [and] for the month of February 2002. . . .”⁵⁹

That Petitioner had no “idea that the department would take the position that [signing the withholding tax returns for Staff Pro Leasing] made [him] personally liable for the taxes if they had not been paid”⁶⁰ is not relevant to the determination of Petitioner’s responsibility for the unpaid taxes. The statute clearly outlines the factors to be considered and the taxpayer’s belief as to his potential liability is not among them. If Petitioner is a corporate officer and “had control or supervision of, or responsibility for, making the returns or payments,”⁶¹ he can be held “personally liable for the failure”⁶² of the corporation to file a return or pay a tax.

The Tribunal finds that Petitioner was not a corporate officer of StaffPro Leasing, Inc. Petitioner was an employee, chief financial officer, of StaffPro, Inc. during the tax periods at issue. As

⁵³ Transcript page 71, ll 4-7

⁵⁴ Amended Stipulation of Uncontroverted Facts

⁵⁵ Amended Stipulation of Uncontroverted Facts, paragraph 4

⁵⁶ Amended Stipulation of Uncontroverted Facts, paragraph 5

⁵⁷ Amended Stipulation of Uncontroverted Facts, paragraphs 7 and 8

⁵⁸ Amended Stipulation of Uncontroverted Facts, paragraphs 10 and 11

⁵⁹ Amended Stipulation of Uncontroverted Facts, paragraphs 12 and 13

⁶⁰ Transcript page 19, ll 20-24

⁶¹ MCL 205.27a(5)

⁶² MCL 205.27a(5)

CFO, Petitioner utilized information gathered by other employees from computer programs and general ledgers to complete monthly withholding returns for the tax periods at issue for StaffPro, Inc. Petitioner was not an employee of StaffPro Leasing, Inc. As an accommodation to the president of both StaffPro, Inc. and StaffPro Leasing, Inc., Mr. William Brann, Petitioner completed the monthly withholding returns for StaffPro Leasing, Inc. for January and February, 2002. Although Petitioner signed those returns as CFO, he was not CFO of StaffPro Leasing, Inc. Further, Petitioner was not a corporate officer of either entity.⁶³ William Brann was the sole listed officer on mandatory corporate filings for both companies.

Respondent argues that a CFO of an entity is a corporate officer of that entity. Respondent asserts that Black's Law Dictionary defines a CFO as an executive and defines an executive as a corporate officer. A dictionary definition may provide guidance when an ambiguity must be resolved. However, the Tribunal finds that Petitioner's status is clear and unambiguous. The stipulated facts, and the evidence and testimony presented at hearing, make it clear that Petitioner was an employee of StaffPro Inc., not a corporate officer. And, he was neither an employee of StaffPro Leasing, Inc., nor a corporate officer of that entity.

The parties also agreed that Petitioner had no managerial responsibilities for StaffPro Leasing, Inc. Petitioner was a salaried employee of StaffPro, Inc. and Petitioner testified that he never partook in profit sharing, stock, or any returns of either company.⁶⁴ Petitioner had no tax or non-tax related decision-making authority for either company. Petitioner's testimony that he prepared returns based upon information generated by a computer program and then gave those returns to

⁶³ Respondent's exhibits 10 and 11

⁶⁴ Transcript page 42, ll 4-21

Mr. Brann was credible and undisputed. His testimony that he did not file the returns and did not sign checks to be sent with the returns was credible and undisputed. His testimony that he did not know what happened to the returns after he placed them on Mr. Brann's desk is credible and undisputed. The Tribunal finds that the responsibility to make the final determination as to what returns would be filed, to then file the returns, and to pay the tax rested solely with William Brann.

CONCLUSIONS OF LAW

MCL 205.27a(5) provides:

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.

Petitioner signed January and February 2002 monthly withholding returns for StaffPro Leasing, Inc. That signature is, under the statute, prima facie evidence of his responsibility for making the returns or payments. However, a signature that constitutes prima facie evidence must be the signature of an officer of the corporation.

The Michigan Supreme Court has ruled that:

In order to hold a person personally liable for a corporation's tax liability under [MCL 205.96(3); MSA 7.555(6)(3)], the Department of Treasury must first show that the person is an officer of the corporation. *Livingstone v. Department of*

Treasury, 434 Mich 771, 780 (1990), quoting *Peterson v. Treasury Department*, 145 Mich App 445, 450 (1985).

The Tribunal finds that Respondent's assertion that Petitioner was holding himself out as an executive "in charge of making [the] company's accounting and fiscal decisions,"⁶⁵ and further "demonstrated that his involvement with the corporation was tax specific,"⁶⁶ is Respondent's conclusion, unsupported by the facts and evidence, and with which the Tribunal does not agree. The Tribunal concludes that Respondent did not meet its burden of proving that Petitioner was an officer of StaffPro Leasing, Inc.

Notwithstanding the above, Petitioner provided sufficient, reliable and credible evidence to rebut the presumption that he had responsibility for making returns and payments. Petitioner did not have check writing authority and thus could not make payments. Based upon the evidence and testimony presented by Petitioner, the Tribunal concludes that Petitioner's actions were administrative and ministerial in nature. He compiled the information and he did complete the tax returns but he was not the person responsible for making and filing the returns. Only Mr. Brann had the authority to make or file the returns.

Based upon the evidence and testimony presented, the case file, and briefs, the Tribunal concludes that Petitioner was not a corporate officer and that he did not have control or supervision of, or responsibility for, making the returns or payments. Petitioner prepared the returns indicating the correct amount to be paid. Mr. Brann filed the returns and did not pay the required amount. Petitioner is not personally liable for the failure of StaffPro Leasing, Inc. to make the payments in full as required for the January and February 2002 withholding tax for

⁶⁵ Respondent's trial brief, page 3

⁶⁶ Respondent's trial brief, page 2

StaffPro Leasing, Inc. Respondent's Assessment Nos. L188256 and L230556 for failure to pay withholding taxes for the tax periods ending January, 2002 and February, 2002 should be cancelled.

IT IS ORDERED that Assessment Nos. L188256 and L230556 are CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: June 23, 2009

By: Rachel J. Asbury